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THE HON. THOMAS S. ZILLY

8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON, SEATTLE

10 **OMNI INNOVATIONS, LLC, a**
11 **Washington limited liability company;**
12 **Emily Abbey, an individual,**

13 **Plaintiff,**

14 v.

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

20 **Defendants.**

NO. CV06-01284

PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS AND TO
STAY THIS LITIGATION

Noted for Motion Calendar:
March 16, 2007

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22 MOTION TO DISMISS AND TO STAY THIS LITIGATION.
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INTRODUCTION

1
2 Defendants' motion to dismiss and to stay this action should be denied because even if
3 the Court were to reverse all of the presumptions that normally apply to motions brought under
4 FRCP 12 (b)(6), instead accepting all of the facts and legal analysis set forth in the Defendants'
5 motion as true (as opposed to accepting as true the facts and allegations set forth in Plaintiffs'
6 complaint), both Omni Innovations, LLC ("Omni") and Emily Abbey's ("Abbey") state law
7 claims under CEMA still survive. Accordingly, Abbey should not be dismissed and Omni's
8 claims should not be stayed.

ARGUMENT AND AUTHORITY

11 Defendants have offered three theories in support of their motion.

12
13 **1. Abbey's Claims Sound Under CEMA as an Individual Recipient – Her Status as**
14 **an Internet Access Service is Irrelevant.** Defendants have argued that Plaintiff Emily
15 Abbey's claims should be dismissed because she is not an "Internet Access Service" ("IAS") as
16 that term is defined in CAN SPAM. However, Abbey's claims arise under Washington State's
17 anti-spam statute, CEMA.¹ Emily Abbey has standing to bring her claims because CEMA only

18 ¹ Plaintiff contends that Emily Abbey's claims as a recipient of unlawful spam under CEMA (as
19 opposed to her being an Internet Access Service under CAN SPAM), was clear from the original
20 complaint. Under FRCP 8(a) notice pleading in which litigants are generally required only to provide
21 their opponent with fair notice of their claim and the grounds upon which that claim rests. *Swierkiewicz*
22 *v. Sorema N. A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002); *Conley v. Gibson*, 355
23 U.S. 41, 47, 78 S. Ct. 99, 102, L.Ed.d 80 (1957). The rules "do not require a claimant to set out in detail
24 the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain
25 statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the
grounds on which it rests." *Conley v. Gibson, supra*. Assuming, however, that it was not clear in the
original complaint that Emily Abbey's claims were based on her receipt of illegal email under CEMA,
the Plaintiff has now filed a motion for leave to amend the complaint, to add this clarity. The Court
should grant this motion because, to the extent that this clarity is lacking, the amendment FRCP 15 and
Washington case law provide that leave to amend a complaint should be granted liberally, and the

1 requires that a Plaintiff be a Washington resident who has received illegal commercial email
2 a/k/a “spam” at their email address. RCW 19.190.020 states in pertinent part

3 (1) No person may initiate the transmission, conspire with another to initiate the
4 transmission, or assist the transmission, of a commercial electronic mail message from a
5 computer located in Washington or to an electronic mail address that the sender knows, or has
6 reason to know, is held by a Washington resident that:.. (emphasis added).

7 As plainly set forth both in the initial complaint, and now the amended complaint, Abbey
8 is a Washington resident, and she has received unlawful email at her email address initiated by or
9 on behalf of Defendants, whose products are indisputably advertised in the subject emails. As
10 such, she has standing to bring her claims, and her status as an IAS under Can-Spam, or as an
11 Interactive Computer Service (“ICS”) under the CEMA are irrelevant to this action.

12 **2. Omni Clearly Qualifies as an Internet Access Service and Interactive**
13 **Computer Service.** The Defendant’s second theory is that this litigation should be stayed
14 because the Defendant’s lawyers have brought a specious motion claiming Omni is not an IAS in
15 another action (hereafter the “other action”). However, as in the other action, Omni has also
16 brought claims under Washington State’s anti-spam statute, CEMA. Omni has standing to bring
17 these claims because Omni is an “Interactive Computer Service” under CEMA. Notably,
18 nowhere in the other action has any party challenged Omni’s status as an ICS under CEMA, nor
19 have the Defendants claimed that anyone else has done so. The Court should therefore note that
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22 purposes of CR 15 are to "facilitate a proper decision on the merits", *CARUSO v. LOCAL 690, INT'L*
23 *BHD. OF TEAMSTERS*, 100 Wn.2d 343, 670 P.2d 240 (1983), at 349, and to provide each party with
24 adequate notice of the basis of the claims or defenses asserted against him. *PIERCE CY. SHERIFF v.*
25 *CIVIL SERV. COMM'N*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983).

1 the definition of an IAS under CAN SPAM is different than the definition of an ICS under
2 CEMA. RCW 19.190.010(8) defines an ICS as follows:

3 "Interactive computer service" means any information service, system, or access software
4 provider that provides or enables computer access by multiple users to a computer server,
5 including specifically a service or system that provides access to the internet and such
6 systems operated or services offered by libraries or educational institutions.

7 The CAN-SPAM Act defines an IAS as follows:

8 "The term "Internet access service" has the meaning given that term in section 231(e)(4)
9 of Title 47."

10 which in turn states:

11 "The term "Internet access service" means a service that enables users to access content,
12 information, electronic mail, or other services offered over the Internet, and may also
13 include access to proprietary content, information, and other services as part of a package
14 of services offered to consumers. Such term does not include telecommunications
15 services."

16 Thus, even if the Court in the other action determined that Omni is not an IAS under
17 CAN SPAM, the Court will *not* have necessarily determined whether Omni is an "ICS under
18 CEMA. Accordingly, Omni's claims under CEMA will proceed in the other action *regardless* of
19 whether the Court rules that Omni isn't an IAS in the other action. It would be an erroneous
20 result to stay proceedings in the instant action awaiting a ruling that cannot possibly impact
21 Omni's state law CEMA claims awaiting a ruling by the Court in the other action on separate
22 and distinct federal CAN-SPAM claims.

23 **3. The Washington CEMA is Not Preempted by the federal CAN-SPAM Act.**

24 Finally, the Defendants assert that the Plaintiff's claims under CEMA are preempted by CAN
25 SPAM. At the outset, the Plaintiff's note that the Defendant's argument relies entirely on the

1 Fourth Circuit's recent ruling that CAN SPAM preempted portions of an Oklahoma statute in
 2 Omega World Travel v. Mummagraphics, Inc. 469 F.3d 348 (4th Cir. 2006). However, the
 3 Oklahoma statute is not at issue in this case, and therefore Omega does not apply. Washington's
 4 statute, the CEMA, is at issue in this case. CEMA has been upheld by Washington State courts
 5 as not being subject to federal preemption. Moreover, the Court should also note that the federal
 6 Court in the Eastern District of Washington has directly considered whether CEMA is preempted
 7 by CAN SPAM, and has concluded that it is not.²

8 The Court concludes that the plain language of the CAN-SPAM Act does not support
 9 Defendant's argument that Plaintiff's claims are preempted by the CAN-SPAM Act. Since
 10 subsection 1(a) prohibits misrepresentation in the transmission path or in identifying the
 11 point of origin, and subsection 1(b) prohibits false or misleading information in the
 12 subject line, the Court concludes that Washington's Commercial Electronic Mail Act is
 13 excepted from federal preemption because it prohibits "falsity and deception". Further,
 14 since it is a violation of Washington's CPA, RCW § 19.86, "to conspire with another
 15 person to initiate the transmission or to initiate the transmission of a commercial
 16 electronic mail message" that contains "false or misleading information in the subject
 17 line", RCW § 19.190.030(1), Plaintiff's claim that Defendant violated Washington's CPA
 18 is also excepted from federal preemption. Accordingly, to the extent Defendant's motion
 19 to dismiss is based on the assertion that Plaintiff's claims are preempted by federal law,
 20 the motion is denied. *Gordon v. Impulse Mktg. Group, Inc.*, 375 F. Supp. 2d 1040, 1045-
 21 46; 2005 U.S. Dist. LEXIS 17147; 10 A.L.R.6th 681 (E.D. Wash. 2005)

22 There are further distinctions besides the fact that the Omega court was construing a
 23 different statute. In Omega, the only violation of CAN SPAM before the Court was a very
 24 specific inaccuracy in an email header that the Omega Court ruled was not "materially false or
 25 materially misleading." Defendants contend that the specific violations of the emails at issue in

² The Plaintiff is somewhat dismayed that the Defendant did not bring this ruling to the Court's attention, given that the Plaintiff's attorneys were made aware of the decision in the other action.

1 this matter are the same as those set forth in the other action, and should be treated the same as
2 the specific violation discussed in Omega, but they provide no basis for this contention, and they
3 are wrong. Obviously, the emails at issue in the present lawsuit are not the same as the emails at
4 issue in either the other action or Omega. In fact, the alleged violations are substantively
5 different than those set forth in Omega and in the other action. Of course, the Defendant has no
6 way of knowing that with any certainty, since discovery has yet to commence, and the Plaintiff
7 has yet to set forth all of the details of the specific violations of the emails that are at issue here.
8 Accordingly, the present case is readily distinguished not only from Omega, but also from the
9 other action based on the facts at issue in the specific emails, despite the Defendant's wholly
10 unsupported allegations to the contrary.

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12
13 Even if the Court ignores the facts that distinguish Omega from the present case, Omni
14 would still argue that the Fourth Circuit's holding in Omega should not be followed by this or
15 any other Court, because it is simply bad law.

16
17 While the Fourth Circuit correctly recognized that Congress created a national standard
18 for commercial email with the CAN-SPAM Act, Congress plainly did NOT intend to have this
19 standard apply in all areas governing commercial email. Congress explicitly stated:

20
21 IN GENERAL- This Act supersedes any statute, regulation, or rule of a State or political
22 subdivision of a State that expressly regulates the use of electronic mail to send commercial
23 messages, except to the extent that any such statute, regulation, or rule prohibits falsity or
deception in any portion of a commercial electronic mail message or information attached
thereto. 15 USC 7707(b)(1) (emphasis added).

1 The Omega Court simply ignored this language, and assumed that Congress intended that
2 the national standard created by the Act would apply in all areas governing commercial email.
3 However, it is clear that the Congress had no such intention. Rather, Congress specifically
4 preserved the authority for the States to promulgate statutes, regulations, and/or rules prohibiting
5 falsity or deception in any portion of a commercial electronic mail message or information
6 attached thereto. The legislative history is clear on this issue.

7 Thus, a State law requiring some or all commercial e-mail to carry specific types
8 of labels, or to follow a certain format or contain specified content, would be
9 preempted. By contrast, a state law prohibiting fraudulent or deceptive headers,
subject lines, or content in commercial e-mail would not be preempted...

10 Given the inherently interstate nature of e-mail communications, the Committee
11 believes that this bill's creation of one national standard is a proper exercise of the
12 Congress's power to regulate interstate commerce that is essential to resolving
13 significant harms from spam faced by American consumers, organizations, and
14 businesses throughout the United States. This is particularly true because, in
15 contrast to telephone numbers, e-mail addresses do not reveal the State where the
16 holder is located. As a result, a sender of e-mail has no easy way to determine
17 with which State law to comply. Statutes that prohibit fraud and deception in the
e-mail do not raise the same concern, because they target behavior that a
legitimate business trying to comply with relevant laws would not be engaging in
anyway. Sen. Rep. No. 108-102, at 21-22 (2003) (emphasis added).

18 Accordingly, there is really no question that Congress intended to allow the States wide
19 latitude in governing falsity and deception, and had no intention whatsoever of applying a
20 national standard over these consumer protection aspects of commercial email. For the Court to
21 eviscerate Washington's anti-spam statute, CEMA, in the face of this clear Congressional intent
22 would plainly frustrate the Congress' purpose in carefully carving out the exception for statutes,
23 regulations, and/or rules prohibiting falsity or deception to the general pre-emption rule provided
24 in the CAN SPAM Act.

1
2 **CONCLUSION**

3 Plaintiffs respectfully request that the Court deny the Defendant's Motion under FRCP
4 12(b)(6) and for a stay, and allow the case to proceed in due course.

5
6 **RESPECTFULLY SUBMITTED** this 12TH day of March, 2007.

7 /S/ Robert J. Siegel

8 Robert J. Siegel, WSBA #17312
9 Attorney for Plaintiffs

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11
12 **Certificate of Service**

13
14 I, hereby, certify that on March 12, 2007, I filed the attached pleading with this Court via
15 approved electronic filing, and served the following:
16 Attorneys for Defendants: Derek Newman, Newman & Newman.

17 i.Justice Law, PC

18 /s/ Robert J. Siegel

19 Attorneys for Plaintiffs.
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