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**SENT VIA ELECTRONIC FILING**

November 14, 2007

The Honorable John C. Coughenour  
U.S. Courthouse  
700 Stewart Street  
Seattle, WA 98101-9906

**Re: Omni Innovations, LLC et al. v. Ascentive, LLC et al.,  
U.S.D.C. W.D.Wash. Case No. 06-01284-JCC**

Your Honor:

This firm represents Defendants Ascentive, LLC and Adam Schran (together, "Defendants") in the above-captioned matter. We are transmitting herewith Defendants' response to the undocketed Motion for a Change of Venue and Modification of Order to Stay, which Plaintiffs James S. Gordon, Jr. and Omni Innovations, LLC claim to have filed with the Court on October 17, 2007. Defendants were served on October 17, 2007.

Very Truly Yours,

NEWMAN & NEWMAN,  
ATTORNEYS AT LAW, LLP

A handwritten signature in black ink, appearing to read 'Derek Newman', written over a light grey rectangular background.

Derek A. Newman

cc: James S. Gordon, Jr. (pro se)

The Honorable John C. Coughenour

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

OMNI INNOVATIONS, LLC, a  
Washington limited liability company,

Plaintiff,

v.

ASCENTIVE, LLC, a Delaware limited  
liability company; ADAM SCHRAN,  
individually and as part of his marital  
community; JOHN DOES, I-X,

Defendants.

NO. 06-01284-JCC

**DEFENDANT’S RESPONSE TO  
PLAINTIFFS’ MOTION FOR A  
CHANGE OF VENUE AND  
MODIFICATION OF ORDER TO  
STAY**

NOTE ON MOTION CALENDAR:  
November 19, 2007

**I. INTRODUCTION**

Defendants Ascentive, LLC and Adam Schran (together, “Defendants”) oppose the Motion for a Change of Venue and Modification of Order to Stay (the “Motion”) filed by Omni Innovations, LLC (“Plaintiff”) on October 17, 2007 (not docketed). Plaintiff has filed a number of lawsuits with identical claims, which this Court previously held to be meritless. There is no legitimate reason to transfer venue to make it even easier for Plaintiff and its manager, James S. Gordon, Jr. (“Gordon”) to pursue their frivolous claims. Further, there is no credible reason to modify the stay for Plaintiff’s requested purpose – amendment of the complaint to include a malpractice claim against its former counsel. Accordingly, this Court should dismiss Plaintiff’s Motion in its entirety and

1 order Plaintiff to compensate Defendants for their reasonable attorneys' fees and costs  
2 incurred in preparing this response.

## 3 II. FACTS

### 4 A. Plaintiff and Gordon Are Vexatious Litigants.

5 Plaintiff in the instant action, as well as its manager - James S. Gordon, Jr., a  
6 Washington resident, and Omni Innovations, LLC, a Washington limited liability  
7 company - were also the plaintiffs in Gordon et al. v. Virtumundo et al., Case No.  
8 CV06-0204-JCC, W.D.Wash. (Coughenour, J.) ("Virtumundo"). (*See Virtumundo*, First  
9 Amended Complaint (Dkt. #15) ¶¶ 3.2, 3.3 ("FAC"); Complaint (Dkt. #1) ¶¶ 1, 2.) In  
10 addition to the above captioned lawsuit and Virtumundo, Plaintiff and Gordon have filed  
11 many<sup>1</sup> other suits under 15 U.S.C. § 7705 *et seq.* ("CAN-SPAM") and the Washington  
12 Commercial Electronic Mail Act, RCW 19.190 *et seq.* ("CEMA"). Gordon testified in  
13 Virtumundo that these lawsuits are his and Plaintiff's sole source of income.

14 (Virtumundo, Gordon Deposition Transcript, attached as Exhibit A to the Declaration of  
15 Derek A. Newman (Dkt. #101) at 118:2-6.)

16 In Virtumundo, this Court held that: 1) Plaintiff lacks standing to assert CAN-  
17 SPAM claims; 2) Plaintiff's CEMA claims are preempted by CAN-SPAM, and 3)  
18 Plaintiff's CPA claims fail because they are based on Plaintiff's CEMA claims.  
19 (Virtumundo, Dkt. # 121.) As such, Plaintiff's claims have been fully litigated, and  
20 Plaintiff has lost. The doctrine of collateral estoppel bars Plaintiff from relitigating  
21 identical claims in this action, as Stamps.com argued in its previously filed Motion to  
22 Dismiss for Failure to State a Claim (Dkt. #65).

23 This Court determined in Virtumundo that Plaintiff and Gordon are not "bona fide  
24 Internet service providers" of the sort CAN-SPAM was intended to benefit, and that

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25  
26 <sup>1</sup> Gordon and Omni are the plaintiffs in several CAN-SPAM lawsuits in this district alone. (Omni  
27 Innovations LLC v. Inviva Inc. d/b/a American Life Direct and American Life Insurance Co of New York,  
28 C06-1537 C; Omni Innovations LLC v. BMG Music Publishing NA Inc., C06-1350 C; Omni Innovations LLC v.  
Publishers Clearing House Inc., C06-1348 T; Omni Innovations LLC v. Efinancial LLC et al., C06-01118-MJP;  
Omni Innovations LLC v. Insurance Only Inc et al., C06-01210-TSZ; Omni Innovations LLC et al v. Inviva Inc et  
al., C06-01537-JCC.)

1 Plaintiff and Gordon seek to “generat[e] lawsuit-fueled revenue” from their “prolific  
2 litigation and settlements.” (Virtumundo, Dkt. # 121 at 15:9-16.) The Court further held  
3 as follows:

4 The Court finds that Plaintiffs’ instant lawsuit is an excellent example of the  
5 ill-motivated, unreasonable, and frivolous type of lawsuit that justifies an  
6 award of attorneys’ fees to Defendants under Fogerty. The context of this  
7 litigation and the context of Plaintiffs’ overall litigation strategy, involving at  
8 least a dozen federal actions, indicate that Plaintiffs are motivated by the  
9 prospect of multi-million-dollar statutory damages awards in exchange for  
10 their relatively paltry spam-collection and spam-litigation costs. Plaintiffs have  
11 alleged no actual damages in this action. Under these circumstances,  
12 compensation to Defendants for defending this lawsuit is warranted. Similarly,  
13 the Court finds that the goal of deterrence is particularly relevant here.  
14 Plaintiffs should be deterred from further litigating their numerous other  
15 CAN-SPAM lawsuits now that they are aware their lack of CAN-SPAM  
16 standing.

17 Gordon v. Virtumundo, Inc., 2007 U.S. Dist. LEXIS 55941, \*17-18 (W.D.Wash. Aug. 1,  
18 2007).

19 **B. Plaintiff Fails to Provide a Credible Reason for Modifying the Stay.**

20 This Court stayed the above captioned lawsuit pending the appeal of Virtumundo  
21 to the Ninth Circuit. (Dkt. # 75.) Subsequently, the Court approved the request of  
22 Plaintiff’s counsel, Robert Siegel and Douglas McKinley, to withdraw from the case.  
23 (Dkt. # 84.)

24 Plaintiff’s Motion amounts to an expression of grievances against its former  
25 counsel, whom Plaintiff claims were ineffective and failed to comply with fiduciary  
26 duties. (Motion at 2:2.) The basis for the Motion is as follows: “Plaintiff is making this  
27 request due to possible misconduct by his former attorney, Robert J. Siegel.” (Motion at  
28 1:24-25.) Plaintiff wishes to modify the stay as follows:

29 The event that triggers the resumption of litigation should be the latter of the  
30 9<sup>th</sup> Circuit’s decision to remand or affirm the Gordon v. Virtumundo decision  
31 or the resolution of the Washington State Bar Association (WSBA) grievance  
32 against Mr. Siegel... The relevance of the WSBA matter to this lawsuit is the  
33 grievance will likely become a malpractice lawsuit against Mr. Siegel.

34 (Motion at 4:7-13.) Since this case is already stayed pending resolution of Virtumundo,  
35 Plaintiff’s motion to modify the stay is based exclusively on the desire to sue its former  
36

1 counsel for malpractice. However, Plaintiff's malpractice claims are plainly unrelated to  
2 Plaintiff's causes of action against Ascentive. There is no reason to lift the stay to allow  
3 to add its former counsel as a defendant in this case.

4 **C. Plaintiff Chose to File Its Lawsuits in the Western District of**  
5 **Washington.**

6 Plaintiff decided to file this lawsuit in Seattle. (Dkt. #1.) Exhibit A to Plaintiff's  
7 Motion indicates Gordon discussed the issue with his lawyer, Robert Siegel, and the two  
8 concluded that venue in Western Washington was appropriate since Gordon had "one  
9 client presently in King County." (Id.) As indicated above, Plaintiff has filed many more  
10 lawsuits in this judicial district, all based on the same frivolous claims. Ironically,  
11 Plaintiff now argues it is "prejudiced" by its decision to file numerous meritless lawsuits  
12 in the Western District of Washington, noting that travel time and expense "will be  
13 duplicated for each of plaintiffs' nine lawsuits in Western Washington" (emphasis  
14 added). (Motion at 3:16-17.)

15 **III. ARGUMENT**

16 Plaintiff fails to provide any authority at all in support of their Motion, nor do they  
17 provide any credible reasons for modifying the stay and transferring this case to another  
18 judicial district.

19 **A. Plaintiff Is Unrepresented By Counsel.**

20 The Court should not even consider Plaintiff's motion. As the Court noted when  
21 granting Plaintiff's counsel leave to withdraw, "as a business entity, [Plaintiff] must be  
22 represented by a licensed attorney." (Dkt. # 84 at 2:5.) United States v. Unimex, 991  
23 F.2d 546, 549 (9<sup>th</sup> Cir. 1993) ("Counsel is essential for a corporation at trial because it  
24 cannot appear pro se."). This in itself is a sufficient reason to deny the Motion and  
25 reimburse Defendants for their costs in opposing it.

26 ///

1                   **B. Plaintiff’s Motion Lacks Factual Support and Provides No Authority**  
2                   **for Granting the Requested Relief.**

3                   Pursuant to FED.R.CIV.P. 11, the act of filing a motion in this Court certifies that  
4 motion:

5                   (1) ... is well grounded in fact; (2) ... is warranted by existing law or a good  
6 faith argument for the extension, modification, or reversal of existing law or  
7 the establishment of new law; [and] (3) ... is not interposed for any improper  
purpose, such as to harass or to cause unnecessary delay or needless increase  
in the cost of litigation...

8                   Plaintiff’s Motion is not well grounded in fact. Based on Plaintiff’s allegations of  
9 misconduct by its former counsel, they seek to add him as a defendant in this case, even  
10 though Plaintiff’s proposed malpractice claims are completely unrelated to Ascentive.  
11 Defendants never provided any legal advice to Plaintiffs. The argument for transferring  
12 venue is equally meritless. Plaintiff chose to file this lawsuit in Seattle after discussing  
13 venue with its former counsel. (Motion Ex. A.) Now that its counsel has withdrawn,  
14 Plaintiff has decided it is more convenient to litigate “within 10 miles of [Gordon’s]  
15 home”, despite the inconvenience to Defendants. (Motion at 4:6.)

16                   In addition, Plaintiff’s Motion is not supported by a single reference to any legal  
17 authority of any kind. Plaintiff cites no court rules, no statutes, and no case law in  
18 support of either a change of venue or a modification of the stay. Accordingly, Plaintiff’s  
19 Motion cannot be “warranted by existing law”, since it has no legal support. It cannot be  
20 a “good faith argument” concerning existing law because it does not cite any law in  
21 support of Plaintiff’s requested relief. It is not even a good faith argument for the  
22 establishment of new law, since Plaintiff does not propose a new law.

23                   Plaintiff’s Motion is unsupported by authority, and lacking in factual support. The  
24 only reasonable conclusion is that Plaintiff filed it to harass Ascentive and needlessly  
25 increase its attorneys’ fees and costs.

26                   **1. There Is No Reason to Modify the Stay.**

27                   This Court dismissed Plaintiff’s claims in Virtumundo, a case nearly identical to  
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1 this one. While Plaintiff's appeal of Virtumundo is pending, a stay is essential to judicial  
 2 economy. The Court may exercise its inherent power to stay proceedings in the interest  
 3 of judicial economy until the resolution of a related case that would resolve a dispositive  
 4 matter. *See Leyva v. Certified Grocers of California*, 593 F.2d 857, 863-64 (9th Cir.  
 5 1979) ("A trial court may, with propriety, find it is efficient for its own docket and the  
 6 fairest course for the parties to enter a stay of an action before it, pending resolution of  
 7 independent proceedings which bear upon the case."); *see also Silvaco Data Systems, Inc.*  
 8 *v. Technology Modeling Associates, Inc.*, 896 F. Supp. 973, 975 (N.D. Cal. 1995) ("in  
 9 the interest of wise judicial administration, a federal court may stay its proceedings where  
 10 a parallel state action is pending") (internal citation omitted).

11 "Collateral estoppel" or "offensive nonmutual issue preclusion" generally prevents  
 12 a party from relitigating an issue that the party has litigated and lost. *See Catholic Social*  
 13 *Servs., Inc. v. I.N.S.*, 232 F.3d 1139, 1152 (9th Cir. 2000). The application of "offensive  
 14 nonmutual issue preclusion" is appropriate if:

- 15 1. there was a full and fair opportunity to litigate the identical issue in  
 16 the prior action, *see Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391,  
 17 1399 (9th Cir. 1992); *Resolution Trust Corp. v. Keating*, 186 F.3d  
 18 1110, 1114 (9th Cir. 1999); *Appling v. State Farm Mut. Auto Ins.*  
 19 *Co.*, 340 F.3d 769, 775 (9th Cir. 2003);
- 20 2. the issue was actually litigated in the prior action, *see Appling*, 340  
 21 F.3d at 775;
- 22 3. the issue was decided in a final judgment, *see Resolution Trust*  
*Corp.*, 186 F.3d at 1114; and
- 23 4. the party against whom issue preclusion is asserted was a party or in  
 24 privity with a party to the prior action, *see id.*

25 *See also Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006);  
 26 *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988).

27 This Court's finding that Plaintiff was not adversely affected by emails during the  
 28 subject period meets the Ninth Circuit's test for offensive nonmutual issue preclusion.  
 First, Plaintiff had a full and fair opportunity to litigate the identical issue in Virtumundo.

1 Second, the issues of standing and adverse effect were litigated and were the basis for the  
2 Court's ruling. Third, final judgment was entered in favor of Virtumundo and the other  
3 defendants. *See Virtumundo* at Dkt. # 122. Finally, Plaintiff and Gordon are the  
4 identical parties to the *Virtumundo* action. The Court's Order in *Virtumundo*  
5 unquestionably has a preclusive effect in this lawsuit. This warrants a stay until the  
6 Ninth Circuit disposes of Plaintiff's appeal.

7 Plaintiff cites no logical reason why this Court should modify the stay so it may  
8 amend the complaint to add malpractice claims against its former counsel. Whatever  
9 their grievances against him, this Court's resolution of malpractice claims against an  
10 unrelated defendant, Robert Siegel, would not resolve any issues against Defendants.<sup>2</sup> It  
11 would, however, increase Defendants' legal costs and impair judicial economy. This  
12 Court should reject Plaintiff's requested relief and deny their Motion in its entirety.

## 13 2. There Is No Reason to Transfer Venue.

14 By choosing the Western District of Washington as the forum to commence this  
15 lawsuit, Plaintiff waived any venue objection as to Ascentive. *Manley v. Engram*, 755  
16 F.2d 1463, 1468 (11<sup>th</sup> Cir. 1985). This waiver is effective even though Plaintiff alleges its  
17 previous counsel acted improperly by filing the lawsuit in this judicial district. In *Nichols*  
18 *v. G. D. Searle & Co.*, 991 F.2d 1195, 1201 (4<sup>th</sup> Cir. 1993), the court cited with approval  
19 several other cases "premised on the notion that"

20 district court acts within its discretion when it finds that the interest of justice  
21 is not served by allowing a plaintiff whose attorney committed an obvious  
22 error in filing the plaintiff's action in the wrong court, and thereby imposed  
23 substantial unnecessary costs on both the defendant and the judicial system,  
simply to transfer his/her action to the proper court, with no cost to him/herself  
or his/her attorney.

24 *Id.*; *see also King v. Russell*, 963 F.2d 1301, 1304 (9<sup>th</sup> Cir. 1992) (citing *Wood v. Santa*  
25 *Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1523 (9<sup>th</sup> Cir. 1983)): "Justice  
26 would not have been served by transferring Wood's claims back to a jurisdiction that he  
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28 <sup>2</sup> Further, Gordon's malpractice claims likely arise under state law, not federal law, and the King County Superior Court would likely be a more appropriate venue.



1 purposefully sought to avoid through blatant forum shopping.”)

2 Further, Exhibit A to Plaintiff’s Motion indicated it discussed the venue issue with  
3 its former counsel and decided to proceed in the Western District of Washington.  
4 Plaintiff has filed multiple lawsuits like this one in the Western District, all of which raise  
5 the same claims as Virtumundo, a case this Court determined to be “ill-motivated,  
6 unreasonable, and frivolous.” Gordon v. Virtumundo, Inc., 2007 U.S. Dist. LEXIS  
7 55941, \*17-18 (W.D.Wash. Aug. 1, 2007). Now that its counsel has withdrawn, Plaintiff  
8 seeks to keep its multitude of frivolous lawsuits going in a venue which is more  
9 convenient for Plaintiff. This is unreasonable. Plaintiff’s Motion wastes this Court’s  
10 time and caused Defendants to incur unnecessary legal fees. This Court should deny the  
11 motion and order Plaintiffs to reimburse Defendants for their reasonable attorneys’ fees  
12 and costs.

13  
14 **C. This Court Should Grant Defendants Their Reasonable Attorneys’ Fees  
and Costs for Responding to This Motion.**

15 A plaintiff violates FED.R.CIV.P. 11 when he files a baseless pleading “for the  
16 improper purpose of harassing Defendants... and for the improper purpose of  
17 unnecessarily increasing the costs of litigation.” ITI Internet Servs. v. Solana Capital  
18 Partners, Inc., 2007 U.S. Dist. LEXIS 14099, \*20 (W.D.Wash. Feb. 27, 2007). Rule 11  
19 applies to *pro se* plaintiffs as well as parties represented by counsel: “The Court warns  
20 Plaintiff that Rule 11 bars pro se litigants from filing improper or frivolous suits and that  
21 he may be subject to monetary sanctions under that Rule.” Kim v. Dep’t of Licensing,  
22 2007 U.S. Dist. LEXIS 21915, \*13-14 (W.D.Wash. Mar. 27, 2007).

23 Sanctions under FED.R.CIV.P. 11 are warranted in this case. Plaintiff’s Motion is  
24 clearly baseless, since it is not well grounded in fact and provides no legal authority. The  
25 Motion consumed scarce judicial resources and wasted Defendants’ funds on this  
26 response, a clear abuse of the judicial system.

27 If a party signs a pleading in violation of FED.R.CIV.P. 11, that party may be  
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1 subject to sanctions, including “an order to pay the other party... the amount of the  
2 reasonable expenses incurred because of the filing of the pleading, motion, or legal  
3 memorandum, including a reasonable attorney fee.” FED.R.CIV.P. 11. Plaintiff’s Motion  
4 was neither made in good faith nor warranted under existing law or even a good faith  
5 argument for its extension. Accordingly, this Court should order Plaintiff to pay  
6 Defendants’ reasonable attorneys’ fees and costs incurred in opposing the Motion.

7 **IV. CONCLUSION**

8 For the foregoing reasons, this Court should deny Plaintiff’s Motion and award  
9 Defendants their costs and fees for having to oppose it.

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11  
12 DATED this 14<sup>th</sup> day of November, 2007.

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14 **NEWMAN & NEWMAN,  
15 ATTORNEYS AT LAW, LLP**

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17 By:

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19 Derek A. Newman, WSBA No. 26967  
20 Randall Moeller, WSBA No. 21094

21 Attorneys for Defendants  
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