

The Honorable John C. Coughenour

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

OMNI INNOVATIONS, LLC, a
Washington limited liability company, and
EMILY ABBEY,

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-JCC

**DEFENDANT'S RESPONSE TO
PLAINTIFF EMILY ABBEY'S
MOTION TO STRIKE NAME
FROM LAWSUIT**

Note for Motion Calendar:
January 4, 2008

I. INTRODUCTION

Defendants Ascentive, LLC and Adam Schran (together, "Defendants") oppose the Motion to Strike Name from Lawsuit (the "Motion") filed by Emily Abbey ("Abbey") (Dkt. #91). The Federal Rules of Civil Procedure bar Abbey from requesting a partial dismissal of the claims in this action; accordingly, this Court should deny Abbey's Motion in its entirety. In the alternative, the Court should dismiss Abbey's claims with prejudice. As a second alternative, if the Court decides to allow Abbey to withdraw her

1 claims without prejudice, thereby allowing her to re-file a lawsuit in which she claims she
 2 has no interest, it should require her to pay Defendants' reasonable attorneys' fees and
 3 costs incurred in defending this action.

4 5 **II. FACTS**

6 The emails attached to Abbey's Motion indicate she has some sort of fee
 7 agreement with her former counsel, and it is likely her agreement permitted her lawyer to
 8 name her as a plaintiff in this case despite her current protests. (Motion Ex. D ("once you
 9 are removed from the Ascentive case, our fee agreement is no longer effective").) There
 10 has been almost no discovery in this case, and Defendants have not had an opportunity to
 11 test the veracity of the alleged facts in Abbey's Motion.

12 Further, Defendants have had to spend considerable amounts of time and money
 13 defending themselves in this lawsuit since it was filed in September 2006. If Abbey is
 14 dismissed from the case, Plaintiffs may re-file their Motion for Change of Venue, based
 15 on the absence of a plaintiff who resides in this judicial district. (See Dkt. # 86.) If
 16 Abbey is dismissed as a party, Defendants' ability to conduct discovery regarding her
 17 involvement in this lawsuit will be limited. Abbey's dismissal would cause Defendants
 18 to suffer considerable prejudice. This Court should deny the relief she requests in the
 19 Motion.

20 21 **III. ARGUMENT**

22 **A. The Federal Rules of Civil Procedure Prohibit a Partial Dismissal of the** 23 **Sort Abbey Requests in Her Motion**

24 FED.R.CIV.P. 41(a)(1)(A) provides as follows:

25 (a) Voluntary Dismissal.

26 (1) By the Plaintiff.

27 (A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2,
 28 and 66 and any applicable federal statute, the plaintiff may dismiss

1 an action without a court order by filing:
2 (i) a notice of dismissal before the opposing party serves either an
3 answer or a motion for summary judgment; or
4 (ii) a stipulation of dismissal signed by all parties who have
5 appeared.

6 Id. (emphasis added). Defendants have filed an answer; consequently, Abbey cannot
7 dismiss this action without a court order.

8 Further, Abbey may not dismiss her own claims even with a court order unless
9 that order disposes of all claims in this action, not just those brought by Abbey.
10 FED.R.CIV.P. 41(a)(1)(B) provides that “an action may be dismissed at the plaintiff’s
11 request only by court order, on terms that the court considers proper”. The rule speaks to
12 the dismissal of an action in its entirety, not just one party’s claims within an action; it
13 does not apply to the dismissal of fewer than all claims in a lawsuit. See Gobbo Farms &
14 Orchards v. Poole Chem. Co., 81 F.3d 122, 123 (10th Cir. 1996)(“Gobbo offers no
15 authority, and we have found none, to support its contention that Rule 41(a) applies to
16 dismissal of less than all claims in an action”); Smith, Kline & French Laboratories v A.
17 H. Robins Co. 61 F.R.D. 24, 29, 181 USPQ 12 (E.D.Pa. 1973) (“when Rule 41(a) refers
18 to dismissal of an ‘action’, there is no reason to suppose that the term is intended to
19 include the separate claims which make up an action”). Since this lawsuit involves more
20 than one plaintiff, the action will not be dismissed in its entirety even if this Court grants
21 Abbey’s Motion. Consequently, granting the Motion would violate the terms of
22 FED.R.CIV.P. 41(a)(1)(B).

23 Contrary to Abbey’s assertions, Defendants will suffer considerable prejudice if
24 Abbey is allowed to dismiss her claims without prejudice and without payment of
25 Defendants’ reasonable attorneys’ fees and costs. Defendants have had to incur
26 significant costs in defending this lawsuit since Plaintiffs initiated it in September 2006.
27 Defendants will still be defending this lawsuit even if Abbey is permitted to withdraw her
28 claims. They may even face another motion for change of venue to the Eastern District of
Washington – based on Abbey’s withdrawal – when the Court lifts the current stay of

proceedings. Defendants' discovery regarding Abbey will also be considerably restricted if she is no longer a party.

Given the prejudice Defendants will face if this Court permits Abbey to withdraw without prejudice and without payment of Defendants' fees, this Court should deny Abbey's Motion. *See United States ex rel. Doe v Dow Chem. Co.*, 343 F.3d 325, 330 (5th Cir. 2003) (district court properly denied motion for voluntary dismissal under FED.R.CIV.P. 41(a)(2) where motion was filed nine months after filing suit, and both sides had filed responsive pleadings and motions).

B. This Court Should Either Dismiss Abbey's Claims With Prejudice or Condition Her Dismissal on An Award of Fees and Costs to Defendants

If a dismissal is without prejudice to the plaintiff, the later it is granted the more likely it is to harm the defendant by subjecting him to the potential of additional litigation expenses. *See, e.g., Williams v. Ford Motor Credit Co.*, 627 F.2d 158, 160 (8th Cir. 1980) (district court abused its discretion by granting dismissal at end of trial, thereby subjecting the defendant to greater litigation expense). If this Court is inclined to dismiss Abbey's claims fifteen (15) months after this lawsuit commenced, then it should dismiss her case with prejudice to prevent Abbey from subjecting Defendants to further litigation costs, should she re-file later.

Alternatively, the Court should require Abbey to pay Defendants' reasonable attorneys' fees and costs incurred in defending this action. This Court has the discretion to condition dismissal under FED.R.CIV.P. 41(a)(2) on an award of costs and attorney's fees to Defendants. *Mercer Tool Corp. v Friedr. Dick GmbH*, 175 F.R.D. 173, 176 (E.D.N.Y. 1997); *see also Anderberg v Masonite Corp.*, 176 F.R.D. 682, 687 (N.D.Ga. 1997) (court may cure prejudice to defendant by conditioning dismissal on moving party's payment of costs and expenses borne by other party in action).

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IV. CONCLUSION

This Court should deny Abbey's Motion, dismiss Abbey's claims with prejudice or require her to pay Defendants' reasonable attorneys' fees and costs incurred in defending this action.

DATED this 31st day of December, 2007.

**NEWMAN & NEWMAN,
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By: _____

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