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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

Netbula, LLC, et al.,

NO. C 08-00019 JW

Plaintiffs,

**ORDER DENYING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

v.

Chordiant Software, Inc., et al.,

Defendants.

**I. INTRODUCTION**

Dongxiao Yue (“Dr. Yue”) and Netbula, LLC (“Netbula”) (collectively, “Plaintiffs”) bring this action against Chordiant Software, Inc. (“Chordiant Inc.”), Steven R. Springsteel (“Springsteel”), and Derek P. Witte (“Witte”), (collectively, “Defendants”) alleging copyright infringement and vicarious copyright infringement. Plaintiffs allege that Defendants infringed Plaintiffs’ copyrights by reproducing copyrighted computer programs and incorporating that material into unauthorized derivative works.

Presently before the Court is Defendants’ Motion for Summary Judgment.<sup>1</sup> The Court conducted a hearing on April 6, 2009. Based on the papers submitted to date and oral argument, the Court DENIES Defendants’ Motion for Summary Judgment.

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<sup>1</sup> (Defendants’ Notice of Motion, Motion and Memorandum of Points and Authorities in Support of Summary Judgment or Summary Adjudication, hereafter, “Motion,” Docket Item No. 104.)

1 **II. BACKGROUND**

2 **A. Undisputed Facts**

3 **1. Plaintiffs' Software**

4 In January 2000, Netbula owned the copyrights to several pieces of software ("the  
5 Software") developed by Dr. Yue, Netbula's founder and sole employee.<sup>2</sup> Among other duties, Dr.  
6 Yue sold licenses to use the Software on behalf of Netbula. (Id.) The Software is a form of open  
7 network computing remote procedure call ("ONC RPC") created for use with Microsoft Windows  
8 32-bit operating systems. (Milionis Decl., Ex. 48 at 63.) The Software allows a program on one  
9 computer to execute a command remotely on a separate computer. (Motion at 4; Milionis Decl., Ex.  
10 30.) The Software has two parts: (1) a Software Development Kit ("SDK") that consists of the  
11 software tools that allow licensed programmers to create applications using the ONC RPC standard,  
12 including a file called "rpcgen.exe"; and (2) "runtime software" that consists of files that must be  
13 installed to provide the remote call functionality to applications developed using the SDK. (Second  
14 Amended Complaint ¶ 16, Docket Item No. 91; Motion at 4.)

15 **2. Chordiant Inc.'s Use of Plaintiffs' Software**

16 One of Chordiant Inc.'s products is the Chordiant Marketing Director ("CMD"), which is  
17 developed, in part, by using the Software.<sup>3</sup> The pre-cursor product to CMD was originally  
18 developed by a separate company called Prime Response, Inc. ("Prime Response"), a Delaware  
19 Corporation. (Wilson Decl. ¶ 4, Ex. A.) Prime Response, Ltd. ("Prime Response UK") was a  
20 United Kingdom subsidiary of Prime Response.<sup>4</sup> In January 2000, Prime Response UK purchased  
21 from Plaintiff Netbula an SDK license for one software developer and a distribution license for 1000  
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23 <sup>2</sup> (Motion at 5; Declaration of Mary E. Milionis in Support of Defendants' Motion for  
24 Summary Judgment, Ex. 11, hereafter, "Milionis Decl.," Docket Item No. 105.)

25 <sup>3</sup> (Declaration of Oliver Wilson in Support of Defendants' Motion for Summary Judgment  
26 ¶¶ 3-4, hereafter, "Wilson Decl.," Docket Item No. 106.)

27 <sup>4</sup> (Wilson Decl. ¶ 4; Declaration of Dongxiao Yue in Opposition to Defendants' Motion for  
28 Summary Judgment, Ex. 24, hereafter, "Yue Decl.," Docket Item No. 120.)

1 copies of the runtime component of the Software (“2000 Prime Response UK License”). (Milionis  
2 Decl., Ex. 11; Yue Decl., Ex. 3.)

3 In January 2001, Defendant Chordiant purchased Prime Response through a reverse  
4 triangular merger. (Wilson Decl. ¶ 4, Ex. A, B.) In May 2001, Chordiant Inc. changed the name of  
5 Prime Response UK to Chordiant Software International Limited (“Chordiant International”). (Yue  
6 Decl., Ex. 24.) Chordiant International maintained its status as a separate United Kingdom  
7 corporation. (Id.) In 2004, Chordiant moved its operations concerning CMD to New Hampshire.  
8 (Wilson Decl. ¶ 4.)

### 9 3. Chordiant’s 2004 Upgrade Purchase

10 In February and March 2004, Chordiant Inc. solicited Netbula for an updated version of the  
11 Software after discovering that an upgraded version would resolve a problem Chordiant Inc. was  
12 experiencing with one of the Software’s runtime files. (Wilson Decl. ¶ 18; Milionis Decl., Ex. 7.)  
13 In April 2004, an office manager at Chordiant International sent a purchase order to Netbula for an  
14 SDK license and 1000 “client runtime licenses” to the upgraded version of the Software (“2004  
15 Chordiant Upgrade”). (Milionis Decl., Ex. 28.) Netbula then sent an invoice and CD with the  
16 upgraded version of the Software to Chordiant International in the United Kingdom, and emailed an  
17 upgraded copy of the SDK component of the software to an employee located in the United  
18 Kingdom at Chordiant International’s office. (Id.)

### 19 4. 2007 License Usage Reports

20 In August 2007, Netbula began requesting “License Usage Reports” from Chordiant Inc.  
21 (See Milionis Decl., Ex. 37.) After months of back-and-forth communication between Netbula and  
22 Chordiant Inc., Chordiant Inc. sent Netbula a usage report in December 2007 stating that Chordiant  
23 Inc. had used 953 runtime “units.” (Id., Ex. 41.) On the same day that Chordiant Inc. provided its  
24 license usage report, Netbula informed Chordiant Inc. that Netbula believed Chordiant Inc. was  
25 infringing Netbula’s copyright. (Id., Ex. 42.)

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1 **B. Procedural Background**

2 On January 2, 2008, Plaintiffs filed this law suit alleging copyright infringement against  
3 Chordiant Inc. and vicarious copyright infringement against Defendants Springsteel and Witte. (See  
4 Docket Item No. 1.) On March 20, 2009, the Court dismissed Plaintiffs’ vicarious copyright  
5 infringement claims against Springsteel and Witte with leave to amend. (March 20, 2009 Order,  
6 Docket Item No. 121.) On April 6, 2009, Plaintiffs filed an Amended Complaint re-alleging  
7 copyright infringement by Chordiant Inc. and vicarious copyright infringement by Springsteel and  
8 Witte. (See Docket Item No. 130.)

9 Presently before the Court is Defendants’ Motion for Summary Judgment.

10 **III. STANDARDS**

11 Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and  
12 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any  
13 material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
14 56(c). The purpose of summary judgment “is to isolate and dispose of factually unsupported claims  
15 or defenses.” Celotex v. Catrett, 477 U.S. 317, 323-24 (1986).

16 The moving party “always bears the initial responsibility of informing the district court of  
17 the basis for its motion . . . .” Id. at 323. “The judgment sought should be rendered if the pleadings,  
18 the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue  
19 as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ.  
20 P. 56(c). The non-moving party “may not reply merely on allegations or denials in its own pleading;  
21 rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts  
22 showing a genuine issue for trial.” Fed. R. Civ. P. 56(e).

23 When evaluating a motion for summary judgment, the court views the evidence through the  
24 prism of the evidentiary standard of proof that would pertain at trial. Anderson v. Liberty Lobby  
25 Inc., 477 U.S. 242, 255 (1986). The court draws all reasonable inferences in favor of the non-  
26 moving party, including questions of credibility and of the weight that particular evidence is

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1 accorded. See, e.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1992). The court  
2 determines whether the non-moving party’s “specific facts,” coupled with disputed background or  
3 contextual facts, are such that a reasonable jury might return a verdict for the non-moving party.  
4 T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 631 (9th Cir. 1987). In such a case,  
5 summary judgment is inappropriate. Anderson, 477 U.S. at 248. However, where a rational trier of  
6 fact could not find for the non-moving party based on the record as a whole, there is no “genuine  
7 issue for trial.” Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

8 **IV. DISCUSSION**

9 Defendants move for summary judgment on the ground that Chordiant Inc. has a license to  
10 use the Software pursuant to the 2000 Prime Response UK License and the 2004 Chordiant  
11 Upgrade. (Motion at 11-12.) In the alternative, Defendants move for summary judgment on the  
12 grounds that Chordiant Inc. obtained an implied license from Netbula to use the Software and that  
13 Plaintiffs are estopped from asserting copyright infringement because Chordiant Inc. justifiably  
14 relied on Plaintiffs’ conduct in using the Software. (Motion at 12-15.) The Court considers these  
15 issues in turn.

16 **A. Express License to Use the Software**

17 At issue is whether Defendant Chordiant Inc. had an express license to use Plaintiffs’  
18 Software. (Motion at 11-12.) Plaintiffs contend that the 2000 Prime Response UK License and the  
19 2004 Chordiant Upgrade were not licenses granted to Defendant Chordiant Inc., but rather licenses  
20 granted to Prime Response UK and Chordiant International, non-parties to this action. (Opposition  
21 for Summary Judgment at 9-10, hereafter, “Opposition,” Docket Item No. 119.)

22 An express, nonexclusive, copyright license may be granted orally or in writing. Effects  
23 Assocs., Inc. v. Cohen, 908 F.2d 555, 558 (9th Cir. 1990). A federal court must look to state  
24 contract law to determine whether a copyright license has been granted. Foad Consulting Group,  
25 Inc. v. Azzalino, 270 F.3d 821, 826 (9th Cir. 2001). Under California law, a court must interpret a  
26 contract according to the parties’ intent. Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1, 18

1 (1995). Where the terms of the contract are unambiguous, a court must enforce the contract  
2 according to its plain meaning. Id. However, where the terms of the contract are ambiguous—i.e.,  
3 susceptible to more than one reasonable construction—extrinsic evidence must be introduced to  
4 determine the parties’ intent. Benach v. County of Los Angeles, 149 Cal. App. 4th 836, 847 (2007).  
5 Determining whether a contract is ambiguous is a question of law for which a court may look to  
6 extrinsic evidence to divine the parties’ intent. Id. However, where the interpretation of a contract  
7 turns on the credibility of conflicting extrinsic evidence, a question of fact exists that must be  
8 resolved by the trier of fact. Id.

9 In this case, the parties do not dispute most of the circumstances surrounding the 2000 Prime  
10 Response UK License and the 2004 Chordiant Upgrade. Instead, the parties dispute the factual  
11 inferences that should be drawn from those circumstances. The parties present the following  
12 evidence:

- 13 • Plaintiff Netbula admitted in its 30(b)(6) deposition that it “granted to [Prime  
14 Response UK] [a] license” to the Software. (Milionis Decl., Ex. 46 at 105-106.)  
15 Netbula testified that its CD labels “usually contain a brief description of what the  
16 customer have [sic] purchased in terms of license grant.” (Id., Ex. 46 at 159-60.) The  
17 label of the CD containing the Software shipped to Prime Response UK states  
18 “Licensed to Prime Resposne [sic] UK, One Developer, 1000 mach runtime.” (Id.,  
19 Ex. 21.)
- 20 • In January 2001, Chordiant Inc. purchased Prime Response, the parent corporation of  
21 Prime Response UK and changed the name of Prime Response UK to Chordiant  
22 International, but maintained Chordiant International as a separate United Kingdom  
23 corporation. (Wilson Decl. ¶ 4, Exs. A, B; Yue Decl., Ex. 24.)
- 24 • On February 18, 2004, Toye Akande emailed Netbula stating, “We licensed your  
25 product to use in 2000. . . . Have you got an updated copy of the PowerRPC dll?”  
26 (Milionis Decl., Ex. 7 at 7.) The signature line of Akande’s email stated “Toye  
27 Akande, Engineering Department, Chordiant Software, Inc.” (Id.) After a series of  
28 emails discussing technical issues with the Software, Netbula emailed Akande, asking  
“When were the licenses purchased? What was the invoice number for the license  
purchase? Was your company under another name? somehow [sic] I could not find  
Chordiant in our customer database.” (Id. at 2.) Akande responded by stating “I  
might have mentioned that the invoice would have been raised under the previous  
company name of Prime Response Ltd. We are based in 2 goat Wharf, Brentford,  
Middlesex, UK, TW8 0BA.” (Id.)
- On April 2, 2004, a purchase order from “Chordiant Software Intl Ltd” was submitted  
to Netbula, requesting “1000 client runtime licenses . . . standard  
support/maintenance contract . . . upgrade to the current version of the SDK.”

1 (Milionis Decl., Ex. 24 at 2.) On April 27, 2004, Netbula sent an invoice for “1000  
2 ONC RPC WIN32 Client runtime upgrade (NT/2K/XP/Server 2003) Standard  
3 support/maintenance contract (back 2000-2004), ONC RPC Win32 SDK Upgrade.”  
4 (Id., Ex. 24 at 1.) The invoice lists the “Customer” as “Chordiant Software Intl Ltd, 2  
Goat Wharf, Brentford, UK.” (Id.) Netbula mailed a disk to Chordiant International  
stating “Licensee Chordiant Software Developer 1000 Runtime (s1030).” (Id., Ex.  
26.)

5 The evidence indicates that Netbula granted two licenses. First, the 2000 license  
6 unambiguously granted a license to Prime Response UK. Although Defendants contend that  
7 Chordiant Inc. possesses a license as the parent corporation to Prime Response UK’s successor  
8 company, Chordiant International, the evidence shows that Chordiant Inc. and Chordiant  
9 International have always remained separate entities and there is no evidence indicating that a valid  
10 transfer of Prime Response UK’s license was ever made to Chordiant Inc. Thus, the Court finds  
11 Chordiant Inc. does not possess a license to the Software pursuant to the 2000 Prime Response UK  
12 license.

13 With respect to the 2004 Chordiant Upgrade, the CD sent to Chordiant International lists  
14 “Chordiant Software” as the licensee, but does not identify whether Chordiant Software  
15 International Limited, a United Kingdom corporation, or Chordiant Software, Inc., a Delaware  
16 corporation, is the intended licensee. The extrinsic evidence regarding the negotiations to the  
17 license does not resolve the ambiguity. A reasonable jury could find that the communications  
18 between Netbula and Chordiant Inc. evidence an intent to grant Defendant Chordiant Inc. a license  
19 to the upgraded version of the Software because of the identification of Chordiant Software, Inc. in  
20 the signature line of Toye Akande’s email. However, a reasonable jury could also find that Netbula  
21 intended to grant a license to Chordiant International based on Akande’s representation that his  
22 company was the successor to the Prime Response UK license and the fact that the invoice and  
23 purchase order were sent to and received from Chordiant International in the United Kingdom.  
24 Neither party submits evidence showing whether Chordiant International or Defendant Chordiant  
25 paid for the 2004 license. Thus, the Court finds a genuine issue of material fact exists as to whether  
26 Chordiant Inc. has an express license to the 2004 Chordiant Upgrade.

1 In response to the conflicting evidence, Defendants contend that summary judgment is still  
2 appropriate because, in light of the fact that some license was granted by Netbula to some Chordiant  
3 entity, Plaintiffs bear the burden on summary judgment of showing that the scope of those licenses  
4 did not include Chordiant Inc. (Motion at 11.) According to Defendants, Plaintiffs have not met  
5 this burden because “the undisputed evidence reflects no agreement to exclude Chordiant as a  
6 licensee.” (Defendants’ Reply Memorandum in Support of Chordiant’s Motion for Summary  
7 Judgment at 2, hereafter, “Reply,” Docket Item No. 125.)

8 A copyright owner who grants a nonexclusive license waives his right to sue for copyright  
9 infringement, unless the owner can show that the license is limited in scope and the licensee has  
10 acted outside the scope of the license. Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115,  
11 1121-22 (9th Cir. 1999). “[W]here the existence of a license agreement is not in dispute, and the  
12 scope of the license is the only issue, the copyright owner bears the burden of proving that the  
13 copying was unauthorized.” Netbula, LLC v. Bindview Dev. Corp., 516 F. Supp. 2d 1137, 1150  
14 (N.D. Cal. 2007).

15 In this case, the scope of the license is not the only disputed issue. While the parties agree  
16 that some license was granted by Plaintiff Netbula, there are genuine issues of material fact as to  
17 whether a license was granted to Defendant Chordiant Inc. Thus, the law does not place the burden  
18 on Plaintiffs to show that Chordiant Inc. acted outside the scope of a license.

19 Accordingly, the Court DENIES Defendants’ Motion for Summary Judgment based on the  
20 existence of an express license to Chordiant Inc. to use Plaintiffs’ Software.

21 **B. Implied License to Use the Software**

22 At issue is whether Defendant Chordiant Inc. had an implied license to use Plaintiffs’  
23 Software. (Motion at 12-14.) Plaintiffs contend that Chordiant Inc. does not have an implied license  
24 because Netbula treated Chordiant as a licensee based only on its belief that Chordiant Inc. was  
25 actually Chordiant International. (Opposition at 14-16.)

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1 A copyright owner may grant a nonexclusive license expressly or impliedly through conduct.  
2 Asset Marketing Systems, Inc. v. Gagnon, 542 F.3d 748, 754 (9th Cir. 2008). An implied license is  
3 granted when “(1) a person (the licensee) requests the creation of a work, (2) the creator (the  
4 licensor) makes that particular work and delivers it to the licensee who requested it, and (3) the  
5 licensor intends that the licensee-requestor copy and distribute his work.” Id. Some courts have  
6 held that an implied license can exist even where the copyright owner does not create a custom work  
7 for the putative licensee. See Field v. Google Inc., 412 F. Supp. 2d 1106, 1116 (D. Nev. 2006);  
8 Keane Dealer Servs., Inc. v. Harts, 968 F. Supp. 944, 947 (S.D.N.Y. 1997). In all cases, the relevant  
9 inquiry is “the licensor’s objective intent at the time of the creation and delivery of the software as  
10 manifested by the parties’ conduct.” Asset Marketing Systems, 542 F.3d at 756 (citing Effects  
11 Assoc., Inc. v. Cohen, 908 F.2d 555, 559 n.6 (9th Cir. 1990)). Whether the licensor intended to  
12 grant an implied license “is a question of fact that must be left to the jury.” Intelligraphics, Inc. v.  
13 Marvell Semiconductor, Inc., No. C 07-2499 JCS, 2008 WL 3200212, at \*6 (N.D. Cal. Aug. 6,  
14 2008).

15 In this case, the parties’ dispute centers on whether Netbula’s conduct exhibited an objective  
16 intent to allow Chordiant Inc. to use the Software. In addition to the evidence regarding the issuance  
17 of the 2000 Prime Response UK License and the 2004 Chordiant Upgrade discussed above,  
18 Defendants provide emails from April 2007 and October 2007 discussing some Chordiant entity’s  
19 use of the Software and identifying Chordiant employees as employees of “Chordiant Software,  
20 Inc.” in the signature line at the bottom of their emails. (See Milionis Decl., Exs. 34-35, 41.)

21 Defendants also provide the following emails:

- 22 • A June 2004 email from Toye Akande stating “We have now installed the latest  
23 version of the Netbula ONC-ROC [sic] kit.” (Milionis Decl., Ex. 32.) The signature  
24 line to Akande’s email stated “Toye Akande, Chordiant Software, Inc., Brentford,  
25 Middlesex, United Kingdom.” (Id.) Netbula responded by stating “We will get back  
26 to you on this ASAP.” (Id.)
- 27 • An August 2005 marketing email from Netbula to Oliver Wilson, a Chordiant  
28 employee located in New Hampshire, which addressed Wilson as a “Netbula ONC  
RPC and PowerRPC user.” (Milionis Decl., Ex. 33.)

1 In contrast, Dr. Yue provides his declaration, which states that “[o]n October 1, 2007, when I  
2 was trying to find the mailing address of Chordiant Software, Inc.’s CEO, I started to realize that  
3 [Chordiant Inc.] was probably a different company from the UK company Prime Response Ltd  
4 which had changed its name to Chordiant Software Intl Ltd.” (Yue Decl. ¶ 73.) Dr. Yue further  
5 explains that “[a]fter spending so much time inquiring and investigating the situation [with  
6 Chordiant Inc.], I concluded (1) [Chordiant Inc.] was not Chordiant Software International Ltd or  
7 Prime Response Ltd; [and] (2) [Chordiant Inc.] did not have any Netbula license . . . .” (*Id.* ¶ 81.)

8 Based on the evidence showing that Netbula sent the Software to Chordiant International in  
9 the United Kingdom and Dr. Yue’s declaration explaining that he did not realize Chordiant Inc. was  
10 a separate entity from Chordiant International, a reasonable jury could find that Netbula did not  
11 intend to grant Chordiant Inc. an implied license to the Software. Moreover, Defendants’ evidence  
12 would not preclude a reasonable jury from finding that Netbula reasonably believed it was dealing  
13 with an existing licensee. Thus, the Court finds that genuine issues of material fact remain as to  
14 whether Chordiant Inc. possessed an implied license to use Plaintiffs’ Software.

15 Accordingly, the Court DENIES Defendants’ Motion for Summary Judgment on the ground  
16 that Chordiant Inc. possessed an implied license.<sup>5</sup>

17 **C. Equitable Estoppel Against Plaintiffs**

18 In the absence of an express or implied license, Defendants contend that summary judgment  
19 is appropriate on the ground that Plaintiffs are equitably estopped from asserting copyright  
20 infringement. (Motion at 14-15.)

21 In the copyright context, there are four conjunctive elements to an equitable estoppel  
22 defense: (1) the plaintiff must know the facts of the defendant’s infringing conduct; (2) the plaintiff  
23 must intend that his conduct be acted on or must so act that the defendant has a right to believe that  
24 it is so intended; (3) the defendant must be ignorant of the true facts; and (4) the defendant must

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26 <sup>5</sup> In light of the Court’s finding that genuine issues of material fact exist regarding the  
27 existence of an express or implied license to Chordiant Inc., the Court need not address the parties’  
28 contentions as to whether Chordiant Inc.’s use of the Software was beyond the scope of any license.

1 detrimentally rely on the plaintiff's conduct. Hadady Corp. v. Dean Witter Reynolds, Inc., 739 F.  
2 Supp. 1392, 1399 (C.D. Cal. 1990); see also 4 Nimmer on Copyright § 13.07 (2008).

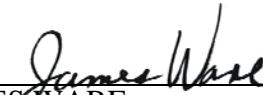
3 Here, based on the evidence discussed above, triable issues exist regarding the first two  
4 elements of Defendants' estoppel defense. First, there is a genuine issue of material fact as to  
5 whether Netbula knew that Chordiant Inc. was using the Software and whether Netbula intended to  
6 license the Software only to Prime Response UK and its successor corporation Chordiant  
7 International. Second, there is a genuine issue of material fact as to whether Chordiant Inc. had the  
8 right to believe that Netbula intended for Chordiant Inc. to rely on its conduct.

9 Accordingly, the Court DENIES Defendants' Motion for Summary Judgment on the ground  
10 of equitable estoppel.

11 **V. CONCLUSION**

12 The Court DENIES Defendants' Motion for Summary Judgment.

13  
14 Dated: July 9, 2009

  
\_\_\_\_\_  
JAMES WARE  
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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**Dated: July 9, 2009**

**Richard W. Wieking, Clerk**

**By: /s/ JW Chambers**  
**Elizabeth Garcia**  
**Courtroom Deputy**