

Exhibit 31

FILED

JUL - 9 2001

RICHARD W. WIENING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE NAPSTER, INC. COPYRIGHT
LITIGATION

No. C 00-1369 MHP
No. C 00-4725 MHP

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
For the Northern District of California

Plaintiff Matthew Katz, a music producer, alleges copyright infringement, trademark infringement, unfair competition and interference with economic relations by Napster, Inc. ("Napster"), and individual defendants John W. Fanning, Sean Fanning, Sean Parker, Hank Barry, Hummer Winblad, Bob Bozeman, Yosi Amram, Joe Kraus, Fred Durst, Roger McGuinn, Jonathan H. Greene and Does 1 through 10. Now before the court are the motions of defendants Hank Barry, Yosi Amram, Shawn Fanning, Hummer Winblad, Bob Bozeman and Fred Durst to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and John W. Fanning's motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Fred Durst's motion for sanctions is also before the court. Having considered the parties' arguments and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

This action is one of several copyright infringement actions against Napster, an Internet service that facilitates the downloading of MP3 music files, currently pending before this court. See In re Napster, C 00-1369 MHP. Because the court has discussed the Napster service at length in prior orders in this proceeding, and because the parties are familiar with the system, the court will

1 limit this background section to information relevant to defendants' motions. For the purposes of
2 these motions, the court draws on the factual allegations of the complaint.

3 Matthew Katz describes himself as a "producer and owner of music" having created several
4 musical bands including "jefferson airplane," "Moby Grape," "It's a Beautiful Day," "Indian
5 Puddin' and Pitpe," "Tripsichord" and "Fraternity of Man." Complaint ¶ 4.

6 Katz contends that Hank Barry is the CEO of Napster, Shawn Fanning is the co-founder of
7 napster.com and John W. Fanning is the registrant of the domain name "napster.com." Complaint
8 ¶¶ 6-7, 9. According to the complaint, Hummer Winblad, a company operating within the state of
9 California, is a "part-owner of [Napster] by virtue of a \$15 Million venture capital investment."
10 Complaint ¶ 10. Katz alleges that Yosi Amram is a part-owner of Napster "by virtue of a \$2 Million
11 private investment" and Bob Bozeman is a part-owner "by virtue of a \$2 Million private investment
12 by his company svangels.com." Complaint ¶¶ 11-12. Fred Durst is a member of the musical band
13 "Limp Bizkit." Complaint ¶ 14.

14 On July 24, 2000, Katz filed this action in the United States District Court for the Central
15 District of California alleging copyright infringement, trademark infringement, unfair competition
16 and interference with economic relations. See Katz v. Napster, Inc. et al., C00-07966 CAS. On
17 December 20, 2000, the action was transferred to this court, reassigned to Case No. C 00-4725 MHP
18 and coordinated with the Multi-District Litigation pending before this court in In re Napster, Inc., C
19 00-1369 MHP.

20
21 LEGAL STANDARD

22 I. Rule 12(b)(6)

23 In considering the sufficiency of a complaint under Rule 12(b)(6), the court will not grant a
24 motion to dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in
25 support of his claims which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46
26 (1957). The Federal Rules do not require plaintiff to plead in detail the facts upon which he bases
27 his claim; he must merely set forth a "short and plain statement of the claim" that gives the
28 defendant fair notice of its nature and grounds. See id. at 47 (citing Fed. R. Civ. P. 8(a)(2)). Courts

1 in the Ninth Circuit have often stated that unwarranted inferences and conclusory allegations of law,
2 even when pled as facts, are insufficient to defeat a motion to dismiss. See In re Verifone Sec.
3 Litig., 11 F.3d 865, 868 (9th Cir. 1993).

4
5 II. Rule 12(c)

6 Any party may move for judgment on the pleadings after the pleadings are closed but within
7 such time as not to delay the trial. Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings is
8 properly granted when, taking all the allegations in the pleading as true, the moving party is entitled
9 to judgment as a matter of law. See Nelson v. City of Irvine, 143 F.3d 1196, 1200 (9th Cir. 1998).

10
11 DISCUSSION

12 I. Copyright Infringement

13 In his Second Claim for Relief, Katz alleges contributory copyright infringement against all
14 defendants. Although the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, does not expressly impose
15 liability on anyone other than direct infringers, courts have long recognized that in certain
16 circumstances, vicarious or contributory liability will be imposed. See Fonovisa, Inc. v. Cherry
17 Auction, Inc., 76 F.3d 259, 261 (9th Cir. 1996).

18 A. Contributory Infringement

19 Katz asks this court to adopt what is best described as a "tertiary theory" of liability for
20 contributory infringement. He argues that defendants are liable for contributory infringement on the
21 basis of their relationship to Napster. Katz does not allege that Napster is a direct infringer, but
22 would hold Napster liable for contributory infringement on the basis of the service Napster provides
23 to its users. Under this formulation, Napster users are the direct infringers, Napster is the secondary
24 infringer and the individual defendants are tertiary infringers. The court finds no support for this
25 legal proposition. Rather, courts have consistently held that liability for contributory infringement
26 requires substantial participation in a specific act of direct infringement. See e.g. Cable/Home
27 Communication Corp. v. Network Prod., Inc., 902 F.2d 829, 845 (11th Cir. 1990) ("Contributory
28 infringement necessarily must follow a finding of direct or primary infringement."); Gershwin

1 Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162-63 (2nd Cir. 1971); see also 3
2 Nimmer on Copyright § 12.04[A][2][a] at 12-73 ("in order to be deemed a contributory infringer,
3 the authorization or assistance must bear some direct relationship to the infringing acts, and the
4 person rendering such assistance or giving such authorization must be acting in concert with the
5 infringer").

6 Even if the "tertiary theory" were a sound basis for the assertion of claims of contributory
7 infringement against individuals other than the direct infringers, Katz's complaint against the
8 individual defendants must be dismissed.

9 (1) Hank Barry

10 Katz alleges that Barry is liable for contributory infringement because he "substantially
11 contribute[s] to the international unauthorized copying and distribution of musical sound recordings
12 by investing substantial sums of money, supporting, guiding, encouraging, and promoting Defendant
13 NAPSTER, INC. for their own future benefit." Complaint ¶ 51. The complaint offers no factual
14 support for this conclusory assertion.² Moreover, Katz does not allege that Barry "knowingly"
15 contributes to the infringing conduct of another. Katz therefore has failed to state a claim for
16 contributory infringement against Barry.

17 (2) Bob Bozeman

18 Katz alleges that Bozeman is liable for contributory infringement because he "substantially
19 contribute[s] to the international unauthorized copying and distribution of musical sound recordings
20 by investing substantial sums of money, supporting, guiding, encouraging, and promoting Defendant
21 NAPSTER, INC. for [his] own future benefit." Complaint ¶ 51. According to Katz, Bozeman is a
22 part-owner in Napster by virtue of a two million dollar investment in Napster by Bozeman's
23 company. Complaint ¶ 11.

24 Katz has not identified any specific actions by Bozeman. Rather, he alleges in purely
25 conclusory fashion that Bozeman's firm "substantially contribute[s]" to unauthorized copying by
26 reason of its investment in Napster. The court detects no factual basis to conclude that Bozeman
27 substantially contributed to a specific act of infringement.

28 (3) Hummer Winblad

1 Katz alleges that Hummer Winblad "substantially contribute[s] to the international
2 unauthorized copying and distribution of musical sound recordings by investing substantial sums of
3 money, supporting, guiding, encouraging, and promoting Defendant NAPSTER, INC. for [its] own
4 future benefit." Complaint ¶ 51. Once again, the complaint offers conclusory allegations in place of
5 specific factual allegations.³ Katz does not allege that Hummer Winblad substantially contributed to
6 a specific act of direct infringement.

7 (4) Yosi Amram

8 Katz alleges that Yosi Amram "substantially contribute[s] to the international unauthorized
9 copying and distribution of musical sound recordings by investing substantial sums of money,
10 supporting, guiding, encouraging, and promoting Defendant NAPSTER, INC. for [his] own future
11 benefit." Complaint ¶ 51. Katz offers no factual support for this conclusory allegation. According
12 to an earlier portion of the complaint, Amram is a part-owner of Napster "by virtue of a \$2 Million
13 private investment." Complaint ¶ 11. This allegation, standing alone, is insufficient to support a
14 contributory infringement cause of action.

15 (5) Shawn Fanning and John W. Fanning

16 The Second Claim for relief contains no specific factual allegations relating to Shawn
17 Fanning or John W. Fanning. Katz alleges that Shawn Fanning is a co-founder of napster.com.
18 Complaint ¶ 7. Katz alleges that John W. Fanning is the registrant of the domain name
19 "napster.com." Complaint ¶ 6. These allegations provide an insufficient basis on which to conclude
20 that both individuals contributed, in a substantial way, to a specific act of direct infringement.

21 (6) Fred Durst

22 Katz alleges that Durst "substantially contribute[s] to the international unauthorized copying
23 and distribution of musical sound recordings by encouraging, speaking positively, and by
24 participating in free concerts promoting Defendant NAPSTER, INC."⁴ Complaint ¶ 50. Katz does
25 not allege that Durst participated in any way in the development or administration of the Napster
26 system. The allegations that Durst "encouraged" or "spoke positively" about Napster, or that he
27 "participated" in some fashion in free concerts "promoting" Napster, are vague and unspecific. Katz
28 fails to allege that Durst knowingly and substantially participated in a specific act of direct

1 infringement.

2 In light of the court's conclusion regarding the proposed "tertiary theory" of liability and the
3 deficiencies of Katz's complaint, the court will dismiss with prejudice the contributory infringement
4 causes of action against the individual defendants.

5 B. Vicarious Infringement

6 Katz alleges vicarious copyright infringement by all defendants in his Third Claim for Relief.
7 To sustain a cause of action for vicarious copyright infringement, a plaintiff must prove that the
8 vicarious infringer has (1) the right and ability to supervise or control the infringing activity, and (2)
9 a direct financial interest in the infringing activities. See Fonovisa, 76 F.3d at 262-63; Gershwin,
10 443 F.2d at 1162. Once again, the court finds no support for Katz's assertion that an individual can
11 be held vicariously liable for acts of someone other than the direct infringer.

12 (1) Hank Barry, Hummer Winblad, Bob Bozeman and Yosi Amram

13 Katz alleges that Barry, Hummer Winblad, Bozeman and Amram are liable for vicarious
14 infringement because they "substantially contribute to the international unauthorized copying and
15 distribution of musical sound recordings by investing substantial sums of money, supporting,
16 guiding, encouraging, and promoting Defendant NAPSTER, INC. for their own future benefit."
17 Complaint ¶ 68. In addition, Katz alleges that Napster has received over \$17 million in investment
18 capital from Barry, Hummer Winblad, Bozeman and Amram, "all of whom intend to profit from the
19 widespread copyright infringement described [in the complaint.]" Complaint ¶ 70. Katz adds that
20 Hummer Winblad, as owner of website similar to napster.com, also stands to benefit if Napster
21 compiles a list of its users. Complaint ¶ 71.

22 Katz does not allege that any of these defendants have the right or ability to supervise or
23 control the infringing activity. Although the complaint alleges that these defendants "intend to
24 profit" from use of the Napster system, Katz does not assert that they have a direct financial interest
25 in the infringing activity.

26 (2) Shawn Fanning and John W. Fanning

27 In pleading the vicarious infringement cause of action, the complaint contains no factual
28 allegations relating to Shawn Fanning or John W. Fanning. It appears from the entirety of the

1 complaint that Katz would hold Shawn Fanning liable for vicarious infringement as one of the "co-
2 founders" of napster.com. See Complaint ¶ 7. Katz would hold John W. Fanning liable as the
3 registrant of the domain name "napster.com." See Complaint ¶ 6. The complaint does not allege
4 that either individual has the right or ability to control the infringement, or a direct financial interest
5 in the infringement. As pled, the cause of action for vicarious infringement cannot stand against
6 Shawn Fanning and John W. Fanning.

7 (3) Fred Durst

8 Katz alleges the Durst "substantially contribute[s] to the international unauthorized copying
9 and distribution of musical sound recordings by encouraging, speaking positively, and by
10 participating in free concerts promoting Defendant NAPSTER, INC." Complaint ¶ 67. Setting
11 aside Katz's conclusory assertion, Katz does not allege a factual basis on which to conclude that
12 Durst has the right or the ability to supervise or control the infringing activity. Absent such an
13 allegation, Katz cannot maintain a vicarious infringement cause of action against Durst.

14 The individual defendants are entitled to the dismissal of Katz's vicarious infringement cause
15 of action.

16
17 II. California Civil Code Section 980(a)(2)

18 Katz alleges in his Fourth Claim for Relief that all defendants have violated Katz's exclusive
19 ownership interests in certain sound recordings in violation of California Civil Code section
20 980(a)(2). Section 980(a)(2) provides in part that the author of an original work of authorship
21 consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive
22 ownership interest therein until February 15, 2047. See Cal. Civ. Code § 980(a)(2). To recover for
23 infringement under this section, a plaintiff must show three elements: (1) ownership by plaintiff of a
24 protectible property interest; (2) unauthorized copying of the material by defendant; and (3) damage
25 resulting from the copying. See Golding v. R.K.O. Pictures, Inc., 35 Cal. 2d 690, 694 (1950).

26 Katz does not allege a single fact relating to the individual defendants in support of this
27 claim. See Complaint ¶ 78. He does not allege that any of the individual defendants engaged in
28 unauthorized copying of the material. Moreover, Katz does not allege with any factual detail that he

1 owns a protectible property interest or that he was damaged as a result of the copying. Katz's
2 Fourth Claim for Relief must be dismissed.

3
4 III. Trademark Infringement

5 In his Fifth and Sixth Claims for Relief, Katz alleges that all defendants violated his
6 trademarks in the names "It's A Beautiful Day" and "Moby Grape," respectively. A plaintiff may
7 establish a prima facie case of trademark infringement by showing rightful ownership of the marks
8 in suit and a likelihood of confusion or mistake amongst the public from defendants' use of the
9 mark. See Sony Computers Entm't America, Inc v. Gamemasters, 87 F. Supp. 2d 976, 984 (N.D.
10 Cal. 1999).

11 (1) Hank Barry, Hummer Winblad, Bob Bozeman and Yosi Amram

12 Katz alleges that moving defendants Barry, Hummer Winblad, Bozeman and Amram are
13 liable for trademark infringement because they "substantially contribute to the international
14 unauthorized use of plaintiff's mark by investing substantial sums of money, supporting, guiding,
15 encouraging and promoting Defendant NAPSTER, INC. for their own future benefit." Complaint ¶¶
16 87, 95. This generalized, conclusory allegation is insufficient to sustain causes of action for
17 trademark infringement. Katz has failed to allege that any of these defendants actually used a mark
18 owned by plaintiff.

19 (2) Shawn Fanning and John W. Fanning

20 The trademark infringement claims contain no allegations relating to Shawn Fanning or John
21 W. Fanning. Katz does not allege that either Shawn Fanning or John W. Fanning used a mark
22 owned by plaintiff, or that such use created a likelihood of confusion or mistake.

23 (3) Fred Durst

24 The trademark infringement claims are entirely devoid of factual allegations relating to
25 defendant Durst. Katz does not allege that that Durst actually used the "It's A Beautiful Day" or
26 "Moby Grape" marks, or that Durst had any direct involvement in the alleged infringement of Katz's
27 trademark rights.

28 Defendants are entitled to dismissal of Katz's trademark infringement causes of action.

1 IV. Unfair Competition

2 In his Seventh Claim for Relief, Katz alleges that all defendants engaged in unfair
3 competition in violation of California Business and Professions Code section 17200. Under
4 California's Unfair Competition Act, unfair competition means and includes any unlawful, unfair or
5 fraudulent business act or practice. See Cal. Bus. & Prof. Code § 17200; Klein v. Earth Elements
6 Inc., 59 Cal. App. 4th 965, 968 (1997); see also People ex rel. Renne v. Servantes, 86 Cal. App. 4th
7 1081, 1087 (2001) (defining "unlawful business practice" as "one that is forbidden by law, whether
8 civil, criminal, federal, state, or municipal, statutory, regulatory, or court-made").

9 Katz alleges that the "acts and conduct" of defendants described in the complaint
10 "constitute[] an appropriation and invasion of property rights of plaintiff, and constitute unfair
11 competition" under section 17200. Complaint ¶ 100. Katz seeks to recover "all proceeds and other
12 compensation received or to be received by Napster arising from its users' direct infringements of
13 Plaintiff's music." Complaint ¶ 101. Katz's unfair competition cause of action does not contain any
14 specific factual allegations relating to the individual defendants.

15 Although the nature and scope of the unfair competition claim is ambiguous, it appears from
16 the allegations of the complaint, as well as Katz's representations at the hearing on this matter, that
17 the allegedly unlawful business practice at the heart of the unfair competition claim is copyright
18 infringement. As copyright infringement lies at the heart of the unfair competition claim, the unfair
19 competition action is preempted by federal copyright law. See Kodadek v. MTV Networks, Inc.,
20 152 F.3d 1209, 1213 (9th Cir. 1998) (holding section 17200 unfair competition claim "based solely
21 on rights equivalent to those protected by the federal copyright laws" and is preempted); Xerox
22 Corp. v. Apple Computer, Inc., 734 F. Supp. 1542, 1551 (N.D. Cal. 1990) (holding unfair
23 competition claim preempted where essence of unfair competition claim is defendant's alleged
24 unauthorized use of plaintiff's copyrighted work). Katz's Seventh Claim for Relief must be
25 dismissed.

26

27 V. Interference With Economic Relations

28 In his Eighth Claim for Relief, Katz alleges that defendants interfered with his economic

1 relationship with retailers and distributors, including Valley Media, by distributing copies of Katz's
2 music without permission and with the intent to harm him financially. Complaint ¶ 108. According
3 to the complaint, Valley Media ended its relationship with plaintiff as a result of defendant's
4 conduct. Complaint ¶ 109.

5 To state a cause of action for the tort of interference with prospective economic advantage,
6 plaintiff must show (1) an economic relationship between the plaintiff and some third party, with the
7 probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the
8 relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4)
9 actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by
10 the acts of the defendant.⁵ See Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118,
11 1126 & n.2. (1990).

12 Once again, Katz relies on purely conclusory allegations and proffers no specific facts on
13 which to conclude that any of the individual defendants interfered with Katz's economic
14 relationships. This cause of action must be dismissed because Katz has not alleged that defendants
15 knew of the relationships between Katz and the retailers and distributors, intended to interfere with
16 such relationships or actually did so.

17
18 VI. Motion for Sanctions

19 Durst asks the court to award sanctions in the amount of \$45,569.25, the amount of Durst's
20 fees and costs, pursuant to Rule 11 of the Federal Rules of Civil Procedure. Rule 11 requires the
21 imposition of sanctions when a cause is frivolous, legally unreasonable or without factual
22 foundation, or when it is brought for an improper purpose. See Conn v. Borjorquez, 967 F.2d 1418
23 (9th Cir. 1992). Durst contends that sanctions are appropriate because Katz's allegations contain no
24 factual support and because Durst was named in the suit solely for publicity purposes.

25 Katz's comments at the hearing on this matter suggest to the court that he might have had an
26 improper motive, such as harassment, in bringing suit against Durst. See Fed. R. Civ. P. 11(b)(1)
27 (defining "improper purpose" to include harassment); see also Fed. R. Civ. P. 11(c) (authorizing
28 court to impose sanctions upon parties who have violated Rule 11(b)). The record, however, is

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insufficient to determine that such an improper purpose actually motivated Katz. The court is unwilling to grant Durst's motion for sanctions on this record. If Durst can establish that Katz brought the suit for the purpose of harassment, the court will reconsider its ruling.

CONCLUSION

For the reasons stated above, the court hereby GRANTS defendants' motions to dismiss, DISMISSES WITH PREJUDICE Katz's complaint and DENIES defendant Durst's motion for sanctions.

IT IS SO ORDERED.

Dated: *July 9, 2001*



MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

1 ENDNOTES

2 1. The complaint identifies Bozeman's company as svangels.com. Complaint ¶ 11. Bozeman
3 represents that svangels.com is the web site of his venture capital firm, Angel Investors.

4 2. In opposition to Barry's motion to dismiss, Katz contends that Barry contributes to the
5 infringement by "tout[ing] Napster as a legitimate service" and argues that Barry, as an active
6 member of the Napster management team, has "helped guide the growth" of the infringing activity.
7 Katz's Opp. at 5, 8. Even if these conclusory allegations appeared in the complaint, they would be
8 insufficient to satisfy Katz's pleading obligation.

9 On April 30, 2001, Katz submitted an additional declaration, accompanied by various
10 exhibits, purporting to support his opposition to the motions to dismiss. Because these materials are
11 confidential within the meaning of the protective order entered in this case, and because Katz
12 submitted the documents after the close of briefing in violation of Civil Local Rule 7-3(e), the court
13 by separate order directs that the documents be lodged under seal rather than filed.

14 It appears to the court that the only document ostensibly relating to defendant Barry is an e-
15 mail addressed to Barry suggesting a possible relationship with a third party that would enable
16 Napster to work with the major record labels. Nothing in this document would support an assertion
17 that Barry substantially contributes to the alleged acts of direct infringement.

18 3. Included in Katz's April 30, 2001 submission are e-mails to John Hummer regarding potential
19 business relationships between third parties and Napster and references to Napster's funding. These
20 documents do not provide a factual basis on which to conclude that Hummer Winblad occupies a
21 position of control vis-à-vis Napster or that it substantially contributes to the alleged acts of
22 infringement in some meaningful way.

23 4. In opposition to the motion, Katz adds that Durst has "publicly stated that the activity by Napster
24 has increased [his] sales and [his] public celebrity." Katz Opp. at 3. Katz contends that Durst has
25 benefitted financially from the "pirating activity" of Napster. *Id.* Katz offers similar allegations in
26 his declaration submitted on April 30, 2000. Even if these allegations were included in the
27 complaint, none would rise to the level of substantial participation required to sustain a claim for
28 contributory infringement.

Katz's reliance on Cable/Home Comm. Corp. v. Network Prod., Inc., 902 F.2d 829 (11th Cir.
1990), is unwarranted. In Cable/Home, the court required evidence that the promoter engaged in
substantial participation in the alleged infringement. The court found the promoter liable for
contributory infringement upon a showing that the promoter provided funds and equipment to
facilitate the duplication. See Cable/Home, 902 F.2d at 846.

5. To state a claim for intentional interference with contractual relations, plaintiffs must allege (1) a
valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3)
defendant's intentional acts designed to induce a breach or disruption of the contractual relationship;
(4) actual breach or disruption of the contractual relationship; and (5) resulting damage. See Pacific
Gas & Elec., 50 Cal. 3d at 1126. The tort of intentional interference with contractual relations
protects the same interest in stable economic relationships as does the tort of interference with
contract, though interference with prospective advantage does not require proof of a legally binding
contract. See *id.*

awb

United States District Court
for the
Northern District of California
July 10, 2001

* * CERTIFICATE OF SERVICE * *

Case Number:M:00-cv-01369

Napster, Inc.

vs

Napster, Inc.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 10, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Richard W. Wierking, Clerk

BY: 
A Bowser, Deputy Clerk

FILED

JUL - 9 2001

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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IN RE NAPSTER, INC., COPYRIGHT MDL No. C 00-1369
LITIGATION

ORDER

Plaintiff Matthew Katz in Katz v. Napster, Inc. et. al, C 00-4725 MHP, has submitted to the court an ex parte application for an order permitting the Declaration of Matthew Katz dated April 30, 2001, and six exhibits to be filed under seal. Katz argues that the documents support his opposition to defendants' motions to dismiss the complaint, which are currently under submission.


After reviewing the documents, the court agrees that they are confidential within the meaning of the protective order entered in this action. Pursuant to Civil Local Rule 7-3(e), however, no additional memoranda, paper or letters shall be filed once a reply is filed without prior court approval. See Civ. Local R. 7-3(e). Katz represents that he obtained the material after the April 10, 2001, hearing on the motion by reviewing the documents produced by defendant Hummer Winblad in the offices of Mitchell, Silberberg & Knupp, plaintiffs' liaison counsel in In re Napster, MDL No. 00-1369. Katz offers no explanation as to why he did not review or obtain copies of the material before the court took the matter under submission on April 10, 2001. Under these circumstances, Katz has not made an adequate showing as to why the documents should be filed at this stage of the proceedings.

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Accordingly, the court hereby ORDERS that the Declaration of Matthew Katz dated April 30, 2001, and the six exhibits accompanying the declaration be LODGED UNDER SEAL.
IT IS SO ORDERED.

Dated: *July 9, 2001*



MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

awb

United States District Court
for the
Northern District of California
July 10, 2001

* * CERTIFICATE OF SERVICE * *

Case Number:M:00-cv-01369

Napster, Inc.

vs

Napster, Inc.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 10, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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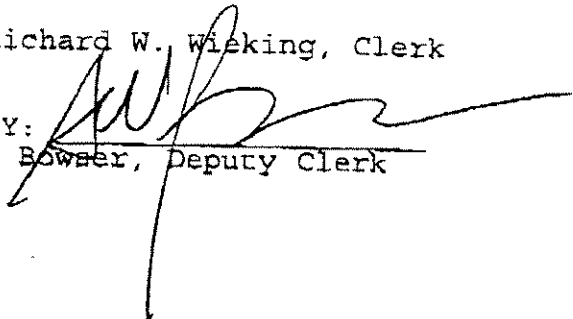
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