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May 17, 2009

The Honorable Edward M. Chen
U.S. District Court, N. Dist. California, San Francisco Division
450 Golden Gate Ave.
San Francisco, CA 94102

Re: *Valentine, v. Nebuad*, Case No. CV 08-5113

Dear Judge Chen:

The purpose of this letter is to request a telephonic conference to discuss and resolve a discovery issue that has arisen between Plaintiffs and defendant Nebuad, Inc. Pursuant to the instructions of chambers, this letter sets forth a brief statement of issue, the position of each party, and available times.

Plaintiff's Statement

Plaintiffs have been informed by counsel for Nebuad that Nebuad will “imminently” assign all its assets as an assignment for the benefit of creditors and that the documents will immediately be moved from where they have been stored in the ordinary course of business, thus altering sequence and location. Nebuad, will, at that point, cease to exist as an ongoing concern. Included in the assignment will be all of NebuAd’s offices, documents, computers, and all remaining assets. From a company that once employed over 60 people, NebuAd now operates with a skeleton staff, and shortly, that too will disappear. Once a business has eliminated its employees and disposed of its assets, the institutional knowledge possessed by that former entity is dispersed and is not recoverable or reconstructable.

Plaintiffs believe that the present physical location of files, computers, and documents in their labeled drawers—the location itself -- offers irreplaceable and valuable knowledge and information, that once everything is packed up in boxes and shipped to a warehouse, that knowledge and information will forever and irreplaceably be lost.

Judge Chen’s Standing Order provides:

14. To the maximum extent feasible, all party files and records should be retained and produced in their original form and sequence, including file folders, and the originals should remain available for inspection by any counsel on reasonable notice.

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15. As soon as a party has notice of this order, the party shall take such reasonable steps as are necessary to preserve evidence related to the issues presented by the action, including, without limitation, interdiction of any document destruction programs and any ongoing erasures of emails, voicemails, and other electronically recorded material to the extent necessary to preserve information relevant to the issues presented by the action.

Plaintiffs understand and believe that this Standing Order applies in the instant litigation to NebuAd, and any assignee thereof. Plaintiffs wish to be able to inspect the original documents in the condition in which those documents presently exist and have been maintained in the ordinary course of business. Pursuant to Fed. R. Civ. P. 34(b)(2):

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request

In *Ultratech, Inc. v. Tamarack Sci. Co.*, 2005 U.S. Dist. LEXIS 1782 at *7,8 (N.D. Cal. Jan. 5, 2005) Judge Larson observed:

[P]roducing documents as they are maintained in storage is not as the documents are kept in the "usual course of business" and therefore does not satisfy the requirements of Federal Rule of Civil Procedure 33(d).

Judge Larson further noted:

At least one district court has found that Rule 34 does not permit producing boxes of documents organized for storage in response to a request for production of documents. *City of Wichita, Ks. v. Aero Holdings, Inc.* 2000 U.S. Dist. LEXIS 19817, 2000 WL 1480499 (D.Kan., 2000)

Ultratech, 2005 U.S. Dist. LEXIS 1782 at *8.

Plaintiffs therefore request the right to inspect the documents and records of NebuAd *before* they are removed from their office location and boxed and placed into storage.

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NebuAd's Statement

Plaintiffs' request lacks merit. NebuAd has been winding down its affairs since late summer 2008. NebuAd laid off substantially all of its officers and employees in July/August 2008 and closed its office in Redwood City on or about September 25, 2008. NebuAd thereafter moved what documents and data remained at the company to the current Foster City location on or about September 29, 2008, long before the filing of this litigation on November 10, 2008. Counsel for NebuAd is informed that upon learning of the filing of this lawsuit, NebuAd took steps to preserve relevant documents and data. Because NebuAd's files have already been moved, and given that NebuAd has taken steps to preserve relevant documents and data, plaintiffs' request is baseless and should be denied.

Counsel Contact Information

The parties propose a teleconference with the Court to discuss and resolve this issue. Because the transfer to the assignee is imminent (within days / hours), the parties respectfully request an expedited conference.

- Participating on behalf of Plaintiffs:

Scott A. Kamber -- 646-441-7100
Alan Himmelfarb -- 323-585-8696

Availability:

May 18 (prior to 2 p.m. Pacific)
May 19

- Participating on behalf of Nebuad:

Thomas Gilbertsen -- 202-342-8505

Availability:

May 18 (noon to 3 p.m. Pacific)
May 19 (morning only)

Respectfully submitted,

/s/

Alan Himmelfarb (counsel for Plaintiffs) &
Thomas Gilbertsen (counsel for NebuAd, Inc.)