

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

MERKLE SIEGEL & FRIEDRICHSEN, P.C.
Robert J. Siegel
1325 Fourth Ave., Suite 940
Seattle, WA 98101
(206) 624-9392

THE HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

JAMES S. GORDON, Jr., a married individual; OMNI INNOVATIONS, LLC., a Washington limited liability company;

Plaintiffs,

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' [Second] MOTION TO DISMISS

[Hearing Noted Without Oral Argument for Sept. 15, 2006]

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 DEFENDANTS' [SECOND] MOTION TO DISMISS

-1
GORDON v. VIRTUMUNDO, INC., ET AL

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

1
2 **I. Introduction**

3 This case involves a private citizen of Washington State, James Gordon, Jr.,
4 who is a regular user of the internet, provides internet access services to a group of
5 customers, and who seeks to enforce his rights under the State and Federal anti-spam
6 statutes in an effort to stem the tide of what has become the bane of internet users, and
7 particularly of internet access/service providers, ie. unsolicited commercial electronic
8 email, a/k/a "spam". Defendants Virtumundo and AdKnowledge ("Defendants") are
9 some of the largest and most notorious spammers in the country. Plaintiffs themselves
10 have now received in excess of 17,000 offending emails from Defendants. (See
11 Declaration of James S. Gordon, Jr.).

12 This Court has already considered and denied Defendants' 12(b)(2) motion to
13 dismiss. Defendants now seek to dismiss certain causes of action asserted in Plaintiff's
14 First Amended Complaint ("FAC").

15 A. Defendants suppositiously contend that the heightened pleading
16 requirements of FRCP 9(b), for actions sounding in fraud should apply to
17 Plaintiff's allegations under the Federal CAN-SPAM Act, and the
18 Washington CEMA (together the "Email Statutes"), and that Plaintiff has
19 failed to plead with sufficient "particularity" to satisfy his burden
20 thereunder.

21 Plaintiff maintains that the Email Statutes are consumer
22 protection statutes, are wholly intended to proscribe certain conduct on the
23 part of those sending commercial Email, and were never intended to be
24 subject to the heightened pleading requirements of actions sounding in
25 fraud. And further, that requiring Plaintiffs, who are in receipt of many
thousands of offending Emails from a particular defendant to "articulate"
the details of each alleged violation of each offending Email, at this early
stage of the litigation would effectively put an onerous and undue burden

1 on them, requiring them to effectively provide their trial preparation, and
2 perform Defendants' analytical work for them. The imposition of such
3 an onerous burden would only serve to dissuade private citizens from
4 seeking to enforce their private right of action under the Email Statutes, an
5 unintended and unfair result, particularly since it was Defendants who
6 actually caused the offending Emails to be sent, or initiated them in the
7 first place.

8 B. Defendants speciously contend that Plaintiff has failed to plead with
9 sufficient detail in order to meet the requirements of FRCP 8(a). Plaintiff
10 has clearly met his burden under the liberal pleading requirements of
11 FRCP 8(a). There is nothing unduly "vague" about the detailed allegations
12 contained in Plaintiffs' FAC.

13 C. Defendants further contend that Plaintiff has failed to meet his
14 burden under FRCP 12(b)(6) insofar as claims under the Washington
15 Consumer Protection Act, RCW 19.86.090 (the "CPA"), arguing that a
16 causal connection between a statutory violation and damages to
17 Plaintiff is required.

18 Plaintiff contends that he has met the requirements of 12(b)(6) in
19 this regard, as, notwithstanding that he has suffered "actual" damages, it
20 is well established that a plaintiff must only allege "injury", and not
21 "damage" as a result of a CPA violation, and that the loss of time, or good
22 will, or other nonspecific or relatively minor monetary injury will satisfy this
23 requirement under the CPA.

24 D. Defendants claim that Plaintiffs have failed to satisfactorily allege
25 damages as a result of violations of RCW 19.170 et seq. the "Deceptive
Offers". To the extent that is true, Plaintiffs request leave to amend and
cure what appears to have been an apparent oversight in the perfunctory
recitation of a statement that Plaintiffs have been "damaged" from the

1 receipt of emails containing promotional advertisements in violation of the
2 RCW 19.170.

3 E. In the alternative, in the event that the Court deems that Plaintiff's First
4 Amended Complaint is somehow deficient on the pleadings, it should grant
5 the Plaintiff a continuance during which to conduct discovery on the issues
6 raised, and/or allow him an opportunity to correct by further amendment.

7 **II. Facts**

8 Plaintiffs wholly and unequivocally deny Defendants' unfounded, and disparaging
9 statement that "Plaintiffs are in the business of signing up for lists to receive
10 solicitations by email, refusing to unsubscribe to the lists through the prescribed
11 process, and filing lawsuits..." In fact, as evidenced by the 322,601 cease and desist
12 electronic notices Plaintiff has sent to "all" spammers, approximately 2,900 of which
13 were sent to Defendants, and the 11,000 separate electronic complaints to regulators –
14 government and internet service providers, the dozens of certified letters sent to
15 spammers, and other steps taken by Plaintiffs, Plaintiffs would love nothing more than
16 to be left alone, and to stop the flow of unwanted spam, which has had an enormously
17 damaging impact on their interactive computer service business. Such is the purpose
18 of this lawsuit. (See Declaration of James S. Gordon, Jr.)

19
20 Plaintiffs are compelled here to make an effort to clarify what has become
21 Defendants' battle cry in this litigation, to wit, the Court's statement in its order Denying
22 Defendants' 12(b)(2) Motion To Dismiss that Plaintiff has a "tendency to exaggerate
23 claims in its briefing". The Court clearly found so in response to certain apparent
24 contradictory statements found in Plaintiffs' pleadings. However, the Court should note
25

1 that, although inconsistent, those statements were hardly exaggerations. For instance,
2 the Court noted the discrepancy between a statement in Plaintiff's Response In
3 Opposition To Motion To Dismiss claiming that Plaintiff sent "literally thousands" of
4 cease-and-desist emails, and Mr. Gordon's statement in his Declaration where he
5 claims to have sent "200" cease-and-desist emails. As the Declaration of James S.
6 Gordon, Jr. in support hereof explains, the discrepancy was a result of a
7 mischaracterization of Plaintiffs' notices to Defendants, some of which are more
8 correctly characterized as "cease-and-desist" notices, while others were simply email
9 complaints. In fact, as the Declaration of James S. Gordon, Jr. submitted herewith
10 makes clear, Plaintiffs have actually received in excess of 17,000 offending emails from
11 Defendants. They have sent 322,601 cease and desist notices to all spammers, and
12 approximately 2,900 of these cease and desist notices were sent to defendants
13 requesting an end to Defendants' unwanted emails. (Declaration of James S. Gordon,
14 Jr.). Defendants have been supplied with a dvd, which contains copies of these
15 voluminous complaints by Plaintiff, examples of which are attached as exhibits to the
16 Gordon Declaration. Thus, Plaintiff respectfully begs the pardon of the Court for its
17 inadvertently inconsistent statements, but reminds the Court that it has caused no
18 harm, or even prejudice to Defendants here.
19
20

21 **III. Argument and Authority**

22 Defendants' Motion is plainly frivolous. As the Court will come to see,
23 aside from some inconsequential issues as to the form of the pleadings, Defendants'
24
25

1 arguments are wholly without merit, and are posed for no other reason but to intimidate
2 and harass Plaintiffs, and unfortunately resulting in a waste of valuable judicial time and
3 resources.

4
5 **3.1 Dismissal Of Actions Under Rule 12(b)(6) Are Disfavored - The Court**
6 **Should Consider Only Plaintiff's Allegations In A Light Most Favorable To Them.**

7 A complaint may be dismissed as a matter of law for only two reasons: (1) lack of a
8 cognizable legal theory or (2) insufficient facts under a cognizable legal theory. (*Conley*
9 *v. Gibson*, 355 U.S. 41, 45-46 (1957); *Robertson v. Dean Witter Reynolds, Inc.*, 749
10 F.2d 530, 533 34 (9th Cir. 1984) (citing 2A J. MOORE, ET AL., MOORE'S FEDERAL
11 PRACTICE ¶ 12.08 at 2271 (2d ed. 1982)).) "A court may dismiss a complaint only if it
12 is clear that no relief could be granted under any set of facts that could be proved
13 consistent with the allegations." (*Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984);
14 *see also Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994).) Motions to
15 dismiss generally are viewed with disfavor under this liberal standard and are granted
16 rarely. (*Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).) For purposes
17 of a motion to dismiss, the plaintiff's allegations are taken as true, and the Court must
18 construe the complaint in the light most favorable to the plaintiff. (*Jenkins v. McKeithen*,
19 395 U.S. 411, 421 (1969); *Argabright, supra*, 35 F.3d at 474.) "[T]he central issue is
20 whether, in the light most favorable to the plaintiff, the complaint states a valid claim for
21 relief." (*Hughes v. Tobacco Institute, Inc.*, 278 F.3d 417, 420-21 (5th Cir.2001).). In fact,
22 the complaint need not necessarily identify a particular legal theory at all. *Williams v.*
23
24
25

1 *Seniff*, 342 F. 3d 774, 792 (7th Cir. 2003); *Barrett v. Tallon*, 30 F. 3d 1296, 1299 (10th
2 Cir. 1994). A claim will not generally be dismissed, even though the asserted legal
3 theories are not cognizable or the relief sought is unavailable, as long as other tenable
4 legal claims are evident on the face of the complaint, or the pleader is otherwise entitled
5 to any type of relief under another possible legal theory. *Conley v. Gibson*, 355 U.S. 41,
6 45-46, 78 S.Ct. 99, 101-102, 2 L. Ed. 2d 80 (1957); *See also Barrett v. Talon, supra*.
7 For purposes of a motion under FRCP 12(b)(6), even the mere “possibility” of a
8 cognizable claim is sufficient to defeat dismissal. *Carparts Distrib. Ctr. v. Automotive*
9 *Wholesaler’s Ass’n. of Ne England, Inc.*, 37 F. 3d 12, 17 (1st Cir. 1994).

10
11 Further, in considering a Rule 12(b)(6) motion, the court should be particularly
12 hesitant to dismiss at the pleading stage those claims asserting novel legal theories,
13 where the claims could be better examined following the development of the facts
14 through discovery. *McGary v. City of Portland*, 386 F. 3d 1259, 1270 9th Cir. 2004);
15 *Baker v. Cuomo*, 58 F.3d 814, 118-819 (2d. Cir. 1995).

16 Here, it is clear from a reading of Plaintiffs’ FAC that they have easily satisfied
17 the requirements of pleading under FRCP 12(b)(6). Defendants complain that Plaintiffs
18 merely parrot the applicable statutory language in describing the statutory violations set
19 forth in the FAC. However, to the extent that is accurate, there is certainly nothing
20 wrong, or otherwise deficient in so doing. Plaintiffs’ claims are in fact statutorily based,
21 and the Statutes set forth the basic elements of a claim brought thereunder.
22 Accordingly, despite Defendants’ dissatisfaction with this style of complaint, it is patently
23 appropriate to quote, or paraphrase the statutory language in setting out such a claim.
24

1
2 **3.2 The Heightened Pleading Requirements Of FRCP 9(b) Do Not Apply**
3 **To The Plaintiffs' Claims Under The Statutes Because The Plaintiffs' Claims**
4 **Under The Statutes Are Not "GROUNDED IN FRAUD".**

5 The Plaintiff's complaint does not allege fraud. Instead, the Plaintiff's complaint
6 alleges that the Defendant violated the provisions of RCW 19.190 et seq. and certain
7 provisions of the CAN-SPAM Act of 2003, 15 U.S.C. §7701 et seq. (collectively referred
8 to herein as the "Statutes"). FRCP 9(b) provides: "In all averments of fraud or mistake,
9 the circumstances constituting fraud or mistake shall be stated with particularity. Malice,
10 intent, knowledge, and other condition of mind of a person may be averred generally."
11 Thus, the question before the court is whether alleged violations of the Statutes
12 constitute "averments of fraud or mistake" and thus trigger the applicability of FRCP
13 9(b). A comparison of the elements of fraud and the requirements of a violation of the
14 Statutes makes plain that they do not.

15 The elements of fraud consist of 1) a false representation in reference to 2) a
16 material fact made with 3) knowledge of its falsity and with 4) the intent to deceive with
17 5) action taken in reliance upon the representation. Hart v. McLucas, 535 F.2d 516, 519
18 (9th Cir.1976) (citing Pence v. United States, 316 U.S. 332, 338, 62 S.Ct. 1080, 86
19 L.Ed. 1510 (1942)). In contradistinction, a violation of both RCW 19.190.020 and RCW
20 19.190.030 occurs when a person initiates the transmission, conspires with another to
21 initiate the transmission, or assists the transmission, of a commercial electronic mail
22 message from a computer located in Washington or to an electronic mail address that
23 the sender knows, or has reason to know, is held by a Washington resident that:

24 (a) Uses a third party's internet domain name without permission of the third party, or
25

1 otherwise misrepresents or obscures any information in identifying the point of origin or
2 the transmission path of a commercial electronic mail message; or

3 (b) Contains false or misleading information in the subject line.

4 And a violation of the Federal Can-Spam Act occurs when a commercial Email is
5 initiated to a protected computer that:

6 "...contains, or is accompanied by, header information that is materially false or
7 materially misleading.", 15 U.S.C. §7704(1)(a), or
8 "...if such person has actual knowledge, or knowledge fairly implied on the basis of
9 objective circumstances, that a subject heading of the message would be likely to
mislead a recipient, acting reasonably under the circumstances, about a material fact
regarding the contents or subject matter of the message...". 15 U.S.C. §7704(2).

10
11 Accordingly, there is no requirement that the Plaintiff establish the elements of
12 fraud to prove a violation of the Anti-Spam Statutes, which do not require that anyone
13 actually be deceived, or defrauded by a particular offending Email. RCW 19.190 does
14 not require that the sender "know" that the information in the subject line or transmission
15 path is "false or misleading." The Statutes do not require that "false or misleading
16 information" in the subject line or transmission path be "material." RCW 19.190 does
17 not require that the person who sent the message have "knowledge" of the "falsity" in
18 the subject line or transmission path. The Statutes do not require that the person
19 sending an email that violates the Statute do so with "the intent to deceive." The
20 Statutes do not require that the recipient of an email that violates the statute take any
21 "action" in "reliance upon the representation." In short, the Statutes require virtually
22 none of the scienter, intent, damages, or interplay between the actors, that are all
23 required in an action for fraud.

1 Instead, the Statutes are proscriptive, and are directed to prohibit certain conduct
2 on the part of the senders/initiators of commercial Email, and those conspiring with and
3 assisting them. The Statutes effectively impose strict liability for violations. What
4 Defendants refer to as allegations of “fraud” or “misrepresentation” are more
5 appropriately characterized as conditions or specifications, defined in detail in the
6 Statutes. Neither intent on the part of the sender, nor reliance or actual damages on the
7 part of the recipient, are required. All a successful complaint for a violation of the
8 Statutes must allege is that a commercial electronic mail message was sent that
9 violated the technical requirements of the Statutes, and in the case of the Washington
10 CEMA, that it was received by a Washington resident. Applying the heightened
11 pleading requirements of FRCP 9(b) would thus force the Plaintiff to plead numerous
12 facts that the Plaintiff will NOT be required to prove at trial to establish that the Plaintiff
13 is entitled to relief under the Statutes. Such a result is plainly not warranted under
14 FRCP 9(b).

15 In addition to RCW 19.190.020, Plaintiff has also complained of violations of
16 RCW 19.190.030, and RCW 19.86, the Washington Consumer Protection Statute.
17 However, all of these statutes amount to the same complaint, as the language of RCW
18 19.190.030 simply repeats RCW 19.190.020, and defines a violation of RCW
19 19.190.030 as a violation of RCW 19.86. RCW 19.190.030 also extends liability those
20 who “assist in the transmission of a commercial electronic mail message, when the
21 person providing the assistance knows, or consciously avoids knowing, that the initiator
22 of the commercial electronic mail message is engaged, or intends to engage, in any act
23 or practice that violates the consumer protection act.” Liability for “providing assistance”
24
25

1 to one violating RCW 19.190.030 and RCW 19.86 is thus triggered by “knowing” that
2 the initiator is violating the statute, but it can also be triggered simply by “consciously
3 avoiding knowing.” And under 15 U.S.C. §7704(2) “...if such person has actual
4 knowledge, or knowledge fairly implied on the basis of objective circumstances, that a
5 subject heading of the message would be likely to mislead a recipient, acting
6 reasonably under the circumstances, about a material fact regarding the contents or
7 subject matter of the message...” Accordingly, this element of the Plaintiff’s complaint
8 also does not trigger the heightened pleading requirements of FRCP 9(b), as it is also
9 not an allegation of fraud, and it further falls squarely within the exception of the second
10 sentence in the rule; “Malice, intent, knowledge, and other condition of mind of a person
11 may be averred generally.” (underline added)

12 In setting forth Defendants’ argument, lacking controlling authority, Defendants
13 rely on a recent Northern District Court of California decision *Asis Internet Services v.*
14 *Optin Global, Inc., et al.*, No. C-05-5124 CW. However, Asis is readily distinguished
15 from the instant case, and, as a decision of the US District Court for the Northern
16 District of California is not binding precedent on this Court even if it were not.
17 Nonetheless, the Court in *Asis* actually found that most of that Plaintiff’s claims did
18 withstand the 12(b)(6) motion, granted Plaintiff opportunity to amend its complaint, and
19 focused its dismissal on a few very limited allegations. For instance, with regard to the
20 issue of initiation of the offending Emails there, the Court found that:

21 ...”multiple Defendants may be held liable under the CAN-SPAM Act if they
22 “initiated” illegal emails, including either actually sending the message or paying or
23 inducing another to send the message while consciously avoiding knowledge that the
24 messages violated the law. Plaintiff’s averments of fraud do not extend to the initiation
25 of the allegedly fraudulent commercial emails, but only to their content. Therefore, the

1 Court finds that Plaintiff need not plead with particularity the circumstances surrounding
2 the initiation of the alleged email; for instance, Plaintiff need not plead particular facts
3 showing a business relationship between the Mortgage Defendants and the Spammer
4 Defendants." *Id at p. 5.*

4 To the knowledge of the undersigned, no United States Court of Appeals has
5 decided whether a complaint for a violation of either a State anti-spam statute, or the
6 Federal Can-Spam Act triggers the heightened pleading requirements of FRCP 9(b).
7 However, the 9th Circuit Court of Appeals did consider the application of FRCP 9(b) to a
8 diversity class action complaint against psychiatric associations and manufacturers of
9 prescription pharmaceuticals alleging that defendants increased sales of particular
10 prescription drug in violation of California Consumers Legal Remedies Act (CLRA) and
11 California's unfair business practice laws. In Vess v. Ciba-Geigy Corp., 317 F.3d 1097,
12 (9TH Cir. 2003), 54 Fed.R.Serv.3d 1032, 3 Cal. Daily Op. Serv. 970, 2003 Daily Journal
13 D.A.R. 1265 the Ninth Circuit established the framework for analyzing the applicability of
14 FRCP 9(b). In pertinent part, the Court states:

15 "The text of Rule 9(b) requires only that in "all *averments of fraud* ..., the
16 circumstances constituting fraud ... shall be stated with particularity."
17 Fed.R.Civ.P. 9(b) (emphasis added). The rule does not require that allegations
18 supporting a claim be stated with particularity when those allegations describe
19 non-fraudulent conduct." *Id.* at 1104.

19 Plainly, the Statutes both impose liability for non-fraudulent conduct, and the only
20 claims the Plaintiff has set forth in his complaint are for violations of the Statutes.
21 Accordingly, the rule does not require that allegations supporting these claims be stated
22 with particularity. Finally, the Plaintiff would bring to the attention a recent decision by
23 the United States District Court for the Southern District of New York, In re: Initial Public
24

1 Offering Securities Litigation, 241 F.Supp.2d 281, Fed. Sec. L. Rep. P 92,282, which
2 analyzed the 9th Circuit's opinion in Vess v. Ciba-Geigy Corp. while considering a case,
3 such as the one now before this Court, where a defendant sought to have the Court
4 extend the pleading requirements of FRCP 9(b) to cases which do not allege fraud.
5 Beginning with a quote from the United States Supreme Court, New York's Southern
6 District Court observed:

7 "Whatever merits these and other policy arguments may have, it is not the
8 province of [the courts] to rewrite the statute [or Rules] to accommodate them."
9 Artuz v. Bennett, 531 U.S. 4, 10, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000). See
10 also Badaracco v. Commissioner, 464 U.S. 386, 398, 104 S.Ct. 756, 78 L.Ed.2d
11 549 (1984) ("Courts are not authorized to rewrite a statute because they might
12 deem its effects susceptible of improvement."). Indeed, in the last decade the
13 Supreme Court has *twice* admonished the lower courts for augmenting federal
14 pleading requirements: "A requirement of greater specificity for particular claims
15 is a result that *'must* be obtained by the process of amending the Federal Rules,
16 and *not* by judicial interpretation.'" Swierkiewicz, 534 U.S. at 515, 122 S.Ct. 992
17 (quoting Leatherman, 507 U.S. at 168, 113 S.Ct. 1160) (emphasis added). In
18 fact, in Swierkiewicz, the Defendant tried to persuade the Court on policy
19 grounds by asserting that "allowing lawsuits based on conclusory allegations of
20 discrimination to go forward will burden the courts and encourage disgruntled
21 employees to bring unsubstantiated suits." *Id.* at 514, 122 S.Ct. 992. The Court
22 responded: "Whatever the practical merits of this argument, the Federal Rules do
23 not contain a heightened pleading standard for employment discrimination suits."
24 *Id.* at 514-15, 122 S.Ct. 992. *Id.* 340-341.

25 Just as the Southern District Court in New York analyzed our own 9th Circuit
opinion in Vess v. Ciba-Geigy Corp. to find that the Court should not allow the
heightened pleading standard for certain violations of securities law, so also should this
Court decline to extend the heightened pleading standard for violations of the anti-spam
Statutes at issue here.

1 **3.3 Plaintiff's First Amended Complaint Easily Satisfies The**
2 **Liberal Notice Pleading Requirements Of FRCP 8(a).** Under FRCP 8(a) notice
3 pleading, litigants are generally required only to provide their opponent with fair
4 notice of their claim and the grounds upon which that claim rests. *Swierkiewicz v.*
5 *Sorema N. A.*, 534 U.S. 506, 512, 122 S. Ct. 992, 998, 152 L. Ed. 2d 1 (2002);
6 *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 102, L.Ed.d 80 (1957). These rules
7 "do not require a claimant to set out in detail the facts upon which he bases his
8 claim. To the contrary, all the Rules require is 'a short and plain statement of the
9 claim' that will give the defendant fair notice of what the plaintiff's claim is and the
10 grounds on which it rests." *Conley v. Gibson, supra.*

11 Here, it is nothing short of specious for Defendants to argue that Plaintiffs'
12 FAC fails to provide them with fair and sufficient notice under FRCP 8(a). This is
13 apparently a throw-away issue frivolously raised by Defendants.

14 Washington is a notice pleading state, and even if Plaintiff had merely stated
15 "Virtumundo sent me emails that violate 15 U.S.C. §7704, RCW 19.190, 19.170, and
16 19.86," this would have been sufficient to put Virtumundo on notice of what the nature of
17 the claim was, sufficient to mount whatever defense was necessary.

18 However, Plaintiffs did not make such a complaint. Instead, they filed an
19 extensive complaint, clearly and specifically detailing the claims against Virtumundo,
20 using the applicable statutory language.

21 For Defendants, themselves admittedly in the "internet marketing" business,
22 who have been sued before for violations of anti-spam statutes, to claim that they
23
24
25

1 have no idea of why, or for what they are being sued here is simply preposterous.
2 The basic allegations of Plaintiffs' FAC are more than sufficient to meet Plaintiff's
3 burden under notice pleading standards. Some examples of Plaintiffs' allegations in
4 his FAC include:

5 "The Defendants have initiated the transmission of numerous commercial
6 email messages directed to and through Plaintiff Omni's interactive computer
7 service, and/or to and through Plaintiff Omni's domain 'gordonworks.com', and/or
8 further addressed to Plaintiff Gordon's email address jim@gordonworks.com, as well
9 as to other users of Omni's interactive service.

10 "Plaintiffs have received thousands of commercial electronic mail messages from
11 or on behalf of defendants, sent to Omni's electronic mail server located in
12 Benton and Franklin Counties, Washington, and/or to its registered domains,
13 including 'gordonworks.com' in violation of the CAN-SPAM Act of 2003, 15 U.S.C.
14 §7701 et seq."

15 "Plaintiffs Omni and Gordon further allege that they received numerous items
16 of electronic mail from the defendants sent to the 'gordonworks.com' domain on
17 Omni's server, and to email addresses served thereby, that were responded to with
18 specific requests not to receive future commercial electronic mail messages, which
19 requests went unheeded for a substantial amount of time during which defendants
20 continued to send unlawful email to plaintiff in violation of 15 U.S.C. §7704(a)(4)."

21 "Defendants initiated the transmission, or assisted and/or conspired to
22 transmit numerous commercial electronic mail messages to Plaintiff's domain and
23 server, and to Plaintiff Gordon's individual email account which defendants knew, or
24 had reason to know were located in the state of Washington, which emails
25 misrepresented or obscured information identifying the point of origin or the
transmission path, and/or which contained false or misleading information in the
subject line, which constitutes violations of RCW 19.190 et seq."

"It is further a violation of RCW 19.190.080 to "solicit, request, or take any
action to induce a person to provide personally identifying information by means of a
web page, electronic mail message, or otherwise using the internet by representing
oneself, either directly or by implication, to be another person, without the authority

1 or approval of such other person.” Numerous emails sent by Defendants and
2 received by Plaintiff violated this provision of the CEMA.”

3 The foregoing allegations, only a portion of those in the FAC, in and of
4 themselves are surely sufficient to put Defendants on notice of what they are being
5 sued for, and the basis for such claims. Not only can Plaintiff articulate a set of facts
6 that would justify recovery, he fully expects to prevail on his arguments to do so.

7 Defendants correctly cite authority which states that a complaint may contain
8 allegations from which an inference may fairly be drawn that evidence on the
9 material allegations will be introduced at trial. Here, not only have Plaintiffs satisfied
10 their initial notice pleading burden, but Plaintiffs have also provided Defendants with
11 Initial Disclosures pursuant to FRCP 26(a)(1) which include copies of the thousands
12 of offending Emails, and thousands of pages of analyses of the offending Emails in
13 digital format, on a CD. (See Docket No. 28). Additionally, Plaintiffs have recently
14 supplemented their discovery responses with a yet more detailed analysis of the
15 offending Emails, a legend explaining the analysis and what is included on the DVD
16 is attached to the Gordon Declaration. The most recent analyses include a
17 breakdown of the offending Emails into categories referenced by particular domains
18 and/or IP addresses from which the Emails were sent, and a highlighting of the
19 portions, or elements of the Emails alleged to violate the referenced statutes. (See
20 Declaration of James S. Gordon, Jr. submitted herewith). (A copy of that DVD can
21 be made available to the Court upon request). Accordingly, Defendants’ claim that
22 they have not received fair or sufficient notice under FRCP 8(a) must fail.
23
24
25

1 **3.4 Plaintiffs' CPA Claims Should Stand.** Defendants argue that Plaintiffs'
2 CPA claims should fail because Plaintiff has not sufficiently pled a nexus between the
3 alleged violations and alleged damages.

4 Although Defendants ask this Court to ignore the clear language of the CEMA,
5 making violations of it *per-se* violations of the Washington Consumer Protection Act,
6 Defendants may be independently liable under the CPA. Defendants argue that
7 Plaintiffs have failed to put forth any evidence to support a CPA claim. However,
8 Defendants' misleading statements in their Emails containing promotional offers from
9 third parties constitute misleading, and deceptive statements; made in the course of
10 trade or commerce (advertising goods and services); with a public impact (Defendant
11 admits to sending *millions* of emails, many presumably to Washington residents against
12 their wills); that injured Plaintiff in his business and property (Plaintiff was forced to deal
13 with a large volume of unwanted, illegal spam that cost him time away from his work,
14 bandwidth, and other costs associated with ISP time, not to mention the costs
15 associated with enforcing his rights under the Statutes, all of which are recoverable
16 damages. (*See Declaration of James S. Gordon, Jr.*).

17
18 Defendants are either confused, or once again attempt to mislead this Court as
19 to the requirements to establish the "injury" element of a CPA claim. With regard to the
20 fourth element, the CPA claimant must establish a specific injury to his business or
21 property. "The injury involved need not be great, but it must be established." *Hangman*
22 *Ridge*, 105 Wn.2d at 792. As the Washington Court of Appeals noted in *Besel v. Viking*
23
24
25

1 *Ins. Co. of Wisconsin*, 105 Wn. App. 463, 21 P. 3d 293, rev. granted 144 Wn. 2d 1016,
2 32 P. 3d 283, reversed on other grounds, 146 Wn. 2d 730, 49 P. 3d 887 (2002):

3
4 Moreover, the term "injury" is separate from "damages." See *Mason v. Mortgage*
5 *Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990). A "nonquantifiable" injury, such as
6 loss of good will, or a nonspecific or relatively minor monetary injury such as some
7 diminution in value of property or money will suffice to satisfy the injury requirement. *Id.*
8 "Damages" pertains to treble damages based upon "actual damages" awarded under
9 the CPA. *Id.* at 855.

10 Thus, it is well settled under Washington law that no monetary damages need be
11 proven to establish the "injury" element of the CPA, but it is sufficient that plaintiff is
12 deprived of use of his property as a result of an unfair or deceptive act or practice.

13 *Sorrel v. eagle Healthcare, Inc.* 110 Wn. App. 290, 38 P. 3d 1024 (2002). And further,
14 that damages may be only inconvenience and, for instance the deprivation of the use
15 and enjoyment of an automobile. A consumer who must defend an action under the
16 CPA will generally sustain such damages as inconvenience, loss of time in helping
17 prepare the case, actual time spent in court, and litigation costs for attorney fees, etc.
18 *St. Paul Fire & Marine Ins. Co., v. Updegrave*, 33 Wn. App. 653, 656, P. 2d 1130
19 (1983). Here, that would certainly be the case. And further, once the fact of "injury" or
20 damage is established, the precise amount need not be shown with mathematical
21 certainty. *Haner v. Quincy Farm Chemicals, Inc.* 29 Wn. App. 93, 627, P. 2d 571, rev.
22 granted, affirmed in part, reversed in part 97 Wn. 2d 753, 649 P. 2d 828 (1981).

23 Plaintiffs' claims under the Washington CPA should stand.

24 **3.5 Plaintiffs' Claims Under RCW 19.170 the Deceptive Prize**

25 **Statute Should Stand.**

Defendants point to an apparent oversight, or

1 scrivner's error in Plaintiffs' FAC. That is, Plaintiffs apparently inadvertently omitted
2 the recital of damages in their Fourth cause of action under RCW 19.170 et seq.
3 Plaintiffs respectfully request leave to file a Second Amended Complaint to remedy
4 the noted omission.

5
6 Notwithstanding the foregoing, here again Defendants' analysis is flawed for
7 purposes of a 12(b)(6) motion. Here again, RCW 19.170 et seq. (the "Statute") is a
8 consumer protection, "truth in labeling" type statute. The Statute is both proscriptive
9 in that it prohibits certain deceptive conduct on the part of a "sponsor" and/or
10 "promoter", and also places upon them certain requirements, which must be met in
11 the form and content of a promotional offer made to a person in this State. Like the
12 CEMA, pursuant to RCW 19.170.010(2) the Statute makes violation of it a per se
13 violation of the CPA. Defendants glaringly misinterpret, and seek to rewrite the
14 Statute. They argue that "Plaintiffs must pursue the offered prize and be
15 damaged...", and "Damages in a private cause of action cannot be realized merely
16 from viewing an email or other promotional offer; there must be some additional step
17 taken to redeem the offer." However, they offer no support for such a contention,
18 which is contrary to the very language of the Statute, which states at 19.170.060(1):
19

20 "A person who suffers damage from an act of deceptive promotional
21 advertising may bring an action against the sponsor or promoter of the advertising,
22 or both. Damages include, but are not limited to, fees paid in violation of RCW
23 19.170.030(6) and the dollar value of a prize represented to be awarded to a person,
24 but not received by that person."

25 Clearly, the language of the Statute contemplates a broad array of possible
damages, and leaves the possibility open for a Plaintiff to prove same.

1 Here, Plaintiff received numerous commercial Emails from Defendants
2 promoting products on behalf of third party advertisers, purporting to offer “free”
3 prizes, and other promotional incentives. (See Gordon Declaration). Some of these
4 so-called “offers” contained violations of RCW 19.170 on their face, which did not
5 comply with the requirements of the Statute. Further, pursuant to the Declaration of
6 James S. Gordon, Jr. submitted herewith, Plaintiffs did indeed suffer damages as a
7 result of their receipt of the offending promotional ads via the internet, in the way of
8 time and effort spent in reviewing, sorting, investigating the emails containing the
9 ads, as well as the bandwidth and server space taken up by such unsolicited spam.
10 Plaintiffs allegations, taken as true for purposes of this 12(b)(6) Motion should serve
11 to more than satisfy the liberal requirements under FRCP 8(a), and Defendants’
12 Motion should be denied.
13

14 **CONCLUSION**

15 The Court should find that none of the Defendants’ purported grounds for
16 dismissal under FRCP 12(b)(6) has any basis in law or fact, and that Defendant’s
17 purported grounds for dismissal under FRCP 9(b) and FRCP 8(a) are also without
18 merit. Plaintiff therefore respectfully requests that the Court deny the Defendant’s
19 motion to dismiss in its entirety.
20

21 In the event that the Court determines that the Plaintiff’s FAC is subject to the
22 heightened pleading requirements of FR 9(b), or is otherwise deficient, the Plaintiff
23 respectfully requests that the Court grant the Plaintiff sixty days leave to conduct any
24 pertinent discovery, and to further amend their Complaint.
25

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

RESPECTFULLY SUBMITTED this 11th day of September, 2006.

MERKLE SIEGEL & FRIEDRICHSEN, P.C.

/s/ Robert J. Siegel
Robert J. Siegel, WSBA #17312
Attorneys for Plaintiffs