

Appeal Nos. 09-15932 & 09-16044

United States Court of Appeals

FOR THE

Ninth Circuit

MDY INDUSTRIES LLC and MICHAEL DONNELLY,
Plaintiffs-Appellants,

v.

BLIZZARD ENTERTAINMENT, INC. and VIVENDI GAMES, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
THE HONORABLE DAVID G. CAMPBELL, JUDGE
CASE No. 06 CIV. 2555

**DECLARATION OF DAVID R. EBERHART IN SUPPORT OF
AMICUS CURIAE BUSINESS SOFTWARE ALLIANCE'S
UNOPPOSED MOTION TO EXTEND TIME TO
FILE AMICUS CURIAE BRIEF UNTIL NOVEMBER 13, 2009**

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I, David R. Eberhart, declare as follows:

1. I am a member of the bars of, among others, the State of California and the United States Court of Appeals for the Ninth Circuit. I am a partner of the law firm of O'Melveny & Myers LLP, attorneys for *amicus curiae* Business Software Alliance ("BSA"). I submit this declaration in support of BSA's Unopposed Motion To Extend Time To File *Amicus Curiae* Brief Until November 13, 2009 ("Unopposed Motion"). I have personal knowledge of the facts set forth in this declaration and, if called as a witness, could and would testify to those facts.

2. BSA is an association of the world's leading software and hardware technology companies. BSA's members include Adobe, Apple, Autodesk, AVG, Bentley Systems, CA, Cadence Design Systems, Cisco Systems, Corel, Cyberlink, Dassault Systèmes SolidWorks Corporation, Dell, Embarcadero, HP, IBM, Intel, Intuit, McAfee, Microsoft, Mindjet, Minitab, Quark, Quest, Rosetta Stone, SAP, Sheba Distribution, Siemens PLM Software, Inc., Sybase, Symantec, Synopsys, and The MathWorks. BSA's members have a substantial interest in this case, because it impacts important issues regarding the licensing and protection of software under the Copyright Act.

3. Before filing any *amicus curiae* brief, BSA must coordinate with its members regarding those members' input to, and approval of, BSA's *amicus curiae* brief. Although that process is already under way, BSA requires an

additional week to complete the process and file its brief.

4. I have communicated with counsel for all of the parties to this appeal and for *amicus curiae* Public Knowledge, specifically: Lance Venable for MDY Industries, LLC and Michael Donnelly; Christian Genetski for Blizzard Entertainment, Inc. and Vivendi Games, Inc.; and Brian Carver for Public Knowledge. Each of the parties and Public Knowledge have stated that they do not oppose BSA's request for an extension to November 13, 2009.

5. I have also communicated with Scott Bain, counsel for *amicus curiae* Software & Information Industry Association ("SIIA"). SIIA has stated that it does not oppose BSA's request but maintains that a two week extension for SIIA is both necessary and appropriate.

6. BSA has exercised, and will continue to exercise, diligence in preparing its brief.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on November 2, 2009, in San Francisco, California.

By /s/ David R. Eberhart
David R. Eberhart

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 2, 2009

By: /s/ David R. Eberhart

David R. Eberhart
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