

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

ACTIVISION TV, INC.,	§
	§
Plaintiff,	§
v.	§
	§
PINNACLE BANCORP, INC.,	§
	§
and	§
	§
JON BRUNING, Attorney General of	§
Nebraska (in his official capacity);	§
DAVID D. COOKSON, Chief Deputy	§
Attorney General of Nebraska (in his	§
official capacity); DAVID A. LOPEZ,	§
Assistant Attorney General of Nebraska	§
(in his official capacity),	§
	§
Defendants.	§

Civil Action No. 8:13-cv-00215

**ACTIVISION TV, INC.’S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS BRUNING, COOKSON AND LOPEZ’S
MOTION TO STAY PROCEEDINGS PENDING APPEAL**

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INTRODUCTION

Plaintiff Activision TV, Inc. (“Activision” or “Plaintiff”) respectfully submits this Memorandum of Law in Opposition to Defendants Bruning, Cookson and Lopez’s (collectively “the AG Defendants” or “the Nebraska AG”), Motion to Stay Proceedings in this Court pending the Nebraska AG’s Appeal of this Court’s preliminary injunction Orders entered on September 26 and September 30. *See* Filings 38 and 41.

Simple justice compels denial of the AG Defendants’ Motion. On July 18, 2013, the AG Defendants issued a sweeping unprecedented Order against a law firm that interfered with the rights of clients of that firm, including Activision, to enforce their patents, which are time-limited assets. The record to date has shown that the AG Defendants took this action without any basis, or even any investigation, into clients such as Activision. Almost four months later, the AG Defendants have still not produced a single bit of evidence that their Order had any lawful basis when it was issued, or has any lawful basis now.

It offends simple notions of justice to allow an Attorney General to issue, without any basis or lawful justification, a sweeping unconstitutional order breaching multiple parties’ constitutional free speech and property rights, and then for that same Attorney General to take every possible step to avoid having to defend its actions in court.

Moreover, the appeal on which the request for stay is based is not reasonable. As shown below, it is frivolous on its merits. Moreover, it was filed in the wrong court. Rather than correct that mistake, counsel for the AG Defendants have informed counsel for Activision that “they will not oppose” a motion to transfer. In short, it appears that not only are the AG Defendants asking this Court to stay proceedings pending an appeal that is frivolous on the merits, but have filed that appeal in the wrong court for the purpose of dragging out the time the

appeal will take (to add the time it will take to get the matter transferred to the Federal Circuit and re-docketed there).

While it has secured preliminary relief from this Court, Activision's patent enforcement efforts using the counsel of its choice remains under an unfair and baseless cloud, from which it is entitled to permanent and final relief. The efforts by the Attorney General to prolong its farcical order do great damage to Activision and the administration of justice. The delays the AG Defendants seek, both by their Motion to Stay pending appeal, and their request to stay discovery and a scheduling order, should be rejected. This case should move forward so that any limited discovery that may be necessary may be obtained, and Activision can move forward with seeking a summary judgment for permanent relief.

ARGUMENT

I. Because The Nebraska AG Knowingly Appealed This Court's Orders To The Wrong Appellate Court, Its Motion To Stay Should Be Denied

Despite receiving numerous communications from counsel for Activision explaining that an appeal of this Court's preliminary injunctions falls under the exclusive jurisdiction of the Federal Circuit, the Nebraska AG appealed to the wrong court – the Eighth Circuit. *See* Exh. A and Filing 65. Because of this, Activision has been forced to move to dismiss the Nebraska AG's Appeal. *See* Exh. B. The Court may review Activision's Motion to see that it is clear, as the Court already knows, that this is a patent case (see Count I of the First Amended Complaint) where any appeal exclusively lies in the Federal Circuit.¹ There can be no reasonable doubt on this, and indeed, the counsel for the AG Defendants has informed Activision's counsel that they will not oppose a motion to transfer. It appears that the filing in the Eighth Circuit is simply part

¹ Pursuant to 28 U.S.C. § 1292(c)(1), an interlocutory appeal for a case in which jurisdiction is premised under 28 U.S.C. § 1295(a)(1) would reside exclusively in the Federal Circuit. Section 1295(a) calls for Federal Circuit jurisdiction over any civil action "relating to patents."

of a scheme to delay adjudication of this case on the merits. The Motion to Stay should be rejected on that basis.

II. A Stay Should Not Be Granted Because The Nebraska AG's Appeal Is Frivolous

Where an appeal is plainly frivolous, a district court should continue with the underlying proceedings. *See Rose v. Utah State Bar*, 2011 U.S. Dist. LEXIS 10788, 6, 9 (D. Utah Feb. 2, 2011) citing *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1161 (10th Cir. 2005) (explaining that “the district court is not divested of jurisdiction to continue to hear the case if the appeal is frivolous) and *Braley v. Campbell*, 832 F.2d 1504, 1511 (10th Cir. 1987) (“An appeal is frivolous when the result is obvious, or the appellant’s arguments of error are wholly without merit.”). Here the appeal plainly is frivolous.

A. That The Appeal Was Knowingly Taken To, Or At Least Kept In, The Wrong Court Of Appeals Demonstrates The Appeal Is Frivolous

As an initial matter, of course, the appeal has been taken to an appellate court that does not have jurisdiction to hear the appeal. *See* Exh. B. On this basis alone the Court should deny the stay on grounds the appeal is frivolous. But it is also frivolous on its merits.

B. That The Nebraska AG Failed To Identify Any Reason For Its Appeal Also Argues Against Granting A Stay

As an initial matter, Activision believes it was incumbent upon the Nebraska AG, in seeking the Stay, to identify the issues on which appeal is sought, and to explain why the appeal is non-frivolous. The Nebraska AG failed to do that. Instead, it bases its Stay solely upon the fact that it filed an appeal, without regard to what the basis of that appeal might be. Plainly this is insufficient to warrant a Stay. If it were sufficient, every party who is preliminarily enjoined from further wrongful conduct could put off the day of final reckoning by just filing an appeal, regardless of the merits of that appeal. As the cases cited above indicate, this cannot be the law.

C. It Would Appear The Only Basis Of Appeal Is That The Orders Did Not Relate To Activision, Which Plainly Is Frivolous

Even if one considers the Nebraska AG's opposition to the preliminary injunction in this Court in an attempt to divine what they may say on appeal, it can be seen that the principal argument they make is that their Order "did not relate to Activision" but instead to "Farney Daniels." As explained briefly below, an appeal of either preliminary injunction Order of this Court (Filing 38 or Filing 41) on this basis would be frivolous.

1. The Federal Circuit Will Undoubtedly Affirm This Court's First Preliminary Injunction Order

This Court's first preliminary injunction Order only pertained to whether Farney Daniels could file patent infringement lawsuits in federal court on behalf of Activision, and represent Activision in patent suits already on file. Filing 38. This Court explained this Order was based, in part, on the Nebraska AG's concession at the preliminary injunction hearing that the Cease and Desist Order did not prevent Farney Daniels from representing Activision in any case. *Id.* at p. 2. Ironically, despite this concession, the Nebraska AG now appeals this preliminary injunction. *See* Filing 65. As this Court will recognize, it is certain that the Federal Circuit will affirm the Order of Filing 38. The Federal Circuit simply is not going to rule that a state attorney general may interfere with which counsel may represent a patent owner in a federal lawsuit. That admission to practice before the federal courts is the province of the federal judiciary, not state attorneys general. Moreover, the Nebraska AG has already conceded that its authority does not extend to the subject of the Order of Filing 38, and any appeal of that Order plainly is frivolous.

2. Likewise, The Federal Circuit Will Undoubtedly Affirm This Court's Second Preliminary Injunction Order

This Court's second preliminary injunction Order enjoined the Nebraska AG "from taking any steps . . . that would prevent or impede the Farney Daniels firm from representing

Activision in connection with licensing and litigation of U.S. patents owned by Activision with respect to companies based in, or having operations in, Nebraska.” Filing 41, p. 16. As noted above, the Nebraska AG failed to even indicate any basis on which it believes this Order is appealable. But, presumably, it will be on the basis that was raised below – that the July 18 Order purportedly only related to Farney Daniels and not Activision, and thus, Activision lacks standing and ripeness to bring this suit.

In deciding that Activision had standing and ripeness to bring its claims against the Nebraska AG, this Court relied on statements made by counsel for the Nebraska AG at the preliminary injunction hearing. There, the Nebraska AG declared that its Order did prevent Farney Daniels from sending patent licensing letters to infringers of Activision’s patents on Activision’s behalf. Filing 41, p. 3; Filing 49, 43:21-24; 46:22-24. The Nebraska AG also acknowledged that Activision has a constitutional right to its choice of counsel. The Nebraska AG argued only that Activision’s right to choice of counsel was not violated because it could still send its patent letters without employing Farney Daniels to do so. Filing 49, 36:3-20; 52:1-3.

Clearly, if Activision cannot choose Farney Daniels to send letters and file suits on its behalf, Activision’s constitutional right to choice of counsel has been violated. Thus, given that the Nebraska AG conceded that Activision has a right to choice of counsel, and that it now contends that Activision cannot use Farney Daniels to send patent enforcement letters on its behalf, it is plain that Activision suffered a constitutional injury as a result of the July 18 Order. This Court found that there is “no doubt” that Activision’s injuries are causally related to the July 18 Order and that the injury is directed at Activision’s activities via counsel. *Id.* at p. 5. Any appellate court would agree.

The record further supports this clear conclusion that Activision has standing and ripeness to bring its claims against the Nebraska AG, as the Nebraska AG injected itself into settlement negotiations between Activision and an out-of-state defendant having operations in Nebraska, CenturyLink, alerting CenturyLink to the existence of the Cease and Desist Order and the impact it had on CenturyLink's negotiations with Activision. Filing 49, 49:11-24. Importantly, CenturyLink's interpretation of that conversation is irrelevant. Rather, the fact that the Nebraska AG contacted CenturyLink to alert it of the Cease and Desist Order confirms the Nebraska AG's position that the Cease and Desist Order prohibits Activision's efforts to enforce its patents against out of state businesses that happen to have Nebraska operations.

Further, despite insisting that the Cease and Desist Order has nothing to do with Activision, the Nebraska AG spends much of its Motion to Dismiss and Opposition to Activision's Preliminary Injunction explaining how Activision's activities (and Farney Daniels' activities on Activision's behalf) violate Nebraska law and warrant the issuance of the July 18 Order. *See* Filing 22, *passim*. As the Nebraska AG has argued for the application of the July 18 Order to Activision's activities, it is disingenuous for the Nebraska AG to now argue, on appeal, that Activision does not have standing and ripeness to bring its claims.

III. A Comparison Of The Hardships Compels Denying The Stay

This Court's factual findings in its preliminary injunction Orders (Filing Nos. 38 and 41) show that Activision, not the Nebraska AG, will be harmed if the stay is granted. The Nebraska AG proffers no evidence in its appeal that was not available to it at the preliminary injunction hearing. While a district court has discretion to grant a motion to stay under its general equity powers, its discretion is not "without limitation." In ruling on a motion to stay, the court "must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A stay is merited only if the moving party "make[s] out a clear case of hardship or

inequity in being required to go forward.” *See id.* at 255. *See also GP Indus., LLC v. ERAN Indus.*, 2007 U.S. Dist. LEXIS 3836, at *4 (D. Neb. Jan. 17, 2007) (same).

A. A Stay Would Harm and Unduly Prejudice Activision

The activity that this Court’s Preliminary Injunction Orders is based on is the issuance of an unconstitutional Cease and Desist Order by the Nebraska AG. That Order impeded Activision’s constitutional rights upon its issuance to Farney Daniels on July 18, 2013. This Court agreed and issued its preliminary injunctions on September 26 and September 30. *See* Filings 38 and 41. Prior to the issuance of this Court’s preliminary injunction Orders, the Cease and Desist Order directly impeded Activision’s ability to enforce its time-limited patent rights. Thus, for over two months, before this Court’s Orders, as a direct consequence of the Cease and Desist Order, Activision could not enforce its patents against Nebraska residents or those entities having operations in Nebraska. Since it received relief from this Court in late September from the unlawful Cease and Desist Order, Activision has already begun to actively enforce its patent rights against Nebraska Infringers.²

Now, to intentionally delay the ultimate relief Activision seeks from the initiation of this suit, including a permanent injunction against the enforcement of the Cease and Desist Order as it relates to all patent enforcement activities of Activision, the Nebraska AG has appealed this Court’s Preliminary Injunction Orders (to the wrong Court at that), further postponing Activision’s relief from the unconstitutional Cease and Desist Order. An appeal on these Orders will undoubtedly take months – if not longer. Thus, not only will a stay unjustifiably delay Activision’s suit for patent infringement and a declaration that its patent enforcement activities did not violate Nebraska law, but Activision will be delayed in receiving the permanent relief it

² Since this Court issued its preliminary injunction Orders, Activision has filed and/or served at least seven different complaints for patent infringement against companies that, on information and belief, have operations in Nebraska.

seeks – to be free from the enforcement of the unconstitutional Cease and Desist Order.³

Further, because of the Nebraska AG’s delay tactic, not only will Activision be prejudiced, but Pinnacle and MPHJ Technology Investments will be prejudiced as well, as both will be tied up in this litigation for much longer than necessary as a result of the Nebraska AG’s meritless appeal.

B. A Denial Of The Nebraska AG’s Motion To Stay Would Not Prejudice The Nebraska AG

In contrast to the prejudice that Activision, Pinnacle and MPHJ would face if the stay were granted, the Nebraska AG would suffer no hardship from a denial of the requested stay. Nor has it identified any. The Nebraska AG’s Motion should be denied on this basis alone. *See Landis*, 299 U.S. at 255 (“the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else.”); *GP Indus., LLC*, 2007 U.S. Dist. LEXIS 3836 at *4. (“Traditionally, an applicant for a stay has the burden of showing specific hardship or inequity if he or she is required to go forward.”). The Nebraska AG has already obtained its relevant discovery through the response of Activision’s counsel to the Civil Investigative Demand served by the Nebraska AG with the July 18 Order. Delay thus impedes Activision’s right to proceed with the case, but does not similarly prejudice the Nebraska AG.

Moreover, a stay is not necessary to achieve the cost savings and efficiencies advanced by the Nebraska AG as the only basis for its Motion, as an abundance of the proceedings in this Court could move forward while the appeal is pending. *See* Section V, *infra*.

³ As Activision has had to incur fees and costs in challenging the unconstitutional Order, it will be entitled to those fees and costs for the violation of 42 U.S.C. § 1983. Delay of final adjudication on the merits will delay Activision’s right to reimbursement, imposing an unnecessary additional unfair burden on a small company.

IV. Because The Appeal Pertains To A Preliminary Injunction, Any Relief On Appeal Would Be Preliminary

It is clear that any relief sought by the Nebraska AG on appeal would only be preliminary relief and would not affect the merits of this case. The court in *Pharm. Care Mgmt. Ass'n v. Me. AG*, 332 F. Supp. 2d 258 (D. Me. 2004) denied a motion to stay discovery pending an appeal of a preliminary injunction order against a state Attorney General's enforcement of a Maine statute. The court noted that "[t]he general rule for an interlocutory appeal of a preliminary injunction is that it 'does not defeat the power of the trial court to proceed further with this case.'" *Id.* at 259. In explaining its analysis, the court acknowledged that some courts have held that an interlocutory appeal divests a district court of jurisdiction with respect to "any matter touching upon, or involved in, the appeal." *Id.* In declining to follow those courts, the *Pharm. Care Mgmt. Ass'n* court noted that "[o]n the one hand, it can be said that trial court proceedings directed to the merits of the lawsuit inevitably 'touch upon' the interlocutory appeal. On that basis, however, interlocutory appeals would almost uniformly bring trial court proceedings to a halt." *Id.* In light of this conclusion, the court held that it would only restrict "trial court proceedings that impinge more directly upon the questions presented in the interlocutory appeal." *Id.* at 260.

In denying the motion to stay and finding "that the interlocutory appeal of the preliminary injunction does not ipso facto deprive the court of jurisdiction to proceed with discovery, pretrial preparation, motion practice and trial," the court noted that "[a]ny decision of the Court of Appeals on the preliminary injunction will by definition be preliminary so far as the merits are concerned. It is an appropriate use of judicial resources (and those of the parties) to proceed with the actual merits so as to obtain a final resolution." *Id.*

The court cited *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 673 (9th Cir. 1988) as further supporting its holding:

In this case . . . the government moved to stay discovery in the underlying litigation pending our disposition of this appeal. To the extent that a desire to get an early glimpse of our view of the merits of the underlying legal issues in this litigation motivated this tactic, it was both misconceived and wasteful. A preliminary injunction is, as its name implies, preliminary to the trial -- not to an appeal. We believe that this case could have proceeded to trial, or to the summary judgment stage, in less time than it took the parties to submit these cases for appeal. Had the parties pursued this course, they would have achieved a prompt resolution of the merits. But the parties did not pursue this course; therefore, we are conducting our review on the basis of a limited record. On the basis of this limited record and the status of the litigation, we may do no more than determine whether the district court abused its discretion in determining that serious legal questions were raised and that the balance of hardships tipped sharply in favor of the owners and crew. Our resolution of these issues will not determine the merits of the underlying legal issues presented in this litigation, and will only temporarily affect the rights of the parties.

Id. at 260 n.2. Here, the Nebraska AG's appeal only pertains to this Court's issuance of its preliminary injunction Orders. Thus, any decision by the appellate court will be limited to preliminary relief. Accordingly, this Court should follow *Pharm. Care Mgmt. Ass'n* and find that an appropriate use of the parties' and judicial resources is to allow this case to proceed on the merits towards reaching a final resolution.

V. The Stay Requested By The Nebraska AG Is Overbroad

The Nebraska AG's Motion to Stay seeks a stay of all proceedings until ten days after the Eighth Circuit issues a ruling resolving the Nebraska AG's appeal. *See* Filing 68. Such a requested stay is overly broad and highly prejudicial to the parties in this case for a number of reasons. First, the Nebraska AG has failed to provide *any* justification for staying Activision's infringement count against Defendant Pinnacle pending the Nebraska AG's appeal, or how such an appeal would have any effect on the infringement suit. Second, the Nebraska AG fails to explain why a prompt adjudication of Count II of the Amended Complaint should not proceed, as

Count II seeks a declaratory judgment that Activision's patent enforcement activities did not violate Nebraska state law, which presents issues not relevant to the appeal. As the Nebraska AG's appeal only relates to Count III, there is no reason to forego proceeding with adjudication of Counts I and II. Finally, discovery with respect to all counts of the Amended Complaint should proceed, and the Nebraska AG fails to explain why it should not. *See, e.g., GP Indus., LLC v. Bachman*, 514 F. Supp. 2d 1156, 1159 (D. Neb. 2007) (“[The] application of the general rule in an appeal of a preliminary injunction order is limited to those matters involved in the appeal.”); *West Publ'g Co. v. Mead Data Ctr., Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986) (“[T]he pendency of an interlocutory appeal from an order granting or denying a preliminary injunction does not wholly divest the District Court of jurisdiction over the entire case.”).

Accordingly, should this Court find that any sort of stay of proceedings is warranted in this case, which it is not, Activision requests that this Court limit that stay accordingly.

CONCLUSION

Accordingly, for the foregoing reasons, Plaintiff Activision respectfully requests that this Court deny the Nebraska AG's Motion to Stay Proceedings in this Court Pending its Appeal.

Respectfully submitted,

Dated: November 6, 2013

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served November 6, 2013, with a copy of this document via the Court's CM/ECF system.

/s/ W. Bryan Farney _____
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