

THE HON. THOMAS A. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

<p>OMNI INNOVATIONS, LLC, a Washington Limited Liability company; EMILY ABBEY, an individual,</p>	<p>Plaintiffs,</p>	<p>ASCENTIVE, LLC, a Delaware limited liability company; ADAM SCHRAN, individually and as part of his marital community; JOHN DOES, I-X,</p>	<p>Defendants,</p>
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NO. 06-01284

MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT

NOTED FOR HEARING: March 16,

2007

[WITHOUT ORAL ARGUMENT]

1. MOTION

Plaintiffs, Omni Innovations, LLC ("Omni") and Emily Abbey ("Abbey") by and
through their undersigned attorneys, Robert J. Siegel and Douglas McKinley, hereby
move the Court for an order granting leave to file Plaintiffs' Second Amended Complaint
(copy attached hereto as Exhibit "A").

!JUSTICE LAW, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

MOTION FOR LEAVE TO FILE SECOND AMENDED
COMPLAINT

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Fax: 206-624-0717

MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

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legal authority cited herein.

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This Motion is based upon the files and records herein, and the memorandum of

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IV. EVIDENCE RELIED UPON

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Second Amended Complaint?

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1. Should the Court enter an order granting Plaintiffs leave to file their

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III. STATEMENT OF ISSUES

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statute, 19.190 et seq., and the Federal Can-Spam Act of 2003.

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2. The case involves alleged violations of both the Washington anti-spam

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("Schran").

marketing firm, and its principal owner and manager Adam Schran

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Defendant Ascentive, LLC. ("Ascentive"), a Philadelphia based internet

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internet and computer user, properly commenced this action against the

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interactive computer service, and Emily Abbey ("Abbey"), an individual

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1. In September 2006, Plaintiffs Omni Innovations, LLC. ("Omni"), a small

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1. STATEMENT OF FACTS

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V. ARGUMENT AND AUTHORITY

1 Plaintiffs seek only to amend their complaint to clarify certain aspects of their pleadings
2 in response to Defendants' Motion To Dismiss. Specifically, the Second Amended Complaint
3 more accurately and precisely delineates between Plaintiff Omni and Plaintiff Abbey insofar as
4 which statutory violations apply to each.
5
6 FRCP 15 and Washington case law provide that leave to amend a complaint should be
7 granted liberally in the interests of justice, "and leave shall be freely given when justice so
8 requires." Federal Rule of Civil Procedure 15(a) provides that a trial court shall grant leave to
9 amend freely "when justice so requires." See *Foman v. Davis*, 371 U.S. 178, 182 (1962) ("[T]his
10 mandate is to be heeded."). "[L]eave to amend should be granted if it appears at all possible that
11 the plaintiff can correct the defect." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en
12 banc) (internal citations and quotations omitted)
13
14 The purposes of CR 15 are to "facilitate a proper decision on the merits", *CARUSO v.*
15 *LOCAL 690, INT'L BHD. OF TEAMSTERS*, 100 Wn.2d 343, 670 P.2d 240 (1983), at 349, and to
16 provide each party with adequate notice of the basis of the claims or defenses asserted against
17 him. *PIERCE CY. SHERIFF v. CIVIL SERV. COMM'N*, 98 Wn.2d 690, 695, 658 P.2d 648
18 (1983). SEE GENERALLY 6 C. Wright & A. Miller, *FEDERAL PRACTICE* 1471 (1971);
19 Trautman, *PLEADING PRINCIPLES AND PROBLEMS IN WASHINGTON*, 56 Wash. L.
20 Rev. 687, 711-14 (1981). Leave to amend should be freely given "except where prejudice to the
21 opposing party would result." *CARUSO*, at 349; SEE ALSO 6 C. Wright & A. Miller 1473. The
22 amendment of pleadings is left to the sound discretion of the trial court, whose determination
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Fax: 206-624-0717

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will be overturned on review only for an abuse of that discretion. Herron v. Tribune Pub. Co.,

108 Wn.2d 162, 165, 736 P.2d 249 (1987). Discretion is abused if it is manifestly unreasonable,

or exercised on untenable grounds, or for untenable reasons. State ex rel. Caroll v. Junker, 79

Wn.2d 12, 26, 482 P.2d 775 (1971).

Granting Plaintiffs leave to amend would certainly not prejudice Defendants in any way.

As set forth in further detail in Plaintiffs' Response To Motion To Dismiss, at a minimum, the

currently operable First Amended Complaint has sufficiently put Defendants on notice, pursuant

to FRCP 8(a), of the allegations against them generally, notwithstanding that certain allegations

may have been pled with more clarity, as is done in the Second Amended Complaint. No

discovery has yet been had, and the parties have only recently filed their Joint Status Report.

Plaintiffs submit that allowing them to amend their Complaint is in the interest of justice.

RESPECTFULLY SUBMITTED, this 1st day of March, 2007.

!JUSTICE LAW, P.C.

DOUGLAS E. MCKINLEY, JR

Attorney at Law

/S/ Douglas E. McKinley, Jr.

Douglas E. McKinley, Jr., WSBA 20806

Attorney for Plaintiffs

Robert J. Siegel

Robert J. Siegel, WSBA #17312

Attorney for Plaintiffs

-4

MOTION FOR LEAVE TO FILE SECOND AMENDED

COMPLAINT

!JUSTICE LAW, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

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MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

!JUSTICE LAW, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

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BY: /S/ ROBERT J. SIEGEL
ROBERT J. SIEGEL
WASHINGTON BAR NO. 17312
1325 FOURTH AVENUE, SUITE 940
SEATTLE, WA 98101
TELEPHONE: 206.304.5400
FAX: 206.624.0717
BOB@MSFSEATTLE.COM

DATE: MARCH 1, 2007

!JUSTICE LAW, P.C.

CERTIFICATE OF SERVICE
I hereby certify that on March 1, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following: Derek A. Newman, Newman & Newman

PROPOSED: 2ND AMENDED COMPLAINT

Justice Law, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

[SECOND] AMENDED COMPLAINT FOR
DAMAGES, PENALTIES, ETC. - 1

1. Plaintiff OMNI INNOVATIONS, LLC, (hereinafter "OMNI") is a Washington limited liability company duly licensed and registered with the State of Washington, with its principal place of business in Franklin County, Washington.
2. Plaintiff EMILY ABBEY, (hereinafter "ABBHEY") is an individual residing in King County, Washington who maintains a computer connected to the internet, which is also located in King County, Washington, on which she sends and receives E-mail, and whose residency information was and is available from and registered with a

PARTIES, JURISDICTION, VENUE

OMNI INNOVATIONS, LLC, a Washington Limited Liability company; EMILY ABBEY, an individual,
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
[SECOND] AMENDED COMPLAINT
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

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!Justice Law, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

[SECOND] AMENDED COMPLAINT FOR
DAMAGES, PENALTIES, ETC. - 2

10. At all times material hereto, for the Domains and each of them, the information that all e-mail addresses at each Domain (the "Recipient Addresses") belong to "Domain").

gordonworks.com (collectively the "Domains" and individually and generically a jaycelia.com, celiajay.com, jaykayspace.com, rcw19190020.com, and chiefmusician.net, ehahome.com, itdidoendright.com, jammtom.com, The domain names served by Plaintiff OMNI include: anthonycentral.com,

General Allegations

multiple users to a computer server that provides access to the Internet. From and after May 2005, Plaintiff OMNI provided and enabled computer access for

7. Venue is proper pursuant to 28 U.S.C. §1391.

1367.

6. This Court has supplemental jurisdiction of state law claims pursuant to U.S.C. §

§1332 (diversity).

5. Jurisdiction is proper pursuant to 28 U.S.C. §1331 (federal question) and 28 U.S.C.

in the Western District of Washington.

Pennsylvania and transacts or has transacted business in the State of Washington and

and were for the benefit of his marital community. SCHRAN resides in the State of

Ascentive. All acts and practices undertaken by Schran on behalf of Ascentive are

policies, activities, and practices, including those alleged herein on behalf of

officer, director, and/or majority shareholder of Ascentive, and as such controls its

4. On information and belief, Plaintiffs allege that ADAM SCHRAN, ("Schran") is an

principal place of business located in Philadelphia, Pennsylvania.

("ASCENTIVE") is a limited liability company registered in Delaware, with its

3. On information and belief, Plaintiffs allege that Defendant ASCENTIVE, LLC,

registered with and available through her domain registration.

Washington address, which E-mail address was at all relevant times herein, and is

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1 Washington residents, including Plaintiff Abbey's, was and is available upon request
2 from the registrant of each Domain, each registrant being a Washington resident and
3 each Domain being registered with a Washington address.

4 During the time period of approximately August 2003 through February, 2007,
5 Plaintiffs received at the Domains electronic-mail messages (collectively the "E-
6 mails" or individually and generically as an "Email").

7 The E-mails, and each of them, were received by Plaintiff OMNI's servers serving
8 the Domains, or at the Domains themselves, and/or on individual Plaintiffs email
9 accounts, and on their computers, including, but not limited to the email account and
10 computer of Plaintiff Abbey.

11 Each of the E-mails misrepresents or obscures information in identifying the point of
12 origin or the transmission path thereof, and contains header information that is
13 materially false or materially misleading. The misrepresentations include without
14 limitation: IP address and host name information that do not match, or are missing, or

15 are false in the "From" and "By" tokens in the Received header fields; or fail to
16 include a valid physical address in the body of the E-mail; and/or used false, or
17 misleading information in registering the domains used to send the subject E-mails.

18 Defendant initiated the transmission of the E-mails, and each of them. In the
19 alternative, Defendant conspired or otherwise acted in collusion with another or
20 others or assisted another or others to transmit the E-mails, and each of them.

21 At all times material hereto, Defendants knew or had reason to know that the
22 Recipient Addresses, and each of them, were and are held by a Washington resident.

23 FIRST CAUSE OF ACTION – CAN-SPAM ACT

24 15 U.S.C. §7701 et seq.

25 On the basis of the facts set forth hereinabove, Defendants initiated the transmission
26 of the E-mails, and each of them, to a protected computer in violation of 15 U.S.C.
27 §7704(a), causing damage to Plaintiff Omni as the provider of the Internet access

[SECOND] AMENDED COMPLAINT FOR DAMAGES, PENALTIES, ETC. - 3

Justice Law, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

Justice Law, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

[SECOND] AMENDED COMPLAINT FOR
DAMAGES, PENALTIES, ETC. -4

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service receiving each such E-mail in the amount of \$100 for each such E-mail, as

provided in 15 U.S.C. §7706 (g) (3).
17. Defendants did willfully and knowingly so act in violation of the provisions of 15

U.S.C. §7701 et seq.

SECOND CAUSE OF ACTION – CEMA

RCW 19.190.010 - .070

18. On the basis of the facts set forth hereinabove, Defendants initiated, conspired with

another to initiate, or assisted the transmission of the E-mails, and each of them, in violation of RCW 19.190.020, causing damage to Plaintiff Omni as the interactive

computer service receiving each such E-mail in the amount of \$1,000 for each such

E-mail, and to Plaintiff Abbey in the amount of \$500 for each such E-mail directed to and received at Abbey's E-mail address, as provided in RCW 19.190.040(1) and (2).

THIRD CAUSE OF ACTION – CONSUMER PROTECTION ACT

Ch. 19.86 RCW

19. On the basis of the facts set forth hereinabove, Defendants initiated the E-mails, and each of them, in violation of RCW 19.190.030 and Chapter 19.86 RCW, causing

damage to Plaintiffs as the recipients of each such E-mail in an amount to be proven at trial, including, but not limited to, treble damages. Defendants' acts as described

hereinabove constituted unfair and deceptive acts or practices in the conduct of trade or commerce, which acts or practices caused injury to Plaintiffs, and as such

constitute independent violations of RCW 19.86 et seq.

REQUEST FOR RELIEF

Plaintiffs respectfully request the following relief:

1. Entry of a judgment in favor of Plaintiff Omni against the Defendants in the amount of \$1,100 per unlawful E-mail, plus such other and further damages as may be proved at trial, plus treble damages to the extent permitted by Chapter 19.86 RCW and to the extent permitted by 15 U.S.C. §7706 (g) (3) (C), plus prejudgment and post-judgment interest at the highest rate permitted by law, plus cost of suit and reasonable attorney fees pursuant to Chapter 19.86 RCW and 15 U.S.C. §7706 (g) (4);

2. Entry of a judgment in favor of Plaintiff Abbey against the Defendants in the amount of \$500 per unlawful E-mail, plus such other and further damages as may be proved at trial, plus treble damages to the extent permitted by Chapter 19.86 RCW plus prejudgment and post-judgment interest at the highest rate permitted by law, plus cost of suit and reasonable attorney fees pursuant to Chapters 19.190 et seq., and 19.86 RCW;

3. Entry of a permanent injunction against the Defendants prohibiting the Defendants from sending or causing to be sent electronic mail messages of any kind or nature to e-mail addresses at Plaintiffs' Domains and/or email addresses.

4. Such other and further relief as the Court deems just and equitable in the premises.

[SECOND] AMENDED COMPLAINT FOR DAMAGES, PENALTIES, ETC. -5

iJustice Law, P.C.
 1325 Fourth Ave., Suite 940
 Seattle, WA 98101
 Phone: 206-304-5400
 Fax: 206-624-0717

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[SECOND] AMENDED COMPLAINT FOR DAMAGES, PENALTIES, ETC. - 6

!Justice Law, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

RESPECTFULLY SUBMITTED this 27th day of February, 2007.

!Justice Law, P.C.

DOUGLAS E. MCKINLEY, JR.
Attorney at Law

/S/ Robert J. Siegel

/S/ Douglas E. McKinley, Jr.

Robert J. Siegel, WSB# 17312

Douglas E. McKinley, Jr., WSB# 20806

Attorney for Plaintiffs

Attorney for Plaintiffs

PROPOSED ORDER

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!JUSTICE LAW, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101
Phone: 206-304-5400
Fax: 206-624-0717

[Proposed] ORDER GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT

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granted, and Plaintiffs are granted leave to file their Second Amended Complaint;
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion is
pleadings, and having found that good cause exists, therefore
Second Amended Complaint, and the Court, having considered all moving and responsive
THIS MATTER having come before the Court by Plaintiff's Motion For Leave To File

**OMNI INNOVATIONS, LLC, a
Washington Limited Liability
company; EMILY ABBEY, an
individual,**
Plaintiffs,
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

**ORDER GRANTING PLAINTIFFS
LEAVE TO FILE SECOND
AMENDED COMPLAINT**

NOTED FOR HEARING:
WITHOUT ORAL ARGUMENT
[March 16, 2007]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

THE HON. THOMAS A. ZILLY

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[Proposed] ORDER GRANTING LEAVE TO FILE SECOND AMENDED COMPLAINT

!JUSTICE LAW, P.C.
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DONE IN OPEN COURT this _____ Of March, 2007.

The Hon. Judge Thomas A. Zilly

!JUSTICE LAW, P.C.

/s/ Robert J. Siegel

Robert J. Siegel, WSBA #17312

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following: Derek A. Newman, Newman & Newman

!JUSTICE LAW, P.C.

DATE: FEB, 27, 2007

By: /s/ ROBERT J. SIEGEL
ROBERT J. SIEGEL
WASHINGTON BAR NO. 17312
1325 FOURTH AVENUE, SUITE 940
SEATTLE, WA 98101
TELEPHONE: 206.304.5400
FAX: 206.624.0717
BOB@MSFSSEATTLE.COM