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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91198095
Party	Defendant Nimble Storage, Inc.
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Attachments	2011-03-25 - Notice of Errata.pdf ( 19 pages )(6493105 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No. 77/740,539  
For the Trademark: NIMBLE STORAGE  
Published in the Official Gazette on November 23, 2010

NIMBUS DATA SYSTEMS, INC.,	)	
	)	
Opposer,	)	
	)	Opposition No. 91198095
v.	)	
	)	
NIMBLE STORAGE, INC.,	)	
	)	
Applicant.	)	
	)	
	)	

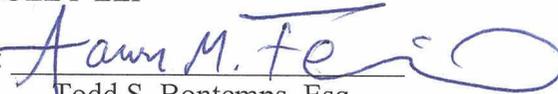
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**NOTICE OF ERRATA RE APPLICANT'S MOTION TO SUSPEND PROCEEDING  
PENDING OUTCOME OF RELATED CIVIL COURT ACTION**

On March 18, 2011, Applicant Nimble Storage, Inc. ("Applicant") filed and served its Motion to Suspend Proceeding (the "Motion"). The Motion requests suspension of this proceeding due to the filing of Opposer's Complaint in Federal district court. Page 2 of the Motion refers to the Complaint as being attached as Exhibit A. Due to administrative error, the Complaint was not attached as intended. Therefore, Applicant hereby corrects its error by submitting a copy of the Complaint.

COOLEY LLP

Date: March 25, 2011

By:   
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**Nimble Storage, Inc.**

**EXHIBIT A**

COPY

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FILED

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RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12  
13 NIMBUS DATA SYSTEMS, INC., a Delaware  
corporation,

14 Plaintiff,

15 v.

16 NIMBLE STORAGE, INC., a Delaware  
17 corporation,

18 Defendant.

CV11

1214

COMPLAINT FOR FALSE  
DESIGNATION OF ORIGIN AND  
UNFAIR COMPETITION UNDER  
FEDERAL LAW,  
CYBERSQUATTING UNDER  
FEDERAL LAW, UNFAIR  
COMPETITION UNDER STATE  
LAW, DECEPTIVE, FALSE, AND  
MISLEADING ADVERTISING  
UNDER STATE LAW, AND  
COMMON LAW TRADEMARK  
INFRINGEMENT

JURY TRIAL DEMANDED

1 Plaintiff Nimbus Data Systems, Inc. (“Nimbus” or “Plaintiff”), as its complaint against  
2 Defendant Nimble Storage, Inc. (“Nimble” of “Defendant”), alleges as follows:

3 **PARTIES**

4 1. Nimbus is a corporation organized and existing under the laws of the state of  
5 Delaware with its principal place of business at One Market Street, 36<sup>th</sup> Floor, San Francisco,  
6 California 94105.

7 2. Upon information and belief, Nimble is a corporation organized and existing under  
8 the laws of Delaware with its principal place of business at 2645 Zanker Road, Suite 100,  
9 San Jose, California 95134.

10 **JURISDICTION**

11 3. This Court has jurisdiction over this action pursuant to 15 U.S.C. § 1121 (action  
12 arising under the Lanham Act); 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1338(a) (any act  
13 of Congress relating to trademarks); 28 U.S.C. § 1338(b) (action asserting claim of unfair  
14 competition joined with a substantial and related claim under trademark laws); and 28 U.S.C.  
15 § 1367 (supplemental jurisdiction).

16 4. Nimble is subject to personal jurisdiction in the state of California because, on  
17 information and belief, its principal place of business is in this judicial district, the unlawful  
18 conduct complained of herein causes injury in this judicial district, and Nimble transacts business  
19 and derives revenue in this judicial district.

20 **VENUE**

21 5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) in that  
22 Nimble’s principal place of business is in this judicial district and a substantial part of the events  
23 giving rise to this Complaint occurred in this judicial district.

24 **NATURE OF THE ACTION**

25 6. This is an action for trademark infringement under federal and California law that  
26 Nimbus brings to protect some of its most important assets, namely the goodwill and recognition  
27 associated with the trademarks NIMBUS™ and NIMBUS DATA™ (collectively, “the  
28 NIMBUS™ Marks”). Since 2003, Nimbus has used and extensively promoted the NIMBUS™

1 Marks in connection with high-speed data storage systems that are used in the storage, backup,  
2 and management of electronic data over computer networks. As described more fully below,  
3 without Nimbus's authorization or consent, and with knowledge of Nimbus's prior rights in the  
4 NIMBUS™ Marks, Nimble commenced using and continues to use NIMBLE and NIMBLE  
5 STORAGE (collectively "the NIMBLE Marks") as trademarks in connection with data storage  
6 systems that compete directly with Nimbus products. Through its conduct, Nimble has created  
7 circumstances whereby members of the public and members of the relevant trade have been and  
8 are likely to continue to be confused to believe incorrectly that Nimble's products are authorized  
9 by, sponsored by, or affiliated with Nimbus. Nimbus accordingly brings this action in order to  
10 protect its valuable trademarks and to halt the harm it has suffered and will continue to suffer as a  
11 result of Nimble's actions.

#### 12 INTRADISTRICT ASSIGNMENT

13 7. Because this case involves a dispute over intellectual property, intradistrict  
14 assignment does not apply. Civil L.R. 3-2(c).

#### 15 GENERAL ALLEGATIONS

##### 16 Nimbus's Business and the NIMBUS™ Marks

17 8. Business enterprises and datacenters have been increasingly struggling with  
18 nonstop data growth while storage capacity, complexity, and operating costs have grown  
19 relentlessly over the past decade. Since 2003, Nimbus has offered storage solutions that combine  
20 revolutionary storage software and hardware to deliver exponential improvements in application  
21 performance and power efficiency while automating and simplifying storage administration and  
22 dramatically reducing datacenter operating costs. Nimbus has received acclaim for its product,  
23 including being selected for the Product of the Year by *Storage Magazine/SearchStorage.com* in  
24 2010, as the Best Midrange Storage System by *Tech Awards Circle* in 2010, and one of the Most  
25 Promising Storage Startups by *StorageNewsletter.com* in 2011. As a result, Nimbus is well  
26 known in the data storage industry for its data storage solutions, with over 200 customers relying  
27 on NIMBUS™ storage systems and over 18,000 customers relying on NIMBUS™ storage  
28 software for their enterprise storage management.





1 Nimbus's S-class products, the Nimble products offer inline data deduplication, snapshot backup,  
2 replication, and RAID as data protection features. The systems, like Nimbus's use Intel x64  
3 processors and rackmount chassis from the same manufacturer, also featuring removable power  
4 supplies, drives, and fans. Nimble's CS-Series storage systems typically cost between \$60,000  
5 and \$100,000—the same range as Nimbus's competing products.

6 18. Nimble claims its "CASL" technology uses solid state drives (SSD) to accelerate  
7 storage performance and assist in data compression, mimicking an approach originally developed  
8 by Nimbus in its "hybrid" H-class storage systems, released April 2, 2008, over two years before  
9 Nimble. Nimble now claims this approach as its unique invention and intellectual property,  
10 causing further confusion with Nimbus' existing H-class customers who believe Nimbus  
11 pioneered this technology.

12 19. On information and belief, Nimble also targets midsize businesses for its storage  
13 products and claims to have customers in the same fields as Nimbus, including high tech,  
14 financial services, healthcare, and state and local governments. Since its product launch last  
15 summer, Nimble's products have been reviewed in precisely the same publications where  
16 Nimbus's products are routinely reviewed, including but not limited to *SearchStorage.com*,  
17 *StorageNewsletter.com*, *eWeek.com*, and *Network Computing*.

18 20. Nimbus became aware of Nimble's activities on April 4, 2010. On information  
19 and belief, Nimble had not formally launched its products at that time. In fact, Nimble's website  
20 displayed only a logo and an indication that more information would be available "soon." Shortly  
21 thereafter, in an attempt to avoid confusion prior to Nimble's actual launch, Nimbus's CEO sent a  
22 letter to Nimble's CEO on April 23, 2010, making him aware of Nimbus's long-standing  
23 trademark, the high likelihood of market confusion that would ensue should Nimble publicly  
24 launch using the Nimble brand, and Nimbus's desire to avoid costly litigation for both parties.  
25 The letter outlined the similarities between: (1) the trademarks, (2) the goods already offered by  
26 Nimbus and the goods Nimble was planning to offer (going so far as to describe overlap in the  
27 specific technology used in the competing data storage systems and highlighting the similar  
28 aesthetic appearances—including the blue color—of the companies' products and branding), and

1 (3) the two companies' target customer bases and channels of trade. Attached hereto as Exhibit A  
2 is a true and correct copy of the April 2010 letter.

3 21. Nimbus was particularly concerned because it understood that Nimble had not  
4 only selected a confusingly similar name for its company, it would be using the name with a  
5 system that directly competed with Nimbus's enterprise network storage systems that provided  
6 network-attached primary storage and backup systems that also incorporated solid state-drive  
7 ("SSD") technology.

8 22. Nimble refused to comply with Nimbus's demand. The CEO of Nimble responded  
9 to Nimbus's April 23, 2010 letter with a letter stating that he did not believe there would be any  
10 confusion in the marketplace and that Nimble had no intention of changing its name. Attached  
11 hereto as Exhibit B is a true and correct copy of that letter. Instead, less than one month after  
12 receiving Nimbus's April 23, 2010 letter, Nimble applied to register the mark NIMBLE  
13 STORAGE with the United States Patent and Trademark Office (Serial No. 77,740,539). It  
14 subsequently launched its competing product line under the confusingly similar NIMBLE  
15 STORAGE trademark, which, not surprisingly, resulted almost instantly in confusion. For  
16 example, almost immediately after Nimble's products were launched, publications started to refer  
17 to Nimble Storage—as *Nimbus* Storage. In fact, several publications written by industry experts,  
18 who are well positioned to know the difference between companies and their products, use  
19 NIMBUS and NIMBLE interchangeably to refer to Defendant or Plaintiff (to the point that it is  
20 not clear which company is intended to be the subject of the article):

21 While Sharon Fisher broke the **Nimble Storage** news as it  
22 happened here, I found their story compelling enough that a deeper  
23 dive would be useful. **Nimble's** primary claim to fame is the  
24 combination of flash memory as a huge read and write through  
cache with 1TB SATA drives to create a high performance system  
that can not only act as a primary iSCSI array but also store enough  
snapshots to replace conventional backups.

25 The basic CS220 combines a 640GB flash cache with 12 1TB  
26 SATA drives for 9TB of useable capacity and what **Nimble's** folks  
27 claim is the equivalent of 108TB of backup data. Like StorWise or  
28 even NTFS, they do LZ style compression on data before saving it.  
They then use their own log-based file system that always writes  
full stripes to the RAID back end, making much random I/O—which

1 SATA drives don't handle well--look more like sequential I/O,  
2 which SATA drives are pretty good at.

3 **Nimbus** uses redirect on write snapshots, which unlike the more  
4 common copy on write variety, should have limited impact on  
5 performance even if you retain a large number of snapshots for a  
6 long time. Of course snapshots alone aren't a replacement for  
7 backups since an explosive power supply failure, or the like, that  
8 destroys the system also destroys the data and the snapshots. My  
9 friend W, Curtis Preston, who was also at the event, has written that  
10 a combination of snapshots and replication could replace daily  
11 backups, but it would still need a metadata index to help you find  
12 the version of a file you want to restore.

13 Today, **Nimble** doesn't quite allow you to replace your backup  
14 system. They can only replicate between two systems so you have  
15 to choose between a local copy for fast restores and a remote copy  
16 for disaster protection. They have promised cascading replication  
17 in a future version of the software.

18 23. Another blog includes the following:

19 **Nimbus Storage** has unveiled the **Nimble** CS-Series, which is  
20 intended for midsize companies of 200 to 2000 employees. The  
21 CS-series combines primary flash storage and secondary SATA  
22 storage, providing high-speed flash access at a reasonable cost  
23 along with simpler backup and disaster recovery. It is available in  
24 two configurations: CS220 (effective capacity 9TB primary and  
25 108TB for 60-90 days of integrated backup), and CS240 (effective  
26 capacity 18TB primary and 216TB backup). Each configuration  
27 offers high availability through redundant, hot-swappable  
28 controllers, power supplies, fans and drives and resiliency  
capabilities. The CS-Series comes with thin provisioning,  
replication, zero-copy cloning, application-integrated data  
protection, and diagnostics and support. It supports both VMware,  
and Microsoft HyperV environments.

29 24. Subsequent to the launch of Nimble's products, Nimbus's CEO, Thomas  
30 Isakovich, has repeatedly been approached by potential customers who have been confused  
31 between Nimble and Nimbus, including at the Storage Networking World trade show in Dallas in  
32 October 2010 and, more recently, at the Storage Visions trade show in Las Vegas in January  
33 2011.

34 25. Confusion is not limited to customers at trade shows—on-line postings reflect  
35 confusion as well. For example, on January 24, 2011, a prospective customer sought information  
36 about the "Nimbus Data S-Class" product from colleagues in the industry and posted his question  
37  
38

1 on the Ars Technica Open Forum at [www.arstechnica.com](http://www.arstechnica.com). After several reply postings about  
2 Nimbus, the person who wrote the original message wrote:

3  
4 *"I stand corrected, I confused Nimbus with Nimble."*  
5

6 26. This confusion will undoubtedly continue because the two companies offer  
7 competing products under marks that are extremely similar—NIMBUS and NIMBLE—and  
8 readily confusable, and that are repeatedly discussed in the same publications. For example, the  
9 parties were mentioned as "number one" and "number two" in a January 24, 2011 article titled  
10 "Most Promising Storage Start-Ups" in *StorageNewsletter.com*. Similarly, in a December 10,  
11 2010 issue of *InformationWeek's* "Storage Blog," Nimbus and Nimble were mentioned side-by-  
12 side as vendors in the enterprise storage space: "There are many other storage vendors that are  
13 innovating their way into be considered part of that next wave of enterprise storage alternatives,  
14 companies like: \*BlueArc, \*Coraid, \*Nexsan, **Nimble Storage**, \*Nimbus and \*Promise  
15 Technology, to name a few."

16 27. In addition to using NIMBLE and NIMBLE STORAGE as its trademarks and  
17 trade name, Nimble has also registered the domain [nimblestorage.com](http://nimblestorage.com). Its use of that domain has  
18 caused and will continue to cause consumers to be led to incorrectly believe that Defendant's  
19 products are authorized by, sponsored by, or affiliated with Nimbus.

20 28. Nimble's unlawful and infringing conduct is unjustly enriching Nimble at the  
21 expense of Nimbus, as consumers have been confused and misled by Nimble's adoption of the  
22 NIMBLE STORAGE trademark and name and are likely to purchase Nimble's products as a  
23 result of this confusion.

24 29. On January 6, 2011, Nimbus filed a Notice of Opposition to Nimble's application  
25 to register the NIMBLE STORAGE trademark. In addition, on January 7, 2011, Nimbus sent  
26 Nimble a cease and desist letter to address the conduct complained of herein and attempt to reach  
27 an amicable resolution to this dispute. However, Nimble stonewalled and waited fully six weeks  
28 to respond to the letter, and then only offered to "further engage with Nimbus Data in a business

1 discussion.” Nimbus has no interest in a business discussion with a company that continues to  
2 willfully trade on its NIMBUS™ Marks.

3 **FIRST CLAIM FOR RELIEF**

4 **FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION**  
5 **15 U.S.C. § 1125(a)**

6 30. Nimbus realleges and incorporates herein Paragraphs 1 through 29 of this  
7 Complaint.

8 31. Nimbus has common law rights in the NIMBUS™ Marks and in the color blue  
9 used in connection with data storage systems. These rights predate Nimble’s use of the NIMBLE  
10 Marks and the color blue.

11 32. Nimble’s use of the NIMBLE Marks and the color blue in connection with  
12 competing products is likely to cause confusion as to the origin of Nimble’s competing products  
13 and is likely to cause, and has caused, consumers and industry professionals to believe that there  
14 is a relationship between Nimble and Nimbus.

15 33. Nimble’s actions complained of herein are likely to cause, and have caused,  
16 confusion, mistake, or deception among consumers and industry professionals as to an affiliation,  
17 connection, or association of Nimble and its products with Nimbus, in violation of Section 43 of  
18 the Lanham Act, 15 U.S.C. § 1125(a).

19 34. Nimble’s unauthorized conduct has deprived and will continue to deprive Nimbus  
20 of the ability to control the perception of industry professionals and consumers of its products  
21 marketed under the NIMBUS™ Marks, placing the valuable reputation and goodwill of Nimbus  
22 in the hands of Nimble, over whom Nimbus has no control.

23 35. Because Nimble has refused to cease its infringing conduct despite repeated  
24 requests by Nimbus, Nimble has acted willfully.

25 36. As a result of Nimble’s conduct, Nimbus has suffered substantial damage and  
26 irreparable harm to its NIMBUS™ Marks, constituting an injury for which Nimbus has no  
27 adequate remedy at law. Unless this Court enjoins Nimble’s conduct, Nimbus will continue to  
28 suffer irreparable harm.



1 between Nimble and Nimbus, particularly when those source designators are used in connection  
2 with products that rely on the same technology that has been associated with Nimbus.

3 46. The above-described acts and practices by Nimble are likely to mislead or deceive  
4 the general public and industry professionals and therefore constitute fraudulent business  
5 practices in violation of California Business & Professions Code §§ 17200, *et seq.*

6 47. The above-described acts further constitute acts that violate Section 43(a) of the  
7 Lanham Act, 15 U.S.C. § 1125(a), and constitute unlawful acts in violation of California Business  
8 & Professions Code §§ 17200, *et seq.*

9 48. The unlawful and fraudulent business practices of Nimble described above present  
10 a continuing threat to and are meant to deceive members of the public in that Nimble continues to  
11 promote its products by wrongfully trading on the goodwill of Nimbus's NIMBUS™ Marks.

12 49. As a direct and proximate result of these acts, Nimble has profited and will  
13 continue to profit from the strength of Nimbus's NIMBUS™ Marks.

14 50. As a direct and proximate result of Nimble's wrongful conduct, Nimbus has been  
15 injured in fact and has lost money and profits, and such harm will continue unless Nimble's acts  
16 are enjoined by the Court. Nimbus has no adequate remedy at law for Nimble's continuing  
17 violation of Nimbus's rights.

18 51. Because Nimble has refused to cease its conduct despite repeated requests by  
19 Nimbus, Nimble has acted willfully.

20 52. Nimble should be required to restore to Nimbus any and all profits earned as a  
21 result of its unlawful and fraudulent actions, or provide Nimbus with any other restitutionary  
22 relief as the Court deems appropriate.

23 **FOURTH CLAIM FOR RELIEF**

24 **STATE DECEPTIVE, FALSE, AND MISLEADING ADVERTISING**  
25 **CALIFORNIA BUS. & PROF. CODE §§ 17500, *ET SEQ.***

26 53. Nimbus realleges and incorporates herein Paragraphs 1 through 52 of this  
27 Complaint.



1 is likely to cause consumers and industry professionals to believe that there is a relationship  
2 between Nimble and Nimbus, and constitutes common law trademark infringement.

3 63. Nimble's unauthorized conduct has deprived and will continue to deprive Nimbus  
4 of the ability to control the perception of industry professionals and consumers of its products  
5 marketed under the NIMBUS™ Marks, placing the valuable reputation and goodwill of Nimbus  
6 in the hands of Nimble, over whom Nimbus has no control.

7 64. Because Nimble has refused to cease its infringing conduct despite repeated  
8 requests by Nimbus, Nimble has acted willfully.

9 65. As a direct and proximate result of these acts, Nimble has profited and will  
10 continue to profit from the strength of Nimbus's NIMBUS™ Marks.

11 66. As a result of Nimble's conduct, Nimbus has suffered substantial damage and  
12 irreparable harm to its NIMBUS™ Marks, constituting an injury for which Nimbus has no  
13 adequate remedy at law. Unless this Court enjoins Nimble's conduct, Nimbus will continue to  
14 suffer irreparable harm.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Nimbus requests that this Court enter a judgment and declaration in favor  
17 of Nimbus and against Nimble as follows:

18 A. Preliminarily and permanently enjoining and restraining Nimble, all entities under  
19 its control, as well as any associated subsidiaries, licensees, owners, directors, officers, partners,  
20 assigns, related entities, predecessors, successors, employees, representatives, trustees, receivers,  
21 agents, and any other persons or entities acting on behalf of Nimble, in concert with Nimble, or  
22 with Nimble's authority, from:

23 1. using, selling, offering for sale, holding for sale, advertising or promoting  
24 data storage products under or in connection with any trade name, trademark, Internet domain  
25 name or other designation of origin that is comprised in whole or in part of the NIMBLE or  
26 NIMBLE STORAGE designation, or any terms, designations, designs, or styles confusingly  
27 similar thereto; or  
28

1                   2.       doing any act or thing that is likely to induce the belief that Nimble and/or  
2 Nimble's products are in some way connected with Nimbus and/or its business, or that is likely to  
3 injure or damage Nimbus or its NIMBUS™ Marks; and

4           B.       Ordering Nimble to:

5                   1.       pay Nimbus the compensatory damages sustained by Nimbus as a result of  
6 the unlawful acts alleged herein and that such damages be trebled pursuant to 15 U.S.C. § 1117  
7 because of the willful and unlawful acts alleged herein;

8                   2.       pay Nimbus punitive damages as a consequence of the willful and wanton  
9 acts alleged herein;

10                  3.       account for and pay over to Nimbus all gains, profits and advantages  
11 derived by it from the unlawful acts alleged herein;

12                  4       deliver up for destruction all materials that bear either of the infringing  
13 NIMBLE and NIMBLE STORAGE designations, including without limitation all letterhead,  
14 signage, brochures, labels, stickers, trade show displays and materials, written materials and other  
15 promotional materials;

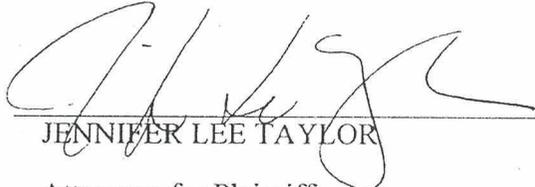
16                  5.       reimburse Nimbus for the costs it has incurred in bringing this action,  
17 together with its reasonable attorneys' fees and disbursements;

18                  6.       pay Nimbus's costs of corrective advertising; and

19       C.       Awarding such other and further relief as this Court may deem proper.  
20

21 Dated: March 11, 2011

JENNIFER LEE TAYLOR  
WILLIAM A. CHRISTOPHER  
MORRISON & FOERSTER LLP

22  
23  
24 By: 

JENNIFER LEE TAYLOR

Attorneys for Plaintiff  
NIMBUS DATA SYSTEMS, INC.

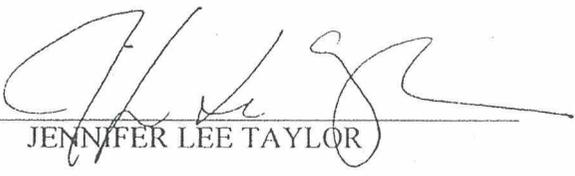
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**JURY DEMAND**

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Nimbus demands a trial by jury as to all issues so triable in this action.

Dated: March 11, 2011

JENNIFER LEE TAYLOR  
WILLIAM A. CHRISTOPHER  
MORRISON & FOERSTER LLP

By:   
JENNIFER LEE TAYLOR

Attorneys for Plaintiff  
NIMBUS DATA SYSTEMS, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing NOTICE OF ERRATA RE APPLICANT'S MOTION TO SUSPEND PROCEEDING PENDING OUTCOME OF RELATED CIVIL COURT ACTION was mailed, first-class postage prepaid, to counsel for Opposer at the address listed below, this 25<sup>th</sup> day of March 2011.

Counsel for **Nimbus Data Systems, Inc.**  
Jennifer Lee Taylor  
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425 Market Steet  
San Francisco, CA 94105



Heather Hunt