

1 MICHAEL RISCH (State Bar No. 197600)  
Of Counsel to RUSSO & HALE LLP  
2 401 Florence Street  
Palo Alto, CA 94301  
3 Telephone: 650-327-9800  
Facsimile: 650-327-3737  
4 Email: mrisch@computerlaw.com

5 Attorneys for Plaintiffs  
RUSSO & HALE LLP, JACK RUSSO, TIM C. HALE, and JOHN KELLEY  
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SANTA CLARA

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

12 Plaintiffs,

13 v.

14 USERLAND SOFTWARE, INC., SCRIPTING  
15 NEWS, INC., VERISIGN, INC., DAVID  
WINER, and DOES 1 through 20,

16 Defendants.  
17

Case No.: 1-06-CV-069576

**PLAINTIFFS' NOTICE OF MOTION AND  
MOTION FOR RECONSIDERATION OF  
ORDER RE: MOTION TO DISQUALIFY  
RUSSO & HALE LLP; MEMORANDUM  
OF POINTS AND AUTHORITIES**

**[C.C.P. § 1008]**

Date: April 26, 2007

Time: 9:00 a.m.

Dept: 8

Judge: Hon. Joseph Huber

18 **TO EACH PARTY AND ITS ATTORNEYS OF RECORD:**  
19

20 PLEASE TAKE NOTICE that Plaintiff's Russo & Hale LLP, Jack Russo, Tim C. Hale, and  
21 John Kelley (collectively, "Plaintiffs") shall and hereby do move the Court to reconsider its Order  
22 re: Motion to Disqualify Russo & Hale LLP, dated March 8, 2007 ("Order"). This motion is  
23 based upon C.C.P. § 1008, the Court's Order, and new and different facts and circumstances, and  
24 is supported by the accompanying Memorandum of Points and Authorities, the Declaration of  
25 Michael Risch in Support of Motion for Reconsideration, the Request for Judicial Notice, the other  
26 pleadings and matters on file or to be filed with the court in this action, matters of which the Court  
27 can take judicial notice, and such other evidence and oral argument as is presented to the Court at  
28 the hearing hereon.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 On March 8, 2007, the Honorable Joseph Huber in Department 8 of the Superior Court of  
4 California, County of Santa Clara, issued an Order partially granting Defendants David Winer and  
5 Scripting News, Inc.'s (collectively, "Defendants Winer and SN") Motion to Disqualify Russo &  
6 Hale LLP ("Motion to Disqualify") as to the derivative action claims in Plaintiffs' First Amended  
7 Complaint ("FAC"). See Request for Judicial Notice ("RJN"), submitted concurrently herewith, at  
8 Exh. A. The Court, relying on Apple Computer, Inc. v. Superior Court (2005) 126 Cal.App.4th  
9 1253, reasoned as follows: "Russo & Hale LLP has placed itself in a position of divided loyalties  
10 by attempting to represent the minority shareholders on a claim against the majority shareholder  
11 while simultaneously representing itself on a separate claim that is adverse to the minority  
12 shareholders... [resulting in] a direct conflict of interest..." Id. at 1:28-2:3. In other words, given  
13 the finding of divided loyalties, the Court disqualified Russo & Hale LLP from serving as counsel  
14 as to one type of claim (direct versus derivative).

15 In support of this motion, Plaintiffs respectfully submit the following new fact before this  
16 Court: Plaintiffs will dismiss the direct claim (the fifth cause of action for specific performance)  
17 from the instant suit if the Court permits reinstatement of counsel on the derivative causes of  
18 action. In its opposition papers, Plaintiffs did not present said willingness to dismiss for the reason  
19 that Plaintiffs were not previously aware of the possibility of a "partial disqualification."<sup>1</sup> Indeed,  
20 in its moving and reply papers, the concept of partial disqualification - or disqualification as to a  
21 particular claim or cause of action - was not the relief Defendants Winer and SN sought.  
22 Moreover, in Apple Computer, the case this Court referenced in the Order at issue, the Court of  
23 Appeal reversed the trial court's denial of disqualification, and ordered the total disqualification of  
24 two law firms. Thus, Plaintiffs (and even Defendants) were not aware that partial disqualification  
25 was possible until the Order.

26  
27 <sup>1</sup> Furthermore, Apple Computer was a class action case, making this Order a novel application  
28 of the law. Had the ruling in this case been well settled, Plaintiffs would have offered to  
dismiss its claim in the opposition papers.

1 Accordingly, Plaintiffs respectfully request that the Court reconsider its Order in light of  
2 Plaintiffs' aforementioned dismissal proposal, and modify said Order to permit reinstatement of  
3 counsel as to the derivative causes of action pending Plaintiffs' dismissal of the fifth cause of  
4 action.

5 **ARGUMENT**

6 **I. THE COURT MUST CONSIDER FACTS NOT PREVIOUSLY**  
7 **CONSIDERED THAT DIRECTLY AFFECTS THE COURT'S RULING.**

8 **A. Plaintiffs Present A Previously Unconsidered Fact.**

9 California Code of Civil Procedure § 1008(a) governs a party's means to seek  
10 reconsideration of a court order, under the prerequisite of presenting "new or different facts,  
11 circumstances, or law." C.C.P. § 1008(a). The purpose of C.C.P. § 1008 is "to restrict motions to  
12 reconsider to circumstances where a party offers the court some fact or authority that was not  
13 previously considered by it." Gilberd v. ACT Transit (1995) 32 Cal.App.4th 1494, 1500. In this  
14 motion, Plaintiffs request that the Court reconsider its Order in light of Plaintiff's willingness and  
15 proposal to dismiss its fifth cause of action from the instant suit, which proposal was not set forth  
16 prior for the reasons that (a) Plaintiffs were not previously aware of the possibility of a "partial  
17 disqualification" of counsel by Order of the Court, and (b) Plaintiffs took the legal position that  
18 Apple Computer did not apply to non-class action suits such as the instant suit. See Declaration of  
19 Michael Risch, submitted concurrently herewith, at ¶ 3. Indeed, it was not until the Order that  
20 counsel for Plaintiffs first became aware of the possibility of a partial disqualification. Id.

21 **B. Plaintiffs' Proposal Directly Affects the Court's Ruling,**  
22 **But is Consistent With Its Underlying Rationale.**

23 Had Plaintiffs included in its opposition papers its willingness to dismiss the direct claim if  
24 the Court found that Apple Computer applied and disqualification is warranted in light of a  
25 "divided loyalties" scenario, the Court's Order would likely have been different. The only basis  
26 for disqualification was the presence of the fifth cause of action. At the hearing, the Court made  
27 clear that the other bases for disqualification asserted by Defendants lacked merit; indeed, the  
28 partial disqualification means that all of the other bases for disqualification were rejected.

Although Plaintiffs' proposal directly affects the Court's ruling, it is not inconsistent with

1 its stated rationale, i.e., there is a direct conflict of interest for Russo & Hale LLP because of its  
2 "attempting to represent the minority shareholders... while simultaneously representing itself  
3 [against] the minority shareholders." RJN, Exh. A at 1:28-2:2. Allowing Plaintiffs to dismiss the  
4 fifth cause of action would resolve any conflicts of interest arising from representations of and  
5 against the minority shareholders in the direct and derivative types of claims.

6 **II. JUDICIAL EFFICIENCY FAVORS RECONSIDERATION.**

7 If the Court were to permit the reinstatement of counsel as to the derivative causes of action  
8 in this suit. Plaintiffs would dismiss the fifth cause of action, thereby alleviating the Court from  
9 having to adjudicate a point of contention. Indeed, judicial efficiency strongly favors that the  
10 Court reconsider its Order to permit reinstatement pending dismissal. Moreover, if Plaintiffs  
11 dismiss the direct claim for specific performance, the parties shall also benefit from not having to  
12 litigate an additional cause of action. Thus, the general principle of efficiency favors  
13 reconsideration as well.

14 **CONCLUSION**

15 For the reasons set forth, Plaintiffs respectfully request that the Court reconsider its Order  
16 to permit reinstatement of Russo & Hale LLP as counsel in the derivative causes of action pending  
17 Plaintiffs' dismissal of the fifth cause of action from the instant suit.

18 Respectfully submitted,

19 MICHAEL RISCH, ESQ.

20 Dated: March 23, 2007

21 By:

  
22 Michael Risch

23 Attorney for Plaintiffs  
24 RUSSO & HALE LLP, JACK RUSSO,  
25 TIM C. HALE, and JOHN KELLEY

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Palo Alto, CA 94301  
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14 NEWS, INC., VERISIGN, INC., DAVID  
WINER, and DOES 1 through 20,

15 Defendants.

Case No.: 1-06-CV-069576

**DECLARATION OF MICHAEL RISCH IN  
SUPPORT OF MOTION FOR  
RECONSIDERATION**

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

17 I, Michael Risch, declare as follows:

- 18 1. I am an attorney in good standing before the State Bar of California, and am of counsel to
- 19 the law firm of Russo & Hale LLP. I make the statement herein of my personal knowledge
- 20 and could and would competently testify thereto if called as a witness.
- 21 2. On January 16, 2007, Defendants David Winer and Scripting News, Inc. ("Defendants")
- 22 filed a Motion to Disqualify Russo & Hale LLP ("MTD") with this Court. A hearing on
- 23 Defendants' MTD was held on March 8, 2007 before the Hon. Joseph Huber in Department
- 24 8 in the Superior Court of California, County of Santa Clara. On that same day, Judge
- 25 Huber issued an Order partially granting Defendants' MTD, disqualifying Russo & Hale
- 26 LLP as to the derivative causes of action in Plaintiffs' First Amended Complaint ("Order"),
- 27 reasoning that the firm "has placed itself in a position of divided loyalties by attempting to
- 28 represent the minority shareholders on a claim against the majority shareholder while

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simultaneously representing itself on a separate claim that is adverse to the minority shareholders... [resulting in] a direct conflict of interest...”

3. Plaintiffs presently move this Court to reconsider its Order based on the new fact and circumstance relating to Plaintiffs’ willingness and proposal to dismiss its fifth cause of action (for specific performance) from the instant suit, if the Court permits reinstatement of Russo & Hale LLP as counsel for Plaintiffs in the derivative causes of action. Said proposal was not set forth prior for the reasons that (a) Plaintiffs were not previously aware of the possibility of a “partial disqualification” of counsel by Order of the Court; indeed, Defendants did not seek such form of relief in their moving and reply papers on the MTD; and (b) Plaintiffs believed that Apple Computer, Inc. v. Superior Court (2005) 126 Cal.App.4th 1253, the case this Court referenced in the Order at issue, did not apply to non-class action suits such as the instant suit: as such, Plaintiffs did not anticipate the Court’s application of class action law to the facts of this case and so did not make the offer to dismiss the direct claim at issue in its opposition papers.

I declare, under penalty of perjury, that the foregoing is true and correct under the laws of the State of California and that this declaration was executed on March 23, 2007, in Palo Alto, California.

  
\_\_\_\_\_  
Michael Risch