

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

COURTESY
COPY

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ALTITUDE NINES LLC,

Plaintiff,

Index No.: 603268/2008

-against-

Hon. Richard B. Lowe III

DEEP NINES LLC,

Defendant.

FILED

JAN 28 2009

ORIGINAL SUBJECT TO FILE
UNDER SEAL

AFFIDAVIT DANIEL H. JACKSON
COUNTY CLERK NEW YORK

STATE OF TEXAS)

: ss

COUNTY OF DALLAS)

Daniel H. Jackson, being duly sworn, deposes and says:

1. I am President and Chief Operating Officer of Deep Nines, Inc. ("Deep Nines"). I submit this affidavit in opposition to Plaintiff's application for a preliminary injunction and in response to the affidavits submitted on behalf of plaintiff Altitude Nines, LLC ("Altitude") and do so from my personal knowledge.

2. Deep Nines is a privately-held computer technology company that provides network security solutions. Deep Nines owns several patents for the technologies used in its products, including U.S. Patent No. 7,058,976 (the "976 Patent").

3. Deep Nines earns revenues in two primary ways: (1) it sells its unified threat management and intrusion prevention/detection products to enterprises and governmental entities; and (2) it licenses its intellectual property to other businesses.

4. Deep Nines also pursues patent litigation against parties whom it believes are infringing its patents. This patent litigation is crucial to Deep Nines' business. Deep Nines must pursue such litigation in order to maintain the enforceability of its valuable intellectual property

rights. Patent litigation can also produce a significant additional source of revenue for Deep Nines.

5. In August 2006, Deep Nines engaged Fish & Richardson (“F&R”), pursuant to a written contingency fee agreement (the “Contingency Agreement”). A true and correct copy of the Contingency Agreement is attached hereto as Exhibit A. The purpose of the engagement was for F&R to represent Deep Nines in a patent litigation against McAfee, Inc. (“McAfee”), the world’s largest dedicated security technology company, for infringement of the ’976 Patent (the “Action”).

6. The Contingency Agreement provided that F&R would charge Deep Nines on a blended basis, which was comprised of three components: (1) a discounted hourly component; (2) a contingency component (13% of the recovered amount); and (3) a component for reimbursement of out-of-pocket expenses. (Ex. A, at 1-2.)

7. Deep Nines also engaged Hon. Robert Parker as local counsel for the Action. Judge Parker agreed, pursuant to a written contingency fee agreement, to work on a contingency basis at 5% of the recovered amount, plus reimbursement of out-of-pocket expenses.

8. Around the time that Deep Nines was initiating the Action, Deep Nines also sought to raise additional capital so that it could expand its efforts to monetize its intellectual property portfolio. Deep Nines decided to pursue negotiations for additional capital with Altitude Capital Partners.

9. After approximately five months of negotiation, Deep Nines, Altitude, Dawntreader Ventures, a venture capital firm (“Dawntreader”), and myself entered into a binding term sheet dated November 16, 2006 (the “Term Sheet”). A true and correct copy of the binding Term Sheet is attached hereto as Exhibit B. The Term Sheet sets forth the terms for the purchase

of promissory notes from Deep Nines (the "Notes") by Altitude, Dawntreader and myself (the "Note Holders").

10. The Term Sheet provided that the Notes would be repaid with Net IP Revenue, which is clearly defined in the Term Sheet as "gross IP proceeds minus any related legal expense, of any IP litigation or enforcement/licensing activity." (Ex. B. at 1.) After full repayment of the notes and interest due, the Note Holders would receive an ongoing "Participation Percentage," which would entitle the Note Holders to a percentage of the profits of any IP litigation going forward. (Ex. B, at 3.)

11. Over the next two months, the parties drafted complete documentation to memorialize their agreement. In January 2007, Deep Nines and the Note Holders executed the Securities Purchase Agreement ("SPA"). A true and correct copy of the SPA is attached hereto as Exhibit C.

12. As required by Article III of the SPA, Deep Nines provided the Note Holders with Schedules, including Schedule 3.34a to the SPA (the "Schedule"). A true and correct copy of Schedule 3.34a is attached hereto as Exhibit E.

13. In September 2008, after two years of extensive motion practice, discovery, and a trial, McAfee settled the Action by agreeing to make a \$25 million payment to Deep Nines. In September 2008, McAfee transferred that sum into an IOLA account controlled by F&R.

14. At the conclusion of the Action, F&R had invoiced Deep Nines for \$4,070,584.71 in hourly fees, and \$3,250,000.00 for the contingency component of its fees.

15. Judge Parker's attorneys' fees totaled \$1,250,000.00.

16. In accordance with their written contingency agreements, the out-of-pocket expenses reimbursed to F&R and Judge Parker, such as fees paid to experts, copy charges, and travel expenses, totaled \$2,109,881.05.

17. The hourly fees charged by F&R were significantly higher than the amount that was budgeted by F&R and the amount for which Deep Nines expected to be billed. Altitude and the other Note Holders were timely informed of these fees and were certainly aware of them. Deep Nines has questioned many of the charges with F&R, and disputes \$1,947,103.79 of the hourly fees with F&R.

18. In October 2008, F&R distributed to Deep Nines proceeds from the settlement with McAfee. In distributing these funds, F&R withheld \$1,947,103.79 that was subject to dispute. As of the date hereof, Deep Nines has not received any of the funds being withheld by F&R.

19. After receipt of the undisputed proceeds of the settlement, Deep Nines calculated Net IP Revenue in order to determine what should be distributed to the Note Holders. First, Deep Nines subtracted from the \$25,000,000 settlement amount the \$1,947,103.79 that was being withheld by F&R due to the fee dispute. This left \$23,052,896.21 as the Gross IP Revenue.

20. Next, Deep Nines deducted from Gross IP Revenue the fees charged to Deep Nines pursuant to its Contingency Agreement with F&R. This included a deduction of \$3,250,000.00 for the contingency component, and a deduction of \$4,070,584.71 for the hourly fee component. The total amount deducted from Gross IP Revenue for F&R fees was \$7,320,584.71.

21. Next, Deep Nines deducted the amount of fees paid to Judge Parker pursuant to his written contingency agreement with Deep Nines, which totaled \$1,250,000.00.

22. Finally, Deep Nines deducted the \$2,109,881.05 reimbursed to F&R and Judge Parker as out-of-pocket expenses, pursuant to their written contingency agreements.

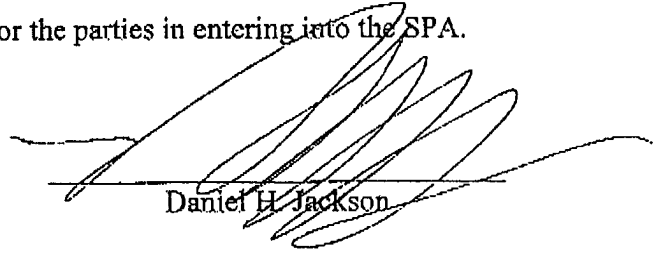
23. After the above deductions, \$12,372,430.45 was left as Net IP Revenue.

24. On October 22, 2008, Deep Nines distributed a total of \$11,596,856.87 of the Net IP Revenue to the Note Holders as contemplated by Schedule 3.34a. Of this amount, \$10,149,350.20 was paid to Altitude. \$9,470,582.84 of the amount paid to Altitude was paid to retire the Notes, and \$678,767.36 was paid to Altitude as its Participation Percentage.

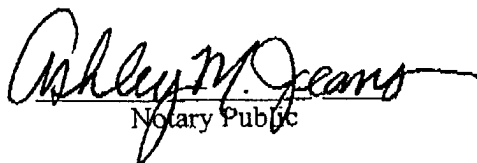
25. On or about October 27, 2008, Deep Nines received a letter from Altitude demanding that Deep Nines pay to it additional proceeds of \$5,345,950.18 (the "Demand Letter"). A true and correct copy of the Demand Letter is attached hereto as Exhibit D.

26. I have read the Demand Letter and Altitude's Complaint in this action. The positions that Altitude takes in those papers concerning the calculation of Net IP Revenue do not reflect the agreement made by the parties to the SPA. It was my understanding, as a party to the SPA, that Net IP Revenue would capture the profits of IP litigation, after the payment of all attorneys' fees and legal expenses.

27. As a Note Holder, I personally receive a Participation Percentage from Net IP Revenue. Although Altitude's purported calculation of Net IP Revenue would cause me to receive more money from my Participation Percentage, I do not agree that Altitude's calculation of Net IP Revenue reflects the agreement of me or the parties in entering into the SPA.


Daniel H. Jackson

Sworn to before me this
12 th day of December, 2008.


Notary Public

