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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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YESH MUSIC, LLC,

Plaintiff,

v.

REGENTS OF THE UIVERISITY OF MINNESOTA,

Defendant.

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Case No.: 19-cv-5512

PLAINTIFF'S MEMORANDUM OF LAW IN PARTIAL SUPPORT OF DEFENDANT'S MOTION

Served on: November 18, 2019

Plaintiff submits this Memorandum of Law in partial support of defendant's motion to dismiss or stay the matter at bar. On June 5, 2019, the United States Supreme Court heard oral argument in *Allen v. Cooper,* Case No. 18-877. Plaintiff joins in the defendant's motion to the extent that it seeks a brief stay until the Supreme Court renders its decision in *Allen*.

ARGUMENT

I. THIS COURT HAS THE POWER TO STAY THE PROCEEDINGS

A district court's power to stay proceedings was settled in *Landis v. North American Co*., 299 U.S. 248, 254 (1936): "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its own docket with economy of time and effort for itself, for counsel, and for litigants." A court may properly exercise this power when a higher court is close to settling an important issue of law bearing on the action. See e.g. *Marshel*

v. AFW Fabric Corp., 552 F.2d 471, 472 (2d Cir. 1977) (per curiam) (instructing district court to stay further proceedings pending a Supreme Court decision in a closely related case which was likely to determine the question of liability); *Goldstein v. Time Warner New York City Cable Group*, 3 F. Supp. 2d 423, 439 (S.D.N.Y. 1998) (staying a case involving a controversial FCC regulation in order to allow the D.C. Court of Appeals to determine the validity of the regulation).

In deciding whether to grant a stay, courts generally consider five factors:

> (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.

Kappel v. Comfort, 914 F. Supp. 1056, 1058 (S.D.N.Y. 1996) (citing *Volmar Distributors v. New York Post Co.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993)).

In the case at bar, all parties agree that the above considerations weigh in favor of a stay of all proceedings. The Supreme Court's review of *Allen* will have a significant, if not dispositive, impact on the case here. Proceeding with this litigation several months before the Supreme Court more precisely defines the issue of jurisdiction over State actors under the Copyright Remedies Clarification Act ("CRCA") would be unnecessarily wasteful of both the Court's and the litigants' resources. Moreover, a stay of several months will cause no prejudice or hardship on either party.

"It would be an inefficient use of time and resources of the court and the parties to proceed in light of a pending U.S. Supreme Court decision that all agree will significantly impact this . . . litigation." *Authors Guild v. Dialog Corp. (In Re Literary Works in Elec. Databases Copyright Litig.)*, 2001 U.S. Dist. LEXIS 2047 (S.D.N.Y 2001). All parties agree that a

moderate stay of the proceedings is warranted. Plaintiff respectfully joins in with the defendant, and requests this Court find that a stay is within the bounds of moderation, automatically ending upon a decision by the United States Supreme Court in *Allen*, is an appropriate exercise of this Court's discretion.

II. THE DECISION IN *ALLEN v. COOPER* WILL DETERMINE WHETHER THIS COURT HAS JURISDICTION OVER THE DEFENDANT

As mentioned above, the Supreme Court heard oral argument in Allen v. Cooper (Case No. 18-877) on November 5, 2019. Petitioner Allen claimed that the State of North Carolina infringed his copyrights in images and video of the salvage of Blackbeard's famed pirate ship. Relying on the CRCA, Allen seeks monetary damages against the State. The State argued, that the CRCA is unconstitutional and state sovereign immunity precludes Allen from recovering copyright infringement damages against the State.

A. The Copyright Remedies Clarification Act

Enacted in 1990, the CRCA precludes states from defending against copyright infringement claims by asserting sovereign immunity. However, relying on the Supreme Court's 1999 decision in *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999), many courts have found the CRCA unconstitutional. Florida Prepaid broadly construed *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) for the proposition that Article I of the U.S. Constitution (which sets out the structure, powers, and responsibilities of the legislative branch of the federal government) could not, as a matter of law, abrogate sovereign

immunity. But ten years later, the Supreme Court's decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) interpreted *Seminole Tribe* differently:

> We acknowledge that statements in both the majority and the dissenting opinions in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), reflected an assumption that the holding in that case would apply to the Bankruptcy Clause. Careful study and reflection have convinced us, however, that that assumption was erroneous.

Central Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006) (emphasis added).

At oral argument, Justice Alito raised what he termed an "interesting question under Section 5 of the Fourteenth Amendment[,]" which permits Congress to make laws to enforce other sections of the Fourteenth Amendment, including the prohibition on state laws that "abridge the privileges or immunities of citizens of the United States" or "deprive any person of life, liberty, or property, without due process of law. . . ." Specifically, Justice Alito stated:

> When we have decided that the — the congressional record at the time of an enactment that attempts to rely on Congress's Section 5 power is insufficient, and in subsequent years there are events that would have made the record a lot stronger, what does that do to the decision? Does that –does that mean that it's — it's subject to reexamination based on what has happened after that point? So why should we look at events that occurred after the enactment of this?

(Tr. at 29:4-17.)

Justice Kagan echoed this question during the State's arguments, stating that she believed Congress could pass prophylactic legislation, and that the CRCA might qualify as such. (Tr. 47:5-14.) The State argued that such prophylactic legislation would violate *City of Boerne v. Flores*, where the Court struck down the federal Religious Freedom Restoration Act of 1993 because it legislatively overruled the Court's interpretation of a constitutional right in *Employment Division v. Smith* and encroached on the judiciary's authority under separation of powers principles. Yet *City of Boerne* leaves room for Section 5 legislation that "deters" as well

as "remedies" constitutional violations," *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), as well as measures that "prevent unconstitutional actions," *id*. at 519, which counsel for Allen noted during oral argument. (Tr. 18:23-25.)

The Justices' questioning of the State's counsel seemed to indicate that at least some of the Justices have grave concerns over a rule that would endorse routine willful infringement by state actors insulated by sovereign immunity:

> JUSTICE BREYER: What the state decides to do with its own website, charging $5 or something, Is to run Rocky, Marvel, whatever, Spider-Man, and perhaps Groundhog Day, all right? Now, great idea. Several billion dollars flows into the treasury. Okay? Now, if you win, why won't that happen?

(Tr. at 36:17-37:2.)

Under *United States v. Georgia*, 546 U.S. 151 (2005), such egregious, willful infringements could be remedied as direct constitutional violations, a point that counsel for the State essentially conceded with the caveat that there must be no alternative remedy. (Tr. at 40:25 to 41:18). Thus, the parties appeared to agree that the CRCA would be constitutional in at least some cases.

There is good reason to believe that *Florida Prepaid* has already been significantly eroded by *Katz*, and accordingly, the 5-4 decision in *Florida Prepaid* may be ripe for reversal. Indeed, counsel for the State admitted that the reasoning of *Florida Prepaid* had been "undercut" by Katz. (Tr. 61:21-23). Of the five justices in the *Florida Prepaid* majority, only Justice Thomas remains on the Court, along with two of the four dissenters in that case, Justice Ginsburg and Justice Breyer.

The oral argument in Allen was fairly typical, in that no indication was given from the majority of the Justices as to which way they were leaning. Because of this unpredictability, only a stay would serve to benefit the parties and the Court.

CONCLUSION

The Supreme Court's decision in *Allen* is directly controlling on the issue of jurisdiction here. There is an average of 91.73 days between oral argument and a written opinion on the Robert's Court (78.73 days left as of the date of this Memorandum). This is a modest period of time when weighed against the fact that the decision in *Allen* will directly control the issue of jurisdiction at bar. Accordingly, plaintiff joins with the defendant to request a stay.

Dated: November 18, 2019
New York, New York

GARBARINI FITZGERALD P.C.

By: Richard M. Garbarini
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