

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

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)
ALTTITUDE NINES, LLC,)
)
Plaintiff.)
)
- against -)
)
DEEP NINES, INC.,)
)
Defendant.)
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Index No. 08/603268

AFFIDAVIT OF ROBERT KRAMER

FILED
JAN 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Robert Kramer, being duly sworn, deposes and says:

1. I am over the age of 18 years and I am the Managing Partner of Altitude Capital, a private investment firm which has as its primary focus the provision of capital into all areas of intellectual property.

2. Deep Nines, Inc. ("Deep Nines") and Altitude Nines, Inc. ("Altitude"), an affiliate of Altitude Capital, are parties to a Securities Purchase Agreement dated January 10, 2007 (the "Agreement"). A true and accurate copy of the Agreement, exclusive of exhibits and disclosure schedules, is attached as Exhibit A to the Amended Complaint.

3. Pursuant to the Agreement, Altitude and other entities (collectively, the "Note Holders") purchased approximately \$9.14 million in the aggregate in promissory notes issued by Deep Nines (the "Notes"). Of this, Altitude purchased \$8 million, or approximately 87.5%, of the Notes.

4. At the time the parties entered into the Agreement, Deep Nines was the plaintiff in a patent litigation action pending against McAfee, Inc. ("McAfee"), a software security company, in the United States District Court for the Eastern District of Texas, captioned *Deep Nines v. McAfee, Inc.*, USDC/EDTX Civil Action No. 9:06 cv 174 (RC) (the "Action").

5. Deep Nines retained Fish & Richardson ("F&R") as its lead counsel in the Action on a partial contingency basis, under the terms of an engagement letter dated August 16, 2006. Attached as Exhibit 1 is a true and accurate copy of Deep Nines' engagement letter with F&R. I understand that F&R provided Deep Nines with an estimated budget of \$2.4 million for litigation of the Action. In addition, Deep Nines' engaged its local counsel in the Action, Judge Parker, on a 5% contingency fee basis.

6. At the time Altitude and Deep Nines entered into the Agreement, Deep Nines was severely cash constrained. A true and accurate copy of Deep Nines' statement of Cash Flows and Balance Sheet as of the time the parties entered into the Agreement is attached as Exhibit 2.

7. Pursuant to the Agreement, Altitude provided financing to Deep Nines through the purchase of a secured note, and Deep Nines agreed to use funds that it derived from its intellectual property, including from the licensing or sale of any intellectual property and any enforcement activities, first to repay the principal and any accrued interest on the secured note, and then to distribute any additional consideration according to a formula in the Agreement (the "Waterfall"). The detailed terms of the Waterfall, including the calculation of "Net IP Revenue," which is one of the defined terms in the Waterfall, are described in detail in the Amended Complaint, at paragraphs 10-16.

8. In connection with the parties' entry into the Agreement, Deep Nines also prepared and delivered to Altitude a Schedule 3.34.a, entitled "Detailed Estimated Damages Model" ("Schedule 3.34.a" or the "Schedule"). Deep Nines represented to Altitude that Schedule 3.34.a was an accurate description of the manner in which Net IP Revenue would be calculated and funds would be distributed under the Waterfall. A true and accurate copy of Schedule 3.34a is attached as Exhibit B to the Amended Complaint.

9. In the fall of 2008, Deep Nines received \$25 million from McAfee (the "McAfee Payment").

10. Despite repeated requests from Altitude, Deep Nines did not make any distribution from the McAfee Payment until October 22, 2008.

11. On that date, Deep Nines distributed \$10,149,350.20 to Altitude, a sum which Deep Nines represented to be the full amount due to Altitude under the Agreement from the McAfee Payment.

12. The next day, October 23, 2008, Deep Nines delivered a document labeled "Schedule 3.33.a" to Altitude, which illustrated the manner in which Deep Nines had calculated Net IP Revenue and made distributions from the McAfee Payment under the Waterfall. A true and correct copy of Schedule 3.33.a is attached as Exhibit D to the Amended Complaint.

13. As set forth in detail in the Amended Complaint (see ¶¶20-27), Deep Nines failed to properly calculate Gross IP Revenue and Net IP Revenue under the Agreement and as it represented it would in Schedule 3.34a.

14. As a result of these improper calculations, Deep Nines has failed to distribute \$5,345,950.18 (the "Disputed Funds") from the McAfee Payment to Altitude as required under the Agreement.

15. Altitude has repeatedly requested that Deep Nines provide it with the reasoning for Deep Nines' calculation of Gross and Net IP Revenue, as well as other information related to the distribution made under the Waterfall. See Amended Complaint, Ex. C. Deep Nines has repeatedly failed to do so.

16. For example, two weeks *prior* to Altitude receiving any of the McAfee Payment, Deep Nines represented to Altitude that the out-of-pocket expenses Deep Nines had incurred in the Action were \$1.3 million. Schedule 3.33a, however, which Deep Nines delivered just two weeks later, indicates that Deep Nines incurred \$2,109,881.05 in out-of-pocket legal expenses. Altitude has asked for an explanation for the substantial additional expenses, but Deep Nines has refused to provide such information.

17. I am aware that Deep Nines intends to pursue further patent enforcement actions, and I am concerned that those efforts will result in the rapid dissipation of the Disputed Funds before this case can be resolved.

18. In particular, I am aware that Deep Nines is already engaged in the process of seeking counsel to assist it with its next enforcement action, and that it has considered proceeding under a partial contingency arrangement, as was used in the Action. Attached as Exhibit 3 is a true and accurate copy of an email message among Ed Sim, Dan Jackson, Robert Kramer, William Marino and Sang Ahn, dated October 6, 2008.

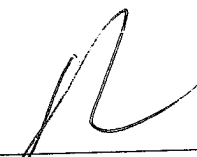
19. I understand that Deep Nines currently has approximately \$4 million in cash, exclusive of the funds it has retained from the McAfee Payment. I am also aware that Deep Nines' core business does not generate excess cash sufficient to fund costly patent litigation, and that because Deep Nines' core business is not highly profitable and is not growing, it is difficult for Deep Nines to obtain additional outside financing. Attached as Exhibit 4 is an email message from Ed Sim to Dan Jackson, Robert Kramer and Sang Ahn, dated October 21, 2008.

20. Deep Nines has represented to Altitude that in the Action, F&R incurred approximately \$10 million in legal fees and out-of-pocket expenses in little more than two years

of litigation -- a sum that is significantly more than the amount originally contemplated, and nearly twice the amount of the Disputed Funds.

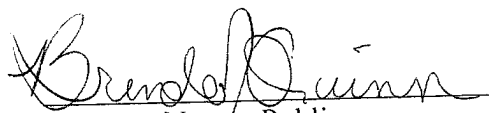
21. I am therefore concerned that Deep Nines will use the Disputed Funds to finance additional, costly patent litigation, and that in doing so, the Disputed Funds will be dissipated before this action can be concluded. In such circumstances, Altitude would be irreparably harmed, as it would then have no source for recovery of the funds owed to it.

AFFIANT FURTHER SAYETH NAUGHT



Robert Kramer

Sworn to before me
this 26th day of November, 2008.



Notary Public

BRENDA J QUINN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01QU6191847
Qualified in New York County
My Commission Expires August 25, 2012