UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 12-3200 Caption [use short title] The Authors Guild et al. v. Google Inc.

Motion for: Stay of Proceedings Below Pending Appeal

Set forth below precise, complete statement of relief sought:

Google moves to stay proceedings below pending appeal.

MOVING PARTY: Google Inc.
☐ Plaintiff ☑ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: The Authors Guild

MOVING ATTORNEY: Seth P. Waxman

OPPOSING ATTORNEY: Michael J. Boni, Joanne E. Zack

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: The Hon. Denny Chin, U.S. District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☑ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☑ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Seth P. Waxman **Date:** 9/10/2012 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080 (rev. 7-12)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE AUTHORS GUILD, INC., Associational Plaintiff, BETTY MILES, JOSEPH GOULDEN, and JIM BOUTON, on behalf of themselves and all other similarly situated,	)	Case No. 12-3200
Plaintiffs-Appellees,	)	
v.	)	
GOOGLE INC.,	)	
Defendant-Appellant.	)	

DEFENDANT-APPELLANT GOOGLE'S UNOPPOSED MOTION TO STAY DISTRICT COURT PROCEEDINGS PENDING APPEAL OF CLASS CERTIFICATION ORDER

Pursuant to Rule 23(f) of the Federal Rules of Civil Procedure and Rule 8 of the Federal Rules of Appellate Procedure, Defendant-Appellant Google Inc. respectfully moves this Court to stay proceedings below pending appeal. The district court is presently entertaining summary judgment motions from the parties. Absent a stay, the district court will likely adjudicate the merits of those motions before the Court of Appeals reaches a final decision on class certification and thus before class notice and the opt-out period. If Google prevails, class members will have every incentive to opt-out; if Plaintiffs prevail, class members will have every

incentive to remain in the class. Google thus faces the prospect of a classwide defeat—with a judgment of potentially billions of dollars—or a greatly diminished victory. A stay is necessary to prevent this anomalous result and to abate the very in terrorem effects that interlocutory review was designed to avoid. As required by Federal Rule of Appellate Procedure 8(a)(1), Google first sought a stay in the district court, which was denied. *See* Holtzblatt Decl., Ex. 1; Holtzblatt Decl., Ex. 2. Plaintiffs-Appellees do not oppose and do not intend to file a response to this motion.

BACKGROUND

In 2004, Defendant-Appellant Google began a revolutionary project—a markedly improved version of the traditional card catalog—now known as Google Books. Google made electronic copies of more than 20 million books in major libraries and indexed them so that anyone can enter a search term, find a list of books containing that term, and often see eighth-of-a-page long "snippets" showing the context in which the term is used. Google included safeguards to ensure that the snippets could not be used to obtain the full, or even a substantial percentage, of a book's text. This tool provides a new and much better way of finding books, but it does not substitute for buying or borrowing books; on the contrary, Google Books enables and encourages those activities.

In 2005, the Authors Guild and several individual authors sued Google, claiming that Google's uses infringe on authors' copyrights. The suit sought potentially billions of dollars in damages and threatened to shut down a significant part of Google Books.[1] Google's principal defense was and is fair use.

This appeal arises from the district court's decision to grant Author Plaintiffs' motion to certify a class under Rule 23(b)(3). *See Authors Guild v. Google Inc.*, No. 05-cv-8136 (S.D.N.Y.), ECF Nos. 1023, 1026. The class contains millions of different books written by hundreds of thousands of authors, many of whom believe they benefit from and approve of Google Books, *see* Poret Decl., Ex. 1, at 21-23. Google opposed class certification, arguing that class representatives seeking to dismantle Google Books cannot adequately represent absent class members who support the project. Google also argued that class certification would impermissibly prevent Google from proving fair use on an individualized basis. Finally, Google argued that the need to determine copyright ownership on a work-by-work basis precludes class certification under Federal Rule of Civil Procedure 23(b)(3). After the district court rejected these arguments, Google petitioned this Court for permission to appeal class certification pursuant to Federal Rule of Civil Procedure 23(f). This Court granted the petition on August

[1] Plaintiffs have stipulated that they seek statutory damages of $750 per book, which they would multiply across a class that contains millions of works.

14, 2012. *See Authors Guild v. Google Inc.*, No. 12-2402-mv (2d Cir. Aug. 14, 2012), ECF No. 58.

Google promptly sought a stay pending appeal in the district court. Google explained that without a stay the district court will consider and likely adjudicate the principle merits issues in this case before the Court of Appeals reaches a final decision on class certification and thus before the class notice and opt-out period.[2] *See* Holtzblatt Decl., Ex. 1. As a result, Google argued, class members will have an incentive to opt-out if Google prevails but not if plaintiffs prevail, which would seriously prejudice Google. *See id.* Plaintiffs filed no opposition to Google's request for a stay. *See* Holtzblatt Decl., Ex. 2, at 1.

The district court disagreed that Google would be prejudiced by proceeding to the merits. It reasoned that even if "class members are motivated to opt-out of the class [following a Google victory on the merits], Google would be in no worse a position than it would have been in had it prevailed on the class certification motion and the plaintiffs had been forced to litigate their claims individually."

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[2] While the district court and then this Court were considering class certification, the fact and expert discovery periods closed and the parties filed cross-motions for summary judgment. *See Authors Guild v. Google Inc.*, No. 05-cv-8136 (S.D.N.Y.), ECF Nos. 982, 996, 1031, 1049. Briefs opposing summary judgment are now due October 24, 2012, reply briefs are due November 19, 2012, and oral argument on the motions for summary judgment is scheduled for December 4, 2012. *See Authors Guild v. Google Inc.*, No. 05-cv-8136 (S.D.N.Y.), ECF No. 1061.

Holtzblatt Decl., Ex. 2, at 2. The district court also noted that it would have to decide the merits eventually and that the case was seven years old. *Id.* It therefore denied Google's request for a stay. *Id* at 3.

ARGUMENT

The decision whether to stay a proceeding pending interlocutory appeal requires consideration of the following four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *SEC v. Citigroup Global Markets Inc.*, 673 F.3d 158, 162-163 (2d Cir. 2012) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134 (2d Cir. 2001) (a stay pending appeal pursuant to Rule 23(f) is warranted when "the likelihood of error on the part of the district court tips the balance of hardships in favor of the party seeking the stay"); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). The Second Circuit assesses these factors on a sliding scale, and "more of one excuses less of the other." *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (internal quotation marks omitted). "[S]ome possibility" of success on appeal is sufficient to justify a stay where "the balance of

hardships tips decidedly in . . . favor" of the party seeking the stay. *Thapa v. Gonzales*, 460 F.3d 323, 335 (2d Cir. 2006); *see also Citigroup Global Markets, Inc. v. VCG Special Opport. Master Fund Ltd.*, 598 F.3d 30, 35-38 (2d Cir. 2010) (reaffirming that a preliminary injunction should issue where there are "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief" (internal quotation marks omitted)).

Here, the balance of hardships strongly favors a stay. Adjudicating the merits of this case before absent class members decide whether to opt-out—as is likely absent a stay—unfairly forces Google to risk a total classwide defeat with a judgment of potentially billions of dollars while offering it the chance for only a greatly diminished victory. Absent class members would, in effect, "be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision." Fed. R. Civ. P. 23(c)(3) Adv. Comm. Note to 1966 Amend. That would unfairly and irreparably prejudice Google and exacerbate the very in terrorem effects that interlocutory review under Rule 23(f) was designed to avoid, *see Sumitomo Copper Litig.*, 262 F.3d at 138; *Blair*, 181 F.3d at 834-835. The authors of Rule 23 recognized this concern when they

amended the rule to prevent "'one-way' intervention[s]." Fed. R. Civ. P. 23(c)(3) Adv. Comm. Note to 1966 Amend. And the Second Circuit has imposed a strong presumption in favor of deciding class certification *before* any adjudication of the merits in order to avoid "the multi-billion dollar specter of a risk-free intervention decision by thousands of putative plaintiffs." *See Philip Morris Inc. v. National Asbestos Workers Med. Fund*, 214 F.3d 132, 135 (2d Cir. 2000). Acknowledging that a defendant is similarly prejudiced by a judgment entered after class certification but before the opt-out period, at least one court has likewise deferred ruling on summary judgment until after completion of the class notice procedure. *See Brecher v. Republic of Argentina*, 2010 WL 3584001, at *2 (S.D.N.Y. Sept. 14, 2010). Plaintiffs, by contrast, face little cognizable harm from a stay, and do not oppose Google's stay request.

The district court dismissed Google's concern about proceeding to the merits because the court believed that "Google would be in no worse shape than it would have been in had it prevailed on the class certification motion and the plaintiffs had been forced to litigate their claims individually." Holtzblatt Decl., Ex. 2, at 2. But that is wrong. Had Google defeated class certification its litigation risks would have been proportionate to the potential rewards: Google could have at best secured judgment against only the named plaintiffs but could have at worst faced a

similarly narrow defeat. In contrast, without a stay, Google must risk a potentially multi-billion dollar classwide adverse judgment without being able to obtain a similarly broad judgment in its favor.

The district court also overlooked the benefits of a stay in terms of judicial economy. Although the court was correct that "[t]he merits would have to be reached at some point" (Holtzblatt Decl., Ex. 2, at 2), they are more likely to be resolved once and for all if adjudicated after the opt-out period is complete. If instead class members are able to opt-out following a Google victory, the courts may have to resolve successive lawsuits brought by those objectors.

Finally, although this case was filed seven years ago, the parties have not dragged their feet in attempting to resolve it. The parties spent years and considerable effort negotiating and seeking approval of a proposed settlement, which the district court rejected on March 22, 2011. *See Authors Guild v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011). In the year and a half since the settlement was rejected, the parties have obtained decisions from the district court on class certification and on a Google motion to dismiss and have begun briefing summary judgment. Certainly the parties have not delayed the case in any way that would justify disregarding the serious prejudice that Google would suffer without a stay.

Given that "the balance of hardships tips decidedly in favor" of Google, a stay should issue so long as Google can show "some possibility" of success on its appeal. *Thapa*, 460 F.3d at 336. In fact, Google has a strong likelihood of prevailing on its appeal, for the reasons explained more fully in the opening and reply briefs filed in support of Google's Petition for Permission to Appeal, which are here incorporated by reference. *See Authors Guild v. Google Inc.*, 12-2402-mv (2d Cir.), ECF Nos. 1, 32. In particular, Google will show that the class plaintiffs seeking to dismantle Google Books cannot adequately represent the large segment of class members who believe they benefit economically and in other ways from Google Books and want it to continue. *See Valley Drug v. Geneva Pharm.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (holding that where "some party members claim to have been harmed by the same conduct that benefitted other members," those harmed cannot adequately represent both groups); *Bieneman v. City of Chicago*, 864 F.2d 463, 465 (7th Cir. 1988); *Phillips v. Klassen*, 502 F.2d 362, 367 (D.C. Cir. 1974). In addition, Google will demonstrate that the district court erred in finding "predominance" in light of the individual issues posed by Google's distinct fair use defense based on the different, but most often favorable, effects of Google Books on different individual works, as well as the need to determine copyright ownership on a work-by-work basis. *See Wal-Mart Stores v. Dukes*, 131 S. Ct.

2541, 2551 (2011) (requiring that class litigation "generate common *answers* apt to drive the resolution of the litigation"). Google has a strong likelihood of prevailing on both issues.

In sum, because the balance of hardships tips decidedly towards Google and plaintiffs do not oppose a stay, and because the district court likely erred in granting class certification, the Court should stay proceedings below pending appeal.

Dated: September 10, 2012

Respectfully submitted,

/s/ Seth P. Waxman

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant-Appellant Google Inc.'s Unopposed Motion to Stay Proceedings Below Pending Appeal were filed using the Appellate CM/ECF system on this 10th day of September, 2012. All participants in the case are registered CM/ECF users, and service will be accomplished through the CM/ECF system.

/s/ Seth P. Waxman
SETH P. WAXMAN

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on this 10th day of September 2012, I caused a pdf version of the foregoing Defendant-Appellant Google Inc.'s Unopposed Motion to Stay Proceedings Below Pending Appeal to be filed electronically using the CM/ECF system. Prior to transmittal, the pdf was scanned for viruses and no viruses were detected.

/s/ Seth P. Waxman
SETH P. WAXMAN