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Instead of filing a discovery plan, however, according to the Plaintiff, the parties have
 recently agreed to submit to arbitration on this matter. The Plaintiff anticipates that a stipulation
 to arbitrate will be submitted to the Court within two weeks of May 20, 2013. For this reason, the
 Plaintiff requests that the Court allow the parties to submit their stipulation concerning
 arbitration in lieu of a discovery plan. The Plaintiff has filed this request as an *ex parte* motion.<sup>1</sup>

## DISCUSSION

"When an ex parte motion is filed . . . [t]he judge drops everything except other urgent
matters to study the papers. It is assumed that . . . all will be lost unless immediate action is
taken." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 491-92 (C.D. Cal. 1995).
"Lawyers must understand that filing an *ex parte* motion, whether of the pure or hybrid type, is
the forensic equivalent of standing in a crowded theater and shouting, 'Fire!' There had better be
a fire." *Id.* Accordingly, courts are highly sensitive to unwarranted *ex parte* motions. *Id.*

Rule 7–5 of the Local Rules of Practice states, "[a]ll *ex parte* motions, applications or 13 requests shall contain a statement showing good cause why the matter was submitted to the Court 14 15 without notice to all parties, [and] applications or requests may be submitted *ex parte* only for 16 compelling reasons, and **not for unopposed or emergency motions**." LR 7-5(b)-(c) (emphasis 17 added). In order to show that ex parte relief is necessary, "[f]irst, the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to 18 regular noticed motion procedures." Mission Power Eng'g Co. v. Cont'l Cas. Co., 883 F. Supp. 19 20 488, 492 (C.D. Cal. 1995).

"A sliding scale is used to measure the threat of prejudice. If the threatened prejudice
would not be severe, then it must be apparent that the underlying motion has a high likelihood of
success on the merits. If drastic harm is threatened, then it is sufficient to show that there are
close issues that justify the court's review before the party suffers the harm." *Id.*

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<sup>&</sup>lt;sup>1</sup>The motion contains a certification that it was served via Nevada's CM/ECF "which will
send notification of such filing and constitute e-service of same to Defendants' counsel of record in
this case." Docket. No. 16, at 3. Since counsel filed this motion *ex parte*, however, this certification
is inaccurate. The Plaintiff subsequently filed a separate certification indicating that the motion was
served via U.S. Mail. Docket No. 17.

1 Here, the Plaintiff failed to show good cause why this motion was submitted to the Court 2 as an *ex parte* motion. See LR 7-5(b). The Plaintiff does not even attempt to argue that it will be 3 irreparably prejudiced if the underlying motion is heard according to regular noticed motion 4 procedures. Rather, the Plaintiff states that the Defendants have agreed to arbitration and that the 5 parties will be filing a stipulation shortly. If both parties wish to stay this case pending their formal stipulation to arbitrate, the correct manner to make this request is a stipulation to stay.<sup>2</sup> 6 7 The present motion to stay simply does not establish that the Plaintiff will be irreparably 8 prejudiced if its motion is heard on the regular motion calendar.

9 Additionally, the Court notes that the parties did not properly meet and confer prior to the 10 filing of this motion. LR 26-7(b) provides that a "[d]iscovery motion will not be considered 11 unless a statement of the movant is attached thereto certifying that, after personal consultation 12 and sincere effort to do so, the parties have not been able to resolve the matter without Court 13 action. LR 26-7. Personal consultation means the movant must "personally engage in two-way 14 communication with the nonresponding party to meaningfully discuss each contested discovery 15 dispute in a genuine effort to avoid judicial intervention." ShuffleMaster, Inc. V. Progressive 16 Games, Inc., 170 F.R.D. 166, 171 (D. Nev. 1996). Meaningful discussion means the parties must 17 present the merits of their respective positions and assess the relative strengths of each. See 18 Fifty-Six Hope Rd. Music, Ltd. v. Mayah Collections, Inc., 2007 WL 1726558, \*11 (D. Nev. June 19 11, 2007). Here, the Plaintiff failed to indicate what efforts, if any, were made to meet and confer 20 prior to filing this *ex parte* motion.

Accordingly, the parties should properly meet and confer on this issue and try to reach an agreement on this matter. However, if no agreement can be reached, the Plaintiff may re-file this motion as a noticed motion and, upon a showing of good cause, may request an expedited briefing schedule.

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<sup>&</sup>lt;sup>2</sup>Stipulations to stay are subject to the requirements articulated in *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D 597(D. Nev. 2011).

1	CONCLUSION
2	Based on the foregoing, and good cause appearing therefore,
3	IT IS HEREBY ORDERED that Plaintiff's Ex Parte Motion to Stay Requirement to File
4	Disocovery Plan (#16) is DENIED without prejudice.
5	DATED this <u>20th</u> day of May, 2013
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8	NANCY J. KOPPE
9	United States Magistrate Judge
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