

OCT 23 2013

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH W. PENDERS, II,

Plaintiff - Appellant,

v.

SEGA OF AMERICA, INC.;  
ELECTRONIC ARTS, INC.,

Defendants - Appellees.

No. 12-55544

D.C. No. 2:11-cv-08173-ODW-E

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Otis D. Wright, District Judge, Presiding

Argued and Submitted October 11, 2013  
Pasadena, California

Before: PREGERSON and TALLMAN, Circuit Judges, and SIMON, District  
Judge.\*\*

Kenneth W. Penders, II (“Penders”) appeals the district court’s dismissal  
without prejudice of his claims against SEGA of America, Inc. (“SEGA”) and

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

\*\* The Honorable Michael H. Simon, District Judge for the U.S. District  
Court for the District of Oregon, sitting by designation.

Electronic Arts, Inc. (“EA”) for copyright infringement and related claims arising out of SEGA’s and EA’s alleged use of Penders’s copyrighted “Sonic the Hedgehog” creations, particularly in the Sonic Chronicles: The Dark Brotherhood video game. Penders argues on appeal that the district court improperly applied the first-to-file rule and that the court should have stayed, rather than dismissed, the case. We have jurisdiction under 28 U.S.C. § 1291.

The district court properly exercised its discretion when it applied the first-to-file rule. *See Alltrade, Inc. v. Uniweld Prods. Inc.*, 946 F.2d 622, 625 (9th Cir. 1991). Chronology, similarity of parties, and similarity of issues all support that discretionary ruling. *See id.*

Penders failed to apprise the district court why dismissal would negatively impact his potential monetary award. Because the district court was not informed of this, it did not abuse its discretion when it chose to dismiss without prejudice, rather than stay, the Second California Action.

**AFFIRMED. Each party shall bear its own costs on appeal.**