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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DONGXIAO YUE,  
Plaintiff,  
v.  
MSC SOFTWARE CORPORATION,  
Defendant.

Case No. 15-cv-5526-PJH

**ORDER DENYING MOTION TO DISMISS**

United States District Court  
Northern District of California

Defendant’s motion to dismiss came on for hearing before this court on February 24, 2016. Plaintiff Dongxiao Yue (“plaintiff”) appeared in pro per. Defendant MSC Software Corporation (“defendant”) appeared through its counsel, Jed Wakefield. Having read the papers filed in conjunction with the motion and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES defendant’s motion.

Defendant seeks dismissal based on the nominative fair use doctrine. However, the primary case cited by defendant (in its papers and at the hearing) is a case that was decided at the summary judgment stage, not at the motion to dismiss stage. See Adobe Systems Inc. v. Christenson, 891 F.Supp.2d 1194, 1205-08 (D. Nev. 2012). Moreover, the Ninth Circuit authority cited within Adobe further shows that the nominative fair use defense is properly decided at the summary judgment stage, because the applicable test provides that “[a] defendant seeking to assert nominative fair use as a defense need only show that it used the mark to refer to the trademarked good,” which then shifts the burden “to the plaintiff to show a likelihood of confusion.” Toyota Motor Sales, U.S.A., Inc. v. Tabarij, 610 F.3d 1171, 1183 (9th Cir. 2010). Applying such a burden-shifting test

1 at this stage of the case would be premature, and thus, defendant's motion to dismiss is  
2 DENIED.

3 **IT IS SO ORDERED.**

4 Dated: February 24, 2016



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6 PHYLLIS J. HAMILTON  
7 United States District Judge  
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