SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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MEMORANDUM OF POINTS AND AUTHORITIES

YCHEN SU VS. RAINBERRY, INC. A CALIFORNIA CORPORATION ET AL

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

YUCHEN (JUSTIN) SUN, an individual,

Plaintiff,

vs.

RAINBERRY, INC., a California corporation, and DOES 1 to 20, inclusive,

Defendants.

Case No. CGC-18-564015

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT BE ISSUED

Date: Friday, February 2, 2018
Time: 11:00 a.m.
Dept.: 302

Complaint Filed: February 1, 2018

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This *ex parte* application by Plaintiff Yuchen Sun seeks issuance of a temporary restraining order against defendant Rainberry, Inc. barring it from performing acts ***it already agreed not to do*** based on the exclusivity / "no shop" clause contained in an enforceable Letter of Intent to acquire Rainberry that the parties agreed to on Sunday evening, January 28, 2018. After starting to perform that Letter of Intent, Defendant claimed it suddenly and out-of-the-blue received three "unsolicited" bids to acquire it that are superior to the terms in Plaintiff's Letter of Intent that Defendant had only agreed to hours before. Defendant's story is not believable.

Defendant now claims because it did not actually sign the Letter of Intent, which, while technically true, is contrary to the words and actions it took when it in fact agreed to the Letter of Intent. The Letter of Intent and the short, 31-day exclusivity clause (which has been running since Sunday evening and Defendants are currently flouting) are enforceable.

Plaintiff will be irreparably harmed if Defendant Rainberry is not enjoined from continuing to violate the no-shop exclusivity provision in the Letter of Intent as Plaintiff will lose the benefit of the 31-day standstill that he bargained for, that is, the ability to focus the target's attention on the finalization of a long-form definitive agreement without being used as a stalking horse by the target to fish for competing bids. The Letter of Intent is meaningless without the exclusivity clause, and enforcing that clause is the only way to give the provision any effect.

In the meanwhile, Defendant will not be harmed if the Letter of Intent is enforced. By definition and as a matter of common sense, **enforcement of a legal contract that a party freely and willingly entered into cannot result in irreparable harm**. While Defendant is anticipated to argue that it will suffer harm if it is not allowed to negotiate and attempt to close on competing birds it has received, those bids were obtained in violation of the Letter of Intent's exclusivity clause, and Defendant is barred from pursuing those opportunities anyhow. Allowing Defendant to use such ill-gotten competitive bids to argue against enforcement of the exclusivity clause would also reward it for breaching the Letter of Intent. A TRO simply prohibits Defendant from performing acts that it, supported by its General Counsel and major shareholder advisors (a prominent venture capital firm in the Silicon Valley, which itself has sophisticated in-house legal counsel), ***already agreed it would not do***.

FACTUAL BACKGROUND

Plaintiff Pursues an Acquisition of Rainberry, Culminating in a Letter of Intent

Plaintiff began pursuing an opportunity to acquire the assets or equity of Rainberry, Inc. (formerly known as BitTorrent, Inc.), a company that develops peer-to-peer software and protocols, in September 2017. Yuchen Sun Decl., ¶ 2. Plaintiff dealt principally with Rogelio ("Ro") Choy, CEO of Rainberry, Dorothy An, the General Counsel of Rainberry, and David Chao of DCM Ventures (who is a major shareholder in Rainberry) in these negotiations. *Id.*, ¶ 3.

On January 14, 2018, Plaintiff's counsel John Zhang sent to Rainberry a letter of intent signed by Plaintiff, to which Rainberry's CEO Ro Choy responded on January 16, 2018 with further edits and comments. Sun Decl., ¶ 4. After another week-plus of further negotiation and due diligence, on Friday, January 26, 2018, Plaintiff's counsel sent a simplified version of the letter of intent to Ro Choy, and copied the company's General Counsel and David Chao. *Id.*, ¶ 5.

Rainberry's General Counsel responded to Plaintiff's counsel's January 26 draft with edits and comments on Sunday afternoon, January 28, 2018. Sun Decl., ¶ 6. Plaintiff's counsel responded to those suggested changes an hour later by accepting all of them but proposing a single change -- extending the exclusivity period into March 2018 due to his personal travel and the upcoming Lunar New Year holiday. *Id.*, ¶ 7. Minutes later, David Chao responded to Plaintiff's counsel stating that the exclusivity period could not run into March 2018 and that "we need to get this deal done in February." *Id.*, ¶ 8. In response, Plaintiff's counsel made a single change to the exclusivity period by shortening it to February 28, 2018 and submitted that version, DocuSigned by Plaintiff, to Ro Choy and copied Rainberry's General Counsel and David Chao in an email at 6:44 pm that evening, and alerting them to this single proposed change. *Id.*, ¶ 9 (*see also* Ex. A to the Sun Decl., and the unredacted version of the Letter of Intent, which contains a confidentiality clause, attached to the concurrently filed motion to seal).

Five minutes later, Rainberry's CEO responded to Plaintiff's counsel's 6:44 pm email with the DocuSigned Letter of Intent and stated "Have had issues signing docusigns over the phone John. As soon as I get home and to my laptop will sign. Either way, will have this signed

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no later than tomorrow morning when back in office." Sun Decl., ¶ 10. Plaintiff's counsel responded to Rainberry's CEO's 6:49 pm email, stating "Understood. Thank you, Ro." *Id.* Rainberry's CEO, Ro Choy, responded at 7:00 pm with "Thanks John. Appreciate the speed and flexibility on **getting this loi done**. Let's repeat for getting the full agreement executed." (Emphasis added). *Id.*, ¶ 11.

Defendant Begins to Perform the Letter of Intent, But Then Suddenly Reneges

Plaintiff's counsel reached out the following day, January 29, only to learn that Rainberry was having second thoughts. That evening, Plaintiff and his counsel held a conference call with Ro Choy, David Chao, an advisor with Rainberry's major shareholder and Rainberry's General Counsel. On the call, Ro Choy and David Chao claimed that the Letter of Intent was not enforceable because it was not signed, and that in any event, Rainberry received three "unsolicited" acquisition bids, and the exclusivity provision permitted Rainberry to act based on its fiduciary duties to unsolicited bids that are materially better than the offer in the Letter of Intent. Sun Decl., ¶ 12. David Chao admitted that he had already been in contact with these three bidders about making bids for Rainberry. *Id.* Ro Choy also admitted that Rainberry received the bids after he had informed the other potential suitors that Rainberry's virtual data room would be closed to them in compliance with the terms of the Letter of Intent. *Id.*

LEGAL ARGUMENT

A temporary restraining order preserves the status quo or prevents irreparable harm pending a hearing of an application for a preliminary injunction. *Scripps Health v. Marin*, 72 Cal. App. 4th 324, 334 (1999). Injunctive relief is appropriate "[w]hen it appears . . . that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action"; "[w]hen pecuniary compensation would not afford adequate relief"; or "[w]here it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." Cal. Civ. Proc. Code section 526(a)(2), (4), (5). In deciding whether to issue injunctive relief, the Court "weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to

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the parties from the issuance or nonissuance of the injunction." *Whyte v. Schlage Lock Company*, 101 Cal. App. 4th 1443, 1449 (2002). "The greater the . . . showing on one, the less must be shown on the other to support an injunction." *Dodge, Warren & Peters Ins. Serv. Inc. v. Riley*, 105 Cal. App. 4th 1414, 1420 (2003). The Court must exercise its discretion, however, "in favor of the party most likely to be injured . . . If denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins v. Sup.Ct. (County of Sacramento)*, 38 Cal. 3d 199, 205 (1985).

A. The Letter of Intent is an Enforceable Agreement, and Plaintiff Is Likely to Succeed on the Merits of Proving His Declaratory Relief and Breach of Contract Claims.

Defendant's assent to the Letter of Intent's terms is plainly evidenced by Rainberry CEO Ro Choy's emails on Sunday, January 28, 2018 and his admitted actions subsequent to his assent on behalf of Rainberry. The Letter of Intent does not require an actual countersignature in order to be enforceable against Rainberry, as contracts have been enforced with less evidence of assent than found here because an agreement may be "'shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances.'" *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 681, 765 P.2d 373, 388 (1988). Thus, the mere receipt and "acceptance of a paper which purports to be a contract ordinarily is sufficient to indicate an assent to its terms," even if "signed by only one party." *2 Williston on Contracts § 6:44* (4th ed. 2005); *accord 1 Witkin, Summ. of Cal. Law*, "Contracts," § 188 (10th ed. 2005) (*citing Dallman Supply Co. v. Smith-Blair*, 103 Cal. App .2d 129, 132 (1951) (holding defendant was bound by agreement it did not sign based on "evidence from which the court could find that defendant accepted the [agreement] and acted upon it"); *Beatty v. Oakland Sheet Metal Supply Co.*, 111 Cal. App. 2d 53, 62-63 (1952) (recognizing that "[c]onduct of the offeree may, under proper circumstances, constitute acceptance" and holding that party was bound by written agreement she had not signed where "[s]he told [the other party] that his offer was satisfactory, she took the writing with her, and she acted on it as she had told him she was going to act").

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Here, Ro Choy claimed that the only reason he did not immediately return an actual signed copy of the Letter of Intent was due to technical issues on his mobile device. A few minutes later, he refers to the parties' entry into the Letter of Intent in the past tense: "Thanks John. Appreciate the speed and flexibility on **getting this loi done**. Let's repeat for getting the full agreement executed." (Sun Decl., ¶ 11; Emphasis added). He also admitted that he began performing the exclusivity clause in the Letter of Intent by shutting down access to virtual data room that had been granted to other potential suitors, which evidences Defendant's own understanding that it had entered into an enforceable agreement.

Defendant has also admitted that it is in breach of the exclusivity clause (Section 4 of the Letter of Intent).[1] While Defendant's after-the-fact excuse that it did not physically sign the Letter of Intent merely reinforces its intentional breach of the agreement, it is also obvious from Defendant's admissions and the surrounding circumstances that Defendant or its major shareholder advisor (a prominent Silicon Valley venture capital firm) continued to solicit the three supposedly superior bids. As Plaintiff testifies, it took months of negotiations and due diligence to get to an exchange and agreement on the Letter of Intent's terms (which contain the financial details of his offer). Within literally hours after the parties agreed to the Letter of Intent, and ***after*** Ro Choy began performing the terms of the Letter of Intent, Defendant claims it received three "superior" bids from companies that David Chao admitted they had been communicating with. There is a strong inference (which discovery of text messages, cell phone records and emails will verify) that Defendants solicited the offers, and they did not come literally out-of-the-blue, unsolicited by Defendant (the only exception to the exclusivity agreement). Whether it was a nod, nod, wink, wink to the other potential suitors as Rainberry shut down its due diligence virtual data room, or more direct communications by third parties is frankly irrelevant at this time. Under the terms of the Letter of Intent, and the evidence before the Court, such bids should be considered invalid and could not be considered by Defendant in any event.

Thus, Plaintiff is likely to succeed on the merits of its breach of contract and declaratory

[1] A complete, unredacted copy of the Letter of Intent is lodged with the concurrently filed Motion to Seal, based on Section 5 of the Letter of Intent, which requires confidentiality.

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relief claims as to the enforceability of the Letter of Intent and its exclusivity clause.

B. Plaintiff Will Be Irreparably Harmed If Defendant Is Not Barred From Performing the Acts It Already Agreed It Would Not Do In the Letter of Intent.

The purpose of exclusivity, "no shop" clauses such as the one in the Letter of Intent is to require a target company to suspend any solicitation, discussion or negotiation with other potential buyers, and to refrain from seeking alternative acquisition proposals before the agreed exclusivity period expires, and in turn, that induces the bidders who propose letters of intent to make attractive, firm offers for the target to consider. It also prevents the party proposing the letter of intent from being used as purely a stalking horse to attract other bidders.

While, as noted above, the exclusivity provision at issue here does not prohibit the target company's management, in exercising its fiduciary duties, from accepting purely unsolicited competing bids (a common carve out in such clauses), active solicitation and continued negotiation of alternative bids were specifically barred by Section 4 of the Letter of Intent. And, as noted above, the timing of events strongly suggests that Defendant and its advisors violated the exclusivity requirements of the Letter of Intent.

If Defendant is not enjoined from breaching the no-shop exclusivity provision, it may proceed to consummate a competing transaction during the exclusivity period when it had already agreed to negotiate exclusively with Plaintiff, costing him the opportunity to purchase the company and the damages for such opportunity cost are extremely difficult, if not entirely impossible, to measure. Also, if Defendant is not enjoined from continuing its breach of the no-shop exclusivity provision, it will be incentivized to use the other bids it is negotiating during the exclusivity period to coerce Plaintiff into concessions or price increases.

In technology acquisitions such as this one, market conditions for targets such as Rainberry are volatile, the direction and application of the relevant technology shift constantly which may negatively affect the attractiveness of a target company such as Rainberry very quickly. The valuation of such companies can change just as quickly based on the latest monthly financial report or a sudden cancellation of a major contract. Therefore, the existence of an

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exclusivity period, however short it may appear, gives bidder such as Plaintiff an immeasurably advantage over other bidders in consummating the acquisition since the target may not be able to afford the luxury to sit out the exclusivity period in favor of uncertain and unsure new bids.

Importantly, Defendant is not an unsophisticated party. It is represented by an experienced, well-qualified General Counsel and advised by a prominent Silicon Valley venture capital firm (and that firm's founder, David Chao), who is a major shareholder in the company. It, through its CEO, made a free and willing decision to negotiate at arm's length with Plaintiff and his counsel, and negotiated, edited and ultimately agreed, unambiguously, to the terms in the Letter of Intent. It cannot now come into Court and claim that requiring it to abide by the terms of a contract it agreed to will cause it any harm, let alone irreparable harm. And, allowing Defendant to even argue that it should be allowed to pursue the competing bids to support its claim to harm would be to reward its breach of the Letter of Intent. Section 4 expressly barred any solicitation or negotiation of competing bids; Defendant cannot claim that enforcing the exclusivity clause harms it when the only evidence it can argue against enforcement are bids obtained in violation of that very clause!

The Court should issue a Temporary Restraining Order as requested in the concurrently submitted proposed order, and schedule a hearing on an Order to Show Cause re: preliminary injunction as soon as permissible under the Court's schedule so as to preserve the value and effect steadily dwindling exclusivity period in the Letter of Intent.

Dated: February 1, 2018

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