

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FOX TELEVISION STATIONS, INC., *et al.*,
Plaintiffs-Appellees

v.

FILMON.TV NETWORKS INC., *et al.*,
Defendants-Appellants.

Nos. 13-7145,
13-7146

**PLAINTIFFS-APPELLEES' EMERGENCY MOTION
TO HOLD ALL PROCEEDINGS IN ABEYANCE
PENDING THE SUPREME COURT'S DECISION IN
AMERICAN BROADCASTING COS., INC., ET AL. V. AEREO, INC.**

Pursuant to Circuit Rule 27(f), Plaintiffs-Appellees¹ (collectively, “Copyright Owners”) hereby respectfully move the Court, on an emergency basis, to hold in abeyance all proceedings in the above-captioned appeal, including the current briefing schedule, pending the decision of the United States Supreme Court in *American Broadcasting Cos., Inc, et al. v. Aereo, Inc.*, No. 13-461 (cert. granted Jan. 10, 2014) (“*Aereo*”), in which the Supreme Court granted *certiorari* this past Friday. On January 13, 2014, the first business day after the grant of *certiorari* in *Aereo*, Plaintiffs-Appellees conferred with counsel for Defendants-Respondents

¹ Plaintiffs-Appellees are Fox Television Stations, Inc., Twentieth Century Fox Film Corporation, Fox Broadcasting Company, NBC Subsidiary (WRC-TV) LLC, NBC Studios LLC, Universal Network Television, LLC, Open 4 Business Productions LLC, Telemundo Network Group LLC, American Broadcasting Companies, Inc., Disney Enterprises, Inc., CBS Broadcasting Inc., CBS Studios Inc., Allbritton Communications Company, and Gannett Co., Inc.

(collectively, “FilmOnX”), who indicated that FilmOnX will not consent to the requested relief and believes it is likely that FilmOnX will file a written response to the motion.

This appeal arises from an order by the district court granting Copyright Owners’ motion for a preliminary injunction and enjoining FilmOnX from infringing Copyright Owners’ copyrights through the unauthorized retransmission, over the Internet, of Copyright Owners’ live broadcasts of television programming. In *Aereo*, the Supreme Court granted *certiorari* on January 10, 2014 to consider whether an Internet-based retransmission service offered by Aereo, Inc., which FilmOnX contends uses materially identical technology to that employed by FilmOnX, infringed the copyrights of American Broadcasting Companies, Inc. and others (including many of the instant Copyright Owners). *See* Order, *Aereo*, No. 13-461 (Jan. 10, 2014).² Because, according to FilmOnX, Aereo’s retransmission service is materially identical to FilmOnX’s retransmission service, the Supreme Court’s decision in *Aereo* will necessarily address the same questions of law presented in this appeal.³

² Available at http://www.supremecourt.gov/orders/courtorders/011014zr_bp24.pdf.

³ The question presented to the Supreme Court in *Aereo* is: “Whether a company ‘publicly performs’ a copyrighted television program when it retransmits a broadcast of that program to thousands of paid subscribers over the Internet.” Available at <http://www.supremecourt.gov/qp/13-00461qp.pdf>.

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Accordingly, this Court has often held appellate proceedings in abeyance when an impending decision of the Supreme Court would address a central issue in the appeal before this Court. *See, e.g., Trump Plaza Assocs. v. N.L.R.B.*, 679 F.3d 822, 826 (D.C. Cir. 2012) (explaining that this Court “held the case in abeyance pending the United States Supreme Court’s decision” in a review of agency decision-making); *United States v. Wheeler*, 403 F. App’x 518, 519 (D.C. Cir. 2010) (explaining that this Court “acted on its own motion to hold the cases in abeyance pending the Supreme Court’s decision” in a criminal sentencing matter).

Holding all proceedings in abeyance (including the current briefing schedule) is appropriate here, because it will promote “economy of time and effort” for the Court, counsel, and parties. *See Landis*, 299 U.S. at 255. Copyright Owners’ responsive brief is currently due January 17, 2014, and FilmOnX’s reply brief is due January 31, 2014. Even if the parties submitted those briefs as scheduled, it seems unlikely that this Court would both hear argument *and* issue a decision before the Supreme Court decides *Aereo* (likely around the week of June 30, 2014). Given the identity of legal issues between *Aereo* and this case, the

Supreme Court's *Aereo* decision will necessarily guide this Court's review of the pending appeal. If the Supreme Court decides that Aereo's service infringes the petitioners' copyrights, the same conclusion would be required here, thereby rendering moot any briefs already filed and any argument already held in this action, given that FilmOnX's basis for claiming it does not infringe rests solely on the Second Circuit decision under Supreme Court review and FilmOnX's claim that it operates in the same way as Aereo. Conversely, if Aereo's service were held not to infringe, any briefs already filed in this appeal would similarly need to be supplemented and the case would likely merit re-argument. Holding the case in abeyance at this time and relieving the parties of the present need to continue briefing the appeal would avoid any unnecessary (or unnecessarily duplicative) effort by the Court or the parties.

Because the Supreme Court's eventual decision in *Aereo* will supersede the authorities relied upon in the parties' forthcoming briefs, emergency review of this Motion is sought before January 17, 2014, to prevent "irreparable harm" to the parties through unnecessary expenditures of significant time, effort, and resources through further briefing. *See* Cir. R. 27(f). Good cause exists for filing this Emergency Motion within seven days of "the date by which court action is necessary," *see id.*, because the Supreme Court granted *certiorari* in *Aereo* only seven days before Copyright Owners' briefing deadline in this case.

For the foregoing reasons, the Court should hold in abeyance proceedings in this case pending the Supreme Court's decision in *Aereo*.

Dated: January 13, 2014

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2014 , I caused the foregoing Plaintiffs-Appellees' Emergency Motion to Hold All Proceedings in Abeyance Pending the Supreme Court's Decision in *American Broadcasting Cos., Inc., et al. v. Aereo, Inc.* to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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: January 13, 2014

s/ Robert A. Garrett
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