No._____

(District Case Nos. C06-07391-MJJ and C06-0711-MJJ (N.D. Cal))

EMERGENCY: Summary Judgment Hearing Set for Dec 13, 2007

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.

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

Dr. Dongxiao Yue
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San Leandro, CA 94577
FAX: (510) 291-2237
Unrepresented

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PROLOGUE

"Mr. Yue, I am going to have you taken out if you don't be quiet."

--- Honorable Judge Martin J. Jenkins, November 20, 2007, U.S.D.C., N.D. Cal., at the hearing of relevant motions. (Appendix, at A41).

ISSUES PRESENTED FOR REVIEW

Petitioner presents the following issues:

1. Whether district court judge's "cease and desist" order which prohibits Petitioner from filing anything is proper;

2. Whether a party can use a "motion for administrative relief" to seek to vacate a properly scheduled hearing of a motion for injunctive relief;

3. Whether it is proper for the district judge to issue an *ex parte* order which grants SUN defendants' "administrative" motion to vacate the hearing of Petitioner's motion for injunctive relief;

4. Whether it is proper for the district judge to permit SUN defendants to use confidential documents in another case, including Petitioner's source code, while refuse to hear Petitioner's timely filed opposition and prohibit Petitioner to speak in the court;

5. Whether Judge Jenkins' judicial actions evince bias that requires the case to be reassigned to another judge.

THE RELIEF SOUGHT

Petitioner requests that the Court issue a Writ of Mandamus and direct

the district court to:

1. Vacate the "cease and desist" order issued by district Judge Martin J. Jenkins ("Judge Jenkins") which prohibits Petitioner from filing anything before his court;

2. Vacate an *ex parte* order issued by Judge Jenkins which granted Sun Microsystems, Inc.'s "administrative" motion to vacate the hearing of Petitioner's Motion to Intervene, for Injunctive Relief and Copyright Impoundment;

3. Vacate an order issued by Judge Jenkins which permitted SUN and others to use confidential documents in the BindView case (including Petitioner's computer software source code) without hearing Petitioner's timely filed opposition;

4. Reassign the Netbula v. Storage Technology case to another judge;

5. Hear expeditiously Petitioner's Motion to Intervene and for Injunctive Relief to prevent further irreparable harm to Petitioner's copyright;

6. Hear expeditiously Petitioner's motion to intervene and to hold defense counsel of SUN in willful violation of the Protective Order in the BindView case.

STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21(a), the Court has inherent power and jurisdiction to confine a district court to

lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.

SUPPORTING DOCUMENTS

In accordance with FRAP 21(a)(2)(C), Petitioner attaches part of the record which may be essential to understand the matters set forth in this Petition. The pages in the appendix are numbered A01 to A45.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner, Dr. Dongxiao Yue ("Yue"), is the owner of a small software company named "Netbula, LLC" ("Netbula") and a computer programmer. Since 1994, Yue has been developing software called PowerRPC. In July 1996, Yue founded Netbula to market the PowerRPC software.

In January 2006, Netbula filed a lawsuit against BindView Development Corporation ("BindView"), Symantec Corporation ("Symantec") et al. for copyright infringement, Case No. C06-0711-MJJ (N.D. Cal) (the "BindView case" or "Symantec case").

In December 2006, Netbula filed another copyright infringement action against Storage Technology Corporation ("StorageTek"), Sun Microsystems, Inc. ("SUN") and others[1], Case No. C06-07391-MJJ (the "SUN case"). The SUN case alleges infringement of the 1996 version of the PowerRPC. SUN,

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[1] The other defendants are EMC Corporation, Darden Restaurants Inc. and IBM Corporation.

which has its own RPC software, counterclaimed Yue as an individual for trademark infringement.

Judge Jenkins presides over both the BindView and SUN cases. The defendants in the BindView case and SUN case are represented by the same attorneys.

On September 10, 2007, Judge Jenkins entered an order granting summary judgment for the BindView defendants on the copyright, fraud and contract claims, despite BindView's own admissions that it did not have a license[2].

Yue always owned the copyrights of the PowerRPC code he wrote before he founded Netbula in July 1996. On September 26, 2007, Netbula transferred the copyrights in the 2000 and 2004 versions of PowerRPC to Yue personally. On October 1, 2007, Netbula filed a motion to substitute Yue as the party for the copyright claim in the SUN case.

On November 5, 2007, Yue filed a substitution of counsel, making himself a *pro se* counter-defendant in the SUN case.

On November 19, 2007, Yue filed a separate copyright action against StorageTek and SUN, alleging infringement of three other copyrights, namely, the copyrights in the code he wrote before July 1996, the code in

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[2] The parties in the BindView case stipulated that Netect, Inc. (Delaware), a subsidiary of Netect, Ltd (Israel), had a license with disputed scope.

2000 and 2004. Yue v. Storage Technology Corporation, et al., Case No. C07-05850-SI (N.D. Cal).

1. The ex parte order that vacated Petitioner's motion to intervene and for injunctive relief in the SUN case (Case No. C06-07391-MJJ)

On October 22, 2007, Yue filed a motion to intervene and for injunctive relief in the SUN case, alleging irreparable harm from SUN defendants' continuing copyright infringement based on newly discovered evidence. Docket No. 68. The clerk of the court scheduled Yue's motion for hearing on November 27, 2007.

On October 23, 2007, SUN defendants filed a motion for summary judgment. Docket No. 63[3]. But, their motion was based on a declaration that did not exist at the time they filed the motion – they later admitted that they could not locate the declarant to review his declaration. Yue pointed out such issues to defendants. Defense counsel Laurence Pulgram then sent Yue numerous emails on the merits of these issues. When Yue indicated that he would have to file a separate action against SUN and StorageTek, Mr. Pulgram emailed Yue, advising Yue about personal liabilities and such. Mr. Pulgram also requested Yue to withdraw his motion for injunctive relief. Yue refused.

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[3] SUN's motions had a smaller document numbers because their motions were e-filed, while Yue's motion was filed on paper and required manual processing.

On October 26, 2007, SUN defendants filed two motions for administrative relief. One of the motions requested the district judge to vacate the hearing of Yue's Motion for Injunctive Relief. Docket No. 78. The other requested the district judge to consider the declaration that did not exist when defendants filed their motion for summary judgment. Docket No. 80. Yue filed oppositions to both motions, on the merits and on the ground that such "administrative" motions were procedurally improper. Docket Nos. 90 and 91. In Yue's opposition to defendants' motion to vacate, he further stated that if the district court found that he was a represented party, then it should disqualify defense counsel for making direct communications with him.

On October 31, 2007, Judge Jenkins held a telephonic hearing on defendants' "administrative motions." Yue was not given notice about this hearing and was not allowed to participate. Following the hearing, on November 2, 2007, Judge Jenkins issued an order that granted SUN defendants' motion to vacate the hearing of Yue's Motion to Intervene and for Injunctive Relief. Docket No. 94.

Yue then mailed a request to the clerk of the court for a recording of the telephonic hearing, who informed Yue that no court reporter was present and no audio recording was made.

2. SUN Defendants' Motion to Modify the Protective Order in the BindView case and Yue's Opposition and Motion to Hold Defense Counsel in Willful Violation of the Protective Order (Case No. C06-0711-MJJ)

On September 12, 2007, SUN defendants, who are represented by the same counsel as BindView, deposed Yue as a witness. In the deposition, SUN used confidential documents from the BindView case as exhibits, which were governed by a protective order in the BindView case (the "BindView Protective Order"). Afterwards, Netbula sent SUN defendants a letter stating that their use of the confidential material violated the BindView Protective Order.

On October 9, 2007, SUN defendants filed a Motion to Intervene and Modify Protective Order on the BindView docket. C06-0711-MJJ, Docket No. 303.

On October 15, 2007, Yue filed a Motion to Intervene, to Enforce the Protective Order and to hold SUN defense counsel in willful violation of the BindView Protective Order, and an Opposition to SUN's motion to modify the Protective Order. C06-0711-MJJ, Docket No. 308. The clerk of the court set the hearing of Yue's Motion and Opposition on the same day as the hearing of SUN defendants (intervenors)' motion, November 20, 2007.

On October 30, 2007, SUN defendants filed their opposition to Yue's motion to enforce the BindView Protective Order. On November 6, 2007,

Yue filed a reply brief. Docket No. 319.

On November 20, 2007, Netbula's counsel, Ms. Vonnah M. Brillet and Yue went to the district court in San Francisco for the hearing of the motions about the Protective Order and Netbula's motion to substitute party.

At the beginning of the hearing, Judge Jenkins said: Mr. Yue does not presently have any right to file anything before the court. Then the Judge told Yue directly: "You should cease and desist from doing such… Listen and hear me clear. You should cease and desist from doing such until you are authorized to do so." Judge Jenkins further ordered that Yue cannot file anything until after the district court rules on defendants' summary judgment motion. After the Judge finished, Yue asked: "What is the Court's legal rationale for that?" Judge Jenkins said: "That is the rationale, and that is a statement." Yue then said: "Following rules of civil procedure--" Judge Jenkins interrupted Yue and said: "Mr. Yue, I am going to have you taken out if you don't be quiet." See A41 of the appendix for that exchange.

At the hearing, Judge Jenkins coached defense counsel, Laurence Pulgram, telling him to question the validity of Netbula's copyright assignment to Yue. See A42.

Judge Jenkins denied Netbula's motion to substitute party. He also granted SUN defendants' motion to intervene and to modify the BindView Protective Order without hearing Yue's opposition, so that defendants can

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use the material in the BindView case (also referenced as the Symantec case) for their summary judgment motion in the SUN case. See A44.

At the end of the hearing, Yue asked Judge Jenkins about his motion to intervene and enforce the protective order. The Judge said it was not on the calendar. See A45. But, there was nothing on the docket indicating that the hearing of Yue's motion was vacated.

REASONS WHY WRIT SHOULD ISSUE

I.   Grant of Writ of Mandamus is Necessary

1. Petitioner has no other adequate means to attain the relief

Judge Jenkins issued a "cease and desist" order that prohibits Yue from filing "anything" until he is authorized to do so. This "cease and desist" order effectively prevents Yue from seeking any relief from the district court, such as a motion for reconsideration or a motion for recusal on the basis of apparent bias.

2. Petitioner will be irreparably harmed and prejudiced if mandamus relief is not granted

Yue's motion to intervene and for injunction and impoundment under copyright law seeks to stop the continuing infringement of his copyrights by SUN defendants. Under copyright law, Yue is entitled to a presumption of irreparable harm. Yue filed his motion for injunction on October 22, 2007. SUN defendants filed their motion for summary judgment the day after.

SUN defendants requested the Judge to vacate the hearing of Yue's motion for injunction. Yue requested the Judge to reject SUN defendants' motion for summary judgment because it is "supported" by a non-existent declaration.

Judge Jenkins then granted SUN's motion to vacate the hearing of Yue's injunction motion in a telephonic hearing, without Yue's participation.

All signs indicate that Judge Jenkins has pre-judged the case. If mandamus relief is not granted and Judge Jenkins rules in favor of defendants despite their own admissions that they did not have licenses for the copies made -- as he already did in the BindView case, Petitioner will effectively lose his copyrights. Such a ruling in favor of defendants will be a license for them to copy freely, causing additional irreparable harm. Such a ruling will also affect Petitioner's other case against SUN and StorageTek -- the Yue v. Storage Technology Corporation, et al. case. (Case No. C07-05850-SI (N.D. Cal)).

SUN and Yue are direct competitors in the RPC software market. By granting SUN defendants' motion to intervene and modify protective order without even hearing Yue's opposition, Judge Jenkins' order will irreparable injure Petitioner's commercial interest and irreparably prejudice Petitioner and his company in the litigation. The Ninth Circuit has held that a "protective order is the 'conclusive' determination by the district court of the legal issue in question" and "resolves an 'important' issue 'separate from the

merits' of the underlying action." *Osband v. Woodford*, 290 F.3d 1036, 1039-40 (9th Cir. 2002). With Judge Jenkins' "cease and desist" order in place, Yue can't even file a notice for interlocutory appeal on the BindView docket without risking a contempt of court proceeding against him.

3. The trial court's orders are clearly erroneous as a matter of law

Judge Jenkins' aforementioned "cease and desist" and "vacate hearing" orders greatly affected the conduct of the case, but he gave no legal rationale for these orders.

The Ninth Circuit had outlined four factors for district courts to examine before entering pre-filing orders which require pre-approval for filing documents. *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990); See also, *Molski v. Evergreen Dynasty Corp.*, No. 05-56452 (9th Cir. 08/31/2007). Here, Judge Jenkins' "cease and desist" order goes far beyond a "pre-filing" order: it is a simple prohibition without exception. Yet, Judge Jenkins provided no legal rationale, cited no authority and gave no reason.

Judge Jenkins issued the "cease and desist" order because he said so. For the order vacated the hearing of Petitioner's motion for injunction, Judge Jenkins did not provide any analysis or reason.

4. The trial court's orders manifested a persistent disregard of federal rules

After Judge Jenkins granted SUN defendants' request to vacate Yue's

motion to intervene and for injunction, Yue mailed a request for the recording of the hearing. But Yue was informed that no recording was made, making it impossible for him to determine the nature of that order.

When Yue was about to cite Federal Rules of Civil Procedure to raise issue about the "cease and desist" order, Judge Jenkins' reaction was threatening to have Yue taken out.

As for granting SUN defendants' motion to modify the BindView Protective Order, Netbula did not file an opposition, and Netbula's counsel was not prepared to argue about the details. By prohibiting Yue to speak about his opposition to the modification of the Protective Order, Yue was severely prejudiced. SUN defendants wanted to use Yue's deposition from the BindView case – which is hearsay -- in the SUN case out of the proper context, despite the fact that Yue has been available and SUN has taken a seven-hour deposition of Yue.

SUN defense counsel's violations of the BindView Protective Order were well documented. The harm cause by these violations was substantial. Yue's motion to hold SUN defendants in violation of the Protective Order was properly scheduled to be heard on November 20, 2007. But, Judge Jenkins told Yue that the motion was not on the calendar, and he made no indication when that motion will be heard.

5. The trial court's orders raise new and important problems

SUN filed a "motion for administrative relief" to vacate the hearing of Yue's motions. Yue contended that "administrative" motions were only designed for miscellaneous matters not otherwise governed by federal rules or statutes. But, Judge Jenkins granted SUN defendants' administrative motion to vacate the hearing of Yue's motions.

If Judge Jenkins' ruling establishes a precedent, then every litigant can utilize "administrative" motions to perform two attacks on a motion: first, an "administrative" motion to vacate the hearing, which would force the other party to file a response within three days; then, after learning the other party's arguments, a second chance to counter the motion in an opposition brief. Petitioner believes such an outcome is not intended by the Federal Rules of Civil Procedure.

II. THE COURT SHOULD ORDER THE CASES TO BE REASSIGNED TO ANOTHER JUDGE

Judge Jenkins increasingly showed bias. He coached defense counsel, Laurence Pulgram, at the November 20, 2007 hearing, telling him to question the validity of Netbula's copyright assignment and get back to the court with an argument[4]. See A42 for that exchange.

Judge Jenkins' harsh words for Yue are indicative of personal animus

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[4] In any case, Yue always owned the copyright of substantial portion of the PowerRPC software, because the copyrights in the code that Yue wrote before July 1996 was never transferred to Netbula.

which affected and will continue to affect his judgment. Netbula's opposition to SUN defendants' motion for summary judgment was based solely on the declaration of Yue and evidence attached to it. With Judge Jenkins presiding over the cases where Yue is the key witness, there is a substantial chance that a miscarriage of justice will occur. Moreover, Judge Jenkins ruling in the SUN case will affect Yue's other case, Yue v. Storage Technology Corporation, et al.

In view of the situation, Yue requests the Court to reassign the cases to another judge.

A separate emergency motion to stay the hearing of SUN defendants' motion for summary judgment is being filed concurrently.

CONCLUSION

Yue respectfully requests the Court to grant the mandamus relief sought, including reassigning the cases to a different judge.

Respectfully submitted,

Date: November 28, 2007

Dongxiao Yue
Pro Se

CERTIFICATE OF SERVICE

I certify that I served the Petition for Writ of Mandamus and Exercise of Supervisory Authority on the following persons on November 28, 2007:

1) Honorable Martin J. Jenkins, U.S. District Court Judge, Northern District of California, by delivering a true copy to the Clerk's Office, in an envelope addressed to Judge Jenkins;

2) The real parties in interest, by emailing a true copy to their attorneys of record, Mr. Laurence Pulgram, Mr. Jedediah Wakefield, Mr. Albert Sieber, Mr. David Eiseman, Ms. Vonnah M. Brillet, in accordance to an agreement on service by email.
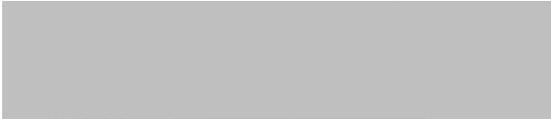
Dongxiao Yue

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

I certify that the within Petition is proportionately spaced, has a typeface of 14 points, and contains no more than 3,000 words.

Dongxiao Yue

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