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8 **UNITED STATES DISTRICT COURT**
 9 **SOUTHERN DISTRICT OF CALIFORNIA**

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11 Marketing Information Masters, Inc., a
 California corporation,

12 Plaintiff,

13 vs.

14 The Board of Trustees of the California State
 15 University System, a public entity acting
 through its subdivision San Diego State
 16 University; and Robert A. Rauch, an
 individual,

17 Defendants.

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 19

Case No. 06 CV 1682 JAH (JMA)

**DECLARATION OF GREGORY P.
 GOONAN IN SUPPORT OF (1)
 PLAINTIFF’S OPPOSITION TO
 MOTION TO DISMISS SECOND
 AMENDED COMPLAINT; AND (2)
 PLAINTIFF’S OPPOSITION TO
 DEFENDANTS’ RULE 11 MOTION**

Date: June 6, 2008
 Time: 2:30 p.m.
 Court: 11 (Hon. John A. Houston)

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21 I, Gregory P. Goonan, state as follows for my declaration:

22 1. I am an attorney duly licensed to practice law in the State of California and before this
 23 Court. I am a shareholder in The Affinity Law Group APC, attorneys of record for plaintiff
 24 Marketing Information Masters, Inc. (“MIMI”).

25 2. I offer this declaration in support of MIMI’s opposition to Defendants’ motion to
 26 dismiss MIMI’s second amended complaint and in support of MIMI’s opposition to Defendants’
 27 Rule 11 motion.

28

***GOONAN DECLARATION IN SUPPORT OF PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO
 DISMISS SECOND AMENDED COMPLAINT AND RULE 11 MOTION***

1 procedure to gain a tactical advantage for his clients.

2 7. As I will discuss below, there has not been any Rule 11 violation in this case. Upon
3 receipt of the Court's February 5, 2008 order (the "February 5 Order") I carefully researched
4 whether the allegations and claims against SDSU and Rauch in his official capacity should be
5 retained in the second amended complaint or deleted. As I will explain below, I concluded
6 following hours of research that it was in fact necessary and appropriate for such allegations to be
7 retained in the second amended complaint.
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9 8. In short, as the Court will see, Defendants' claim that I either did not read the February
10 5 Order or simply chose to ignore it is as ridiculous as it is insulting. As I explain, I included the
11 allegations and claims against SDSU and Rauch in his official capacity only after detailed research
12 that more than satisfied the "reasonable inquiry" requirement under Rule 11. The inclusion of
13 such allegations and claims is supported by existing law and has not been done for any improper
14 purpose.
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16 9. So, there is no basis to find that there has been any violation of Rule 11 here and
17 Defendants' motion should be denied.

18 There Has Not Been Any Improper Conduct Or Rule 11 Violation In Connection With The Filing
19 Of The Second Amended Complaint

20 10. As the Court is aware, the February 5 Order granted in part and denied in part a
21 motion to dismiss brought by SDSU and Rauch against MIMI's first amended complaint. By the
22 February 5 Order, the Court found that SDSU and Rauch in his official capacity only were
23 immune from all of MIMI's claims pursuant to the Eleventh Amendment to the United States
24 Constitution. The Court further found that Rauch was not entitled to Eleventh Amendment
25 immunity against MIMI's claims brought against him in his individual capacity. Finally, by the
26 February 5 Order, the Court gave MIMI leave to file a second amended complaint to assert
27 additional allegations to establish that its state law claims against Rauch in his individual capacity
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1 were not preempted.

2 11. MIMI filed its second amended complaint on February 25, 2008. In preparing such
3 complaint, I found myself faced with a dilemma. The Court's February 5 Order did not specify
4 what form the second amended complaint should take, and specifically did not address whether
5 the allegations and claims against SDSU and Rauch in his official capacity should remain as part
6 of the second amended complaint or should be stricken from the second amended complaint.
7 Consequently, I had to determine whether the allegations against SDSU and Rauch in his
8 individual capacity should be retained or needed to be deleted as part of the amendment of the
9 complaint.

10 12. I want to make one thing crystal clear: I read the February 5 Order very carefully as
11 soon as I received it and understood that the Court by the February 5 Order decided that SDSU
12 and Rauch in his official capacity enjoy immunity from MIMI's copyright infringement and state
13 law claims here.

14 13. But the fact that SDSU and Rauch in his official capacity are immune from MIMI's
15 claims does not answer the question whether MIMI was obligated to delete from the second
16 amended complaint all of the allegations against SDSU and Rauch in his official capacity.

17 14. As I already have stated, the Court's February 5 Order posed a dilemma because it did
18 not expressly state whether or not the allegations about SDSU and Rauch in his official capacity
19 should remain in or be deleted from MIMI's second amended complaint.

20 15. After determining that MIMI would file a second amended complaint to add additional
21 allegations to demonstrate that MIMI's state law claims were not preempted, I carefully and
22 thoroughly researched the issue whether the allegations and claims against SDSU and Rauch in his
23 official capacity needed to be omitted from the second amended complaint because of the Court's
24 immunity ruling. Surprisingly, I was not able to locate any case law on point. So I was forced to
25 decide the correct course of action based on my research and analysis of general principles of
26 pleading.

27 16. Based on my research, I determined that the law has long been settled that an amended
28 pleading replaces and supersedes the prior pleading that is amended by the amended pleading. As
*GOONAN DECLARATION IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO
DISMISS SECOND AMENDED COMPLAINT AND RULE 11 MOTION*

1 the Ninth Circuit explained in its recent decision in *Ogansalu v. Nair*, 2008 WL 187050 (9th Cir.
2 2008), “an amended pleading supersedes the original pleading such that ‘after amendment the
3 original pleading no longer performs any function and is treated thereafter as nonexistent’ (citing
4 and quoting *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992);” *see also Bullen v. De*
5 *Bretteville*, 239 F.2d 824 (9th Cir. 1956) (accord).]

6 17. My research also revealed an important corollary of this principle: all causes of action
7 in an original complaint that are not alleged in an amended complaint are deemed waived. [*See*,
8 *e.g., King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).] Moreover, my research also brought to
9 mind the familiar rule that there can be only one judgment in a case.

10 18. Based on these well-settled pleading concepts, I determined that it was necessary and
11 appropriate for MIMI to include the allegations and claims against SDSU and Rauch in his official
12 capacity in the second amended complaint. I reached this conclusion for several reasons. First,
13 given the foregoing authorities, I determined it could not be disputed that MIMI’s second amended
14 complaint replaced and superseded its first amended complaint, thereby rendering the first
15 amended complaint “nonexistent.”

16 19. But more importantly, it was my analysis that filing a second amended complaint
17 without the allegations and claims against SDSU and Rauch in his official capacity would result in
18 a waiver of MIMI’s claims against SDSU and Rauch in his official capacity. While MIMI
19 understands and accepts that the Court has found that SDSU and Rauch officially are immune
20 from MIMI’s claims, MIMI does not want to waive such claims. Indeed, MIMI ultimately may
21 seek review of the Court’s immunity ruling by the Ninth Circuit. Accordingly, I was concerned
22 that such appellate review might be adversely impacted or rendered impossible if MIMI did not
23 include its allegations and claims against SDSU and Rauch in its second amended complaint,
24 thereby waiving such claims.

25 20. And finally, as I noted, only one final judgment can be rendered in this case. Given
26 this rule, I was concerned that judgment could not be entered in favor of SDSU and Rauch in his
27 official capacity if MIMI did not include its claims against SDSU and Rauch in his official
28 capacity in the second amended complaint.

1 21. In my analysis, given that MIMI's second amended complaint superseded the first
2 amended complaint and the first amended complaint became a nullity for pleading and judgment
3 purposes, it would not be possible in this action for one judgment to be rendered on the second
4 amended complaint on MIMI's claims against Rauch individually, and a separate judgment in
5 favor of SDSU and Rauch in his official capacity on the first amended complaint.

6 22. My concern about having judgment properly entered in favor of SDSU and Rauch in
7 his official capacity was motivated by a concern that such a judgment is required to allow for
8 appellate review of the Court's immunity ruling.

9 23. Even though I was confident in my research and the conclusions I reached based on
10 my research, I nevertheless decided that my conclusions needed to be scrutinized based on
11 common sense given the absence of any case law right on point.

12 24. To test my conclusions, I considered two other scenarios that might have occurred in
13 this case. Under one scenario, MIMI could have decided not to file an amended complaint to
14 address the preemption issues, but rather just to proceed on its copyright infringement claim
15 against Rauch individually. Under another scenario, the Court might have decided that that SDSU
16 and Rauch in his official capacity were immune, but that MIMI's state law claims were not
17 preempted.

18 25. I concluded that the critical point about both of the foregoing scenarios is that the first
19 amended complaint would have stood as the operative pleading in this case. In such case, the first
20 amended complaint would have contained and retained all of the allegations and claims against
21 SDSU and Rauch in his official capacity that now are in dispute by this motion.

22 26. Under either of these scenarios, MIMI would not have had any obligation to file an
23 amended complaint which deleted all allegations against SDSU and Rauch in his official capacity
24 just because the Court found them immune. Instead, the allegations and claims against SDSU and
25 Rauch in his official capacity would remain a part of the operative pleading but neither SDSU nor
26 Rauch in his official capacity would be required to file an answer to such claims. On the contrary,
27 only Rauch in his individual capacity would be required to file an answer to the operative
28 complaint.

1 27. In my mind, retaining the allegations and claims against SDSU and Rauch in his
2 official capacity in the second amended complaint was the functional equivalent of the foregoing
3 scenarios.

4 28. I submit that the foregoing analysis shows clearly why MIMI did not do anything
5 improper in retaining the allegations and claims against SDSU and Rauch in his official capacity
6 in the second amended complaint notwithstanding the Court's immunity ruling.

7 29. MIMI does not dispute that SDSU and Rauch in his official capacity are immune and
8 MIMI has not included the claims against SDSU and Rauch because it intends to try to litigate
9 such claims. Nevertheless, for the reasons I have discussed, I believed (and still believe) it was
10 necessary and appropriate for MIMI to retain the allegations and claims against SDSU and Rauch
11 in his official capacity in the second amended complaint.

12 30. I also want to make it crystal clear that I did not retain the allegations and claims
13 against SDSU and Rauch in his official capacity for any improper purpose such as to harass SDSU
14 or Rauch, or to increase the burden or expense of this lawsuit to them. On the contrary, as I have
15 explained, I included such allegations and claims based solely on my good faith belief that it was
16 necessary and appropriate to retain such allegations and claims in the second amended complaint
17 to protect MIMI's rights and interests. Never in my wildest imagination could I or did I anticipate
18 that the inclusion of such allegations would morph into another motion to dismiss and the first
19 Rule 11 motion in my career.

21 Interactions With Defense Counsel After Filing Of Second Amended Complaint

22 31. As I noted above, I filed MIMI's second amended complaint on February 25, 2008.
23 One day later, on February 26, 2008, I received a letter from defense counsel Jonathan Pink that
24 was a supposed "Notice of Rule 11 Violation."
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26 32. A true and correct copy of Mr. Pink's February 26 letter is submitted herewith as
27 Exhibit 1.

28 33. Two things struck me immediately when I first read Mr. Pink's February 26 letter.
GOONAN DECLARATION IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO
DISMISS SECOND AMENDED COMPLAINT AND RULE 11 MOTION

1 First, the tone and substance of the letter is extremely arrogant, and is among the most
2 unprofessional and intemperate of letters that I have received in recent years. I frankly was
3 surprised that a partner in a firm with a good reputation like Mr. Pink's firm would send such an
4 unseemly letter.

5 34. The other thing that struck me about Mr. Pink's February 26 letter is how soon it was
6 sent after the filing of the second amended complaint. Knowing how much time I myself had
7 spent researching and analyzing the question whether the allegations and claims against SDSU and
8 Rauch in his individual capacity should remain in the second amended complaint, it was obvious
9 to me that Mr. did not spend – and could not have spent – sufficient time researching the issues
10 and relevant case law before deciding to fire off his Rule 11 accusation.

11 35. Given the seriousness of the accusations in Mr. Pink's February 26 letter, I
12 immediately drafted and sent a response to Mr. Pink on February 26. A true and correct copy of
13 my February 26 letter to Mr. Pink is submitted herewith as Exhibit 2. As the Court will see when
14 it reviews Exhibit 2, I explained in detail to Mr. Pink why I had retained the allegations against
15 SDSU and Rauch in the second amended complaint.

16 36. But most importantly, by my February 26 letter, I asked Mr. Pink to provide me with
17 citation to any legal authority that he believed demonstrated that it was improper to retain the
18 allegations against SDSU and Rauch in his official capacity in the second amended complaint.

19 37. Critically, Mr. Pink never has provided such authority because such authority simply
20 does not exist. One would think that if the issue was as clear cut as Defendants would have the
21 Court believe, it would be a simple matter for Mr. Pink to provide me with some relevant and on-
22 point legal authority.

23 38. But he has not done so. On the contrary, the only case citations that Mr. Pink ever
24 provided to me were the cases cited at page 3 of Defendants' memorandum in support of their
25

1 motion to dismiss. However, as discussed in MIMI's opposition to Defendants' motion to
2 dismiss, the cases cited by Mr. Pink are inapposite here.

3 39. The true motivation for the present Rule 11 motion unfortunately soon became
4 apparent. On March 5, 2008, Mr. Pink sent me a letter that purports to be a settlement letter, even
5 though the supposed offer set forth therein is not a legitimate, good faith offer at all.

6 40. A true and correct copy of Mr. Pink's March 5, 2008 is submitted herewith as Exhibit
7
8 3. As the Court will see when it reviews Exhibit 3, the critical point about Mr. Pink's March 5
9 letter is that he plainly and explicitly is trying to use the threat of the present Rule 11 motion to
10 bully MIMI into agreeing to a low ball settlement offer. The tactics embodied by the March 5
11 letter speak volumes both about the merits and the good faith of the present Rule 11 motion.

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13
14 I declare under the penalty of perjury under the laws of the United States of America that
15 the foregoing is true and correct and this declaration was executed on May 5, 2008 at San Diego,
16 California.

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19 /s/ Gregory P. Goonan

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Certificate of Service

The undersigned hereby certifies that on this 5th day of May 2008, a true and accurate copy of the attached document was electronically filed with the Court, to be served by operation of the Court's electronic filing system, upon the following:

Jonathan S. Pink, Esq.
Lewis Brisbois Bisgaard & Smith LLP
650 Town Center Drive, Suite 1400
Costa Mesa, CA 92626
Attorneys for Defendants

/s/ Gregory P. Goonan