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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE ANDRÉ BIROTTE JR., U.S. DISTRICT JUDGE

NOMADIX, INC.,)
)
PLAINTIFF,)
)
vs.) No. CV 16-8033-AB
)
GUEST-TEK INTERACTIVE)
ENTERTAINMENT LTD.,)
)
DEFENDANT.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FRIDAY, AUGUST 31, 2018

10:07 A.M.

LOS ANGELES, CALIFORNIA

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1 LOS ANGELES, CALIFORNIA; FRIDAY, AUGUST 31, 2018

2 10:07 A.M.

3 - - -

4 THE CLERK: Calling CV 16-8033-AB, Nomadix, Inc.,
5 versus Guest-Tek Interactive Entertainment Ltd.

6 Counsel, please step forward and state your
7 appearances.

8 MR. LEZAMA: Mark Lezama of Knobbe Martens on
9 behalf of plaintiff Nomadix.

10 THE COURT: Good morning.

11 MR. LEZAMA: With me is my colleague, James Smith.

12 THE COURT: Say that again.

13 MR. LEZAMA: My colleague, James Smith.

14 THE COURT: Good morning.

15 MR. WARREN: Tom Warren on behalf of Guest-Tek.
16 With me is Michael Swope.

17 THE COURT: Good morning to you both.

18 MR. KOLTUN: Greg Koltun, Morrison and Foerster,
19 for intervenor applicant, Gate Worldwide Holdings.

20 THE COURT: Good morning to you as well.

21 There has been a lot that's happening in this case
22 over the last -- since the last time we were all together,
23 including what I just saw, I guess, was filed yesterday
24 by -- by Nomadix, their statement or their position with
25 respect to what's happened in New York.

1 I guess let's hear from Mr. Lezama, if you would
2 just outline your views as to where we are. It sounds like,
3 if I understand you correctly, that even if there is the
4 sale, the sale will only do -- the sale will not relinquish
5 the patent rights of Nomadix. Is that in sum and substance
6 your position?

7 MR. LEZAMA: That is correct, Your Honor. It's
8 clear now that Nomadix owns the patents. It has since the
9 outset of this case, as we argued. And the foreclosure path
10 that Gates sought and has been approved to take and is now
11 ordered to take will transfer only the LLC membership
12 interest units of Nomadix's parent company.

13 So, basically, the New York Court has made clear
14 that Nomadix owns the patents and Nomadix will remain the
15 owner even if Gate completes its foreclosure.

16 THE COURT: If you wouldn't mind, play out --
17 let's play out what would happen. The foreclosure sale
18 occurs, okay? And then what? Foreclosure sale occurs and
19 just pick a figure -- it sold for X amount. That money goes
20 to who?

21 MR. LEZAMA: That money goes to Gate.

22 THE COURT: And they're done? They just take
23 their money and run?

24 MR. LEZAMA: Yes. Whoever is the prevailing
25 bidder at the foreclosure sale will acquire

1 interTouch Holdings, which is the parent company of Nomadix.

2 So interTouch Holdings and its assets will remain
3 intact. Nomadix and its assets will remain intact through
4 the closing of the foreclosure sale.

5 THE COURT: Help me understand that. How does
6 Nomadix and its holdings -- they remain intact but they will
7 be owned by whom?

8 MR. LEZAMA: They will still be owned by
9 interTouch Holdings, the present parent company.

10 THE COURT: Who will own interTouch Holdings?

11 MR. LEZAMA: Whoever is the prevailing bidder at
12 the foreclosure sale. This is assuming that the defendants
13 do not first pay the money that's owed and, basically, avoid
14 a sale.

15 THE COURT: Right. What's the likelihood of that?

16 MR. LEZAMA: We think it's likely but --

17 THE COURT: Percentage-wise, can you give me a
18 little more? I will likely win the Lotto tomorrow. What
19 are we talking about?

20 MR. LEZAMA: So Nomadix and its related group of
21 companies have secured a contractual obligation to provide
22 over \$70 million in funding, and that money is earmarked for
23 paying off the debt. That's as much as I can say.

24 THE COURT: Okay. All right. I guess -- well, is
25 there anything else you wish to add as it relates to this

1 issue?

2 MR. LEZAMA: Sure. I would just say that, by
3 stipulated order of the parties in the New York case, the --
4 if the foreclosure sale goes through to completion, even
5 though what's being sold is interTouch Holdings, that sale
6 will extinguish the security interests of Gate in all the
7 subsidiary collateral. So that, basically, includes
8 Nomadix's patents.

9 So Gate will no longer -- the foreclosure sale
10 will extinguish any security interest in Nomadix's patents.

11 THE COURT: I don't know if Mr. Warren or
12 Mr. Swope, which of you have drawn the short straw. What's
13 your response to it? I guess I am concerned -- well, not
14 concerned. The language at least that's highlighted in the
15 filing by Nomadix yesterday that talks about -- seems to
16 suggest that, at the closing of the sale, for all intents
17 and purposes, once that sale is done, Gate is out. Do you
18 have a different view?

19 MR. WARREN: Well -- and, yes, Your Honor, I drew
20 the short straw.

21 The -- I mean, unlikely that they -- I mean it's
22 likely that they will be the high bidder.

23 THE COURT: You think it is likely that Gate --
24 that Nomadix will be the high bidder?

25 MR. WARREN: No. I think Your Honor has a better

1 chance of winning the lottery than Nomadix coming up with
2 the money.

3 THE COURT: Okay.

4 MR. WARREN: But, you know, Gate has a \$50 million
5 note. Since they are likely to be the company that has the
6 biggest interest in purchasing these assets since they have
7 such a large note on it -- and I don't want to speak for
8 Gate, but in all likelihood what will happen will be that
9 Gate will be the high bidder just like the bank is a high
10 bidder on any other foreclosure where they have got the big
11 note. So they'll end up owning it.

12 And I think that we're getting a little bit into
13 the metaphysical when Nomadix argues that the company will
14 still own the patents. It won't be the company as it is
15 currently constituted. InterTouch will be owned either by
16 Gate or by some other company --

17 THE COURT: So what's your view? You are right.
18 We are getting into the weeds. I am just trying to play
19 this out because I have a feeling we'll end up at this point
20 at some point, and I would rather just, at least, start a
21 discussion about it.

22 MR. WARREN: I mean, when we originally briefed
23 this issue, Gate was taking the position that it owned the
24 patents and Nomadix was taking the position that it owned
25 the patents.

1 Now we're, sort of, in this intermediary position
2 where -- and Judge Ostragar in New York wasn't entirely
3 clear on this. He started off by saying that Nomadix owned
4 the patents, and by the end of that hearing he said, "Look.
5 The only thing I am holding is that you guys have a valid
6 note, and you are allowed to foreclose on it."

7 But we have a situation where the patents are
8 redeemable -- the collateral is redeemable by Nomadix if it
9 comes up with the dough, which it's likely not to, and it's
10 part of the collateral that Gate is foreclosing on.

11 THE COURT: So, then, let's play out two
12 scenarios. One, Nomadix comes up with the money, it's their
13 patent. That's the easier one; right?

14 MR. WARREN: Right.

15 THE COURT: The other scenario, Gate comes up --
16 they likely prevail at the foreclosure sale. Okay? Does
17 Gate own the patent at that point? Or Gate owns interTouch
18 Holdings, which is the parent company of Nomadix; and if so,
19 does that, in essence, mean that Gate owns the patent?

20 MR. WARREN: Yes. So if Gate buys interTouch, it
21 owns Nomadix, and that means it owns the patents.

22 THE COURT: And then what difference does it
23 make -- well, I will ask the question. I think I know the
24 answer. Would it be Gate's position -- and, obviously, I
25 will give Gate an opportunity to be heard on this -- but

1 would Gate say, "Okay. We now own you, Nomadix. We're
2 going to shut you down or get out of the way so we can
3 proceed with this lawsuit"?

4 MR. WARREN: I think that Gate, as the owner of
5 the patents, at that point would have the right to either
6 operate the company and litigate these cases or sell the
7 company and try to collect the rest of their collateral that
8 way.

9 I don't want to speak to Gate's interests, but,
10 when we started this, we were concerned about whether 25(c)
11 really applied or not. I think we -- to my mind, we've
12 moved past the legal into the practical at this point.

13 THE COURT: Right. Although there are some legal
14 implications just by -- at least paragraph 14 suggests that
15 Gate's rights get extinguished upon the foreclosure sale.
16 So I guess that may -- forgive me because I am going to add
17 another scenario.

18 Let's say somebody else comes in and they're the
19 prevailing party. What happens then? Is Gate out? I mean,
20 at least, if you read this language, it suggests that Gate
21 is out of the game in that third scenario.

22 MR. WARREN: I'm not entirely sure what Gate's
23 position would be on whether they're in or out because I'm
24 not entirely sure what the record is in New York on that
25 point. But we believe that it is likely that Gate will end

1 up owning the patents.

2 And if either Nomadix or Gate ends up owning the
3 patents, then we know who we're litigating against, and then
4 we are not put in the middle of this foreclosure.

5 THE COURT: So getting back to the real issue from
6 your perspective, your of the view, for lack of a better
7 term, let's kick this can down the road another 70 days and
8 figure out who is going to -- where we stand after the
9 foreclosure sale.

10 MR. WARREN: That's right, Your Honor.

11 THE COURT: All right. Thank you, Mr. Warren.

12 Let me hear from Mr. Koltun because I have a
13 feeling we are all going to be back here again, but I just
14 want to at least, for the sake of my slow mind, I want to
15 get my thoughts rolling on this.

16 MR. KOLTUN: Good morning.

17 THE COURT: I gave three scenarios. Okay? I
18 think we all agree, if Nomadix comes up with the money and
19 they're the prevailing party at the foreclosure sale, then
20 Nomadix, I guess, owns the patent.

21 MR. KOLTUN: Right. There are three scenarios at
22 the foreclosure sale. The most likely scenario is that Gate
23 Worldwide bids its credit or some portion of its credit and
24 then owns interTouch Holdings. Another possibility is a
25 third party comes in and outbids Gate Worldwide.

1 The third possibility, which to me, based on my
2 experience in these types of things seems the least likely,
3 is Nomadix comes in and redeems because, if they had that
4 ability to do that, they would have done it a long time ago.

5 THE COURT: Right.

6 MR. KOLTUN: It's, sort of, like a situation --
7 well, it is a situation where there is likely to be a change
8 of ownership in the company, a potential change in counsel
9 down the line.

10 You granted a stay last time of 120 days so these
11 issues over ownership and control could be resolved. What's
12 happened in the meantime is, sort of, two things. It
13 switched from transfer of ownership of the patents to a
14 transfer of ownership of the entire company.

15 And then the other thing that's happened is that
16 the judge in New York, Judge Ostragar, has put it on a
17 really tight schedule, like, much quicker than you would
18 normally see in cases like this. And I don't know if it was
19 done for the purposes of this litigation or what, but he set
20 a schedule where the sale of the company is likely to take
21 place within two months.

22 So to us, to Gate Worldwide Holdings, it cries out
23 for an extension to accommodate that process that
24 Judge Ostrager set up so we can get certainty over who is
25 going to control the company and how we move forward in the

1 litigation.

2 THE COURT: I appreciate your comments. I want to
3 get your thoughts as to the scenario where, let's say, a
4 third party comes in and outbids. What would you contend
5 happens after that?

6 MR. KOLTUN: If a third party comes in -- and I
7 don't want to bind the company to this -- but I believe, if
8 a third party comes in and satisfies Gate Worldwide's debt
9 or is the winning bidder, they take the company, the third
10 party.

11 THE COURT: Including the patent?

12 MR. KOLTUN: Yeah, because they own the company
13 which owns the patents.

14 By the way, there is another scenario. I can't
15 put a percentage of likelihood on this, but in these kind of
16 circumstances where there is a change of control, it's
17 frequently the case that a new entity would be set up to own
18 some or all of the interest.

19 So there is a decent chance that the patents would
20 be set into a different entity and that entity could become
21 the plaintiff in the case.

22 That was suggested to me as a possibility. I
23 don't -- like I said, I can't put a percentage of likelihood
24 on it.

25 But back to your point, if a third party comes in

1 and buys the company and they outbid Gate Worldwide, then
2 presumably Gate Worldwide is satisfied with that result and
3 would not have --

4 THE COURT: Dealing with a whole other potential
5 plaintiff in this case.

6 MR. KOLTUN: Right. Entirely different.

7 THE COURT: Okay. Thank you for your thoughts.

8 Mr. Lezama, is there anything else you wish to say
9 in response? I am going to tell you -- look. It just seems
10 to me we need to put this over to sometime in November.
11 Given that you take a different view than everyone else,
12 let's figure out who prevails, and then we can have a real
13 discussion about who is the plaintiff in this case. But I
14 will allow you a moment to be heard.

15 MR. LEZAMA: Sure, just a few points.

16 One, everything that we just heard is really just
17 speculation. There is no basis for saying that Gate will be
18 the likely bidder or the New York defendants won't come up
19 with the money. I don't think we can stay the case based on
20 speculation.

21 THE COURT: Hold on, Mr. Lezama. You are saying
22 it's speculation. But -- yes, technically, it is
23 speculation. But the reality of it is there is a
24 foreclosure sale that's been set up for your company.
25 Somebody is going to prevail at that foreclosure sale.

1 It may be you, it may be Gate, it could be a third
2 party. But the point is we now know that there is a
3 likelihood -- or at least there is at least two thirds of a
4 chance that someone else other than Nomadix is going to own
5 this company after the foreclosure sale.

6 And why wouldn't I just wait to figure that out as
7 opposed to -- let's say I move forward and we start with
8 discovery and other matters and then a third party comes in.
9 And then I am going to get a bunch of paper saying "Whoa.
10 Time out. We just got in this case. We don't know what we
11 want to do." I mean, why would I do that?

12 As much as I like seeing you all, wouldn't it just
13 make sense -- what's the prejudice in putting this over till
14 November until we know what's happened? Particularly given
15 the fact that, thanks to the judge in New York, he put it on
16 a tight timeline, he's willing to take time out of his
17 vacation with his -- I think it was his daughter is getting
18 married, to deal with this so we could get some finality?
19 What's the harm in that?

20 MR. LEZAMA: So as to the harm, we are preparing
21 for foreclosure sale, and the foreclosure sale needs to be
22 conducted on commercially reasonable terms, which means
23 terms that are designed to get fair value for the assets
24 being sold.

25 And when bidders are making a valuation of the

1 assets being sold, they're going to look to this litigation,
2 and they're going to look at our claim against Guest-Tek,
3 which is for many millions of dollars; and this will be an
4 important asset that the prevailing bidder will be looking
5 at in trying to attach a value to.

6 And the farther out trial is, the longer it will
7 take to monetize this claim and the lower a prep and value
8 the bidders will assign to this asset. Likewise, the more
9 uncertainty we have about when trial will occur, the lower
10 the present value the bidders are going to assign to this
11 claim and thus to their overall bid for interTouch Holdings.

12 THE COURT: Flip side of that, there is
13 litigation -- no one is hiding the fact that this litigation
14 exists. That's a known fact. That's going to be a factor
15 in a foreclosure sale regardless of whether this gets
16 continued or not, isn't it? I mean --

17 MR. LEZAMA: I'm sorry. What?

18 THE COURT: There is a foreclosure sale that's
19 set. Anyone that does their due diligence is going to know
20 that there is existing litigation. I'm not sure I
21 understand what you mean when you say that delaying the case
22 might have an impact on the value of the company. It seems
23 to me the existing litigation may have a value on the
24 company, not necessarily the dates contained within that
25 litigation.

1 MR. LEZAMA: Well, I think the time to trial and
2 the time to monetization of, you know, of this claim,
3 certainly the farther out trial is, the less -- smaller
4 present value would be assigned to this claim. So it will
5 tend to depress the foreclosure sales proceeds, in our view.

6 I guess one way to address that potential
7 uncertainty would be to say -- would be to set a trial date
8 for a fixed amount of time when the stay lifts, if the
9 Court's inclined to issue a sale -- to issue a stay order.

10 The other thing I want to just point out is --
11 this is speculation. Let's imagine a hypothetical where
12 there is no foreclosure sale, there is no litigation in
13 New York. What we're basically saying is we should stay the
14 case because Nomadix's grandparent company might sell
15 Nomadix's parent company to some third party and that some
16 third party might decide to change the direction of
17 litigation.

18 THE COURT: That's a vastly different hypothetical
19 than what's currently going on. Look. There has been
20 litigation. There has been a decision by the Court. There
21 is a foreclosure sale. There are certain things that have
22 occurred and will occur going forward.

23 It's not like I am just saying -- look. I would
24 not be inclined to kick this can down the road if I didn't
25 know there was going to be a foreclosure sale.

1 But to the judge's credit in New York, the judge
2 recognizes the competing interests of all the parties, says,
3 "We need some finality. Let's get some dates in place and
4 move forward." And I guess that's to your concern as to you
5 want this trial to move forward.

6 I think currently we have a pretrial conference
7 scheduled for November 9th and a jury trial set for December
8 the 4th. Maybe you will be ready for both of those dates --
9 I don't know. But my proposal would be to have another
10 status conference on November 9th. We would continue the
11 pretrial conference -- we'll continue everything another 30
12 days. So the pretrial conference will be December the 14th,
13 and then a jury trial -- we could do February the 12th of
14 2019. We could have those dates. This way it gives you
15 some comfort the case is moving forward.

16 Now, I am going to give you a little hard time. I
17 will put those dates down at your request, but then, when
18 you come -- assuming if you are the prevailing party, then
19 asks to continue the case, I am going to remind you of this
20 conversation.

21 But, again, you made that request. So I want to
22 try to at least give you some comfort that, hey, we've got
23 dates set. We're not going anywhere. I am here all day.
24 So I'm ready to try the case whenever you all are.

25 MR. LEZAMA: I appreciate that, Your Honor.

1 THE COURT: With that in mind, I appreciate the
2 comments of all counsel. Why -- I think it makes sense to
3 continue this matter. Let's have a status conference for
4 November the 9th so we can figure out where we are at
5 relative to that.

6 We'll move the pretrial conference to -- the
7 pretrial conference will be December -- I think I said the
8 14th and then a jury trial date of February the 12th of
9 2019. So let's do that, then. And your objection and your
10 opposition is noted for the record.

11 Is there anything else we need to discuss today?

12 Mr. Lezama?

13 MR. LEZAMA: I don't think so, Your Honor.

14 THE COURT: Mr. Warren?

15 MR. WARREN: Just one thing, Your Honor. I just
16 want to note, as the Court knows, that we are still in the
17 preliminary stages of discovery. If in fact the sale goes
18 through, I would presume that the parties will be back
19 before the Court seeking a little more time.

20 THE COURT: I would presume that to be the case,
21 but I know your track record, Mr. Warren, you could try a
22 case in a moment's notice -- I am giving you a hard time.

23 We'll keep these dates. Maybe there is a
24 Hail Mary and Nomadix prevails with the sale and we move
25 forward. But I want to give Mr. Lezama some comfort that we

1 have got dates set. But I will be amenable. I think my
2 reputation is that I am amenable to the parties moving dates
3 if it's a reasonable request. But we'll keep these dates
4 for now.

5 MR. WARREN: Very good. Your Honor, thank you.

6 THE COURT: All right. Mr. Koltun, anything
7 further?

8 MR. KOLTUN: No, thank you, Your Honor.

9 THE COURT: All right. So thank you all. I will
10 see you all on November 9th, and, hopefully, we'll get
11 closer to some finality in this matter. Thank you all.

12 MR. LEZAMA: Thank you, Your Honor.

13 (Proceedings concluded at 10:32 a.m.)

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CERTIFICATE

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United States.

Date: September 24, 2018.

/S/ CHIA MEI JUI

Chia Mei Jui, CSR No. 3287

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