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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 DONGXIAO YUE,
11
12 Plaintiff,
13
14 v.
15 Storage Technology Corporation, et al.,
16 Defendants.

Case Nos. C07-05850-JW and
C08-0019-JW

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' CONSOLIDATED
MOTION FOR ADMINISTRATIVE
RELIEF FOR LEAVE TO FILE
DEFENDANTS' SUPPLEMENTAL BRIEF
IN OPPOSITION TO MOTIONS TO
DISQUALIFY DEFENSE COUNSEL**

Dept: 8, 4th Floor
Judge: Honorable James Ware

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18 DONGXIAO YUE,
19 Plaintiff,
20 v.
21 Chordiant Software, Inc., et al.,
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1 Plaintiff, Dongxiao Yue (“Yue”) hereby opposes Defendants’ administrative motion for
2 leave to file a supplemental brief in opposition to Plaintiff’s motion to disqualify Fenwick & West,
3 LLP. Plaintiff’s opposition is based on the Declaration of Dongxiao Yue, filed concurrently and
4 the record of the Court. Plaintiff is also filing a motion to compel the depositions of Claude M.
5 Stern et al., who made declarations in support of Defendants’ proposed supplemental brief.
6

7 **ARGUMENT**

8 **1. The supplemental brief is not authorized by the rules**

9 The court in *Garrison v. Northeast Georgia Medical Center, Inc.*, 66 F. Supp.2d 1336
10 (N.D.Ga. 1999) made the following reasoning in a very similar situation:

11 [Defendant] Principal moves for leave to file a surreply to plaintiffs' reply
12 in support of the motion to remand because plaintiffs introduced two new
13 arguments in their reply brief. ***No authorization exists in the Federal
14 Rules of Civil Procedure or the local rules*** for the Northern District of
15 Georgia for parties to file surreplies. To allow such surreplies as a regular
16 practice would ***put the court in the position of refereeing an endless
17 volley of briefs***. Moreover, after review of plaintiffs' various briefs, the
18 court finds that plaintiffs have ***merely extended the arguments*** that they
19 originally made in their motion to remand. Accordingly, Principal's
20 motion for leave to file a surreply to plaintiffs' reply is DENIED.

21 *Id.* at 1339-40 (emphasis added).

22 “Surreplies are disfavored, and normally will be permitted only upon prior invitation by
23 the court.” *Wright Ex Rel. Trust Co. Of Kan. v. Abbott Labs.*, 62 F. Supp.2d 1186
24 , fn.1 (Kan. 1999). The Court has not invited Defendants to file a surreply in this case. In any case,
25 Defendants’ supplemental brief lacks legal soundness¹ and will only lead to endless loop of
26 briefing.

27 ¹ For instance, Yue stated in his declaration that Ms. Brillet told him that the Pulgram emails violated attorney ethics.
28 Defendants claim that this verbal act and circumstantial evidence offered to prove state of mind is hearsay.

1 **2. Plaintiff’s reply brief merely refuted Defendants’ contentions made in their**
2 **Opposition**

3 Defendants complain that Plaintiff “ambushed” them by raising new arguments and presenting
4 new facts in his reply brief. But Plaintiff merely refuted Defendants’ contentions raised in their
5 opposition, often by offering their own statements against them.

6 For instance, on the issue of whether the *Netbula v. Distinct* case is substantially relevant or
7 related to the instant cases, Defendants asserted in their opposition that it is irrelevant. Plaintiff
8 then offered Mr. Wakefield’s own words which stated that the *Distinct* case is highly relevant.
9 Fenwick attorneys previously made binding judicial admissions on this relatedness question,
10 including the declarations of Albert Sieber. See, e.g., C06-0711-MJJ, Docket 113-1, Siber Decl. at
11 ¶7. Tellingly, in the proposed supplemental brief, Fenwick attorneys made no effort to argue
12 against their own words, but attempt to introduce large number of documents not found in the
13 record of the instant cases or the *Netbula v. Symantec* case.
14

15 On the issue of whether Vonnah M. Brillet authorized Laurence Pulgram to communicate with
16 Yue on the Netbula case, Fenwick attorneys alleged in their opposition that Ms. Brillet made such
17 authorization or encouragement in a telephone conference. Plaintiff refuted this allegation with the
18 declarations of Mr. Wakefield and Ms. Brillet.
19

20 The list can go on. Without exception, Plaintiff simply refuted or impeached Defendants’
21 contentions in their opposition brief.

22 **3. Defendants’ proposed supplemental brief is untimely and prejudicial**
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1 Defendants could have raised the arguments and contentions in their opposition to Plaintiff's
2 motion to disqualify. Instead, they made conclusory allegations of "screening²" and "extreme
3 prejudice" without any factual support. These issues are waived due to Defendants' failure to
4 present them in a timely manner.

5 Back in April 2008, Defendants stated that they planned to file a supplemental brief. Plaintiff
6 asked Defendants to provide a copy of that brief for review sooner. Over one month passed,
7 Defendants did nothing. On June 2, 2008, 20 some days before the scheduled hearing, Defendants
8 sent Plaintiff their proposed brief only – without the exhibits and declarations. Plaintiff then asked
9 for the supporting declarations and exhibits. Defendants ignored Plaintiff's request, but rushed to
10 file this administrative motion for leave to file the supplemental brief. Yet, they tell the Court that
11 Plaintiff had refused to stipulate to the filing of it. Such conduct is designed to reduce the time that
12 Plaintiff can respond and is prejudicial.
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15 **4. The four declarations are mostly hearsay and Defendants' refusal to be deposed
16 renders the declarations of no weight**

17 To support their "screening" and "extreme prejudice" theories, Defendants now submit four
18 declarations, laden with vague and ambiguous allegations, such as the allegations regarding the
19 destruction of Claude Stern files, hearsay statements by Mr. Stern's secretary, etc. Plaintiff has
20 reasons to believe that these allegations are false or misleading. Accordingly, on June 4, 2008,
21 Plaintiff requested to cross-examine the four declarants by under-oath deposition to ascertain the
22

23 _____
24 ² Defendants now rely on *Goldberg v. Warner/Chappell Music, Inc.*, 125 Cal.App.4th 752 (2005) for the argument
25 that the presumption of shared confidences can be rebutted. But *Goldberg* deals with a situation where only an
26 "informal and brief" meeting occurred with no files opened or documents created. If the Court concludes that these
27 facts do not distinguish the instant cases from *Goldberg*, Plaintiff is entitled to discovery on Defendants' allegations of
28 "screening."

1 truth. On June 6, 2008, Defendants simply said "no" after pondering about their decision for two
2 days.

3 The refusal by Claude M. Stern and the other three declarants to have deposition taken indicates
4 the inherent untrustworthiness of their declarations. Accordingly, these declarations are entitled to
5 no weight.

6
7 If the Court permits their supplemental brief to be filed, Plaintiff requests a Court Order to
8 permit Plaintiff to take the depositions of Claude M. Stern and other declarants.

9 **CONCLUSION**

10 For the foregoing reasons, Plaintiff requests that the Court deny Defendants' motion for leave
11 to file the supplemental brief. In the alternative, Plaintiff requests that the Court grant Plaintiff's
12 motion to take the deposition of Claude M. Stern, et al.

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15 Respectfully submitted,

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17 Dated: June 6, 2008

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19 DONGXIAO YUE (*Pro Se*)