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NETPICKLE, INC., LANCE TOKUDA and JIA SHEN
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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
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12 ICONIX, INC.,
13 Plaintiffs,
14 v.
15 LANCE TOKUDA, JIA SHEN,
NETPICKLE, INC.,
16 Defendants,
17

Case No. C06-02201 SBA
**DEFENDANT NETPICKLE, INC.'S,
JIA SHEN'S, AND LANCE TOKUDA'S
ANSWER TO ICONIX, INC.'S
COMPLAINT**
**COUNTER-CLAIMS BY NETPICKLE,
INC., LANCE TOKUDA AND JIA
SHEN AGAINST ICONIX, INC. FOR
DECLARATORY JUDGMENT;
VIOLATION OF CALIFORNIA
PENAL CODE § 502(C);
CONVERSION; COMMON LAW
MISAPPROPRIATION; UNFAIR
COMPETITION; AND
CONSTRUCTIVE TRUST**
JURY TRIAL DEMANDED

ANSWER TO COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12, Defendants Netpickle, Inc. (“Netpickle”), Lance Tokuda (“Tokuda”) and Jia Shen (“Shen”) answer Plaintiff’s Complaint (“Complaint”) (collectively, “Defendants”), as follows:

1. Defendants admit that the action is brought against Defendants and that Tokuda and Shen performed work for Iconix previously, but otherwise deny every allegation of paragraph 1. Defendants further deny that they have engaged in any wrongful conduct, or stole any inventions or software code owned by Iconix.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2, and therefore deny such allegations.

3. Defendants admit that Tokuda is a former employee of Iconix and resides in Foster City, California, but otherwise deny every allegation of paragraph 3.

4. Defendants admit the allegations set forth in paragraph 4.

5. Defendants admit the allegations set forth in paragraph 5.

JURISDICTION AND VENUE

6. Defendants admit the allegations set forth in paragraph 6.

7. Defendants admit the allegations set forth in paragraph 7.

FACTUAL BACKGROUND

8. Defendants admit the allegations set forth in paragraph 8 of the Complaint.

9. Defendants admit Tokuda and Shen began performing work for Iconix in or about December 2004, but otherwise are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 9 of the Complaint, and therefore deny such allegations..

10. Defendants admit that Tokuda held the titles Vice President of Engineering and Chief Technology Officer at Iconix, but otherwise are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in paragraph 10 of the Complaint, and therefore deny such allegations.

11. Defendants deny all of the allegations of paragraph 11.

1 12. Defendants admit that Shen held the title Manager of Client Development at
2 Iconix, but otherwise are without knowledge or information sufficient to form a belief as to the
3 truth of the remaining allegations set forth in paragraph 12, and therefore deny such allegations.

4 13. Defendants admit that they signed documents entitled "Proprietary Information
5 and Inventions Assignment Agreement" and that the excerpts quoted in paragraph 13, with
6 variations, are contained in the documents, but otherwise deny the allegations of paragraph 13.

7 14. Defendant admit that the excerpts quoted in paragraph 14, with variations, are
8 contained in the documents, but otherwise deny the allegations of paragraph 14.

9 15. Defendants admit that the documents appended to the Complaint as Exhibits A and
10 B purport to be copies of Proprietary Information and Inventions Agreements, but otherwise deny
11 the allegations of paragraph 15.

12 16. Defendants are without knowledge or information sufficient to form a belief as to
13 the truth of the allegations set forth in paragraph 16, and therefore deny such allegations.

14 17. Defendants are without knowledge or information sufficient to form a belief as to
15 the truth of the allegations set forth in paragraph 17, and therefore deny such allegations.

16 18. Defendants are without knowledge or information sufficient to form a belief as to
17 the truth of the allegations set forth in paragraph 18, and therefore deny such allegations.

18 19. Defendants deny that Iconix considered making a customizable slideshow.
19 Defendants are without knowledge or information sufficient to form a belief as to the truth of the
20 remaining allegations set forth in paragraph 19, and therefore deny such allegations.

21 20. Defendants are without knowledge or information sufficient to form a belief as to
22 the truth of the allegations set forth in paragraph 20, and therefore deny such allegations.

23 21. Defendants admit the allegations set forth in paragraph 21.

24 22. Defendants admit that Tokuda registered the domain name rockmyspace.com in or
25 about October 2005. As to the remaining allegations in paragraph 22, Defendants are without
26 knowledge or information sufficient to form a belief as to the truth of such allegations and
27 therefore deny them.
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1 23. Defendants admit that Tokuda formed Netpickle, Inc., but otherwise deny all of
2 the remaining allegations of paragraph 23.

3 24. Defendants deny all of the allegations of paragraph 24.

4 25. Defendants deny all of the allegations of paragraph 25.

5 26. Defendants deny all of the allegations of paragraph 26.

6 27. Defendants deny all of the allegations of paragraph 27.

7 28. Defendants admit that they received a letter from Iconix on or about March 13,
8 2006, but otherwise deny the allegations set out in paragraph 28.

9 29. Defendants deny all of the allegations of paragraph 29.

10 30. Defendants refer to and incorporate their responses set forth above to each and
11 every allegation in paragraphs 1-29 as if fully set forth herein.

12 31. Defendants deny all of the allegations of paragraph 31.

13 32. Defendants are without knowledge or information sufficient to form a belief as to
14 the truth of the allegations set forth in paragraph 32, and therefore deny such allegations.

15 33. Defendants deny all of the allegations of paragraph 33.

16 34. Defendants deny all of the allegations of paragraph 34.

17 35. Defendants deny all of the allegations of paragraph 35.

18 36. Defendants refer to and incorporate their responses set forth above to each and
19 every allegation in paragraphs 1-29 as if fully set forth herein.

20 37. Defendants deny all of the allegations of paragraph 37.

21 38. Defendants deny all of the allegations of paragraph 38.

22 39. Defendants deny all of the allegations of paragraph 39.

23 40. Defendants deny all of the allegations of paragraph 40.

24 41. Defendants deny all of the allegations of paragraph 41.

25 42. Defendants deny all of the allegations of paragraph 42.

26 43. Defendants deny all of the allegations of paragraph 43.

27 44. Defendants deny all of the allegations of paragraph 44.

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1 45. Defendants refer to and incorporate their responses set forth above to each and
2 every allegation in paragraphs 1-29 as if fully set forth herein.

3 46. Defendants deny all of the allegations of paragraph 46.

4 47. Defendants deny all of the allegations of paragraph 47.

5 48. Defendants deny all of the allegations of paragraph 48.

6 49. Defendants deny all of the allegations of paragraph 49.

7 50. Defendants deny all of the allegations of paragraph 50.

8 51. Defendants deny all of the allegations of paragraph 51.

9 52. Defendants refer to and incorporate their responses set forth above to each and
10 every allegation in paragraphs 1-29 as if fully set forth herein.

11 53. Defendants admit that Tokuda and Shen signed certain agreements, while at
12 Iconix, but otherwise deny the allegations of paragraph 53.

13 54. Defendants admit that the excerpts quoted in paragraph 54, with variations, are
14 contained in the documents, but otherwise deny the allegations of paragraph 54.

15 55. Defendants admit that the excerpts quoted in paragraph 55, with variations, are
16 contained in the documents, but otherwise deny the allegations of paragraph 55.

17 56. Defendants admit that the excerpts quoted in paragraph 56, with variations, are
18 contained in the documents, but otherwise deny the allegations of paragraph 56.

19 57. Defendants admit that the excerpts quoted in paragraph 57, with variations, are
20 contained in the documents, but otherwise deny the allegations of paragraph 57.

21 58. Defendants deny all of the allegations of paragraph 58.

22 59. Defendants deny all of the allegations of paragraph 59.

23 60. Defendants deny all of the allegations of paragraph 60.

24 61. Defendants deny all of the allegations of paragraph 61.

25 62. Defendants deny all of the allegations of paragraph 62.

26 63. Defendants refer to and incorporate their responses set forth above to each and
27 every allegation in paragraphs 1-29 and 45-65 as if fully set forth herein.

28 64. Defendants deny all of the allegations of paragraph 64.

- 1 65. Defendants deny all of the allegations of paragraph 65.
2 66. Defendants deny all of the allegations of paragraph 66.
3 67. Defendants deny all of the allegations of paragraph 67.
4 68. Defendants deny all of the allegations of paragraph 68.
5 69. Defendants deny all of the allegations of paragraph 69.
6 70. Defendants deny all of the allegations of paragraph 70.
7 71. Defendants deny all of the allegations of paragraph 71.
8 72. Defendants deny all of the allegations of paragraph 72.

9 **AFFIRMATIVE DEFENSES**

10 **First Defense**

11 73. Defendants allege that the Complaint fails to state a claim upon which relief may
12 be granted.

13 **Second Defense**

14 74. Defendants allege that some or all of Iconix's claims are barred by the doctrine of
15 laches.

16 **Third Defense**

17 75. Defendants allege that some or all of Iconix's claims are barred by the doctrine of
18 waiver.

19 **Fourth Defense**

20 76. Defendants allege that some or all of Iconix's claims are barred by the doctrine of
21 estoppel.

22 **Fifth Defense**

23 77. Defendants allege that some or all of Iconix's claims are barred by the doctrine of
24 unclean hands.

25 **Sixth Defense**

26 78. Defendants allege that some or all of Iconix's claims are barred because Iconix
27 failed to mitigate its alleged damages.
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Seventh Defense

79. Defendants allege that some or all of Iconix’s claims are barred because Defendants’ actions were not the actual or proximate cause of any damages to Iconix.

Eighth Defense

80. Defendants allege that Iconix’s copyright infringement claim is barred in whole or in part because upon information and belief, Iconix engaged in inequitable conduct before, and/or committed a fraud upon the United States Copyright Office. Specifically, on information and belief, Iconix filed the copyright registration for the copyright at issue in this case with full knowledge and awareness that the software code contained therein was created and authored and owned by Defendants in this case, and not Iconix. Upon information ad belief, un claiming that Iconix was the lawful owner of the code, Iconix misrepresented facts to the copyright office.

Ninth Defense

81. On information and belief, Defendants allege that Iconix’s copyright infringement claim is barred in whole or in part because Iconix’s copyrighted work lacks originality.

Tenth Defense

82. On information and belief, Defendants allege that Iconix’s copyright infringement claim is barred in whole or in part because Iconix does not have standing to bring such a claim.

Eleventh Defense

83. On information and belief, Defendants allege that Iconix’s copyright infringement claim is barred in whole or in part because Defendants’ action constitute permissible copying of Iconix’s alleged copyrighted materials pursuant to 17 U.S.C. § 117.

Twelfth Defense

84. Defendants allege that Iconix’s copyright infringement claim is barred in whole or in part because Iconix’s actions constitute copyright misuse.

Thirteenth Defense

85. Defendants allege that Iconix’s breach of contract claim is barred in whole or in part because it is unenforceable as against public policy.

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Fourteenth Defense

86. Defendants allege that Iconix has expressly or impliedly licensed or otherwise authorized defendants to engage in the activities challenged by Iconix.

Fifteenth Defense

87. Defendants allege that Iconix is not the true and lawful owner of the code described in its complaint.

PRAYER FOR RELIEF AS TO ICONIX’S COMPLAINT

WHEREFORE, Defendants pray:

- 1. That the Complaint be dismissed with prejudice and that Plaintiff take nothing thereby;
- 2. That the Court deny any requested injunctive relief, whether preliminary or permanent;
- 3. That the Court make a finding that the alleged copyright identified in paragraph 32 of the Complaint is null and void;
- 4. Direct Iconix to transfer immediately to Defendants all copies of any of the software code;
- 5. That the Court award Defendants attorneys’ fees and their costs of suit as authorized by law; and
- 6. For such other relief as the Court may deem proper.

Dated: March 31, 2006

I. NEEL CHATTERJEE
MICHAEL APARICIO
ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/

Michael Aparicio
Attorneys for Defendants and Counterclaimants
NETPICKLE, INC., LANCE TOKUDA
and JIA SHEN

COUNTERCLAIMS

As counter-claims against Iconix, Defendants Netpickle, Tokuda and Shen (collectively, “Counter-claimants”) allege as follows:

FIRST COUNTER-CLAIM FOR RELIEF:
(Violation of Penal Code § 502(c))

1. Counter-claimants reallege and incorporate by reference their assertions set forth in their Answer and Affirmative Defenses to Iconix’s Complaint, as is fully set forth herein.

2. California Penal Code § 502(c)(1) makes it a crime for any person to knowingly access and, without permission, alter, damage, delete, destroy, or otherwise uses any data, computer, computer system, or computer network in order to either “(A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data.”

3. Penal Code § 502(c)(2) also makes it a crime for any person to knowingly accesses and, without permission, take, copy, or make use of any data from that computer, computer system, or computer network, or take or copy any supporting documentation.

4. Upon information and belief, Iconix violated Penal Code § 502(c) by accessing computers and taking or copying the software code at issue in this lawsuit.

5. Iconix did so without permission from Counter-claimants as the owners of the data, the software code.

6. Upon information and belief, Iconix acted with the intention to and/or as part of a scheme or artifice to wrongfully control the software code and related property rights in the software code, such as the exclusive copyright, to misappropriate the software code, to convert the software code, to falsely represent to the United States Copyright Office that the software code was authored by Iconix in order to obtain a copyright in and over the software code, which belongs to Counter-claimants.

1 7. As a direct and proximate result of Iconix's acts, Counter-claimants have suffered
2 and will continue to suffer injury and, pursuant to California Penal Code § 502(e)(1), are entitled
3 to an injunction and damages in an amount to be proven at trial.

4 8. Counter-claimants are further entitled to an award of attorneys' fees pursuant to
5 California Penal Code § 502(e)(2).

6 9. By these acts, Iconix is guilty of oppression, fraud and malice, and wanton
7 disregard of Counter-claimants' rights, thereby entitling Counter-claimants to punitive damages
8 pursuant to California Penal Code § 502(e)(4), in an amount to be proven at trial.

9 **SECOND COUNTER-CLAIM FOR RELIEF:**
10 **(Conversion)**

11 10. Counter-claimants reallege and incorporate by reference paragraphs 1 through 9 as
12 stated above.

13 11. Counter-claimants are the true owners of the software code Iconix incorrectly
14 alleges through this lawsuit that it owns.

15 12. On information and belief, Iconix wrongfully obtained the software code
16 belonging to Counter-claimants and knew that the software code was not Iconix's property.

17 13. On information and belief, Iconix converted Counter-claimants' property and
18 property rights by claiming for itself ownership of the copyright in and to Counter-claimants'
19 software code, by representing to the United States Copyright Office that Iconix, rather than
20 Counter-claimants, is the author of the software code and by asserting that Iconix is entitled to
21 copyright protection for the software code.

22 14. On information and belief, by so registering Counter-claimants' work as its own to
23 obtain copyright ownership, unlawfully, and by thereafter commencing this lawsuit in an attempt
24 to keep Counter-claimants from using, reproducing and distributing its own software code, Iconix
25 has converted the software code and deprived Counter-claimants of their property right in the
26 software code, including the exclusive rights available to Counter-claimants under the Copyright
27 Act.
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1 15. As a result of the conversion, Counter-claimants have been damaged in an amount
2 to be proven at trial.

3 16. Iconix's actions in converting Counter-claimants' property were carried out
4 willfully, fraudulently, maliciously, and with wanton disregard of Counter-claimants' rights,
5 thereby entitling Counter-claimants to punitive damages in an amount to be proven at trial.

6 **THIRD COUNTER-CLAIM FOR RELIEF:**
7 **(Common Law Misappropriation)**

8 17. Counter-claimants reallege and incorporate by reference paragraphs 1 through 16
9 as stated above.

10 18. Counter-claimants invested substantial time, skill and money in developing the
11 software code that is the subject of this lawsuit.

12 19. On information and belief, Iconix appropriated and used the software code by,
13 among other things, taking the software code from Counter-claimants and registering the software
14 code with the United States Copyright Office.

15 20. Iconix's appropriation and use of the software code was without the authorization
16 or consent of Counter-claimants.

17 21. Counter-claimants have been injured by Iconix's conduct. Counter-claimants are
18 informed and believe, and on that basis allege, that Iconix's acts and conduct constitute common
19 law misappropriation and were carried out willfully, fraudulently, maliciously and with wanton
20 disregard of Counter-claimants' rights, thereby entitling Counter-claimants to punitive damages
21 to be proven at trial.

22 **FOURTH COUNTER-CLAIM FOR RELIEF:**
23 **(Unfair Competition Under California Business**
24 **And Professions Code § 17200, *et seq.*)**

25 22. Counter-claimants reallege and incorporate by reference paragraphs 1 through 21
26 as stated above.

27 23. California Business and Professions Code § 17200 *et seq.* prohibits acts of unfair
28 competition, including any and all "unlawful, unfair or fraudulent business act or practice," as
well as "unfair, deceptive, untrue or misleading advertising."

1 24. Iconix’s actions toward Counter-claimants and others, are unfair, unlawful, and
2 fraudulent. In particular, Iconix’s acts of misappropriating and converting Counter-defendants’
3 property; claiming for itself the copyright to Counter-claimants’ software code; its inequitable
4 conduct before, and possibly the commission of a fraud upon, the United States Copyright Office;
5 and violation of Penal Code § 502(c), constitute unfair, unlawful and fraudulent acts. Upon
6 information and belief, Iconix has engaged in such unlawful actions with respect to software code
7 against Counter-claimants and others.

8 25. Counter-claimants have sustained actual injury and have lost property to Iconix as
9 a direct and proximate result of Iconix’s unfair, unlawful and fraudulent acts, in that Iconix has
10 taken Counter-claimants’ software code.

11 26. Counter-claimants have been and continue to be irreparably injured and damaged
12 by Iconix’s actual and/or threatened acts of unfair competition as described herein. As a result of
13 all of Iconix’s unfair and improper actions, Counter-claimants are entitled to injunctive relief and
14 restitution in an amount to be proven at trial.

15 **FIFTH COUNTER-CLAIM FOR RELIEF:**
16 **(Declaratory Judgment, 28 U.S.C. § 2201)**

17 27. There is an actual and justiciable controversy between Iconix and Counter-
18 Claimants with respect to the ownership of the copyright in and to the software code that Iconix
19 alleges through this lawsuit that it owns.

20 28. Counter-Claimants desire a judicial determination that:

21 a. Counter-claimants are not infringing upon the copyright alleged in
22 Inconix’s Complaint (Reg. No. TXul-272-636) because Counter-claimants, either jointly or as
23 individuals, are the true and lawful owners of the copyright to the software code;

24 b. Counter-claimants are not infringing upon the copyright alleged in
25 Inconix’s Complaint (Reg. No. TXul-272-636) because Iconix has obtained the copyright through
26 inequitable conduct and/or a fraud upon the United States Copyright Office, as alleged herein and
27 through the Affirmative Defenses asserted in response to Iconix’s Complaint; and
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1 c. Counter-claimants are not infringing upon the copyright alleged in Iconix's
2 Complaint (Reg. No. TXul-272-636) because the software code is not being used by Counter-
3 claimants.

4 29. Pursuant to 28 U.S.C. § 2201, a judicial declaration is necessary and appropriate at
5 this time under the circumstances in order that Counter-claimants may ascertain their rights and
6 duties with respect to the software code which Iconix incorrectly alleges it owns.

7 **SIXTH COUNTER-CLAIM FOR RELIEF:**

8 **(Constructive Trust)**

9 30. Counter-claimants reallege and incorporate by reference paragraphs 1 through 29
10 as stated above.

11 31. As a result of Iconix's purposeful misconduct against Counter-claimants as
12 described herein, upon information and belief, Iconix has unjustly benefited, and has unjustly
13 retained that benefit, at Counter-claimants' expense.

14 32. Equity demands that the software code taken from Counter-claimants and the
15 copyright and materials subject to the copyright registration at issue, as well as all revenues and
16 earnings attributable to the unlawful conduct described herein, be held in constructive trust for
17 Counter-claimants, and that upon a proper accounting such funds should be delivered to Counter-
18 claimants.

19 **PRAYER FOR RELIEF AS TO COUNTER-CLAIMS**

20 WHEREFORE, Counter-claimants pray that the Court:

21 1. Enter judgment in favor of Counter-claimants and against Iconix on all of their
22 counter-claims;

23 2. Preliminarily and permanently enjoin Iconix, and all persons acting in concert with
24 it, from directly or indirectly obtaining, using, possessing, conveying or communicating to any
25 person any software code belonging to Counter-claimants;

26 3. Direct Iconix to transfer immediately to Counterclaimants all copies of any of the
27 software code;

28 4. Declare that Counter-claimants, and not Iconix, are the true owners of the

1 materials submitted by Iconix to the United States Copyright Office, as identified in Iconix's
2 Complaint by the Registration Number TXul-272-636.

3 5. Issue a declaration of rights pursuant to 28 U.S.C. § 2201, that:

4 a. the copyright identified by the Registration Number TXul-272-636 is null
5 and void as a result of Iconix's inequitable conduct before the U.S. Copyright Office and/or as a
6 result of a fraud upon the U.S. Copyright Office perpetrated by Iconix;

7 b. Counter-claimants are not infringing upon the copyright alleged in
8 Iconix's Complaint (Reg. No. TXul-272-636) because Counter-claimants, either jointly or as
9 individuals, are the true and lawful owners of the copyright to the software code;

10 c. Counter-claimants are not infringing upon the copyright alleged in
11 Iconix's Complaint (Reg. No. TXul-272-636) because Iconix has obtained the copyright through
12 inequitable conduct and/or a fraud upon the United States Copyright Office, as alleged herein and
13 through the Affirmative Defenses asserted in response to Iconix's Complaint; and

14 d. Counter-claimants are not infringing upon the copyright alleged in Iconix's
15 Complaint (Reg. No. TXul-272-636) because the software code is not being used by Counter-
16 claimants.

17 6. Order Iconix to pay to Counter-claimants the damages sustained by Counter-
18 claimants as a result of Iconix's wrongful and unlawful acts;

19 7. Order Iconix to pay to Counter-claimants punitive and/or exemplary damages for
20 all claims for relief for which punitive or exemplary damages are authorized;

21 8. Impose a constructive trust over Counter-claimants' property wrongfully held by
22 Iconix, including any and all such property transferred by Iconix to any third party;

23 9. Order Iconix to pay Counter-claimants' attorneys' fees and all other costs incurred
24 in this action;

25 10. Order prejudgment and post judgment interest at the maximum legal rate, as
26 applicable, as an element of damages that Counter-claimants have suffered as a result of the
27 wrongful and unlawful acts of Iconix; and

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11. Order such other relief as the Court deems just and equitable.

Dated: March 31, 2006

I. NEEL CHATTERJEE
MICHAEL APARICIO
ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/

Michael Aparicio
Attorneys for Defendants and Counterclaimants
NETPICKLE, INC., LANCE TOKUDA
and JIA SHEN

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DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Defendants/Counter-claimants Netpickle, Inc., Lance Tokuda and Jia Shen hereby demand a trial by jury on all claims properly triable to a jury, including without limitation the claims brought against them by Iconix, Inc. and the Counter-claims asserted against Iconix.

Dated: March 31, 2006

I. NEEL CHATTERJEE
MICHAEL APARICIO
ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/

Michael Aparicio
Attorneys for Defendants and Counterclaimants
NETPICKLE, INC., LANCE TOKUDA
and JIA SHEN

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F.R.C.P. 7.1 and L.R. 3-16 CERTIFICATIONS

Pursuant to Federal Rule of Civil Procedure 7.1, Defendant Netpickle, Inc. states that it has no parent corporation and no publicly traded corporation owns more than 10% of its shares.

Pursuant to Civil Local Rule 3-16, the undersigned certifies that as of this date, other than the named parties, there is no interest to report.

Dated: March 31, 2006

I. NEEL CHATTERJEE
MICHAEL APARICIO
ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/
Michael Aparicio
Attorneys for Defendants and Counterclaimants
NETPICKLE, INC., LANCE TOKUDA
and JIA SHEN