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The Honorable John C. Coughenour

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

JAMES S. GORDON, Jr., a married individual, d/b/a 'GORDONWORKS.COM'; 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, 1-X,

Defendants.

NO. CV06-0204JCC

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PARTIAL SUMMARY  
JUDGMENT**

**NOTE ON MOTION CALENDAR:**  
January 12, 2007

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## I. INTRODUCTION

1  
2 This motion arises out of Plaintiffs' Motion for Relief from Deadline (Docket.  
3 No. 42, the "Relief Motion") filed in response to Defendants' (still-pending) Motion for  
4 an Undertaking Pursuant to 15 U.S.C. § 7706(g)(4) (Dkt. No. 38, the "Motion for an  
5 Undertaking"). In the Relief Motion, Plaintiffs asserted that if excused from responding  
6 to the Motion for an Undertaking they planned to file a motion that would "result in the  
7 resolution of the ultimate issues in this case" (Relief Motion 2:11-12). Plaintiffs therefore  
8 requested "the opportunity to establish that as a matter of law . . . emails sent by, or on  
9 behalf of Defendants, do in fact violate the [CAN-SPAM] Act." (Relief Motion 3:11-12).

10 This Court gave Plaintiffs the opportunity they requested (Dkt. No. 46). Far from  
11 filing a motion that would result in the resolution of this case, however, Plaintiffs filed  
12 the instant motion against Virtumundo only<sup>1</sup> which they characterize as a "Motion for  
13 Partial Summary Judgment" (Dkt. No. 53, the "Motion"). The Motion addresses only a  
14 single non-dispositive issue, namely "[d]oes a commercial electronic mail message that  
15 does not accurately identify the sender of the email in the 'From' field of the header  
16 comply with the CAN-SPAM ACT and/or CEMA" (Motion 3:19). Plaintiffs' novel  
17 theory that CAN-SPAM requires the "from name" field (in the "from" line) to contain the  
18 "actual name" of the sender is contrary to the plain language of CAN-SPAM, unworkable  
19 in practice, and without legal precedent. In fact, Plaintiff concedes uncertainty whether  
20 this sender would be the person who sent the email or the person who hired the  
21 Defendant to send it (Motion 3:15).

22 Moreover, even if Plaintiffs were correct that CAN-SPAM contained such a  
23 requirement, Defendants' emails would not violate it. Every email Defendants send  
24 contains their domain name and a working email address in the "from line". The domain  
25 names Defendants use identify Defendants as the source of the message. In addition,  
26

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27 <sup>1</sup> Plaintiffs do not specify against which defendant(s) they move. However, the so-  
28 called "Relevant Facts" section addresses only defendant Virtumundo's alleged emails,  
and does not mention defendant Adknowledge or Mr. Lynn. See Motion 2:2 - 3:9.

1 Defendants use the “from name” field to identify either (1) the line of business to which  
2 the email pertains, or (2) the actual name of the entity on whose behalf the email is  
3 initiated. Defendants’ “from” line usages are expressly contemplated by CAN-SPAM  
4 and provide more (and more useful) information to recipients than does the interpretation  
5 Plaintiffs urge.

6 Plaintiffs’ position, if adopted, would result in *more* consumer confusion, not less,  
7 and would run contrary to the policies underlying CAN-SPAM. It would also create  
8 regulatory confusion in situations where a single email message contained promotions or  
9 solicitations from multiple and independent advertisers (which is the case with Defendant  
10 Adknowledge). Plaintiffs’ argument that Defendants’ “from name” usage is materially  
11 false or misleading is not only factually incorrect but legally frivolous. Plaintiffs’  
12 repeated rhetorical exhortations that various matters are “indisputable” notwithstanding,  
13 Plaintiffs cannot establish they are entitled to summary judgment on any of their claims<sup>2</sup>  
14 and their Motion should be denied.

## 15 II. FACTS

### 16 A. Virtumundo Emails

17 Exhibit “A” to the Declaration of James Gordon in Support of Plaintiffs’ Motion  
18 (Dkt. No. 64) consists of printouts of the emails upon which Plaintiffs’ claims against  
19 defendant Virtumundo are based. (Motion 2:19-3:2). Although Virtumundo has not  
20 performed an exhaustive analysis of these emails, the vast majority of them include a  
21 return email address at one of the following domain names: <vm-mail.com>,  
22 <vmadmin.com>, and <virtumundo.com>. Declaration of Michael Shopmaker in Support  
23 of Opposition to Plaintiffs’ Motion for Partial Summary Judgment (“Shopmaker Decl.”)  
24

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25  
26 <sup>2</sup> Plaintiffs fail even to identify the elements of their claim, much less point to  
27 specific undisputed evidence in support of those elements. Plaintiffs’ focus is entirely on  
28 the supposed “actual name of the sender” issue, and their motion is more accurately  
characterized as a motion for summary adjudication of that issue than as one for partial  
summary judgment.

1 ¶ 2.

2 Virtumundo is the registrant (*i.e.*, owner) of each of these domain names, and  
3 Virtumundo is identified in the WHOIS database as such. Shopmaker Decl. ¶ 3. The  
4 WHOIS database is a publically available source to identify the registrant of, and the  
5 registrant's contact information for, any .com domain name. Id. ¶ 4. The registrant  
6 provides its own contact information for the WHOIS database. Id. A WHOIS query on  
7 any of the domain names at issue in this case will return information including  
8 Virtumundo's name, correct physical address, and telephone number. Id. ¶ 5.

9 Email senders who wish to obscure their identity may provide inaccurate contact  
10 information when registering domain names, or use "domain proxy" services to prevent  
11 their contact information from appearing in the WHOIS database. Shopmaker Decl. ¶ 6.  
12 Virtumundo does not engage in such practices, and indeed endeavors to make itself easy  
13 to identify and locate from the information in the "from" lines of the emails it sends. Id.  
14 ¶ 7. Every "from" line from Virtumundo contains (i) a working "from" email address that  
15 is attached to (ii) an accurate and truthful domain name that is registered to Virtumundo  
16 listed in WHOIS. Id. ¶ 8. In addition, the body of each email Virtumundo sends always  
17 includes accurate contact information for Virtumundo and working "unsubscribe" links.  
18 Id.

19 In the course of its business, Virtumundo creates and transmits emails as part of  
20 promotional campaigns for its customers. Shopmaker Decl. ¶ 9. All of Virtumundo's  
21 email solicitations contain a working "from" email address that routes to Virtumundo.  
22 Virtumundo typically also uses the "from name" field to identify the customer. Id. In  
23 other circumstances, Virtumundo uses the "from name" field to identify the line of  
24 business to which the email pertains. Id. ¶ 10. Thus, an email advertising police training  
25 might have the "from name" of "Criminal Justice" followed by the email address at  
26 Virtumundo's domain, "CriminalJustice@vm-mail.com". Id. This performs three  
27 functions. Id. ¶ 11. First, it informs the recipient that the message is a commercial email,  
28 rather than an email from a particular individual. Id. Second, it informs the recipient of

1 the general subject of the message. Id. Third, it accurately identifies Virtumundo's  
2 business line that initiated the message. Id. It is not "advertising copy" as Plaintiffs  
3 contend. Id. .

4 Virtumundo identifies itself in the "from" line by using its domain name, and  
5 expressly in the content of the emails it sends, for informational rather than "branding"  
6 purposes. Shopmaker Decl. ¶ 12. Virtumundo does not advertise its own services to  
7 consumers, and most consumers would not recognize the Virtumundo name. Id. ¶ 13  
8 Similarly, Virtumundo transmits email to persons who generally do not have any personal  
9 relationship with any Virtumundo employee. As such, including in the "from name" field  
10 the name of Virtumundo or its employee who initiates the transmission would not provide  
11 meaningful information. Id. ¶ 14. To the contrary, to do so would obscure the fact that  
12 the email contains a commercial solicitation. A "from name" of "William A. Worker" (a  
13 hypothetical Virtumundo employee, for example) may lead a consumer to believe the  
14 message is from an individual and is personal in nature, rather than from a company. Id.  
15 The "from name" of *CriminalJustice*, on the other hand, clearly implies a commercial  
16 solicitation. "Virtumundo" or "William A. Worker" would be ambiguous. Id.

17 Plaintiffs admitted that they "were not 'adversely affected' (as that term is used in  
18 15 USC 7706(g)(1)) by the [emails they allege Defendants sent]." <sup>3</sup> See Declaration of  
19 Derek A. Newman in Support of Opposition to Plaintiffs' Motion for Partial Summary  
20 Judgment ("Newman Decl.") ¶ 6, Ex. C at 2:3 (No. 7). Rather, "Omni is only seeking  
21 statutory damages in this action." Id.

## 22 **B. Relevant Procedural and Discovery History**

23 Plaintiffs are in the business of filing lawsuits under CAN-SPAM and CEMA.  
24 (Newman Decl. ¶ 2). Plaintiffs commenced this action on February 9, 2006, alleging,  
25 *inter alia*, receipt of 6000 unsolicited emails. (Dkt. No. 1). Plaintiff filed a first amended  
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27 <sup>3</sup> Plaintiffs made this surprising admission in "Plaintiff Omni's Answers and  
28 Responses to Defendant Virtumundo's First Requests for Admission to Omni" in  
response to Request for Admission No. 7.

1 complaint on April 4, 2006 (Dkt. No. 15).

2 On November 2, 2006, Defendants filed a Motion for an Undertaking Pursuant to  
3 15 U.S.C. § 7706(g)(4), with a noting date of November 17, 2006 (Dkt. No. 38). On  
4 November 3, 2006, Plaintiffs filed a Motion for Relief, seeking to be excused from  
5 responding to the Motion for an Undertaking on the ground that they planned to file a  
6 summary judgment motion that would “result in the resolution of the ultimate issues in  
7 this case” (Relief Motion 2:11-12)) (Dkt. No. 42). The Court granted Plaintiffs’ Motion  
8 for Relief. (Dkt. No. 46). On December 18, 2006, Plaintiffs filed the Motion now before  
9 the Court. (Dkt. No. 53).

10 Pursuant to FED. R. CIV. P. 16(f), the last court day to complete discovery  
11 and file and serve motions to compel discovery was December 15, 2006.  
12 By stipulation of the parties, the Court extended the deadline for the parties to depose fact  
13 witnesses to January 15, 2007, and extended the deadline for filing general dispositive  
14 motions to January 22, 2007 (Dkt. No. 50).

15 The depositions of plaintiffs James S. Gordon and Omni Innovations, LLC are  
16 scheduled for January 10 and 11, 2006. (Newman Decl., ¶ 3). Counsel for Defendants  
17 asked Plaintiffs’ counsel to stipulate to move the Motion back a week, to permit  
18 Plaintiffs’ depositions to be taken before Defendants’ Opposition to the Motion was due.  
19 Plaintiffs refused. (Newman Decl., ¶ 4). Accordingly, Defendants’ Opposition is being  
20 filed before Plaintiffs’ depositions have been taken. Id.

### 21 III. ARGUMENT

#### 22 A. Summary judgment should be denied because there are disputed issues of 23 material fact.

24 Summary judgment is appropriate only upon a showing that there is “no genuine  
25 issue as to any material fact and the moving party is entitled to judgment as a matter of  
26 law.” FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 91 L. Ed. 2d  
27 265, 106 S. Ct. 2548 (1986) (“One of the principal purposes of the summary judgment  
28 rule is to isolate and dispose of factually unsupported claims or defenses . . .”). A fact is

1 “material” if its resolution will affect the outcome of the lawsuit. Anderson v. Liberty  
2 Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). A dispute  
3 about a material fact is “genuine” if “the evidence is such that a reasonable jury could  
4 return a verdict for the nonmoving party.” Id.

5 The moving party bears the burden of informing the court of the basis for its  
6 motion, together with evidence demonstrating the absence of any genuine issue of  
7 material fact. Celotex Corp. v. Catrett, *supra*, 477 U.S. at 323. Once the moving party  
8 has met its burden, the party opposing the motion may not rest upon the mere allegations  
9 or denials of his pleadings but must set forth specific facts showing that there is a genuine  
10 issue for trial. Anderson v. Liberty Lobby, Inc., *supra*, 477 U.S. at 248. Although the  
11 parties may submit evidence in an inadmissible form--namely, depositions, admissions,  
12 interrogatory answers, and affidavits--only evidence which might be admissible at trial  
13 may be considered by a trial court in ruling on a motion for summary judgment. FED. R.  
14 CIV. P. 56(c) ; Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542,  
15 1550-51 (9th Cir. 1990); Beyene v. Coleman Security Services, Inc., 854 F.2d 1179, 1181  
16 (9th Cir. 1988); *see* United States v. Dibble, 429 F.2d 598, 603 (9th Cir.1970) (court may  
17 disregard inadmissible evidence *sua sponte*).

18 Plaintiffs Motion falls far short of meeting the initial burden of demonstrating the  
19 absence of any genuine issue of material fact. Instead, Plaintiffs repeatedly  
20 mischaracterize Defendants’ position as consistent with their own (*see, e.g.*, Motion 2:2  
21 (“[t]he Material facts of this matter are uncontested”); id. at 5:8 (“there are no material  
22 facts in dispute”); id. at 6:15-16 (“the fact that the Defendant Virtumundo here failed to  
23 identify itself on the ‘From’ line, but instead falsely displayed its advertising copy, is  
24 indisputable”). In truth, Defendants dispute most of Plaintiffs’ factual contentions.  
25 Plaintiffs’ rhetoric cannot remedy the paucity of their evidence, the vast majority of  
26 which is inadmissible (and to which Defendants object and move to strike, as described  
27 below). Finally, Plaintiffs and Defendants have radically different views regarding the  
28 inferences that can properly be drawn from those facts that are uncontested, again



1 suggesting that summary judgment is inappropriate in the instant action.

2 **B. Plaintiffs lack standing to assert claims under CAN-SPAM because they are**  
3 **not a *bona fide* Internet access service provider adversely affected.**

4 CAN-SPAM (15 U.S.C. §§ 7701, *et seq.*, the “Act”) provides that *only* certain  
5 federal agencies, state attorneys general, and “a provider of Internet access service  
6 adversely affected by a violation” have standing to bring a claim under the statute. 15  
7 U.S.C. § 7706(g)(1). CAN-SPAM does not provide a private right of action to  
8 consumers. 15 U.S.C. § 7706(a). Consequently, the first material issue in dispute is  
9 whether Plaintiffs (i) are an Internet access service provider and (ii) have been adversely  
10 affected by a violation of the statute.

11 **1. Plaintiffs are not a bona fide Internet access service provider.**

12 As described in Defendants’ pending Motion for an Undertaking, Plaintiffs have  
13 no standing unless they prove they are “bona fide Internet service provider(s)” providing  
14 “actual Internet access service to customers.” 150 CONG. REC. E72 (attached as Exhibit  
15 M to Townsend Decl. in support of Motion for an Undertaking (Dkt. No. 41)). “The term  
16 ‘Internet access service’ has the meaning given that term in section 231(e)(4) of the  
17 Communications Act of 1934 (47 U.S.C. 231(e)(4))”. 15 U.S.C. § 7702 (11).

18 The term “Internet access service” means a service that enables users to access  
19 content, information, electronic mail, or other services offered over the  
20 Internet, and may also include access to proprietary content, information, and  
other services as part of a package of services offered to consumers. Such term  
does not include telecommunications services.

21 47 U.S.C. § 231(e)(4).

22 Plaintiffs contend they are an Internet access service provider because they operate  
23 a web site and have provided email accounts to nine people since May 2005. (Omni  
24 Response to Interrogatory No. 22, Attached as Exhibit U to Townsend Decl.) These  
25 accounts were provided for free “subject to data collection” by Plaintiff Gordon. *Id.*  
26 Merely providing email accounts to a handful of friends and family at no charge does not  
27 render Plaintiffs a bona fide Internet access service provider. If it did, every one of  
28 AOL’s more than 20 million subscribers (who can assign screen names and associated

1 email accounts to household members) would qualify. Such a construction is plainly  
2 absurd.

3 Plaintiffs do not provide “Internet access service” for the purposes of the Act  
4 because “consumers” in the context of the Act implies a commercial relationship.<sup>4</sup> CAN-  
5 SPAM’s standing requirement is intended to provide a private right of action for  
6 legitimate Internet access service businesses, such as AOL itself. The statute does not  
7 confer that right on an Internet access service customer, notwithstanding that such  
8 customer may in turn provide free email accounts to its friends or family. *See* REPORT  
9 OF THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON  
10 S. 877, S. REP. No. 102, 108th Cong., 1st Sess. 2-3 (2003) (the “Committee Report”)  
11 (Exhibit N to Townsend Decl. in Support of Defendants’ Motion for an Undertaking)  
12 (Dkt. No. 41-14) (referencing global Internet access providers such as Microsoft,  
13 Earthlink, AOL, etc.). Since Plaintiffs do not have customers, they are not a “bona fide  
14 Internet service provider” as contemplated by the Act, and do not satisfy CAN -SPAM’s  
15 standing requirement.

16 Further support for Defendants’ contention that Plaintiffs are not a “bona fide  
17 Internet service provider” comes in the Gordon Declaration. There, the plaintiff  
18 acknowledges at some unspecified time since 2005 he “took over the administration of  
19 those email accounts and began directly receiving the email sent thereto.” (Gordon Decl.  
20 ¶ 9). Gordon thus admits that even the non-paying “customers” upon whom he founded  
21 his claim to be a provider of Internet access service no longer receive email sent to their  
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<sup>4</sup> This implication is supported by the fact that in presenting the bill eventually  
codified as CAN-SPAM to the House of Representatives, Hon. John D. Dingell stressed  
that “we intend that Internet access service providers provide *actual Internet access  
service to customers*. 150 CONG. REC. E72, *supra* (Exhibit “M” to Townsend Decl.)  
(emphasis added). “Customers” clearly suggests a commercial transaction. *See, e.g.*,  
Dictionary.com Unabridged (v 1.1). Random House, Inc.  
<http://dictionary.reference.com/browse/customer> (accessed: January 03, 2007)  
 (“Customer: 1. a person who purchases goods or services from another; buyer; patron.”)

1 (former) accounts. Plaintiffs have not met their burden of establishing that they are  
2 providers of Internet access service, and the Motion on the CAN-SPAM claims should be  
3 denied without further consideration.

4 **2. Plaintiffs were not adversely affected by a violation of the statute.**

5 The Committee Report submitted in connection with S. 877 (the bill ultimately  
6 codified as CAN-SPAM) described in some detail the adverse economic impact of  
7 unsolicited commercial email on Internet service providers:

8 Massive volumes of spam can clog a computer network, slowing Internet  
9 service for those who share that network. ISPs must respond to rising volumes  
10 of spam by investing in new equipment to increase capacity and customer  
11 service personnel to deal with increased subscriber complaints. ISPs also face  
12 high costs maintaining e-mail filtering systems and other anti-spam technology  
13 on their networks to reduce the deluge of spam. Increasingly, ISPs are also  
14 undertaking extensive investigative and legal efforts to track down and  
15 prosecute those who send the most spam, in some cases spending over a  
16 million dollars to find and sue a single, heavy-volume spammer.

17 S. Rep 108-102, at 6. The experience of Earthlink, as described in Earthlink, Inc.  
18 v. Carmack, 2003 U.S. Dist. LEXIS 9963, 12-13 (D. Ga. 2003), is illustrative:

19 In addition to the administrative and out-of-pocket expenses described above,  
20 EarthLink suffers other types of more serious and substantial economic loss  
21 as the result of spam sent into or out of EarthLink's network. These include  
22 the loss of business reputation and the loss of existing and prospective  
23 customers that necessarily occurs when an ISP's users are repeatedly spammed  
24 and/or when its resources are used to send spam to other users.

25 Earthlink, Inc. v. Carmack, 2003 U.S. Dist. LEXIS 9963, 12-13 (D. Ga. 2003) (Internal  
26 quotations and citations omitted).

27 Unlike Earthlink, Plaintiffs did not suffer serious and substantial economic loss,  
28 and indeed suffered no economic loss whatsoever. Since Plaintiffs do not operate a  
29 business, they could not have suffered loss of business reputation, nor the loss of  
30 prospective customers. Likewise, since there were only nine users of Plaintiffs' email  
31 server at most, Plaintiffs' resources could not have been used to send spam to other users.

32 The only evidence offered by Plaintiffs that they experienced any adverse impact  
33 as a result of Defendants' conduct is a vague, unsupported allegation in the Gordon  
34 Declaration that "the volume of spam sent by Defendants . . . has cost me untold hours of

1 manpower, and substantial resources.” Gordon Decl. ¶ 26. First, this does not suffice to  
2 establish that there is no genuine issue as to any material fact. Second, the time and  
3 resources expended by Gordon appear to be exclusively directed toward litigation  
4 preparation (such as sorting emails by sender and deleting duplicates), and not related to  
5 combating or managing spam *per se*. See, e.g., Gordon Declaration in Reponse and  
6 Opposition to Defendants’ Motion to Compel Segregation of Emails, ¶ 3 (“The job of  
7 collecting, sorting, and compiling records on this and other defendants is a very time-  
8 consuming process”). Mr. Gordon’s time, it should be stressed, is invested in collecting,  
9 reviewing, sorting, and compiling records on emails that have *already been identified as*  
10 *spam*. See *id.* (“my clients send me emails that are unsorted in lots of 10-50,000 at one  
11 time”).

12 Nowhere, in contrast, do Plaintiffs allege that they had to increase server capacity,  
13 hire customer service representatives, or spend money to implement spam filters.  
14 Plaintiffs do not claim, and certainly do not present any evidence, that they lost money,  
15 experienced system downtime, or that any business was otherwise adversely affected as a  
16 result of receiving Defendants’ alleged email messages. The time invested by Plaintiffs  
17 in intentionally gathering alleged spam emails from their clients in preparation for  
18 litigation is obviously not the sort of adverse impact that Congress had in mind when  
19 drafting CAN-SPAM.

20 If Plaintiffs had left the messages in the junk mail folders, then they would not  
21 have seen the messages and likely would not have known the messages were sent.  
22 Plaintiffs were not adversely affected by the violations they allege, and therefore do not  
23 having standing the bring the claims alleged herein. Indeed, Plaintiffs admit in their  
24 responses to requests for admission that they were not adversely affected by Defendants’  
25 alleged emails. See Newman Decl. ¶ 6, Ex. C at 2:7-8. The Motion on the CAN-SPAM  
26 claims should be denied on that basis alone.

27 Moreover, even if Plaintiffs experienced some adverse effect, (which they did not,  
28 and failed to offer any evidence to demonstrate otherwise), Plaintiffs themselves, rather

1 than Defendants, were the proximate cause of those effects. Plaintiffs admit they signed  
2 up to receive the emails upon which they base their claims. *See* Gordon Decl. ¶ 11;  
3 Declaration of Michael Shopmaker in Support of Defendants’ Motion for an Undertaking  
4 ¶¶ 20-22 (users of the email addresses at james@gordonworks.com,  
5 faye@gordonworks.com, jamila@gordonworks.com, jonathan@gordonworks.com,  
6 jay@gordonworks.com, emily@gordonworks.com, msm@gordonworks.com, and  
7 jim@gordonworks.com all affirmatively consented to receive emails from Virtumundo or  
8 one of its registration partners). Plaintiffs do not allege that they ever sought to  
9 unsubscribe from Virtumundo “using a mechanism provided pursuant to [the statute] not  
10 to receive some or any commercial electronic mail messages from” Defendants. *See* 15  
11 U.S.C. § 7704(a)(4)(A). Given that Plaintiffs opted-in to Defendants’ mailings, and  
12 never opted-out through the means provided, they (and not Defendants) are liable for any  
13 adverse effects they may have suffered.

14 **C. Defendants qualify for the safe harbor because the alleged “from” lines**  
15 **identify the sender of the message.**

16 The “from name” entries that Plaintiffs allege Defendants used are neither false  
17 nor misleading, but accurate and significantly more useful to the recipient than the names  
18 Plaintiffs suggest. Defendants are alleged to have used domain names that are registered  
19 to them, together with text that identifies the subject of the email. With this information,  
20 recipients can identify the name, address, and phone number of the sender, and from the  
21 “from” line alone know the email is commercial in nature.

22 Plaintiffs propose a *per se* rule that Congress did not provide where the full legal  
23 name of the individual who sends an email would have to be included in the “from” line.  
24 Plaintiffs’ argument fails on several levels. 15 U.S.C. § 7704(A)1(b) provides that “a  
25 ‘from’ line (the line identifying or purporting to identify a person initiating the message)  
26 that accurately identifies any person who initiated the message shall not be considered  
27 materially false or materially misleading”. This “safe harbor” does not require that such  
28 identification be in any particular field in the “from” line, only that the “from” line as a

1 whole accurately identify the sender.

2 To determine whether Defendants fall within this safe harbor, the court must  
3 identify what it means for a person to be “accurately identified” in a “from line.” An  
4 email address must be unique in order to function, while the names of entities and natural  
5 persons can be shared by literally millions of people around the globe. Consequently, an  
6 email address is far more useful than a person’s name, provided the email address is at a  
7 domain name registered to the person initiating transmission of the email.

8 Congress passed CAN-SPAM to combat commercial marketers that hide their  
9 identities. By using a domain name registered to it, a sender allows the recipient to  
10 obtain the sender’s address and phone number from the publically available WHOIS  
11 database. A “from” line that contains the sender’s actual email address “accurately  
12 identifies” the person who initiated the message for the purpose of 15 U.S.C. §  
13 7704(A)1(b).

14 In this case, Virtumundo is alleged to have sent messages from its own domain  
15 names, which are noted in each “from” line and which route to them. Defendants use  
16 email addresses in the from line which routes to them. The domain names associated  
17 with the email addresses are listed in the WHOIS database. The WHOIS database returns  
18 accurate contact information for Defendants in response to each query of Defendants’  
19 domain names. Defendants accurately identify themselves in the “from” lines of their  
20 emails. As a result, those “from” lines cannot possibly be considered materially false or  
21 materially misleading. Defendants therefore qualify for the safe harbor which provides “a  
22 ‘from’ line . . . that accurately identifies any person who initiated the message shall not  
23 be considered materially false or materially misleading”.

24 A contrary conclusion would elevate form over substance and run counter to the  
25 concerns underlying CAN-SPAM. For example, “John Smith” would be acceptable  
26 under Plaintiffs’ construction, even if his email address were jsmith@yahoo.com (which  
27 would require the recipient to subpoena Yahoo to learn John Smith’s address and phone  
28 number). Conversely, the safe harbor would not apply to a sender who uses its accurate

1 domain name in its email address (*e.g.*, CriminalJustice@vmmail.com), is listed in the  
2 WHOIS database, and clearly identifies itself in the message. Pursuant to the policy  
3 underlying the CAN-SPAM requirement, namely disclosure of the sender, Defendant  
4 qualifies for the safe harbor.

5 The plain language of the statute compels this interpretation. It is also consistent  
6 with Congressional intent in the definition of the term “materially”:

7 the term “materially”, when used with respect to false or misleading header  
8 information, includes the alteration or concealment of header information in  
9 a manner that would impair the ability of an Internet access service processing  
10 the message . . . or a law enforcement agency to identify, locate, or respond to  
a person who initiated the electronic mail message or to investigate the alleged  
violation, or the ability of a recipient of the message to respond to a person  
who initiated the electronic message.

11 15 U.S.C. 7704(a)(6). The “from name” fields in Defendants’ emails in no way impair the  
12 ability of a recipient (or anyone else) to locate them. In most cases with commercial  
13 email, the “from name” field does not provide useful information because the sender is  
14 unknown to the recipient. For example, a “from name” field of “William A. Worker”  
15 would provide no real information to a consumer. On the other hand, the “from name” of  
16 “Criminal Justice” (accompanied by Virtumundo’s domain name) in connection with a  
17 message advertising jobs in criminal justice puts the recipient on notice of the nature of  
18 the message.

19 Further, CAN-SPAM’s prohibition against materially false and materially  
20 misleading header information is not specific as to information contained in the “from”  
21 line, but applies to header information as a whole.

22 The term ‘header information’ means the source, destination, and routing  
23 information attached to an electronic mail message, including the originating  
24 domain name and originating electronic mail address, and any other  
information that appears in the line identifying, or purporting to identify, a  
person initiating the message.

25 15 U.S.C. § 7702 (8). Plaintiffs’ contention that the “from name” field must be analyzed  
26 independently, outside the context of the entire email header, is inconsistent with the Act.  
27 In fact, the term “from name” is not contained within the text of CAN-SPAM. The issue  
28 the court must decide is whether the *header information, as a whole*, is materially false

1 and misleading. Defendants' header information, which informs a recipient of the  
2 general subject of the email and permits Defendants to be easily located, is neither false  
3 nor misleading.

4 **D. CAN-SPAM does not require the "from name" to consist of a sender's**  
5 **"actual" name.**

6 Plaintiffs place great emphasis on a rhetorical effort to establish that Congress  
7 intended CAN-SPAM to require the use of a sender's "actual" name in the "from name"  
8 field. Even a cursory review of the statute reveals that Plaintiffs' argument fails because  
9 Congressional intent is clear. "One determines what Congress would have done by  
10 examining what it did." *See Legal Services Corporation v. Velazquez*, 531 U.S. 533, 560  
11 (2001) (Scalia, J., dissenting).

12 CAN-SPAM contains no requirement that the actual name of a person be  
13 contained in the "from name" portion of the from line, and no such requirement is found  
14 in the legislative history of the Act. In truth, there is no requirement in CAN-SPAM that  
15 the "from name" (as opposed to the "from line") field contain any information at all; a  
16 sender is free to simply leave it blank. *Any* descriptive information in the "from name"  
17 field exceeds the CAN-SPAM requirement.

18 Interpreting a federal statute requires two steps. First, the court must determine  
19 whether Congress has directly spoken to the precise question at issue. *New Edge*  
20 *Network, Inc. v. FCC*, 461 F.3d 1105, 1111 (9th Cir. 2006). If the intent of Congress is  
21 clear, the inquiry ends; the court "must give effect to the unambiguously expressed intent  
22 of Congress." *Id.* (citations omitted) Second, "if the statute is silent or ambiguous with  
23 respect to the specific issue, the question for the court is whether the [plaintiff's position]  
24 is based on a permissible construction of the statute." *Id.*

25 **1. Congress clearly did not intend to require a "from name".**

26 Plaintiffs assert "the accurate identification of the *actual sender* of a commercial  
27 electronic email message in the 'header' portion of that email is both required under, and  
28 central to, Congress's scheme to regulate commercial email." (Motion at 5:20-23)



1 (emphasis added). This is not, however, what CAN-SPAM provides. The relevant portion  
2 of the Act, Section 7704, provides in pertinent part,

3 It is unlawful for any person to initiate the transmission, to a protected  
4 computer, of a commercial electronic mail message . . . that contains, or is  
5 accompanied by, header information that is materially false or materially  
6 misleading. For purposes of this paragraph . . . (B) a “from” line (the line  
7 identifying or purporting to identify a person initiating the message) that  
8 accurately identifies any person who initiated the message shall not be  
9 considered materially false or materially misleading

10 15 U.S.C. § 7704 (a) (1).

11 In the Act, Congress addressed the precise question at issue. It declined to require  
12 the actual name of the sender in the “from name” field of the header. There is nothing  
13 ambiguous in CAN-SPAM or its safe harbor for those who accurately identify themselves  
14 in the “from” line. The safe harbor does *not* require a sender to accurately identify itself  
15 in the “from name” field; it provides a safe harbor for those senders who accurately  
16 identify themselves in the “from” line. The term “from name” never appears in CAN-  
17 SPAM. Given this unambiguous language, the intent of Congress is clear, and the inquiry  
18 into interpretation ends. The construction that Plaintiffs urge contradicts the clear intent  
19 of Congress.

20 **2. Plaintiffs’ position is not based on a permissible construction of the**  
21 **statute.**

22 Plaintiffs conclude the “from name” field must contain the “actual name” of the  
23 sender because of the Section 7704(a)(1)(B) safe harbor. This conclusion is a logical  
24 error known as the “vacuous implication” or “denying the antecedent”. It takes the form  
25 of an assertion that “if a, then b” compels the conclusion “if not a, then not b.” Plainly,  
26 this is not the case.

27 Congress wrote express language into the Act that identifying a sender in the  
28 “from” line means the “from” line is *not* misleading. This does not mean the converse is  
true. Congress did not intend to provide that *failing* to identify oneself in the “from” line  
*is* misleading, or it would have so provided. The existence of the safe harbor makes clear  
that CAN-SPAM does not require a sender’s actual name in the “from” line. To conclude

1 otherwise would render 15 U.S.C. § 7704(a)(1)(B) superfluous.

2 Also, the Act applies to one who “initiates the transmission” of emails within the  
3 scope of the Act. “[M]ore than one person may be considered to have initiated a  
4 message.” 15 U.S.C. § 7702(9). Since there may be more than one initiator, Plaintiffs’  
5 contention leads to the conclusion that to comply a “from name” might have to be an  
6 unwieldy list of all senders in the event more than one person initiated a message. This is  
7 not a hypothetical issue. Plaintiffs’ theories lead to confusion, rather than clarity, as to  
8 who precisely should be in Plaintiffs’ “from name”. Plaintiff itself identifies this issue  
9 but offers no solution to it (Motion 3:15). The Federal Trade Commission (the “FTC”),  
10 however, which has a primary enforcement role over CAN-SPAM, has proposed a  
11 workable solution to this issue. See, 70 Fed. Reg. 25426, 25452 (May 12, 2005)  
12 (Proposed Rule) (Proposed § 316.2(m), addressing when more than one person’s products  
13 or services are advertised or promoted in a single electronic mail message). Plaintiffs’  
14 proposed solutions are utterly unworkable from a practical standpoint, and inconsistent  
15 with the rule the FTC proposes.

16 Moreover, 15 U.S.C. § 7702 (16)(B) provides that senders and initiators may use  
17 the name of a line of business or a division to identify themselves. In this case,  
18 Defendants’ “from name” entries such as “criminal justice” are not “advertising copy,” as  
19 Plaintiffs repeatedly contend, but rather represent Defendants’ business lines. See  
20 Shopmaker Decl. ¶ 11.

21 Congress spoke expressly when it provided that a header may not be materially  
22 false or misleading. The “from” line is but a small portion of the header information.  
23 Congress did not provide that the “from” line contain an accurate “from name”. Instead,  
24 Congress wrote a safe harbor providing that an accurate “from” line would render the  
25 header information compliant. By “denying the antecedent” and writing in a requirement  
26 that Congress did not, Plaintiffs are improperly construing the statute, and their position  
27 must fail. Further, Congress delegated to the FTC the role of developing further rules and  
28 guidance for the regulated community. Congress deliberately denied private parties, such

1 as the present plaintiffs, a right of action under CAN-SPAM. Consequently, the regulated  
2 community is spared litigation costs of the type Plaintiffs presently impose upon these  
3 Defendants.

4 **E. Plaintiffs' state law claims do not establish any violation of CEMA, and CAN-**  
5 **SPAM preempts Plaintiffs' CEMA argument.**

6 Plaintiffs assert that Defendants' emails violated Washington's Commercial  
7 Electronic Mail Act, RCW 19.190 et seq. ("CEMA"). In particular they allege a violation  
8 of RCW 19.190.020 which prohibits transmitting a commercial email message that  
9 "misrepresents or obscures any information in identifying the point of origin" of the  
10 message. Plaintiffs contend that Defendants' failure to include their employees' legal  
11 names or their full corporate name in the "from name" field "misrepresents or obscures"  
12 information in identifying the point of origin.

13 Plaintiffs' argument must fail given the ease with which Defendants can be  
14 located – not only by performing a simple WHOIS lookup regarding the domain names  
15 from which the emails are sent, but by merely opening the emails themselves.  
16 Defendants' names and addresses are clearly set forth in each email they send. To the  
17 extent, if any, that CEMA purports to prohibit information in the "from name" field, it  
18 prohibits immaterial misrepresentations and falsehoods and is preempted by CAN-SPAM.

19 Congress intended CAN-SPAM to create a single national standard for commercial  
20 email, and to that end it preempts state laws, subject to a narrow exception:

21 This chapter 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  
23 send commercial 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.

24 15 U.S.C. 7707(b)(1). Further, the following congressional finding is part of  
25 CAN-SPAM:

26 Many States have enacted legislation intended to regulate or reduce unsolicited  
27 commercial electronic mail, but these statutes impose different standards and  
28 requirements. As a result, they do not appear to have been successful in  
addressing the problems associated with unsolicited commercial electronic  
mail, in part because, since an electronic mail address does not specify a

1 geographic location, it can be extremely difficult for law-abiding businesses  
2 to know with which of these disparate statutes they are required to comply.

3 15 U.S.C. 7701(a)(11).

4 In Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F. 3d 348 (4th Cir.  
5 2006), the Fourth Circuit considered the CAN-SPAM preemption clause in relation to an  
6 Oklahoma law that prohibits, among other things, sending a commercial email that  
7 “misrepresents any information in identifying the point of origin or the transmission path  
8 of the electronic mail message.” This is virtually identical to the CEMA provision upon  
9 which Plaintiffs rely. The district court ruled that the Oklahoma statute created a cause of  
10 action for immaterial errors, and was preempted. The Fourth Circuit affirmed, reasoning  
11 “[r]ather than banning all commercial e-mails or imposing strict liability for insignificant  
12 inaccuracies, Congress targeted only e-mails containing something more than an isolated  
13 error.” Omega World Travel, Inc. v. Mummagraphics, Inc., *supra*, 469 F.3d at 348.

14 The court thus held that permitting claims under state law for immaterial errors  
15 would subvert Congress’ intent to create a national standard:

16 In sum, Congress’ enactment governing commercial e-mails reflects a calculus  
17 that a national strict liability standard for errors would impede “unique  
18 opportunities for the development and growth of frictionless commerce,” while  
more narrowly tailored causes of action could effectively respond to the  
obstacles to “convenience and efficiency” that unsolicited messages present.

19 Id. Like the Oklahoma statute, CEMA is preempted to the extent it purports to impose  
20 liability for minor errors that do not impede the ability of a recipient to locate the sender.  
21 Defendants’ alleged “from” lines are not false or misleading, but even if they were, the  
22 errors would be immaterial given the ease with which Defendants can be located from the  
23 email address or the content of the email in any given instance. Messages do not violate  
24 the statute’s accuracy requirements when the messages provide numerous methods to  
25 identify, locate, and respond to the senders. Omega World Travel, *supra*, 469 F. 3d 348.

26 Even if CEMA were not preempted by CAN-SPAM, Plaintiffs fail to meet their  
27 burden as to their CEMA claims. Plaintiffs provide no analysis or reference to relevant  
28 judicial authority supporting their interpretation of the state statute. In the only decisions

1 regarding CEMA, Washington courts held that *subject* lines transmitted with commercial  
2 email were deceptive when a recipient was forced to open the message to identify  
3 unwanted commercial email. State v. Heckel, 122 Wn. App. 60 (Heckel II) (2004). In  
4 that case, the Washington Attorney General brought suit against an Oregon resident,  
5 Jason Heckel, alleging violations of the CEMA prohibitions involving two subject lines:  
6 “Did I get the right e-mail address?” and “For your review - HANDS OFF!” Id. at 71.  
7 The Heckel II court held that those subject lines when transmitted with unsolicited  
8 commercial email were deceptive because they were designed to entice the recipient to  
9 open the message based on the mistaken belief that the message might be from a friend or  
10 acquaintance, or business contact. Id. at 71. Similarly, in an earlier decision in that case,  
11 the Washington Supreme Court characterized the sending of commercial email with  
12 deceptive subject lines as shifting costs to consumers by making it “virtually impossible  
13 to distinguish spam from legitimate personal or business messages.” State v. Heckel, 143  
14 Wn.2d 824, 835 (Heckel I), *cert. denied*, 534 U.S. 997 (2001).

15 By this standard, Defendants’ “from” lines are not deceptive or misleading.  
16 Rather, Defendants’ “from” lines clearly inform recipients that the messages are  
17 commercial solicitations. In some cases, Defendants provide the actual name of the  
18 business entity on whose behalf the message is initiated. In other cases, they provide the  
19 name of the line of business to which the message pertains. Unlike the Heckel subject  
20 lines, no reasonable person would believe that a message from “CriminalJustice” is a  
21 personal message. Accordingly, Plaintiffs’ CEMA claims fail.

22 Plaintiffs do nothing more than make a general reference to the emails attached to  
23 the Gordon Declaration combined with a vague assertion that Defendants’ “from” lines  
24 violate CEMA. This does not meet Plaintiffs’ burden of showing that there is no genuine  
25 issue as to any material fact. Plaintiffs’ Motion should be denied.

26 **F. Plaintiffs fail to establish that Defendants are the initiators of the emails**

27 As described in the Motion for an Undertaking, Plaintiffs have filed numerous  
28 emails with the Court from <msdsa.com>, <prefersend.com>, or <ew01.com>, which

1 purportedly form the basis of their claims. Defendants did not initiate those messages,  
2 nor do those messages have any relationship to Defendants. *See* Declaration of Michael  
3 R. Geroe in Support of Motion for an Undertaking at ¶¶ 20, 21 (Dkt. No. 39) and  
4 Exhibits thereto (Adknowledge did not send or initiate emails from <msdsa.com>,  
5 <prefersend.com>, or <ew01.com>); Declaration of Michael Shopmaker in Support of  
6 Motion for an Undertaking at ¶¶ 23, 24 (Dkt. No. 40) and Exhibits thereto (Virtumundo  
7 did not send or initiate emails from <msdsa.com>, <prefersend.com>, or <ew01.com>);  
8 Townsend Decl. (Dkt. No. 41) and Exhibits P, Q & R thereto (Defendants are not the  
9 registrants of <msdsa.com>, <prefersend.com>, or <ew01.com>).

10 Plaintiffs have failed to establish that Virtumundo sent the 7,890 emails described  
11 in their Motion. There is no representation, for example, that all such emails included  
12 return addresses at domain names registered to Virtumundo. Simply attaching thousands  
13 of emails to a declaration and alleging that they violate CAN-SPAM is wholly  
14 insufficient to meet Plaintiffs' burden of establishing that there are no disputed issues of  
15 material fact.

16 **G. Plaintiffs' purported evidence is inadmissible and should be stricken**

17 Although a certain amount of rhetorical hyperbole is expected in our adversarial  
18 system, such rhetoric becomes improper when it crosses the line into false statements of  
19 fact. Plaintiffs cross that line many times in the Motion, repeatedly asserting, incorrectly,  
20 that there are no disputed issues of material fact that would preclude summary judgment.  
21 (*see, e.g.*, Motion 2:2 (“[t]he material facts of this matter are uncontested”); *id.* at 5:8  
22 (“there are no material facts in dispute”). Plaintiffs make little effort to educate  
23 Defendants and the Court about those facts, in most cases failing to cite to specific  
24 evidence (or any evidence). In other cases, Plaintiffs cite inadmissible hearsay or  
25 speculation. Few, if any, of the “relevant facts” identified by Plaintiffs are supported by  
26 citations to any evidence that might demonstrate their supposed uncontested status.  
27 Rather, Plaintiffs refer generally to Exhibit A of the Declaration of James S. Gordon, Jr.  
28 in support of the Motion (the “Gordon Decl.”), which consists of thousands of pages of

1 printouts of emails allegedly sent by Defendants to Plaintiffs.

2 Plaintiffs make no effort beyond the stack of alleged emails to establish that each  
3 (or any) of the 7,890 emails upon which they base their claims was sent by Defendants,  
4 was received by Plaintiffs, or fails to identify an actual sender in its “from” line.  
5 Plaintiffs are even unclear as to the number of emails underlying their claim. See Gordon  
6 Decl.¶ 26. This falls far short of the showing required to warrant summary judgment in  
7 Plaintiffs’ favor. Defendants therefore object to Plaintiffs’ purported evidence, as set  
8 forth in **Exhibit A** attached to this memorandum. Defendants hereby move to strike the  
9 Gordon declaration in its entirety, or in the alternative move to strike each piece of  
10 evidence identified in the attached Exhibit A.

#### 11 IV. CONCLUSION

12 “The CANSPAM Act addresses ‘spam’ as a serious and pervasive problem, but it  
13 does not impose liability at the mere drop of a hat.” Omega World Travel, *supra*, 469 F.  
14 3d 348. Yet, Plaintiffs seek over ten million dollars based upon a hyper-technical  
15 argument about an immaterial description in an email “from” line that CAN-SPAM does  
16 not forbid.

17 In trying to educate the court about CAN-SPAM, Plaintiffs ignore the point that  
18 CAN-SPAM does not prohibit commercial email; it merely regulates it. Congress makes  
19 clear in the very first paragraph of CAN-SPAM that the statute was passed in order to  
20 facilitate the transmission of commercial email through acceptable means. The Act sets  
21 forth the construction and mandate defining those acceptable means, and Defendants  
22 comply. Plaintiffs’ behavior illustrates they have no interest in actually stopping emails  
23 from reaching their inbox, but rather they seek to use CAN-SPAM and CEMA to extract  
24 settlement payments from law abiding commercial email businesses such as Defendants.

25 Plaintiffs fail to establish that there are no disputed issues of material fact and that  
26 they are entitled to judgment as a matter of law. Plaintiffs’ Motion consists almost  
27 entirely of rhetoric rather than legal argument. Plaintiffs do not identify the elements of  
28 the causes of action for which they seek to recover, do not identify undisputed evidence

1 that establishes each such element, do not authenticate the emails for which they seek to  
2 recover, and do not establish that each of those emails contains materially false or  
3 materially misleading header information. To the extent that Plaintiffs' motion is  
4 considered for summary adjudication of a single novel legal theory – whether CAN-  
5 SPAM requires an actual name in the “from name” field - Plaintiffs urge an expansive  
6 interpretation of CAN-SPAM that is inconsistent with the policy concerns underlying the  
7 Act. Plaintiffs' position is unsupported by the plain language of the Act and is in any  
8 case inapplicable to Plaintiffs' emails, which accurately identify the sender.

9 Plaintiffs fail to meet their burden and, accordingly, Defendants respectfully  
10 request the Court deny the Motion.

11 DATED this 8th day of January, 2007.

12  
13 **NEWMAN & NEWMAN,  
ATTORNEYS AT LAW, LLP**

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15 By:

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