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

Proceeding	91221438
Party	Plaintiff Node Source LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application Serial No. : 86/174,797  
Mark : THE NODE FIRM  
International Class : 42  
Applicant : YLD Limited  
Filed : January 24, 2014  
Published : October 7, 2014

-----X  
The Node Firm, LLC :  
Opposer, :  
v. : Opposition No. 91221438  
YLD Limited :  
Applicant. :  
-----X

**MEMORANDUM OF OPPOSER THE NODE FIRM, LLC IN OPPOSITION TO  
APPLICANT YLD LIMITED'S MOTION TO DISMISS**

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Opposer The Node Firm, LLC (“Opposer” or “The Node Firm”) respectfully submits this memorandum in opposition to the motion to dismiss filed by YLD Limited (“Applicant” or “YLD”) in this Opposition No. 91221438 (the “Opposition”).

**I. Preliminary Statement**

YLD’s motion to dismiss (“YLD’s Motion”) is both procedurally improper and directly contradicts YLD’s position taken in *YLD Limited v. The Node Firm, LLC et al*, Civil Action No. 1:15-cv-00855-JPO (S.D.N.Y. Feb. 5, 2015) (the “Pending Civil Action”, cited as a Related Proceeding in Opposer’s Notice of Opposition), which Pending Civil Action may well be dispositive of this Opposition.

By filing YLD’s Motion instead of a customary request to suspend, YLD is attempting to avoid compliance with the policies that govern this Opposition, and to secure relief that has no authoritative support. YLD’s Motion is facially defective, and improperly seeks to circumvent the requirements set forth in § 206.02 and § 303.05(b) of the Trademark Trial and Appeal Board Manual of Procedure (the “TBMP”).

YLD’s assertions that the Board lacks jurisdiction because Opposer has not sufficiently shown privity between The Node Firm – the party that filed the Notice of Opposition – and Node Source, LLC (“Node Source”) – the party that requested and was granted extensions of time to file the Opposition – also belie allegations made by YLD in the Pending Civil Action. In the Pending Civil Action, YLD asserts that The Node Firm and Node Source – *the very same parties challenged by YLD as not being in privity in this Opposition* – are one and the same. Accordingly, and as demonstrated more fully below, YLD’s Motion should be denied in all respects.

## II. Statement of Facts

### A. The Opposition

On January 24, 2014, YLD filed Application Serial No. 86/174,797 (the “Offending Application”) for the mark THE NODE FIRM (the “Offending Mark”) in International Class 42. The Offending Application was published for opposition on October 7, 2014, providing until November 6, 2014 for any party who believes it will be damaged by the registration of the Offending Mark to file a notice of opposition (or extension of time therefor) against the Offending Application. *See* Klein Decl., Exh. A.

On November 5, 2014, Node Source requested a ninety (90) day extension of time to oppose the Offending Application and, with YLD’s consent, on February 4, 2015, Node Source requested a further sixty (60) day extension of time to oppose the Offending Application. *See* Klein Decl., Exhs. B, D. Such extension requests were granted by the Board, providing until April 5, 2015 to file an opposition. *See* Klein Decl., Exhs. C, E. Pursuant to 37 CFR § 2.196, because April 5, 2015 was a Sunday, the deadline to file an opposition against the Offending Application was automatically extended to the next succeeding day that was not a Saturday, Sunday or Federal holiday, i.e., Monday, April 6, 2015.

On April 6, 2015, The Node Firm filed a Notice of Opposition (the “Notice”) against the Offending Application, thereby initiating this Opposition. *See* Klein Decl., Exh. F. The Notice alleges that the Offending Application is void *ab initio*; that YLD committed fraud on the U.S. Patent & Trademark Office; that the Offending Mark is descriptive and YLD has not established the requisite secondary meaning to support its registration thereof; that the Offending Mark has been abandoned by YLD; that use of the Offending Mark by YLD falsely suggests a connection with Opposer; and that any use of the Offending Mark by YLD is likely to cause confusion with Opposer’s mark THE NODE FIRM. *Id.* at pp. 3-8. The Notice states that Node

Source, LLC, now NodeSource, Inc., a corporation duly formed and existing under the laws of the State of Delaware, is in privity with The Node Firm for purposes of TBMP § 206.02. *Id.* at pp. 1-2.

The Notice was accepted to the satisfaction of the Board, and this Opposition was instituted.

B. The Pending Civil Action

On February 5, 2015, i.e., the day after YLD provided its consent to file an additional sixty (60) day extension of time to oppose the Offending Application, YLD filed a complaint (“YLD’s Complaint”) to institute the Pending Civil Action in the U.S. District Court of the Southern District of New York against Opposer The Node Firm, Node Source, and the individuals Daniel Shaw (“Shaw”) and Joe McCann (“McCann”)<sup>1</sup>, who are or were members of these companies (collectively, “The Node Defendants”). YLD’s Complaint asserts federal claims of trademark infringement under 15 U.S.C. § 1125(a), and federal claims of copyright infringement under various sections of the Copyright Act, relating to The Node Defendants’ allegedly infringing use of the mark THE NODE FIRM, and their alleged reproduction, display and distribution (directly or by inducement of others) of certain training materials in connection with the mark THE NODE FIRM (copy of YLD’s Complaint attached hereto as Klein Decl., Exh. G).

In YLD’s Complaint, YLD also asserts certain state law actions, including a claim for fraudulent conveyance against Node Source based on YLD’s theory that The Node Firm transferred and conveyed assets to Node Source with no or inadequate consideration. *See* Klein Decl., Exh. G ¶¶ 144-152. In particular, YLD’s Complaint alleges the following regarding the

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<sup>1</sup> Another individual, Isaac Schlueter, was initially a named defendant, but has since been dismissed.

relationship between The Node Firm (referred to as “TNF LLC”), Node Source, Shaw and McCann (numbered in accordance with the paragraph numbers of YLD’s Complaint):

59. Upon information and belief, it was the intent of [TNF LLC, Node Source, Isaac Schlueter, Shaw and McCann] that Node Source absorb the business of TNF LLC.
60. Upon information and belief, Node Source is engaged in the same business as TNF LLC, in that like TNF LLC, Node Source is engaged in the business of providing consulting, training and support services for Node.js programmers using the Training Materials and unauthorized derivatives thereof.
61. Upon information and belief, Node Source has continued to use substantially the same management and personnel, structure, assets, property, customer lists, and business format and general business operations as that of TNF LLC.
62. Upon information and belief, Node Source assumed the assets of TNF LLC, without adequate compensation therefor, and is operating as a mere continuation of TNF LLC.
63. Upon information and belief, Node Source took and is utilizing all of the assets of TNF LLC including cash, contracts and receivables, without adequate compensation to TNF LLC therefor.
147. Upon information and belief, following the formation of Node Source, Shaw, McCann, Schlueter and TNF LLC transferred and conveyed TNF LLC’s assets, including cash, receivables and contracts to Node Source.

On May 4, 2015, The Node Defendants filed a motion to dismiss certain of the state claims alleged in the Pending Civil Action, and a motion to transfer the Pending Civil Action to the Northern District of California.<sup>2</sup> See Klein Decl., Exh. H. In particular, as relevant here, The Node Defendants stated that YLD’s fraudulent conveyance claim was irrelevant because, *inter alia*, the context presented is not a bankruptcy or debtor/creditor action, and in any

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<sup>2</sup> The federal trademark and copyright claims were not the subject of Opposer’s motion to dismiss, and thus are expected to remain in the Pending Civil Action upon transfer to the Northern District of California.

event, both The Node Firm and Node Source are named as defendants in the Pending Civil Action. *Id.* at pp. 21-23.

In response to The Node Defendants' motion to dismiss, YLD filed an amended complaint in the Pending Civil Action ("YLD's Amended Complaint", copy attached hereto as Klein Decl., Exh. I). YLD's Amended Complaint was filed on May 28, 2015, i.e., nine (9) days after YLD filed YLD's Motion in this Opposition.

YLD's Amended Complaint attempts to bolster certain of YLD's allegations against The Node Defendants, further emphasizing the relatedness between The Node Firm, Node Source and NodeSource Inc. YLD's Amended Complaint also reiterates that Shaw and McCann own the majority of the ownership interest in both The Node Firm and Node Source, and that both such entities, and the property and assets thereof, remain under the control of Shaw and McCann. *See* Klein Decl., Exh. I ¶¶ 161, 163. Additionally, YLD's Amended Complaint introduces NodeSource, Inc. as a party<sup>3</sup>, and alleges that Shaw and McCann own and control NodeSource, Inc., and that NodeSource, Inc. is "operating as a mere continuation of Node Source." *Id.* at ¶¶ 179, 181.

In particular, YLD's Amended Complaint alleges the following regarding the relationship between The Node Firm (again referred to as "TNF LLC"), Node Source, NodeSource, Inc. (referred to as "NS Inc."), Shaw and McCann (numbered in accordance with the paragraph numbers of YLD's Amended Complaint):

61. Upon information and belief, on or about February 25, 2014...Shaw and McCann formed a new company under the name Node Source LLC.

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<sup>3</sup> Opposer's Notice states that "Node Source, LLC is now NodeSource, Inc., a corporation duly formed and existing under the laws of the State of Delaware...." *See* Klein Decl. Exh. F at pp. 1-2. A Certificate of Conversion evidencing the conversion of Node Source, LLC to NodeSource, Inc. is attached at Klein Decl., Exh. J.

62. Upon information and belief, it was the intent of Defendants that Node Source absorb and continue the business of TNF LLC.
63. Upon information and belief, Node Source is engaged in the same business as TNF LLC, in that, like TNF LLC, Node Source is engaged in the business of providing consulting, training and support services for Node.js programmers using the Training Materials and unauthorized derivatives thereof.
64. Upon information and belief, Node Source has continued to use substantially the same management and personnel, structure, assets, property, customer lists, and business format and general business operations as that of TNF LLC.
65. Upon information and belief, TNF LLC transferred all of its assets including but not limited to, property, customer lists, capital, cash, contracts, receivables, and business operations to Node Source, without adequate, fair or any compensation therefor.
66. Upon information and belief, Node Source is operating as a mere continuation of TNF LLC.
75. Upon information and belief, through the present [TNF LLC, Node Source, NS Inc., Shaw and McCann] continue to use and exploit the Training Materials and “The Node Firm” trade name for their own commercial purposes without authorization or permission from YLD.
151. Upon information and belief, Node Source and NS Inc., have also benefitted from the use of “The Node Firm” name and the goodwill associated therewith as they have taken over the business of TNF LLC and are mere continuations of the same and benefit from the reputation and goodwill associated with “The Node Firm” brand.
158. Upon information and belief, TNF LLC transferred all of its assets including, property, customer lists, capital, cash, contracts, receivables, and business operations to Node Source, an entity owned and controlled by McCann and Shaw, without adequate or any compensation therefor, and Node Source is operating as a mere continuation of TNF LLC.
163. Upon information and belief, after the above transfers, Shaw and McCann still retained control over the property and

assets that were transferred from TNF LLC to Node Source, by virtue of their control over Node Source.

181. Upon information and belief, by virtue of this conversion Node Source transferred all of its assets including, property, customer lists, capital, cash, contracts, receivables, and business operations to NS Inc., an entity owned and controlled by McCann and Shaw, without adequate or any compensation therefor, and NS Inc., is operating as a mere continuation of Node Source.
184. Upon information and belief NS Inc., is deemed to be the same entity as Node Source.
199. Upon information and belief, within days after being served with the Complaint in the within action Node Source, an entity owned and controlled by McCann and Shaw, transferred and/or gave possession of its assets, including property, customer lists, capital, cash, contracts, receivables, and business operations to NS Inc., and all rights thereto, without adequate or any compensation therefor, and NS, Inc., is operating as a mere continuation of Node Source.
200. Upon information and belief, Node Source transferred all of its assets including but not limited to, property, customer lists, capital, cash, contracts, receivables, and business operations, to NS Inc., without adequate or fair compensation.
201. Upon information and belief, Shaw and McCann own the majority of the ownership interest in Node Source and NS Inc.
203. Upon information and belief, after the above transfers, Shaw and McCann still retained control over the property and assets that were transferred from Node Source to NS Inc., by virtue of their control over NS Inc.

(the allegations in ¶¶ 59-63, 147 of YLD's Complaint, and in ¶¶ 61-66, 75, 151, 158, 163, 181, 184, 199 – 201, 203 of YLD's Amended Complaint, are hereinafter referred to collectively as "YLD's Privity Allegations").

The fraudulent transfer claims alleged in YLD's Complaint and YLD's Amended Complaint are dependent on YLD's Privity Allegations that The Node Firm and Node Source are

the same entity and/or have transferred all assets successively from one entity to the other. *See* Klein Decl., Exh. I ¶¶ 154-218. The Amended Complaint also alleges that the operations, decisions, property and assets of The Node Firm, Node Source and NodeSource, Inc. are under common control, i.e., control by Shaw and McCann. *See, e.g., id.* at ¶¶ 15, 16, 18, 19, 158, 163, 179, 181, 196, 199 and 203.

### III. Legal Standard

Pursuant to TBMP § 206.02, “[a] request for a further extension, or an opposition, filed by a different party will not be rejected on that ground if it is shown *to the satisfaction of the Board* that the different party is in privity with the party granted the previous extension. The ‘showing’ should be in the form of a recitation of the facts upon which the claim of privity is based, and *must be submitted either with the request or opposition, or during the time allowed by the Board in its action requesting an explanation of the discrepancy*” (emphasis added). TBMP § 303.05(b) similarly states that “[a] party in privity with a potential opposer may step into the potential opposer’s shoes and file a notice of opposition or may join with the potential opposer as a joint opposer.” TBMP § 303.05(b) contains nearly the identical language regarding the “showing” of privity required, and then refers to TBMP § 206.02 “[f]or information concerning the meaning of the term ‘privity.’” TBMP § 206.02 goes on to explain that “[i]n the field of trademarks, the concept of privity generally includes, *inter alia*, the relationship of successive ownership of a mark (e.g., assignor, assignee) and the relationship of ‘related companies’ within the meaning of Trademark Act § 5 and Trademark Act § 45, 15 U.S.C. § 1055 and 15 U.S.C. § 1127.” Trademark Act § 45 defines “related company” as “any person whose use of a mark is controlled by the owner of the mark with respect to the nature and quality of the goods or services on or in connection with which the mark is used.”

#### IV. Argument

##### A. YLD's Motion to Dismiss is Procedurally Improper

YLD's Motion requests that the Board dismiss the Opposition on the grounds that The Node Firm failed to allege facts in the Notice "that would allow the Board to find that there was a sufficient showing that privity exists" between The Node Firm and Node Source. *See* YLD's Motion at p. 4. Under TBMP § 206.02, if the Board is satisfied that there is privity between the party that filed a notice of opposition and a different party that was granted the previous extension, the opposition will not be rejected. Such a showing of privity "must be submitted either with the request or opposition, or during the time allowed by the Board in its action requesting an explanation of the discrepancy." TBMP § 206.02.

Here, The Node Firm alleges in its Notice that it is in privity with Node Source for purposes of § 206.02.<sup>4</sup> The Opposition was initiated, i.e., it was not rejected. Moreover, the Board did not issue an action requesting an explanation of any discrepancy between The Node Firm, i.e., the party that filed the Notice, and Node Source, i.e., the party that was granted the previous extensions.

On this record, the only possible conclusion is that the showing made by Opposer was to the satisfaction of the Board. Moreover, even if the Board were to decide that there is a "discrepancy," the proper remedy is for the Board to issue an action requesting an explanation thereof. *See* TBMP § 206.02. The record is devoid of any evidence that would permit the Board to decide the privity issue based on YLD's Motion alone. YLD's request for the Board to dismiss this Opposition based on an issue that has not been challenged by the Board – an issue that the Board is required to ask more about if it has any questions – is procedurally improper.

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<sup>4</sup> The Notice also states that Node Source, LLC is now NodeSource, Inc., and accordingly such privity extends thereto. *See* Klein Decl., Exh. F at pp. 1-2.

The cases that YLD cites in support of YLD's Motion are inapposite. In *Renaissance Rialto Inc. v. Ky Boyd*, 107 U.S.P.Q. 1083 (T.T.A.B. 2013), the case on which YLD most heavily relies, the Board decided the issue of privity only after substantial briefing, discovery, and testimony depositions took place between the parties on the merits of the case. Likewise, in *Cass Logistics v. McKesson Corp.*, 27 U.S.P.Q.2d 1075 (T.T.A.B. 1993), the TTAB granted applicant's motion to dismiss based on lack of jurisdiction *after* the Board requested and then accepted the opposer's explanation of the parties' discrepancy. Indeed, the Board generally determines the issue of privity and its own jurisdiction only after discovery and/or evidentiary submissions have taken place. *See, e.g., Mo. Silver Pages Directory Publ'g Corp. Inc. v. Sw. Bell Media, Inc.*, 6 U.S.P.Q.2d 1028 (T.T.A.B. 1988) (denying summary judgment because there was a question of fact in the record as to privity); *see also Custom Computer Servs., Inc., v. Paychex Props., Inc.*, 337 F.3d 1334, 1337 (Fed. Cir. 2003) (reversing the Board's dismissal of a notice of opposition as having been untimely filed on the grounds that the Board's findings were "not supported by substantial evidence"). No such discovery has occurred here.

Moreover, the cases YLD cites in support of the particularity requirements for pleading causes of action are entirely irrelevant to YLD's Motion. A showing of privity with respect to the filing of an opposition is unrelated to the pleading standard for stating claims to relief as required by *Iqbal* and *Twombly*. Instead, TBMP § 206.02 and § 303.05(b) govern the showing of privity in connection with the filing of an opposition, and state that such a showing must be submitted "either with the opposition, or during the time allowed by the Board in its letter requesting an explanation of the discrepancy." Significantly, YLD has submitted *no* authority for its demand that the Board decide the issue of privity without any underlying factual record or before the Board itself requests an explanation of any discrepancy it might perceive.

Opposer submits that privity has already been shown to the satisfaction of the Board. Notwithstanding, in the event that the Board seeks a further explanation of this issue as contemplated by TBMP § 206.02, Opposer is prepared to provide the same.

B. YLD's Privity Allegations in the Pending Civil Action are Sufficient to Defeat YLD's Motion

YLD's challenge of privity between The Node Firm and Node Source in YLD's Motion is directly contrary to YLD's Privity Allegations made in YLD's Complaint and YLD's Amended Complaint. As set forth in Section II(B) above, YLD's Privity Allegations include assertions that "it was the intent of [the Node] Defendants that Node Source absorb and continue the business of TNF LLC" and that "Node Source has continued to use substantially the same management and personnel, structure, assets, property, customer lists, and business format and general business operations as that of TNF LLC." Klein Decl., Exh. I ¶¶ 62, 64. YLD further argues that "Node Source is operating as a mere continuation of TNF LLC" and that "the present [Node] Defendants continue to use and exploit... 'The Node Firm' trade name..." *Id.* at ¶¶ 66, 75. Notably, YLD alleges that both Node Source and NodeSource, Inc. have "benefited from the use of 'The Node Firm' name and the goodwill associated therewith as they have taken over the business of TNF LLC and are mere continuations of same and benefit from the reputation and goodwill associated with 'The Node Firm' brand." *Id.* at ¶ 151. Indeed, YLD's claims of trademark and copyright infringement in the Pending Civil Action depend wholly on its allegations that privity between The Node Firm and Node Source exists with respect to transfer and use of the mark THE NODE FIRM.

Accordingly, it is not only untenable, but also disingenuous, for YLD to challenge privity between The Node Firm and Node Source in the Opposition, while relying on its own factual allegations of such privity in the Pending Civil Action to support its causes of action.

These *precise issues* of privity are what underlie YLD's allegations in the Pending Civil Action, and what will ultimately be decided by the court as the Pending Civil Action moves forward.

V. Conclusion

For each of the foregoing reasons, Opposer respectfully submits that the Board should deny Applicant's motion to dismiss in all respects.

Respectfully submitted,

Dated: New York, NY  
June 8, 2015

KRAMER LEVIN NAFTALIS & FRANKEL LLP  
Attorneys for Opposer The Node Firm, LLC



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**CERTIFICATE OF SERVICE**

I hereby certify that on June 8, 2015, I caused one true and correct copy of the foregoing Memorandum of Opposer The Node Firm, LLC in Opposition to Applicant YLD Limited's Motion to Dismiss, and the accompanying Declaration of Erica D. Klein, with Exhibits, to be served by first class mail upon Applicant YLD Limited by causing a true and correct copy thereof to be deposited in the United States mail, postage prepaid, addressed to counsel for Applicant as follows:

Sarah M. Matz  
Adelman Matz P.C.  
1173A Second Avenue, Suite 153  
New York, NY 10065

  
Erica D. Klein

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

In re Application Serial No. : 86/174,797  
Mark : THE NODE FIRM  
International Class : 42  
Applicant : YLD Limited  
Filed : January 24, 2014  
Published : October 7, 2014

-----X  
The Node Firm, LLC :  
Opposer, :  
v. : Opposition No. 91221438  
YLD Limited :  
Applicant. :  
-----X

**DECLARATION OF ERICA D. KLEIN**

I, Erica D. Klein, under penalty of perjury, hereby declare as follows:

1. I am a partner with the law firm of Kramer Levin Naftalis & Frankel LLP, representing Opposer The Node Firm, LLC (“Opposer” or “The Node Firm”) in this proceeding. I have personal knowledge of the facts set forth in this declaration, except as otherwise stated, and am competent to testify as to all matters stated.
2. I make this declaration in support of The Node Firm’s opposition to the motion to dismiss filed by YLD<sup>1</sup> in the above-captioned proceeding.

<sup>1</sup> All capitalized and abbreviated terms not otherwise defined herein shall have the same meaning as set forth in The Node Firm’s accompanying Memorandum in Opposition to YLD’s Motion to Dismiss.

3. I hereby attest to my personal knowledge that attached as Exhibit A is a true and correct copy of the *Trademark Official Gazette* Publication Confirmation indicating that the Offending Application was published in the *Trademark Official Gazette* on October 7, 2014.

4. I hereby attest to my personal knowledge that attached as Exhibit B is a true and correct copy of the First 90 Day Request for Extension of Time to Oppose for Good Cause filed by Node Source against the Offending Application on November 5, 2014 (“Node Source’s 90 Day Request”).

5. I hereby attest to my personal knowledge that attached as Exhibit C is a true and correct copy of the Board’s grant of Node Source’s 90 Day Request, extending the time to oppose the Offending Application until February 4, 2015.

6. I hereby attest to my personal knowledge that attached as Exhibit D is a true and correct copy of the 60 Day Request for Extension of Time to Oppose Upon Consent filed by Node Source against the Offending Application on February 4, 2015 (“Node Source’s 60 Day Request”).

7. I hereby attest to my personal knowledge that attached as Exhibit E is a true and correct copy of the Board’s grant of Node Source’s 60 Day Request, further extending the time to oppose the Offending Application until April 5, 2015.

8. I hereby attest to my personal knowledge that attached hereto as Exhibit F is a true and correct copy of the Notice of Opposition filed by The Node Firm against the Offending Application on April 6, 2015.

9. I hereby attest to my personal knowledge that attached hereto as Exhibit G is a true and correct copy of the Complaint and Demand for Jury Trial filed by YLD on February 5,

2015 in the Pending Civil Action, *YLD Limited v. The Node Firm, LLC et al*, Civil Action No. 1:15-cv-JPO (S.D.N.Y. Feb. 5, 2015).

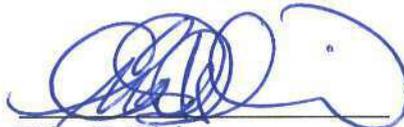
10. I hereby attest to my personal knowledge that attached hereto as Exhibit H is a true and correct copy of the Memorandum of Law in Support of Defendants' (The Node Firm, LLC, Node Source, LLC, Daniel Shaw and Joe McCann) Motion to Transfer to the Northern District of California and to Dismiss Certain Causes of Action for Failure to State a Claim filed by The Node Defendants in the Pending Civil Action on May 4, 2015.<sup>2</sup>

11. I hereby attest to my personal knowledge that attached hereto as Exhibit I is a true and correct copy of the Amended Complaint and Demand for Jury Trial filed by YLD in the Pending Civil Action on May 28, 2015.

12. I hereby attest to my personal knowledge that attached hereto as Exhibit J is a true and correct copy of the Certificate of Conversion evidencing the conversion of Node Source, LLC to NodeSource, Inc.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 8<sup>th</sup> day of June, 2015.



Erica D. Klein

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<sup>2</sup> Concurrent with the filing of the attached Memorandum of Law, The Node Defendants also filed the following supporting materials in the Pending Civil Action: (1) Notice of Motion; (2) Declaration of Daniel Shaw, with accompanying exhibits; and (3) Declaration of Erica D. Klein, with accompanying exhibits. These materials are all of public record as part of the docket in the Pending Civil Action. Copies of these materials have not been submitted here, as there is no reference made to them in Opposer's Memorandum to which this Declaration is attached. The Node Firm shall readily provide copies of such materials, should the Board request for it to do so.

**EXHIBIT A**

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**From:** TMOOfficialNotices@USPTO.GOV  
**Sent:** Tuesday, October 7, 2014 00:21 AM  
**To:** erik@eraklaw.com  
**Cc:** erakoczy@gmail.com  
**Subject:** Official USPTO Notice of Publication Confirmation: U.S. Trademark SN 86174797: THE NODE FIRM

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## **TRADEMARK OFFICIAL GAZETTE PUBLICATION CONFIRMATION**

**U.S. Serial Number:** 86-174,797  
**Mark:** THE NODE FIRM  
**International Class(es):** 042  
**Owner:** YLD Limited  
**Docket/Reference Number:**

The mark identified above has been published in the Trademark Official Gazette (TMOG) on Oct 07, 2014.

### **To View the Mark in the Next Generation TMOG (eOG):**

Click on the following link or paste the URL into an internet browser: <https://tmog.uspto.gov/#issueDate=2014-10-07&serialNumber=86174797>

### **To View the Mark in the Legacy format TMOG:**

1. Click on the following link or paste the URL into an internet browser:  
[http://www.uspto.gov/web/trademarks/tmog/20141007\\_OG.pdf#page=00000885](http://www.uspto.gov/web/trademarks/tmog/20141007_OG.pdf#page=00000885).
2. Locate your mark on the displayed page.

If the TMOG PDF file does not open to the page containing your mark (you must have an Adobe Reader installed on your workstation), click on the following link or paste the URL into an internet browser to review the Frequently Asked Questions about the Trademark Official Gazette: [http://www.uspto.gov/trademarks/resources/tm\\_og\\_faqs.jsp](http://www.uspto.gov/trademarks/resources/tm_og_faqs.jsp).

On the publication date or shortly thereafter, the applicant should carefully review the information that appears in the TMOG for accuracy. If any information is incorrect due to USPTO error, the applicant should immediately email the requested correction to [TMPostPubQuery@uspto.gov](mailto:TMPostPubQuery@uspto.gov). For applicant corrections or amendments after publication, please file a post publication amendment using the form available at <http://teasroa.uspto.gov/ppa/>. For general information about this notice, please contact the Trademark Assistance Center at 1-800-786-9199.

### **Significance of Publication for Opposition:**

Any party who believes it will be damaged by the registration of the mark may file a notice of opposition (or extension of time therefor) with the Trademark Trial and Appeal Board. If no party files an opposition or extension request within thirty (30) days after the publication date, then eleven (11) weeks after the publication date a certificate of registration should issue.

To view this notice and other documents for this application on-line, go to <http://tsdr.uspto.gov/search.action?sn=86174797>.

NOTE: This notice will only become available on-line the next business day after receipt of this e-mail.

**EXHIBIT B**

ESTTA Tracking number: **ESTTA637212**

Filing date: **11/05/2014**

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

Applicant:	<b>YLD Limited</b>
Application Serial Number:	<b>86174797</b>
Application Filing Date:	<b>01/24/2014</b>
Mark:	<b>THE NODE FIRM</b>
Date of Publication	<b>10/07/2014</b>

## **First 90 Day Request for Extension of Time to Oppose for Good Cause**

Pursuant to 37 C.F.R. Section 2.102, Node Source LLC, c/o Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, NY 10036, UNITED STATES, a Limited Liability Company, organized under the laws of Texas, respectfully requests that it be granted a 90-day extension of time to file a notice of opposition against the above-identified mark for cause shown.

Potential opposer believes that good cause is established for this request by:

- The potential opposer needs additional time to investigate the claim

The time within which to file a notice of opposition is set to expire on 11/06/2014. Node Source LLC respectfully requests that the time period within which to file an opposition be extended until 02/04/2015.

Respectfully submitted,

/Erica D. Klein/

11/05/2014

**Erica D. Klein**

**Kramer Levin Naftalis & Frankel LLP**

**1177 Avenue of the Americas**

**New York, NY 10036**

**UNITED STATES**

**kltrademark@kramerlevin.com**

# **EXHIBIT C**

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

Erica D. Klein  
Kramer Levin Naftalis & Frankel LLP  
1177 Avenue of the Americas  
New York, NY 10036

**Mailed: November 5, 2014**

**Serial No.: 86174797**  
**ESTTA TRACKING NO: ESTTA637212**

The request to extend time to oppose is granted until  
**2/4/2015** on behalf of potential opposer **Node Source LLC**

Please do not hesitate to contact the Trademark Trial and  
Appeal Board at (571)272-8500 if you have any questions  
relating to this extension.

**Note from the Trademark Trial and Appeal Board**

TTAB forms for electronic filing of extensions of time to  
oppose, notices of opposition, petition for cancellation, notice  
of ex parte appeal, and inter partes filings are now available  
at <http://estta.uspto.gov>. Images of TTAB proceeding files can  
be viewed using TTABVue at <http://ttabvue.uspto.gov>.

**EXHIBIT D**

ESTTA Tracking number: **ESTTA653949**

Filing date: **02/04/2015**

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

Applicant:	<b>YLD Limited</b>
Application Serial Number:	<b>86174797</b>
Application Filing Date:	<b>01/24/2014</b>
Mark:	<b>THE NODE FIRM</b>
Date of Publication	<b>10/07/2014</b>

## **60 Day Request for Extension of Time to Oppose Upon Consent**

Pursuant to 37 C.F.R. Section 2.102, Node Source LLC, c/o Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of Americas, New York, NY 10036, UNITED STATES respectfully requests that he/she/it be granted an additional 60-day extension of time to file a notice of opposition against the above-identified mark with applicant's consent.

The time within which to file a notice of opposition is set to expire on 02/04/2015. Node Source LLC respectfully requests that the time period within which to file an opposition be extended until 04/05/2015.

Respectfully submitted,  
/Erica D. Klein/  
02/04/2015

**Erica D. Klein**

**Kramer Levin Naftalis & Frankel LLP**

**1177 Avenue of Americas**

**New York, NY 10036**

**UNITED STATES**

**KLTrademark@KramerLevin.com**

**EXHIBIT E**

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

Erica D. Klein  
Kramer Levin Naftalis & Frankel LLP  
1177 Avenue of the Americas  
New York, NY 10036

**Mailed: February 4, 2015**

**Serial No.: 86174797**  
**ESTTA TRACKING NO: ESTTA653949**

The request to extend time to oppose is granted until  
**4/5/2015** on behalf of potential opposer **Node Source LLC**

Please do not hesitate to contact the Trademark Trial and  
Appeal Board at (571)272-8500 if you have any questions  
relating to this extension.

**Note from the Trademark Trial and Appeal Board**

TTAB forms for electronic filing of extensions of time to  
oppose, notices of opposition, petition for cancellation, notice  
of ex parte appeal, and inter partes filings are now available  
at <http://estta.uspto.gov>. Images of TTAB proceeding files can  
be viewed using TTABVue at <http://ttabvue.uspto.gov>.

# **EXHIBIT F**

ESTTA Tracking number: **ESTTA665207**

Filing date: **04/06/2015**

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

**Notice of Opposition**

Notice is hereby given that the following party opposes registration of the indicated application.

**Opposer Information**

Name	The Node Firm, LLC
Granted to Date of previous extension	04/05/2015
Address	c/o Kramer Levin Naftalis & Frankel LLP 1177 Avenue of the Americas New York, NY 10036 UNITED STATES
Party who filed Extension of time to oppose	Node Source LLC
Relationship to party who filed Extension of time to oppose	Node Source, LLC, now NodeSource, Inc., is in privity with The Node Firm, LLC for purposes of TBMP Â§ 206.02.

Correspondence information	The Node Firm, LLC c/o Kramer Levin Naftalis & Frankel LLP 1177 Avenue of the Americas New York, NY 10036 UNITED STATES kltrademark@kramerlevin.com Phone:212-715-9205
----------------------------	--

**Applicant Information**

Application No	86174797	Publication date	10/07/2014
Opposition Filing Date	04/06/2015	Opposition Period Ends	04/05/2015
Applicant	YLD Limited 32-38 Scrutton St. STE# 5 London,, EC2A4RQ UNITED KINGDOM		

**Goods/Services Affected by Opposition**

Class 042. First Use: 2011/11/28 First Use In Commerce: 2011/11/28 All goods and services in the class are opposed, namely: Computer programming; Computer programming consultancy; Computer software consulting; Computer software development and computer programming development for others; Creating of computer programs
---

**Grounds for Opposition**

False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)
The mark is merely descriptive	Trademark Act section 2(e)(1)

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Other	Void Ab Initio; Abandonment

### Mark Cited by Opposer as Basis for Opposition

U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	THE NODE FIRM		
Goods/Services	Computer programming; computer programming consultancy; computer software consulting; computer software development and computer programming development for others; creating of computer programs		

Related Proceedings	YLD Limited v. The Node Firm, LLC et al, Case No. 1:15-cv-00855-JPO (S.D.N.Y. Feb. 5, 2015)
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Attachments	Notice of Opposition.pdf(1877769 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Erica D. Klein/
Name	The Node Firm, LLC
Date	04/06/2015



Source, LLC, now NodeSource, Inc., a corporation duly formed and existing under the laws of the State of Delaware, is in privity with The Node Firm for purposes of TBMP § 206.02.

The grounds for opposition are set forth below.

## **I. BACKGROUND**

### **A. Opposer.**

1. Opposer is the owner of common law rights in the name and mark THE NODE FIRM (“Opposer’s Mark”), which such name and mark has been used by or on behalf of Opposer since at least as early as November 28, 2011 in connection with services including computer programming; computer programming consultancy; computer software consulting; computer software development and computer programming development for others; and creating of computer programs (“Opposer’s Services”).

2. Through Opposer’s long term use of Opposer’s Mark in connection with Opposer’s Services, Opposer’s Mark has acquired secondary meaning as a source of Opposer’s Services.

3. Through Opposer’s long term use of Opposer’s Mark in connection with Opposer’s Services, Opposer’s Mark has acquired significant value and goodwill.

4. Through Opposer’s long term use of Opposer’s Mark in connection with Opposer’s Services, Opposer’s Mark is closely associated with Opposer, its owners and employees, and work performed by them or on their behalf.

### **B. Applicant.**

5. The Offending Application seeks registration of the Offending Mark for use in connection with Computer programming; Computer programming consultancy; Computer software consulting; Computer software development and computer programming development for others; Creating of computer programs in International Class 42 (the “Offending Services”).

6. The Offending Application was filed on January 24, 2014 (the “Filing Date”) based on Section 1(a) of the Trademark Act.

7. The Offending Application alleges November 28, 2011 as the date that the Offending Mark was first used by Applicant in connection with the Offending Services, and as the date that the Offending Mark was first used in commerce by Applicant in the United States in connection with the Offending Services.

## **II. GROUNDS FOR OPPOSITION**

### **A. The Offending Application is Void *Ab Initio* Because Applicant Had No Use of the Offending Mark in Connection with the Offending Services Prior to the Filing Date.**

8. Upon information and belief, the Offending Mark was not created by Applicant or any predecessor thereof.

9. Upon information and belief, Applicant is a foreign corporation that operates under the laws of the United Kingdom.

10. Upon information and belief, the LinkedIn profile for Applicant, a true and correct copy of which is attached as Exhibit A hereto, indicates that Applicant was formed in 2013.

11. Upon information and belief, since its formation, Applicant has not used the Offending Mark in connection with the Offending Services.

12. Upon information, Applicant, for its own behalf, has never used the Offending Mark in connection with any of the Offending Services.

13. Because Applicant was not rendering the Offending Services at the time it filed its use-based application for the Offending Mark, the Offending Application is void *ab initio*.

**B. The Offending Application is Void *Ab Initio* Because the Services Applicant Relied Upon to Support the Offending Application Were Performed for the Benefit of Opposer.**

14. Opposer repeats and realleges the allegations stated in Paragraphs 1- 13 hereof and incorporates the same by reference as though fully restated herein.

15. Upon information and belief, Mr. Nuno Job (“Job”) is a founder of Applicant.

16. Upon information and belief, prior to founding Applicant, Job offered services including computer programming; computer programming consultancy; computer software consulting; computer software development and computer programming development for others; and creating of computer programs as part of a collaboration with persons including founders of Opposer.

17. All computer programming; computer programming consultancy; computer software consulting; computer software development and computer programming development for others; and creating of computer programs performed by Job under the Offending Mark were performed on behalf of Opposer or a predecessor thereof.

18. Because the Offending Services performed by Job under the Offending Mark were performed on behalf of Opposer or a predecessor thereof, Job had no rights in the Offending Mark as a result of his performance of any Offending Services.

19. Job’s performance of the Offending Services under the Offending Mark do not inure to the benefit of Applicant.

20. Job’s performance of the Offending Services under the Offending Mark are an insufficient basis for Applicant to support the Offending Application.

21. The Offending Application is void *ab initio* because any Offending Services rendered by Job under the Offending Mark did not inure to the benefit of Applicant or a predecessor thereof (and instead inured to the benefit of Opposer or a predecessor thereof), and

thus the Offending Services had not been performed on behalf of Applicant or a predecessor thereof at the time Applicant filed its use-based application for the Offending Mark.

**C. The Offending Application is Void Because Applicant Committed Fraud on the PTO.**

22. Opposer repeats and realleges the allegations stated in Paragraphs 1-21 hereof and incorporates the same by reference as though fully restated herein.

23. Upon information and belief, Applicant knew at the time that it executed and filed the Offending Application that Applicant was not rendering the Offending Services at the time it filed its use-based application for the Offending Mark.

24. Upon information and belief, Applicant knew at the time that it executed and filed the Offending Application that any Offending Services performed by Job did not inure to the benefit of Applicant or any predecessor thereof.

25. Upon information and belief, Applicant knew at the time that it executed and filed the Offending Application that any Offending Services performed by Job were performed for the benefit of Opposer or a predecessor thereof.

26. Upon information and belief, Applicant knew at the time that it executed and filed the Offending Application that the Offending Mark was not in use in commerce by or on behalf of Applicant in connection with the Offending Services.

27. Upon information and belief, Applicant knew at the time it executed and filed the Offending Application that the specimens submitted in support of the Offending Application, true and correct copies of which are attached hereto as Exhibit B (the "Specimens"), were not actually in use in commerce by or on behalf of Applicant.

28. Upon information and belief, Applicant knew at the time it executed and filed the Offending Application that the Specimens did not show use in commerce by or on behalf of Applicant in the rendering or advertising of the Offending Services.

29. Upon information and belief, by filing the Offending Application, representing that the Offending Mark was in use in commerce by Applicant in the United States in connection with the Offending Services, Applicant knowingly made a false, material representation with the intent to deceive the United States Patent and Trademark Office (“PTO”).

30. Upon information and belief, as a result of the aforementioned acts of Applicant, the PTO relied on Applicant’s false statement that the Offending Mark was in use in commerce by Applicant in the United States in connection with the Offending Services, and thereby approved the Offending Application for publication.

31. Upon information and belief, Applicant’s fraud in the execution and filing of the Offending Application requires that the Offending Application be deemed void and that this opposition be sustained.

**D. The Offending Mark is Descriptive, and Applicant Has Not Established the Requisite Secondary Meaning to Support Registration.**

32. Opposer repeats and realleges the allegations stated in Paragraphs 1-31 hereof and incorporates the same by reference as though fully restated herein.

33. The Offending Mark is comprised of the term THE NODE FIRM.

34. The word NODE describes Node.js, which is an open source, cross-platform runtime environment for server-side and networking applications.

35. The word FIRM describes a type of business organization.

36. The Offending Mark is merely descriptive under §2(e)(1) of the Trademark Act, as it describes a characteristic and purpose of the Offending Services recited in the Offending Application, namely, a business organization that performs computer programming; computer programming consultancy; computer software consulting; computer software development and computer programming development for others; and creating of computer programs, in the Node.js programming language.

37. To be registerable on the Principal Register, the Offending Mark must have acquired distinctiveness.

38. Because Applicant has not established acquired distinctiveness of the Offending Mark, and for the reasons stated above could not establish acquired distinctiveness of the Offending Mark, Applicant is not entitled to registration of the Offending Mark covered by the Offending Application.

**E. The Offending Mark Has Been Abandoned by Applicant.**

39. Opposer repeats and realleges the allegations stated in Paragraphs 1-38 hereof and incorporates the same by reference as though fully restated herein.

40. Opposer alleges in the alternative that, if Applicant, or any predecessor thereof, has at any time used the Offending Mark in connection with the Offending Services on Applicant's behalf: (a) the Offending Mark has not been used in connection with the Offending Services by or on behalf of Applicant or any predecessor thereof for several years; and (b) Applicant has an intent not to resume use of the Offending Mark in connection with the Offending Services.

**F. Any Use of the Offending Mark on Applicant's Behalf Falsely Suggests a Connection with Opposer.**

41. Opposer repeats and realleges the allegations stated in Paragraphs 1-40 hereof, as applicable, and incorporates the same by reference as though fully restated herein.

42. Through Opposer's use of THE NODE FIRM to identify Opposer's Services, such mark has acquired significant value and goodwill as a source of Opposer's Services, and is closely associated with Opposer, its owners and employees, and work performed by them or on their behalf.

43. Opposer alleges in the alternative that, if Applicant, or any predecessor thereof, has at any time used the Offending Mark in connection with the Offending Services on

Applicant's behalf, such use falsely suggests a connection with Opposer, and therefore violates the rights of Opposer under Section 2(a) of the Trademark Act.

**G. Any Use of the Offending Mark on Applicant's Behalf is Likely to Cause Confusion with Opposer's Mark.**

44. Opposer repeats and realleges the allegations stated in Paragraphs 1-43 hereof, as applicable, and incorporates the same by reference as though fully restated herein.

45. Opposer alleges in the alternative that, if Applicant, or any predecessor thereof, has at any time used the Offending Mark in connection with the Offending Services on Applicant's behalf, such use is likely to cause confusion with Opposer's Mark and therefore violates the rights of Opposer under Section 2(d) of the Trademark Act.

WHEREFORE, Opposer requests that this opposition be sustained and that Application Serial No. 86/174,797 for the mark THE NODE FIRM be refused registration.

This Notice is being filed electronically with the Board, and is being served on Applicant, through its attorney of record, at Applicant's correspondence address of record with the PTO. Proof of Service is attached hereto.

Respectfully submitted,

Dated: New York, NY  
April 6, 2015

KRAMER LEVIN NAFTALIS & FRANKEL LLP  
Attorneys for Opposer The Node Firm, LLC

  
By: Erica D. Klein  
1177 Avenue of the Americas  
New York, New York 10036  
(212) 715-9205 (telephone)  
(212) 715-8000 (fax)  
KLtrademark@kramerlevin.com

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2015, I caused one true and correct copy of the foregoing Notice of Opposition against U.S. Application No. 86/174,797 for THE NODE FIRM, and accompanying Exhibits, to be served by first class mail upon YLD Limited, by causing a true and correct copy thereof to be deposited in the United States mail, postage prepaid, addressed to Applicant's attorney of record, at the correspondence address of record with the PTO as follows:

Sarah M. Matz  
Adelman Matz P.C.  
1173A Second Avenue, Suite 153  
New York, NY 10065



---

Erica D. Klein

Opposition filed against  
Application No. 86/174,797  
The Node Firm, LLC v. YLD Limited  
Exhibit A Filed by The Node Firm, LLC

## **EXHIBIT A**

[What is LinkedIn?](#) [Join Today](#) [Sign In](#)



**YLD**

Home

From concept to product we build high performance, stable node.js products. Responsible for some of the largest Node.js solutions in production today. We are based in London. Created by Nuno Job and Pedro Teixeira, engineers responsible for the Nodejitsu Cloud.

**Specialties**

Node.js, Consulting, Docker, Training

**Website**

<http://yld.io>

**Industry**

Computer Software

**Type**

Privately Held

**Headquarters**

32-38 Scrutton St, Suite 5 London, EC2A 4RQ United Kingdom

**Company Size**

1-10 employees

**Founded**

2013

60 followers

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**YLD employees**

**14** Employees on LinkedIn

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Opposition filed against  
Application No. 86/174,797  
The Node Firm, LLC v. YLD Limited  
Exhibit B Filed by The Node Firm, LLC

## **EXHIBIT B**



the  
**NODE FIRM**

projects are developed around



**Sebastian Tiedtke**

 **sourishkrout**



Products  
Pricing  
Technology  
Partners  
Company

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## The Node Firm and Joyent Offer Node.js Training

August 28, 2013 - by **The Node Firm**

SHARE

The post originally appeared on [The Node Firm blog](#).

Since its inception, The Node Firm has been the go-to choice for corporate Node.js training. We've excited to begin offering open enrollment training too. We are launching our public trainings at the home of Node.js at Joyent in San Francisco. Custom tailored training doesn't fit all budgets and some teams are just so lean that flying in experts doesn't make sense. We hope you come join us for these inaugural sessions.

### Increased Demand for Professional Training

Node.js has become the number one choice for creating scalable, efficient, real-time services. This has led to an increasing need to train developers in Node.js from startups to government to Fortune 100 corporations. Companies like IBM, Oracle, Microsoft, Google and others have been relying on Node.js in the production stack since 2010. Node has now become the default choice for new development, enabling rapid development with robust scalability and unparalleled ease of use for developers.

“The simple truth is Node has revolutionized the way we create websites. Developers just love it.”  
- [Chris Williams](#), [Senior Software Engineer](#), [Google](#)

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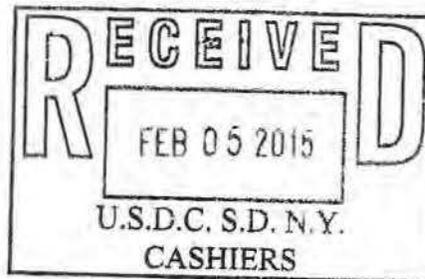
Contact Us

**EXHIBIT G**

JUDGE VETREN

15 CV 00855

ADELMAN MATZ, P.C.  
Attorneys for Plaintiff  
1173A Second Avenue, Suite 153  
New York, New York 10065  
Phone: (646) 650-2207



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
X-----X  
YLD LIMITED,

Case No.:

Plaintiff,

v.

**COMPLAINT AND DEMAND  
FOR JURY TRIAL**

THE NODE FIRM, LLC, NODE SOURCE, LLC  
ISAAC SCHLUETER, DANIEL SHAW, AND  
JOE MCCANN,

Defendants.

X-----X

Plaintiff YLD Limited (“YLD” or “Plaintiff”) by its attorneys, Adelman Matz, P.C., for its complaint against The Node Firm, LLC (“TNF LLC”), Node Source, LLC (“Node Source”), Isaac Schlueter (“Schlueter”), Daniel Shaw (“Shaw”), and Joe McCann (“McCann”) (collectively the “Defendants”) alleges as follows:

**NATURE OF THE CASE**

1. This is an action by Plaintiff for copyright infringement, contributory copyright infringement, vicarious copyright infringement, inducement of copyright infringement under the Copyright Act of 1976, 17 U.S.C. §101 *et seq.*, trademark infringement, unfair competition, unjust enrichment and fraudulent transfer, based on the knowing and willful conduct by all the Defendants infringing YLD’s copyrights in its Node.js platform training materials (the “Training Materials”), infringing YLD’s trademark rights in and to “The Node Firm” trade name, engaging in acts that constitute

unfair competition and unjustly retaining the benefit of the use of YLD's trade name without compensation to YLD.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, 1338(a) and (b), and pursuant to the principles of supplemental jurisdiction under 28 U.S.C. § 1367.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) and (b) because a substantial part of the events giving rise to this claim occurred in this district, all of the Defendants conduct substantial business within the State of New York, Defendants transact business within the state to supply services in the state, have committed tortious acts within the state and/or committed tortious acts without the state and Defendants regularly do business within the state, solicit business within the state, derive substantial revenue from services rendered in the state, and have infringed Plaintiff's intellectual property rights, including YLD's copyright and trademark within the State of New York as described herein, and at least one of the Defendants is a resident of the State of New York.

4. In addition, upon information and belief, Defendants TNF LLC and Node Source have employees and agents within the State of New York and transact business within the state through those employees and/or agents.

5. Venue is also proper in this district pursuant to 28 U.S.C. §1400(a) and (b) as Defendants and their agents reside and are found in this district and as the Defendants have committed acts of infringement in this district.

### NATURE OF THE PARTIES

6. YLD Limited is a foreign corporation duly formed and existing under the laws of the United Kingdom, with its principal place of business at 32-38 Scrutton Street, EC2A 4RQ, London, England.

7. YLD Limited is a privately held corporation. Its shares are owned by Nuno Job.

8. Upon information and belief, Defendant TNF LLC is a limited liability company duly formed and existing under the laws of the State of Texas.

9. Upon information and belief, TNF LLC has no central office and has members, managers, employees, agents and/or team members in places all around the world, including New York State.

10. Upon information and belief, Defendant Node Source is a limited liability company duly formed and existing under the laws of the State of Texas.

11. Upon information and belief, Node Source has no central office and has members, managers, employees, agents and/or team members in places all around the world, including New York State.

12. Upon information and belief, Defendant Joe McCann is an individual who resides in the State of New York.

13. Upon information and belief, McCann owns one third (33.33%) of TNF LLC and Node Source and is the Business Director and/or CEO of TNF LLC and Node Source.

14. Upon information and belief, Defendant Isaac Schlueter is an individual who resides in the State of California.

15. Upon information and belief, Schlueter owns one third (33.33%) of TNF LLC and is the Advising Director of TNF LLC.

16. Upon information and belief, Defendant Daniel Shaw is an individual who currently resides in the State of California.

17. Upon information and belief, Shaw owns one third (33.33%) of TNF LLC and Node Source and is the Managing Director and/or CEO of TNF LLC and Node Source.

18. Upon information and belief, each of the Defendants regularly transacts business within the State of New York in that they have entered into contracts in the State of New York to supply services, have committed tortious acts and the acts complained of herein in the State of New York, and have caused injury to Plaintiff within New York State. Additionally, Defendants regularly solicit business in and derive substantial revenue from the State of New York.

## **FACTUAL BACKGROUND**

### **A. Plaintiff's Ownership of the Training Materials**

19. Upon information and belief, Nodejitsu, Inc. ("Nodejitsu") is a corporation duly formed and existing under the laws of the state of Delaware with its principal place of business at 110 5th Avenue, 5th Floor, New York, NY 10011, and is a well-known provider of infrastructure, platform services, and software for enterprise and public cloud users that help its clients develop and deploy applications written for Node.js.

20. In late 2011, Nuno Job, an individual working for and under contract with Nodejitsu, saw a lack of qualified companies providing consulting services to third parties who were beginning to program in Node.js.

21. Nodejitsu believed it would benefit directly from creating these materials by charging licensing fees to consulting service providers who used these training materials. Nodejitsu believed that having its materials strategically placed in front of potential customers through the consulting service providers, would in turn drive business leads to Nodejitsu.

22. In late 2011 and early 2012, Nodejitsu created a set of Node.js platform training materials. Specifically, Nodejitsu created, selected, arranged, and edited the text, computer program code and artwork for these training materials. Nodejitsu registered the training materials with the United States Copyright Office, attaining a U.S. Copyright Registration No. TX 7-87-084 with an effective date of January 27, 2014 (the “Training Materials”).

23. Nodejitsu, by way of agreement, written assignments and/or work for hire, was the copyright owner of exclusive rights with respect to the Training Materials.

24. By virtue of written agreement, YLD has acquired the right, title and interest in and to the Training Materials, as well as all rights to income from the Training Materials and the right to prosecute all causes of action for past, present or future infringement thereof.

25. Under the Copyright Act, YLD has the exclusive rights, among other things “to do and to authorize” reproduction of the Training Materials in copies, preparation of derivative works based upon the Training Materials, distribution of copies of the Training Materials, and to display the Training Materials.

**B. Plaintiff's Ownership of THE NODE FIRM Mark**

26. In late November of 2011, YLD's founder Mr. Nuno Job began advertising and offering training, consulting and support services to third parties for Node.js programming, under the trade name "The Node Firm."

27. On or about November 28, 2011, Job registered the domain name thenodefirm.com, registered to receive email @thenodefirm.com using the Google Apps service and created a website for The Node Firm.

28. In the beginning of 2012, social media accounts, including Twitter, were registered under the handle "TheNodeFirm."

29. In 2011 and 2012, YLD's founder Mr. Nuno Job advertised and offered its services under "The Node Firm" name. In addition, during this time frame Job invested significant time in pitching new clients, providing training services under "The Node Firm" name, developing client leads and new clients interested in training support and technology services branded as "The Node Firm." Job also promoted "The Node Firm" brand through speaking engagements, sponsorship opportunities, attendance at conferences and other networking opportunities. One of the customer leads Job spent significant time developing as a potential customer for "The Node Firm" branded services was PayPal.

30. Among others, Job offered training services utilizing the Training Materials through an oral, non-exclusive, non-transferrable license under which Job would be allowed to use the Training Materials for Node.js training events and presentations and in exchange would capture business leads to drive business to the Nodejitsu platform. The license was terminable at will by Nodejitsu.

31. Job invested substantial time, resources and hard work to develop “The Node Firm” brand and to ensure that services offered under “The Node Firm” name were of high quality and as such has established substantial goodwill in “The Node Firm” name in New York, around the country and the world.

32. Through Job’s efforts and use of “The Node Firm” trade name, as well as its advertising, offering and providing services in interstate commerce, and other use, Job established ownership rights in “The Node Firm” trade name and the exclusive right to use “The Node Firm” name in interstate commerce in connection with the provisioning of consulting services.

33. Thereafter, all right in and to “The Node Firm” trade name, along with the goodwill associated with same and the right to sue for all past infringement, was validly assigned by Job to YLD, so that YLD could continue providing consulting services under The Node Firm name.

**C. Defendants’ Infringing Acts**

34. In late 2011, Defendant Shaw was aware that Job was offering and providing consulting services under “The Node Firm” name and that Nodejitsu owned the copyright in and to all of the Training Materials and that said materials were used by Job providing services as “The Node Firm” through a non-exclusive, non-transferrable oral license agreement.

35. In 2012, Defendants McCann and Schlueter were aware that Job was offering and providing consulting services under “The Node Firm” name and that Nodejitsu owned the copyright in and to all of the Training Materials and that said materials

were used by Job providing services as “The Node Firm” through a non-exclusive, non-transferrable oral license agreement.

36. Upon information and belief, in early 2013, Defendants Shaw, McCann and Schlueter decided to form a new company that would offer the same training, consulting and support services that were being offered by Job for the Node.js platform.

37. Upon information and belief, Defendants Shaw, McCann and Schlueter wanted to offer these services through a new company that would be owned by them, but wanted to use “The Node Firm” trade name so that they could utilize the good will and client trust associated with “The Node Firm” trade name, which had been created by Job.

38. Essentially, Defendants Shaw, McCann and Schlueter wanted to take over the existing consulting, training and support business that had been started, cultivated and substantially developed by Job under the name “The Node Firm.”

39. Job communicated to Defendants Shaw, McCann and Schlueter that he was willing to consider allowing Defendants Shaw, McCann and Schlueter’s new company to use “The Node Firm” trade name, provided that he was properly compensated for use of the name, and that Job’s other conditions of a license were satisfied.

40. In addition, on or around February 5, 2013, directly prior to the formation of their new Company, Shaw and McCann were advised in writing by Nodejitsu, who owned the copyrights in and to the Training Materials at that time, that they needed a formal written agreement to use the Training Materials. Among other things, any agreement would have needed to include terms for the license of the Training Materials from Nodejitsu, it would also have needed to include compensation to Nodejitsu in the form of

formalization of lead generation system to Nodejitsu, would need to include preferred pricing and would need to address certain liability issues.

41. In emails exchanged between the parties in February of 2013, Shaw and McCann acknowledged that Nodejitsu then owned the Training Materials and that they needed to license any use of the Training Materials from Nodejitsu for the new company they planned to form.

42. Upon information and belief, on or about February 28, 2013, Defendants Shaw, McCann and Schlueter started a limited liability company under the name The Node Firm, LLC (defined herein as "TNF LLC").

43. No license for use of the Training Materials was ever obtained by Shaw, McCann, Schlueter or TNF LLC.

44. No license for use of the name "The Node Firm" was ever obtained by Shaw, McCann, Schlueter or the company they formed The Node Firm LLC (TNF LLC).

45. Upon information and belief, beginning on February 28, 2013, Shaw, McCann, Schlueter, and TNF LLC, began offering, advertising and providing consulting, support and training services using the name "The Node Firm" without permission or authorization from Job.

46. Upon information and belief, beginning on February 28, 2013, Shaw, McCann, Schlueter, and/or TNF LLC (under the direction and control of Shaw, McCann and Schlueter) have prepared unauthorized derivative works of the Training Materials, without authorization or permission from Nodejitsu or YLD.

47. Upon information and belief, a qualitatively and quantitatively significant portion of the unauthorized derivative was appropriated from and/or based on the Training Materials owned by YLD and is substantially similar to the Training Materials.

48. Upon information and belief, between February 28, 2013 and the present, TNF LLC, at the direction and under the control of Shaw, McCann and Schlueter, have offered trainings that utilize and display the Training Materials and/or unauthorized derivatives thereof to third parties including PayPal, Netflix, and Symantec, without authorization or permission from Nodejitsu or YLD.

49. Upon information and belief, between February 28, 2013 and the present, TNF LLC, at the direction and under the control of Shaw, McCann and Schlueter, have transmitted the Training Materials and/or unauthorized derivatives thereof to third parties including PayPal, Netflix, and Symantec, without authorization or permission from Nodejitsu or YLD. Instances where TNF LLC, Shaw, McCann and Schlueter have transmitted the Training Materials and/or unauthorized derivatives thereof via the internet and/or electronic mail constitute unauthorized “reproductions” of said Training Materials.

50. Upon information and belief, between February 28, 2013 and the present, TNF LLC, at the direction and under the control of Shaw, McCann and Schlueter, issued licenses to third parties for use of the Training Materials and/or unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

51. By way of example, upon information and belief, TNF LLC, at the direction and under the control of Shaw, McCann and Schlueter, licensed the Training Materials to PayPal, among others, for PayPal to train their employees and contractors, in exchange for over one million dollars (\$1,000,000).

52. Upon information and belief, beginning on February 28, 2013, TNF LLC, at the direction and under the control of Shaw, McCann and Schlueter, also authorized, encouraged and induced, third parties including but not limited to PayPal, to reproduce, distribute, and display the Training Materials, and/or the unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

53. Upon information and belief, beginning on February 28, 2013, TNF LLC, Shaw, McCann and Schlueter derived substantial profits from their exploitation and infringing use of the Training Materials.

54. Upon information and belief, beginning on February 28, 2013, TNF LLC, Shaw, McCann and Schlueter derived substantial profits from their exploitation and use of “The Node Firm” trade name and the goodwill associated therewith.

55. Upon information and belief, by way of just one example, based on the reputation of “The Node Firm” brand, PayPal, believing that TNF LLC was associated with “The Node Firm” brand, signed a contract with TNF LLC wherein TNF LLC would provide training services to PayPal in exchange for over one million dollars (\$1,000,000).

56. From February 2013 through February 2014, Job advised Defendants orally and in writing, on behalf of himself, YLD and Nodejitsu, that they were not permitted to use “The Node Firm” trade name or the Training Materials without permission from Job and Nodejitsu, respectively.

57. On or about February 4, 2014, Plaintiff sent Defendants a cease and desist letter demanding that Defendants cease and desist from use of the Training Materials and “The Node Firm” trade name.

58. Upon information and belief, on or about February 25, 2014, Shaw and McCann formed a new company under the name Node Source LLC.

59. Upon information and belief, it was the intent of Defendants that Node Source absorb the business of TNF LLC.

60. Upon information and belief, Node Source is engaged in the same business as TNF LLC, in that like TNF LLC, Node Source is engaged in the business of providing consulting, training and support services for Node.js programmers using the Training Materials and unauthorized derivatives thereof.

61. Upon information and belief, Node Source has continued to use substantially the same management and personnel, structure, assets, property, customer lists, and business format and general business operations as that of TNF LLC.

62. Upon information and belief, Node Source assumed the assets of TNF LLC, without adequate compensation therefor, and is operating as a mere continuation of TNF LLC.

63. Upon information and belief, Node Source took and is utilizing all of the assets of TNF LLC including cash, contracts and receivables, without adequate compensation to TNF LLC therefor.

64. Upon information and belief, since its formation in February of 2014, Node Source, at the direction and under the control of Shaw and McCann, have also reproduced, distributed, displayed, licensed and otherwise exploited the Training Materials and/or unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

65. Additionally, upon information and belief, since its formation in February of 2014, Node Source, at the direction and under the control of Shaw and McCann, has created derivative works of the Training Materials, without authorization or permission from Nodejitsu or YLD.

66. Upon information and belief, since its inception, Node Source, at the direction and under the control of Shaw and McCann, also authorized, encouraged and induced third parties to reproduce, distribute, and display the Training Materials, and/or the unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

67. Upon information and belief, through the present Defendants continue to use and exploit the Training Materials and “The Node Firm” trade name for their own commercial purposes without authorization or permission from YLD respectively.

68. Upon information and belief, Defendants’ infringing acts are willful and deliberate and committed with prior notice of Nodejitsu’s and subsequently YLD’s ownership of the copyright in and to the Training Materials.

69. Upon information and belief, Defendants’ infringing acts are willful and deliberate and committed with prior notice of YLD’s ownership rights in and to “The Node Firm” trade name.

70. As a result of Defendants’ unlawful actions, Plaintiff has been damaged and has suffered, and continues to suffer, irreparable injury for which it has no adequate remedy at law. An injunction is necessary to ensure that Defendants permanently cease any further use of the Training Materials and “The Node Firm” name.

**COUNT I**

**COPYRIGHT INFRINGEMENT OF THE TRAINING MATERIALS**  
**(Against All Defendants)**

71. Plaintiff repeats and re-alleges each and every allegation of paragraphs 1 through 70 as above as if fully set forth herein.

72. YLD is the owner of a valid copyright in and to the Training Materials.

73. Upon information and belief, Defendants have infringed YLD's exclusive rights in and to its copyrights by *inter alia*, reproducing, distributing, displaying, licensing and otherwise exploiting the Training Materials.

74. Upon information and belief, Defendants have further infringed on YLD's copyright in and to the Training Materials by preparing, distributing, licensing, displaying and otherwise exploiting unauthorized derivatives of the Training Materials.

75. Neither Nodejitsu nor YLD authorized any of the Defendants to copy, reproduce, display, distribute, license, or otherwise exploit the Training Materials or any derivative thereof.

76. Additionally, neither YLD nor Nodejitsu authorized any of the Defendants to make derivative works of the Training Materials.

77. Defendants did not obtain any permission, consent or license for the use, distribution, copying, reproduction, or exploitation of the Training Materials nor did they obtain permission, consent or license for the preparation of derivative works of the Training Materials.

78. Upon information and belief, Defendants' infringing acts alleged herein were willful, deliberate, and committed with prior notice and knowledge of the copyright in and to the Training Materials.

79. Upon information and belief, Plaintiff has been harmed by the continued infringement by Defendants of YLD's copyright in and to the Training Materials.

80. Upon information and belief, Defendants are likely to continue infringing YLD's copyright in and to the Training Materials unless they are enjoined from further infringement.

81. Upon information and belief, the infringing acts of Defendants have been, are and, if continued hereafter, will continue to be committed willfully.

82. As a direct and proximate result of their actions, Defendants are liable to the YLD for willful copyright infringement under 17 U.S.C. § 501, in violation of YLD's exclusive rights under 17 U.S.C. § 106.

83. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained but to be determined at trial.

84. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

85. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

86. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and as such, YLD is also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under the Copyright Act.

87. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

**COUNT II**

**INDUCEMENT OF COPYRIGHT INFRINGEMENT**  
**OF THE TRAINING MATERIALS**  
**(Against All Defendants)**

88. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 87 above with the same force and effect as if set forth fully herein.

89. Defendants' clients have engaged in, including but not limited to, the unauthorized reproduction, display, and distribution of the copyrighted Training Materials and/or unauthorized derivatives thereof. As a result, the Defendants' clients are liable for direct copyright infringement of YLD's exclusive rights of reproduction, display, and distribution under 17 U.S.C. § 106.

90. Each one of Defendants' clients' infringing acts has been encouraged and made possible by Defendants, whose intent is to promote and encourage the unlawful reproduction, display, distribution and exploitation of the copyrighted Training Materials and/or unauthorized derivatives thereof.

91. As a direct and proximate result of their actions, Defendants are liable to the YLD for inducing the infringing acts of their clients, in violation of Sections 106 and 501 of the Copyright Act. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained, but to be determined at trial.

92. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

93. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

94. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and YLD is accordingly also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under the Copyright Act.

95. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

### **COUNT III**

#### **CONTRIBUTORY COPYRIGHT INFRINGEMENT** **OF THE TRAINING MATERIALS** **(Against All Defendants)**

96. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 95 above with the same force and effect as if set forth fully herein.

97. Defendants' clients have engaged in, including but not limited to, the unauthorized reproduction, display, and distribution of the copyrighted Training Materials and/or unauthorized derivatives thereof. As a result, the Defendants' clients are liable for direct copyright infringement of YLD's exclusive rights of reproduction, display, and distribution under 17 U.S.C. § 106.

98. Upon information and belief, Defendants had actual and constructive knowledge of their clients' infringing activity and materially contributed to that activity by licensing the Training Materials, and/or unauthorized derivatives thereof, to said third parties and approving and encouraging their Clients to display, reproduce and distribute the Training Materials to employees within those organizations, thus urging and contributing to infringing conduct.

99. At the time they began using the materials in 2013, Defendants were aware of Nodejitsu's ownership of the Training Materials prior to the start of any of the above mentioned acts, and despite requests, have refused to take any action to halt the infringing conduct.

100. As a direct and proximate result of their actions, Defendants are liable to the YLD for contributorily infringing YLD's copyright, in violation of Sections 106 and 501 of the Copyright Act. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained, but to be determined at trial.

101. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

102. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

103. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and YLD is accordingly also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under copyright.

104. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

**COUNT IV**

**VICARIOUS COPYRIGHT INFRINGEMENT**  
**OF THE TRAINING MATERIALS**  
**(Against All Defendants)**

105. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 104 above with the same force and effect as if set forth fully herein.

106. Defendants' clients have engaged in various infringing acts, including but not limited to, the unauthorized reproduction, display, and distribution of the copyrighted Training Materials and/or unauthorized derivatives thereof. As a result, the Defendants' clients are liable for direct copyright infringement of YLD's exclusive rights of reproduction, display, and distribution under 17 U.S.C. § 106.

107. Upon information and belief, Defendants had the legal right and ability to supervise and control the infringing activity that occurred through their services.

108. Upon information and belief, by promoting TNF LLC and Node Source's ability to provide Node.js training seminars to its clients and by using and disseminating the copyrighted Training Materials in those seminars and licensing the Training Materials to their Clients for further display and reproduction within those organizations, Defendants are intimately involved in supervising and controlling the infringing activity.

109. Upon information and belief, Defendants nevertheless refused to exercise any control over the illegal reproduction, display, and distribution of the copyrighted Training Materials, and as a direct and proximate result of such failure, Defendants' clients have infringed the copyrighted Training Materials.

110. Upon information and belief, Defendants derived a substantial financial benefit from those infringements of the copyrighted Training Materials.

111. Upon information and belief, TNF LLC and Node Source were paid by their clients for the training services they provided, which were based on the unauthorized use of the copyrighted Training Materials.

112. Upon information and belief, Schlueter, Shaw and McCann also derived substantial benefit from those infringements by distributing the profits from their infringing activities to themselves.

113. Upon information and belief, Defendants also derived substantial benefit from licensing the Training Materials and/or unauthorized derivatives thereof to their clients for the purpose of their clients running their own internal training sessions.

114. As a direct and proximate result of their actions, Defendants are liable to the YLD for vicariously infringing YLD's copyright, in violation of Sections 106 and 501 of the Copyright Act. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained, but to be determined at trial.

115. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

116. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

117. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and YLD is accordingly also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under copyright.

118. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

**COUNT V**

**TRADEMARK INFRINGEMENT IN VIOLATION OF 15 U.S.C. §1125(a)**  
**(Against All Defendants)**

119. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 118 above with the same force and effect as if set forth fully herein.

120. Through Job's efforts and use of "The Node Firm" trade name, he established ownership rights in "The Node Firm" name and the exclusive right to use "The Node Firm" name in interstate commerce in connection with the provisioning of consulting services, which was assigned to YLD, along with, *inter alia*, the goodwill associated therewith.

121. Defendants' use of "The Node Firm" trade name in connection with the provisioning of support, consulting and training services constitutes a false designation of origin and/or a false or misleading description and representation of fact which is likely to cause confusion and mistake, and is likely to deceive as to the affiliation, connection and/or association of Defendants with YLD and is likely to mislead consumers to believe that the Defendants' services are sponsored, approved or somehow associated with YLD.

122. By reason of the foregoing, the trade and public are likely to be and will continue to be confused, misled, or deceived, and YLD has, is now, and will continue to suffer irreparable injury to its goodwill and business reputation for which it has no adequate remedy at law.

123. Upon information and belief, Defendants have intentionally and knowingly adopted and used a trade name that is likely to cause confusion in the marketplace as to the source, origin, or sponsorship of the goods offered for sale and sold by the Defendants.

124. By virtue of the foregoing, Defendants' acts are in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

125. Defendant's acts are causing and continue to cause YLD irreparable harm in the nature of loss of control over its reputation and loss of substantial consumer goodwill. The irreparable harm to YLD will continue, without any adequate remedy at law, unless and until Defendants' unlawful conduct is enjoined by this Court.

126. Upon information and belief, Defendants are using "The Node Firm" trade name, willfully and with knowledge that they do not have the right to use said name, and with the intent to unfairly compete with YLD, and benefit from the goodwill associated with "The Node Firm" name.

127. Defendants' conduct has caused, and is likely to continue causing, substantial injury to the public and to YLD, and YLD is entitled to injunctive relief and to recover Defendants' profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1125(a), 1116 and 1117.

## **COUNT VI**

### **COMMON LAW UNFAIR COMPETITION** **(Against All Defendants)**

128. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1-127 above as though fully set forth herein.

129. Defendants' use of "The Node Firm" name to offer support, training and consulting services in connection with Node.js, without the authorization or consent of

YLD is likely to cause confusion and mistake and to deceive consumers as to the source, origin, sponsorship or affiliation of Defendants and constitutes trade name and trademark infringement, unfair competition and misappropriation of YLD's goodwill and reputation.

130. Upon information and belief, Defendants adopted and used "The Node Firm" name as a trade name and trademark with the intent to trade off of the goodwill and reputation of "The Node Firm" name, which is owned by YLD.

131. Upon information and belief, Defendants have infringed YLD's mark as alleged herein with the intent to deceive the public into believing that services offered by Defendants are made by, approved by, sponsored by or affiliated with, YLD. Defendants' acts as alleged herein were committed with the intent to pass off and palm off Defendants' services as the services of Job (now YLD), and with the intent to deceive and defraud the public.

132. Upon information and belief, Defendants adopted and continued to use "The Node Firm" name with knowledge of Job's (now YLD's) ownership of same. Despite this knowledge and the fact that Defendants could provide goods and services under another name, it decided instead to misappropriate "The Node Firm" name and use it as its own.

133. Defendants' acts are causing and continue to cause YLD irreparable harm in the nature of loss of control over its reputation, and loss of substantial consumer goodwill. This irreparable harm to YLD will continue, without any adequate remedy at law, unless and until Defendants' unlawful conduct is enjoined by this Court.

**COUNT VII**

**UNJUST ENRICHMENT**  
**(Against All Defendants)**

134. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -133 above as though fully set forth herein.

135. Defendants are using YLD's trademark, and the goodwill associated therewith for their own commercial gain without making any payments to YLD.

136. Upon information and belief, Shaw, McCann and Schlueter started TNF LLC, with the intention to take the clients, leads, and goodwill already developed in "The Node Firm" brand name and use it for their own commercial benefit.

137. Upon information and belief, when TNF LLC was formed, at the instruction of Shaw, McCann and Schlueter, TNF LLC took over the clients and business leads and started using "The Node Firm" name so that TNF LLC could utilize the goodwill associated with said name for their own commercial benefit.

138. Upon information and belief, TNF LLC have obtained monetary benefit from their use of "The Node Firm" name and the goodwill associated therewith, without payment or compensation to YLD.

139. Upon information and belief, by way of just one example, based on the reputation of "The Node Firm" brand, PayPal, believing that TNF LLC was associated with "The Node Firm" brand, signed a contract with TNF LLC wherein TNF LLC would provide training services to PayPal in exchange for over one million dollars (\$1,000,000).

140. Upon information and belief, Shaw, McCann and Schlueter also benefitted from their use of "The Node Firm" name, as they were compensated by TNF LLC.

141. Upon information and belief, Node Source has also benefitted from the use of “The Node Firm” name and the goodwill associated therewith as it has taken over the business of TNF LLC and is a mere continuation of same and benefits from the reputation and goodwill associated with “The Node Firm” brand.

142. Upon information and belief, Defendants’ above described benefit has been at the expense of YLD and equity and good conscience require restitution.

143. YLD is entitled to the reasonable value Defendants’ use of “The Node Firm” name, and the goodwill and trust in same, which Defendants benefitted from, in an amount to be determined at trial.

#### **COUNT VIII**

#### **FRAUDULENT CONVEYANCE** **(Against Node Source)**

144. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -143 above as though fully set forth herein.

145. Upon information and belief, on or about February 25, 2014, very shortly after receiving Plaintiff’s cease and desist letter which *inter alia*, demanded that TNF LLC, Shaw, McCann, and Schlueter cease and desist from use of Plaintiff’s property and demanded compensation for past use of said property, Shaw and McCann, formed a new company under the name Node Source LLC.

146. Upon information and belief, at the time Node Source was formed Plaintiff was a present and/or future creditor of TNF LLC and Plaintiff’s identity was known to TNF LLC, Shaw, McCann, and Schlueter

147. Upon information and belief, following the formation of Node Source, Shaw, McCann, Schlueter and TNF LLC transferred and conveyed TNF LLC's assets, including cash, receivables and contracts to Node Source.

148. Upon information and belief, no consideration, and/or inadequate consideration, was paid for the assets transferred to Node Source.

149. Upon information and belief, the above conveyances rendered TNF LLC insolvent or with an unreasonably small amount of property.

150. Upon information and belief, the conveyances were made to hinder, delay or defraud Plaintiff's ability to recover on any potential claims against TNF LLC.

151. As such, the above conveyances were fraudulent against Plaintiff pursuant to Debtor and Creditor Law §§ 273, 274 and 276.

152. By reason of the foregoing, Node Source is liable to Plaintiff for all sums TNF LLC is liable to Plaintiff for, as set forth in the above causes of action, in an amount to be determined at trial.

**WHEREFORE**, Plaintiff respectfully requests judgment against the Defendants, and each of them jointly and severally, as follows:

a) On Counts I through IV, for such permanent injunctive relief as is necessary to prevent or restrain infringement of the Copyrighted Training Materials, including a preliminary injunction requiring that Defendants and their agents, servants, employees, officers, directors, attorneys, successors, assigns, licensees, and all others in active concert or participation with any of them, cease infringing, publishing, licensing, exploiting, or causing, aiding, enabling, facilitating, encouraging, promoting, inducing or materially contributing to or participating in the infringement,

publishing, licensing, or exploiting of any of YLD's copyrights or exclusive rights protected by the Copyright Act (whether now in existence or hereafter created).

b) That the Court enters judgment against Defendants, and each of them, that Defendants have infringed YLD's rights in the copyright in the Training Materials under 17 U.S.C. §501, and that the infringement by Defendants was willful.

c) On counts I through IV, that the Court enter judgment against the Defendants, jointly and severally, for damages suffered by YLD as a result of the infringement complained of herein, as well as disgorgement of any profits attributable to the Defendants' infringement, including the value of all gains, profits, advantages, benefits, and consideration derived by Defendants from and as a result of their infringement of YLD's copyright in the Training Materials, in an amount to be determined at trial; or

d) In the alternative, if YLD so elects, in lieu of recovery of their actual damages and Defendants' profits, for an award of statutory damages against Defendants, for their acts of willful copyright infringement.

e) That the Court enters an Order pursuant to 17 U.S.C. § 503 mandating the impounding of all infringing copies of the Training Materials, including the derivative works created therefrom, and any other materials prepared by Defendants containing any copies or any portions thereof.

f) For costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505.

g) Defendants and all of their agents, officers, employees, representatives, successors, assigns, attorneys, and all other persons acting for, with, by, through, or

under authority from Defendants, or in concert or participation with Defendants, and each of them, should be permanently enjoined, from:

- i. using "The Node Firm" name, or any other imitation or simulation thereof in connection with Defendants' services;
- ii. using any trademark, service mark, name, logo, design or source designation of any kind on or in connection with Defendants' services that is likely to cause confusion, mistake, deception, or public misunderstanding that such services are provided by YLD, or are sponsored or authorized by or in any way connected or related to YLD;
- iii. passing off, palming off, or assisting in passing off or palming off, Defendants' services as those of YLD, or otherwise continuing any and all acts of unfair competition as alleged in this Complaint;
- iv. Engaging in any activity constituting unfair competition with YLD, or constituting an infringement of YLD's trade name; and
- v. Registering or applying to register as a trademark, service mark, trade name, internet domain name or any other source identifier or symbol of origin, that is at all similar "The Node Firm," or any other mark or name that infringes on or is likely to be confused with YLD's trade name.

h) That Defendants be required to account for and pay any and all profits derived from the provisioning of its services and for all damages sustained by YLD by reason of said acts of infringement and unfair competition complained of herein;

i) That Defendants pay YLD for all of Defendants' profits, gains and sums and for all damages sustained arising from the acts of infringement and unfair competition alleged herein, including that YLD should be awarded all damages caused by the acts forming the basis of this Complaint, in an amount to be determined at trial;

j) That this Court award YLD treble the amount of actual damages suffered by YLD in an amount to be determined at trial;

k) The costs of this action;

l) That this is an exceptional case and that Defendants should be required to pay to YLD its reasonable attorneys' fees pursuant to 15 U.S. C. § 1117(a);

m) Based on Defendants' willful and deliberate infringement of YLD's trade name, and by reason of Defendants' fraud and palming off, and to deter such conduct in the future, YLD should be awarded punitive damages;

n) On Count VII, a sum to be determined at trial, that represents restitution for YLD's work, labor, services, and development of "The Node Firm" brand and the goodwill YLD built in said name;

o) On Count VIII, a sum to be determined at trial, which represents all sums TNF LLC is liable to Plaintiff for as set forth in the above causes of action;

p) Costs and attorneys' fees; and

q) For such other and further relief in favor of Plaintiff as the Court deems just and proper.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury on all claims for relief and issues triable by jury.

Dated: New York, New York  
February 4, 2015

Respectfully submitted,  
ADELMAN MATZ, P.C.



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# **EXHIBIT H**



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Defendants The Node Firm, LLC, Node Source, LLC (now NodeSource, Inc.), Daniel Shaw and Joe McCann (collectively, “Defendants”),<sup>1</sup> respectfully submit this memorandum of law in support of their motion under 28 U.S.C. § 1404(a) to transfer this Action to the United States District Court for the Northern District of California, where nearly all Defendants, and likely all witnesses and documents relevant to this Action, are located. Additionally, Defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss certain counts in this Action for failure to state plausible claims for relief.

## **I. INTRODUCTION**

This lawsuit has virtually no connection to the Southern District of New York. Plaintiff, a foreign corporation, and its sole owner, a foreign individual, are domiciled in the United Kingdom. Likewise, only one of the five named Defendants has any link to New York. Of the two corporate defendants – i.e., The Node Firm, LLC and Node Source, LLC (now NodeSource, Inc.) – neither is a New York company, and neither has a principal place of business in New York or is otherwise located in New York. Additionally, two of the three individual defendants – i.e., Daniel Shaw and Isaac Schlueter – reside in the Northern District of California. The third individual defendant, Joe McCann, resided in Austin, Texas from 2011 through 2013. While McCann has maintained an apartment in New York City since June 2013, he works remotely, travels regularly outside of New York, and is in the process of moving out of the Southern District of New York, primarily because much of his professional time is spent in Northern California.

Meanwhile, Plaintiff has made it very easy to determine that this case belongs in the Northern District of California, in that it has identified in the Complaint third party companies that were integral participants in Defendants’ allegedly wrongful activities –

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<sup>1</sup> Defendant Isaac Schlueter, located in Oakland, California, is represented by separate counsel.

i.e., PayPal, Netflix, and Symantec – all of which are located within the Northern District of California. As demonstrated in these moving papers, the contracts between The Node Firm and each of these companies were negotiated in the Northern District of California, relevant witnesses from these companies are located in the Northern District of California, and the corresponding services delivered by the Defendants for these companies were performed in the Northern District of California.

For these reasons, and as more fully discussed below, this case should be transferred to the Northern District of California, where it should have been brought initially.

Additionally, the claims for unjust enrichment and fraudulent conveyance should be dismissed, as the facts and circumstances alleged in the Complaint concerning these counts could not, under any reading, support these counts as plausible causes of action.

In addition to this Memorandum of Law, Defendants submit the Declaration of Daniel Shaw (“Shaw Decl.”), and the Declaration of Erica D. Klein (“Klein Decl.”), with attached Exhibits, in support of Defendants’ motion to transfer and dismiss.

## **II. FACTUAL BACKGROUND**

Plaintiff YLD Limited (“Plaintiff” or “YLD”) is a foreign corporation duly formed and existing under the laws of the United Kingdom. Compl. ¶ 6. YLD is a privately held corporation, whose shares are owned by Nuno Job (“Job”). Compl. ¶ 7. Upon information and belief, Job is not a U.S. citizen. Upon information and belief, Job currently resides in the United Kingdom, and from at least as early as 2011 until his move to the UK in or around late 2013, Job resided in Portugal.

A. **The Node Firm: An Alliance of Collaborators Located Throughout the World**

In or around late November 2011, Job joined together with defendant Daniel Shaw (“Shaw”) and three persons not mentioned in Plaintiff’s Complaint, i.e. Mikeal Rogers (“Rogers”), Pedro Teixeira (“Teixeira”) and Paolo Fragomeni (“Fragomeni”) (Job, Shaw, Rogers, Teixeira and Fragomeni, collectively, the “Collaborators”), in an informal collaboration of computer programmers knowledgeable about the Node.js computer programming platform. Shaw Decl. ¶ 5. Node.js – also known as Node – is a server-side, open source framework used to build scalable, lightweight, cross-platform applications. Shaw Decl. ¶ 6. The Collaborators sought to grow the significance of Node.js through building a community of experts who worked in Node.js. Shaw Decl. ¶ 5.

Rogers suggested that the community brand their collective efforts under the name “The Node Firm” (“TNF”), which suggestion was adopted by the other Collaborators. Shaw Decl. ¶ 7. Rogers was located in Oakland, California. Shaw Decl. ¶ 7.

TNF grew to be an informal alliance of approximately twenty (20) independent experts in Node.js, inclusive of the Collaborators (collectively, the “Members”), who shared the goal of increasing awareness and use of Node.js, and heralded their association with TNF as a collective marketing tool. Shaw Decl. ¶ 8.

The primary services provided by Members of TNF were basic training and consulting on Node.js. Shaw Decl. ¶ 9. Informational materials were compiled for use by Members of TNF in connection with such training services (the “First Generation Training Materials”). Shaw Decl. ¶ 9.

TNF was not incorporated or otherwise formed as a formal corporate entity. Shaw Decl. ¶ 10. TNF had no offices and no employees. Shaw Decl. ¶ 10. Members each

worked remotely from their own locations around the world, typically from their homes or wherever they were traveling at any given time. Shaw Decl. ¶ 11. During the time period that Job, Teixeira and Fragomeni were affiliated with TNF, they also independently worked for a company called Nodejitsu, Inc. (“Nodejitsu”), a Delaware corporation founded by Charlie Robbins (“Robbins”).<sup>2</sup> Shaw Decl. ¶ 12. There were no written contracts or other business understandings between Nodejitsu and TNF. Shaw Decl. ¶ 12.

**B. The Node Firm Begins to Formalize Operations**

In November 2012, the Collaborators undertook to systemize the informal alliance that was TNF. Shaw Decl. ¶ 13. Upon the urging of the Collaborators, Shaw formed The Node Firm LLC, a Nevada single member LLC, with Shaw as the sole member. Shaw Decl. ¶ 14. Also upon the urging of the Collaborators, Shaw enlisted the assistance of Joe McCann (“McCann”) in connection with day-to-day operations and business development efforts for TNF. Shaw Decl. ¶ 15. At that time, McCann resided and worked in Austin, Texas. Shaw Decl. ¶ 15.

**C. Several Collaborators Step Aside, A Core Team Rises**

From November 2012 through the end of January 2013, Shaw and McCann undertook to review TNF records, learn about liabilities, and otherwise conduct due diligence directed at illuminating the scope of activities engaged in by Members of TNF. Shaw Decl. ¶ 16. On February 28, 2013, Shaw formed The Node Firm LLC, a Texas limited liability company, with Shaw, McCann and Isaac Schlueter (“Schlueter”) as members. At that time (and currently, with the exception of McCann), Shaw was domiciled in San Francisco, California; Schlueter in

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<sup>2</sup> When procedurally appropriate, Defendants intend to file counterclaims in this Action, including against Robbins and Nodejitsu. Nodejitsu is now owned by GoDaddy Inc., who has offices in San Francisco, CA and Sunnyvale, CA, i.e. also within the jurisdiction of the District Court of the Northern District of California. Klein Decl. ¶¶ 3-4, Ex. Klein-II and Klein-III.

Oakland, California; and McCann in Austin, Texas. While McCann relocated to New York City in June 2013, the majority of his professional time was spent traveling and working remotely to pursue business development opportunities and manage client relations. Shaw Decl. ¶ 17.

Throughout the remainder of 2013, under the leadership of Shaw, McCann and Schlueter, TNF was transformed from a loose collective of individuals into an organized, accountable, and professionally-operated venture. Shaw Decl. ¶ 18. TNF undertook several targeted business development initiatives, including holding monthly office hours (via the internet), typically led by Shaw, where members of the tech community could learn about Node.js, raise specific problems they encountered, and the like. Shaw Decl. ¶ 18. During the latter two-thirds of 2013, Shaw, McCann and Schlueter also participated in several Node.js conferences (such as Node Summit, held in San Francisco in December 2013), participated in online forums, and otherwise engaged in industry-relevant promotional activities. Shaw Decl. ¶ 19. TNF created new training materials for its training engagements that were devoid of any original contribution that may have existed in the First Generation Training Materials.<sup>3</sup> Shaw Decl ¶ 20.

Job was highly committed to, and spent considerable time with, Nodejitsu during this period. Shaw Decl. ¶ 21. According to Job's LinkedIn profile, from December 2011 to August 2013, Job served as Chief Commercial Officer for Nodejitsu, and also acted as an Advisor and Board Member of Nodejitsu from December 2011 to February 2015. Klein Decl. ¶ 2, Ex. Klein-I. Job's LinkedIn profile also states that Job founded his current company, YLD Limited (Plaintiff in this Action) in November 2013, and that Job served as Founder and Managing Director from November 2013 to present. Klein Decl. ¶ 2, Ex. Klein-I. Upon

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<sup>3</sup> While outside the purpose of this Motion, Defendants expressly reserve their right to challenge any copyright protection claimed by Plaintiffs in the First Generation Training Materials when procedurally appropriate.

information and belief, Job was domiciled in Portugal from at least as early as 2011 through 2013, and Job relocated to London in or around late 2013. Shaw Decl. ¶ 21.

**D. The Node Firm Attracts Silicon Valley**

In or around the end of 2013, Shaw was approached by Erik Toth (“Toth”), an employee of PayPal’s San Jose office who regularly attended the monthly office hours sessions typically led by Shaw. Shaw Decl. ¶ 22. Toth had raised several complex problems to Shaw during the course of Shaw’s office hours, and repeatedly returned to work with Shaw to solve new concerns. Shaw Decl. ¶ 22. Through introduction by Toth, PayPal engaged TNF to create content and provide training on Node.js, Express (a framework for creating web applications with Node.js), and PayPal’s own open source framework. Shaw Decl. ¶ 23. The meetings and negotiations that culminated in the contract between TNF and PayPal occurred at PayPal’s offices in San Jose, California. Shaw Decl. ¶ 23. Shaw delivered the requested training at PayPal’s San Jose offices, and organized the training at PayPal’s offices in Boston, Massachusetts and Austin, Texas. Shaw Decl. ¶ 24. Bill Scott, also an employee of PayPal’s San Jose office, led the TNF/PayPal project, and was TNF’s direct contact at PayPal for this work. Shaw Decl. ¶ 24.

Thereafter, TNF was introduced to Netflix. Shaw Decl. ¶ 25. In December 2013, Shaw and McCann met with a Netflix representative at Node Summit, a Node.js industry conference held in San Francisco, California, to discuss a potential business transaction. Shaw Decl. ¶ 25. A deal between TNF and Netflix was finalized at Netflix’s headquarters located in Los Gatos, California. Shaw Decl. ¶ 25. Shaw subsequently provided consultation services to Netflix at its Los Gatos headquarters. Shaw Decl. ¶ 26. Chris Saint-Amant, an employee of Netflix’s Los Gatos headquarters, led the TNF/Netflix project, and was TNF’s direct contact at Netflix for this work. Shaw Decl. ¶ 26.

In November 2013, TNF was introduced to Symantec by a friend of Shaw's, i.e. Peter McRae, who was a Symantec employee. Shaw Decl. ¶ 27. In early 2014, Shaw conducted an introductory training session for Symantec at Symantec's headquarters in Mountain View, California. Shaw Decl. ¶ 27. TNF subsequently provided consultative support to Symantec via internet and phone, with Shaw located in San Francisco, California, and Symantec located in Mountain View, California. Shaw Decl. ¶ 28. Peter McRae worked in Symantec's Mountain View office, led the TNF/Symantec project, and was TNF's direct contact at Symantec for this work. Shaw Decl. ¶ 28.

TNF did not use the First Generation Training Materials in connection with its engagements with PayPal, Netflix, or Symantec. Shaw Decl. ¶ 29. Training materials for these engagements were created primarily by Shaw, working in San Francisco. Shaw Decl. ¶ 29.

**E. NodeSource: A New Company, A New Focus**

In or around early 2014, upon being unexpectedly locked out of TNF's online resources and thereby rendered unable to operate TNF,<sup>4</sup> Shaw and McCann were forced to cease day-to-day operations. Shaw Decl. ¶ 30. Shaw and McCann had previously recognized the market need for a new kind of company that specialized in Node.js, one which was different than TNF and which catered to large enterprise customers and provided software development tools, support, and related products and services. Shaw Decl. ¶ 31.

On February 25, 2014, Shaw and McCann formed Node Source, LLC, a Texas limited liability company, with Shaw and McCann as its only members. Shaw Decl. ¶ 32, Ex.

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<sup>4</sup> In or around early 2014, Job independently and without warning terminated TNF's access to its website and rerouted incoming TNF email and calendar requests using his access to TNF's DNS servers. Because TNF was locked out of its own email and website, it could no longer conduct business. Shaw Decl. ¶ 30. Defendants advised Job of their concerns by letter dated August 13, 2014, alleging that Job's activities violated numerous statutory and common law rights, to which no response was received, and no remedial action was taken. While outside the purpose of this Motion, Defendants expressly reserve their right to pursue any and all claims against Job and YLD relating to these issues, when procedurally appropriate.

Shaw-I. On February 17, 2015, Node Source, LLC converted to NodeSource, Inc., a Delaware corporation. Shaw Decl. ¶ 33, Ex. Shaw-II. (Node Source, LLC and NodeSource, Inc., hereinafter collectively, “NS”).

The business model and operations of TNF were measurably distinguishable from those of NS. Shaw Decl. ¶ 34. TNF was a loose collection of independent consultants who provided only general Node.js training and consulting services. Shaw Decl. ¶ 34. TNF had no operations, sold no products, and implemented no solutions. Shaw Decl. ¶ 34.

By contrast, NS is a product company whose primary business is to develop and sell products to customers. Shaw Decl. ¶ 34. NS has dedicated employees that work on engineering, operations, sales and services. Shaw Decl. ¶ 34. NS is not a training and consulting firm. Shaw Decl. ¶ 34. Any training, consulting or support services provided by NS are ancillary to its sale of products, i.e. to augment its product offerings. Shaw Decl. ¶ 34. The First Generation Training Materials have no application for, would not be useful to, and were/are not used by, NS. Shaw Decl. ¶ 35. Any training materials used by NS have been originally created and compiled by NS. Shaw Decl. ¶ 35.

NS currently has approximately 25 employees, all of whom work virtually from around the world. Shaw Decl. ¶ 36. NS does not maintain a physical headquarters, though the majority of NS’s employees are located in or around San Francisco, California or Austin, Texas. Shaw Decl. ¶ 37. NS also does not maintain a comprehensive physical repository for documents or records, which instead are maintained electronically via online solutions. Shaw Decl. ¶ 38.

### **III. ARGUMENT**

#### **A. This Case Should be Transferred to the Northern District of California**

Title 28 U.S.C. § 1404(a) provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other

district or division where it might have been brought. . . .” The purpose of transfer under Section 1404(a) is to “prevent the waste of ‘time, energy and money’ and ‘to protect litigants, witnesses and the public against unnecessary inconvenience and expense.’” *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (citation omitted); *see also Berger v. Cushman & Wakefield of Pa., Inc.*, No. 12 Civ. 9224(JPO), 2013 WL 4565256, at \*3 (S.D.N.Y. Aug. 28, 2013).

Transfer of this case to the Northern District of California undoubtedly furthers these objectives.

**1. Venue is Proper in the Northern District of California**

The Court’s first step in evaluating a motion to transfer under Section 1404(a) is to determine whether the case “might have been brought” in the transferee court. *See Berger*, 2013 WL 4565256, at \*3; *In re Nematron Corp. Sec. Litig.*, 30 F. Supp. 2d 397, 400 (S.D.N.Y. 1998). Indisputably, Plaintiff’s action could have been brought in the Northern District of California – the place where most of the parties are located, and where all of the material third party witnesses, even those identified in the Complaint, are located. As discussed below, relevant client negotiations with the third parties identified in the Complaint occurred in the Northern District of California. Shaw Decl. ¶¶ 22-28 . Furthermore, virtually all of Defendants’ relevant actions and decisions regarding the underlying events recited in the Complaint occurred in the Northern District of California. Shaw Decl. ¶¶ 5-38. The Northern District of California would have personal jurisdiction over the parties and venue over this Action for the very same reasons asserted by Plaintiff in paragraphs 3 through 5 of the Complaint, as the same assertions would apply in the Northern District of California. Accordingly, the Northern District of California is an appropriate venue for this matter under 28 U.S.C. § 1391(b)(2).

## 2. Transfer is Warranted Under Relevant Factors

In deciding whether a transfer is warranted for the convenience of the parties and the witnesses, and in the interest of justice, courts in the Second Circuit have typically considered the following factors: (1) the convenience of witnesses; (2) the convenience of the parties; (3) the location of relevant documents and the relative ease of access to sources of proof; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight accorded the plaintiff's choice of forum; and (9) trial efficiency and the interest of justice, based on the totality of the circumstances. *In re Nematron*, 30 F.Supp.2d at 400. “There is no rigid formula for balancing these factors and no single one of them is determinative. Instead, weighing the balance is essentially an equitable task left to the Court's discretion.” *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 561 (S.D.N.Y. 2000).

Applying all of these general considerations, as well as taking into account the particular circumstances of this case, strongly favors, and indeed compels, a transfer of this Action to the Northern District of California.

### (a) Convenience of Witnesses

Courts typically regard the convenience of witnesses as the most important factor in considering a § 1404(a) motion to transfer. *Berger*, 2013 WL 4565256, at \*3 (quoting *Herbert Ltd. P'ship v. Elec. Arts Inc.*, 325 F. Supp. 2d 282, 286 (S.D.N.Y. 2004) (internal citation omitted)); *see also Everlast World's Boxing Headquarters Corp. v. Ringside, Inc.*, 928 F. Supp. 2d 735, 743 (S.D.N.Y. 2013). In fact, the “center of gravity of the litigation” is judged primarily by the convenience of material witnesses. *Indian Harbor Ins. Co. v. Factory Mut. Ins. Co.*, 419 F. Supp. 2d 395, 402 (S.D.N.Y. 2005) (citation omitted) (transferring case when

resolution of dispute turned on a factual determination requiring the testimony of witnesses located in a different jurisdiction). Generally, “[t]he convenience of non-party witnesses is accorded more weight than that of party witnesses.” *Id.*; see also *Emerging Vision, Inc. v. For Eyes Optical Co.*, No. 06 CIV. 5823(DAB), 2009 WL 702243, at \*7 (S.D.N.Y. Mar. 16, 2009) (transferring trademark infringement case from Southern District of New York to Northern District of California to avoid inconveniencing material witnesses identified by defendant); *Varsity Spirit Fashions & Supplies, Inc. v. I.I.P., Inc.*, No. 03 CIV. 2069(LLS), 2003 WL 22772638, at \*2 (S.D.N.Y. Nov. 24, 2003) (transferring case from Southern District of New York to Northern District of California, using the convenience of third party witnesses to tip the balance).

Based on the third party companies identified in the Complaint, and as confirmed by the Shaw Declaration, the material witnesses from these companies reside in California. In the Complaint, Plaintiff alleges that Defendants acquired three major clients based on Defendants’ alleged wrongdoing: PayPal, Netflix, and Symantec. Compl. ¶¶ 48-55. All three of these clients, whose executives and employees would be material witnesses in the case, have their headquarters and principal place of business in the Northern District of California: PayPal in San Jose; Netflix in Los Gatos; and Symantec in Mountain View. Shaw Decl. ¶ 22-28. Relevant meetings and negotiations with these three companies regarding materials that form the basis of Plaintiff’s claims occurred at these companies’ offices in the Northern District of California. Shaw Decl. ¶ 22-28. Furthermore, virtually all of the key trainings involving the materials in question were provided to these companies at their Northern District of California offices. These companies also have principal employees located in the Northern District of

California, who would be expected to provide crucial testimony regarding Defendants' alleged activities, in addition to documents that are relevant to the Action.

At minimum, given the allegations in the Complaint, we expect that Plaintiff may need, and Defendants presently expect to offer, the testimony of these five (5) non-party witnesses who are located in the Northern District of California:

- 1) Erik Toth, the employee of PayPal's San Jose office who regularly attended office hour sessions provided by TNF, initiated and spearheaded TNF's relationship with PayPal, and introduced TNF to Netflix and Symantec, would be expected to provide information about TNF's training materials and methods, engagement by PayPal, and general business activities.
- 2) Bill Scott, the employee of PayPal's San Jose office who led the TNF/PayPal project, and who was TNF's direct contact at PayPal, would be expected to provide information about TNF's training materials and methods, and general business activities.
- 3) Chris Saint-Amant, the employee of Netflix's Los Gatos headquarters who led the TNF/Netflix project, and was TNF's direct contact at Netflix for this work, would be expected to provide information about TNF's training materials and methods, consultation services, engagement by Netflix, and general business activities.
- 4) Peter McRae, the employee of Symantec's Mountain View office who led the TNF/Symantec project, and was TNF's direct contact at Symantec for this work, would be expected to provide information about TNF's training materials and methods, consultation services, engagement by Symantec, and general business activities.
- 5) Mikeal Rogers, one of the initial Collaborators, would be expected to provide information about TNF's formation, the development of TNF's training materials, and the respective contributions of TNF's Members.

In addition, Defendants anticipate that other employees of PayPal, Netflix, and Symantec located in the Northern District of California may be called as witnesses to provide testimony about TNF's training materials and methods, consultation services, and general business activities relating to TNF's engagement by each respective company. The convenience of these witnesses would best be served by transferring the case to the Northern District of California.

Furthermore, defendants Daniel Shaw and Isaac Schlueter, who also reside in the Northern

District of California, will be significant sources of crucial testimony about TNF's formation, the creation of training materials, the development of client relationships, and the provision of training and consultation services. The transfer of this action to the Northern District of California would greatly reduce the burden imposed upon all of the above-listed witnesses in preparing for and testifying at trial.

The availability of process to compel the attendance of unwilling witnesses is another significant factor of the transfer analysis. See *Capitol Records, LLC v. VideoEgg, Inc.*, 611 F. Supp. 2d 349, 366-67 (S.D.N.Y. 2009) (transferring case where material witnesses were not within the subpoena power of transferor Court). As described above, the material third party witnesses in this case will be California-based employees of PayPal, Netflix and Symantec, who do not work for any of the parties, and who reside more than 100 miles from the Southern District of New York, and therefore are outside the subpoena power of this Court. Fed. R. Civ. P. 45(c)(3)(A)(ii); *Capitol Records*, 611 F. Supp. at 366; *Viacom Int'l, Inc. v. Melvin Simon Prods., Inc.*, 774 F. Supp. 858, 868 (S.D.N.Y. 1991) (transferring case to California where relevant third party witnesses were beyond the subpoena powers of the transferor court but not of a court in California). In *AEC One Stop Grp., Inc. v. CD Listening Bar, Inc.*, 326 F. Supp. 2d 525, 530-31 (S.D.N.Y. 2004), the court noted that third party witnesses with insight into alleged infringement "would probably be more willing to testify in their home state than in New York," and that "any unwilling witnesses would likely be subject to process in California to compel their attendance but not in New York," citing these considerations in its decision to transfer, even before specific individuals had been identified. Similarly, in the present Action, employees of PayPal, Netflix and Symantec could be required, if not willing, to testify in their home state of

California, and would be within the subpoena power of the local court. Accordingly, this factor weighs most heavily in favor of transfer of this action to the Northern District of California.

(b) Weight Accorded the Plaintiff's Choice of Forum

While the plaintiff's choice of forum is ordinarily given deference, such a practice is based on the assumption that the plaintiff's choice will be a convenient one for the plaintiff itself. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). When a plaintiff sues outside of its home forum, the amount of deference given to its forum choice will depend on the locus of the operative facts. *See, e.g., Invivo Research Inc. v. Magnetic Resonance Equip. Corp.*, 119 F. Supp. 2d 433, 439 (S.D.N.Y. 2000) (transferring case when out-of-state plaintiff's chosen forum had no material connection with the action).

A foreign resident's choice of a U.S. forum receives less consideration than a plaintiff suing in his or her home forum, because "it is much less reasonable to presume that the choice was made for convenience." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (quoting *Piper Aircraft*, 454 U.S. at 256); *see also Walker v. Jon Renau Collection, Inc.*, 423 F. Supp. 2d 115, 118-19 (S.D.N.Y. 2005) (transferring case brought by non-U.S. plaintiff when the locus of operative facts was in a different jurisdiction); *Emerging Vision, Inc. v. For Eyes Optical Co.*, No. 06 CIV. 5823 (DAB), 2009 WL 702243, at \*4 (S.D.N.Y. Mar. 16, 2009) (granting motion to transfer where most of the operative facts bearing upon trademark infringement and contract claims were connected to the Northern District of California).

Here, Plaintiff is not a U.S. resident. Plaintiff is incorporated and located in the United Kingdom. The owner of all shares in Plaintiff, i.e. Job, is also not a U.S. citizen, and is not located in the United States. The Complaint posits no connection between Plaintiff or its owner and this District. Therefore, if any proper consideration should be given to Plaintiff's choice of forum in the Southern District of New York, the Court must consider the locus of the

operative facts. As discussed below, the principal activities complained of by Plaintiff in the Complaint have no relationship to this forum. As such, little weight, if any, should be given to Plaintiff's selection of this forum.

(c) Locus of Operative Facts

The location of a case's operative facts is considered a "primary factor" in determining a motion to transfer venue. *Beckerman v. Heiman*, 2006 WL 1663034, at \*7 (S.D.N.Y. June 16, 2006). In a case for trademark and copyright infringement, the locus of operative facts is generally where the allegedly infringing activities took place. *See, e.g., Cartier v. D & D Jewelry Imports*, 510 F. Supp. 2d 344, 346 (S.D.N.Y. 2007). As all of the allegations in the Complaint are closely tied to the activities that form the basis of Plaintiff's trademark and copyright claims, it is indisputable that the locus of operative facts in this case is the Northern District of California.

In copyright infringement cases, the operative facts relate to the design, development, and production of an infringing product. *See AEC One Stop Grp., Inc. v. CD Listening Bar, Inc.*, 326 F. Supp. 2d 525, 530 (S.D.N.Y. 2004) (transferring copyright case to California, where the allegedly infringing product was designed and developed); *CYI, Inc. v. Ja-Ru, Inc.*, 913 F. Supp. 2d 16, 19 (S.D.N.Y. 2012). With regard to the trademark infringement and unfair competition claims, the location of consumer confusion is key to establishing the locus of operative facts. *CYI*, 913 F. Supp. 2d at 19-22 (transferring trade dress infringement and unfair competition claims to district where products were designed and developed, finding that some sales of the products in the initially chosen forum were insufficient to constitute a locus of operative facts); *see also Herbert Ltd. P'ship v. Elec. Arts Inc.*, 325 F. Supp. 2d 282, 289 (S.D.N.Y. 2004) (transferring case to Northern District of California where, other than some sales of the allegedly infringing products, all of the events surrounding the action, such as the

creation of the products, approval of the products, and negotiation and drafting of all relevant contracts transpired in California); *French Transit v. Modern Coupon Sys.*, 858 F. Supp. 22, 25 (S.D.N.Y.1994) (transferring case to district in which allegedly infringing labels were affixed to the goods and where confusion of purchasers was likely to occur); *G.F.C. Fashions, Ltd. v. Goody's Family Clothing, Inc.*, No. 97 CIV. 0730 (LAP), 1998 WL 78292, at \*3 (S.D.N.Y. Feb. 24, 1998) (transferring trademark and unfair competition claims because plaintiff alleged no consumer confusion in the district where case was filed).

Here, the copyright, trademark and unfair competition analyses point to the Northern District of California. The allegedly infringing materials, which the Complaint itself asserts that Defendants created for use with PayPal, Netflix and Symantec, were developed and created by NodeSource specifically for use in engagements with these clients in the Northern District of California. Shaw Decl. ¶ 29. All discussions regarding such materials, NodeSource's implementation of the delivered product, and NodeSource's training thereon took place in the Northern District of California. Shaw Decl. ¶¶ 22-28. Similar to *AEC*, where alleged infringing materials were developed in California, the development and distribution of NodeSource's training materials took place in California, as Defendants conducted on-site client training in San Jose, Mountain View, and Los Gatos. 326 F. Supp. 2d at 530; Shaw Decl. ¶ 22-29. While a few supplemental training sessions for PayPal took place at other PayPal offices in Boston, Massachusetts and Austin, Texas, none took place in New York. Shaw Decl. ¶ 24. Likewise, with respect to Plaintiff's claims for inducement of copyright infringement, contributory copyright infringement, and vicarious copyright infringement, the alleged underlying infringing activity by Defendants' clients took place at their respective headquarters in the Northern District of California. Compl. ¶¶ 89, 97, 106. Shaw Decl. ¶¶ 22-29.

The Complaint alleges that substantial consumer confusion occurred in California, based on Plaintiff's claim that PayPal, whose headquarters are in California, purchased training services from TNF in exchange for over one million dollars. Compl. ¶ 139. Plaintiff's allegation that Defendants obtained Netflix and Symantec as clients also relies on the assumption that consumer confusion took place in the Northern District of California. The locus of operative facts with respect to the copyright and trademark infringement claims is unquestionably the Northern District of California.

New York has no connection to the complained-of conduct, whereas the Complaint asserts that any alleged wrongdoing by Defendants occurred in the Northern District of California with the clients Plaintiff has specifically named. Therefore, this case should be transferred to the Northern District of California.

(d) Convenience of the Parties

Two of the three individual Defendants, Shaw and Schlueter, reside in the Northern District of California, making the Northern District of California a far more convenient venue for them. One corporate defendant is incorporated in Texas, and the other is incorporated in Delaware, though they have each maintained a "virtual" office, allowing their employees to conduct business operations online through the Internet.<sup>5</sup> Shaw Decl. ¶ 11, 36. As alleged in the Complaint, however, a substantial portion of Defendants' business is in the Northern District of California. Plaintiff is a London-based corporation, and therefore neither district is substantially more convenient for it. In the words of this Court in deciding to transfer a case out of the Southern District of New York with a foreign plaintiff, "[r]egardless of where this litigation occurs, [plaintiff] will be travelling from London to the United States." *Berger*, 2013 WL

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<sup>5</sup> TNF has been inactive since the beginning of 2014, when Job permanently terminated TNF's access to its website and rerouted incoming TNF email and calendar requests, as further detailed in Footnote 4.

4565256, at \*14. Given Defendants' substantial interest in transferring the case to where it belongs in the Northern District of California, and no significant interest on the part of Plaintiff for keeping the case in the Southern District of New York, this factor weighs in favor of transfer.

(e) Location of Documents and Relative Ease of Access to Sources of Proof

The most significant documents in this case would be located in the Northern District of California, where Defendants entered into and implemented all of the contracts complained of in the Complaint. "Even assuming Defendant's documents are easily transported . . . this ease of transport weighs no more heavily in favor of this district than the proposed transferee district." *Raines v. Switch Mfg. Corp.*, No. 96 CIV. 2361(JFK), 1996 WL 413720 at \*2 (S.D.N.Y. July 24, 1996). Therefore, this factor weighs in favor of transferring the case, or, to the extent that TNF and NS store their documents electronically, bears little weight in favor of either forum.

(f) Remaining Factors

(i) The Relative Means of the Parties

As this factor "is entitled to little weight where both parties are corporations," *Student Advantage, Inc. v. Int'l Student Exch. Cards, Inc.*, No. 00 Civ. 1971(AGS), 2000 WL 1290585 at \*8 (S.D.N.Y. Sept. 13, 2000), the location of Plaintiff, TNF and NodeSource is largely irrelevant for this determination. However as the majority of the individual Defendants in this case are located in the Northern District of California, it would be far more financially equitable to allow those Defendants to defend themselves in their home forum. Accordingly, this factor weights in favor of transfer.

(ii) Comparative Familiarity with the Governing Law

Here, the most significant of the claims arise under federal law, and as discussed above, Plaintiff has failed to state a claim for two of the three state law claims. Courts of both Districts are equally able to interpret federal copyright and trademark law. The remaining claim for common law unfair competition is not unique to the State of New York, and courts in the Northern District of California are equally well-equipped to adjudicate this claim. In addition, even if the law of another jurisdiction governs the outcome of a case, this factor is accorded little weight on a motion to transfer, especially in an instance where no complex questions of foreign law are involved. *See Coker v. Bank of Am.*, 984 F. Supp. 757, 766 (S.D.N.Y. 1997). Each forum's comparative familiarity with the governing law is therefore a neutral factor in deciding the motion to transfer.

(iii) Trial Efficiency and the Interests of Justice

All parties will incur significantly greater expense if the case is adjudicated in New York, primarily because the most important witnesses, documents, and other evidence are located in or near the Northern District of California. If the case were transferred to the Northern District of California, the material witnesses' location in the District would undoubtedly make adjudication more efficient and far less costly. *See Helfant v. La. & S. Life Ins. Co.*, 82 F.R.D. 53, 59 (E.D.N.Y. 1979) ("the direct and indirect costs of litigation in this district would be far greater than litigation in Florida, and thus on balance defendants have clearly shown the need for transfer in the interest of justice"); *see also St. Cyr v. Greyhound Lines, Inc.*, 486 F. Supp. 724, 728 (E.D.N.Y. 1980) (granting motion to transfer where the direct and indirect costs of litigation in transferor district would be greater than those of litigation in transferee district). Therefore, trial efficiency and the interests of justice compel the transfer of this Action to the Northern District of California.

Given the comprehensive discussion and analysis above regarding the factors strongly favoring transfer of this case, for the convenience of the parties and witnesses, and in the interest of justice, this case should be transferred to the Northern District of California.

**B. Plaintiff has Failed to State Claims for Fraudulent Transfer and for Unjust Enrichment**

Federal Rule of Civil Procedure 12(b)(6) provides that a cause of action shall be dismissed if a complaint fails “to state a claim upon which relief can be granted.” To survive dismissal, the plaintiff must provide factual allegations sufficient “to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 555 (internal quotation marks and citations omitted). Rather, the claim must be “plausible on its face.” *Id.* at 570. For the reasons discussed below, Plaintiff has failed in its Complaint to state a claim for fraudulent conveyance (Count VIII) or unjust enrichment (Count VII) upon which relief can be granted. Accordingly, such claims should be dismissed.<sup>6</sup>

**1. Fraudulent Conveyance**

Plaintiff’s largely repetitive causes of action conclude with empty allegations in Count VIII that, “upon information and belief,” the conveyance of the assets of TNF to NS

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<sup>6</sup> In the interests of convenience and justice, many courts have transferred cases prior to determining a motion to dismiss. See *In re Stillwater Min. Co. Sec. Litig.*, No. 02 CIV. 2806 (DC), 2003 WL 21087953 (S.D.N.Y. May 12, 2003) (“the motion to transfer is granted. I do not reach the motion to dismiss”); *Credit Suisse Sec. (USA) LLC v. Hilliard*, 469 F. Supp. 2d 103, 105 (S.D.N.Y. 2007) (“defendants’ . . . motion to transfer is granted. In view of this, I do not reach defendants’ other motions”); *Sookhoo v. CRCG, Inc.*, No. 91 CIV. 1087 (JFK), 1992 WL 142034, at \*2 (S.D.N.Y. June 10, 1992) (“Because the Court is granting defendants’ motion for a transfer, it does not reach their alternative request for relief pursuant to Fed. R. Civ. P. 12(b)”); *Eisenberg v. Wachovia Bank, N.A.*, No. 00 CIV. 7910 (NRB), 2001 WL 30452, at \*1 (S.D.N.Y. Jan. 11, 2001) (“we grant [defendant’s] motion to transfer venue to the Western District of North Carolina and, accordingly, do not reach Wachovia’s motion to dismiss”). Defendants have no objections to, and indeed favor, this Court transferring this case and deferring judgment on the motions to dismiss to the Northern District of California.

constitutes a fraudulent conveyance under Sections 273, 274 and 276 of the New York Debtor and Creditor Law. Not only are such allegations entirely unfounded in fact, but they are also in no way relevant to the circumstances of this case.

Preliminarily, it is illogical for Plaintiff to tack on claims of fraudulent conveyance to the numerous copyright and trademark claims alleged. The purpose of New York's fraudulent conveyance statute is to allow a debtor to recover fraudulently transferred property so that the property may be used to satisfy the debt owed to the creditor seeking its recovery. *Hassett v. Goetzmann*, 10 F. Supp. 2d 181, 188 (N.D. N.Y. 1998). Most, if not all, of the litigation surrounding these claims appears in the context of bankruptcies and debtor/creditor actions, and not in conjunction with trademark and copyright infringement claims. *See, e.g., In re Geltzer*, 502 B.R. 760 (S.D.N.Y. 2013) (fraudulent transfer claim filed by Chapter 7 trustee); *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F.Supp.2d 134 (W.D.N.Y. 2003) (claim brought by judgment creditor committee); *277 Mott St. LLC v. Fountainhead Constr., LLC*, 83 A.D.3d 541 (1st Dep't 2011) (claim brought by property owner against contractor's principal). This case concerns neither a bankruptcy, nor a debtor/creditor action, nor any other circumstances under which a conveyance – let alone a “fraudulent” conveyance – was made which would be cognizable under any relevant law.

Moreover, Plaintiff apparently fails to appreciate that it has filed a lawsuit against both TNF and NS. The creditor's remedy in a fraudulent conveyance action is limited to reaching property or assets that would have been available to satisfy judgment had there been no conveyance. *Marine Midland Bank v. Murkoff*, 120 A.D.2d 122, 133 (2d Dep't 1986). A lawsuit against both entities upends the very premise of a fraudulent transfer claim, i.e. to set aside a transfer to allow recovery to a creditor. Accordingly, Plaintiff's claims of fraudulent

transfer are irrelevant and redundant. Plaintiff clearly can obtain the recovery it seeks from either entity based on its other alleged claims.

Furthermore, Plaintiff fails to allege facts sufficient to support its fraudulent conveyance claim. In order to state a claim for fraudulent conveyance under §§ 273 or 274, a plaintiff must allege that there is a conveyance without fair consideration, and that: (1) the transferor is insolvent at the time of the conveyance or will be rendered insolvent by the transfer in question (§ 273); or (2) as a result of the transfer in question, the transferor is left with unreasonably small capital to conduct its business (§ 274). N.Y. Debt. & Cred. Law §§ 273–74 (McKinney 2001); *Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 428 (S.D.N.Y. 2006); *In re Sharp Int'l Corp.*, 403 F.3d 43, 53 (2d Cir. 2005). The bald recitation of the statute, without more, is insufficient to establish a fraudulent conveyance under New York law. *See, e.g., In re Sharp*, 403 F.3d at 53 (affirming dismissal of fraudulent conveyance claim for failure to state a claim where plaintiff failed to adequately allege lack of “fair consideration”). Plaintiff’s allegations to support its fraudulent conveyance claims are indeed mere recitations of the statute (Compl. ¶¶ 145-51), and therefore cannot support legally cognizable claims.

To the extent that Plaintiff alleges that Defendants engaged in an intentional fraudulent transfer under § 276, such a claim fails, as Plaintiff must show intent to defraud, and must plead with the particularity required by Fed. R. Civ. P. 9(b). *Atlanta Shipping Corp. v. Chem. Bank*, 818 F.2d 240, 251 (2d Cir. 1987). In addition to not pleading any of the details of the so-called conveyance with particularity, including what *actual* property was conveyed, Plaintiff has failed to sufficiently plead the element of fraudulent intent as required by Rule 9(b).

In determining whether a plaintiff has sufficiently pled fraudulent intent with particularity, courts look to considerations including: “(1) lack or inadequacy of consideration;

(2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction in question; (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; (6) the general chronology of the events and transactions under inquiry; (7) a questionable transfer not in the usual course of business; and (8) the secrecy, haste, or unusualness of the transaction.” *In re Actrade Fin. Techs. Ltd.*, 337 B.R. 791, 809 (citations omitted); *see also MFS/Sun Life Trust-High Yield Series v. Van Duesent Airport Servs. Co.*, 910 F. Supp. 913, 935 (S.D.N.Y. 1995). Since Plaintiff’s Complaint fails to provide any particularity beyond a mere recitation of the literal language of the statute, Count VIII cannot stand.

Accordingly, Plaintiff’s fraudulent conveyance claim in Count VIII of the Complaint should be dismissed for failure to state a plausible cause of action.

### **C. Unjust Enrichment**

To prevail on a claim for unjust enrichment in New York, a plaintiff must establish that: (1) the defendant benefitted; (2) at the plaintiff’s expense; and (3) that equity and good conscience require restitution. *R.F.M.A.S., Inc. v. Mimi So*, 619 F. Supp. 2d 39, 89 (S.D.N.Y. 2009); *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 586 (2d Cir.2006) (*citing Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000)). Ultimately, the doctrine of unjust enrichment is based on quasi-contract, permitting a court to find an implied contract “to prevent one person who has obtained a benefit from another . . . from unjustly enriching himself at the other party’s expense.” *Lightfoot v. Union Carbide*

*Corp.*, 110 F.3d 898, 905 (2d Cir. 1997) (quoting *Chadirjian v. Kanian*, 123 A.D.2d 596, 597 (2d Dep't 1986)).

As an initial matter, Plaintiff's claim for unjust enrichment in Count VII of the Complaint merely repeats Plaintiff's allegations regarding the trademark infringement claim of Count V. Plaintiff alleges that the defendants "are using YLD's trademark, and the goodwill associated therewith for their own commercial gain without making any payments to YLD." Compl. ¶ 135. Pleading an alleged claim for unjust enrichment in this manner runs contrary to the jurisprudence that "[u]njust enrichment is an equitable claim that is unavailable where an adequate remedy at law exists." *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l N.V.*, 400 F. App'x 611, 613 (2d Cir. 2010) (upholding dismissal of unjust enrichment claim in light of existing Lanham Act claims).

Moreover, New York courts require that the plaintiff demonstrate that "they themselves conferred a direct benefit on the defendants." *Kaplan, Inc. v. Yun*, 16 F. Supp. 3d 341, 353 (S.D.N.Y. 2014); *see also Kaye*, 202 F.3d at 616. However, here Plaintiff only alleges an *indirect* – rather than a *direct* – benefit on the Defendants. The allegation that Defendants obtained a monetary benefit from using Plaintiff's trademark and associated goodwill is an indirect and indefinable link that does not rise to the level of a direct and unjust benefit that warrants equitable restitution through a claim for unjust enrichment.<sup>7</sup> In *Kaplan*, the plaintiff similarly alleged unjust enrichment claims based on infringement of a trademark. The court found that the plaintiff failed to state a claim for unjust enrichment under New York state law, as

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<sup>7</sup> While for purposes of this Motion, Defendants have argued from the position that Plaintiff owns THE NODE FIRM trademark, in reality, Plaintiff does not. Defendants have filed Opposition No. 91221438 with the Trademark Trial and Appeal Board of the United States Patent and Trademark Office ("PTO") to oppose registration of Application No. 86/174,797 for the mark THE NODE FIRM filed by YLD Limited (the "Offending Application"), on numerous grounds including that YLD committed fraud on the PTO, and that use of the Offending Mark by YLD falsely suggests a connection with The Node Firm (i.e. Defendants). Such opposition is currently pending. A copy of the Notice of Opposition is attached as Exhibit Klein-IV to the Klein Decl.

“the defendants were enriched only *indirectly* from the plaintiffs’ prior activities of promoting their marks.” *Kaplan*, 16 F. Supp. 3d at 353 (emphasis added).

Accordingly, Plaintiff’s unjust enrichment claim in Count VII of the Complaint should be dismissed for failure to state a plausible cause of action.

#### IV. CONCLUSION

For each of the foregoing reasons, Defendant respectfully requests that the Court transfer this Action to the Northern District of California, for the convenience of the parties and witnesses, and in the interest of justice. Additionally, if the Court also chooses to decide Defendant’s motion to dismiss before transferring the Action, Defendant respectfully requests that the Court grant its motion and dismiss the fraudulent conveyance and unjust enrichment claims for failure to state claims upon which relief can be granted.

RESPECTFULLY SUBMITTED,

Dated: May 4, 2015

By: s/Randy Lipsitz

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# **EXHIBIT I**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
X-----X  
YLD LIMITED,

Case No.: 15cv00855 (JPO)

Plaintiff,

v.

**AMENDED COMPLAINT AND  
DEMAND FOR JURY TRIAL**

THE NODE FIRM, LLC, NODE SOURCE, LLC,  
NODESOURCE INC., DANIEL SHAW, and JOE  
MCCANN,

Defendants.

X-----X

Plaintiff YLD Limited (“YLD” or “Plaintiff”) by its attorneys, Adelman Matz, P.C., for its complaint against The Node Firm, LLC (“TNF LLC”), Node Source, LLC (“Node Source”), NodeSource, Inc., (“NS Inc.”), Daniel Shaw (“Shaw”), and Joe McCann (“McCann”) (collectively referred to herein as the “Defendants”) alleges as follows:

**NATURE OF THE CASE**

1. This is an action by Plaintiff for copyright infringement, contributory copyright infringement, vicarious copyright infringement, inducement of copyright infringement under the Copyright Act of 1976, 17 U.S.C. §101 *et seq.*, trademark infringement, unfair competition, unjust enrichment and fraudulent transfer, based on the knowing and willful conduct by all the Defendants infringing YLD’s copyrights in its Node.js platform training materials (the “Training Materials”), infringing YLD’s trademark rights in and to “The Node Firm” trade name, engaging in acts that constitute

unfair competition, unjustly retaining the benefit of the use of YLD's trade name "The Node Firm" without compensation to YLD and fraudulently transferring and conveying assets with the intent to hinder, delay and defraud YLD.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121, 28 U.S.C. §§ 1331, 1338(a) and (b), and pursuant to the principles of supplemental jurisdiction under 28 U.S.C. § 1367.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) and (b) because a substantial part of the events giving rise to this claim occurred in this district, all of the Defendants conduct substantial business within the State of New York, Defendants transact business within the state to supply services in the state, have committed tortious acts within the state and/or committed tortious acts without the state and Defendants regularly do business within the state, solicit business within the state, derive substantial revenue from services rendered in the state, and have infringed Plaintiff's intellectual property rights, including YLD's copyright and trademark within the State of New York as described herein, and at least one of the Defendants is a resident of the State of New York.

4. In addition, upon information and belief, Defendants TNF LLC and Node Source have employees and agents within the State of New York and transact business within the state through their officers, directors, members, managers, employees and/or agents.

5. Venue is also proper in this district pursuant to 28 U.S.C. § 1400(a) and (b) as Defendants and their officers, directors, members, managers, employees and agents

reside and are found in this district and as the Defendants have committed acts of infringement in this district.

#### **NATURE OF THE PARTIES**

6. YLD Limited is a foreign corporation duly formed and existing under the laws of the United Kingdom, with its principal place of business at 32-38 Scrutton Street, EC2A 4RQ, London, England.

7. YLD Limited is a privately held corporation.

8. Upon information and belief, Defendant TNF LLC is a limited liability company duly formed and existing under the laws of the State of Texas.

9. Upon information and belief, TNF LLC has no central office and has members, managers, employees, agents and/or team members in places all around the world, including in New York State.

10. Upon information and belief, Defendant Node Source is a limited liability company duly formed and existing under the laws of the State of Texas.

11. Upon information and belief, Node Source has no central office and has members, managers, employees, agents and/or team members in places all around the world, including in New York State.

12. Upon information and belief NS Inc., is a corporation duly formed and existing under the laws of the State of Delaware.

13. Upon information and belief, NS Inc., has no central office and has officers, directors, officers, managers, employees, agents and/or team members in places all around the world, including in New York State.

14. Upon information and belief, Defendant Joe McCann is an individual who resides in the State of New York.

15. Upon information and belief, McCann owns at least one third (33.33%) of TNF LLC and Node Source, and, among other things serves as a member/manager, Business Director and/or CEO of TNF LLC and Node Source, and as such has control over TNF LLC and Node Source's operations and decisions.

16. Upon information and belief, McCann owns at least one third (33.33%) of the shares of NS Inc., and is a director and CEO of NS Inc., and as such has control over NS Inc.'s operations and decisions.

17. Upon information and belief, Defendant Daniel Shaw is an individual who currently resides in the State of California.

18. Upon information and belief, Shaw owns one third (33.33%) of TNF LLC and Node Source and is the Managing Director and/or CEO of TNF LLC and Node Source, and as such has control over TNF LLC and Node Source's operations and decisions.

19. Upon information and belief, Shaw owns at least one third (33.33%) of the shares of NS Inc., and is a director and President of NS Inc., and as such has control over NS Inc.'s operations and decisions.

20. Upon information and belief, each of the Defendants regularly transacts business within the State of New York in that they have entered into contracts in the State of New York to supply services, have committed tortious acts and the acts complained of herein in the State of New York, and have caused injury to Plaintiff within New York State. Additionally, upon information and belief Defendants regularly solicit business in and derive substantial revenue from the State of New York.

## FACTUAL BACKGROUND

### A. Plaintiff's Ownership of the Training Materials

21. Upon information and belief, Nodejitsu, Inc. (“Nodejitsu”) is a corporation duly formed and existing under the laws of the state of Delaware with its principal place of business at 110 5th Avenue, 5th Floor, New York, NY 10011, and is a well-known provider of infrastructure, platform services, and software for enterprise and public cloud users that help its clients develop and deploy applications written for Node.js.

22. In late 2011, Nuno Job, an individual working for and under contract with Nodejitsu, saw a lack of qualified companies providing consulting services to third parties who were beginning to program in Node.js.

23. Upon information and belief, Nodejitsu believed it would benefit directly from creating these materials by charging licensing fees to consulting service providers who used these training materials. Nodejitsu believed that having its materials strategically placed in front of potential customers through the consulting service providers, would in turn drive business leads to Nodejitsu.

24. In late 2011 and early 2012, Nodejitsu created a set of Node.js platform training materials. Specifically, Nodejitsu created, selected, arranged, and edited the text, computer program code and artwork for these training materials. Nodejitsu registered the training materials with the United States Copyright Office, attaining a U.S. Copyright Registration No. TX 7-87-084 with an effective date of January 27, 2014 (the “Training Materials”).

25. Nodejitsu, by way of agreement, written assignments and/or work for hire, was the copyright owner of exclusive rights with respect to the Training Materials.

26. By virtue of written agreements, YLD has acquired the right, title and interest in and to the copyright in the Training Materials, as well as all rights to income from the Training Materials and the right to prosecute all causes of action for past, present or future infringement thereof.

27. Under the Copyright Act, YLD has the exclusive rights, among other things “to do and to authorize” reproduction of the Training Materials in copies, preparation of derivative works based upon the Training Materials, distribution of copies of the Training Materials, and the display of the Training Materials.

**B. Plaintiff’s Ownership of THE NODE FIRM Mark**

28. In late November of 2011, YLD’s founder Mr. Nuno Job (“Job”) began advertising and offering training, consulting and support services to third parties for Node.js programming, under the trade name “The Node Firm.”

29. On or about November 28, 2011, Job registered the domain name thenodefirm.com, registered to receive email @thenodefirm.com using the Google Apps service and created a website for The Node Firm.

30. In the beginning of 2012, social media accounts, including Twitter, were registered by Job under the handle “TheNodeFirm.”

31. Thereafter, in 2011 and 2012, YLD’s founder Job advertised and offered training and consulting services under “The Node Firm” name. In addition, during this time frame Job invested significant time in pitching new clients, providing training services under “The Node Firm” name, developing client leads and new clients interested in training support and technology services branded as “The Node Firm.” Job also promoted “The Node Firm” brand through speaking engagements, sponsorship opportunities, attendance

at conferences and other networking opportunities. One of the customer leads Job spent significant time developing as a potential customer for “The Node Firm” branded services, was PayPal.

32. Among others, Job offered training services utilizing the Training Materials through an oral, non-exclusive, non-transferrable license under which Job would be allowed to use the Training Materials for Node.js training events and presentations and in exchange would capture business leads to drive business to the Nodejitsu platform. The license was terminable at will by Nodejitsu.

33. Job invested substantial time, resources and hard work to develop “The Node Firm” brand and to ensure that services offered under “The Node Firm” name were of high quality and as such has established substantial goodwill in “The Node Firm” name in New York, around the country and the world.

34. Through Job’s efforts and use of “The Node Firm” trade name, as well as its advertising, offering and providing services in interstate commerce, and other use, Job established ownership rights in “The Node Firm” trade name and the exclusive right to use “The Node Firm” name in interstate commerce in connection with the provisioning of consulting and training services.

35. Thereafter, all right in and to “The Node Firm” trade name, along with the goodwill associated with same and the right to sue for all past infringement, was validly assigned by Job to YLD, so that YLD could continue providing consulting services under The Node Firm name.

**C. Defendants' Infringing Acts**

36. Upon information and belief, in late 2011, Defendant Shaw was aware that Job was offering and providing consulting services under "The Node Firm" name and that Nodejitsu owned the copyright in and to all of the Training Materials and that said materials were used by Job providing services as "The Node Firm" through a non-exclusive, non-transferrable oral license agreement.

37. Upon information and belief, in 2012, Defendant McCann was aware that Job was offering and providing consulting services under "The Node Firm" name and that Nodejitsu owned the copyright in and to all of the Training Materials and that said materials were used by Job providing services as "The Node Firm" through a non-exclusive, non-transferrable oral license agreement.

38. Upon information and belief, in early 2013, Defendants Shaw, McCann and an individual by the name of Isaac Schlueter decided to form a new company that would offer the same training, consulting and support services that were being offered by Job for the Node.js platform.

39. Upon information and belief, Defendants Shaw and McCann wanted to offer these services through a new company that would be owned by them, but wanted to use "The Node Firm" trade name so that they could utilize the good will, client trust, and business already associated with "The Node Firm" trade name, which had been created by Job.

40. Essentially, upon information and belief Defendants Shaw and McCann wanted to take over the existing consulting, training and support business that had been started, cultivated and substantially developed by Job under the name "The Node Firm."

41. Job communicated to Defendants Shaw and McCann that he was willing to consider allowing Defendants Shaw and McCann's new company to use "The Node Firm" trade name, provided that he was properly compensated for use of the name, and that Job's other conditions of a license were satisfied.

42. In addition, on or around February 5, 2013, directly prior to the formation of their new Company, Shaw and McCann were advised in writing by Nodejitsu, who owned the copyrights in and to the Training Materials at that time, that they needed a formal written agreement to use the Training Materials. Among other things, any agreement would have needed to include terms for the license of the Training Materials from Nodejitsu, it would also have needed to include compensation to Nodejitsu in the form of formalization of lead generation system to Nodejitsu, it would have needed to include preferred pricing and would need to address certain liability issues.

43. In emails exchanged between the parties in February of 2013, Shaw and McCann acknowledged Nodejitsu's ownership of the Training Materials and that they needed to license any use of the Training Materials from Nodejitsu for the new company they planned to form.

44. Upon information and belief, on or about February 28, 2013, Shaw, McCann and Schlueter started a limited liability company under the name The Node Firm, LLC (defined herein as "TNF LLC").

45. No license for use of the Training Materials was ever obtained by Shaw, McCann, or TNF LLC.

46. No license for use of the name "The Node Firm" was ever obtained by Shaw, McCann, or the company they formed The Node Firm LLC (TNF LLC).

47. Upon information and belief, beginning on February 28, 2013, Shaw, McCann, and TNF LLC, began offering, advertising and providing consulting, support and training services using the name “The Node Firm” without permission or authorization from Job.

48. Upon information and belief, beginning on February 28, 2013, Shaw, McCann, and/or TNF LLC (under the direction and control of Shaw and McCann) have prepared unauthorized derivative works of the Training Materials, without authorization or permission from Nodejitsu or YLD.

49. Upon information and belief, a qualitatively and quantitatively significant portion of the unauthorized derivatives was appropriated from and/or based on the Training Materials owned by YLD and is substantially similar to the Training Materials.

50. Upon information and belief, between February 28, 2013 and the present, TNF LLC, at the direction and under the control of Shaw and McCann, have offered trainings that utilize and display the Training Materials and/or unauthorized derivatives thereof to third parties including but not limited to PayPal, Netflix, Pearson Education and Symantec, without authorization or permission from Nodejitsu or YLD.

51. Upon information and belief, between February 28, 2013 and the present, TNF LLC, at the direction and under the control of Shaw and McCann, have distributed, transmitted and displayed the Training Materials and/or unauthorized derivatives thereof for profit to third parties consumers who participated in their virtual training sessions and their customers, including but not limited to Pearson Education, PayPal, Netflix, and Symantec, without authorization or permission from Nodejitsu or YLD. Instances where TNF LLC, Shaw and McCann have transmitted the Training Materials and/or unauthorized

derivatives thereof via the internet, electronic mail, and/or virtual training sessions constitute unauthorized “reproductions” of, distribution of, and unauthorized display of said Training Materials and/or unauthorized derivatives thereof.

52. Upon information and belief, between February 28, 2013 and the present, TNF LLC, at the direction and under the control of Shaw and McCann, issued licenses to third parties for use of the Training Materials and/or unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

53. Upon information and belief the issuances of licenses to third parties for use of the Training Materials and/or unauthorized derivatives thereof, constitute violations of YLD’s exclusive right to authorize (i) reproductions; (ii) preparation of derivative works; (iii) distribution of copies; and (iv) display, of the Training Materials and/or unauthorized derivatives thereof.

54. By way of example, upon information and belief, TNF LLC, at the direction and under the control of Shaw and McCann, licensed the Training Materials to PayPal and Pearson Education, among others, for those entities to train their employees and contractors, in exchange for over one million dollars (\$1,000,000).

55. Upon information and belief, beginning on February 28, 2013, TNF LLC, at the direction and under the control of Shaw and McCann, also authorized, encouraged and induced, third party individuals including consumers who participated in their training sessions and their customers such as PayPal and Pearson Education, to reproduce, distribute, and display the Training Materials, and/or the unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

56. Upon information and belief, between February 28, 2013 and the present, TNF LLC, Shaw and McCann derived substantial profits from their exploitation and infringing use of the Training Materials.

57. Upon information and belief, between February 28, 2013 and the present, TNF LLC, Shaw and McCann derived substantial profits from their exploitation and use of “The Node Firm” trade name and the goodwill associated therewith.

58. Upon information and belief, by way of just one example, based on the reputation of “The Node Firm” brand, PayPal and Pearson Education, believing that TNF LLC was associated with “The Node Firm” brand, entered into contracts with TNF LLC wherein TNF LLC would provide training services and/or license for use of the Training Materials in exchange for over one million dollars (\$1,000,000).

59. Between February 2013 and February 2014, Job advised Defendants orally and in writing, on behalf of himself, YLD and Nodejitsu, that they were not permitted to use “The Node Firm” trade name or the Training Materials without permission from Job and Nodejitsu (at that time the owner of the Training Materials), respectively.

60. On or about February 4, 2014, Plaintiff sent Defendants a cease and desist letter demanding that Defendants cease and desist from use of the Training Materials and “The Node Firm” trade name.

61. Upon information and belief, on or about February 25, 2014, after Shaw, McCann and TNF LLC, were aware of Plaintiff’s claims of copyright and trademark infringement and Plaintiff’s demand, Shaw and McCann formed a new company under the name Node Source LLC.

62. Upon information and belief, it was the intent of Defendants that Node Source absorb and continue the business of TNF LLC.

63. Upon information and belief, Node Source is engaged in the same business as TNF LLC, in that, like TNF LLC, Node Source is engaged in the business of providing consulting, training and support services for Node.js programmers using the Training Materials and unauthorized derivatives thereof.

64. Upon information and belief, Node Source has continued to use substantially the same management and personnel, structure, assets, property, customer lists, and business format and general business operations as that of TNF LLC.

65. Upon information and belief, TNF LLC transferred all of its assets including but not limited to, property, customer lists, capital, cash, contracts, receivables, and business operations to Node Source, without adequate, fair or any compensation therefor.

66. Upon information and belief, Node Source is operating as a mere continuation of TNF LLC.

67. Upon information and belief, TNF LLC's conveyance of the afore-stated assets to Node Source caused TNF LLC to become insolvent and/or with unreasonably small capital and/or without an ability to pay the debts previously claimed by Plaintiff.

68. Upon information and belief, TNF LLC's conveyance of the afore-stated assets to Node Source without fair consideration, shortly after Plaintiff's cease and desist letter including a demand for compensation, was intended to hinder, delay and/or defraud YLD.

69. Upon information and belief, since its formation in February of 2014, Node Source, at the direction and under the control of Shaw and McCann, has also reproduced,

distributed, displayed, licensed and otherwise exploited the Training Materials and/or unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

70. Additionally, upon information and belief, since its formation in February of 2014, at the direction and under the control of Shaw and McCann, Node Source has created derivative works of the Training Materials, without authorization or permission from Nodejitsu or YLD.

71. Upon information and belief, since its inception, Node Source, at the direction and under the control of Shaw and McCann, also authorized, encouraged and induced third parties to reproduce, distribute, and display the Training Materials, and/or the unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

72. Upon information and belief, since its inception NS Inc., at the direction and under the control of Shaw and McCann, has also reproduced, distributed, displayed, licensed and otherwise exploited the Training Materials and/or unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

73. Additionally, upon information and belief, since its inception, NS Inc., at the direction and under the control of Shaw and McCann, has created derivative works of the Training Materials, without authorization or permission from Nodejitsu or YLD.

74. Upon information and belief, since its inception, NS Inc., at the direction and under the control of Shaw and McCann, also authorized, encouraged and induced third parties to reproduce, distribute, and display the Training Materials, and/or the unauthorized derivatives thereof, without authorization or permission from Nodejitsu or YLD.

75. Upon information and belief, through the present Defendants continue to use and exploit the Training Materials and “The Node Firm” trade name for their own commercial purposes without authorization or permission from YLD.

76. Upon information and belief, Defendants’ infringing acts are willful and deliberate and committed with prior notice of Nodejitsu’s and subsequently YLD’s ownership of the copyright in and to the Training Materials.

77. Upon information and belief, Defendants’ infringing acts are willful and deliberate and committed with prior notice of YLD’s ownership rights in and to “The Node Firm” trade name.

78. Upon information and belief, as a result of Defendants’ unlawful actions, Plaintiff has been damaged and has suffered, and continues to suffer, irreparable injury for which it has no adequate remedy at law. An injunction is necessary to ensure that Defendants permanently cease any further use of the Training Materials and “The Node Firm” name.

## COUNT I

### COPYRIGHT INFRINGEMENT OF THE TRAINING MATERIALS (Against All Defendants)

79. Plaintiff repeats and re-alleges each and every allegation of paragraphs 1 through 78 as above as if fully set forth herein.

80. YLD is the owner of a valid copyright in and to the Training Materials.

81. Upon information and belief, Defendants have infringed YLD’s exclusive rights in and to its copyrights by *inter alia*, reproducing, distributing, displaying, licensing and otherwise exploiting the Training Materials.

82. Upon information and belief, Defendants have further infringed on YLD's copyright in and to the Training Materials by authorizing third parties to and preparing, distributing, licensing, displaying and otherwise exploiting unauthorized derivatives of the Training Materials.

83. Neither Nodejitsu nor YLD authorized any of the Defendants to copy, reproduce, display, distribute, license, or otherwise exploit the Training Materials or any derivative thereof.

84. Additionally, neither YLD nor Nodejitsu authorized any of the Defendants to make derivative works of the Training Materials.

85. Upon information and belief, Defendants did not obtain any permission, consent or license for the use, distribution, copying, reproduction, display or exploitation of the Training Materials nor did they obtain permission, consent or license for the preparation of derivative works of the Training Materials.

86. Upon information and belief, Defendants' infringing acts alleged herein were willful, deliberate, and committed with prior notice and knowledge of the copyright in and to the Training Materials.

87. Upon information and belief, Plaintiff has been harmed by the continued infringement by Defendants of YLD's copyright in and to the Training Materials.

88. Upon information and belief, Defendants are likely to continue infringing YLD's copyright in and to the Training Materials unless they are enjoined from further infringement.

89. Upon information and belief, the infringing acts of Defendants have been, are and, if continued hereafter, will continue to be committed willfully.

90. As a direct and proximate result of their actions, Defendants are liable to the YLD for willful copyright infringement under 17 U.S.C. § 501, in violation of YLD's exclusive rights under 17 U.S.C. § 106.

91. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained but to be determined at trial.

92. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

93. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

94. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and as such, YLD is also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under the Copyright Act.

95. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

## **COUNT II**

### **INDUCEMENT OF COPYRIGHT INFRINGEMENT** **OF THE TRAINING MATERIALS** **(Against All Defendants)**

96. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 95 above with the same force and effect as if set forth fully herein.

97. Upon information and belief, Defendants' clients have engaged in, including but not limited to, the unauthorized reproduction, display, and distribution of the

copyrighted Training Materials and/or unauthorized derivatives thereof. As a result, the Defendants' clients are liable for direct copyright infringement of YLD's exclusive rights of reproduction, display, and distribution under 17 U.S.C. § 106.

98. Upon information and belief, Each one of Defendants' clients' infringing acts has been encouraged and made possible by Defendants authorization and encouragement of those infringing acts, whose intent is to promote and encourage the unlawful reproduction, display, distribution and exploitation of the copyrighted Training Materials and/or unauthorized derivatives thereof.

99. As a direct and proximate result of their actions, Defendants are liable to the YLD for inducing the infringing acts of their clients, in violation of Sections 106 and 501 of the Copyright Act. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained, but to be determined at trial.

100. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

101. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

102. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and YLD is accordingly also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under the Copyright Act.

103. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

**COUNT III**

**CONTRIBUTORY COPYRIGHT INFRINGEMENT**  
**OF THE TRAINING MATERIALS**  
**(Against All Defendants)**

104. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 103 above with the same force and effect as if set forth fully herein.

105. Upon information and belief, Defendants’ clients have engaged in, including but not limited to, the unauthorized reproduction, display, and distribution of the copyrighted Training Materials and/or unauthorized derivatives thereof. As a result, the Defendants’ clients are liable for direct copyright infringement of YLD’s exclusive rights of reproduction, display, and distribution under 17 U.S.C. § 106.

106. Upon information and belief, Defendants had actual and constructive knowledge of their clients’ infringing activity and materially contributed to that activity by licensing the Training Materials, and/or unauthorized derivatives thereof, to said third parties and approving and encouraging their Clients to display, reproduce and distribute the Training Materials to employees within those organizations, thus urging and contributing to infringing conduct.

107. Upon information and belief, at the time they began using the materials in 2013, Defendants were aware of Nodejitsu’s ownership of the Training Materials prior to the start of any of the above mentioned acts, and despite requests, have refused to take any action to halt the infringing conduct.

108. As a direct and proximate result of their actions, Defendants are liable to the YLD for contributorily infringing YLD’s copyright, in violation of Sections 106 and

501 of the Copyright Act. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained, but to be determined at trial.

109. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

110. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

111. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and YLD is accordingly also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under copyright.

112. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

#### **COUNT IV**

#### **VICARIOUS COPYRIGHT INFRINGEMENT OF THE TRAINING MATERIALS (Against All Defendants)**

113. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 112 above with the same force and effect as if set forth fully herein.

114. Upon information and belief, Defendants' clients have engaged in various infringing acts, including but not limited to, the unauthorized reproduction, display, and distribution of the copyrighted Training Materials and/or unauthorized derivatives thereof. As a result, the Defendants' clients are liable for direct copyright infringement of YLD's exclusive rights of reproduction, display, and distribution under 17 U.S.C. § 106.

115. Upon information and belief, Defendants had the legal right and ability to supervise and control the infringing activity that occurred through their services, including but not limited to by issuing licenses, authorizations to and/or giving their clients permission to engage in the infringing activity.

116. Upon information and belief, by promoting TNF LLC and Node Source's ability to provide Node.js training seminars to its clients and by using and disseminating the copyrighted Training Materials in those seminars and licensing the Training Materials to their Clients for further display and reproduction within those organizations, Defendants are intimately involved in supervising and controlling the infringing activity.

117. Upon information and belief, Defendants nevertheless refused to exercise any control over the illegal reproduction, display, and distribution of the copyrighted Training Materials, and as a direct and proximate result of such failure, Defendants' clients have infringed the copyrighted Training Materials.

118. Upon information and belief, Defendants derived a substantial financial benefit from those infringements of the copyrighted Training Materials.

119. Upon information and belief, TNF LLC and Node Source were paid by their clients for the training services they provided, which were based on the unauthorized use of the copyrighted Training Materials.

120. Upon information and belief, Shaw and McCann also derived substantial benefit from those infringements by distributing the profits from their infringing activities to themselves.

121. Upon information and belief, Defendants also derived substantial benefit from licensing the Training Materials and/or unauthorized derivatives thereof to their clients for the purpose of their clients running their own internal training sessions.

122. As a direct and proximate result of their actions, Defendants are liable to the YLD for vicariously infringing YLD's copyright, in violation of Sections 106 and 501 of the Copyright Act. YLD suffered, and will continue to suffer, actual losses in an amount not yet ascertained, but to be determined at trial.

123. In addition to YLD's actual damages, YLD is entitled to receive the profits made by the Defendants from their wrongful acts, pursuant to 17 U.S.C. §504.

124. In the alternative, YLD is entitled to statutory damages, pursuant to 17 U.S.C. §504(c), which should be enhanced by 17 U.S.C. § 504(c)(2) because of the Defendants' willful copyright infringement.

125. Unless and until Defendants' conduct is enjoined by this Court, they will continue to cause irreparable injury that cannot fully be compensated for or measured in money and YLD is accordingly also entitled to an injunction pursuant to 17 U.S.C. § 502 prohibiting further infringement of its exclusive rights under copyright.

126. YLD is further entitled to recover its attorneys' fees and costs of this action pursuant to 17 U.S.C. § 505.

## **COUNT V**

### **TRADEMARK INFRINGEMENT IN VIOLATION OF 15 U.S.C. §1125(a)** **(Against All Defendants)**

127. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 – 126 above with the same force and effect as if set forth fully herein.

128. Through Job's efforts and use of "The Node Firm" trade name, he established ownership rights in "The Node Firm" name and the exclusive right to use "The Node Firm" name in interstate commerce in connection with the provisioning of consulting services, which was assigned to YLD, along with, *inter alia*, the goodwill associated therewith.

129. Defendants' use of "The Node Firm" trade name in connection with the provisioning of support, consulting and training services constitutes a false designation of origin and/or a false or misleading description and representation of fact which is likely to cause confusion and mistake, and is likely to deceive consumers as to the affiliation, connection and/or association of Defendants with YLD and is likely to mislead consumers to believe that the Defendants' services are sponsored, approved or somehow associated with YLD.

130. By reason of the foregoing, the trade and public are likely to be and will continue to be confused, misled, or deceived, and YLD has, is now, and will continue to suffer irreparable injury to its goodwill and business reputation for which it has no adequate remedy at law.

131. Upon information and belief, Defendants have intentionally and knowingly adopted and used a trade name that is likely to cause confusion in the marketplace as to the source, origin, or sponsorship of the goods offered for sale and sold by the Defendants.

132. By virtue of the foregoing, Defendants' acts are in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

133. Defendant's acts are causing and continue to cause YLD irreparable harm in the nature of loss of control over its reputation and loss of substantial consumer goodwill.

The irreparable harm to YLD will continue, without any adequate remedy at law, unless and until Defendants' unlawful conduct is enjoined by this Court.

134. Upon information and belief, Defendants are using "The Node Firm" trade name, willfully and with knowledge that they do not have the right to use said name, and with the intent to unfairly compete with YLD, and benefit from the goodwill associated with "The Node Firm" name.

135. Defendants' conduct has caused, and is likely to continue causing, substantial injury to the public and to YLD, and YLD is entitled to injunctive relief and to recover Defendants' profits, actual damages, enhanced profits and damages, costs, and reasonable attorneys' fees pursuant to 15 U.S.C. §§ 1125(a), 1116 and 1117.

## **COUNT VI**

### **COMMON LAW UNFAIR COMPETITION** **(Against All Defendants)**

136. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -135 above as though fully set forth herein.

137. Defendants' use of "The Node Firm" name to offer support, training and consulting services in connection with Node.js, without the authorization or consent of YLD is likely to cause confusion and mistake and to deceive consumers as to the source, origin, sponsorship or affiliation of Defendants and constitutes trade name and trademark infringement, unfair competition and misappropriation of YLD's goodwill and reputation.

138. Upon information and belief, Defendants adopted and used "The Node Firm" name as a trade name and trademark with the intent to trade off of the goodwill and reputation of "The Node Firm" name, which is owned by YLD.

139. Upon information and belief, Defendants have infringed YLD's mark "The Node Firm" as alleged herein with the intent to deceive the public into believing that services offered by Defendants are made by, approved by, sponsored by or affiliated with, YLD.

140. Upon information and belief, Defendants' acts as alleged herein were committed with the intent to pass off and palm off Defendants' services as the services of Job (now YLD), and with the intent to deceive and defraud the public.

141. Upon information and belief, Defendants adopted and continued to use "The Node Firm" name with knowledge of Job's (now YLD's) ownership of same. Despite this knowledge and the fact that Defendants could provide goods and services under another name, it decided instead to misappropriate "The Node Firm" name and use it as its own.

142. Upon information and belief, YLD has been damaged by Defendants' afore-described acts in an amount to be determined at trial, but in an amount no less than one million dollars (\$1,000,000.00), plus interest thereon.

143. Defendants' acts are causing and continue to cause YLD irreparable harm in the nature of loss of control over its reputation, and loss of substantial consumer goodwill. This irreparable harm to YLD will continue, without any adequate remedy at law, unless and until Defendants' unlawful conduct is enjoined by this Court.

## **COUNT VII**

### **UNJUST ENRICHMENT** **(Against All Defendants)**

144. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -143 above as though fully set forth herein.

145. Defendants are using YLD's trademark, and the goodwill associated therewith, for their own commercial gain without making any payments to YLD.

146. Upon information and belief, Shaw, McCann and Schlueter started TNF LLC, with the intention to take the clients, leads, and goodwill already developed in "The Node Firm" brand name and use it for their own commercial benefit.

147. Upon information and belief, when TNF LLC was formed, at the instruction of Shaw and McCann, TNF LLC took over the clients and business leads and started using "The Node Firm" name so that TNF LLC could utilize the goodwill associated with said name for their own commercial benefit.

148. Upon information and belief, TNF LLC have obtained monetary benefit from their use of "The Node Firm" name and the goodwill associated therewith, without payment or compensation to YLD.

149. Upon information and belief, by way of just one example, based on the reputation of "The Node Firm" brand, PayPal and Pearson Education, believing that TNF LLC was associated with "The Node Firm" brand, entered into contracts with TNF LLC wherein TNF LLC would provide training services in exchange for over one million dollars (\$1,000,000).

150. Upon information and belief, Shaw and McCann also benefitted from their use of "The Node Firm" name, as they were compensated by TNF LLC.

151. Upon information and belief, Node Source and NS Inc., have also benefitted from the use of "The Node Firm" name and the goodwill associated therewith as they have taken over the business of TNF LLC and are mere continuations of same and benefit from the reputation and goodwill associated with "The Node Firm" brand.

152. Upon information and belief, Defendants' above described benefit has been at the expense of YLD and equity and good conscience require restitution.

153. YLD is entitled to the reasonable value Defendants' use of "The Node Firm" name, and the goodwill and trust in same, which Defendants benefitted from, in an amount to be determined at trial.

### **COUNT VIII**

#### **FRAUDULENT CONVEYANCE** **(Against Node Source)**

154. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -153 above as though fully set forth herein.

155. Upon information and belief, on or about February 25, 2014, very shortly after receiving Plaintiff's cease and desist letter which *inter alia*, demanded that TNF LLC, Shaw and McCann cease and desist from use of the name "The Node Firm" and demanded compensation for past use of said property, Shaw and McCann, formed a new company under the name Node Source LLC.

156. Upon information and belief, at the time Node Source was formed Plaintiff was a present and/or future creditor of TNF LLC and Plaintiff's identity and claims were known to TNF LLC, Shaw and McCann.

157. Upon information and belief, at the time Node Source was formed, TNF LLC was the owner of assets, including property, capital, cash, contracts and receivables that could have been used as payment for Plaintiff's claims.

158. Upon information and belief, TNF LLC transferred all of its assets including, property, customer lists, capital, cash, contracts, receivables, and business operations to Node Source, an entity owned and controlled by McCann and Shaw, without

adequate or any compensation therefor, and Node Source is operating as a mere continuation of TNF LLC.

159. Upon information and belief, TNF LLC's conveyance of the afore-stated assets to Node Source caused TNF LLC to become insolvent and/or with unreasonably small capital and/or without an ability to pay the debts claimed by Plaintiff.

160. Upon information and belief, TNF LLC's conveyance of the afore-stated assets to Node Source, shortly after Plaintiff's cease and desist letter including a demand for compensation, was intended to hinder, delay and/or defraud YLD and to avoid making payments to YLD or to avoid having assets sufficient to satisfy YLD's claims.

161. Upon information and belief, Shaw and McCann own the majority of the ownership interest in TNF LLC and Node Source.

162. Upon information and belief, prior to the above transfers, Shaw, McCann, and TNF LLC had knowledge of Plaintiff's claims.

163. Upon information and belief, after the above transfers, Shaw and McCann still retained control over the property and assets that were transferred from TNF LLC to Node Source, by virtue of their control over Node Source.

164. Upon information and belief, the assets that were transferred from TNF LLC to Node Source were the only assets of TNF LLC, and the only assets that would have been available to satisfy Plaintiff's claims.

165. Upon information and belief, no consideration, and/or inadequate consideration, was paid to TNF LLC for the assets it transferred to Node Source.

166. Upon information and belief, the above conveyances rendered TNF LLC insolvent or with an unreasonably small amount of property.

167. Upon information and belief, the conveyances were made to hinder, delay or defraud Plaintiff's ability to recover on any potential claims against TNF LLC.

168. Upon information and belief, Node Source, was not a transferee for fair consideration without knowledge of the fraud at the time of its acquisition of TNF LLC's assets.

169. As such, the above conveyances were fraudulent against Plaintiff pursuant to Debtor and Creditor Law §§ 270 *et seq.*

170. Upon information and belief, YLD has been damaged by Defendants' afore-described acts in an amount to be determined at trial, but in an amount no less than one million dollars (\$1,000,000.00), plus interest thereon.

171. In accordance with Debt. & Cred. Law § 276-a, by reason of TNF LLC, Node Source, Shaw and McCann's fraudulent transfers and conveyances, YLD has been forced to expend, and will in the future expend, considerable sums of money for counsel fees, with interest.

172. By reason of the foregoing, Node Source is liable to Plaintiff for all sums TNF LLC is liable to Plaintiff for, as set forth in the above causes of action, in an amount to be determined at trial.

173. As a result of the foregoing, Plaintiff is entitled to (i) have the above-described conveyances set aside to the extent necessary to satisfy their claim or (ii) to disregard the conveyances and to attach or levy execution upon the property conveyed.

174. Plaintiff is also entitled to recover its reasonable costs and attorneys' fees pursuant to Debt. & Cred. Law § 276-a.

**COUNT IX**

**FRAUDULENT CONVEYANCE**

**(Against NS Inc.)**

175. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -174 above as though fully set forth herein.

176. The Complaint in the instant action was filed against Shaw, McCann, TNF LLC and Node Source on or about February 5, 2015.

177. The Summonses and Complaint in the instant action was sent to counsel for Defendants on or about February 5, 2015.

178. The Summonses and Complaint in the instant action was served on Shaw, McCann and Node Source on or about February 11, 2015.

179. Upon information and belief, on or about February 18, 2015, after receiving the Summons and Complaint in the instant action, Shaw and McCann, formed NS Inc., an entity that they own and control.

180. Upon information and belief, on or about February 18, 2015, after receiving the Summons and Complaint in the instant action Node Source converted to a Delaware corporation under the name NodeSource, Inc.

181. Upon information and belief, by virtue of this conversion Node Source transferred all of its assets including, property, customer lists, capital, cash, contracts, receivables, and business operations to NS Inc., an entity owned and controlled by McCann and Shaw, without adequate or any compensation therefor, and NS Inc., is operating as a mere continuation of Node Source.

182. Upon information and belief, NS Inc., is subject to all actions previously taken by Node Source and its members.

183. Upon information and belief, NS Inc., is subject to all of the debts, liabilities and obligations of Node Source.

184. Upon information and belief NS Inc., is deemed to be the same entity as Node Source.

185. Upon information and belief, the existence of NS Inc., is deemed to have commenced on the date that Node Source commenced its existence, i.e. February 25, 2014.

186. Upon information and belief, all liabilities of Node Source, which has converted to NS Inc., remain attached to NS Inc., and may be enforced against NS Inc., to the same extent as if said liabilities had originally been incurred or contracted by NS Inc.

187. Upon information and belief, YLD has been damaged by Defendants' afore-described acts in an amount to be determined at trial, but in an amount no less than one million dollars (\$1,000,000.00), plus interest thereon.

188. In accordance with Debt. & Cred. Law § 276-a, by reason of Defendants' fraudulent transfers and conveyances, YLD has been forced to expend, and will in the future expend, considerable sums of money for counsel fees, with interest.

189. By reason of the foregoing, NS Inc., is liable to Plaintiff for all sums TNF LLC and/or Node Source are liable to Plaintiff for, as set forth in the above causes of action, in an amount to be determined at trial.

190. As a result of the foregoing, Plaintiff is entitled to (i) have the conveyances described in Count VIII set aside to the extent necessary to satisfy their claim or (ii) to disregard the conveyances described in Count VIII and to attach or levy execution upon the property conveyed.

191. Plaintiff is also entitled to recover its reasonable costs and attorneys' fees pursuant to Debt. & Cred. Law § 276-a.

**COUNT X**

**FRAUDULENT CONVEYANCE**

**(Against NS Inc.)**

192. Plaintiff repeats and re-alleges each of the allegations set forth in paragraphs 1 -174 above as though fully set forth herein.

193. The Complaint in the instant action was filed against Shaw, McCann, TNF LLC and Node Source on or about February 5, 2015.

194. The Summonses and Complaint in the instant action was sent to counsel for Defendants on or about February 5, 2015.

195. The Summons and Complaint in the instant action was served on Shaw, McCann and Node Source on or about February 11, 2015.

196. Upon information and belief, on or about February 18, 2015, after receiving the Summonses and Complaint in the instant action, Shaw and McCann, formed NS Inc., an entity that they own and control.

197. Upon information and belief, at the time NS Inc., was formed YLD was a present and/or future creditor of Node Source and Plaintiff's identity and claims were known to Node Source, Shaw and McCann.

198. Upon information and belief, at the time NS Inc., was formed, Node Source was the owner of assets, including property, capital, cash, contracts and receivables that could have been used as payment for Plaintiff's claims.

199. Upon information and belief, within days after being served with the Complaint in the within action Node Source, an entity owned and controlled by McCann

and Shaw, transferred and/or gave possession of its assets, including property, customer lists, capital, cash, contracts, receivables, and business operations to NS Inc., and all rights thereto, without adequate or any compensation therefor, and NS, Inc., is operating as a mere continuation of Node Source.

200. Upon information and belief, Node Source transferred all of its assets including but not limited to, property, customer lists, capital, cash, contracts, receivables, and business operations, to NS Inc., without adequate or fair compensation.

201. Upon information and belief, Shaw and McCann own the majority of the ownership interest in Node Source and NS Inc.

202. Upon information and belief, prior to the above transfers, Shaw, McCann, and Node Source had knowledge of Plaintiff's claims.

203. Upon information and belief, after the above transfers, Shaw and McCann still retained control over the property and assets that were transferred from Node Source to NS Inc., by virtue of their control over NS Inc.

204. Upon information and belief, the assets that were transferred from Node Source to NS Inc., were the only assets of Node Source, and the only assets that would have been available to satisfy Plaintiff's claims.

205. Upon information and belief, NS Inc., is subject to all actions previously taken by Node Source's members.

206. Upon information and belief, NS Inc., is subject to all of the debts, liabilities and obligations of Node Source.

207. Upon information and belief, Node Source's conveyance of the afore-stated assets to NS Inc., caused Node Source to become insolvent and/or with unreasonably small

capital and/or without an ability to pay the debts claimed by Plaintiff and/or a shell company.

208. Upon information and belief, Node Source's conveyance of the afore-stated assets to NS Inc., shortly after receipt of the Complaint in this action, was intended to hinder, delay and/or defraud YLD.

209. Upon information and belief, no consideration, and/or inadequate consideration, was paid to Node Source for the assets it transferred to NS Inc.

210. Upon information and belief, the above conveyances rendered Node Source insolvent or with an unreasonably small amount of property.

211. Upon information and belief, the conveyances were made to hinder, delay or defraud Plaintiff's ability to recover on any potential claims against Node Source.

212. Upon information and belief, NS Inc., was not a transferee for fair consideration without knowledge of the fraud at the time of its acquisition of Node Source's assets.

213. As such, the above conveyances were fraudulent against Plaintiff pursuant to Debtor and Creditor Law §§ 270 *et seq.*

214. Upon information and belief, YLD has been damaged by Defendants' afore-described acts in an amount to be determined at trial, but in an amount no less than one million dollars (\$1,000,000.00), plus interest thereon.

215. In accordance with Debt. & Cred. Law § 276-a, by reason of TNF LLC, Node Source, Shaw and McCann's fraudulent transfers and conveyances, YLD has been forced to expend, and will in the future expend, considerable sums of money for counsel fees, with interest.

216. By reason of the foregoing, NS Inc., is liable to Plaintiff for all sums TNF LLC and/or Node Source are liable to Plaintiff for, as set forth in the above causes of action, in an amount to be determined at trial.

217. As a result of the foregoing, Plaintiff is entitled to (i) have the above-described conveyances set aside to the extent necessary to satisfy their claim or (ii) to disregard the conveyances and to attach or levy execution upon the property conveyed.

218. Plaintiff is also entitled to recover its reasonable costs and attorneys' fees pursuant to Debt. & Cred. Law § 276-a.

**WHEREFORE**, Plaintiff respectfully requests judgment against the Defendants, and each of them jointly and severally, as follows:

a) On Counts I through IV, for such permanent injunctive relief as is necessary to prevent or restrain infringement of the Copyrighted Training Materials, including a preliminary injunction requiring that Defendants and their agents, servants, employees, officers, directors, attorneys, successors, assigns, licensees, and all others in active concert or participation with any of them, cease infringing, publishing, licensing, exploiting, or causing, aiding, enabling, facilitating, encouraging, promoting, inducing or materially contributing to or participating in the infringement, publishing, licensing, or exploiting of any of YLD's copyrights or exclusive rights in and to the Training Materials protected by the Copyright Act (whether now in existence or hereafter created);

b) On Counts I through IV, that the Court enters judgment against Defendants, and each of them jointly and severally, that Defendants have infringed YLD's rights

in the copyright in the Training Materials under 17 U.S.C. §501, and that the infringement by Defendants was willful;

c) On counts I through IV,

- i. that the Court enter judgment against the Defendants, jointly and severally, for damages suffered by YLD as a result of the infringement complained of herein, as well as disgorgement of any profits attributable to the Defendants' infringement, including the value of all gains, profits, advantages, benefits, and consideration derived by Defendants from and as a result of their infringement of YLD's copyright in the Training Materials, in an amount to be determined at trial; or
- ii. In the alternative, if YLD so elects, in lieu of recovery of their actual damages and Defendants' profits, for an award of statutory damages against Defendants, for their acts of willful copyright infringement;

d) That the Court enters an Order pursuant to 17 U.S.C. § 503 mandating the impounding of all infringing copies of the Training Materials, including the derivative works created therefrom, and any other materials prepared by Defendants containing any copies or any portions thereof;

e) For costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505;

f) Defendants and all of their agents, officers, employees, representatives, successors, assigns, attorneys, and all other persons acting for, with, by, through, or under authority from Defendants, or in concert or participation with Defendants, and each of them, should be permanently enjoined, from:

- i. using “The Node Firm” name, or any other imitation or simulation thereof in connection with Defendants’ services;
- ii. using any trademark, service mark, name, logo, design or source designation of any kind on or in connection with Defendants’ services that is likely to cause confusion, mistake, deception, or public misunderstanding that such services are provided by YLD, or are sponsored or authorized by or in any way connected or related to YLD;
- iii. passing off, palming off, or assisting in passing off or palming off, Defendants’ services as those of YLD, or otherwise continuing any and all acts of unfair competition as alleged in this Complaint;
- iv. Engaging in any activity constituting unfair competition with YLD, or constituting an infringement of YLD’s trade name “The Node Firm”;
- v. Registering or applying to register as a trademark, service mark, trade name, internet domain name or any other source identifier or symbol of origin, that is at all similar “The Node Firm,” or any other mark or name that infringes on or is likely to be confused with YLD’s trade name “The Node Firm”; and
- vi. Opposing the application for, or petitioning for the cancellation of, any registration for “The Node Firm” that YLD has applied for or may apply for in the future;

g) That Defendants be required to account for and pay any and all profits derived from the provisioning of its services and for all damages sustained by YLD by reason of said acts of infringement and unfair competition complained of herein;

h) That Defendants pay YLD for all of Defendants' profits, gains and sums and for all damages sustained arising from the acts of infringement and unfair competition alleged herein, including that YLD should be awarded all damages caused by the acts forming the basis of this Complaint, in an amount to be determined at trial, plus interest thereon;

i) That this Court award YLD treble the amount of actual damages suffered by YLD in an amount to be determined at trial;

j) The costs of this action;

k) That this is an exceptional case and that Defendants should be required to pay to YLD its reasonable attorneys' fees pursuant to 15 U.S. C. § 1117(a);

l) Based on Defendants' willful and deliberate infringement of YLD's trade name, and by reason of Defendants' fraud and palming off, and to deter such conduct in the future, YLD should be awarded punitive damages;

m) On Count VII, that Defendants account and pay restitution to YLD for the benefits that it has obtained unjustly arising from Defendants' use of the "The Node Firm" name, brand and the goodwill, and from the acts of unjust enrichment alleged herein, in a sum to be determined at trial, plus interest thereon;

n) On Counts VIII-X, a judgement be entered against the defendants named therein in a sum to be determined at trial, which represents all sums TNF LLC and/or Node Source are liable to Plaintiff for as set forth in the above causes of action;

- o) On Counts VIII-X, that the transfers and conveyances described therein, be adjudged fraudulent and void, and be declared null and void and set aside;
- p) On Counts VIII-X, that Defendants be compelled to account for assets fraudulently conveyed;
- q) On Counts VIII-X, that Plaintiff have judgment against Defendants for a sum to be determined at trial, but not less than one million dollars (\$1,000,000.00) plus interest thereon;
- r) Costs and attorneys' fees; and
- s) For such other and further relief in favor of Plaintiff as the Court deems just and proper.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury on all claims for relief and issues triable by jury.

Dated: New York, New York  
May 28, 2015

Respectfully submitted,  
ADELMAN MATZ, P.C.



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Gary Adelman, Esq.  
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**EXHIBIT J**

Corporations Section  
P.O.Box 13697  
Austin, Texas 78711-3697



Coby Shorter, III  
Deputy Secretary of State

**Office of the Secretary of State**

**CERTIFICATE OF CONVERSION**

The undersigned, as Secretary of State of Texas, hereby certifies that a filing instrument for

Node Source, LLC  
File Number: 801940874

Converting it to

NodeSource, Inc.  
File Number: [Entity not of Record, Filing Number Not Available]

has been received in this office and has been found to conform to law. ACCORDINGLY, the undersigned, as Secretary of State, and by virtue of the authority vested in the secretary by law, hereby issues this certificate evidencing the acceptance and filing of the conversion on the date shown below.

Dated: 02/13/2015

Effective: 02/13/2015



A handwritten signature in black ink that reads "Coby Shorter III".

Coby Shorter, III  
Deputy Secretary of State

Phone: (512) 463-5555  
Prepared by: Rosa Arrellano

Come visit us on the internet at <http://www.sos.state.tx.us/>  
Fax: (512) 463-5709  
TID: 10340

Dial: 7-1-1 for Relay Services  
Document: 591308390002

# Delaware

PAGE 1

*The First State*

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE DO HEREBY CERTIFY THAT THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF CONVERSION OF A TEXAS LIMITED LIABILITY COMPANY UNDER THE NAME OF "NODE SOURCE, LLC" TO A DELAWARE CORPORATION, CHANGING ITS NAME FROM "NODE SOURCE, LLC" TO "NODESOURCE, INC.", FILED IN THIS OFFICE ON THE SEVENTEENTH DAY OF FEBRUARY, A.D. 2015, AT 7:12 O'CLOCK P.M.

A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS.

5694034 8100V

150209303

You may verify this certificate online  
at [corp.delaware.gov/authver.shtml](http://corp.delaware.gov/authver.shtml)



  
Jeffrey W. Bullock, Secretary of State  
AUTHENTICATION: 2129152

DATE: 02-18-15

State of Delaware  
Secretary of State  
Division of Corporations  
Delivered 10:17 AM 02/18/2015  
FILED 07:12 PM 02/17/2015  
SRV 150209303 - 5694034 FILE

**STATE OF DELAWARE  
CERTIFICATE OF CONVERSION  
FROM A LIMITED LIABILITY COMPANY TO A  
CORPORATION PURSUANT TO SECTION 265 OF  
THE DELAWARE GENERAL CORPORATION LAW**

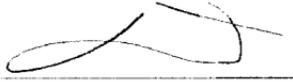
- 1) The jurisdiction where the Limited Liability Company first formed is **Texas**.
- 2) The jurisdiction immediately prior to filing this Certificate is **Texas**.
- 3) The date the Limited Liability Company first formed is **February 25, 2014**.
- 4) The name of the Limited Liability Company immediately prior to filing this Certificate is **Node Source, LLC**.
- 5) The name of the Corporation as set forth in the Certificate of Incorporation is **NodeSource, Inc.**

IN WITNESS WHEREOF, the undersigned being duly authorized to sign on behalf of the converting Limited Liability Company have executed this Certificate this 11th day of February, 2015.

By: 

Name: Joseph McCann

Its: Member

By: 

Name: Daniel Shaw

Its: Member

By: 

Name: Gavon Renfroe

Its: Member