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 8 **UNITED STATES DISTRICT COURT**  
 9 **SOUTHERN DISTRICT OF CALIFORNIA**

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 11 Marketing Information Masters, Inc., a  
 California corporation,

12 Plaintiff,

13 vs.

14 The Board of Trustees of the California State  
 15 University System, a public entity acting  
 through its subdivision San Diego State  
 16 University; and Robert A. Rauch, an  
 individual,

17 Defendants.

Case No. 06 CV 1682 JAH (JMA)

**PLAINTIFF'S MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 OPPOSITION TO DEFENDANTS' RULE  
 11 MOTION**

Date: June 6, 2008  
 Time: 2:30 p.m.  
 Court: 11 (Hon. John A. Houston)

1 Plaintiff Marketing Information Masters, Inc. (“MIMI”) hereby respectfully submits this  
2 memorandum of points and authorities in opposition to the motion for Rule 11 sanctions by  
3 defendants Board of Trustees of the California State University System, acting through and  
4 representing its subdivision San Diego State University (hereinafter “SDSU”) and the individual  
5 defendant Robert Rauch.<sup>1</sup>  
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8 **I. PRELIMINARY STATEMENT**

9 The present motion presents an unfortunate yet textbook example of how the Rule 11  
10 procedure can be misused by a party to try to gain a tactical advantage in litigation. As a  
11 preliminary matter, it must be noted that the present Rule 11 motion is premature and reveals a  
12 high level of arrogance in its prosecution. By the present motion, Defendants accuse MIMI and its  
13 counsel of a Rule 11 violation because MIMI retained allegations against SDSU and Rauch in his  
14 official capacity when MIMI filed its second amended complaint in this matter.

15 But Defendants’ arrogance is revealed when it is considered that Defendants have not yet  
16 even prevailed on the motion to dismiss they brought to challenge MIMI’s inclusion of the  
17 allegations against SDSU and Rauch in his official capacity in the second amended complaint.  
18 Yet they nevertheless accused MIMI and its counsel of a Rule 11 violation one day after the filing  
19 of the second amended complaint and then rushed to file this motion even though the motion to  
20 dismiss has not yet been decided.<sup>2</sup> Of course, if Defendants do not prevail on their motion to  
21 dismiss (as should be the case), the entire basis for this Rule 11 motion is destroyed.

22 As the Court knows, Rule 11 is not a strict liability statute. So, Rule 11 sanctions cannot  
23 be automatically granted against MIMI even if the Court determines that the allegations against  
24 SDSU and Rauch in his individual capacity should not have been retained in the second amended

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25 <sup>1</sup> The factual support for this opposition is set forth in the Declaration of Gregory P. Goonan  
26 (MIMI’s counsel) submitted herewith under separate cover.

1 complaint. On the contrary, as discussed more below, Rule 11 sanctions can only be awarded if  
2 the Court concludes that (1) the inclusion of the SDSU and Rauch allegations was baseless; and  
3 (2) that the inclusion of the challenged allegations against SDSU and Rauch was made without a  
4 reasonable inquiry.

5 Defendants cavalierly accuse MIMI's counsel of either failing to read the Court's February  
6 5 Order or choosing to intentionally ignore such order (Def. Memo. At p. 4). Defense counsel  
7 cannot seriously believe such a ridiculous assertion and cannot honestly believe that MIMI's  
8 counsel would not read or would intentionally ignore a pivotal order like the February 5 Order.  
9 Without any basis whatsoever, defense counsel also engages in the wild speculation that MIMI's  
10 counsel supposedly did not research at all the issue of whether to retain the allegations against  
11 SDSU and Rauch in his official capacity before filing the second amended complaint (Def. Memo  
12 at p. 8). Again, it is hard to imagine that defense counsel honestly and seriously believes that  
13 MIMI's counsel did not conduct any research before filing the second amended complaint –  
14 certainly, Defendants have not offered any factual basis or relevant legal authority to demonstrate  
15 that they really have an honest belief in their accusations.

16 Instead, what should be painfully apparent is that Defendants and their counsel must resort  
17 to the bizarre and ridiculous rhetoric found in their motion because they do not have any legitimate  
18 basis for bringing this motion. On the contrary, as discussed below and in the accompanying  
19 Declaration of Gregory P. Goonan filed in support of this opposition, MIMI's counsel in fact  
20 thoroughly researched the issue of whether the accusations against SDSU and Rauch in his official  
21 capacity should be retained in the second amended complaint, and had a sound legal basis for  
22 retaining such allegations in the second amended complaint.

23 In the final analysis, the present motion is frivolous and wholly lacking in merit, even if  
24 the Court were to conclude that the allegations against SDSU and Rauch in his official capacity  
25 should have been omitted from the second amended complaint. Indeed, in correspondence

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27 <sup>2</sup> The true purpose of the present motion was made clear by a letter dated March 5, 2008 from  
28 Jonathan Pink, lead counsel for Defendants, to MIMI's counsel by which Mr. Pink used the threat  
of the present Rule 11 motion to try to extort a settlement from MIMI. [See Exhibit 3 hereto.]

1 between counsel prior to the filing of this motion, MIMI's counsel explained in detail his reason  
2 for including the challenged allegations against SDSU and Rauch in the second amended  
3 complaint. But defense counsel was undeterred and completely close-minded to the idea that there  
4 could be a legitimate point of view besides his own.<sup>3</sup>

5 Under the circumstances here, the pleading that should be subject to Rule 11 sanctions is  
6 the present motion given the tremendous waste of the time and resources of the Court and MIMI's  
7 counsel that has resulted from the filing of this motion. However, in sharp contrast to the  
8 approach of defense counsel as revealed by the present motion, MIMI's counsel does not believe  
9 in using a Rule 11 motion as a weapon in his litigation arsenal.

10 MIMI's counsel believes that cases should be litigated in a professional manner,  
11 recognizes that there can be legitimate differences between counsel on issues (especially where, as  
12 here, there is no case law directly on point), and (in contrast to defense counsel) understands that  
13 not every dispute rises to the level of a Rule 11 problem. So, MIMI and its counsel do not seek  
14 Rule 11 sanctions against Defendants and their counsel for filing the present frivolous Rule 11  
15 motion. Instead, MIMI and its counsel simply ask that the Court deny this baseless motion so we  
16 finally can proceed to litigate this case on the merits.

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18 **II. ARGUMENT**

19 A. There Has Not Been Any Rule 11 Violation

20 The law is well settled that Rule 11 sanctions can only be granted where a filing is  
21 frivolous. A frivolous filing is both (1) baseless and (2) made without a reasonable and competent  
22 inquiry. [*In re Keegan Management Co. Securities Litigation*, 78 F.3d 431, 434 (9<sup>th</sup> Cir. 1996).]  
23 Alternatively, sanctions Rule 11 sanctions may be granted where a filing has an improper purpose.  
24 [*See Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9<sup>th</sup> Cir.1990). As the Court

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26 <sup>3</sup> The principal correspondence between counsel prior to the filing of this motion is submitted  
27 herewith as Exhibits 1 and 2. Such correspondence (as well as the e-mail correspondence  
28 submitted with Defendants' motion) will demonstrate for the Court the difficulty that MIMI's

1 knows, Rule 11 sanctions are very serious (especially given that they may trigger a State Bar  
2 reporting requirement) so such sanctions should not be granted lightly. [*See Ibid.*]

3 As discussed below, MIMI's second amended complaint is neither frivolous nor filed for  
4 an improper purpose so the present motion should be denied:

5 MIMI and its counsel want to dispel several false and scurrilous accusations by Defendants  
6 at the outset: MIMI and its counsel fully understand and do not dispute that the Court by the  
7 February 5 Order decided that SDSU and Rauch in his official capacity enjoy immunity from  
8 MIMI's copyright infringement and state law claims here. It is important for the Court to  
9 understand that, contrary to Defendants' suggestion, MIMI did not retain the allegations against  
10 SDSU and Rauch in his official capacity in the second amended complaint out of any attempt to  
11 defy or disregard the Court's order but rather (as discussed below) based on the good faith belief  
12 following extensive legal research that it was necessary and appropriate to retain such allegations  
13 in the second amended complaint to protect MIMI's rights and interests (primarily for appeal).

14 MIMI's counsel also wants to make crystal clear that (as discussed more below) contrary  
15 to defense counsel's ridiculous claim that MIMI's counsel either did not read or chose to ignore  
16 the February 5 Order, MIMI's counsel in fact read the February 5 Order very carefully and did not  
17 choose to ignore (and did not ignore) such order, but rather researched quite thoroughly the  
18 pleading issues raised by the February 5 Order.

19 As explained in the accompanying Goonan Declaration, the Court's February 5 Order  
20 posed a dilemma for MIMI's counsel because it did not expressly state whether or not the  
21 allegations about SDSU and Rauch in his official capacity should remain in or be deleted from  
22 MIMI's second amended complaint.<sup>4</sup>

23 \_\_\_\_\_  
24 counsel has had in dealing with defense counsel about the issues raised by this motion and the  
companion motion to dismiss.

25 <sup>4</sup> It should be noted that the allegations in paragraphs 1 through 44 of the second amended  
26 complaint all would have been included in the second amended complaint even if MIMI had  
27 determined to delete its claims against SDSU and Rauch in his official capacity because such  
28 allegations are necessary to provide the background facts for MIMI's claims against Rauch in his  
individual capacity. Indeed, the only changes that would have been made from MIMI's first  
amended complaint to MIMI's second amended complaint, even if MIMI had determined to delete

1           Upon receipt of the Court’s February 5 Order, MIMI’s counsel determined that MIMI  
2 would file a second amended complaint to add additional allegations to demonstrate that MIMI’s  
3 state law claims were not preempted. As explained in the Goonan Declaration, MIMI’s counsel  
4 identified that there was an issue whether the claims against SDSU and Rauch should be kept in  
5 the second amended complaint or should be deleted. As explained in the Goonan Declaration,  
6 MIMI’s counsel carefully researched the issue but surprisingly could not locate any case law on  
7 point. So MIMI’s counsel was forced to decide the correct course of action based on analysis of  
8 general principles of pleading.

9           The law has long been settled that an amended pleading replaces and supersedes the prior  
10 pleading that is amended by the amended pleading. As the Ninth Circuit explained in its recent  
11 decision in *Ogansalu v. Nair*, 2008 WL 187050 (9<sup>th</sup> Cir. 2008), “an amended pleading supersedes  
12 the original pleading such that ‘after amendment the original pleading no longer performs any  
13 function and is treated thereafter as nonexistent’ (citing and quoting *Ferdik v. Bonzelet*, 963 F.2d  
14 1258, 1262 (9<sup>th</sup> Cir. 1992);” *see also Bullen v. De Bretteville*, 239 F.2d 824 (9<sup>th</sup> Cir. 1956)  
15 (accord).] An important corollary of this principle is that all causes of action in an original  
16 complaint that are not alleged in an amended complaint are deemed waived. [*See, e.g., King v.*  
17 *Atiyeh*, 814 F.2d 565, 567 (9<sup>th</sup> Cir. 1987).] Another important corollary of these concepts is the  
18 familiar rule that there can be only one judgment in a case.

19           As explained in the Goonan Declaration, based on the foregoing well-settled pleading  
20 concepts, counsel for MIMI determined that it was necessary and appropriate for MIMI to include  
21 the allegations and claims against SDSU and Rauch in his official capacity in the second amended  
22 complaint. MIMI’s counsel reached this conclusion for several reasons. First, given the foregoing  
23 authorities, it cannot be disputed that MIMI’s second amended complaint replaced and superseded  
24 \_\_\_\_\_  
25 its claims against SDSU and Rauch officially, would have been to change the word “Defendants”  
26 to “Rauch;” eliminate the reference to wrongdoing by SDSU in paragraphs 12, 24, 36, 37, and 38;  
27 delete paragraphs 18 and 19; and delete the reference to Rauch in his official capacity in paragraph  
28 21. Given such minor changes, MIMI submits it is hard to take seriously Defendants’ argument  
that its attack on the second amended complaint is not a textbook example of a “form over  
substance” argument.

1 its first amended complaint, thereby rendering the first amended complaint “nonexistent.”

2 But more importantly, it was MIMI’s analysis that filing a second amended complaint  
3 without the allegations and claims against SDSU and Rauch in his official capacity would result in  
4 a waiver of MIMI’s claims against SDSU and Rauch in his official capacity. While MIMI  
5 understands and accepts that the Court has found that SDSU and Rauch in his official capacity are  
6 immune from MIMI’s claims, MIMI does not want to waive such claims. Indeed, MIMI  
7 ultimately may seek review of the Court’s immunity ruling by the Ninth Circuit, and accordingly  
8 was concerned that such appellate review might be adversely impacted or rendered impossible is  
9 MIMI did not include its allegations and claims against SDSU and Rauch in its second amended  
10 complaint, thereby waiving such claims.

11 And finally, as noted, only one final judgment can be rendered in this case. MIMI was  
12 concerned that judgment could not be entered in favor of SDSU and Rauch in his official capacity  
13 if MIMI did not include its claims against SDSU and Rauch in his official capacity in the second  
14 amended complaint. Stated another way, given that MIMI’s second amended complaint  
15 superseded the first amended complaint and the first amended complaint became a nullity for  
16 pleading and judgment purposes, it is not possible in this action for one judgment to be rendered  
17 on the second amended complaint on MIMI’s claims against Rauch individually, and a separate  
18 judgment in favor of SDSU and Rauch in his official capacity on the first amended complaint.  
19 MIMI did not have this concern out of any altruistic motive – instead, MIMI’s concern about  
20 having judgment properly entered in favor of SDSU and Rauch in his official capacity was  
21 motivated by a concern that such a judgment is required to allow for appellate review of the  
22 Court’s immunity ruling.

23 As explained in the Goonan Declaration, MIMI’s counsel tested his conclusions as  
24 explained above against common sense to make sure his conclusions were grounded in reality. In  
25 undertaking such analysis, MIMI’s counsel considered two other scenarios that might have  
26 occurred in this case. Under one scenario, MIMI could have decided not to file an amended  
27 complaint to address the preemption issues, but rather just to proceed on its copyright  
28 infringement claim against Rauch individually. Under another scenario, the Court might have

1 decided that that SDSU and Rauch in his official capacity were immune, but that MIMI's state law  
2 claims were not preempted.

3 The critical point about both of the foregoing scenarios is that the first amended complaint  
4 would have stood as the operative pleading in this case. In such case, the first amended complaint  
5 would have contained and retained all of the allegations and claims against SDSU and Rauch in  
6 his official capacity that now are in dispute by this motion.

7 Certainly, under either of these scenarios, MIMI would not have had any obligation to file  
8 an amended complaint which deleted all allegations against SDSU and Rauch in his official  
9 capacity just because the Court found them immune. Instead, the allegations and claims against  
10 SDSU and Rauch in his official capacity would remain a part of the operative pleading but neither  
11 SDSU nor Rauch in his official capacity would be required to file an answer to such claims  
12 because of the Court's immunity ruling. On the contrary, only Rauch in his individual capacity  
13 would be required to file an answer to the operative complaint. The filing of the second amended  
14 complaint is the functional equivalent of the two scenarios discussed above.

15 MIMI submits the foregoing analysis shows clearly why MIMI and its counsel did not do  
16 anything improper and did not violate Rule 11 in retaining the allegations and claims against  
17 SDSU and Rauch in his official capacity in the second amended complaint notwithstanding the  
18 Court's immunity ruling.<sup>5</sup> On the contrary, the foregoing analysis makes crystal clear that the  
19 retention of the allegations against SDSU and Rauch in his official capacity had a solid basis in  
20 law and was done only after thorough and careful legal research and analysis.

21 Simply put, the second amended complaint was neither frivolous nor motivated by an  
22 improper purpose.<sup>6</sup> On the contrary, the second amended complaint was the product of extensive

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23 <sup>5</sup> The cases cited at page 7 of Defendants' memorandum in support of this motion have no  
24 application in this case and do not compel a different result. None of the cited cases deal with the  
25 specific situation presented here, which involves whether claims subject to immunity need to be  
26 deleted from an amended pleading. On the contrary, all of the cited cases deal with a situation  
27 where a court has dismissed claims and the plaintiff then sought to assert the dismissed claims in a  
28 new and separate action. That clearly is not the situation here, so the cases relied upon by  
Defendants at page 3 of their memorandum are inapposite.

<sup>6</sup> As explained in MIMI's opposition to Defendants' companion motion to dismiss, the notion  
articulated in Defendants' memorandum in support of this motion that the second amended

1 legal research and well-developed legal analysis that far surpassed he requirements of Rule 11.<sup>7</sup>  
2 The present motion accordingly is itself frivolous and without basis, and consequently should be  
3 denied. This is so even if the Court ultimately concludes that the allegations and claims against  
4 SDSU and Rauch in his official capacity should have been omitted from the second amended  
5 complaint. [*See, e.g., DeMarco v. Depotech Corp.*, 131 F. Supp. 2d 1185 (S.D. Cal. 2001) (Rule  
6 11 sanctions not warranted where pleadings, although defective, were the product of extensive  
7 research and well-developed inquiry).]

8 B. The Amount Of Sanctions Sought By Defendants Is Outrageous

9 Defendants request the incredible amount of \$7,000.00 in sanctions for filing the present  
10 motion. Such outrageous amount provides further evidence that this motion is not legitimate and  
11 has been brought for an improper purpose.

12 As discussed herein, MIMI and its counsel submit that there is no basis to impose any  
13 sanctions at all in this case. But even if some amount of sanctions was warranted (which it is not),  
14 there is no way to justify an award of \$7,000.00 for a very simple motion like the present one.  
15 Indeed, most the request (20 hours) is based on pure speculation about the amount of time it

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17 complaint supposedly does not provide Rauch in his individual capacity with “fair notice and the  
18 ability to draft a cogent answer” is, with all respect, so nonsensical that it borders on the absurd.  
19 There are only four causes of action in the second amended complaint, and it is clear from the  
20 allegations of the second amended complaint (as well as the Court’s February 5 Order) that all  
21 four causes of action have been asserted against Rauch in his individual capacity. The second  
22 amended complaint is no different than any other complaint in a multiple defendant case. Rauch’s  
23 obligation is to respond to those allegations that he reasonably determines set forth the claims  
24 against him individually (which are all of the allegations in the second amended complaint).  
25 Under such circumstances, it strains credibility (to be charitable) for Rauch to assert that he cannot  
26 understand the complaint or the claims against him, or formulate a “cogent” answer.

27 <sup>7</sup> Indeed, as set forth in the Goonan Declaration, MIMI’s counsel asked Defendants’ counsel to  
28 provide case authority that specifically held that MIMI was obligated to delete the allegations  
against SDSU and Rauch in his official capacity because of the Court’s immunity ruling. While  
defense counsel cited some general cases (which also are cited in Defendants’ memorandum in  
support of the present motion) which provided that a plaintiff could not re-file in another action  
claims that had already been dismissed, such cases really were of no help because they did not  
address the issue raised here – whether claims had to be deleted from an amended pleading  
because of an immunity ruling. Critically, defense counsel was not able to cite a single case that  
dealt with the specific situation presented here. One would think there would be some case law  
right on point if the issue was as clear as Defendants would have the Court believe by this motion.



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**Certificate of Service**

The undersigned hereby certifies that on this 5<sup>th</sup> day of May 2008, a true and accurate copy of the attached document was electronically filed with the Court, to be served by operation of the Court's electronic filing system, upon the following:

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/s/ Gregory P. Goonan