CHRISTOPHER COOKE. #142342
STEPHEN S. WU, #205091
COOKE KOBRICK & WU LLP
177 Bovet Road, Suite 600
San Mateo, CA 94402
Telephone: (650) 638-2370
Facsimile: (650) 341-1395

Attorneys for Defendants David Winer and Scripting News, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

RUSSO & HALE LLP, JACK RUSSO, TIM C. HALE, and JOHN KELLEY,

Plaintiffs,

v.

USERLAND SOFTWARE, INC., VERISIGN, INC., SCRIPTING NEWS, INC., and DAVID WINER,

Defendants.

CASE NO.: 1-06-CV-069576

DEFENDANTS DAVID WINER AND SCRIPTING NEWS, INC.'S OPPOSITION TO MOTION FOR RECONSIDERATION

Date: April 26, 2007
Time: 9:00 a.m.
Dept: 8
Judge: Hon. Joseph Huber

Complaint Filed: 8/18/2006
Trial: Not Set

I. INTRODUCTION

Plaintiffs' Motion for Reconsideration must be denied for two reasons. First, the Motion fails to comply with the strict showing required for the Court to grant a motion for reconsideration under Code of Civil Procedure §1008. The motion is not based upon any new and different laws, facts or circumstances that would justify granting such a motion. Rather, the Motion is based solely upon counsel's own prior mistake in not recognizing that well-established law regarding representative shareholder actions that precluded them from representing UserLand Software's other shareholders. Counsel's mistaken view of the law regarding shareholder actions, which they display again in this Motion, is not a proper basis for granting a motion for reconsideration. And, the motion was filed too late—more than 10 days' after the

Court provided plaintiffs with notice of entry of the order of disqualification, and therefore after the statutory deadline specified in Section 1008.

Second, the motion for reconsideration must be denied because plaintiffs' offer to dismiss their claim for specific performance against UserLand DOES NOT remove the conflicts inherent in this situation. Plaintiffs still have conflicts with these shareholders because they seek attorneys fees that would vastly exceed any damages that they might recover as individual shareholders in UserLand—the precise conflict the Court of Appeal held to be disabling in *Apple Computer v. Superior Court* (2005) 126 Cal.App.4th 1253.

II. ARGUMENT

A. PLAINTIFFS' MOTION FAILS TO COMPLY WITH CCP SECTION 1008 AND MUST BE DENIED.

Regarding motions for reconsideration, section 1008(a) of the Code of Civil Procedure provides in relevant part:

> When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, *any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order.* The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. (emphasis added)

Section 1008(e) of the Code of Civil Procedure states that "this section specifies the court's jurisdiction with regard to applications for reconsideration" and provides that "*no application to reconsider . . . may be considered by any judge or court unless made according to this section*" (emphasis added). In *Le Francois v. Goel* (2005) 35 Cal.4th 1094, the Supreme Court held that the italicized language in Section 1008(e) means that the courts are without the authority to grant a party's motion for reconsideration if the party did not comply with the requirements of Section 1008. *See Le Francois* 35 Cal.4th at 1107 ('we hold that section 437c

and 1008 limit the parties' ability to file repetitive motions but do not limit the court's ability, on its own motion, to reconsider its prior interim orders so it may correct its own errors"); *see also* 6 B. Witkin, *California Procedure*, "Proceedings Without Trial," §47 at p. 444 (4th Ed. 1997) ("C.C.P. § 1008(e) thus nullifies former case law holding that courts have inherent power to entertain motions for reconsideration and renewal regardless of compliance with C.C.P. 1008").

Here, plaintiffs' motion for reconsideration must be denied because it does not raise any new facts or law justifying reconsideration and it was filed five days too late.

1. PLAINTIFFS' MOTION IS NOT BASED UPON ANY NEW OR DIFFERENT FACTS OR LAW AND THEREFORE MUST BE DENIED

A motion for reconsideration under Section 1008 of the Code of Civil Procedure "must be based on *new* facts or law." *Le Francois* 35 Cal.4th at 1099. The "burden under section 1008 is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at trial." *New York Times v. Superior Court* (2005) 135 Cal.App.4th 206, 212-13. An attorney or party's mistaken belief as to the law does not constitute a "new fact or law" and is not a proper basis for a motion for reconsideration. *Pazderkas v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 670.

Here, Plaintiffs make three arguments for reconsideration (1) they claim did not know that the rule discussed in *Apple Computer v. Superior Court* might apply to shareholder derivative actions; (2) they did not consider the possibility that the court might enter a partial disqualification order against them; and (3) they now will offer to dismiss their direct claim for specific performance against UserLand Software, Inc. if, but only if, the Court allows them to represent the other shareholders on the derivative claims, and this would cure any conflicts they have with UserLand's other shareholders. None of these is a proper basis for reconsideration.

Plaintiffs' mistaken notions about the laws governing shareholder derivative actions (which mistakes persist to this day, *see* part B, below) and failure to realize that the Court could partially grant defendants' disqualification motion are not proper bases for seeking

reconsideration. At best, these are simply mistakes about the law, they are not "new facts or law."

Plaintiffs' arguments in this case are similar to arguments that the Court of Appeal rejected in *Pazderkas*, 62 Cal.App.4th 658. In that case, the defendants' attorney argued that the court should grant a motion for reconsideration because he and his client did not realize that the plaintiffs' acceptance of the defendant's offer of judgment—made pursuant to section 998 of Civil Procedure Code— could later be used by the plaintiffs as a basis for seeking attorneys' fees under a contract clause awarding attorneys' fees to the prevailing party. In reversing the trial court's decision to grant a motion for reconsideration and set aside the judgment and fee award, the Court of Appeal explained

> The only possible "new facts" offered were presented in the declarations of CDAs [defendant's] counsel and Rodino. Counsel for CDA stated he mistakenly believed the section 998 offer included the issues of attorneys' fees and costs. This statement did not disclose new facts, but merely asserted counsel's mistake. A mistake based on (1) ignorance of the law or (2) imprecision in drafting the offer is not a proper basis for reconsideration.
>
> 62 Cal.App.4th at 1170.

Here, plaintiffs' counsel, Mr. Risch, similarly asserts that he did not know that his firm's attempt to assert a direct claim against UserLand Software for specific performance raised a conflict that could preclude Russo & Hale from representing the shareholders on the derivative claims, and did not realize that the Court might grant only a partial disqualification. These are both simply mistakes about the law which, under *Pazderkas*, are not proper bases for granting reconsideration.

Moreover, plaintiffs' counsel has not provided any satisfactory explanation for not recognizing this conflict of interest before the court granted the motion to disqualify. Had counsel conducted basic legal research on shareholder and derivative lawsuits, he would have found a wealth of authority, in addition to the *Apple Computer* decision, that clearly explained that a plaintiff in a derivative action is a fiduciary and therefore cannot harbor economic interests that are antagonistic to the interests of the corporation's other shareholders.

We cited some of these authorities in both our demurrer and motion to disqualify. These authorities explain that, "[b]y bringing a stockholder's derivative action the plaintiff nominates himself to act in a fiduciary capacity substantially as a guardian ad litem" (*Hogan v. Ingold* (1952) 38 Cal.2d 802, 812), "sues, not for himself alone, but as representative of a class comprising all who are similarly situated" (*Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 129 (quoting *Cohen v. Beneficial Loan Corp.* (1949) 337 U.S. 541, 549)), that a shareholder representative, as a fiduciary, may be liable to the other shareholders for breach of that duty in how he or she conducts the litigation (*Heckmann* 168 Cal.App.3d at128-29 (shareholder may be liable for accepting a settlement that harms other shareholders)), and that the "plaintiffs' attorneys owe an ethical and fiduciary obligation to their clients—the shareholders, and through them to the corporation itself." *Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 444). It is mystifying that plaintiffs failed to see that any conflict existed in their attempt simultaneously to sue their clients (UserLand and its shareholders) and to represent these same clients.

Likewise, plaintiffs' explanation that they did not realize that the Court might find *Apple Computer* applicable because it is a class action suit, and not a derivative suit, is not a satisfactory explanation:

> *Many of the factors that are considered when determining the adequacy of representation in a class action under Rule 23 also apply in the context of derivative suits.* Perhaps the most important element to be considered is whether plaintiff's interests are antagonistic to those he is seeking to represent. If there is a conflict of interest, the representation may well be deemed inadequate and the suit dismissed.
>
> 7C Charles A. Wright, Mary K. Kane, and Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1833 at 133 (1986 and 2005 Supp.) (Emphasis added).

In sum, plaintiffs have no satisfactory explanation for why they did not recognize the obvious conflicts posed by their attempt both to sue UserLand, directly, and to represent UserLand, derivatively. Their mistaken belief about the law regarding these conflicts, and assumption that the conflicts did not exist or were not relevant, are not bases for granting reconsideration. *See Pazderkas*, 62 Cal.App.4th at 670; *see also Foothills Townhome Assn. v.*

Christiansen (1998) 65 Cal.App.4th 688, 692-93 n.6 (plaintiff's belief that certain evidence not necessary at hearing on summary judgment not proper basis for motion for reconsideration); *disapproved on other ground, Navellier v. Sletten* (2002) 29 Cal.4th 82, 91 n.7.

Moreover, plaintiffs' supposed "new fact" justifying reconsideration—their conditional offer to dismiss the claim for specific performance—is not the type of new fact or circumstance that can support a motion for reconsideration. Plaintiffs knew about their many economic conflicts with UserLand's other shareholders from the beginning of this lawsuit—they originally sued UserLand, claiming to be a creditor of the firm that was owed $300,000. Their belated conditional offer to dismiss one of these economic conflicts now—i.e., by dismissing their direct claim for specific performance against UserLand Software— is something that has always been in their control and thus is not a "new fact or circumstance" that justifies the Court in reconsidering its prior order. *See e.g., New York Times* 135 Cal.App.4th at 213 (deposition testimony easily obtained through the discovery process does not constitute "new or different facts" justifying reconsideration).

2. PLAINTIFFS' FILED THEIR MOTION FIVE DAYS TOO LATE

As noted, Section 1008(a) requires a party seeking reconsideration to file such a motion "within 10 days after service upon the party of written notice of entry of the order." The court may deny a motion for reconsideration if the party files the motion only one day later than the 10-day deadline specified in Section 1008(a). *See Wiz Technology v. Coopers & Lybrand LLP* (2003) 106 Cal.App.4th 1, 16-17 ("Wiz's motion for reconsideration was filed one day beyond the statutory 10-day deadline . . .This alone could support the court's denial of the motion.")

Here, plaintiffs' motion was untimely because it was filed five days late—on March 23 instead of March 18. The Court entered its order granting the motion to disqualify on March 8 and the clerk of the Court provided written notice of the order to plaintiffs that same day, by mailing a copy of the order to the parties. (*See* "Order re Motion to Disqualify Russo & Hale LLP", attached to *Plaintiffs' Request for Judicial Notice in Support of Motion for Reconsideration* filed March 23, 2007). The clerk's mailing of a file-stamped copy of the

Court's order on March 8 constituted sufficient notice of the court's entry of the order: "There can be no better notice of what an order says than is provided by a file-stamped copy of the order itself." *Parris v. Cave* (1985) 174 Cal.App.3d 292, 294. Thus, the ten-day period began to run on March 8, and expired on March 18.

Plaintiffs, however, did not file their motion for reconsideration until Friday, March 23, or five days after the 10-day statutory deadline specified in Section 1008 had expired. Therefore, the Court lacks jurisdiction to hear plaintiffs' motion.

Plaintiffs apparently believe that the deadline for filing their motion was extended by five days under Code of Civil Procedure Section 1013(a) because the clerk served the court's order on the parties by mail. *See* C.C.P. §1013(a). This assumption is wrong.

Section 1005(b) of the Code of Civil Procedure states that "Section 1013, which extends the time within which a right may be exercised or an act may be done, *does not apply to a notice of motion . . . governed by this section*" (emphasis added). A motion for reconsideration is governed by Section 1005 because this type of motion is "[a]ny other proceeding under this code in which notice is required" and "no other time or method is prescribed by law or by court or judge" for giving such notice. C.C.P. §1005(a)(13). Therefore, because a motion for reconsideration is governed by Section 1005, Section 1013(a) cannot extend a party's time to file motion for reconsideration, even when the party receives written notice of the court's order by mail. *See* Weil & Brown, *California Practice Guide: Civil Procedure Before Trial*, ¶ 9:326.1 at p. 9(1)-105 (2004) (stating that whether C.C.P. 1013 extends the time for filing a motion for reconsideration "is in doubt" because of CCP 1005, but noting there is no known authority on point).

Moreover, the ten-day statutory deadline in Section 1008 is a jurisdictional requirement, and this factor weighs heavily against construing Section 1013 as extending Section 1008's ten-day deadline. *See* C.C.P. § 1008(e) (this section "specifies the court's *jurisdiction* with respect to applications for reconsideration"); *see also Le Francois* 25 Cal.4th at 1104-1108. The Courts of Appeal have consistently held that section 1013 should not be construed to extend a court's

jurisdiction to hear a motion or appeal, because section 1013 "'was never intended to apply in extending jurisdictional limits.'" *San Mateo Federation of Teachers v. Public Employment Relations Bd.* (1994) 28 Cal.App.4th 150, 155 (quoting *County of Los Angeles v. Surety Ins. Co.* (1984) 162 Cal.App.3d 58, 64), and cases discussed therein. Thus, the Court should deny plaintiffs' motion for reconsideration as untimely.

B. PLAINTIFFS' CONFLICTS WITH USERLAND'S OTHER MINORITY SHAREHOLDERS MANDATE THE FIRM'S DISQUALIFICATION EVEN IF THEY DISMISS THEIR CLAIM FOR ADDITIONAL SHARES OF USERLAND

Plaintiffs' motion is likewise fundamentally flawed because their belated offer to dismiss their direct claim against UserLand does not eliminate the economic conflicts of interest that exist between them and UserLand's other minority shareholders that, under *Apple Computer v. Superior Court* (2005) 126 Cal.App.4th 1253, render Russo & Hale unfit to represent these other shareholders' interests.

In their First Amended Complaint, plaintiffs expressly seek an award of "reasonable attorneys' fees" from defendants. (*See* First Amended Complaint, "Prayer" ¶ 4 at 15 (filed on December 15, 2006)). Presumably, plaintiffs believe they will be entitled to such fees if they prevail, under the "common fund" or "substantial benefit" theories of attorney-fee shifting. *See* 7 B. Witkin, *California Procedure*, "Judgment" §§ 215, 221 (4th Ed. 1997 & 2006 Supp.); *Fletcher v. A.J. Industries* (1968) 266 Cal.App.2d 313 and *Cziraki v. Thunder Cats* (2003) 111 Cal.App.4th 552 (both discussed in 7 B. Witkin, *supra*, "Judgment" § 221 at 754-755, & 2006 Supp. at 228-29.) Yet, plaintiffs are only 2.7 percent shareholders of UserLand and seek only equitable and declaratory relief from defendants, so they will receive no damages and little, if any, economic benefit from this litigation as UserLand shareholders.

Clearly, as in *Apple Computer*, a fee award to plaintiffs (if they are successful in this litigation) would dwarf any individual benefits they might receive from this litigation in their capacity as shareholders. And, as in *Apple Computer*, the prospect of these attorneys fees may tempt plaintiffs to take actions that maximize their recovery of such fees in the litigation to the

detriment of the other shareholders' best interests and thus is a separate ground for their disqualification: "'Most courts have refused to allow attorneys to assume simultaneously the roles of named plaintiff and class counsel, finding that counsel's interest in the litigation's generation of fees presents an insurmountable conflict of interest.'" *Apple Computer* 126 Cal.App.4th at 1278 (quoting 5 *Newberg on Class Actions* § 15:22, pp. 79-82 (4th ed. 2002)). Thus, the Court's original decision to disqualify Russo & Hale from representing these other shareholders should not be disturbed, even if plaintiffs give up their direct claim against UserLand for additional shares of its stock.[1]

III. CONCLUSION

For the reasons set forth above, the Court should deny plaintiffs' motion for reconsideration.

Dated: April 12, 2007.

Respectfully Submitted.

Christopher C. Cooke

COOKE KOBRICK & WU LLP
Attorneys for Defendants David Winer, and Scripting News, Inc.,

[1] Given plaintiffs' persistent refusal to recognize these conflicts with UserLand's other shareholders, the Court may also question their experience in such lawsuits and ability to represent these other shareholders' interests adequately. Moreover, plaintiffs' prior attempt to assert their status as creditors of UserLand should raises serious concerns that they will fairly and adequately represent the other shareholders' interests.

APPENDIX OF NON-CALIFORNIA AUTHORITIES

FEDERAL PRACTICE
AND
PROCEDURE

By
CHARLES ALAN WRIGHT
William B. Bates Chair for the Administration of Justice
The University of Texas
ARTHUR R. MILLER
Bruce Bromley Professor of Law, Harvard University
and
MARY KAY KANE
Professor of Law, University of California
Hastings College of the Law

Federal Rules of Civil Procedure
Rules 23.1 to 25

Sections 1821 to 2000

Volume 7C

[Date First Edition Volume published: 1972]
[Date Second Edition Volume published: 1986]

ST. PAUL, MINN.
WEST PUBLISHING CO.
1986

should be with leave to replead or conditioned on a failure to amend the complaint to satisfy the rule.[33]

§ 1833. Plaintiff Must Adequately Represent Other Shareholders Similarly Situated

The third sentence of Rule 23.1 provides that a derivative action "may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." [1] This prerequisite did not appear in the predecessor of Rule 23.1, original Rule 23(b), but was added when Rule 23.1 was adopted in 1966. However, it is based on requirements that were in another portion of former Rule 23 and were applied to derivative actions. In its Note to Rule 23.1, the Advisory Committee commented that the third sentence "recognizes that the question of adequacy of representation may arise

33. Amendment permitted

Brody v. Chemical Bank, C.A.2d, 1973, 482 F.2d 1111, 1114, **citing Wright & Miller,** certiorari denied 94 S.Ct. 737, 414 U.S. 1104, 38 L.Ed.2d 559.

Meltzer v. Atlantic Research Corp., C.A. 4th, 1964, 330 F.2d 946, certiorari denied 85 S.Ct. 78, 80, 379 U.S. 841, 13 L.Ed.2d 47.

Treves v. Servel, Inc., D.C.N.Y.1965, 244 F.Supp. 773.

The failure of a stockholder, who brought a derivative suit against the corporation's directors and outside accountants seeking the rescission of a restricted stock purchase plan, an accounting, and the recovery of alleged damage sustained by the corporation, to allege reasons excusing the demand on the shareholders did not require the dismissal of the complaint when no demand was necessary as a practical matter, provided that plaintiff file an appropriate paragraph setting forth those allegations within 30 days. Milstein v. Werner, D.C.N.Y. 1972, 54 F.R.D. 228.

1. Adequate representation needed

Plaintiff's motion in a derivative action against a computer manufacturer by a stockholder of a computer-leasing corporation for the alleged violation of the antitrust laws seeking a preliminary injunction against the manufacturer's foreclosure of installment credit agreements, the injunction was denied because the probability of the stockholder's success on the merits was not shown and serious questions regarding his standing to sue and ability to represent the stockholders fairly and adequately were present. Levin v. International Business Machs. Corp., D.C.N.Y.1970, 319 F.Supp. 51.

A complaint by a fund shareholder against its managers and others alleging wrongs to the fund and that plaintiff would fairly insure the adequate representation of the shareholders stated a derivative claim subject to Rule 23.1. Weiner v. Winters, D.C.N.Y.1970, 50 F.R.D. 306.

Amar v. Garnier Enterprises, Inc., D.C. Cal.1966, 41 F.R.D. 211.

See also

Kauffman v. Dreyfus Fund, Inc., D.C. N.J.1969, 51 F.R.D. 18, affirmed in part, reversed in part on other grounds C.A.3d, 1970, 434 F.2d 727, certiorari denied 91 S.Ct. 1190, 401 U.S. 974, 28 L.Ed.2d 323.

when the plaintiff is one of a group of shareholders or members." [2] Thus, the new rule really does not represent a change in substance; [3] it simply makes explicit the point that adequate representation is important in derivative, as well as in class, actions, which means that decisions on this subject under the former rule continue to be authoritative.

Many of the factors that are considered when determining the adequacy of representation in a class action under Rule 23 [4] also apply in the context of derivative suits.[5] Perhaps the most important element to be considered is whether plaintiff's interests are antagonistic to those he is seeking to represent. If there is a conflict of interest, the representation may well be deemed inadequate and the suit dismissed. Of course, a purely hypothetical dispute will not necessitate dismissal.[6] Defendant must show that

2. Advisory Committee Note

See the Advisory Committee Note to Rule 23.1, which is set out in the Appendix to vol. 12.

3. New rule not change

Robinson v. Computer Servicenters, Inc., D.C.Ala.1976, 75 F.R.D. 637, 641, **citing Wright & Miller.**

4. Factors in class action

See vol. 7A, §§ 1765–1770.

5. Factors same

Fradkin v. Ernst, D.C.Ohio 1983, 98 F.R.D. 478, 484, **citing Wright & Miller.**

Mayer v. Development Corp. of America, D.C.Del.1975, 396 F.Supp. 917, 931, **quoting Wright & Miller.**

Note, Res Judicata in the Derivative Action: Adequacy of Representation and the Inadequate Plaintiff, 1973, 71 Mich.L.Rev. 1042.

See generally

Kauffman v. Dreyfus Fund, Inc., C.A.3d, 1970, 434 F.2d 727, certiorari denied 91 S.Ct. 1190, 401 U.S. 974, 28 L.Ed.2d 323.

6. Hypothetical conflict

Vanderbilt v. Geo-Energy Ltd., C.A.3d, 1983, 725 F.2d 204.

GA Enterprises, Inc. v. Leisure Living Communities, Inc., C.A.1st, 1975, 517 F.2d 24, 27, **citing Wright & Miller.**

In Wolf v. Frank, C.A.5th, 1973, 477 F.2d 467, 476, certiorari denied 94 S.Ct. 287, 414 U.S. 975, 38 L.Ed.2d 218, the court upheld the district court's finding that the derivative plaintiffs were adequate representatives under Rule 23.1 stating: "Defendants are purblind to the fact that this is not a case of a brigand seeking to recover his loot. Plaintiffs' actions, alleged to be illegal, were in no way involved with the transactions for which the District Court granted derivative relief. Furthermore, although defendants contend that plaintiffs are economic pirates disqualified because of their piracy from representing an innocent corporation, the District Court made no such finding and in fact found that only defendants were picaroons. Whether plaintiffs were or were not knights in shining armor is irrelevant under Rule 23.1 . . . so long as they fairly and adequately represented the shareholders in enforcing the rights of . . . the corporation." (per Goldberg, J.)

In the absence of a showing that plaintiff's sole motive in bringing the shareholder derivative action was to aid his interest as a competitor, it

a serious conflict exists and that plaintiff could not be expected to act in the interests of the other shareholders because doing so would harm his other interests.[7] For example, when plaintiff

not preclude her from being properly representative of the stockholders and did not require her disqualification as plaintiff under Rule 23.1. Sweet v. Bermingham, D.C.N.Y.1975, 65 F.R.D. 551, 554, **citing Wright & Miller.**

A conflict of interest did not operate to prevent plaintiff from adequately and fairly representing the shareholders in a derivative action, notwithstanding that she had more shares in two other corporations named as defendants than she had in the subject corporation, when plaintiff was redeeming the shares in the other corporations so as to prevent a conflict and she did not present inconsistent claims for relief. Phillips v. Bradford, D.C.N.Y.1974, 62 F.R.D. 681.

Plaintiff in a shareholder derivative suit was under no obligation to seek all available remedies and his "relinquishment" of the damages claim did not illustrate a sufficient conflict of interest on the part of his counsel to warrant striking their appearances from the record. In re KMF Actions, D.C.Mass.1972, 56 F.R.D. 128, 136, **citing Wright & Miller,** affirmed C.A.1st, 1973, 479 F.2d 257.

Hypothetical conflicts of interest concerning plaintiff in a shareholder derivative action, who was a trader in the securities of various corporations that directly or indirectly owned a stock interest in the enterprise with which defendant corporation was negotiating regarding a possible contract arrangement, could not be used to show that plaintiff did not fairly or adequately represent the interest of stockholders similarly situated in enforcing the rights of defendant corporation. Globus, Inc. v. Jaroff, D.C. N.Y.1967, 266 F.Supp. 524.

See also

Youngman v. Tahmoush, Del.Chancery Ct.1983, 457 A.2d 376, 380, **citing Wright & Miller.**

7. Conflict requires dismissal

The holder of a small number of shares of corporate stock of minimal value, who also owned corporate debentures of substantial value, and whose stated primary concern was to protect his investment in debentures, could not maintain a derivative action. Owen v. Modern Diversified Indus., Inc., C.A.6th, 1981, 643 F.2d 441.

In determining whether plaintiff can adequately represent shareholders for purposes of a shareholder's derivative suit, the court should consider whether there are outside entanglements making it likely that the interests of other stockholders will be disregarded in the management of the suit. Davis v. Comed, Inc., C.A.6th, 1980, 619 F.2d 588.

The former chairman, who allegedly engineered several transactions designed to enrich himself and his colleagues at the expense of the corporation and its stockholders, and his wholly owned company could not properly represent the corporation or its shareholders on an appeal seeking to challenge a partial settlement agreement, which expressly reserved principal claims against the former chairman and his company, and therefore could demonstrate no harm to the corporation resulting from alleged defects in the settlement or the procedures by which it was approved, leaving the judgments approving the settlement agreement unchallenged. Darrow v. Southdown, Inc., C.A.5th, 1978, 574 F.2d 1333, certiorari denied 99 S.Ct. 574, 439 U.S. 984, 58 L.Ed.2d 655.

owned stock in two railroads and the purchase of one railroad's stock by the other was alleged to be advantageous to the purchaser but detrimental to the seller, plaintiff was held to be an improper

When it appeared that a minority shareholder's derivative action was controlled by an officer of other corporations and his purpose in urging the maintenance of the action was to force the merger of the defendant corporation with the other corporations, plaintiff shareholder did not adequately represent the interests of the other shareholders in enforcing the corporate right. Nolen v. Shaw-Walker Co., C.A.6th, 1971, 449 F.2d 506.

Quirke v. St. Louis-San Francisco Ry. Co., C.A.8th, 1960, 277 F.2d 705, certiorari denied 80 S.Ct. 1615, 363 U.S. 845, 4 L.Ed.2d 1728.

Largest shareholder was not an adequate class representative in derivative stockholders' suit challenging sale of stock in the corporation, when, inter alia, there was a conflict between his posture as a buyer, due to his announced intention to attempt to buy additional stock and obtain control of the corporation, and the posture of every other shareholder as a potential seller, plus the relative magnitude of his personal interest as compared to his interest in the derivative action itself, and other litigation was pending between the largest shareholder and defendants. Hall v. Aliber, D.C.Mich.1985, 614 F.Supp. 473.

Plaintiff minority shareholder was not shown to be a fair and adequate representative of other minority shareholders in a derivative action alleging that the board of directors' termination of the stock repurchase agreement involved the use of inside information and wasted corporate assets, when plaintiff's personal commitment to the action was doubtful, her counsel, husband of her stepdaughter, had represented the stepdaughter in an earlier derivative action concerning related activities and the litigation history and family relationships indicated that the attorney's interest as counsel was the real interest in question. Cohen v. Block, D.C.N.Y. 1980, 507 F.Supp. 321.

The stockholder of an Alabama corporation, who alleged that the corporation's proposed tender offer for shares of the outstanding stock of a Texas corporation would render the Alabama corporation insolvent and force it into receivership, failed to demonstrate that he would fairly and adequately represent the interest of Alabama corporation's shareholders in enforcing the rights of the Alabama corporation, in view of the evidence indicating that three months after the tender offer was consummated, the stockholder stated he expected to make a profit on the purchase of the stock of the Alabama corporation's corporate parent and that the stockholder admitted under oath that he did not even read the complaint prior to swearing that its allegations were true. Roussel v. Tidelands Capital Corp., D.C.Ala.1977, 438 F.Supp. 684.

Plaintiff, who owned 16% of the stock of defendant corporation, did not fairly and adequately represent the interest of the shareholders and, hence, could not maintain a derivative action charging the president and the vice president with mismanagement when individual defendants owned 70% of the stock between them and submitted affidavits of the remaining six shareholders, each of whom contended that plaintiff did not represent their interests and that the suit was not brought in the best interests of the corporation. Kuzmickey v. Dunmore Corp., D.C.Pa.1976, 420 F.Supp. 226.

Petersen v. Federated Devel. Co., D.C. N.Y.1976, 416 F.Supp. 466, 475 n. 6.

person to maintain a shareholder derivative suit against the purchasing railroad that attacked its acquisition of the stock.[8]

One interesting problem has arisen in connection with determining what is a sufficient showing of antagonism to defeat a person's claim to representative status under Rule 23.1. The rule provides that plaintiff must adequately represent "shareholders or members similarly situated * * *." However, Rule 23.1 also requires that the shareholder allege that he is enforcing a right of the corporation that it refuses to enforce, a decision typically arrived at through a vote of its stockholders. Applied literally, these two provisions appear contradictory: plaintiff is supposed to represent the shareholders but the objective of his litigation coin-

A former corporate officer did not fairly and adequately represent the interests of similarly situated shareholders and, therefore, was not a proper party to bring a derivative action on behalf of the corporation when the former officer was personally asserting claims against the corporation amounting to $750,000 and when the former officer owned a business that had been judicially determined to be in competition with the corporation on whose behalf he sought to sue derivatively and had been enjoined from continuing the competitive activities in an Alabama state court proceeding to enforce the anticompetition agreements of his former employment contract; under those circumstances, the former officer's interests were actually and not merely hypothetically in acute conflict with the interest of the corporate shareholders and the corporation. Robinson v. Computer Servicenters, Inc., D.C.Ala.1976, 75 F.R.D. 637, 641, **quoting Wright & Miller.**

Cannon v. U.S. Acoustics Corp., D.C.Ill. 1975, 398 F.Supp. 209, affirmed in part, reversed in part C.A.7th, 1976, 532 F.2d 1118.

When the representative plaintiff's principal controlled several companies which were engaged in litigation with the defendant corporation, which litigation included the pending claim involving agreements by which plaintiff became owner of less than 1% of the corporation's common stock, those claims were sufficiently adverse to the interest of the remaining shareholders so as to require the dismissal of the derivative action. GA Enterprises, Inc. v. Leisure Living Communities, Inc., D.C.Mass.1974, 66 F.R.D. 123, affirmed C.A.1st, 1975, 517 F.2d 24, 26 n. 3, **citing Wright & Miller.**

Shulman v. Ritzenberg, D.C.D.C.1969, 47 F.R.D. 202, 211 n. 46.

See also

A debenture holder did not have proper standing to maintain a derivative suit grounded on the Securities Act of 1933 and on the Interstate Commerce Act notwithstanding the debenture holder's claim that public debenture holders and public preferred stockholders stand in identical positions vis-a-vis the need for an equitable remedy to prevent the depletion of corporate assets by insiders and their conspirators. Dorfman v. Chemical Bank, D.C.N.Y.1972, 56 F.R.D. 363.

Barrett v. Southern Connecticut Gas Co., 1977, 374 A.2d 1051, 1057, 172 Conn. 362, **citing Wright & Miller.**

8. **Railroad case**

Quirke v. St. Louis-San Francisco Ry. Co., C.A.8th, 1960, 277 F.2d 705, certiorari denied 80 S.Ct. 1615, 363 U.S. 845, 4 L.Ed.2d 1728.

cides with the desire of only a minority and is contrary to the will of the rest of the stockholders. Obviously, if this type of antagonism were treated as demonstrating inadequacy of representation, it could result in a dismissal of virtually all derivative suits.

Thus, the third sentence of Rule 23.1 must be read as only requiring plaintiff to be an adequate representative for those "similarly situated" with him—namely, the minority stockholders.[9] In one reported decision that has dealt with this problem, the court argued as follows:

> * * * it seems clear that fair and adequate representation of those *similarly situated* means something different in Rule 23.1 from fair and adequate protection of interests of the class in Rule 23. * * * It is the very essence of a derivative suit that the opposition of a majority cannot prevent or annul the maintenance of that suit, else very few such suits would ever be brought and minority members would have no effective remedy. In light of this underlying policy of the derivative action and there

9. Similarly situated

Under the Federal Rule of Civil Procedure governing derivative actions brought by one or more shareholders or members to enforce a right of the corporation, plaintiff must fairly and adequately represent the interests of the other shareholders similarly situated; accordingly, plaintiff in a derivative action must maintain his status throughout the pendency of the lawsuit and the action will abate if plaintiff loses his shareholder status before the litigation ends. Portnoy v. Kawecki Berylco Indus., Inc., C.A.7th, 1979, 607 F.2d 765.

"[I]t is not necessary that derivative action plaintiffs have the support of a majority of the shareholders or even that they be supported by all the minority shareholders." Nolen v. Shaw-Walker Co., C.A.6th, 1971, 449 F.2d 506, 508 n. 4 (dictum).

Derivative action plaintiffs are not required to have the support of the majority of shareholders or even the support of all minority shareholders; the true measure of adequacy of representation is not how many shareholders plaintiff represents but, rather, how well the representative plaintiff advances the interest of other similarly situated shareholders. Schupack v. Covelli, D.C.Pa.1981, 512 F.Supp. 1310.

It is not necessary in a derivative action that the plaintiff have the support of all the minority shareholders; however, a derivative action may not be maintained unless the plaintiff represents the interest of shareholders other than himself. Kuzmickey v. Dunmore Corp., D.C.Pa.1976, 420 F.Supp. 226.

Shulman v. Ritzenberg, D.C.D.C.1969, 47 F.R.D. 202.

See also

In Kauffman v. Dreyfus Fund, Inc., C.A. 3d, 1970, 434 F.2d 727, 736, certiorari denied 91 S.Ct. 1190, 401 U.S. 974, 28 L.Ed.2d 323, the court would not permit a shareholder in four mutual funds to maintain a Rule 23.1 action on behalf of sixty-five funds. "The rights sought to be enforced cannot be considered 'common' to those who do and those who do not own shares."

Phillips v. KULA 200, Wick Realty, Inc., 1981, 629 P.2d 119, 122, 2 Hawaii App. 206, **citing Wright & Miller.**

apparently being no attempt on the part of the draftsmen of the 1966 amendments to frustrate this policy, the Court concludes that plaintiff can "fairly and adequately represent the interests" of the minority of venture members * * *.[10]

On the other hand, if plaintiff advocates positions inconsistent with the other minority stockholders or manages the action to the detriment of their interests, he obviously is an inadequate representative. Despite the language of the court, this interpretation and application of the adequacy requirement for derivative suits is entirely consistent with that utilized in the Rule 23 class action context.[11] In effect what is taking place is a narrowing of the class to include only minority stockholders followed by an inquiry into the adequacy of plaintiff's representation of that group.

As is true in the class action context, the court in determining adequacy of representation will look to various additional factors indicating whether the shareholder is likely to vigorously prosecute the action.[12] For example, the plaintiff's lack of knowledge of

10. Essence of suit

Shulman v. Ritzenberg, D.C.D.C.1969, 47 F.R.D. 202, 211 (per Robinson, J.).

11. Antagonism

See vol. 7A, § 1768 for a discussion of conflicting interests in class actions.

12. Additional factors

"Inadequacy as a class representative is not made out merely because of a discordant relation between plaintiff and defendants. To the contrary, this may inspire plaintiff to be an even more forceful advocate." Vanderbilt v. Geo-Energy Ltd., D.C.Pa. 1984, 590 F.Supp. 999, 1001.

Rogosin v. Steadman, D.C.N.Y.1976, 71 F.R.D. 514, 520, **citing Wright & Miller.**

In a shareholders' derivative suit asserting that the proxy statement issued by the corporation was fraudulent and misleading in omitting to state a material fact, the individual shareholders would be dismissed as plaintiffs and the corporation placed in their stead, in view of the fact that the shareholders had failed to pursue the suit for some five years after summary judgment had been granted in their favor on the issue of liability and the fact that the corporation apparently was willing to pursue its rights. Berman v. Thomson, D.C.Ill. 1975, 403 F.Supp. 695, 698, **citing Wright & Miller.**

Mayer v. Development Corp. of America, D.C.Del.1975, 396 F.Supp. 917, 931, **quoting Wright & Miller.**

When plaintiff in a derivative action on behalf of a corporation demonstrates to the court an intent and desire to vigorously prosecute the underlying corporate claim and when he has engaged competent counsel to assist in that endeavor, then, absent either a conflict of interest which goes to the forcefulness of the prosecution or the existence of antagonism between plaintiff and the other shareholders arising from differences of opinion concerning the best method of vindicating the corporate claim, the representation requirement of Rule 23.1 is met. Sweet v. Bermingham, D.C.N.Y. 1975, 65 F.R.D. 551, 554, **quoting Wright & Miller.**

As the shareholders, bringing a derivative action on behalf of a corporation demanding rescission of an allegedly fraudulent stock transfer in violation of the securities laws, had shown be-

CHRISTOPHER COOKE, #142342
STEPHEN S. WU, #205091
COOKE KOBRICK & WU LLP
177 Bovet Road, Suite 600
San Mateo, CA 94402
Telephone: (650) 638-2370
Facsimile: (650) 341-1395

Attorneys for Defendants David Winer and Scripting News, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

RUSSO & HALE LLP, JACK RUSSO, TIM C. HALE, and JOHN KELLEY, Plaintiffs, v. USERLAND SOFTWARE, INC., VERISIGN, INC., SCRIPTING NEWS, INC.,and DAVID WINER, Defendants.	CASE NO.: 1-06-CV-069576 CERTIFICATE OF SERVICE

I, CHRISTOPHER COOKE, declare as follows:

I am employed in San Mateo, California, am over the age of eighteen years, and am not a party to the above-captioned action. My business address is 177 Bovet Road, Suite 600, San Mateo, CA 94402. On the date set forth below, I caused the following documents:

DEFENDANTS DAVID WINER AND SCRIPTING NEWS, INC.'S OPPOSITION TO MOTION FOR RECONSIDERATION

to be served on the parties listed below by the following manner:

[] **(By Mail)** By placing a true and correct copy of the referenced documents, enclosed in a sealed envelope addressed as stated below, with first class postage thereon fully prepaid, for collection and mailing on the date set forth herein following ordinary business practices, in the United States Mail, San Mateo, California

[ ] **(By Hand Delivery)** By causing a true and correct copy of the referenced documents, enclosed in a sealed envelope, to be delivered by hand to the parties indicated below.

[X] **(By Overnight Delivery)** By placing a true and correct copy of the referenced documents, enclosed in a sealed envelope, with delivery charges prepaid, and delivering the envelope to Federal Express for delivery to the persons listed below.

[] **(By Facsimile)** By transmitting a true and correct copy of the referenced documents by facsimile transmission to the parties listed below, using the facsimile numbers below.

TYLER BAKER, ESQ.
EVAN BENNETT, ESQ.
FENWICK & WEST LLP
801 California Street
Mountain View, CA 94041
(FAX No. 650-938-5200)

MICHAEL RISCH, ESQ.
RUSSO & HALE LLP
401 Florence Street
Palo Alto, CA 94301
(FAX No. 650-327-3737)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 12, 2007.

CHRISTOPHER COOKE