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UNITED STATES COURTS
NINTH CIRCUIT COURT OF APPEALS

COMPLAINT OF JUDICIAL MISCONDUCT

AGAINST

Hon. Martin J. Jenkins

STATEMENT OF FACTS

1 I, Dongxiao Yue, file this complaint under 28 U.S.C. §351(a) against Honorable Judge
2 Martin J. Jenkins (“Judge Jenkins”) of the Northern District of California.

3 **I. BACKGROUND OF THE COMPLAINT**

4 I am the owner of a small software company named “Netbula, LLC” (“Netbula”) and a
5 computer programmer. Since 1994, I have been developing software called PowerRPC. In July
6 1996, I founded a company named Netbula, LLC (“Netbula”) to market the PowerRPC software.

7 In January 2006, Netbula filed a lawsuit against BindView Development Corporation
8 (“BindView”), et al. for copyright infringement in the Northern District of California, Case No. C06-
9 0711-MJJ. In December 2006, Netbula filed another copyright infringement action against
10 Storage Technology Corporation (“StorageTek”), et al., Case No. C06-07391-MJJ. One of the
11 StorageTek defendants counterclaimed me personally. The defendants in the BindView case and
12 StorageTek case are represented by the same attorneys.

13 In March 2007, Netbula filed a Rule 11 motion – in full compliance of the 21 day safe
14 harbor provision -- against defense counsel in BindView case for alleged violations in October
15 2006 and earlier. Judge Jenkins referred the Rule 11 motion to Magistrate Judge Edward M.
16 Chen, who shares the same docket clerk with Judge Jenkins.

17 On June 11, 2007, Judge Chen denied Netbula’s Rule 11 motion for being too late --
18 saying the motion was filed several months after the alleged violations, and ordered Netbula to
19 pay \$20,000 attorneys fees to defense counsel. On June 20, 2007, Netbula filed an objection to
20 Judge Chen’s order.

21 On June 26, 2007, Netbula filed a motion for leave to amend its complaint by adding
22 additional copyright infringement claims identified in discovery. On June 28, 2007, Magistrate
23 Judge Wayne D. Brazil, who was overseeing discovery in the BindView case, recommended to
24 extend discovery cutoff to August 10, 2007 and extend the hearing date for dispositive motions to
25 August 31, 2007. On July 6, 2007, Judge Jenkins rejected the recommendation to extend the
26 hearing date for dispositive motions, and kept the hearing date for dispositive motions on August
27 21, 2007.

28 On July 17, 2007, the BindView defendants filed three separate motions for summary
judgment on separate claims, scheduled to be heard on August 21, 2007. However, they filed
corrected documents on July 19, 2007, only 33 days before the hearing date. C06-0711, Docket
No. 231. On July 31, 2007, Netbula filed oppositions to BindView defendants’ motions for
summary judgment and cross-motions for summary judgment.

August 2, 2007, Judge Jenkins entered an order denying Netbula’s motion for leave to
amend complaint. Docket No. 244. On August 6, Judge Jenkins adopted Judge Chen’s order on
the Rule 11 motion. Docket No. 245. On August 21, 2007, the parties went to the court for the

1 hearing of the summary judgment motion, but Judge Jenkins was sick on that day. The summary
2 judgment motion was heard on August 23, 2007.

3 During this time, I criticized Judge Chen's order (not the person), including writing an
4 article about the order in a personal blog. I later closed the blog.

4 **II. MISCONDUCT FACTS (See Exhibits for some of the supporting documents)**

5 **1. The Settlement Conference on August 28, 2007 in the BindView case**

6 Netbula and BindView defendants held a settlement conference before Magistrate Judge
7 Joseph C. Spero on August 28, 2007. Netbula's counsel, Gary S. Fergus and Vonnah M. Brillet
8 and I were present for the plaintiff.

9 Judge Spero first called Mr. Fergus and Ms. Brillet into a room at the back of the
10 courtroom. After a long conversation, Fergus and Ms. Brillet came out and took me to another
11 small room. As soon as we closed the door, Ms. Brillet told me the stuff I wrote blew my case.
12 She specifically told me that Judge Spero told her and Mr. Fergus the following: my criticism of
13 Judge Chen's order had offended some of the judges, including Judge Jenkins. Ms. Brillet also
14 told me that she got a hint that a ruling against Netbula had already been in place.

15 Afterwards, Mr. Fergus, Ms. Brillet and I went to meet Judge Spero, who was very
16 courteous and open. I had met Judge Spero in a settlement conference in another case a few
17 years before and he recalled me. Judge Spero told me at one point that I could write a blog, but
18 nobody would read it and nobody would care.

19 Defendants in the BindView case sold many unlimited licenses of my software to many
20 large corporations without paying anything, but I was under extreme pressure from Netbula's
21 attorneys to settle the case under any condition. Netbula reduced its demand to a small number,
22 but defendants did not even make a counter offer at the settlement conference. Since I believed
23 that Judge Jenkins would rule on the merits and not on personal animus, I refused to listen to my
24 attorneys' and Judge Spero's sincere advice to settle.

25 On August 31, 2007, Judge Jenkins signed an order granting all of defendants' motions
26 for summary judgment and denied Netbula's cross-motions for being untimely. The order was
27 entered on September 10, 2007. Docket No. 288. On September 20, 2007, Netbula filed a motion
28 to leave to file motion for consideration, pointing out the legal and factual issues in summary
judgment ruling, including the omission of defendants' own admissions that they did not have a
license. Docket No. 294. However, with defendants threatening large sums of attorney's fees and
the road to appeal prohibitively costly, Netbula had little choice but to settle with defendants. The
BindView case was closed on September 24, 2007.

**2. The ex parte order that vacated my motion to intervene and for injunctive relief
in the StorageTek case (Case No. C06-07391-MJJ)**

1 On September 26, 2007, Netbula transferred the copyrights in the 2000 and 2004
2 versions of PowerRPC to me personally (I always owned the copyright for the code written before
3 July 1996). On October 1, 2007, Netbula filed a motion to substitute myself as the plaintiff for the
4 copyright claim. C06-07391, Docket No. 56. On October 22, 2007, I filed a motion to intervene
5 and for injunctive relief in the StorageTek case, alleging irreparable harm from Defendants'
ongoing copyright infringement based on newly discovered evidence. Docket No. 68.

6 On October 23, 2007, StorageTek defendants filed a motion for summary judgment.
7 However, their motion was based on a declaration that did not exist –they had not been able to
8 locate the declarant to review his declaration when they filed the motion. I pointed out these
9 issues to defendants. Defense counsel Laurence Pulgram then sent me numerous emails on the
10 merits of numerous issues. I indicated to Mr. Pulgram that I would have to file additional claims
11 against StorageTek. If defendants stipulate to my substitution in the StorageTek case, then I
12 could just amend the complaint, otherwise, I would have to file a whole new lawsuit. Mr. Pulgram
then sent me numerous emails threatening me with personal liabilities and such. Mr. Pulgram
also requested me to withdraw the Motion for Injunctive Relief.

13 On October 26, 2007, defendants filed a motion for administrative relief to vacate the
14 hearing of my Motion for Injunctive Relief and a motion to consider the declaration that did not
15 exist when defendants filed their motion for summary judgment. I filed oppositions to both motions,
16 on the merits and on the ground that such motions were procedurally improper. In my opposition
to defendants' motion to vacate, I stated that if the court found that I was a represented party,
then it should disqualify defense counsel for making direct communications with me.

17 On October 31, 2007, Judge Jenkins held a telephonic hearing on defendants'
18 "administrative motions". I was not given any notice about this hearing and was not allowed to
19 participate. Following the hearing, on November 2, 2007, Judge Jenkins issued an order that
20 granted defendants' motion to vacate the hearing of my Motion to Intervene and for Injunctive
21 Relief. He also granted an extension to hear defendants' motion for summary judgment motion so
22 that their belated declaration appeared to be timely (but the motion itself is still defective because
it refers to a declaration executed in the future). See documents in Exhibit C.

23 I then mailed a request for a tape recording of the telephonic hearing. I was told by the
24 clerk of the court that no court reporter was present and no audio recording was made. Ex. D.

25 **3. The November 20, 2007 hearing on StorageTek defendants' Motion to Intervene 26 in the BindView's case and Netbula's motion to substitute party (C06-0711-MJJ)**

27 On September 12, 2007, the StorageTek defendants, who are represented by the same
28 counsel as BindView, deposed me as a 30(b)(6) witness. In the deposition, StorageTek
defendants used confidential documents from the BindView case as exhibits, which were
governed by a protective order in the BindView case. Later, Ms. Brilllet sent the StorageTek

1 defendants a letter indicating that their use of the confidential BindView material violated the
2 protective order.

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

5 On October 15, 2007, I, acting *pro se*, filed a Motion to Intervene, to Enforce the
6 Protective Order and to Unseal Netbula's Motion for Reconsideration and an Opposition to
7 StorageTek's motion to modify the protective order. C06-0711-MJJ, Docket No. 308. The main
8 issue in my motion was about defense counsel's violation of the protective order. The court clerk
9 set the hearing of my Motion and Opposition on the same day as StorageTek intervenors' hearing,
10 November 20, 2007.

11 On October 30, 2007, Defendants filed their opposition to my motion to enforce. On
12 November 6, 2007, I filed a reply brief. Docket No. 319.

13 On November 20, 2007, Ms. Brilllet and I went to the court. Ms. Brilllet told me that she
14 would be arguing Netbula's motion for substitution of party as to the copyright claim, and I would
15 be arguing about my *pro se* motion to enforce the protective order and opposition to the
16 StorageTek intervenors' motion to modify the protective order.

17 At the very beginning of the hearing, Judge Jenkins said: "Mr. Yue does not presently
18 have any right to file anything before the court." Then the Judge looked down at me from the
19 bench and asked: "Are you Mr. Yue?" I answered "Yes." Then the Judge said: "You should cease
20 and desist from doing such... Listen and hear me clear, you should cease and desist from doing
21 such until you are authorized to do so." Judge Jenkins further indicated that I could not file
22 anything until he ruled on defendants' summary judgment motion. After the Judge finished, I
23 asked: "What is the Court's legal rationale for that?" Judge Jenkins said: "That's a decision." I
24 then said: "Under Federal rules of civil procedure...". Judge Jenkins interrupted and said: "I will
25 have you taken out if you don't be quiet." I was shocked and couldn't say a word.

26 I stayed silent until at a point Ms. Brilllet and defense counsel finished arguing about
27 Netbula's motion for substitution of party. I felt that some of the facts were not correctly presented,
28 and asked the Judge if I could say something on the facts only. Judge Jenkins refused, he said
that I could talk to Ms. Brilllet but I could not talk to him.

At one point, Judge Jenkins coached defense counsel, Laurence Pulgram, telling him to
question the validity of Netbula's copyright assignment to me, and get back to the court with an
argument on the validity of the copyright transfer.

Not surprisingly, Judge Jenkins denied Netbula's motion to substitute party. He also
granted defendants' motion to intervene and to modify the protective order without hearing my
opposition as a third-party intervenor at all (Netbula did not file an opposition).

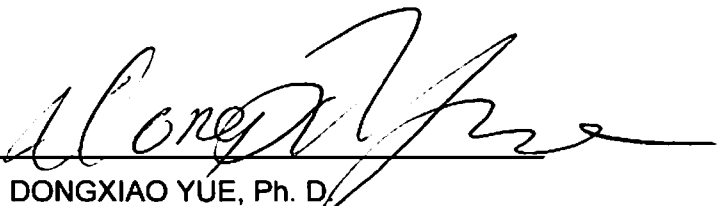
1 At the end of the hearing, I asked the Judge about what happened to my motion to
2 intervene and hold defendants' in violation of the protective order. The Judge said it was not on
3 the calendar. There was nothing on the docket indicating that the hearing of my motion was
4 vacated. I received no notice.

4 III. CONCLUSION

5 Based on the facts presented above, I allege the following misconduct by Judge Jenkins

- 6 1) Judge Jenkins' ruling on the BindView motion for summary judgment was intended as
7 retaliation for the perceived offending words against Judge Chen written by complainant.
- 8 2) Judge Jenkins should have recused himself from the BindView case when he was clearly
9 affected by personal animus and prejudice against complainant, yet he ruled on two important
10 legal questions that would have profound impact on intellectual property protection in the U.S.
11 and abroad.
- 12 3) Judge Jenkins violated the Code of Conduct for United States Judges Canon 3A(4) in his
13 issuance of the ex parte order vacating the hearing of complainant's motion for injunctive
14 relief as an intervenor, resulting in additional irreparable harm to complainant due to
15 defendants' continuing infringement on complainant's copyrighted software.
- 16 4) Judge Jenkins denied complainant access to the court by prohibiting complainant from filing
17 anything before the court, the only legal rationale he offered for the prohibition was because
18 he said so.
- 19 5) Judge Jenkins failed to perform his administrative responsibilities under Canon 3B(3) which
20 required him to initiate action against Mr. Laurence Pulgram for unprofessional conduct.
- 21 6) Judge Jenkins failed to disqualify himself from the StorageTek case when he had clear
22 personal animus against complainant, who is the owner of the plaintiff company and
23 counterclaim defendant.
- 24 7) Judge Jenkins granted StorageTek intervenors' motion to modify protective order ex parte
25 even in open court by forbidding complainant – the only person who filed an opposition to
26 speak.
- 27 8) Judge Jenkins failed to maintain the appearance of justice.
- 28 9) Judge Jenkins discriminated against a *pro se* litigant.

22 Dated: Nov 21, 2007


DONGXIAO YUE, Ph. D.

26 Attached: Exhibits