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U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONGXIAO YUE
Petitioner,
v.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA
Respondent.

Real Parties in Interest: Storage Technology Corporation,
Sun Microsystems, Inc., EMC Corporation, Darden
Restaurants Inc., IBM Corporation., defendants; Netbula,
LLC, plaintiff.

Case No.

District Court Case Nos:
C-06-07391-MJJ, N.D. Cal.
C-06-0711-MJJ, N.D. Cal.

**APPENDIX TO PETITION
FOR WRIT OF MANDAMUS
AND EXERCISE OF
SUPERVISORY
AUTHORITY**

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EXHIBIT 1

EXHIBIT 1

1 Dr. DONGXIAO YUE
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U.S. DISTRICT COURT
NO. DIST. OF CA.

7 Pro Se

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 Case No. Case No. C06-07391-MJJ

11 NETBULA, LLC., a Delaware limited liability
12 company,

13 Plaintiff,

14 v.

15 STORAGE TECHNOLOGY
16 CORPORATION, et al.,

17 Defendants.

**DONGXIAO YUE'S NOTICE AND
MOTION (1) TO INTERVENE AND JOIN
AS PLAINTIFF; (2) FOR INJUNCTIVE
RELIEF; (3) FOR COPYRIGHT
IMPOUNDMENT**

Date: November 27, 2007

Time: 9:30 a.m.

Dept: Courtroom 11

Judge: The Honorable Martin J. Jenkins

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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on November 27, 2007 at 9:30 a.m., or as soon as the
 4 matter may be heard, in the United States District Court for the Northern District of California
 5 located at 450 Golden Gate Avenue, San Francisco, California, in the Courtroom of The
 6 Honorable Martin J. Jenkins, Dr. Dongxiao Yue (“Dr. Yue”, “Yue” or “Intervenor”), acting *pro se*,
 7 hereby moves for a Court Order to (1) grant Yue’s application to intervene and join as plaintiff, (2)
 8 preliminarily or permanently enjoin defendant Storage Technology Corporation (“StorageTek”)
 9 and Sun Microsystems, Inc. (“SUN”) from making unauthorized copies of Netbula software, (3)
 10 impound all unauthorized copies of Netbula software made by StorageTek and SUN.
 11

12 This motion is based upon this Notice, the following Points and Authorities, the
 13 Declaration of Dongxiao Yue (“Yue Decl.”), the Proposed Order, the papers on file in this matter,
 14 and such further evidence and argument as may be presented to the Court at or before the hearing.
 15

16
 17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION**

19
 20 On December 4, 2006, Plaintiff Netbula, LLC (“Netbula”) initiated the instant copyright
 21 infringement action. Along the complaint, Netbula filed an application for a Temporary
 22 Restraining Order (“TRO”) and a Motion for Preliminary Injunction. Netbula was unsuccessful in
 23 obtaining the TRO, partly due to evidentiary concerns raised by the Court. Recently, discovery in
 24 the instant case revealed that defendant StorageTek and SUN knowingly infringed the copyrights
 25 in the Netbula RPC software, which are now owned by Dr. Yue by assignment.
 26

27 Plaintiff Netbula’s counsel is withdrawing from the case, leaving Netbula without adequate
 28 representation. On the other hand, defendants SUN and StorageTek are planning to move for

1 summary judgment on the copyright infringement claim. Under these situations, Dr. Yue seeks to
 2 intervene and join as plaintiff, and to move for a preliminary or permanent injunction and
 3 impoundment order under the Copyright Act.

4 II. FACTS AND PROCEDURAL BACKGROUND

5 A. Facts leading to the instant dispute

6
 7 In July 1996, Dr. Yue founded Netbula, LLC, a Delaware Limited Liability Company, to
 8 market the PowerRPC software that he was developing. PowerRPC is a technology that enables a
 9 program on a computer to execute a command on a remote computer over a network and get
 10 results back. PowerRPC is available for both UNIX and Microsoft Windows platforms. Netbula
 11 also developed a product called Netbula ONC RPC. The Netbula RPC software is used by other
 12 software developers to develop new computer software applications. Yue Decl., ¶2.

13
 14 A Netbula RPC product purchaser must buy one developer license (an "SDK" license) for
 15 each computer programmer who will use Netbula Software Development Kit ("SDK") to develop
 16 RPC applications. Each SDK license is only granted for a single computer for a single user and
 17 only for use in specific operating system environment, such as Windows NT.

18
 19 The Netbula SDK software includes many program files or modules such as "rpcgen.exe",
 20 "pwrpc32.dll", "pwrpc32.lib", "pmapsvc.exe" and computer source code files such as
 21 "powerrpc.h". The pwrpc32.dll file contains the essential code for RPC functionality and is a
 22 necessary component for a program based on RPC technology.

23
 24 To distribute the program based on Netbula RPC, the Netbula customer must buy a
 25 separate license for the right to copy the distributable version of "pwrpc32.dll" file¹. The license
 26 for the right to copy the pwrpc32.dll to a single computer is called a "runtime license". See First
 27 Amended Complaint ("FAC") at ¶¶ 16-22.

28
 1 ¹ The distributable version of the pwrpc32.dll is different from the developer version.

1 In March 2000, StorageTek and Netbula signed a license agreement for PowerRPC (the
2 “2000 Agreement”). Pursuant to this agreement, StorageTek purchased development licenses for
3 eight (8) developers and one block of 1,000-copy runtime licenses. Yue Decl., at ¶¶6-7, Exhibits
4 B-C.

5 In June 2001, Netbula requested a license usage report from StorageTek. Mike Melnick,
6 on behalf of StorageTek, reported that “[t]he license count you request is 107, this leaves us the
7 rights to distribute 893.” FAC at ¶35.

8 In September 2002, Netbula requested another license usage report from StorageTek. Mr.
9 Melnick, on behalf of StorageTek, stated that the product was being terminated and license usage
10 stayed at 107. Yue Decl., ¶10, Exhibit F. Netbula re-confirmed with StorageTek that PowerRPC
11 was no longer used by StorageTek. As a result, Netbula deleted StorageTek from its list of active
12 licensees and stopped requesting license usage reports from StorageTek. FAC at ¶36.

13 Unknown to Netbula, StorageTek had been distributing Netbula RPC with a StorageTek
14 product called LibAttach for Windows 2000 (Yue Decl., ¶9, Ex. E) and had exceeded the 1000-
15 copy limit. StorageTek knew that it exceeded the limit and had an internal discussion. Lisa Rady, a
16 program manager at StorageTek wrote in an email dated March 2, 2004:

17 As you can see, we have exceeded the 1,000 distributions that we
18 had right to with Netbula.... I think it is obvious that engineering
19 has not and did not monitor the distributions on this product.

20 Yue Decl., ¶12, Exhibit G. Responding to Ms. Rady’s messages, Mr. Melnick wrote:

21 The agreement is specific to platform (Win NT and 95/98 platforms)
22 types of Netbula software (PowerRPC SDK). This concerns me
23 greatly as we have already told them we are no longer shipping it
24 with our product.

25 On the same day, March 2, 2004, Mr. Melnick sent an email to Netbula, stating: “Could
26 you provide me with the StorageTek sales representative or if possible give me a quote on
27 distributing an additional 1000 units of RPC? The platform used will need to be Windows 2003.”
28

1 Mr. Melnick did not inform Netbula that StorageTek had been distributing Netbula RPC from
2 2000 to 2004 and had in fact exceeded the license limit. *Id.*

3 Since StorageTek previously represented that it had ceased to use Netbula RPC and since
4 the new request was for a new operating system, Netbula assumed it was for a new project. FAC
5 at ¶38. In March 2004, Netbula and StorageTek signed a new agreement (the “2004 Agreement”).
6 Like the 2000 Agreement, the 2004 Agreement was also not transferable without written
7 authorization from Netbula. Pursuant to the 2004 Agreement, StorageTek issued a purchased order
8 and purchased one developer license and another 1000-copy runtime license. Yue Decl., ¶¶14-15,
9 Exhibits I-J.

11 In a document attached to a March 12, 2004 email, Ms. Lisa Rady wrote the following
12 about LibAttach: “There is no license key in the product, and it is apparent that the software has
13 been copied, uncontrolled, for several years.” Yue Decl., ¶17, Ex. K.

15 On October 25, 2004, a StorageTek employee named Michael Abrmovitz sent an email to
16 Netbula, stating: “We bundle your PowerRPC into several of our products.” On the same day,
17 Netbula emailed StorageTek requesting a license usage report, but StorageTek did not provide a
18 report for this request. Yue Decl., at ¶18.

19 On June 15, 2005, Netbula emailed StorageTek again for an audit of license usage and
20 inquired about the impending SUN- StorageTek merger. Mr. Melnick responded:

22 As for Sun, it should be completed by the end of summer...
23 The only thing that you and I may have to do is for you to
24 allow assignment of the agreement to Sun. The agreements
 calls [sic] for your approval. I assume you would sallow [sic]
 this as if you did not the agreement would be terminated.

25 Yue Decl., at ¶19, Ex. L.

26 On June 20, 2005, Holly Wagner, a Software Product Planner at StorageTek emailed Mr.
27 Michael Melnick, Ms. Lisa Rady, Mr. Michael Abramovitz and others, stating:

1 The SAP query I ran this morning shows 2,386 models shipped.
2 This number is low due to the fact that the query does not have
3 the capability of pulling the client feature quantities that were
released in November of last year.

4 Responding to this email, Mr. Melnick wrote on June 28, 2005:

5 The number that Holly has provided and thought it may be low
6 causes quite a problem for you. We have only made 2
purchases for the rights to distribute a total of 2000 licenses.

7 Yue Decl., at ¶20, Ex. M.

8 In August 2005, after numerous requests by Netbula, StorageTek finally provided a
9 license usage report showing 7455 licenses. However, Netbula found what it believed to be
10 inconsistencies in the report. Yue Decl., at ¶21, Ex. N; FAC at ¶¶47-50.

12 On August 31, 2005, SUN acquired StorageTek via a reverse triangular merger. Yue
13 Decl., ¶24, Ex. Q.

14 After StorageTek became a subsidiary of SUN, it continued to distribute LibAttach
15 products that contained Netbula RPC software. Yue Decl., ¶¶22-23,25-26, Exhibits O, P, R.

17 **B. Procedural background**

18 On December 4, 2006, Netbula filed a lawsuit against Storage Technology Corporation
19 (“StorageTek”) and SUN Microsystems, Inc. (“SUN”), et al., alleging, *inter alia*, copyright
20 infringement on the 2000 and 2004 versions of Netbula RPC SDK and runtime software by (1)
21 developing infringing derivative work, (2) distributing infringing derivative work and (3)
22 copying/distributing Netbula SDK and runtime software without license. Netbula applied for a
23 temporary restraining order. Docket No. 2. A SUN engineer made a declaration stating that SUN
24 had found a “free, open” alternative to replace Netbula RPC. Declaration of Michael Abramovitz,
25 Docket No. 13.

27 On December 6, 2006, a hearing for Netbula’s TRO application was held before
28 Magistrate Judge Bernard Zimmerman, who expressed questions about the evidence Netbula had.

1 Netbula's counsel withdrew the application for the TRO and reserved the right to re-file the
2 motion for preliminary injunction.

3 On January 8, 2007, SUN counterclaimed against Dongxiao Yue and Netbula, alleging,
4 *inter alia*, trademark infringement on SUN RPC marks, cyber-squatting, common law and
5 statutory unfair competition. Docket No. 17.

6 On February 21, 2007, the case was reassigned to the Honorable Judge Jeremy Fogel.

7 On March 2, 2007, the case was reassigned to the Honorable Judge Martin J. Jenkins, upon
8 Netbula's administrative motion to relate cases.

9 On April 26, 2007, Netbula served StorageTek the "FIRST SET OF REQUEST FOR
10 DOCUMENTS AND THINGS FOR STORAGE TEK CORPORATION (NOS. 1-16)".

11 On May 8, 2007, the Court ordered that "[t]he parties are to initially focus on the License
12 Issues/Contract claims. The Parties are directed to exchange letters confirming their stay of
13 responses to pending discovery requests." Docket No. 50, Minute Entry for Initial Case
14 Management Conference held on 5/8/2007 before Judge Martin J. Jenkins.

15 On May 15, 2007, the Court entered a Pretrial Order which set August 31, 2007 as the non-
16 expert discovery cutoff date, and November 27, 2007 as the last day of hearing dispositive
17 motions.

18 Subsequently, the Netbula and SUN/StorageTek served each other amended discovery
19 requests limiting to the license issues and contract claims.

20 On and after August 31, 2007, SUN and StorageTek produced about 1000 pages of
21 documents responsive to Netbula's requests.

22 On September 10, 2007, the Court entered an Order granting summary judgment for the
23 defendants in the related Netbula, LLC v. BindView Development Corp case (Case No. C06-
24 0711-MJJ, N.D. Cal) on the copyright infringement, fraud and breach of contract claims. Docket
25

1 No. 288 of the *BindView* case. The *BindView* defendants were represented by the same defense
2 counsel in the instant action.

3 On September 12, 2007, SUN deposed Dr. Yue as a designated FRCP 30(b)(6) witness for
4 plaintiff Netbula, LLC.

5 On September 19, 2007, Netbula deposed Mr. Melnick, who was designated by SUN as a
6 FRCP 30(b)(6) witness.

7 On September 26, 2007, Netbula executed a copyright assignment, transferring all
8 exclusive copyrights in Netbula PowerRPC and ONC RPC created before January 1, 2007 to Dr.
9 Dongxiao Yue, along with all related claims.

10 On October 1, 2007, Netbula filed a motion to replace Netbula, LLC with Dongxiao Yue
11 as the plaintiff for the copyright claim, scheduled to be heard on November 20, 2007. Docket No.
12 56. On the same day, Netbula's counsel, Vonnah M. Brillet, noticed the parties that she will be
13 unavailable on November 19-20, 26, 27 and 29. Yue Decl., ¶29.

14 On October 3, 2007, Mr. Jededish Wakefield, defense counsel, sent a letter to Ms. Brillet
15 regarding the schedule for defendants' summary judgment motions concerning the license defense.

16 On October 11, 2007, Netbula's counsel, Vonnah M. Brillet, filed a motion to withdraw.
17 Docket No. 59.

18 **III. LEGAL STANDARD**

19 **A. Legal Standard for Intervention of Right**

20 Federal Rule of Civil Procedure 24(a) affords an applicant who has an interest in the
21 subject matter the right to intervene in an action. In the Ninth Circuit, an applicant for intervention
22 as of right must demonstrate that "(1) it has a significant protectable interest relating to the
23 property or transaction that is the subject of the action; (2) the disposition of the action may, as a
24 practical matter, impair or impede the applicant's ability to protect its interest; (3) the application
25
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EXHIBIT 2

EXHIBIT 2

1 Dr. DONGXIAO YUE
2 2777 ALVARADO ST., SUITE C

3 Telephone: ([REDACTED]
4 Facsimile: [REDACTED]

5 *Pro Se*

6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 NETBULA, LLC., a Delaware limited liability
11 company,

12 Plaintiff,

13 v.

14 STORAGE TECHNOLOGY
15 CORPORATION, et al.,

16 Defendants.

Case No. C06-07391-MJJ

**INTERVENOR DONGXIAO YUE'S
OPPOSITION TO DEFENDANTS'
MOTION FOR ADMINISTRATIVE
RELIEF TO VACATE HEARING ON
NON-PARTY DONGXIAO YUE'S
REQUEST FOR INJUNCTIVE RELIEF
AND IMPOUNDMENT**

Dept: Courtroom 11

Judge: The Honorable Martin J. Jenkins

18
19 On October 26, 2007, Defendants Storage Technology Corporation (“StorageTek”), Sun
20 Microsystems, Inc. (“SUN”), EMC Corporation (“EMC”), Darden Restaurants, Inc. (“DARDEN”)
21 [collectively, “Defendants”] filed a Motion for Administrative Relief to vacate the hearing of a
22 motion for injunctive relief and impoundment filed by Dongxiao Yue (“Dr. Yue”, “Intervenor”)
23 [“Motion to Vacate Hearing”]. Docket No. 80. Dr. Yue opposes Defendants’ Motion to Vacate
24 Hearing for the reasons below and the facts established in his declaration in opposition filed
25 concurrently:
26

27 (1) Defendants’ Motion to Vacate was improper;

1 (2) Defendants' objections to Dr. Yue's Motion for Injunctive Relief are premature;

2 (3) Dr. Yue's interest is not identical to Netbula, LLC's interest;

3 (4) The Court should either deny Defendants' Motion to Vacate Hearing or disqualify

4 Fenwick & West, LLP for making direct communications with Dr. Yue.

5 ARGUMENT

6 **1. Defendants' Motion to Vacate Hearing was improper**

7 Civil Local Rule 7-11 states the following,

8
9 The Court recognizes that during the course of case proceedings a
10 party may require a Court order with respect to miscellaneous
11 administrative matters, *not otherwise governed by a federal statute,*
12 *Federal or local rule or standing order of the assigned judge.* These
13 motions would include matters such as motions to exceed otherwise
14 applicable page limitations or motions to file documents under seal,
15 for example.

16 Civil L.R. 7-11 (emphasis added).

17 Defendants' Motion to Vacate Hearing contains complex arguments on the merits of
18 Intervenor's motion: timeliness, irreparable harm and mootness issues for injunctive relief,
19 relevance to the first phase of litigation, whether Intervenor has the right to intervene, whether
20 Intervenor is circumventing the rule against *pro se* representation of a corporation, etc.
21 Defendants' Motion to Vacate Hearing, pp.2:27-3:8.

22 The six points raised by Defendants should be subjects of their opposition to Intervenor's
23 properly scheduled motion. Intervenor moved under Federal Rules of Civil Procedure 24 (a), 65(c)
24 and the Copyright Act. The substantive arguments Defendants raised are governed by the relevant
25 federal statute, federal or local rules or standing order of the presiding judge. It is thus improper
26 for Defendants to disguise their oppositions as a motion for administrative relief, which only
27 affords the opposing party three working days to respond.

28 **2. Defendants' objections to Dr. Yue's Motion for Injunctive Relief are premature**

1 Defendants raised various objections to Dr. Yue's Motion for Injunctive Relief. These
 2 objections are premature. As Intervenor pointed out in his brief, under Ninth Circuit law, a
 3 copyright owner is entitled to a presumption of irreparable harm once he demonstrates a *prima*
 4 *facie* case of infringement. See *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1119
 5 (9th Cir. 1999); *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 77
 6 U.S.P.Q.2d 1560 (9th Cir. 2006). A defendant can then rebut the presumption of irreparable harm
 7 by showing unreasonable delay. Only then, the burden shifts to the copyright owner to overcome
 8 Defendants' rebuttal.

10 Intervenor is not required to preemptively strike on potential arguments Defendants have
 11 not yet made. Intervenor will file a reply brief to counter Defendants' opposing arguments after
 12 they are made. A motion for administrative relief is not designed for resolving such contentions
 13 prior to the scheduled time for filing oppositions and replies.

15 3. Dr. Yue's interest is not identical to Netbula's interest

16 Defendants cited *United States v. High Country Broadcasting Co.*, 3 F.3d 1244, 1245 (9th
 17 Cir. 1993) to oppose Dr. Yue's intervention in the instant action. The *High Country* case can be
 18 distinguished on the facts and timing. In *High Country*, the sole shareholder of the defendant
 19 corporation sought to intervene *after a default judgment was entered against his company*¹. The
 20 Ninth Circuit found that the sole shareholder's interest was "**identical**" to the corporation's interest.
 21 *Id.* (emphasis added). Based on those particular set of facts, the Ninth Circuit affirmed the district
 22 court's decision.

24 As indicated in Dr. Yue's Motion to Intervene and for Injunctive Relief, his claims are
 25 based on **different copyrights** and a **set of facts different** from what Netbula, LLC alleged in its

26 ¹ The Northern District of California has a flexible rule of allowing a corporation to appear *pro se*.
 27 For instance, in *Crossbow Technology, Inc. v. YH Technology et al.* (C-03-04360-SI, N.D. Cal.),
 28 the Court permitted YH Technology to be represented by its owner. See Docket 42 of that case.

1 December 2006 application for Temporary Restraining Order (“TRO”), including newly
2 discovered evidence in May 2007. Netbula does not own the copyrights Dr. Yue owns, but a
3 ruling in the instant action would affect his **personal intellectual property rights** allegedly
4 infringed by Defendants. As shown in Dr. Yue’s accompanying declaration, Dr. Yue owns the
5 copyrights in those earlier works authored before Netbula was formed, which were never assigned
6 to Netbula. As a result of the copyright assignment executed on September 26, 2007, Dr. Yue now
7 owns the copyrights which are allegedly infringed by Defendants but **not** included in Netbula’s
8 complaint – Netbula only alleged the infringement of the 1996 copyright. Yue Decl., at ¶¶2-6.

10 Dr. Yue informed Mr. Pulgram, defense counsel, that he is ready to file a separate action
11 against StorageTek and SUN with additional claims. For judicial economy, he asked Mr. Pulgram
12 for a stipulation to allow Dr. Yue substitute Netbula *as to the copyright claim* and amend the
13 complaint in the instant action. The alternative would be having Dr. Yue filing a new action, and
14 then a motion to relate cases. Mr. Pulgram responded that he would confer with his clients and get
15 back to Dr. Yue in the week of October 29, 2007. Yue Decl., at ¶¶ 7-9. Instead of making the
16 effort to reach a reasonable stipulation, Mr. Pulgram filed this Motion to Vacate Hearing, forcing
17 Dr. Yue to file a separate action against SUN and StorageTek.

19 **4. Defense counsel’s direct communications with Dr. Yue**

20 On October 25, 2007, Dr. Yue emailed the PDF files for his Motion for Injunctive Relief to
21 defense counsel, Mr. Pulgram, Mr. Jedediah Wakefield and other lawyers and requested for a
22 confirmation upon receiving the files. Immediately afterwards, Dr. Yue received an automated
23 message from Mr. Wakefield, indicating that the files were delivered. Dr. Yue then emailed
24 defense counsel stating: “I received an auto-response from Mr. Wakefield, indicating the email is
25 working. No further confirmation is necessary.”

27 Mr. Pulgram responded to Dr. Yue’s email with a lengthy legal argument and asked Dr.
28

1 Yue for certain stipulation based on such legal argument. The two exchanged numerous emails on
2 substantive issues. Such communications led Dr. Yue to believe that defense counsel was
3 engaging him directly and there was no need for an attorney – and he can defend his intellectual
4 property rights all by himself. Yue Decl., at ¶¶ 7-9.

5
6 If the Court finds that Dr. Yue’s interest in the copyright dispute is identical to Netbula’s,
7 then Dr. Yue is a fully represented party and Mr. Pulgram should not contact Dr. Yue directly. In
8 cases where an attorney communicated with a represented party without authorization, severe
9 sanctions may result. See *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993) (dismissing
10 indictment); *Terrebonne, Ltd. v. Murray*, 1 F. Supp. 2d 1050 (E.D.Cal. 1998) (disqualifying
11 attorneys and law firm).

12 If the Court agrees with Defendants and determines that Dr. Yue cannot intervene in the
13 instant action, then he requests the Court to disqualify defense counsel for making unauthorized
14 communications with a represented party.
15

16 **CONCLUSION**

17 For the foregoing reasons, Dr. Yue respectfully requests the Court to deny Defendants’
18 Motion to Vacate Hearing. In the alternative, Dr. Yue respectfully requests the Court to disqualify
19 Fenwick & West LLP for making unauthorized communications to a represented party and permit
20 additional time for Dr. Yue to seek counsel.

21
22 Dated: October 30, 2007 

23
24 By: Dongxiao Yue, Ph. D.

25 *Pro Se*
26
27
28

EXHIBIT 3

EXHIBIT 3

1 Dr. DONGXIAO YUE
2 2777 ALVARADO ST., SUITE C
3 SAN LEANDRO, CA 94577

4 Telephone: [REDACTED]
5 Facsimile: ([REDACTED])
6 [REDACTED]

7 *Pro Se*

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 NETBULA, LLC., a Delaware limited liability
11 company,

12 Plaintiff,

13 v.

14 STORAGE TECHNOLOGY
15 CORPORATION, et al.,

16 Defendants.

Case No. C06-07391-MJJ

**INTERVENOR DONGXIAO YUE'S
OPPOSITION TO DEFENDANTS'
MOTION FOR ADMINISTRATIVE
RELIEF FOR CONSIDERATION OF
DECLARATION OF MICHAEL
MELNICK IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Dept: Courtroom 11
Judge: The Honorable Martin J. Jenkins

17
18
19
20 On October 26, 2007, Defendants Storage Technology Corporation ("StorageTek"), Sun
21 Microsystems, Inc. ("SUN"), EMC Corporation ("EMC"), Darden Restaurants, Inc. ("DARDEN")
22 [collectively, "Defendants"] filed a Motion for Administrative Relief for Consideration of
23 Declaration of Michael Melnick ("Motion for Consideration"). Dr. Dongxiaio Yue ("Dr. Yue"),
24 Intervenor, opposes Defendants' Motion for Consideration for the reasons below:

- 25 (1) Defendants' Motion for Consideration was improper;
- 26 (2) Michael Melnick's declaration was untimely filed and Defendants cannot demonstrate
- 27 excusable neglect;
- 28

1 (3) Defendants' Motion for Summary Judgment is invalid on its face.

2 **BACKGROUND**

3 On May 15, 2007, the Court set the last date for hearing dispositive motions at November
4 27, 2007. Docket No. 51.

5 On October 22, 2007, Dr. Yue filed a Motion to Intervene and for Injunctive Relief and
6 Copyright Impoundment. Docket No. 68.

7 On October 23, 2007, sometime after 11:00 pm, Defendants filed their motion for
8 summary judgment or summary adjudication scheduled for hearing on November 27, 2007.

9 Defendants' motion, signed by Jedediah Wakefield, states the following:

10
11 The motion is based on this Notice of Motion and Motion, the
12 Memorandum of Points and Authorities in Support of Motion for
13 Summary Judgment, the Declaration of Jedediah Wakefield
14 ("Wakefield Decl."), the Declaration of Michael Melnick ("Melnick
15 Decl."), the Declaration of Michael Abramovitz ("Abramovitz
Decl."), the papers, records, and pleadings on file herein, and on
such argument of counsel as the Court may allow.

16 Docket No. 63, pp.1:23-2:3. However, Defendants did not file the Declaration of Michael Melnick
17 on October 23, 2007.

18 In the morning of October 24, 2007, after 8:00AM Pacific Time, Defendants filed the
19 Declaration of Michael Melnick. October 24, 2007 was 34 days before the hearing date, and one
20 day after the deadline of filing dispositive motions.

21 On October 25, 2007, Mr. Laurence Pulgram, defense counsel, emailed Dr. Yue, alleging
22 that Dr. Yue's Motion to Intervene was untimely and asked him to stipulate to a withdrawal or
23 delay of the motion for injunctive relief. In response, Dr. Yue contended that Defendants' motion
24 for summary judgment was clearly untimely and asked Defendants to withdraw their motion.

25 On October 26, 2007, Defendants filed the Motion for Consideration, alleging that the
26 untimely filing of Melnick Declaration was due to their inability to locate Mr. Melnick in the
27
28

1 afternoon and evening of October 23, 2007.

2 **ARGUMENT**

3 **1. Defendants' Motion for Consideration is procedurally improper**

4 Defendants made an untimely filing. The situation Defendants encounters is governed by
5 FRCP 6(b)(2) and the corresponding local rules. The proper remedy for Defendants' untimely
6 filing is a "motion made after the expiration of the specified period permit the act to be done
7 where the failure to act was the result of excusable neglect." FRCP 6(b)(2).
8

9 Instead, Defendants filed a motion for administrative relief, which covers the following
10 types of matters:

11 The Court recognizes that during the course of case proceedings a
12 party may require a Court order with respect to miscellaneous
13 administrative matters, *not otherwise governed by a federal statute,
Federal or local rule or standing order of the assigned judge.*

14 Civil L.R. 7-11 (emphasis added).

15 Since the relief Defendants sought was governed by FRCP 6(b)(2) and corresponding local
16 rules, their Motion for Administrative Relief is procedurally improper.
17

18 **2. Defendants cannot demonstrate excusable neglect required by FRCP 6(b)(2)**

19 When a party files an untimely motion, it essentially deprives the Court jurisdiction to hear
20 that motion. Under FRCP 6(b)(2), the only remedy available for a party is to file a motion to
21 enlarge time, with the required showing of "the failure to act was the result of excusable neglect."
22 FRCP 6(b)(2).

23 The Ninth Circuit had a detailed analysis of what constitutes "excusable neglect" in *Kyle v.*
24 *Campbell Soup Co.*, 28 F.3d 928 (9th Cir. 1994). In that case, "the district court found that counsel
25 acted in good faith, that he had not demonstrated professional incompetence, and that Campbell
26 Soup would not be prejudiced by allowing the time enlargement." *Id.* The Ninth Circuit reversed.
27 It noted U.S. Supreme Court decision in *Pioneer Inv. Servs. v. Brunswick Assocs.*, 123 L. Ed. 2d
28

1 74, 113 S. Ct. 1489 (1993) and concluded that “inadvertence, ignorance of the rules, or mistakes
2 construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 113 S. Ct. at 1496.

3 In the instant situation, Defendants had known the October 23, 2007 deadline for months,
4 and they had months to have Michael Melnick prepare that two-page declaration with exhibits.
5 Instead, they waited till the last minute and they claim they could not find Michael Melnick in the
6 night of October 23, 2007. By common sense, such neglect is not excusable.

7
8 Defendants cited several cases to support their argument that their untimely filing should
9 be considered. However, the cases they cited all dealt with opposition or reply briefs, not an
10 opening motion. As discussed in *Kyle*, the untimely movant must demonstrate “excusable neglect”
11 in order to be granted enlargement of time.

12 **3. Defendants’ motion for summary judgment is invalid on its face**

13 Declaration of Liwen Mah in support of Defendant’s Motion for Consideration states the
14 following:
15

16 On October 23, 2007, Defendants filed a motion for summary
17 judgment/adjudication, supporting declarations of Jedediah
18 Wakefield and Michael Abramovitz, and a proposed order for
19 summary judgment/adjudication. The memorandum of points and
20 authorities in support of the motion refers to a supporting
21 declaration of Michael Melnick (“Melnick Declaration”) and
22 exhibits attached thereto. During the afternoon and evening of
23 October 23, 2007, Fenwick & West attorneys found Mr. Melnick to
24 be inaccessible by telephone, e-mail, or through his employer, Sun.
25 Early on October 24, 2007, he reviewed the actual text of the
26 declaration and concurred in its filing.

27 Declaration of Mah at ¶2, Docket No. 79.

28 In other words, when Mr. Wakefield filed the motion for summary judgment on October
23, 2007, he did not have a declaration that met the requirements of FRCP 56(e).

Defendants’ motion for summary judgment should have truthfully stated the following:

The motion is based on this Notice of Motion and Motion, the
Memorandum of Points and Authorities in Support of Motion for

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Summary Judgment, the Declaration of Jedediah Wakefield (“Wakefield Decl.”), a *Declaration prepared by Fenwick & West, LLP and yet to be reviewed and signed by Michael Melnick - who is supposed to be the person with the required personal knowledge*, the Declaration of Michael Abramovitz (“Abramovitz Decl.”), the papers, records, and pleadings on file herein, and on such argument of counsel as the Court may allow.

Defendants’ motion for summary judgment is invalid on its face and must be denied.

CONCLUSION

For the foregoing reasons, Dr. Yue respectfully requests the Court to deny Defendants’ Motion for Administrative Relief for Consideration of Declaration of Michael Melnick in Support of Defendants’ Motion for Summary Judgment.

Dated: October 30, 2007



By: Dongxiao Yue, Ph.D.

Pro Se

EXHIBIT 4

EXHIBIT 4

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

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6 San Francisco, CA 94104
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7 Facsimile: (415) 281-1350

8 Attorneys for Defendants
STORAGE TECHNOLOGY CORPORATION,
9 SUN MICROSYSTEMS, INC., EMC CORPORATION
and DARDEN RESTAURANTS, INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13
14 NETBULA, LLC, a Delaware limited
15 liability company,

16 Plaintiff,

17 v.

18 STORAGE TECHNOLOGY
CORPORATION, a Delaware corporation;
19 SUN MICROSYSTEMS, INC., a Delaware
corporation; INTERNATIONAL
20 BUSINESS MACHINES
CORPORATION, a New York
21 corporation; EMC CORPORATION, a
Massachusetts corporation; VERITAS
22 SOFTWARE CORPORATION, a
Delaware corporation; DARDEN
23 RESTAURANTS, INC., a Florida
corporation; and DOES 1-100, inclusive,

24 Defendants.
25
26

27 AND RELATED COUNTERCLAIMS
28

Case No. C-06-07391-MJJ

~~PROPOSED~~ ORDER ON VARIOUS
ADMINISTRATIVE MATTERS

Dept: Courtroom 11
Judge: The Honorable Martin J. Jenkins

The Court convened a telephonic conference on October 31, 2007 at 2:00 P.M. Plaintiff Netbula, LLC was represented by Vonnah Brillet. Defendants Storage Technology Corp., Sun Microsystems, Inc., Darden Restaurants, Inc. and EMC Corporation (“Defendants”) were represented by Laurence Pulgram and Jedediah Wakefield. The Court having considered the pleadings filed by the parties and the argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. Defendants’ Motion for Summary Judgment or Summary Adjudication of Issues Relating to License Defense [Docket Nos. 63-67] is hereby rescheduled for hearing on December 13, 2007 at 3:00 P.M. Plaintiff’s Opposition shall be filed and served no later than November 13, 2007, and Defendants’ Reply shall be filed and served no later than November 20, 2007. Defendants’ Motion for Administrative Relief for Consideration of Declaration [Docket No. 78] is moot, as the declaration at issue was filed more than 35 days before the rescheduled hearing date.

2. Defendants’ Motion for Administrative Relief to Vacate Hearing on Non-Party Dongxiao Yue’s Request for Injunctive Relief and Impoundment [Docket Nos. 80-81] is hereby GRANTED. The Motion of DongxiaoYue to Intervene and Join as Plaintiff; for Injunctive Relief; and for Copyright Impoundment [Docket Nos. 68-72] will be taken off calendar. The Court will decide the appropriate schedule for considering this motion after the hearing on Netbula’s Motion for Substitution of Party as to the Copyright Infringement Claim [Docket Nos. 56-58], which remains scheduled for hearing November 20, 2007.

4. Ms. Brillet’s Motion to Withdraw as Counsel for Netbula [Docket Nos. 59-61] will be taken off calendar for November 20, 2007, and will be decided after the Court’s ruling granting or denying Defendants’ Motion for Summary Judgment or Summary Adjudication of Issues Relating to License Defense. Ms. Brillet will continue as counsel for Netbula in the interim, pending the Court’s ruling.

The status conference on 12/11/07 is VACATED.

SO ORDERED.

Dated: 11/01/07

United States District Judge

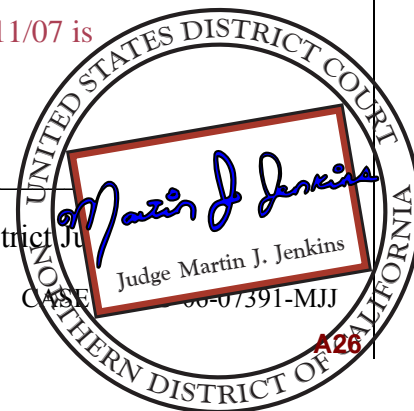


EXHIBIT 5

EXHIBIT 5

1 Dr. DONGXIAO YUE
2 2777 ALVARADO ST., SUITE C
3 SAN LEANDRO, CA 94577
4 Telephone: [REDACTED]
[REDACTED]
[REDACTED]

**ORIGINAL
FILED**
OCT 15 2007
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

5 *Pro Se*

6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 NETBULA, LLC., a Delaware limited liability
12 company,
13 Plaintiff,
14 v.
15 BindView Development Corporation, et al.,
16 Defendants
17
18
19
20

Case No. C06-0711-MJJ-WDB

**THIRD PARTY DONGXIAO YUE'S
NOTICE AND MOTION TO (1)
INTERVENE; (2) ENFORCE
PROTECTIVE ORDER; (3) UNSEAL
DOCUMENT NO. 294; AND
OPPOSITION TO SUN MICROSYSTEMS,
INC., EMC CORPORATION, AND
DARDEN RESTAURANTS, INC.'S
MOTION TO MODIFY PROTECTIVE
ORDER**

Date: November 20, 2007
Time: 9:30 a.m.
Dept: Courtroom 11
Judge: The Honorable Martin J. Jenkins

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| 4 | II. FACTS AND PROCEDURAL BACKGROUND | 5 |
| 5 | III. ARGUMENT..... | 8 |
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| 7 | A. Dr. Yue should be permitted to intervene | 8 |
| 8 | B. The Protective Order restricts the use of Protected Material to the | |
| 9 | Symantec case only and is a clear, specific, unambiguous, valid and | |
| 10 | enforceable Court Order | 10 |
| 11 | C. SUN defense counsel violated the Protective Order | 11 |
| 12 | 1. <i>SUN defendants used Protected Material from the Symantec</i> | |
| 13 | <i>case</i> | 11 |
| 14 | 2. <i>SUN defendants violated the plain terms of the Protective</i> | |
| 15 | <i>Order</i> | 13 |
| 16 | 3. <i>SUN defendants have no valid excuses for their violations</i> | 14 |
| 17 | 4. <i>Neither Netbula nor SUN defendants had the authority to</i> | |
| 18 | <i>override the Protective Order</i> | 15 |
| 19 | D. SUN defense counsel's violation of the Protective Order was willful..... | 16 |
| 20 | E. SUN's violation of the Protective Order injured and will continue to | |
| 21 | injure Intervenor's interest | 16 |
| 22 | F. SUN defense counsel's motion to modify the Protective Order is futile | 18 |
| 23 | G. The SUN case and the Symantec case are distinct disputes..... | 18 |
| 24 | H. Netbula's Motion for Leave to File Motion for Reconsideration | |
| 25 | (Document No. 294) should be unsealed | 19 |
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| 28 | | |

EXHIBIT 6

EXHIBIT 6

ORIGINAL
FILED

07 NOV -6 PM 3:13

RICHARD W. WILKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 Dr. DONGXIAO YUE
2 2777 ALVARADO ST., SUITE C
3 SAN LEANDRO, CA 94577

3 [Redacted] [Redacted]
4 [Redacted] [Redacted]

5 *Pro Se*

6
7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 NETBULA, LLC., a Delaware limited liability
12 company,

12 Plaintiff,

13 v.

14 BindView Development Corporation, et al.,

15 Defendants

Case No. C06-0711-MJJ-WDB

**THIRD PARTY DONGXIAO YUE'S
REPLY IN SUPPORT OF MOTION TO (1)
INTERVENE; (2) ENFORCE
PROTECTIVE ORDER; (3) UNSEAL
DOCUMENT NO. 294**

Date: November 20, 2007

Time: 9:30 a.m.

Dept: Courtroom 11

Judge: The Honorable Martin J. Jenkins

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1 Third party Dr. Dongxiao Yue ("Dr. Yue", "Yue" or "Intervenor"), acting *pro se*, hereby
 2 submits this reply brief in support of his Motion to for a Court order to (1) permit intervention by
 3 Intervenor in this action (the "*Symantec* case"), (2) find defense counsel for SUN Microsystems,
 4 Inc. in the case of *Netbula, LLC v. Storage Technology Corp., et al.*, Case No. 06-07391-MJJ (N.D.
 5 Cal.) (the "*SUN* case") [the "*SUN* defense counsel"] in willful violation of the Protective Order
 6 entered in the *Symantec* case (the "*Protective Order*", Docket No. 56), (3) enforce the *Protective*
 7 *Order*, (4) unseal Netbula's Motion for Leave to File Motion for Reconsideration (Docket No.
 8 294). This reply brief is based on the records in the case and the Declaration of Dongxiao Yue,
 9 filed concurrently.
 10

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 I. INTRODUCTION

13
 14 *SUN* defense counsel repeatedly violated the *Protective Order* in a video taped deposition
 15 by using five protected Netbula documents from the *Symantec* case as exhibits. In their Opposition,
 16 *SUN* defense counsel made a set of incoherent excuses; their primary defense is that they received
 17 authorization from Vonnah M. Brillet. They took one sentence said by Ms. Brillet and tried to
 18 interpret it in the broadest way, while ignoring the explicitly objections raised by Ms. Brillet. As
 19 we will show again, their excuses are invalid. Ms. Brillet did not have the power to override the
 20 *Protective Order* and she did not make the authorization for defense counsel to violate the
 21 *Protective Order*. Instead, Ms. Brillet explicitly objected to SUN's use of the confidential
 22 Kovecses report which included Netbula's license data from 1999 to 2007 and other NB
 23 documents.
 24

25
 26 Intervenor owns the code written by him before Netbula was founded, and he is the
 27 transferee of the copyrights in the software in dispute. Yue Decl, at ¶¶2-3. Intervenor also has an
 28 interest to protect the confidentiality of his deposition transcript in the *Symantec* case which

1 contains various personal information. Yue Decl, at ¶7.

2 **II. FACTS RELATED TO THE VIOLATION**

3 Intervenor has previously summarized the background and facts for his Motion. Below, he
4 will focus on the recorded violations by defense counsel during the September 12, 2007 deposition.
5 In the following, "NB Document" is used to denote documents Netbula, LLC ("Netbula")
6 produced in the *Symantec* case, as these documents bear the "NB" prefix in the Bates numbers;
7 similarly, "NBS Document" is used to denote documents Netbula produced in the *SUN* case.
8

9 At Dr. Yue's deposition in the *SUN* case on September 12, 2007, SUN used a
10 CONFIDENTIAL NB Document as Exhibit 2 (NB-0000846-852). But this use of a
11 CONFIDENTIAL NB document was unnoticed. Yue Decl., at ¶¶ 4-5.

12 When SUN used another CONFIDENTIAL NB Document as Exhibit 3 (NB-0000925-
13 932), Dr. Yue noticed the NB Bates number. The following is the pertinent transcript:
14

15 BY MR. WAKEFIELD:

16 Q Dr. Yue, do you recognize Exhibit 3 to your deposition today?

17 A This appears to be a document we produced for the Netbula
18 versus Symantec litigation with the NB Bates number starting from -
19 925 and marked as confidential --

20 Q Okay.

21 A -- by Netbula, LLC.

22 ...

23 Q Okay. And do you recognize this as the same license agreement
24 that has been produced in the StorageTek litigation?

25 A I cannot be certain unless I compare the two documents.

26 ...

27 Yue Depo., p.19.

28 Ms. Brillat then raised her objections, primarily on the ground that SUN's use of the NB
documents from the *Symantec* case gave SUN an unfair advantage. Mr. Wakefield then stated:

1 You can't put toothpaste back in the tube. I mean, if we know what
 2 Dr. Yue said in his deposition, we know what his source code looks
 like, we cannot erase that information.

3 Yue Depo., pp.23-24.

4 Dr. Yue then pointed out that there is a *Protective Order* in the *Symantec* case for the
 5 protection of the documents. To that, Mr. Wakefield responded:

6 The Court wanted to avoid burden on parties by having to engage in
 7 new discovery on topics that it might not need to get to in this case.
 8 But that doesn't mean that documents that are already in Sun
 Microsystems' counsel's possession that are relevant cannot be used.

9 After some more discussion, the parties took a recess. When they came back, Ms. Brillet
 10 stated:

11 Plaintiff's counsel, Vonnah Brillet, *I have expressed an objection*
 12 *that Plaintiff has to the fact that Defendants are using documents*
 13 *that are produced in another case for the Sun case.* With that
 14 caveat, I have agreed that the documents that pertain to contract and
 licensing would be allowed to be used in this case. *I object to the*
 15 *use of any other documents*, because it's my understanding that the
 Judge has limited the issues for this particular initial phase of
 16 discovery to those two issues.

17 Yue Depo., pp.26-27 (emphasis added).

18 After stating these words, Ms. Brillet clarified her position again,

19 MS. BRILLET: *Unless I have objected that it's not a document*
 20 *that is related to the contracting or the license –*

21 MR. WAKEFIELD: Okay. So is it your position that -- I don't
 22 understand the position. Is your position that IBM's counsel cannot
 today see some documents if you look at one and decide, "I don't
 23 think this is relevant to the -- to the licensing scope and
 interpretation issues that are at issue in this phase of the case"?

24 MS. BRILLET: *The documents that you have for him to view*
 25 *today, are these documents that are produced in the Sun case or*
 26 *are they documents that are produced in Symantec?*

27 MR. WAKEFIELD: There are an interrogatory answer that was
 28 produced in the Symantec litigation, but it is relevant to the issues of
 license formation and the claims that this is a copyright case, rather

1 than a contract case, that Plaintiff is asserting and that are the crux
2 of the issue that we're presented with here.

3 MS. BRILLET: Right. Again, I just -- *I still have the issue with*
4 *IBM seeing the documents that are produced in the Symantec case.*

5 MR. WAKEFIELD: How do you --

6 MS. BRILLET: *I just want to put that objection on the record.*

7 Yue Depo., pp.28-29 (emphasis added).

8 Later, Mr. Wakefield introduced the CONFIDENTIAL Gregory Kovescses report as an
9 exhibit. Ms. Brillet immediately objected. The following is the exchange on this exhibit.
10

11 Q And you -- Netbula submitted that in the form of a declaration
12 from Gregory Kovescses, correct?

13 A I believe so.

14 Q Okay. We'll look at that.
(Defendants' Exhibit 14 marked for identification.)

15 MS. BRILLET: *I object.*

16 MR. WAKEFIELD: Well, my offer to stipulate regarding pricing
17 still stands, but I want to get to this \$18,000 standard price.

18 BY MR. WAKEFIELD:

19 Q Dr. Yue, since the declaration of Mr. Kovescses was provided in
20 the Symantec litigation, have you discovered new licensing
information for the year 2004 and before?

21 Yue Depo., pp.130-131 (emphasis added).

22 Mr. Wakefield then proceeded to question Dr. Yue on the Kovescses report, which
23 contained Netbula's license data from January 1999 to May 2007. Yue Decl., ¶5.

24 In subsequent questioning, SUN used two additional CONFIDENTIAL NB Documents as
25 deposition exhibits:

26 (1) NB-003733: CONFIDENTIAL document with Netbula bank account information and
27 customer name.
28

1 (2) NB-0000883-890: CONFIDENTIAL license agreement between Netbula and a
2 competitor of IBM.

3 4 III. LEGAL STANDARD

5 In addition to the authorities cited in Dr. Yue's Motion, the analysis in *Campo v. American*
6 *Corrective Counseling*, No. C-01-21151-JW-PVT, Docket No. 349, (N.D.Cal. 6-27-2007) is
7 instructive. The protective order allegedly violated in the *Campo* case was virtually identical to
8 the one in the instant case – it was based on the Northern District's Model Stipulated Protective
9 Order.

10
11 The *Campo* case involves the use of confidential material by the same counsel against the
12 same defendant in another case pending in the Northern District of Indiana, namely, *Hamilton v.*
13 *American Corrective Counseling Services, Inc.* et. al. In February 2007, the *Hamilton* Plaintiffs,
14 represented by the same counsel as the *Campo* Plaintiffs, served an opposition to the *Hamilton*
15 Defendants' motion for summary judgment that attached and referred to confidential documents
16 sought to be de-designated in the *Campo* court. Even though the documents were eventually de-
17 designated as non-confidential, the *Campo* court found that a violation of the protective order may
18 have occurred.

19
20 The *Campo* court's analysis focused on Section 7.1 of the protective order (which is
21 identical to Section 7.1 of the Protective Order in the instant action) and found that the use of
22 protected material in the Indiana case was prohibited: "Plaintiffs *used the documents in*
23 *connection with another case*, thus they did not substantially comply with the protective order."
24 *Id.* (emphasis added)

25 26 IV. ARGUMENT

27 A. SUN Willfully Violated the *Protective Order*

28

EXHIBIT 7

EXHIBIT 7

Clerk for Hon. Judge Jenkins
450 Golden Gate Ave.
San Francisco, CA 94102

Dear Clerk of the Court,

On October 22, 2007, I, acting *pro se*, filed a Motion to Intervene, for Injunctive Relief and for Copyright Impoundment in the Netbula, LLC v. Storage Technology Corporation, et al. (C06-07391-MJJ) case. Defendants in the case filed an administrative motion to vacate the hearing of my motion. I filed an opposition.

The Court has granted defendants' motion to vacate in a telephonic hearing.

I am writing to request a recording of the hearing:

Judge: Martin J. Jenkins
Case Name: Netbula, LLC v. Storage Technology Corporation, et al.
Case Number: C06-07391-MJJ
Hearing date: October 31, 2007

Please mail the recording of the above referenced hearing to:

Dongxiao Yue
2777 Alvarado Street
Suite C
San Leandro, CA 94577



Dongxiao Yue
November 5, 2007

Attached: \$26 check for purchasing the recording

EXHIBIT 8

EXHIBIT 8

PAGES 1 - 19

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARTIN J. JENKINS

NETBULA, LLC, A DELAWARE LIMITED
LIABILITY COMPANY,

PLAINTIFF,

VS.

STORAGE TECHNOLOGY CORPORATION,
ET AL.

DEFENDANTS.

COPY

NO. C 06-7391 MJJ

SAN FRANCISCO, CALIFORNIA
TUESDAY
NOVEMBER 20, 2007

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

IN PRO SE

DONGXIAO YUE
2777 ALVARADO STREET, SUITE C
SAN LEANDRO, CALIFORNIA 94577

FOR PLAINTIFF

THE LAW OFFICES OF VONNAH M. BRILLET
2777 ALVARADO STREET, SUITE E
SAN LEANDRO, CALIFORNIA 94577

BY: VONNAH M. BRILLET, ESQUIRE

FOR DEFENDANTS
SUN, DARDEN AND
EMC

FENWICK & WEST
555 CALIFORNIA STREET, SUITE 1200
SAN FRANCISCO, CALIFORNIA 94104

BY: LAURENCE F. PULGRAM, ESQUIRE
JEDEDIAH WAKEFIELD, ESQUIRE

(FURTHER APPEARANCES ON FOLLOWING PAGE)

REPORTED BY: JOAN MARIE COLUMBINI, CSR 5435, RPR
OFFICIAL COURT REPORTER, U.S. DISTRICT COURT

1 LET ME JUST ASK A FEW QUESTIONS ON THE SUBSTITUTION
2 MOTION, BECAUSE THERE IS SOME AMBIGUITY IN THESE PLEADINGS.
3 AND I WILL ALSO SAY MR. YUE DOES NOT PRESENTLY HAVE ANY RIGHT
4 TO FILE ANYTHING BEFORE THE COURT. YOU DON'T.

5 ARE YOU MR. YUE?

6 **MR. YUE:** YES.

7 **THE COURT:** SO YOU DON'T. YOU DON'T. UNLESS AND
8 UNTIL THE COURT WOULD GRANT YOU THAT AUTHORITY, YOU DON'T. SO
9 YOU SHOULD CEASE AND DESIST FROM DOING SUCH, NOTWITHSTANDING
10 THE FACT -- LISTEN AND HEAR ME CLEARLY. YOU SHOULD CEASE AND
11 DESIST FROM DOING SUCH UNTIL YOU ARE AUTHORIZED TO DO SO. ALL
12 RIGHT? I JUST -- THERE'S NO ARGUMENT ABOUT THAT.

13 AND EVEN IF I WERE TO GRANT THIS MOTION, IT STILL
14 WOULD NOT GIVE YOU AUTHORITY TO DO SO, TO FILE PLEADINGS IN THE
15 MATTER. SO THE ISSUE OF REPRESENTATION HAS AT LEAST BEEN
16 SETTLED UNTIL COURT HEARS THE DISPOSITIVE MOTION NEXT WEEK.
17 YOU WILL REMAIN.

18 **MR. YUE:** WHAT'S THE COURT'S LEGAL RATIONALE FOR
19 THAT?

20 **THE COURT:** THAT IS THE RATIONALE, AND THAT'S THE
21 STATEMENT.

22 **MR. YUE:** FOLLOWING RULES OF CIVIL PROCEDURE --

23 **THE COURT:** MR. YUE, I AM GOING TO HAVE YOU TAKEN
24 OUT IF YOU DON'T BE QUIET. YOU HAVE NO STANDING AT THIS
25 JUNCTURE TO MAKE ARGUMENTS TO THE COURT. YOU MAY AT SOME LATER

1 OTHER BUSINESS ENTITIES NEED TO APPEAR THROUGH COUNSEL, AND
2 WHERE IT'S THE RIGHT THAT NETBULA OWNED WHICH HAS BEEN
3 TRANSFERRED FOR NO OTHER REASON OTHER THAN TO GET IT OUT OF THE
4 CORPORATION --

5 **THE COURT:** BUT YOU DON'T ARGUE THAT THE ASSIGNMENT
6 IS NOT VALID, RIGHT?

7 **MR. PULGRAM:** EXCUSE ME?

8 **THE COURT:** YOU DON'T ARGUE THE ASSIGNMENT IS NOT
9 VALID?

10 **MR. PULGRAM:** THERE IS SOME LAW TO THAT EFFECT, YOUR
11 HONOR.

12 **THE COURT:** BUT IT'S NOT BEFORE ME. I HAVEN'T SEEN
13 THAT IN YOUR PAPERS.

14 **MR. PULGRAM:** I BELIEVE THERE'S A PARAGRAPH, THE
15 LAST PARAGRAPH OF OUR ARGUMENT. BUT I DON'T THINK YOU HAVE TO
16 REACH THAT.

17 **THE COURT:** THAT'S WHAT I AM SUGGESTING TO YOU. SO
18 TO DENY THE MOTION MEANS THAT HE'S NOT SUBSTITUTED IN AS A
19 PARTY?

20 **MR. PULGRAM:** CORRECT.

21 **THE COURT:** AND THINGS REMAIN STATUS QUO WITH
22 RESPECT TO THE MOTIONS THAT WOULD BE HEARD IN DECEMBER.

23 **MR. PULGRAM:** EXACTLY RIGHT.

24 **THE COURT:** WE TAKE THAT ISSUE UP POST WHAT
25 TRANSPIRES WITH THOSE MOTIONS.

1 AMENDED PROTECTIVE ORDER, MAYBE WE'LL TALK ABOUT THIS IN THE
2 STATUS CONFERENCE, WOULD YOU PREFER IT BE IN THE SUN CASE OR
3 SYMANTEC FOR CONVENIENCE OF THE COURT.

4 **THE COURT:** WELL, IT STRIKES ME THAT IT OUGHT TO BE
5 IN THIS CASE, AND WE'LL CROSS REFERENCE THE SYMANTEC CASE.

6 **MR. PULGRAM:** VERY GOOD, YOUR HONOR.

7 **THE COURT:** YOU ARE GOING TO BE MAKING RELEVANCE
8 ARGUMENTS WITH RESPECT TO THAT EVIDENCE IN THAT CASE AS IT
9 PERTAINS TO THIS ONE.

10 **MR. PULGRAM:** CORRECT.

11 **THE COURT:** AS LONG AS WE CROSS REFERENCE AND SAY,
12 YOU KNOW, THE COURT HAS ORDERED -- ALLOWED INTERVENTION, AND
13 WE'LL ON AN APPROPRIATE RATE BASIS ALLOW FOR DISCOVERY OF
14 EVIDENCE IN THAT RECORD UNDER THE AUSPICES OF THE PROTECTIVE
15 ORDER SUBJECT TO RELEVANCE CONSIDERATIONS AND THE PARTIES'
16 AGREEMENT TO A PROTECTIVE ORDER AND THE COURT'S ENTRY OF A
17 PROTECTIVE ORDER THAT PROTECTS THE RELATIVE INTERESTS OF ALL
18 THE PARTIES IN THE MATTER, INCLUDING CLIENTS, MR. YUE.

19 **MR. PULGRAM:** THANK YOU, YOUR HONOR.

20 **THE COURT:** SO I WOULD ASK YOU JUST TO DRAFT AN
21 ORDER THAT GRANTS YOUR MOTION AND SETS FORTH THESE PARAMETERS
22 FOR THE GRANT OF THE MOTION, AND THEN LET'S TRY -- WHEN ARE YOU
23 IN FOR THE MOTIONS?

24 **MR. PULGRAM:** THE MOTIONS ARE SECOND WEEK OF
25 DECEMBER, I BELIEVE, YOUR HONOR.

1 **THE COURT:** OKAY. AND YOU OUGHT TO ALSO INCLUDE IN
2 THE ORDER THE EXTENSION OF THE 60-DAY TIMEFRAME.

3 **MR. PULGRAM:** WE WILL, YOUR HONOR. THANK YOU.

4 **MR. YUE:** YOUR HONOR, MAY I, FOR THE RECORD? AM I
5 UNDERSTANDING CORRECTLY THAT MY MOTION TO INTERVENE AND --

6 **THE COURT:** NOT ON TODAY.

7 **MR. YUE:** -- HOLDING COUNSEL IN CONTEMPT --

8 **THE COURT:** LET ME SUGGEST, IT'S NOT ON TODAY
9 BECAUSE YOU CAN'T MAKE SUCH A MOTION YET. SO IT'S NOT ON
10 TODAY.

11 **MR. YUE:** I WAS MOVING AS A THIRD PARTY, JUST AS SUN
12 DEFENSE COUNSEL.

13 **THE COURT:** RIGHT.

14 **MR. YUE:** BUT I WAS A PRO SE.

15 **THE COURT:** IT WASN'T ON TODAY.

16 **MR. YUE:** WAS THE REASON VACATING MY MOTION BECAUSE
17 I AM A PRO SE LITIGANT?

18 **THE COURT:** NO, IT JUST WASN'T -- IT DIDN'T HIT MY
19 CALENDAR TODAY. THAT'S IT. ALL RIGHT. TAKE CARE, MR. YUE.

20 **MR. YUE:** OKAY. THANK YOU, YOUR HONOR.

21 (PROCEEDINGS ADJOURNED.)
22
23
24
25