

ELECTRONICALLY FILED
10/21/2025 2:52 PM
Heidi Percy
County Clerk
Snohomish County, WASH
Case Number: 25-2-10647-31

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF SNOHOMISH

COLBY HUTTON, on his own behalf and on
behalf of others similarly situated,

Plaintiff,

vs.

O5 BNG, LLC,

Defendant.

25-2-10647-31

Case No.: _____

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Colby Hutton, on his own behalf and on behalf of others similarly situated, on information and belief except to his own experiences and matters of public record, complains of Defendant O5 BNG, LLC, as follows:

I. INTRODUCTION

1. In 1998, to protect Washington consumers from the annoyance and harassment caused by the burgeoning spam email industry, the Washington State Legislature enacted the Commercial Electronic Mail Act (CEMA), codified at chapter 190 of title 19 of the Revised Code of Washington (RCW).

2. Among other things, CEMA prohibits transmitting a commercial email to a Washington resident’s email address that “[c]ontains false or misleading information in the subject line.” RCW 19.190.020(1)(b).

1 3. Defendant O5 BNG, LLC, (“O5”) does just what CEMA prohibits.

2 4. O5 markets and sells clothing under the “Quiksilver” brand, which it licenses from
3 the license owner, Authentic Brands Group, LLC.

4 5. Though O5 has held the Quiksilver license for less than a year and has been sending
5 Quiksilver marketing emails for around six months, its email marketing tactics are off to an
6 unpromising start, showing multiple violations of CEMA’s prohibitions already.

7 6. O5 bombards Washington consumers, including Plaintiff, with commercial emails
8 whose subject lines employ various tactics to create a false sense of urgency in consumers’
9 minds—and ultimately, from consumers’ wallets.

10 7. This false urgency wastes consumers’ time by enticing them to engage with O5’s
11 marketing for fear of missing out and chokes consumers’ email inboxes with repeated false
12 notifications that the time to act—*i.e., purchase*—is short.

13 8. And through this deceptive time-sensitivity, O5 falsely narrows the field—steering
14 consumers away from shopping for better deals—to its own products that must be purchased *now*.

15 9. Plaintiff challenges O5’s harassment of Washington consumers with deceptive
16 marketing for violations of the Commercial Electronic Mail Act (RCW 19.190.020) and the
17 Consumer Protection Act (RCW 19.86.020) for injuries caused, additionally seeking injunctive
18 relief against such violations in the future.

19 **II. JURISDICTION AND VENUE**

20 10. The Court has jurisdiction of this case under RCW 2.08.010.

21 11. Venue is proper in Snohomish County under RCW 4.12.020(3) because Plaintiff’s
22 cause of action or some part of it arose in Snohomish County.

1 **III. PARTIES**

2 12. Plaintiff Colby Hutton is a resident of Snohomish County, Washington.

3 13. Defendant O5 BNG, LLC, is a limited liability company formed under the laws of
4 Delaware with its principal place of business at 31 W. 34th St., New York, NY 10001.

5 **IV. FACTUAL ALLEGATIONS**

6 **A. CEMA protects Washington consumers from deceptive spam emails.**

7 14. The Supreme Court of Washington has made clear: “[A]ll Internet users ... bear the
8 cost of deceptive spam.” *State v. Heckel*, 143 Wn. 2d 824, 835 (2001) (en banc).

9 15. In 1998, the Legislature found that the “volume of commercial electronic mail” was
10 “growing,” generating an “increasing number of consumer complaints.” Laws of 1998, ch. 149,
11 § 1.

12 16. In the nearly three decades since, the problems caused by unsolicited commercial
13 email, *i.e.* spam email, have grown exponentially.

14 17. And the problems are not limited to email content. Subject lines of emails are
15 framed to attract consumers’ attention away from the spam barrage to a message that entices
16 consumers to click and, ultimately, *purchase*.

17 18. In 2003, the United States Congress found that “[m]any senders of unsolicited
18 commercial electronic mail purposefully include misleading information in the messages’ subject
19 lines in order to induce the recipients to view the messages.” 15 U.S.C. § 7701(a)(8).

20 19. In 2012, one study estimated that Americans bear “costs of almost \$20 billion
21 annually” due to unsolicited commercial email. Justin M. Rao & David H. Reiley, *The Economics*
22 *of Spam*, 26 J. of Econ. Perspectives 87, 88 (2012).

23 20. Even when bulk commercial email marketers are operating under color of consumer
24

1 consent, the reality is that “[m]ost privacy consent”—especially under the “notice-and-choice”
2 approach predominant in the United States—“is a fiction.” Daniel J. Solove, *Murky Consent: An*
3 *Approach to the Fictions of Consent in Privacy Law*, 104 Boston Univ. L. Rev. 593, 596 (2024).

4 21. Consumers therefore routinely “consent” to receive flurries of commercial emails
5 which they did not meaningfully request and in which they have no genuine interest.

6 22. This includes emails sent to consumers from businesses with which they have no
7 prior relationship—by virtue of commercial data brokers and commercial data sharing agreements.

8 23. Simply conducting the routine affairs of daily life often exposes consumers to
9 unanticipated and unwanted volumes of commercial email. “Nowadays, you need an email address
10 for everything from opening a bank account to getting your dog’s nails trimmed, and ... [o]nce
11 you hand over your email address, companies often use it as an all-access pass to your inbox:
12 Think of shopping websites that send account updates, deals, ‘we miss you’ messages, and holiday
13 promotions throughout the year. It’s too much.” Kaitlyn Wells, *Email Unsubscribe Services Don’t*
14 *Really Work*, N.Y. Times Wirecutter (Aug. 19, 2024), <https://perma.cc/U8S6-R8RU/>.

15 24. The Legislature presciently intended CEMA to “provide some immediate relief”
16 for these problems by prohibiting among other things commercial emails that “contain untrue or
17 misleading information in the subject line.” Laws of 1998, ch. 149, § 1.

18 25. CEMA thereby protects Washington consumers against the “harms resulting from
19 deceptive commercial e-mails,” which “resemble the type of harms remedied by nuisance or fraud
20 actions.” *Harbers v. Eddie Bauer, LLC*, 415 F. Supp. 3d 999, 1008 (W.D. Wash. 2019).

21 26. CEMA’s “truthfulness requirements” increase the costs of sending deceptive
22 commercial emails and thereby reduce their volume. *Heckel*, 143 Wn. 2d at 836.

23 27. CEMA’s “truthfulness requirements” thereby advance the statute’s aim of
24

1 protecting consumers “from the problems associated with commercial bulk e-mail” while
2 facilitating commerce “by eliminating fraud and deception.” *Id.*

3 28. CEMA “mean[s] exactly what it says”: in “broad” but “patently clear” language,
4 CEMA unambiguously prohibits “sending Washington residents commercial e-mails that
5 contain *any* false or misleading information in the subject lines of such e-mails.” *Certification from*
6 *U.S. Dist. Ct. for W. Dist. of Wash. in Brown v. Old Navy, LLC*, 567 P.3d 38, 44, 46–47 (Wash.
7 2025).

8 29. CEMA’s protections do not depend on whether any email was (really or fictively)
9 solicited by consumers, nor on whether consumers relied on any false or misleading statement
10 contained in its subject line. *See Harbers*, 415 F. Supp. 3d at 1011.

11 30. The statute’s only concern is to suppress false or misleading information in the
12 subject line of commercial emails. *See Brown*, 567 P.3d at 44–45.

13 **B. The subject lines of O5’s marketing emails make false time scarcity claims.**

14 31. One common way online marketers “manipulate consumer choice by inducing false
15 beliefs” is to create a false sense of urgency or to falsely claim that consumers’ time to act is scarce.
16 Fed. Trade Comm’n, *Bringing Dark Patterns to Light* 4 (2022), <https://perma.cc/847M-EY69/>; *see*
17 *also* U.K. Competition & Mkts. Auth., *Online Choice Architecture—How Digital Design Can*
18 *Harm Competition and Consumers* 26 (2022), <https://perma.cc/V848-7TVV/>.

19 32. The FTC has identified the “False Limited Time Message” as one example of false
20 time scarcity claims, in which the marketer creates “pressure to buy immediately by saying the
21 offer is good only for a limited time or that the deal ends soon—but without a deadline or with a
22 meaningless deadline that just resets when reached.” *Bringing Dark Patterns to Light*, *supra*
23 para. 31, at 22.

1 33. “False or misleading scarcity claims can change the behaviour of consumers.”
2 *Online Choice Architecture*, *supra* para. 31, at 27.

3 34. Representations about the timing and duration of sales, discounts, and other special
4 offers are fundamentally representations about prices, and such representations matter to ordinary
5 consumers. *See, e.g.,* Huiliang Zhao *et al.*, *Impact of Pricing and Product Information on*
6 *Consumer Buying Behavior with Customer Satisfaction in a Mediating Role*, 12 *Frontiers in*
7 *Psychology* 720151 (2021), available at
8 <https://pmc.ncbi.nlm.nih.gov/articles/PMC8710754/pdf/fpsyg-12-720151.pdf/>.

9 35. False scarcity claims are psychologically effective. As “considerable evidence”
10 suggests, “consumers react to scarcity and divert their attention to information where they might
11 miss opportunities.” *Online Choice Architecture*, *supra* para. 31, at 26.

12 36. Invoking this time pressure achieves a seller’s aim to narrow the field of
13 competitive products and deals, by “induc[ing] consumers to rely on heuristics (mental shortcuts),
14 like limiting focus to a restricted set of attributes or deciding based on habit.” *Id.*

15 37. Under time pressure, “consumers might take up an offer to minimise the uncertainty
16 of passing it up.” *Id.*

17 38. False time scarcity claims thus *harm consumers* by manipulatively distorting their
18 decision-making to *their detriment—and the seller’s benefit*.

19 39. Indeed, one 2019 study found that “customers who took timed deals rather than
20 waiting to see wider options ended up worse off than those who waited.” *Id.* at 27.

21 40. False time scarcity claims also harm market competition. Consumers learn to ignore
22 scarcity claims, “meaning that when a product [or offer] is truly scarce, the seller will not be able
23 to credibly communicate this information.” *Id.*

1 41. False time scarcity claims are a staple of O5’s marketing emails.

2 42. For example, on May 22, 2025, O5 sent consumers a mass email announcing a 30
3 percent off “Memorial Day Sale.”

4 43. On May 26, O5 sent consumers a mass email with the subject line, “Last Call: Save
5 Up to 30% Ends Tonight”.

6 44. The representation contained in the subject line of the May 26 email was false. As
7 the fine print of both the May 22 and May 26 emails reveal, O5 intended to and did run the
8 Memorial Day Sale until the early morning hours, Eastern Daylight Time, of May 28.

9 45. The next day, May 27, O5 sent consumers a mass email with the subject line,
10 “Memorial Day Sale Extended By Popular Demand 🔥”.

11 46. As already demonstrated, however, the sale was not “extended”; O5 always
12 intended to and did run the sale until the early morning, Eastern Daylight Time, of May 28.

13 47. For another example, on July 1, 2025, O5 sent consumers a mass email announcing
14 a 20 percent off sale with use of the code “WAVES20.”

15 48. On July 6, O5 sent consumers a mass email with the subject line, “Last Call: 20%
16 Off Ends Tonight”.

17 49. The representation contained in the subject line of the July 6 email was false. As
18 the fine print of both the July 1 and July 6 emails reveal, O5 intended to and did run the WAVES20
19 sale until the early morning hours, Eastern Daylight Time, of July 8.

20 50. The next day, July 7, O5 sent consumers a mass email with the subject line, “Our
21 Sale Is Back For One More Day!”

22 51. For another example, on August 28, 2025, O5 sent consumers a mass email with
23 the subject line, “Up To 20% Off Starts Now!”, billed as a Labor Day “long weekend” event.
24

1 52. This sale was further promoted by additional mass emails sent on August 28,
2 August 30, and August 31.

3 53. On September 1, 2025, O5 sent consumers a mass email with the subject line,
4 “LAST DAY: Save Up To 20% Off Including Markdowns”.

5 54. The representation contained in the subject line of the September 1 email was false.
6 As the fine print of previous emails reveals, and as a subsequent email confirms, O5 always
7 intended to and did run the sale until “September 2, 2025, at 11:59 p.m. PST / September 3, 2025,
8 at 2:59 a.m. EST.”

9 55. On cue, on September 2, O5 sent consumers a mass email with the subject line,
10 “We Extended Our Long Weekend Event!”, confirming that the 20 percent off sale would be
11 available until the end of that day—as O5 had always intended.

12 56. These examples of O5’s commercial emails whose subject lines contain false or
13 misleading statements are attached to this Class Action Complaint as Exhibit A.

14 **C. O5 knows when it sends emails to Washington residents.**

15 57. A sophisticated commercial enterprise, like O5, who is engaged in persistent
16 marketing through mass email campaigns across the United States, has several ways of knowing
17 where the recipients of its marketing emails are located. The means it employs are peculiarly with
18 its knowledge.

19 58. First, the sheer volume of O5’s email marketing put it on notice that Washington
20 residents would receive its emails. Since taking over the reins of Quiksilver marketing in late
21 March 2025, O5 has been blasting out marketing emails at a rate averaging a little under one per
22 day.

23 59. Second, O5 may obtain location information tied to email addresses when
24

1 consumers make purchases from O5 through digital platforms, including the Quiksilver website,
2 or otherwise self-report such information to O5.

3 60. Third, O5 may obtain location information tied to email addresses by tracking the
4 IP addresses of devices used to open O5's emails, which in turn can be correlated to physical
5 location (as illustrated, for example, by the website <https://whatismyipaddress.com/>).

6 61. Specifically, O5 appears to use Klaviyo to manage its email marketing campaigns.
7 Klaviyo tells O5 where the recipients of its marketing emails are located using IP geolocation and
8 other data extracted from recipients' interactions with O5, which Klaviyo tracks in detail. *See*
9 "Understanding when and how Klaviyo sets a profile's location," Klaviyo (July 7, 2025)
10 (describing "how a profile's location and timezone information are set and updated"),
11 <https://help.klaviyo.com/hc/en-us/articles/115005073907/>; "Understanding profiles in Klaviyo,"
12 Klaviyo (Aug. 5, 2025) ("Each individual profile features an activity log to capture a timeline of
13 their interactions with your business," including receiving emails, opening emails, and clicking
14 links within emails.), <https://help.klaviyo.com/hc/en-us/articles/115005247088/>.

15 62. Fourth, O5 may obtain location information tied to email addresses by purchasing
16 consumer data from commercial data brokers such as Acxiom, Oracle, and Equifax, which sell
17 access to databases linking email addresses to physical locations, among other identifiers.

18 63. Fifth, O5 may obtain location information tied to email addresses by using "identity
19 resolution" services offered by companies such as LiveRamp, which can connect consumers' email
20 addresses to their physical locations, among other identifiers.

21 64. Sixth, O5 may obtain information that the recipients of its marketing emails are
22 Washington residents because that information is available, upon request, from the registrant of
23 the Internet domain names contained in the recipients' email addresses. *See* RCW 19.190.020(2).

1 65. It is thus highly probable that a seller of O5’s size and sophistication employs not
2 just one but several means of tying consumers’ email addresses to their physical locations, at least
3 at the state level.

4 **D. O5 violated Plaintiff’s right under CEMA to be free from deceptive**
5 **commercial emails.**

6 66. O5 has bombarded Plaintiff with commercial emails whose subject lines contain
7 false or misleading statements in violation of his right to be free from such annoyance and
8 harassment under CEMA.

9 67. For example, on July 6, 2025, at 11:02 a.m., Plaintiff received O5’s July 6 “Last
10 Call: 20% Off Ends Tonight” email described in paragraph 45 above.

11 68. The subject lines of these emails are false or misleading in violation of CEMA as
12 further described in paragraphs 31–53.

13 69. These subject lines contained false statements of fact as to the “duration or
14 availability of a promotion.” *Brown*, 567 P.3d at 47.

15 **V. CLASS ALLEGATIONS**

16 70. Plaintiff brings this action under Civil Rule 23 on behalf of the following putative
17 class (“Class”):

18 All Washington citizens holding an email address to which
19 Defendant sent or caused to be sent any email listed in Exhibit A
20 during the Class Period.

21 71. Excluded from this definition of the Class are Defendant’s officers, directors, and
22 employees; Defendant’s parents, subsidiaries, affiliates, and any entity in which Defendant has a
23 controlling interest; undersigned counsel for Plaintiff; and all judges and court staff to whom this
24

1 action may be assigned, as well as their immediate family members.

2 72. The Class Period extends from the date four years before this Class Action
3 Complaint is filed to the date a class certification order is entered in this action.

4 73. Plaintiff reserves the right to amend the Class definition as discovery reveals
5 additional emails containing false or misleading information in the subject line that Defendant sent
6 or caused to be sent during the Class Period to email addresses held by Washington residents.

7 74. The Class is so numerous that joinder of all members is impracticable because the
8 Class is estimated to minimally contain thousands of members.

9 75. There are questions of law or fact common to the class, including without limitation
10 whether Defendant sent commercial emails containing false or misleading information in the
11 subject line; whether Defendant sent such emails to email addresses it knew or had to reason to
12 know were held by Washington residents; whether Defendant's conduct violated CEMA; whether
13 Defendant's violation of CEMA constituted a *per se* violation of the Consumer Protection Act,
14 RCW 19.86.020 (CPA); and whether Defendant should be enjoined from such conduct.

15 76. Plaintiff's claims are typical of the Class's because, among other reasons, Plaintiff
16 and Class members share the same statutory rights under CEMA and the CPA, which Defendant
17 violated in the same way by the uniform false or misleading marketing messages it sent to all
18 putative members.

19 77. Plaintiff will fairly and adequately protect the Class's interests because, among
20 other reasons, Plaintiff shares the Class's interest in avoiding unlawful false or misleading
21 marketing; has no interest adverse to the Class; and has retained competent counsel extensively
22 experienced in consumer protection and class action litigation.

23 78. Defendant has acted on grounds generally applicable to the Class, in that, among
24

1 other ways, it engaged in the uniform conduct of sending uniform commercial emails to Plaintiff
2 and the Class, which violate CEMA and the CPA in the same way, and from which it may be
3 enjoined as to Plaintiff and all Class members, thereby making appropriate final injunctive relief
4 with respect to the Class as a whole.

5 79. The questions of law or fact common to the members of the Class predominate over
6 any questions affecting only individual members, in that, among other ways, Defendant has
7 violated their rights under the same laws by the same conduct, and the only matters for individual
8 determination are the number of false or misleading emails received by each Class member and
9 that Class member’s resulting damages.

10 80. A class action is superior to other available methods for the fair and efficient
11 adjudication of the controversy because, among other reasons, the claims at issue may be too small
12 to justify individual litigation and management of this action on as a class presents no special
13 difficulties.

14 **VI. CLAIMS TO RELIEF**

15 **First Claim to Relief**

16 **Violation of the Commercial Electronic Mail Act, RCW 19.190.020**

17 81. Plaintiff incorporates and realleges paragraphs 1–69 above.

18 82. CEMA provides that “[n]o person may initiate the transmission, conspire with
19 another to initiate the transmission, or assist the transmission, of a commercial electronic mail
20 message ... to an electronic mail address that the sender knows, or has reason to know, is held by
21 a Washington resident that ... [c]ontains false or misleading information in the subject line.”
22 RCW 19.190.020(1)(b).

23 83. Defendant is a “person” within the meaning of CEMA. RCW 19.190.010(11).

1 84. Defendant initiated the transmission, conspired with another to initiate the
2 transmission, or assisted the transition of “commercial electronic mail messages” within the
3 meaning of CEMA. RCW 19.190.010(2).

4 85. Defendant initiated the transmission, conspired with another to initiate the
5 transmission, or assisted the transmission of such messages to electronic mail addresses that
6 Defendant knew, or had reason to know, were held by Washington residents, including because
7 Defendant knew that Plaintiff and putative members were Washington residents through
8 “information is available, upon request, from the registrant of the internet domain name contained
9 in the recipient’s electronic mail address”. RCW 19.190.020(b)(2).

10 86. Defendant initiated the transmission, conspired with another to initiate the
11 transmission, or assisted the transmission of such messages that contained false or misleading
12 information in the subject line, as described herein, in violation of CEMA. RCW 19.190.020(1)(b).

13 87. For Defendant’s violation of CEMA, Plaintiff is entitled to all available relief,
14 including an injunction against further violations.

15 **Second Claim to Relief**

16 **Violation of the Consumer Protection Act, RCW 19.86.020**

17 88. Plaintiff incorporates and realleges paragraphs 1–69 above.

18 89. The CPA provides that “[u]nfair methods of competition and unfair or deceptive
19 acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”
20 RCW 19.86.020.

21 90. A violation of CEMA is a *per se* violation of the CPA. RCW 19.190.030.

22 91. A violation of CEMA establishes all the elements necessary to bring a private action
23 under the CPA. *Wright v. Lyft*, 189 Wn. 2d 718 (2017).

1 92. CEMA provides that “[n]o person may initiate the transmission, conspire with
2 another to initiate the transmission, or assist the transmission, of a commercial electronic mail
3 message ... to an electronic mail address that the sender knows, or has reason to know, is held by
4 a Washington resident that ... [c]ontains false or misleading information in the subject line.”
5 RCW 19.190.020(1)(b).

6 93. Defendant is a “person” within the meaning of CEMA. RCW 19.190.010(11).

7 94. Defendant initiated the transmission, conspired with another to initiate the
8 transmission, or assisted the transition of “commercial electronic mail messages” within the
9 meaning of CEMA. RCW 19.190.010(2).

10 95. Defendant initiated the transmission, conspired with another to initiate the
11 transmission, or assisted the transmission of such messages to electronic mail addresses that
12 Defendant knew, or had reason to know, were held by Washington residents.

13 96. Defendant initiated the transmission, conspired with another to initiate the
14 transmission, or assisted the transmission of such messages that contained false or misleading
15 information in the subject line, as described herein, in violation of CEMA. RCW 19.190.020(1)(b).

16 97. For Defendant’s violation of the CPA, Plaintiff and putative members are entitled
17 to an injunction against further violations; the greater of Plaintiff’s actual damages or liquidated
18 damages of \$500 per violation, trebled; and costs of the suit, including a reasonable attorney’s fee.

19 **VII. JURY DEMAND**

20 98. Plaintiff will demand a jury trial by separate document in accordance with Local
21 Civil Rule 38(b).

22 **VIII. PRAYER FOR RELIEF**

23 Plaintiff asks that the Court:
24

1 DATE: October 21, 2025

Respectfully submitted,

2 /s/ Samuel J. Strauss

3 Samuel J. Strauss, WSBA No. #46971

4 Raina C. Borrelli*

STRAUSS BORRELLI PLLC

980 N. Michigan Avenue, Suite 1610

Chicago, IL 60611

5 Tel.: (872) 263-1100

sam@straussborrelli.com

6 raina@straussborrelli.com

7 Lynn A. Toops*

8 Natalie A. Lyons*

Ian R. Bensberg*

COHENMALAD, LLP

One Indiana Square, Suite 1400

Indianapolis, IN 46204

10 Tel.: (317) 636-6481

ltoops@cohenmalad.com

11 ibensberg@cohenmalad.com

12 Gerard J. Stranch, IV*

13 Michael C. Tackeff*

STRANCH, JENNINGS &

GARVEY, PLLC

14 223 Rosa L. Parks Avenue, Suite 200

Nashville, TN 37203

15 Tel.: (615) 254-8801

gstranch@stranchlaw.com

16 mtackeff@stranchlaw.com

17 *Attorneys for Plaintiff*

18 *** Applications for admission *pro hac***
19 ***vice* forthcoming**