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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MICHAEL E. DAVIS, aka TONY DAVIS, VINCE FERRAGAMO, and BILLY JOE DUPREE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ELECTRONIC ARTS INC.,

Defendant.

Case No. 10-CV-3328-RS (DMR)

ELECTRONIC ARTS INC.'S NOTICE OF MOTION AND MOTION TO STAY

Date: September 24, 2015
Time: 1:30 p.m.
Dept.: 3
Judge: Hon. Richard Seeborg

Date Filed: July 29, 2010

Trial Date:

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 24, 2015, at 1:30 p.m., or as soon thereafter as this matter may be heard, in the courtroom of the Honorable Judge Richard Seeborg of the United States District Court for the Northern District of California, located in Courtroom 3 of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, Defendant Electronic Arts Inc. ("EA") will and hereby does move this Court to extend its stay of these proceedings until the Supreme Court either denies EA's cert petition or rules on the merits, whichever is later.

Dated: August 13, 2015

KEKER & VAN NEST LLP

By: */s/ R. James Slaughter*
ROBERT A. VAN NEST
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Three years ago, ***both*** sides agreed that it was "appropriate" to stay these proceedings pending final resolution of Electronic Arts' ("EA") appeal—and both sides separately asked this Court to do just that. Dkts. 114, 115. Now, with only a few months before the Supreme Court rules on EA's petition for certiorari, Plaintiffs appear to have changed course, demanding that EA amend its responses to some 175 discovery requests and threatening to burden this Court with motions to compel. But reopening these proceedings at this premature juncture threatens to cause the very harm that this Court's previous stay sought to avoid: an unnecessary waste of limited judicial resources. EA continues to believe that it is appropriate to protect this Court's, and the parties', time and resources, and respectfully requests that the Court briefly extend its stay to give the Supreme Court time to rule on EA's petition for certiorari.

II. BACKGROUND

In July 2010, Michael Davis filed a complaint against EA. Dkt. 1. It took Mr. Davis four months to serve that complaint; when he did, he and several others also filed and served an amended complaint. Dkt. 11 ("FAC"). In their First Amended Complaint, Plaintiffs—purporting to act not just for themselves but also "on behalf of all other similarly situated retired National Football League players"—allege that EA misappropriated their "likenesses" by including avatars that supposedly portray them in *Madden NFL 09*'s historic teams. Plaintiffs do not allege that EA has used their names, images or uniform numbers—nor could they. *See generally* Dkt. 20 at 5–6. Although Plaintiffs reference the *Madden NFL* games generally, the FAC only contains specific allegations as to the *NFL 09* edition. *See, e.g.*, FAC, ¶¶ 4, 38–40, 42–51. Significantly, *Madden NFL 09* was the last edition of the game to include historic teams. None of the current *Madden NFL* games contain historic teams, and Plaintiffs have sought no injunctive relief in this case. *Id.* at 20–21.

On June 9, 2011, EA filed an anti-SLAPP motion and a motion to dismiss the First Amended Complaint. Dkts. 62, 63. As EA explained in those motions, Plaintiffs' efforts in this case challenge EA's right to free expression on a subject of public interest—thus running right

into EA's First Amendment rights and California's anti-SLAPP statute.

On March 29, 2012, the Court denied EA's anti-SLAPP motion. Dkt. 110. The Court held that, while EA had met its initial burden under Code of Civil Procedure Section 425.16, Plaintiffs had established a probability of prevailing on their claims. *Id.*

On April 2, 2012, EA filed a notice of appeal, Dkt. 111, followed a week later by a Request for Clarification, in which it asked the Court to "confirm that all proceedings are stayed pending EA's appeal of the denial of its anti-SLAPP motion." Dkt. 114 at 2. EA was not alone in its belief that staying this case made sense and promoted judicial efficiency. Plaintiffs, in their own submission filed just one day later, insisted several times over that a stay was "appropriate" and would promote "judicial efficiency," specifically asking "this Court [to] stay proceedings not related to the preparation of the record for appeal." Dkt. 115 at 1:6–7; *see also id.* at 1:18–20 ("[A]lthough Plaintiffs do not believe that all the proceedings in this Court are automatically stayed pending the appeal, Plaintiffs do agree that a permissive stay is appropriate for judicial efficiency."); *id.* at 1:28–2:1 ("Plaintiffs further believe such a permissive stay [of all proceedings] is appropriate.").

On April 12, 2012, the Court stayed "[a]ll further proceedings … pending the outcome of defendant's appeal." Dkt. 116 at 2:18–19.

The Ninth Circuit ruled on EA's appeal earlier this year, affirming this Court's decision. But, as both parties have acknowledged, that wasn't the end of EA's appeal—or this Court's stay. Two weeks later, EA filed a petition for rehearing *en banc*. And, given the importance of these legal questions, dozens of amici curiae followed suit: EA's request for further review attracted supporting briefs from 27 Intellectual Property and Constitutional Law Professors across the United States, the Electronic Frontier Foundation, the Los Angeles Times, National Public Radio, the Reporters Committee for Freedom of the Press, and the Washington Post, among others.

On July 10, 2015, the Ninth Circuit denied EA's petition for rehearing *en banc* and, on August 6, this Court received and docketed the Ninth Circuit's mandate. Dkts. 130–32. EA currently has until October 8 to file its cert petition with the Supreme Court of the United States—which it intends to and will do. *See* Declaration of R. James Slaughter ISO Defendant

EA's Motion to Stay ("Slaughter Decl."), ¶ 2.

III. ARGUMENT

District courts have "broad discretion to stay proceedings as an incident to [their] power to control [their] own docket[s]." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). Indeed, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also* 5C Wright and Miller, Federal Practice and Procedure § 1360 (3d ed. 2006) (federal courts have inherent power to stay a case pending the outcome of a related proceeding "in an effort to maximize the effective utilization of judicial resources and to minimize the possibility of conflicts between different courts").

Courts throughout the country frequently use this inherent, wide-ranging power to stay proceedings pending petitions for certiorari (and, where necessary, pending Supreme Court review). *See, e.g.*, *NGV Gaming, Ltd. v. Harrah's Operating Co.*, No. 04-3955 SC, 2008 WL 4951587, at *1 (N.D. Cal. Nov. 18, 2008) (staying case pending petition for writ of certiorari pursuant to the Court's inherent power in the interest of "the orderly course of justice without causing hardship to either party"); *Evans v. Buchanan*, 435 F. Supp. 832, 848 (D. Del. 1977) ("I believe that a stay of implementation … is justified, pending disposition of the writ of certiorari by the Supreme Court."); *Peaceable Planet, Inc. v. Ty, Inc.*, No. 01 C 7350, 2004 WL 1574043, at *2 (N.D. Ill. July 13, 2004) ("Therefore, considering the relatively short amount of time anticipated to resolve the pending writ of certiorari, granting Defendants' stay is the more efficient procedure."); *Walker v. Monsanto Co. Pension Plan*, 472 F. Supp. 2d 1053, 1054 (S.D. Ill. 2006) (staying various causes of action pending disposition of petition for certiorari because "the Court cannot fathom[] how the requested stay could cause [Defendants] any prejudice" and noting that "[s]uch stays are entered quite routinely"); *Davis v. Blige*, No. 03 CIV. 993 (CSH), 2008 WL 2477461, at *2 (S.D.N.Y. June 16, 2008) ("If the Court grants certiorari on this novel and economically important question for the recording industry, reverses the opinion of the Second Circuit, and reinstates the judgment of this Court, the federal case is likely at an end, and the time and effort of conducting damages discovery and preparing for a trial on that issue would

have been wasted."); *Inclusive Cmtys. Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2014 WL 2815683, at *2 (N.D. Tex. June 23, 2014) ("The court holds in its discretion that the proceedings on remand should be stayed pending resolution of the Supreme Court's decision on TDHCA's petition for a writ of certiorari."); *TecSec, Inc. v. Int'l Business Machines, Corp.*, No. 10-cv-115, slip op. at 1 (E.D. Va. February 21, 2014) ("the stay of litigation against all remaining defendants in this action is continued until such time as the United States Supreme Court acts on defendants' petition for certiorari").

> Deciding whether a stay is appropriate requires a balancing of interests—including the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.

Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005) (citing *Landis*, 299 U.S. at 268). In this case, each of those interests weighs in favor of extending the stay of these proceedings for another few months.

First, Plaintiffs will not suffer any damage from a brief extension of this Court's existing stay. This is a case focused entirely on ***past*** damages; Plaintiffs seek no injunctive relief whatsoever. Nor could they, because *Madden NFL 09*, published in August 2008, is the only annual edition of Madden NFL including "historic" teams released within the two-year statute of limitations applicable to Plaintiffs' claims—and is therefore the only game at issue in this action.

Moreover, Plaintiffs themselves have been in no rush: they took four months to serve the complaint in this case, separately requested that the Court stay this matter pending appeal, and then asked for various briefing extensions while the appeal was before the Ninth Circuit. This case has been stayed since mid-2012—at the behest of both parties—and is now just ***months*** away from a Supreme Court decision on EA's cert petition. Neither side will be prejudiced, let alone "damaged," by an additional three- or four-month stay. *See, e.g.*, *Walker v. Monsanto Co. Pension Plan*, 472 F. Supp. 2d 1053, 1054 (S.D. Ill. 2006) (granting what it referred to as "a stay of a few months' duration pending resolution by the Supreme Court of the United States of a

petition for writ of certiorari").[1]

Second, absent a stay, Plaintiffs have made clear that they intend to burden both the parties and this Court with overbroad discovery demands and motions practice. For instance, last Friday—just ***24 hours*** after the Ninth Circuit's mandate was filed in this Court and without meeting and conferring—Plaintiffs' counsel called defense counsel to "let you know that, now that the mandate has been filed in the Northern District, we're going to file a motion to compel" and "seek sanctions." Slaughter Decl., ¶ 4. While the parties have begun to discuss their disagreements, Plaintiffs' discovery is extensive (99 requests for production, 66 requests for admission, and 10 interrogatories). It makes little sense for this Court or the parties to spend their resources briefing, reviewing and adjudicating discovery disputes when the Supreme Court's upcoming decision could render all of those issues moot. *See, e.g.*, Dkt. 116 ("The anti-SLAPP motion and the motion to dismiss are, therefore, 'inextricably intertwined.' … Consequently, the Ninth Circuit's decision on appeal will necessarily affect the remaining proceedings."); *see also Inclusive Cmtys.*, 2014 WL 2815683 at *2 ("If the [Supreme] Court grants TDHCA's petition and decides that such claims cannot be brought under the FHA, this court and the parties should not expend the resources necessary to litigate a claim that is not legally viable.").

Third, although the chance that any particular case will be taken up by the Supreme Court is slim, this is one of particular public and practical import. Its effects reach not just video games, but films, books, television, theater, and more. When EA filed its petition for rehearing *en banc*, dozens of amici curiae lined up to echo EA's request—including 27 law professors from Jack Balkin to Eugene Volokh, the Electronic Frontier Foundation, the Los Angeles Times and the

[1] EA's cert petition is due on October 8, and if history is a fair barometer, it will be adjudicated by early 2016. For instance, in *NGV Gaming v. Harrah's*, Harrah's moved the Northern District of California for a stay on October 17, 2008. After briefing, District Judge Samuel Conti granted that request, finding that "a stay will promote the orderly course of justice without causing hardship to either party." *NGV Gaming*, 2008 WL 4951587, at *1. On November 11, 2008, Harrah's filed its cert petition. Then, on January 26, 2009—just ***three months*** after the stay was granted—the Supreme Court ruled on that petition. The same pattern holds true for other cases cited above, too. In *Walker v. Monsanto*, 472 F. Supp. 2d 1053, the case was stayed on October 25, 2006 and the Supreme Court ruled on the cert petition on January 16, 2007 (*i.e.*, less than 3 months). In *Peaceable Planet Inc. v. Ty, Inc.*, 2004 WL 1574043, the court stayed proceedings on July 13, 2004, and the Supreme Court denied certiorari on October 4, 2004 (*i.e.*, less than 3 months).

Washington Post, and the Reporters Committee for Freedom of the Press. There is every reason to believe that the chorus supporting EA's cert petition will be just as strong. And, as those 27 law professors explained to the Ninth Circuit, there are compelling reasons to review this case: "Other circuits, as well as state supreme courts, have confronted [this legal question] and given markedly different answers." Slaughter Decl., Ex. A at 1–2.

IV. CONCLUSION

EA's appeal is not yet over. It is currently preparing to, and will, file a cert petition with the Supreme Court. Slaughter Decl., ¶ 2. If that petition is ultimately denied, then the parties will have lost nothing from a stay but a brief and inconsequential delay. But if EA's petition is ***granted***, and its appeal continues before the Supreme Court, future proceedings in this Court may be avoided altogether. Here, then, the balance of interests tips firmly in favor of extending the stay of these proceedings, which will plainly "promote the orderly course of justice without causing hardship to either party." *NGV Gaming*, 2008 WL 4951587, at *1.

For these reasons, EA respectfully requests that this Court stay all proceedings until the Supreme Court either denies EA's cert petition or rules on the merits, whichever is later.

Dated: August 13, 2015

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