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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PARAMOUNT PICTURES CORPORATION et al.,

Plaintiffs,

v.

REPLAYTV, INC. and SONICBLUE, INC.,

Defendants.

AND CONSOLIDATED ACTIONS.

Case No. 01-09358 FMC (Ex)

Hon. Florence-Marie Cooper

REPLY MEMORANDUM IN SUPPORT OF THE MOTION OF THE COPYRIGHT OWNERS FOR ORDER MODIFYING THE COURT'S MARCH 24, 2003 STAY ORDER FOR LIMITED PURPOSES; REPLY DECLARATION OF SCOTT P. COOPER IN SUPPORT THEREOF

DATE: November 10, 2003
TIME: 10:00 a.m.
PLACE: Courtroom 750

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I. INTRODUCTION

With the agreed-upon dismissal of SONICblue, this action no longer satisfies the "case or controversy" requirement of Article III and will have to be dismissed. The opposition brief makes clear that the lawyers for the Newmark Plaintiffs would like to continue litigating legal issues in the abstract, unfettered by the jurisdictional limitations of the Constitution. The Court need not resolve this issue at this time, however, because the only issue on this motion is whether to grant a limited lifting of the stay so the Court can consider the Copyright Owners' Motion to Dismiss the Newmark Plaintiffs' claims. Nothing in the Newmark Plaintiffs' opposition provides a basis for denying the procedural relief requested by the Copyright Owners, which is the fair and efficient way to proceed towards resolution of this action.

This reply addresses the three requests for relief that the Newmark Plaintiffs seek that were not included in the Copyright Owners' original request. Two of the Newmark Plaintiffs' requests are not the subject of controversy. The third request – for irrelevant discovery – is unwarranted and should be denied.

First, there is no real dispute about whether a complete lifting of the stay is appropriate; both sides agree it is not. Although the Newmark Plaintiffs' opposition starts out by saying the stay should be lifted completely, the Newmark Plaintiffs later concede that allowing the case to proceed during the pendency of the Copyright Owners' jurisdictional and potentially case-dispositive Motion to Dismiss is inappropriate and unnecessary. Thus, there is no reason for an unlimited lifting of the stay. *See* Section II.A. below.

Second, the Newmark Plaintiffs ask that their motion for leave to amend their complaint, which seeks to convert this two year old case into a class action, be heard at the same time as the hearing on the Copyright Owners' Motion to Dismiss. The Newmark Plaintiffs' proposed motion for leave to amend is an attempt to resurrect a case that is and should be over. Nevertheless, to avoid any argument that the

Copyright Owners were trying to gain a procedural advantage over the Newmark Plaintiffs, the Copyright Owners' moving papers explicitly provided for an order allowing the Newmark Plaintiffs to file their motion for leave to amend. As of the date that the instant motion was filed, the Newmark Plaintiffs had not yet completed their motion to amend. Now that the Newmark Plaintiffs have proffered their proposed motion for leave to amend, the Copyright Owners have no objection to a simultaneous briefing and hearing schedule on the two motions. *See* Section II.B. below.

Third, the Newmark Plaintiffs seek leave to propound, at any time, discovery allegedly relevant to the Copyright Owners' Motion to Dismiss for lack of subject matter jurisdiction. However, no form of discovery could be relevant to the Motion to Dismiss, which demonstrates that no case or controversy exists because no ReplayTV DVR owner could have an objectively reasonable apprehension that the Copyright Owners will sue them. Because the test depends on the reasonable belief of potential plaintiffs based on objective facts already within their knowledge, there is no relevant discovery. The Newmark Plaintiffs' request for discovery thus appears to be nothing more than an attempt to delay the inevitable dismissal of this case, or to harass, or both. The Court should not allow the Newmark Plaintiffs to conduct discovery when there are no factual issues relevant to the Motion to Dismiss. *See* Section II.C. below.

II. ARGUMENT

A. The Newmark Plaintiffs Concede That A Complete Lifting Of The Stay Order Is Inappropriate.

The Newmark Plaintiffs include a request that once SONICblue is dismissed from these proceedings, the Court should lift the stay for all purposes. *See* Opp., at 4:12-5:5. Yet they then concede that a complete lifting of the stay is inappropriate. *See id.*, at 6-7.

As the Copyright Owners previously explained, long-standing authority

supports a stay of merits discovery during the pendency of potentially case-dispositive motions, like a motion to dismiss. *See* Motion, at 8:19-28. The Newmark Plaintiffs do not challenge the applicability of this well-settled law here. Rather, they acknowledge it at some length. *See* Opp., at 6-7 n.2 (citing case law staying merits discovery during pendency of potentially case-dispositive motions).[1] In fact, later in their opposition, they concede: "[i]n agreeing to stipulate to a more limited lifting of the stay, the Newmark Plaintiffs *have already agreed to forego merits discovery pending the outcome of the two motions*." *Id.*, at 6:22-7:2 (emphasis added).[2] The Court should therefore reject the Newmark Plaintiffs' request for a complete lifting of the stay.

B. Given The Changed Circumstances, The Copyright Owners Do Not Object To Consolidating The Hearing On Their Motion To Dismiss With The Hearing On The Newmark Plaintiffs' Motion For Leave To Amend Their Complaint.

The Newmark Plaintiffs unfairly contend that the Copyright Owners are looking for an "unwarranted procedural advantage" concerning the timing of the hearing of the Motion to Dismiss and the Newmark Plaintiffs' motion for leave to amend. *See* Opp., at 8:4-7. With the dismissal of the underlying action against SONICblue, which constituted the sole basis for finding an actual controversy between the Newmark Plaintiffs and the Copyright Owners in the Newmark Declaratory Relief Action, the Copyright Owners believe that the Court must and

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[1] Merits discovery has been stayed for over seven months now, without complaint by the Newmark Plaintiffs. The Newmark Plaintiffs also do not claim any prejudice if the stay of merits discovery continues for another brief period during the Court's consideration of the Copyright Owners' Motion to Dismiss.

[2] Similarly, the Newmark Plaintiffs reaffirm that their request for a complete lifting of the stay is off the table when they assert that "[t]he real question" before the Court is whether the Copyright Owners' Motion to Dismiss and the Newmark Plaintiffs' motion for leave to amend should be heard at the same time, an issue addressed in Section II.B. Opp., at 8:21-23.

will dismiss this action.[3] However, to avoid any suggestion that the Copyright Owners were seeking an unfair procedural advantage, the Copyright Owners included within this motion a request for relief from the stay to allow the Newmark Plaintiffs to file their motion for leave to amend. At the time the Copyright Owners filed the instant motion (annexing their proposed Motion to Dismiss), the Newmark Plaintiffs had disclosed only their general intention to move for leave to amend their declaratory relief complaint. They had therefore not satisfied their obligations under Local Rule 7-3 concerning the disclosure of the grounds or relief contemplated for such a motion, and had not told the Copyright Owners when they would even proffer their contemplated motion. Under those circumstances, and facing the possibility of open-ended delay, the Copyright Owners told the Newmark Plaintiffs that they would not prospectively agree to the Newmark Plaintiffs' request to schedule the hearing of the two motions at the same time. *See* Motion, at 9:23-10:4.[4]

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[3] The Newmark Plaintiffs contend that there are over 60 additional ReplayTV DVR owners who have indicated an interest in joining the Newmark Plaintiff Declaratory Relief Action in order to obtain the same covenant not to sue provided to the five Newmark Plaintiffs. Opp., at 3:8-11. Incredibly, counsel for the Newmark Plaintiffs refuse to identify any of these individuals in their proposed amended pleading because they purportedly are afraid that the Copyright Owners will covenant not to sue these individuals for their uses of their ReplayTV DVRs. *See* Hinze Declaration, Exh. L, Exh. E, at 2 n.1. What the Newmark Plaintiffs' counsel are asserting is that these supposed additional plaintiffs have a reasonable apprehension that they will **not** be sued by the Copyright Owners. While the Court need not resolve the issue at this juncture, the Copyright Owners note that this novel conception of declaratory judgment jurisdiction provides further proof that there no longer is a case or controversy here.

[4] The Newmark Plaintiffs contend in their opposition papers that they satisfied their obligations under Local Rule 7-3 to meet and confer concerning their contemplated motion for leave to amend their declaratory relief complaint prior to the Copyright Owners' filing of the instant motion. *See* Opp., at 3:11-4:10. The Copyright Owners strongly disagree with this contention.

The Newmark Plaintiffs' proposed motion seeks leave to attempt to convert this case into a class action. While the Newmark Plaintiffs previously mentioned to the Copyright Owners the possibility that they might seek to amend their complaint "to add additional plaintiffs," as of the filing of the instant motion, the Newmark Plaintiff had not even described beyond that perfunctory reference the relief to be sought or the grounds for that relief as required under Local Rule 7-3. *See* annexed Reply Declaration of Scott P. Cooper ("Cooper Reply Decl."), Exh. A. As the record makes clear, the Newmark Plaintiffs never even mentioned a desire to seek to assert class allegations until October 17, 2003, four days after the filing of the motion, and the parties did not discuss the issue until October 27, 2003. *Id.*, at ¶¶ 2-3 and Exh. A. The Newmark Plaintiffs'

Now that the Newmark Plaintiffs have proffered their motion for leave to amend their complaint, the Copyright Owners do not object to the proposed motion being heard at the same time as the Copyright Owners' Motion to Dismiss, provided that both motions can be heard by the Court on a reasonably prompt schedule. The Copyright Owners propose that the two motions be set for hearing on December 15, 2003, with opposition and reply papers due on November 24, 2003 and December 8, 2003, respectively, for both motions.

C. Given The Undisputed Factual Record, The Newmark Plaintiffs Should Be Required To Demonstrate Their Need For, And The Propriety Of, Discovery On The Motion To Dismiss.

The only issue that the parties seriously dispute is the Newmark Plaintiffs' request to propound discovery on the Copyright Owners' Motion to Dismiss. The Newmark Plaintiffs address this issue in a footnote, and their argument does not withstand scrutiny. *See* Opp., at 6 n.1. All of the facts relevant to the Court's consideration of the Motion to Dismiss are undisputed and already are known to the Newmark Plaintiffs. The Newmark Plaintiffs' request for discovery that can have no effect on the Motion to Dismiss appears to be nothing more than an attempt to needlessly increase the expense and delay associated with the inevitable dismissal of this case. At the very least, the Newmark Plaintiffs should be required to demonstrate a need for, and the propriety of, discovery relevant to the Copyright Owners' Motion to Dismiss, so as to avoid an open-ended, unsupervised exercise in irrelevancy, expense and delay.

The question at the heart of the Copyright Owners' Motion to Dismiss is whether, as a result of recent events, the Newmark Plaintiffs continue to have a "reasonable apprehension" of liability based on the Copyright Owners' actions. *See* Order Denying Copyright Owners' Motion to Dismiss, Cooper Declaration, Exh. K,

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suggestion that they previously complied with Local Rule 7-3 is not borne out by the record.

at 119 ("[C]ourts must focus on whether a declaratory plaintiff has a 'reasonable apprehension' that he or she will be subjected to liability." (citing *Societe de Conditionnement en Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 944 (9th Cir. 1981)); *Hal Roach Studios, Inc. v. Feiner & Co.*, 896 F.2d 1542, 1556 (9th Cir. 1990) (the declaratory plaintiff's reasonable apprehension "must have been caused by the defendant's actions").

While the parties may dispute the legal significance of the facts relevant to this inquiry, the facts are a matter of public record, and therefore known to the Newmark Plaintiffs and their counsel, and not subject to dispute: In the almost two years since the Copyright Owners commenced the Copyright Actions against SONICblue in late 2001, the Copyright Owners have not filed or threatened any legal action against any ReplayTV DVR owner concerning their uses of the DVR. Moreover, even when the Newmark Plaintiffs filed the Newmark Declaratory Relief Action against the Copyright Owners in June 2002, the Copyright Owners did not assert counterclaims against the Newmark Plaintiffs, or commence any legal action against any other ReplayTV DVR owner. The Newmark Plaintiffs can point to nothing ever said or done by the Copyright Owners to them that constitutes, or suggests, or even hints at, a threat of suit. In addition, all of the parties recently stipulated to the dismissal of the Copyright Actions against SONICblue that precipitated the Newmark Plaintiffs' filing of their declaratory relief complaint. Finally, the Copyright Owners have covenanted not to sue the Newmark Plaintiffs for copyright infringement arising from the Newmark Plaintiffs' uses of their ReplayTV DVRs as alleged in their declaratory relief complaint, thereby removing any conceivable threat of liability as a matter of law. These are the undisputed facts that show there is no case or controversy between the Newmark Plaintiffs and the Copyright Owners, and that therefore the Court should dismiss the Newmark Plaintiffs' complaint for lack of subject matter jurisdiction. The Newmark Plaintiffs are free to argue that they do have an objective basis to anticipate being sued, if in

fact there is any basis. But they have no need for discovery that can have no effect on the Motion to Dismiss.

The Newmark Plaintiffs have stated a desire to propound discovery concerning the Copyright Owners' undisclosed intentions with respect to ReplayTV DVR owners. Discovery targeted at the Copyright Owners' subjective state of mind, however, is legally irrelevant to the Motion to Dismiss. The relevant test is whether the declaratory relief plaintiff's knowledge of the defendant's actions has created within the declaratory relief plaintiff an objectively real and reasonable apprehension of suit. *See, e.g., K-Lath, Div. of Tree Island Wire (USA), Inc. v. Davis Wire Corp.*, 15 F. Supp.2d 952, 958 (C.D. Cal. 1998) ("'The test, however, stated is objective . . . .'") (citation omitted). The focus is thus on the declaratory relief plaintiff's knowledge of the defendant's actions. The defendant's uncommunicated, subjective state of mind is irrelevant to the question of whether the declaratory plaintiff had an objectively reasonable apprehension of suit. *See id.*, at 962 and n.12 (finding that the objective words and actions of the defendant control whether the declaratory plaintiff's apprehension of suit is reasonable). Since those facts are necessarily already known to the Newmark Plaintiffs, their requested discovery is an utter waste of time.

Finally, the order sought by the Newmark Plaintiffs would delay the adjudication of the Motion to Dismiss. For example, if the Court were to grant the Newmark Plaintiffs' Second Proposed Order, the Newmark Plaintiffs presumably would be permitted to propound discovery on the Copyright Owners at any time before the hearing on the Motion to Dismiss. The Copyright Owners then might have grounds to object to the discovery, and the parties would be required to engage in the lengthy discovery dispute process mandated by the Local Rules, including the preparation of a joint stipulation for submission of the dispute to the Magistrate Judge, substantially delaying the resolution of the Motion to Dismiss. The procedural mechanism envisioned by the Newmark Plaintiffs is inefficient and

inconsistent with the Newmark Plaintiffs' claimed interest in "an orderly and logical schedule for further proceedings in this action." Opp. at 1:9-10. Accordingly, the Court should reject it.

III. CONCLUSION

For the foregoing reasons, the Court should enter the proposed order previously submitted by the Copyright Owners, modified only to: (1) allow for the filing of the proposed motion for leave to amend proffered by the Newmark Plaintiffs in connection with their opposition to the instant motion; and (2) set the hearing date and briefing schedule on the Copyright Owners' Motion to Dismiss and the Newmark Plaintiffs' motion for leave to amend, consistent with the dates requested above. The Court should not allow the Newmark Plaintiffs to propound any discovery unless and until they demonstrate good cause to permit them to do so.

Dated: November 3, 2003

Respectfully submitted,

By: ______________________
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REPLY DECLARATION OF SCOTT P. COOPER

I, Scott P. Cooper, declare as follows:

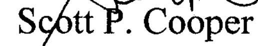
1. I am an attorney at law duly admitted to practice before this Court, and I am a member of Proskauer Rose LLP, counsel for Plaintiffs Metro-Goldwyn-Mayer Studios Inc., Orion Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios Productions LLLP (formerly Universal City Studios Productions, Inc.), Fox Broadcasting Company, Paramount Pictures Corporation, Disney Enterprises, Inc., National Broadcasting Company, Inc., NBC Studios, Inc., Showtime Networks Inc., UPN (formerly the United Paramount Network), ABC, Inc., Viacom International Inc., CBS Worldwide Inc., CBS Broadcasting, Inc. in the above-captioned consolidated actions. I submit this declaration in further support of the Copyright Owners' Motion For Order Modifying The Court's March 24, 2003 Stay Order For Limited Purposes, dated October 13, 2003 (the "Motion"). I make this declaration of my own personal knowledge except where otherwise stated, and, if called as a witness, I could and would testify competently as set forth below.

2. Attached hereto as Exhibit A is a true and correct copy of my October 20, 2003 letter to Gwen Hinze, one of the counsel for the Newmark Plaintiffs. As I explained in my October 20, 2003 letter, Ms. Hinze's October 17, 2003 letter, a copy of which is attached as Exhibit K to Ms. Hinze's declaration in opposition to the Motion, informed the Copyright Owners for the first time that the Newmark Plaintiffs would be seeking leave to amend their complaint to add class allegations.

3. On October 27, 2003, I participated in a Local Rule 7-3 telephonic meeting and conference with counsel for the Newmark Plaintiffs to discuss their contemplated motion for leave to amend their complaint to add class allegations. This call was the first time during which the parties discussed the Newmark Plaintiffs' contemplated motion for leave to amend their complaint to add class allegations.

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

Executed this 3rd day of November, 2003, in Los Angeles, California.



Scott P. Cooper

EXHIBIT A

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October 20, 2003

VIA FACSIMILE AND EMAIL

Gwen Hinze, Esq.
Electronic Frontier Foundation
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Re: Paramount Pictures Corporation, et al. v. ReplayTV, Inc., et al.
U.S. District Court (C.D. Ca.) Case No. CV 01-09358 FMC (Ex) *and Related Cases*

Dear Gwen:

This responds on behalf of my firm's clients in the above-referenced litigation to that portion of your October 17, 2003 letter referring to compliance with Local Rule 7-3. Your letter appears to contend that our prior telephone conversations regarding the Entertainment Companies' proposed motions for relief from stay and to dismiss the Newmark Plaintiffs' declaratory relief action also satisfied the Newmark Plaintiffs' obligation to meet and confer regarding a motion to amend their declaratory relief complaint. As you know from our prior correspondence, we strongly disagree with this contention. While you and Ira have mentioned on several occasions the possibility that the Newmark Plaintiffs might seek to amend their complaint "to add additional plaintiffs," you have never described beyond that perfunctory reference the relief to be sought or the grounds for that relief as required under Local Rule 7-3. The most specific either you or Ira ever got with respect to a potential motion to amend was to suggest that you might be seeking to add four or five new named plaintiffs to replace the existing Newmark Plaintiffs.

If the Newmark Plaintiffs' now-proposed motion to amend sought no more than to add a few new individual plaintiffs, a good faith argument at least might exist whether the Newmark Plaintiffs had satisfied their obligations under Local Rule 7-3. Your October 17 letter, however, informs us for the very first time that the Newmark Plaintiffs will be seeking to amend their complaint, not to add a few new plaintiffs, but to add entirely new, and as yet unspecified, class allegations. It is difficult to conceive of class allegations that would be appropriate to be added now to a two-year old litigation. Be that as it may, there can be no argument that you raised those issues in any prior discussion.

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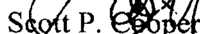
Therefore, we will treat your letter as an invitation to meet and confer on the subject of the Newmark Plaintiffs' motion to amend under Local Rule 7-3. I am sure that Bobby Schwartz and Bob Rotstein will want to participate in that conversation. I understand that Bobby's father died on Friday and that he is out of the office at present. I also understand that Bob is traveling through Wednesday. I have messages in to both of their offices to determine a convenient time when we all can speak.

Finally, I note that your letter makes no mention of your intention to file a motion for relief from the stay in this action as a first step to gain permission to file a motion to seek to pursue a class action. Since that subject as well has never previously been discussed, it too remains to be done under the Local Rules. We will assume that you will address that subject as well when we speak.

Very truly yours,



Scott P. Cooper

SPC/ph

cc: Emmett C. Stanton, Esq.
Laurence F. Pulgram, Esq.
Ira P. Rothken, Esq.
Copyright Owner Plaintiffs' Counsel

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare that: I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2049 Century Park East, Suite 3200, Los Angeles, California 90067-3206.

On November 3, 2003, I served the foregoing document described as:

REPLY MEMORANDUM IN SUPPORT OF THE MOTION OF THE COPYRIGHT OWNERS FOR ORDER MODIFYING THE COURT'S MARCH 24, 2003 STAY ORDER FOR LIMITED PURPOSES; REPLY DECLARATION OF SCOTT P. COOPER IN SUPPORT THEREOF

on the interested parties in this action:

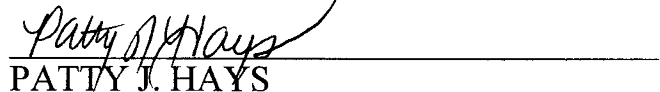
(By Mail) By placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, the envelopes would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 3, 2003, at Los Angeles, California.



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