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The Honorable John C. Coughenour

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

OMNI INNOVATIONS, LLC, a
Washington limited liability company;
JAMES S. GORDON, JR., a married
individual,

Plaintiffs,

v.

BMG COLUMBIA HOUSE, INC., a New
York corporation; and JOHN DOES, 1-X,

Defendants.

NO. 06-cv-01350-JCC

**DEFENDANT BMG'S MOTION TO
STAY THIS LITIGATION**

NOTE ON MOTION CALENDAR:
May 25, 2007

I. INTRODUCTION

Defendant BMG Columbia House, Inc. ("BMG") hereby moves to stay this lawsuit pending resolution of another lawsuit brought by Plaintiffs James S. Gordon, Jr. ("Gordon") and Omni Innovations, LLC ("Omni") alleging precisely the same claims before this Court. Gordon et al. v. Virtumundo et al., Case No. CV06-0204-JCC, W.D.Wash. (Coughenour, J.) ("Virtumundo"). Virtumundo is scheduled for trial on June 18, 2007. The complaints and causes of action alleged by Plaintiffs are virtually identical in each case. Thus, the resolution of Virtumundo may result in a dispositive issue preclusion/collateral estoppel effect on this case.

Plaintiffs seek only statutory damages and are; therefore, not suffering actual harm from the emails in question. In contrast, without a stay of proceedings in this case, the Court's resources are likely to be wasted and the parties will incur unnecessary legal fees

1 and costs. Indeed, in three other cases involving Virtumundo and Omni, this Court has
 2 ordered stays pending resolution of Virtumundo. *See Omni Innovations, LLC v.*
 3 *SmartBargains.com, LP*, Case No. CV06-01129-JCC, W.D.Wash. (Coughenour, J.)
 4 (“SmartBargains”) (Dkt. # 17), *Omni Innovations, LLC et al. v. Ascentive, LLC et al.*,
 5 Case No. CV06-01284-TSZ, W.D.Wash. (Zilly, J.) (“Ascentive”) (Dkt. # 75), and *Omni*
 6 *Innovations, LLC v. Inviva Inc.*, Case No. 2:06-cv-01537-JCC (Coughenour, J.)
 7 (“Inviva”) (Dkt. # 18).

8 II. FACTS

9 In this case, as in Virtumundo, the Plaintiffs allege violations of the CAN-SPAM
 10 Act of 2003, 15 U.S.C. § 7701 et seq. (“CAN-SPAM”) and the Washington Commercial
 11 Electronic Mail Act (RCW 19.190) (“CEMA”). In both cases, each Plaintiff claims to be
 12 a “provider of Internet access service” and an “interactive computer service” as defined in
 13 CAN-SPAM and CEMA, respectively.¹ (*See Virtumundo*, First Amended Complaint
 14 (Dkt. # 15) ¶¶ 3.2, 3.3; *see also* Plaintiffs’ Second Amended Complaint (“SAC”) (Dkt.
 15 # 13) at ¶¶ 7-8.) Plaintiffs’ claimed CAN-SPAM and CEMA damages depend on their
 16 alleged status as interactive computer services. (SAC at ¶¶ 18, 20.)

17 Also, in both cases Plaintiffs seek damages based upon the following theories:

18 13. Each of the E-mails misrepresents or obscures information in identifying
 19 the point of origin or the transmission path thereof, and thereby violate the
 20 Washington CEMA (19.190 et seq.), and further each of these E-mails
 21 contains header information that is materially false or materially misleading
 22 and thereby violate Federal CAN-SPAM Act of 2003 (). The foregoing
 23 violations include without limitation: “subject” lines; “from” lines; and other
 24 header information that does not match, or is missing or false, in the “from”
 25 and “by” tokens in the Received header field.

26 14. On information and belief, Plaintiffs allege that some of the E-mails used
 27 false, or misleading information in registering the domains from which the
 28 subject E-mails were sent, and that numerous domains were used to send the
 E-mails for no other purpose but to avoid spam filters, evade detection, and

26 ¹ CAN-SPAM’s definition of “Internet access service” is nearly identical to CEMA’s definition of
 27 “interactive computer service.” At 47 U.S.C. § 231(e)(4), CAN-SPAM defines an Internet access service as “a
 28 service that enables users to access content, information, electronic mail, or other services offered over the Internet
 ...” (emphasis added). CEMA’s definition of “Internet service provider”, at RCW 19.190.010(8), applies to a party
 “that provides or enables computer access by multiple users to a computer server, including specifically a service or
 system that provides access to the internet ...”(emphasis added)

1 otherwise obscure the true point of origin of the E-mails.

2 (SAC at ¶¶ 13-14.)

3 Plaintiffs brought essentially identical claims in Virtumundo. (*See Virtumundo*,
4 First Amended Complaint (Dkt. # 15).) In that case, the defendants moved for summary
5 judgment alleging, *inter alia*, (i) that Plaintiffs do not have standing because they are not,
6 and never were, an interactive computer service (or provider of Internet access service)
7 adversely affected by the subject emails; and (ii) that Plaintiffs' theories regarding an
8 email "from" line cannot give rise to a violation under CAN-SPAM or CEMA. (*See*
9 Virtumundo, Defendants' Motion for Summary Judgment (Dkt. # 98).)

10 Plaintiffs' novel theories asserted in Virtumundo are unsupported by case law,
11 adopted FTC rule or regulation, or express statutory language. (*See Virtumundo*,
12 Defendants' Motion for Summary Judgment (Dkt. # 98) at 16-28.) In that case, Gordon
13 and Omni allege violations of CAN-SPAM and CEMA from emails they allege
14 defendants sent with an improper IP address and host name protocol, transfer token
15 information and other email header information. (*Id.*) The basis of Plaintiffs' claims are
16 technical in nature and involve the intricacies and inner workings of email transmission
17 over the Internet.

18 **III. ARGUMENT**

19 **A. Standard for Granting a Stay of Proceedings.**

20 In the interest of judicial economy, the Court may exercise its inherent power to
21 stay proceedings until the resolution of a related matter that would resolve a dispositive
22 matter. *See Leyva v. Certified Grocers of California*, 593 F.2d 857, 863-64 (9th Cir.
23 1979) ("A trial court may, with propriety, find it is efficient for its own docket and the
24 fairest course for the parties to enter a stay of an action before it, pending resolution of
25 independent proceedings which bear upon the case."); *see also Silvaco Data Systems, Inc.*
26 *v. Technology Modeling Associates, Inc.*, 896 F. Supp. 973, 975 (N.D. Cal. 1995) ("in the
27 interest of wise judicial administration, a federal court may stay its proceedings where a
28 parallel state action is pending") (internal citation omitted).

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

- 5 1. there was a full and fair opportunity to litigate the identical issue in
 6 the prior action, *see Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391,
 7 1399 (9th Cir. 1992); *Resolution Trust Corp. v. Keating*, 186 F.3d
 8 1110, 1114 (9th Cir. 1999); *Appling v. State Farm Mut. Auto Ins.*
 9 *Co.*, 340 F.3d 769, 775 (9th Cir. 2003);
- 10 2. the issue was actually litigated in the prior action, *see Appling*, 340
 11 F.3d at 775;
- 12 3. the issue was decided in a final judgment, *see Resolution Trust*
 13 *Corp.*, 186 F.3d at 1114; and
- 14 4. the party against whom issue preclusion is asserted was a party or in
 15 privity with a party to the prior action, *see id.*

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

18 **B. A Stay Is Appropriate in This Case Because This Court Is Adjudicating**
 19 **Plaintiffs’ Identical Claims in Virtumundo.**

20 If there is a judgment that Gordon and Omni do not have standing as an Internet
 21 access service in Virtumundo, then issue preclusion will be dispositive as to Plaintiffs’
 22 federal CAN-SPAM claims in the instant lawsuit. Alternatively, if the Court rejects
 23 Gordon’s and Omni’s legal theories in Virtumundo, then those findings will apply to
 24 Plaintiffs’ theories in the instant matter.

25 First, Plaintiffs are the same entities as the plaintiffs in Virtumundo and have had a
 26 full and fair opportunity to litigate the identical issue in the related action. Plaintiffs have
 27 had an opportunity to make a record in Virtumundo and, if applicable, may advance any
 28 facts or testimony at trial that supports their claim to be an Internet access service.

Second, the matters of (i) whether Gordon or Omni have standing as an Internet
 access service that is adversely affected; and (ii) whether their novel theories give rise to
 a claim for statutory damages under CAN-SPAM or CEMA are before the Court in the

1 Virtumundo case.

2 Third, the matter is fully briefed and before the Court in Virtumundo on summary
3 judgment. Trial is scheduled for June 18, 2007. BMG merely requests a stay pending
4 resolution of that case and a final judgment. Finally, Plaintiffs are the identical plaintiffs
5 as in Virtumundo and, accordingly, the fourth prong of issue preclusion has been
6 satisfied.

7 All four factors weigh heavily in favor of granting a stay in the above-captioned
8 case. Virtumundo will have a dispositive effect on this case even if the decision applies
9 only to Plaintiffs' CAN-SPAM claims. The Virtumundo Court may dismiss Plaintiffs'
10 CAN-SPAM claims if it determines that Plaintiffs do not provide an Internet access
11 service. It would be a waste of resources if Omni is allowed to re-litigate the same issue
12 in this lawsuit. Furthermore, since Plaintiffs' CAN-SPAM and CEMA claims in this case
13 arise from the same collection of emails (SAC at ¶ 20-22), it will be far more efficient for
14 the parties and the Court to address the federal and state claims simultaneously, after the
15 potentially dispositive resolution of Virtumundo.

16 **C. This Court Has Recently Granted a Stay in Three Similar Cases.**

17 This Court has already stayed two other cases involving the same issues and the
18 same Plaintiffs, thereby promoting judicial economy and avoiding the potential waste of
19 substantial attorney time and unnecessary pretrial motion practice. Defendants
20 respectfully request the Court grant a stay in this lawsuit for the same reasons it granted
21 them in the three previous cases. In SmartBargains, defendant SmartBargains.com, LP
22 moved this Court to stay that lawsuit pending resolution of Virtumundo. (SmartBargains,
23 Case No. CV06-01129-JCC, W.D.Wash., Motion to Dismiss Plaintiffs' CAN-SPAM
24 Claims or to Stay This Litigation (Coughenour, J.) (Dkt. # 13)). In their response,
25 Gordon and Omni did not oppose staying that litigation. (*See Id.*, Opposition to
26 Defendant's Motion to Dismiss Plaintiffs' CAN-SPAM Claims (Dkt. # 14)).
27 Subsequently, this Court ordered a stay in that case pending resolution of Virtumundo.
28 (*Id.*, Order (Coughenour, J.) (Dkt. # 17.))

1 Similarly, the Ascentive defendants moved to stay that case pending resolution of
2 Virtumundo. (Ascentive, Case No. CV06-01284-TSZ, W.D.Wash., Motion to Dismiss
3 and to Stay This Litigation (Zilly, J.) (Dkt. # 65)). Omni's only argument in response was
4 that Ascentive should not be stayed pending resolution in Virtumundo because the issue
5 of whether Omni has standing under CAN-SPAM as an Internet access service allegedly
6 could not affect Omni's state law CEMA claims. (*See Id.*, Opposition to Defendants'
7 Motion to Dismiss and to Stay This Litigation (Dkt. # 69).) As the defendants' reply
8 noted, Omni's sole argument was unavailing for at least three reasons:

9 First, the Omni decision will have a dispositive effect on this case even if
10 that decision applies only to Plaintiffs' CAN-SPAM claims...

11 Second, CAN-SPAM's definition of "Internet access service" is nearly
12 identical to CEMA's definition of "interactive computer service."... In light
13 of the clear similarities between the statutes, Plaintiffs' argument that the
14 Omni court's ruling on CAN-SPAM "cannot possibly impact Omni's state
15 law CEMA claims" (Response at 4:17-18) lacks credibility.

16 Third, Plaintiffs' ability to define themselves as Internet access service
17 providers is only one of the relevant issues to be determined in the
18 [Virtumundo] case...

19 (*See Id.*, Defendants' Reply Re Motion to Dismiss and Stay (Dkt. # 70).) Subsequently,
20 the Ascentive Court ordered a stay in that case pending resolution of Virtumundo. (*Id.*,
21 Minute Order (Zilly, J.) (Dkt. # 75.))

22 Most recently, this Court entered a stay in Inviva pending resolution of
23 Virtumundo. *See Inviva*, Dkt. # 18. Like SmartBargains and Acentive, the motion for a
24 stay was based upon the commonality of facts and issues in the lawsuit. After a full
25 briefing, the Court granted Inviva's motion. In fact, Defendants are aware of no instance
26 in which a defendant was denied a stay against Plaintiffs in their anti-spam lawsuits
27 pending resolution of Virtumundo. The overwhelming tide of factual and legal authority
28 supports granting a stay in this lawsuit.

In the event the Court declines to grant a stay in this case, then the parties will
have no alternative but to engage in pretrial litigation practice. In discovery, BMG seeks
many of the same documents and issued many of the same requests for admission as

1 propounded by the defendants' counsel in the Virtumundo lawsuit. Plaintiffs will likely
 2 provide the same answers and the same documents. In turn, the parties will take
 3 depositions and develop much of the same record as in the related action. These efforts
 4 will take many months and consume substantial resources. However, all of that time and
 5 money could be for naught if the Virtumundo Court were to rule either that (i) Gordon or
 6 Omni are not Internet access services adversely affected by emails or (ii) Gordon's and
 7 Omni's novel theories lack merit. Such rulings would eliminate Plaintiffs' CAN-SPAM
 8 and CEMA claims in the instant lawsuit pursuant to the doctrine of offensive nonmutual
 9 issue preclusion.

10 This case is in its nascent stages and the parties have just begun to devote
 11 resources to conduct discovery and pretrial motion practice. Balancing the lack of actual
 12 damages to Plaintiffs against the unnecessary expenditure of resources, this Court should
 13 grant a stay until such time as it makes a final adjudication of whether Plaintiffs have
 14 standing and whether their email "from" line theories will prevail.

16 IV. CONCLUSION

17 The Court should stay this litigation pending resolution of collateral issues in
 18 Virtumundo. This Court will resolve many of the same issues in that case as in this case –
 19 including the threshold issue of whether Gordon and Omni have standing – and it would
 20 be a gross waste of judicial resources and the resources of the parties to litigate this case
 21 when the Court is already deciding the same issues in another matter.

23 DATED this 8th day of May, 2007.

24 **NEWMAN & NEWMAN,
 25 ATTORNEYS AT LAW, LLP**

26 BY:



27 Roger M. Townsend, No. 25525
 28 roger@newmanlaw.com