

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
26
27
28

MERKLE SIEGEL & FRIEDRICHSEN,
P.C.
1325 Fourth Ave., Suite 940
Seattle, Washington 98101-2509
Phone (206)-624-9392
Fax (206) 624-0717

THE HONORABLE
JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

**JAMES S. GORDON, Jr., a married
individual, d/b/a
'GORDONWORKS.COM';**

Plaintiff,

v.

**VIRTUMUNDO, INC, a Delaware
corporation, d/b/a
ADNOWLEDGEMAIL.COM;
ADKNOWLEDGE, INC., a Delaware
corporation, d/b/a
ADKNOWLEDGEMAIL.COM;
SCOTT LYNN, an individual; and
JOHN DOES, I-X,**

Defendants,

NO. CV06-0204JCC

**PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS**

**[Hearing Noted Without Oral Argument for
April 7, 2006]**

[JURY DEMANDED]

Plaintiff James S. Gordon, Jr., by and through his attorney of record, responds to Defendants'

Motion To Dismiss as follows:

PLAINTIFF'S RESPONSE IN
OPPOSITION TO
12 (b)(2) MOTION TO DISMISS -1
GORDON v. VIRTUMUNDO, INC., ET
AL

I. Introduction

Defendants seek to dismiss Plaintiff’s Complaint against them, claiming lack of personal jurisdiction pursuant to CR 12(b)(2). Plaintiff asserts that personal jurisdiction clearly attaches to Defendant in the State of Washington. To hold differently would effectively eviscerate the Washington CEMA (RCW 19.190 et seq.) by preventing Washington citizens as well as the State Attorney General from applying the State’s anti-spam laws to out-of-state spammers, such as Defendant here.

This case illustrates the evolving nature of the law of personal jurisdiction in response to new developments in technology. The trend in recent years has become quite clear, indicating that courts around the country, and in particular Washington courts, both state and federal, have been holding in favor of personal jurisdiction in cases involving contacts, including commercial emails, via the internet. (See Declaration of Robert J. Siegel and decisions attached thereto, including: two decisions by this Court, Judge Thomas Zilly at Exhibit “A”; two recent decisions from the U.S. Eastern District court of Washington at Exhibit “B”; a motion and decision from the Washington Superior Court For King County, Judge Hilyer, denying a similar motion to dismiss by this same Defendant, Virtumundo, as Exhibit “C”). Defendants’ arguments are wholly without merit.

Facts

(For a complete statement of the facts discussed herein *See Subjoined Declaration of James S. Gordon, Jr.*)

On September 8, 2003, Plaintiff Gordon received a commercial email from Defendant Virtumundo with the subject line “NFL Sunday Ticket and 4 Free Months of DirecTV”

1 purportedly advertising satellite television subscriptions for sale over the internet, and
2 containing, in fine print, the misrepresentation that “You received this email because you signed
3 up at one of Virtumundo’s websites...”, an allegation that Plaintiff wholly denies. This email
4 was sent to his “james@gordonworks.com” email address, at his domain Gordonworks.com.

5 Mr. Gordon, as he routinely does, replied to the email and informed Defendants that he
6 was a Washington State resident, and to cease and desist sending any further email.

7
8 Subsequently, and incredibly, Mr. Gordon received over 6,000 more emails from Defendants at
9 this email address, transmitted to and through his interactive computer service, and through his
10 LLC’s domain server. (Mr. Gordon’s LLC, Omni Innovations, LLC has been added as a party
11 plaintiff to this lawsuit by the filing of a First Amended Complaint concurrently herewith, a copy
12 of which is attached to the subjoined Declaration of Robert J. Siegel).

13
14 Many of the offending emails contained a statement claiming that he had “subscribed” to
15 receive commercial email, and that if he did nothing further, he would begin receiving more
16 commercial email from Virtumundo. In response, Mr. Gordon sent an email to Virtumundo,
17 informing it that he was a Washington State resident, that the email was in violation of RCW
18 19.190 and RCW 19.86, and requested that Virtumundo cease and desist sending all email, either
19 sent by Virtumundo or by anyone else on its behalf. The email also included a list of all email
20 addresses owned by Mr. Gordon, and specified that if Virtumundo continued sending him email,
21 it agreed to submit itself to the jurisdiction and venue of the courts of Washington. This email
22 did not “bounce,” indicating that Virtumundo received the email.

23
24 Mr. Gordon subsequently sent numerous other cease and desist emails to Virtumundo,
25 including the same message, literally thousands of times! Despite the repeated notices and

1 warnings sent to Defendants, instead of ceasing and desisting its commercial email campaign to
2 Mr. Gordon as he requested, Virtumundo continued to send email after email to him, advertising
3 a wide array of products and services. *See Declaration of James Gordon.* The notices sent by
4 Mr. Gordon to Defendants were much clearer and specific than would be a questionable request
5 to “unsubscribe”¹.
6

7 After his numerous attempts failed to stop the flow of unsolicited email from Defendants,
8 Mr. Gordon served Defendants with this lawsuit.

9 As is apparent from the declarations submitted in support of Defendants’ Motion, and
10 notwithstanding the objectionable nature of same, Defendants admit to selling goods and services
11 through commercial email transmitted through the internet, and nowhere do they flatly deny that
12 Plaintiff received the emails in question from them. Nonetheless, Defendants make the untenable
13 claim that they have not subjected themselves to the jurisdiction of the Washington courts
14 because they do not have the requisite “minimal contacts” with this State, and/or “purposeful
15 availment” on their behalf cannot be established. Plaintiff submits that, in light of the well-
16 established law in this area, as set forth below, such a position is specious, and borders on the
17 frivolous!
18

19 **II. Argument and Authority**

20 **A. The Court Should Consider Only Plaintiff’s Factual Allegations.**

21 When a district court acts on a defendant's motion to dismiss under Rule 12(b)(2) without
22 holding an evidentiary hearing, the plaintiff need make only a prima facie showing of
23

24 ¹ Plaintiff notes that the use of the term “unsubscribe” implies that he “subscribed” to receive
25 unlawful email in the first place, which Mr. Gordon categorically denies having done.

1 jurisdictional facts to withstand the motion to dismiss. Ballard v. Savage, et al., 65 F.3d 1495
2 (1995). “[T]he plaintiff need only demonstrate facts that if true would support jurisdiction over
3 the defendant.” Id., citing Data Disc, Inc. v. Systems Technology Assos., 557 F.2d 1280, 1285
4 (9th Cir. 1977). The facts are viewed in the light most favorable to the Plaintiffs. Compuserve
5 Inc. v Patterson, 89 F.3d 1257, 1262, (6th Cir. 1996), citing Theunissen v. Matthews, 935 F.2d
6 1454, 1458 (6th Cir. 1991). “Furthermore, a ‘court disposing of a 12(b)(2) motion *does not*
7 *weigh* the controverting assertions of the party seeking dismissal,’ ... because we want ‘to
8 prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an
9 affidavit denying all jurisdictional facts.’ Id. at 1459 (emphasis added). Dismissal in this
10 procedural posture is proper only if *all* the specific facts which the plaintiff alleges collectively
11 fail to state a prima facie case for jurisdiction. Id. Unless directly controverted, the plaintiff’s
12 version of the facts is taken as true. Doe v. Unocal, Corp., 248 F. 3d 915, 922 (9th Cir. 2001).
13 Conflicts in the evidence set forth in the parties’ affidavits must be resolved in the plaintiff’s
14 favor. Id. Here, Plaintiff has clearly met his burden, and Defendant’s Motion should be
15 dismissed.
16
17

18 **B. The Statements Of Defendants’ Corporate Counsel Should Be Stricken**

19 **And/Or Ignored.** It likely has not gone unnoticed by the Court that the only sworn
20 statements submitted on behalf of both defendants are not from corporate officers, but rather from
21 their respective corporate counsel, Messrs. Geroe and Brandt. Notwithstanding the highly
22 unusual, and unreliable nature of such testimony, the Court should take particular notice of the
23 fact that nowhere in the Defendants’ brief (nor in the sworn statement of Defendant Virtumundo’s
24 corporate counsel) does the Defendant ever deny sending spam to Mr. Gordon. This omission is

1 particularly telling given the fact that the entire basis of the Plaintiff's complaint is the allegation
2 that the Defendant sent thousands of unsolicited, and otherwise unlawful emails to Mr. Gordon.
3 Instead, the Defendant's counsel simply ignores the issue, essentially arguing that "there was no
4 intentional contact by Defendant with anyone in Washington State", and that they, Defendants,
5 intentionally don't target Washington residents (while claiming they can't ascertain the actual
6 location of the email addresses they regularly send commercial emails to), as if the thousands of
7 Defendant's illegal spams were not "contacts", and were not "intentional".
8

9 As this Court is well aware, intent has nothing to do with the issue, and is nowhere
10 required in order to violate the Washington CEMA. The sworn testimony of the Defendant's
11 corporate counsel is also glaringly equivocal, admitting that a certain amount of their revenue is
12 indeed derived from transactions/sales in Washington, while disingenuously attempting to
13 minimize that admission by stating an unsupported, and uncertified revenue figure completely out
14 of context, i.e., the actual dollar amounts derived from Washington transactions. Thus, we have
15 no way to know just how many dollars .04%, and .16% of Defendants' revenue these percentages
16 actually represent. Nonetheless, for these purposes, it matters not whether these numbers
17 represent millions of dollars, or mere pennies. Neither Defendants' *intent* nor their revenue is
18 relevant to the determination of whether this Court may exercise personal jurisdiction over them.
19

20 Notwithstanding the foregoing, Plaintiff moves this Court to ignore the factual allegations
21 made by "*Defendant's Motion*" and strike the allegations contained within the attached affidavits
22 upon which its entire motion is necessarily, albeit improperly, founded, and consider only the
23 collective claims made by Plaintiff: here, in the subjoined Declarations, attached exhibits, and in
24 his Complaint and First Amended Complaint.
25

26
27 PLAINTIFF'S RESPONSE IN
28 OPPOSITION TO
12 (b)(2) MOTION TO DISMISS -6
GORDON v. VIRTUMUNDO, INC., ET
AL

Page 6 of 19

MERKLE SIEGEL & FRIEDRICHSEN, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101-2509
Phone: 206-624-9392
Fax: 206-624-0717

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
26
27
28

C. Plaintiff’s Prima Facie Facts Clearly Support Personal Jurisdiction.

In Washington, a traditional analysis of jurisdiction under its long-arm statute involves two separate issues: (1) does the statutory language purport to extend jurisdiction, and (2) would imposing jurisdiction violate constitutional principles. Grange Insurance Association v. Washington, 110 Wn.2d 752, 757 P.2d 933 (1988), citing Werner v. Werner, 84 Wn.2d 360, 364, 526 P.2d 370 (1974).

1. Statutory authority

Plaintiff alleges that the Defendant engaged in conduct in violation of RCW 19.190 et seq., the Washington Commercial Electronic Mail Act (CEMA). Long arm jurisdiction under this act is specifically granted under RCW 3.66.020. Plaintiff’s First Amended Complaint also adds allegations and causes of action under: The Federal Can-Spam Act of 2003, 15 U.S.C. §7701, et seq; the Washington State Identity Crimes Act, RCW 9.35 et seq.; the Washington Deceptive Offers Act, RCW 19.170 et seq.; and for Injunctive Relief.

Further statutory authority is granted pursuant to RCW 19.86, which provides that violations of the CEMA statute constitute *per-se violations* of the Consumer Protection Act. Under RCW 19.86.160, persons who fall within the service provisions of the CPA are “deemed to have thereby submitted themselves to the jurisdiction of the courts of this state within the meaning of RCW 4.28.180 and RCW 4.28.185.”

Thus, Washington’s long arm statute clearly extends jurisdiction over the Defendant through the Consumer Protection Act. (*See State v. Readers Digest Association*, 81 Wn. 2d 259, 277 (1991), which held that the performance of an unfair trade practice in Washington, even

1 though by a foreign corporation which had no agents, employees, offices or property in the state,
2 was *alone* sufficient to establish jurisdiction.)

3 Further statutory authority is extended by RCW 4.28.185(b), which extends jurisdiction
4 over persons who commit tortious acts in Washington. Federal Courts have ruled that sending
5 unsolicited email constitutes the common law tort of trespass to chattels. America Online Inc. v.
6 LCGM Inc., 46 F. Supp. 2d 444, 451-452 (E.D. VA, 1998). Washington State courts have ruled
7 that deceptive acts of consumer fraud of the type addressed under the CPA may constitute
8 “tortious” acts for the purposes of extending long-arm jurisdiction over an out of state defendant.
9 Authority is also extended by RCW 4.28.185(a), which extends jurisdiction over any person who
10 transacts business within this state. Further, in addition to the many thousands of unlawful
11 commercial email solicitations received by Plaintiff, it is expected that discovery will reveal the
12 extent of Defendants’ true business transactions in this State, and will show substantial sales that
13 Defendants have made in the State of Washington. (Defendants have already admitted that they
14 do transact business on the internet in this State by virtue of statements contained in their
15 supporting Affidavits indicating that a percentage of their sales, albeit an unspecified amount, are
16 to Washington residents).

19 **2. Due process**

20 The Ninth Circuit employs a three-part test to determine if a district court can exercise
21 specific jurisdiction:
22

- 23 (1) The nonresident defendant must do some act or consummate some transaction with
24 the forum or perform some act by which he purposefully avails himself of the
25 privilege of conducting activities in the forum, thereby invoking the benefits and
26 protections of its laws; (2) the claim must be one which arises out of or results from
27 the defendant's forum-related activities; and (3) exercise of jurisdiction must be

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
26
27
28

reasonable.

Panavision v. Toeppen, 141 F.3d 1316, 1320 (1998).

(a) The First Element - Purposeful Availment.

The purposeful availment requirement ensures that a nonresident defendant will not be hauled into court based upon "random, fortuitous or attenuated" contacts with the forum state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). This requirement is satisfied if the defendant "has taken deliberate action" toward the forum state. Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995). "Fulfilling this step is not necessarily precluded by a lack of physical contacts with the forum. Rather, 'within the rubric of 'purposeful availment' the [Supreme] Court has allowed the exercise of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a *foreign* act having *effect* in the forum state.'" Core-Vent Corp. v. Nobel Industries, 11 F.3d 1482,1485, (1993), citing Haisten v. Grass Valley Medical Reimbursement Fund, 784 F.2d 1392, 1397 (9th Cir. 1986). The "effects test" was established in Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) in which the Supreme Court held that the inquiry into whether a defendant purposefully availed itself on the forum state slightly shifts when the application turns on a tort claim.

Defendant relies heavily on Cybersell v. Cybersell, 130 F.3d 414 (1997) arguing that somehow the purposeful transmission of thousands (and likely millions) of commercial emails is the equivalent of operating a passive advertisement on a website (the act in question in Cybersell). While passive internet advertising alone may not be sufficient to subject a party to jurisdiction in another state, when that party "purposefully (albeit electronically) directed his

1 activity to the forum state,” such is considered “something more” and sufficient to satisfy the
2 purposeful availment requirement. Panavision, at 1321, citing Cybersell Inc. v. Cybersell Inc.,
3 130 F.3d 414 (9th Cir. 1997), and cases attached in Exhibit “A”. Numerous courts have found
4 that email is in fact just such a “purposeful” act, as the sender must affirmatively enter the
5 recipients address into a program, formulate a message, and direct the message to the targeted
6 address by pushing a “send” button, or by affirmatively and purposefully programming specific
7 software to accomplish those acts.

8
9 In any event, Defendant’s ownership and operation of a website advertising its spamming
10 abilities is not alleged as the basis for jurisdiction here. It makes no difference whatsoever
11 whether Defendants’ websites are “active” or “passive,” or whether Defendants even operate a
12 website at all. It is the intentional and purposeful direction of thousands of emails to Plaintiff,
13 particularly after repeated, direct notices to cease and desist that constitutes purposeful availment
14 here.

15
16 The fact that Mr. Gordon gave direct notice to Virtumundo to cease and desist is further
17 dispositive here. The U. S. Supreme Court has held in the context of junk mail that a mailer’s
18 right to communicate is circumscribed by an affirmative act of the addressee giving notice that he
19 wishes no further mailings from that mailer. Rowan v. U.S.P.S., 397 U.S. 728, 737, 90 S. Ct.
20 1484, 25 L. Ed. 2d 736 (1970). They noted the importance of the long held right of “a
21 householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property.” *Id.*,
22 citing Hall v. Commonwealth, 188 Va. 72, 49 S. E. 2d 369, appeal dismissed, 335 U.S. 875
23 (1948). Chief Justice Burger in his opinion stated:
24