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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 CDK Global LLC, et al.,

10 Plaintiffs,

11 v.

12 Mark Brnovich, et al.,

13 Defendants,

14 and

15 Arizona Automobile Dealers Association,

16 Intervenor Defendant.  
17

No. CV-19-04849-PHX-GMS

**ORDER**

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19 Pending before the Court are Plaintiffs’ Motion for Certification Pursuant to 28  
20 U.S.C. § 1292(b) (Doc. 133) and Motion for Stay or Injunction Pending Appeal. (Doc.  
21 130.) In the alternative, Plaintiffs request a limited stay to permit application to the Ninth  
22 Circuit for stay pending appeal. For the following reasons, the motion for stay is denied  
23 and the Court defers ruling on the motion for certification until the Ninth Circuit rules  
24 whether it will grant pendant jurisdiction.

25 **BACKGROUND**

26 On July 24, 2020, the Court issued its Order denying Plaintiffs’ motion for  
27 preliminary injunction which sought to enjoin enforcement of the Dealer Data Security  
28 Law (“the Dealer Law”) passed by the Arizona Legislature. The facts and procedural

1 history are known to the parties and summarized in the Court’s Order. (Doc. 127.) *Id.*  
2 Shortly thereafter, Plaintiffs filed a Notice of Appeal, alerting the Court that they were  
3 appealing, pursuant to 28 U.S.C. § 1292(a)(1) and pendent appellate jurisdiction, the denial  
4 of Plaintiffs’ Motion for Preliminary Injunction and the order granting in part and denying  
5 in part Defendants’ motions to dismiss. (Doc. 129 at 2.) The Plaintiffs then filed the instant  
6 Motion for Certification, requesting certification of the order on Defendants’ Motion to  
7 Dismiss for appeal to the Ninth Circuit. (Doc. 133.) Plaintiffs also filed a motion for a stay  
8 pending appeal, requesting either an injunction pending appeal or a limited stay to permit  
9 application to the Ninth Circuit in the alternative. (Doc. 130.)

## 10 DISCUSSION

### 11 I. Motion for Certification Pursuant to 28 U.S.C. § 1292(b)

#### 12 A. Legal Standard

13 “The general rule is that once a notice of appeal has been filed, the lower court loses  
14 jurisdiction over the subject matter of the appeal.” *In re Combined Metals Reduction Co.*,  
15 557 F.2d 179, 200 (9th Cir. 1977). “This divestiture of district court jurisdiction does not  
16 rest on a statute. *See Hoffman v. Beer Drivers & Salesmen’s Local Union No. 888*, 536  
17 F.2d 1268, 1276 (9th Cir.1976). Rather, it is a judge-made doctrine designed to avoid the  
18 confusion and waste of time that might flow from putting the same issues before two courts  
19 at the same time.” *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir.  
20 1988) (internal quotations omitted). “The divestment rule, therefore, is a rule of judicial  
21 economy and not one that strips the district court of subject matter jurisdiction.” *Cal. Dep’t*  
22 *of Toxic Substances Control v. Com. Realty Projects, Inc.*, 309 F.3d 1113, 1121 (9th Cir.  
23 2002)

#### 24 B. Analysis

25 Here, Plaintiffs’ Motion for Certification followed its appeal asking the Ninth  
26 Circuit to consider the order on the motion to dismiss pursuant to pendant jurisdiction.  
27 (Doc 129.) Thus, whether the issue is appropriate for Ninth Circuit review is already before  
28 that court. It would therefore be redundant for this Court to certify the same issue for

1 appeal. Although it is possible that the Ninth Circuit will deny Plaintiffs' request to  
2 consider the Court's order dismissing counts because it lacks pendant jurisdiction, this  
3 potential alone does not mean the Court should act where the issue has already been sent  
4 to a higher court. *See Ruby v. Sec'y of U.S. Navy*, 365 F.2d 385, 389 (9th Cir. 1966) ("If  
5 the district court is in doubt as to whether the notice of appeal is inoperative by reason of  
6 some such defect, it may decline to act further until the purported appellee obtains dismissal  
7 of the appeal in the court of appeals.")

8 Plaintiffs argue it is impossible for the Court to review the same legal questions as  
9 the Ninth Circuit because their request to amend the claims was denied. The issue currently  
10 before the Court, however, is not the merit of these claims, but whether their denial is  
11 appropriate for appellate review. As Plaintiffs already asked the Ninth Circuit to make the  
12 same determination in its appeal of the Court's denial of the preliminary injunction by  
13 requesting pendant review over the dismissal, the Court defers judgment on certification  
14 until after the Ninth Circuit rules whether it will grant pendant jurisdiction, if it thereafter  
15 remains indicated.

## 16 **II. Motion for Stay or Injunction Pending Appeal**

### 17 **A. Legal Standard**

18 A stay pending appeal is generally subject to the standard governing preliminary  
19 injunctions. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Courts consider: "(1) whether  
20 the stay applicant has made a strong showing that he is likely to succeed on the merits;  
21 (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of  
22 the stay will substantially injure the other parties interested in the proceeding; and  
23 (4) where the public interest lies." *Id.* The Ninth Circuit has held that courts should engage  
24 in a "general balancing approach" of the *Hilton* factors when considering a motion to stay.  
25 *Leiva-Perez v. Holder*, 640 F.3d 962, 965–66 (9th Cir. 2011). This standard requires that  
26 the movant demonstrate "either a probability of success on the merits and the possibility  
27 of irreparable injury, or that serious legal questions are raised and the balance of hardships  
28 tips sharply in petitioner's favor." *Id.* at 964 (quoting *Abbassi v. INS*, 143 F.3d 513, 514

1 (9th Cir. 1998). Both ends of this sliding scale approach require some showing of a  
2 probability of success on the merits. *Id.*

3 A stay pending appeal “is not a matter of right, even if irreparable injury might  
4 otherwise result.” *Nken v. Holder*, 556 U.S. 418, 427 (2009). “It is instead an exercise of  
5 judicial discretion. . . . The party requesting a stay bears the burden of showing that the  
6 circumstances justify an exercise of that discretion.” *Id.* at 433–34.

7 The two alternative reliefs sought by the Plaintiffs’, injunction pending appeal and  
8 limited stay to permit application to the Ninth Circuit for a stay pending appeal, require  
9 substantially the same analysis. *See Golden Gate Rest. Ass’n v. City & Cty. of San*  
10 *Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008) (explaining the above standard for a stay  
11 pending appeal); *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 551 (9th Cir.  
12 1977) (explaining that the test for an injunction pending appeal asks: “(1) Have the movants  
13 established a strong likelihood of success on the merits? (2) Does the balance of irreparable  
14 harm favor the movants? (3) Does the public interest favor granting the injunction?”). The  
15 below analysis therefore applies to each of the Plaintiffs’ alternative requests as well.<sup>1</sup>

## 16 **B. Analysis**

### 17 **1. Success on the Merits**

18 Plaintiffs’ motion to stay is based on the same three claims that their preliminary  
19 injunction motion was premised upon: preemption under the Copyright Act and breach of  
20 their Contracts Clause and the Takings Clause rights. (Doc. 130 at 2.) In their motion,  
21 Plaintiffs essentially reassert many of the arguments considered and rejected in this Court’s  
22 preliminary injunction Order. The Court thoroughly considered those positions and for the  
23 reasons set forth in that Order, (Doc. 127), the Court concludes that the Plaintiffs have not  
24 demonstrated any likelihood of success on the merits. The Plaintiffs’ primary  
25 disagreements with the Court’s Order are addressed below, but because Plaintiffs must

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27 <sup>1</sup> Plaintiffs request that their third alternative argument, a request for limited stay to permit  
28 application to the Ninth Circuit for a stay pending appeal, be treated as unopposed and  
therefore entitled to relief. (Doc. 139 at 2.) Although the Court has discretion to treat an  
unanswered request as unopposed, LRCiv 7.2(i), the Court declines to do so given the  
significant overlap of the tests and respective arguments here.

1 demonstrate some likelihood of success on the merits, the Court need not examine the other  
2 three prongs of the *Hilton* test.

3 **a. Copyright Claim**

4 Plaintiffs argue that the Copyright Act preempts the Dealer Law because of three  
5 categories of copyright protected material: the computer programs and code which makeup  
6 the DMS; the APIs Plaintiffs must write to comply with the Dealer Law; and the data  
7 compilations contained in the Plaintiff's system. But Plaintiffs' motion simply rejects a  
8 primary conclusion of the Preliminary Injunction Order, arguing that the "no set of  
9 circumstances" standard for facial challenges to a legislative act is not applicable to  
10 preemption cases, while offering no authority to contradict the Court's reasoning. *United*  
11 *States v. Salerno*, 481 U.S. 739, 746 (1987); (Doc 127 at 6, fn. 9); (Doc. 130 at 3, fn. 1).  
12 This bare disagreement with the Court's conclusion does not amount to probable success  
13 or substantial question on the merits. Thus, without further guidance, the Dealer Law must  
14 be interpreted to allow compliance without violating the Plaintiffs' Copyright Act rights.  
15 (Doc. 127 at 7.) The Plaintiffs do not provide any new evidence to the contrary.

16 Plaintiffs' reliance on *MAI Sys. Corp. v. Peak Comput., Inc.* 991 F.2d 511 (9th Cir.  
17 1993) does not prove otherwise. Although the case demonstrates that copyright  
18 infringement can occur where a copy is created by the infringer in the system or memory  
19 of a third party, neither is the case here. *Id.* at 518. Rather, the copies created remain in the  
20 Plaintiffs' DMS servers. (Doc 127 at 5, fn. 8.) *MAI Systems* does not support the conclusion  
21 that requiring a copyright holder to create copies within its own servers violates its rights  
22 to prevent third party access.

23 Similarly, Plaintiffs cite *Oracle Am., Inc. v. Google, Inc.*, 750 F.3d 1339, 1365 (Fed.  
24 Cir. 2014), to explain that copyright protection is not limited to source code. (Doc. 130 at  
25 5.) Although it is true that, "the structure, sequence, and organization of a computer  
26 program is eligible for copyright protection where it qualifies as an expression of an idea,"  
27 *Oracle*, 750 F.3d at 1366, this recognition does not place *Oracle* in competition with the  
28 Court's prior reasoning. The fact remains that the circumstances of *Oracle* involved

1 copying source code verbatim. *Id.* at 1365.

2 Finally, as the Court recognized in its Order, witness testimony does not sufficiently  
3 support the point that automated access provided by APIs results in unauthorized use or  
4 copying of DMS software.<sup>2</sup> APIs do not put Plaintiffs’ intellectual property at risk because  
5 they do not copy software from providers.

6 **b. Contracts Clause**

7 Plaintiffs are also not likely to prevail on their Contracts Clause Claim. The  
8 Contracts Clause restricts state power to disrupt preexisting contracts; however, such an  
9 impairment is only unconstitutional where there is “substantial impairment of a contractual  
10 relationship” and the law fails to “advance a significant and legitimate public purpose.”  
11 *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983).  
12 Plaintiffs’ claims that their rights are impaired both because of third party access and  
13 resulting security threats do not present any new analysis which creates a likelihood of  
14 success on the merits. As the Court addressed in its prior Order, an interpretation of the  
15 Dealer Law which complies with federal copyright law also ensures compliance with the  
16 Plaintiffs’ contracts. (Doc. 127 at 10.)

17 Plaintiffs also do not meet their burden of showing that the Dealer Law meets no  
18 significant state interest. Under *Seltzer*, Plaintiffs bear the burden of proving no substantial  
19 state interest exists. *In re Seltzer*, 104 F.3d 234, 236 (9th Cir. 1996). *Seltzer*’s recognition  
20 that “[t]he burden is placed on the party asserting the benefit of the statute only when that  
21 party is the state” does not apply here because the state is not a contracting party in this  
22 suit. *Id.* Rather, the Dealer Law is alleged to impair contracts between private parties. The  
23 state’s defense of the constitutionality of the law does not render it a party such that it bears  
24 the burden of proof. The public purpose already recognized, protecting consumers from  
25 potentially anticompetitive behavior by the plaintiffs, is therefore sufficient to establish  
26 that Plaintiffs are unlikely to succeed on the merits. (Doc. 127 at 12.) Plaintiffs’ contention

27 <sup>2</sup> Plaintiffs’ motion does not resolve this deficiency by citing a limited portion of Kelly  
28 Hall’s testimony while omitting the portion of the testimony that concedes that, unlike  
*Oracle*, source code will not be copied. (Doc. 130 at 5); Transcript of Preliminary  
Injunction Hearing June 2, 2020, Volume B at 108.

1 that the legislature has not proven this interest is not relevant because they bear the burden  
2 of proof, and the Ninth Circuit has expressed its “willingness to defer to the decisions of  
3 state legislatures regarding the impairment of private contracts.” *Nev. Emps. Ass’n, Inc. v.*  
4 *Keating*, 903 F.2d 1223, 1226 (9th Cir. 1990).

5 **c. Takings Clause**

6 Plaintiffs are also not likely to prevail on their takings clause claim because this case  
7 presents neither a physical nor a regulatory taking.

8 First, the Supreme Court’s decision in *Brown v. Legal Foundation of Washington*,  
9 538 U.S. 216, 235 (2003) does not prove otherwise. Brown’s analysis of the taking of  
10 money—interest earned on IOLTA accounts—is not analogous to “entry” and  
11 “occupation” into an intangible program. *Id.* at 235. Regardless, a reasonable interpretation  
12 of the Dealer Law allows compliance without granting third parties direct access to  
13 Plaintiffs’ DMSs. (Doc. 127 at 15.)

14 Second, the Plaintiffs do not establish a regulatory taking by rehashing the *Penn*  
15 *Central* factors. The Plaintiffs have not presented new information about their economic  
16 impact or investment-backed expectations. As addressed in the Court’s prior Order, this  
17 redistribution is not akin to a physical invasion; it is an adjustment of the “benefits and  
18 burdens of economic life to promote the common good,” supported by a conceivable public  
19 purpose. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

20 **CONCLUSION**

21 As described above, the Court defers ruling on the motion for certification until the  
22 Ninth Circuit rules whether it will grant pendant jurisdiction, and the motion for stay is  
23 denied.

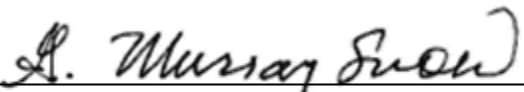
24 **IT IS THEREFORE ORDERED** that Plaintiffs’ Motion for Stay Pending Appeal,  
25 Injunction Pending Appeal, and Stay Pending Disposition of a Motion for Stay to be Filed  
26 with the United States Court of Appeals for the Ninth Circuit (Doc. 130) is **DENIED**.

27 **IT IS FURTHER ORDERED** that Plaintiff’s Motion for Certification Pursuant to  
28 28 U.S.C. § 1292(b) (Doc. 133) is **DEFERRED** until the Ninth Circuit rules on Plaintiff’s

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Appeal seeking pendant appellate jurisdiction.

Dated this 8th day of September, 2020.

  
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G. Murray Snow  
Chief United States District Judge