

#121

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY, INC.

Plaintiff,

v.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.,

Defendant.

**PLAINTIFF'S MEMORANDUM BRIEF IN
SUPPORT OF MOTION TO STAY PROCEEDINGS
AGAINST DEFENDANT AMERICA ONLINE, INC.**

Plaintiff **Ben Ezra, Weinstein and Company, Inc.**, by and through its counsel of record, respectfully submits this memorandum brief in support of its Motion to Stay Proceedings Against Defendant America Online, Inc.

ARGUMENT AND AUTHORITIES

Ben Ezra, Weinstein and Company, Inc. ("BEW") respectfully requests that the Court enter an order staying any proceedings against America Online, Inc. ("AOL") in this litigation. The Court's inherent power to stay proceedings is recognized and well established. "[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. North American Co.*, 299 U.S. 248, 254 (1936); *see also, Clinton v. Jones*, 520 U.S. 681 (1997) (noting that the district court has "broad discretion" to stay proceedings as an incident to its power to control its own docket). Whether a stay of proceedings should be granted "calls for the exercise of

judgment, which must weigh competing interests and maintain an even balance.” *Landis*, 299 U.S. at 254-55.

The party applying for a stay generally must demonstrate “a clear case of hardship or inequity” if there is “even a fair possibility” that the stay would damage another party. *Landis*, 299 U.S. at 255. No such showing is necessary here because there is no possibility that AOL would be damaged. AOL would remain a party to this litigation in name only during the pendency of the stay, assuming that the Court will allow BEW to amend its complaint to allege claims against two other defendants. A Motion to Amend Complaint to Join Additional Defendants is being served by BEW concurrently with this motion to stay proceedings.

However, AOL would receive exactly what it has been seeking in this litigation – freedom from the burdens associated with it. If additional discovery from the proposed two new defendants shows, as AOL alleges, it is not responsible for the inaccurate and misleading publication of BEW’s stock information, AOL properly should not be a party to this action. In that event, an order dismissing them from this lawsuit would be appropriate.

This case raises important and significant issues of first impression with nationwide implications regarding the application and reach of the Communications Decency Act of 1996, 47 U.S.C. § 230. This litigation may have a far-reaching impact on Internet access to information, Internet communications, Internet publishing and the “World Wide Web.” As the United States Supreme Court has explained, “especially in cases of extraordinary public

moment, [a party] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Clinton, quoting Landis*, 299 U.S. at 256.

Although in a different context, this Court has not hesitated to grant an indefinite stay under appropriate circumstances. See, e.g., *Arrazolo v. Youngdahl*, No. CIV 96-0073 LH/LCS (D.N.M. November 15, 1996); and *Allen v. The Pittsburg & Midway Coal Mining Co.* No. CIV 94-0374 LH/WWD (D.N.M. May 3, 1995) (each citing "Colorado River standard" of wise judicial administration, regard for conservation of judicial resources and comprehensive disposition of litigation in granting indefinite stays pending outcomes of parallel state proceedings).

CONCLUSION

For the reasons stated above, Plaintiff Ben Ezra, Weinstein and Company, Inc. respectfully requests that the Court grant a stay of this proceeding as to Defendant America Online, Inc. until such time as the Plaintiff has conducted adequate discovery regarding the proposed two new defendants to this litigation, and for such other and further relief as the Court deems just and proper.

Respectfully Submitted,

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I hereby certify that a true and correct copy of the foregoing pleading was mailed on this the *21st* day of January, 1999 to the following counsel of record:

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