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and PHIL WRIGHT

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

PARAMOUNT PICTURES CORPORATION,	)	Case No. 01-09358 FMC (Ex)
<i>et al.</i> ,	)	
	)	<b>DECLARATION OF GWENITH A.</b>
Plaintiffs,	)	<b>HINZE IN SUPPORT OF NEWMARK</b>
	)	<b>PLAINTIFFS' OPPOSITION TO</b>
v.	)	<b>ENTERTAINMENT COMPANIES'</b>
	)	<b>MOTION FOR MODIFICATION OF</b>
REPLAYTV, INC., <i>et al.</i> ,	)	<b>STAY ORDER</b>
	)	
Defendants.	)	DATE: November 10, 2003
	)	TIME: 10:00 a.m.
	)	PLACE: Courtroom 750
AND CONSOLIDATED ACTIONS.	)	
	)	

I, Gwenith A. Hinze, declare as follows:

1. I am an attorney at law duly admitted to practice before this Court. I am a staff attorney at the Electronic Frontier Foundation, counsel of record for the Newmark Plaintiffs herein. I submit this declaration in support of the attached Newmark Plaintiffs' Opposition to

1 Entertainment Companies' Motion for Order Modifying The Court's March 24, 2003 Stay Order  
2 for Limited Purposes. The facts stated here are known to me of my own personal knowledge,  
3 except where otherwise stated. If called upon to testify thereto I could and would competently do  
4 so.

5 2. Attached hereto as Exhibit A is a true and correct copy of the Court's Minute Order  
6 dated March 24, 2003, staying all proceedings in the above-captioned consolidated proceedings.

7 3. Attached hereto as Exhibit B is a true and correct copy of the Order of the  
8 Bankruptcy Court of the Northern District of California, dated April 25, 2003.

9 4. The parties were able to reach agreement on the signing of a stipulation for a  
10 modification of the stay of the bankruptcy court proceedings under 11 U.S.C. § 362. On August 19,  
11 2003, the Bankruptcy Court issued an order modifying the automatic stay provided by 11 U.S.C.  
12 §362 to allow for the filing in this Court of the stipulated dismissal of SONICblue, inc. and  
13 ReplayTV, Inc. from the Newmark Plaintiffs' action and the Entertainment Companies'  
14 consolidated action against ReplayTV, Inc. and SONICblue, Inc. respectively. Attached hereto as  
15 Exhibit C is a true and correct copy of that order.

16 5. Attached hereto as Exhibit D is a true and correct copy of the bankruptcy  
17 proceeding stipulation for dismissal, signed by all parties.

18 6. In July, 2003, I commenced discussions with all parties to this action to obtain  
19 agreement to a voluntary dismissal of the bankrupt parties SONICblue, Inc. and ReplayTV, Inc., by  
20 a stipulation pursuant to Rule 41 of the Federal Rules of Civil Procedure. Attached hereto as  
21 Exhibit D is a true and correct copy of the letter I sent to Mr. Cooper of Proskauer Rose, counsel  
22 for the MGM Parties, and counsel for the other Entertainment Company parties on July 22, 2003,  
23 advising Newmark Plaintiffs' intention to dismiss the bankrupt parties and attaching a draft  
24 stipulation to dismiss SONICblue, Inc. and ReplayTV, Inc.

25 7. The Entertainment Companies refused to sign the draft stipulation. In a telephone  
26 conversation with Mr. Cooper on July 24, 2003, and in a letter from Mr. Cooper dated July 24,  
27 2003, Mr. Cooper conveyed that the Entertainment Companies covenanted not to sue the  
28 Newmark Plaintiffs for copyright infringement in respect of their past or future uses of their

1     ReplayTV devices and advised that the Entertainment Companies intended to file a Motion to  
2     Dismiss the Newmark Plaintiffs, under 28 U.S.C. § 2201 and Rule 12(h) of the Federal Rules of  
3     Civil Procedure. Attached hereto as Exhibit E is a true and correct copy of the letter I received  
4     from Mr. Cooper on July 24, 2003.

5             8.         On July 24, 2003, I sent a letter to Mr. Cooper, advising that the Newmark Plaintiffs  
6     would be prepared to join in a stipulated modification of the Bankruptcy Court stay and the District  
7     Court stay, or alternatively to join in a motion for lifting of the District Court stay for all purposes,  
8     in order to facilitate filing of a stipulated dismissal of SONICblue, Inc. and ReplayTV, Inc.  
9     Attached hereto as Exhibit F is a true and correct copy of the letter I sent to Mr. Cooper and  
10    counsel for the other Entertainment Companies on July 24, 2003.

11            9.         By a letter of July 25, 2003, the Entertainment Companies rejected that proposal and  
12    stated their intention to make an application to lift the District Court stay for the limited purpose of  
13    filing a stipulated dismissal of the SONICblue parties, and the Entertainment Companies' Motion  
14    to Dismiss the Newmark Plaintiffs' Complaint. Attached hereto as Exhibit G is a true and correct  
15    copy of the letter from Mr. Block of Proskauer Rose to myself dated July 25, 2003.

16            10.        On August 13, 2003, I received a letter from Mr. Cooper attaching a draft  
17    stipulation for dismissal of SONICblue, Inc. and ReplayTV, Inc. and a draft stipulation for relief  
18    from the stay in these proceedings, which would have permitted the stay to be lifted for the purpose  
19    of filing the Entertainment Companies' proposed Motion to Dismiss the Newmark Plaintiffs'  
20    Complaint and the stipulation to dismiss SONICblue, Inc. and ReplayTV, Inc. Attached hereto as  
21    Exhibit H is a true and correct copy of the letter from Mr. Cooper dated August 13, 2003, together  
22    with the draft stipulation for relief from stay.

23            11.        On August 18, 2003, I sent a letter to Mr. Cooper, confirming that the Newmark  
24    Plaintiffs would be prepared to stipulate or join in a motion to lift the stay for all purposes,  
25    including filing of the Entertainment Companies' proposed Motion to Dismiss the Newmark  
26    Plaintiffs' Complaint, but were not prepared to agree to a one-sided lifting of the stay which would  
27    permit only the Entertainment Companies to take procedural action to progress the action. Attached  
28    hereto as Exhibit I is a true and correct copy of my letter to Mr. Cooper and counsel for the other

1 Entertainment Companies dated August 18, 2003.

2 12. On September 4, 2003, Ira Rothken, co-counsel for the Newmark Plaintiffs, and  
3 myself, telephoned Mr. Cooper. In that conversation, Newmark Plaintiffs' counsel again reiterated  
4 agreement to stipulating for a leave to lift the stay for all purposes, or to join in a motion for that  
5 purpose. Mr. Rothken advised that the Newmark Plaintiffs would be seeking leave of the Court to  
6 amend the Newmark Plaintiffs' Complaint to add new parties, and could not agree to the  
7 Entertainment Companies' proposed stipulation because it would not permit that motion to be filed.  
8 Mr. Rothken also foreshadowed that Newmark Plaintiffs may need to consider serving discovery in  
9 order to respond to factual matters raised by the Entertainment Companies' proposed Motion to  
10 Dismiss the Newmark Plaintiffs' Complaint, and stated that an appropriate stipulation to lift the  
11 stay would have to accommodate these matters.

12 13. On September 12, 2003, I sent a letter to Mr. Cooper confirming my understanding  
13 of our conversation on September 4, 2003, and reiterating that Newmark Plaintiffs would be  
14 prepared to stipulate or join in a motion to lift the stay for all purposes. Attached hereto as Exhibit J  
15 is a true and correct copy of my letter to Mr. Cooper of September 12, 2003.

16 14. On September 16, 2003, Ira Rothken and myself telephoned Mr. Cooper. In that  
17 conversation, we discussed the Newmark Plaintiffs' proposed Motion for Leave to Amend to add  
18 additional parties to the Complaint, and Mr. Rothken expressly asked Mr. Cooper whether the  
19 Entertainment Companies would be prepared to give a covenant not to sue in the same terms as the  
20 one given to the five Newmark Plaintiffs, to the other consumer owners of ReplayTV devices with  
21 Commercial Advance and Send Show features. The Entertainment Companies have failed to grant  
22 such a covenant.

23 15. On September 26, I received a letter from Mr. Cooper, attaching a further draft  
24 stipulation to lift the stay for the limited purposes of filing a stipulation to dismiss the bankrupt  
25 parties SONICblue, Inc. and ReplayTV, Inc., the Entertainment Companies' foreshadowed Motion  
26 to Dismiss, the Newmark Plaintiffs' proposed Motion for Leave to Amend to add parties. Attached  
27 hereto as Exhibit K is a true and correct copy of that letter.

28 16. On October 3, 2003, I sent Mr. Cooper a letter with Newmark Plaintiffs' requested

1 modifications to the draft stipulations. The only substantial modification that the Newmark  
2 Plaintiffs requested was a request to have the Entertainment Companies' foreshadowed Motion to  
3 Dismiss heard on the same day as the Newmark Plaintiffs' proposed Motion for Leave to Amend.  
4 Attached as Exhibit L hereto is a true and correct copy of the letter of October 3, 2003.

5 17. The Entertainment Companies rejected the Newmark Plaintiffs' proposed  
6 modifications to the draft stipulation of September 26 by letter dated October 9, 2003. In that letter,  
7 Mr. Cooper stated that the Newmark Plaintiffs had not satisfied their obligations under Local Rule  
8 7-3 with respect to the Newmark Plaintiffs' advised Motion for Leave to Amend. Mr. Cooper's  
9 letter also stated that the Entertainment Companies had rejected the Newmark Plaintiffs' requested  
10 modification to have the two sets of motions heard together on the grounds that it was "premature",  
11 in light of the Entertainment Companies' belief that there had not been compliance with Local Rule  
12 7-3. The letter also stated that the Entertainment Companies would move for a lift of the stay for  
13 limited purposes. Attached as Exhibit M hereto is a true and correct copy of the letter of October 9,  
14 2003.

15 18. Although the Newmark Plaintiffs did not, and do not, agree with Mr. Cooper's  
16 statement about Newmark Plaintiffs' satisfaction of the requirements for Local Rule 7-3 for  
17 Newmark Plaintiffs' proposed Motion for Leave to Amend, on October 17, 2003, I called Mr.  
18 Cooper and left a voicemail message advising that for the purposes of resolving any dispute about  
19 compliance with Local Rule 7-3, the Newmark Plaintiffs intended to seek leave of the Court to file  
20 a Motion for leave to amend to add named plaintiffs and allegations on behalf of a class of  
21 similarly situated consumer owners of ReplayTV devices, together with allegations required to  
22 maintain the Newmark Plaintiffs' case as a class action pursuant to Rule 23 of the Federal Rules of  
23 Civil Procedure. I advised that the reason for seeking relief, was to join persons similarly situated  
24 to the Newmark Plaintiffs, who had indicated that they wanted to obtain the same declaratory relief  
25 as being sought by the Newmark Plaintiffs. I confirmed the content of my voicemail message in a  
26 letter that I sent to Mr. Cooper and counsel for the other Entertainment Companies, on October 17,  
27 2003. Attached hereto as Exhibit N is a true and correct copy of the letter I sent to Mr. Cooper and  
28 counsel for the other Entertainment Companies on October 17, 2003.

1           19.       Attached hereto as Exhibit O is a true and correct copy of the draft Newmark  
2 Plaintiffs' Motion for Leave to Amend.

3           20.       Attached hereto as Exhibit P is a true and correct copy of the draft Newmark  
4 Plaintiffs' First Amended Complaint.

5           I declare under penalty of perjury under the laws of the State of California that the  
6 foregoing is true and correct and that this document was executed in San Francisco, California.

7  
8                               Respectfully submitted,

9       DATED: October 27, 2003

10                           By \_\_\_\_\_  
11                               Gwenith A. Hinze