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10 UNITED STATES DISTRICT COURT  
11 WESTERN DISTRICT OF WASHINGTON, SEATTLE

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

15 **Plaintiff,**

16 v.

17 **VIRTUMUNDO, INC, a Delaware**  
18 **corporation, d/b/a**  
19 **ADNOWLEDGEMAIL.COM;**  
20 **ADKNOWLEDGE, INC., a Delaware**  
21 **corporation, d/b/a**  
22 **ADKNOWLEDGEMAIL.COM;**  
23 **SCOTT LYNN, an individual; and**  
24 **JOHN DOES, I-X,**

25 **Defendants.**

**NO. CV06-0204JCC**

**PLAINTIFFS' REPLY TO**  
**DEFENDANTS' OPPOSITION TO**  
**PLAINTIFF'S MOTION FOR**  
**PARTIAL SUMMARY JUDGMENT**

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JUDGMENT

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1           **I. Defendant Has Confirmed – There Are No Issues Of Material Fact In Dispute**

2           Defendant Virtumundo purports to dispute numerous facts, but none of the supposedly  
3 “disputed” facts are relevant to this dispute. The only facts that are relevant here are the fact that  
4 the Defendant sent the 7,890 commercial emails (the “emails”) to Gordon’s Internet Access  
5 Service, and that those emails were received by Gordon. (those emails are shown in Exhibit “A”  
6 to the Declaration of James Gordon in Support of Plaintiffs’ Motion for Partial Summary  
7 Judgment (Dkt. No. 64)).

8           Far from denying the fact that Defendant sent the emails, Defendant confirms that the  
9 domain names contained in the emails, and from which they were sent, are owned by Defendant,  
10 that Defendant routinely uses these domains to send commercial email in Defendant’s ordinary  
11 course of business, and that Defendant routinely addresses the “from” line of those commercial  
12 emails in exactly the manner shown in the emails that make up Exhibit A to the Gordon  
13 Declaration. Shopmaker Decl. ¶¶ 2, 9, 10, 13. Thus, while Defendant argues that “plaintiff  
14 fail(s) to establish that Defendants are the initiators of the emails,” (Defendants’ opposition to  
15 plaintiffs’ motion for partial summary judgment, hereafter “Response” 19:26) Gordon’s  
16 declaration plainly establishes that Gordon’s Internet Access Service received the emails, and  
17 Defendant (perhaps wary of committing perjury) never actually denies sending them, and instead  
18 admits that it has not even entirely reviewed them. (Response 2:19)

19           Once the moving party has met its burden of showing the basis for its motion, together  
20 with evidence demonstrating the absence of any genuine issue of material fact, the party  
21 opposing the motion may not rest upon the mere allegations or denials of his pleadings but must  
22 set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby,  
23 Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Accordingly, despite  
24 Defendant’s self-serving, and transparently false arguments to the contrary, there simply are no

1 facts before the Court that remotely contradict the only reasonable conclusion to be drawn from  
2 the content of the emails Gordon received: Defendant sent Gordon the emails at issue.<sup>1</sup>

3 The emails, and the information contained within the “from lines” of the headers of the  
4 emails, speak for themselves. These emails, together with the relevant statutes, are all that the  
5 Court need consider in deciding this motion. Every other fact ostensibly “contested” by  
6 Defendant can either be ignored, and/or interpreted in a light most favorable to Defendant, as  
7 they are all ultimately irrelevant, and immaterial to the issues of statutory construction presented  
8 here.

## 9 II. ARGUMENT

10 **2.1 The Parties Agree That The FTC’s Interpretation Of Can-Spam Should**  
11 **Guide The Court – The FTC Supports Plaintiffs’ Position Completely.** Defendant  
12 recognizes that the Federal Trade Commission (FTC) has the primary obligation for enforcing  
13 the CAN SPAM Act, (the Act) on behalf of the federal government, and urges the Court to  
14 follow the FTC’s guidance in interpreting the Act. (Response 15:9). Gordon could not agree  
15 more. When the FTC published the proposed rule interpreting the Act cited by Defendant, it also  
16 provided the FTC’s interpretation of the term “from” line in the Act that is at the core of  
17 Gordon’s motion. The FTC’s interpretation is squarely on point, and wholly supports Plaintiffs’  
18 position. In pertinent part, it states:

19 Several commenters requested guidance on CAN-SPAM’s regulation of “from” line  
20 content... Because a significant number of commenters sought guidance on this issue, the  
21 Commission believes it helpful to set forth its interpretation of this portion of the Act...

22 [I]f the “from” line accurately identifies the person who initiated the message, then the  
23 “from” line would not be deceptive. The Commission believes that this does not mean

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24 <sup>1</sup> After admitting that it hadn’t actually reviewed all of the emails at issue here, Defendant purports to raise an issue  
25 of fact with reference to emails that are not even at issue in this motion. Response 19:26. This argument is  
disingenuous in the extreme, and deserves no further response than this footnote.

1 that the “from” line necessarily must contain the initiator’s formal or full legal name, but  
2 it does mean that it must give the recipient enough information to know who is sending  
3 the message. For example, if John Doe, marketing director for XYZ Company, sent out  
4 commercial e-mails for the company and the “from” line indicated that the message was  
5 from “John Doe” or from “XYZ Company,” the “from” line would have accurately  
6 identified the person who initiated the message. Whether any other name—such as the  
7 user ID, corporate division, e-mail service provider, or others suggested by  
8 commenters—would be legally sufficient depends on whether such name “accurately  
9 identifies” a person who “initiated” the message, as that term is defined by the Act. For  
10 additional guidance on what information in the “from” line is acceptable, e-mail senders  
11 should consider their messages from their recipients’ perspective. If a reasonable  
12 recipient would be confused by the “from” line identifier, or if a reasonable recipient  
13 would not expect the “from” line identifier that is provided, those are indications that the  
14 sender is not providing sufficient information. 70 Fed. Reg. 25426, 25431-32 (May 12,  
15 2005) (emphasis added)

16 The FTC thus agrees with Gordon that the name used in the “from” line is supposed to  
17 give enough information so that the recipient will know who sent the message. A plain reading  
18 of the “from” lines at issue demonstrates without question that Defendant failed to provide that  
19 information. Further, paragraph 10 of the sworn declaration of Defendant’s president, Michael  
20 Shopmaker, (Dkt. 83) demonstrates that this failure was deliberate.

21 Defendant argues that even though Virtumundo doesn’t state its actual name in the  
22 “from” line, it has nevertheless complied with the Act because it uses a registered domain name  
23 in the return email, (the “from” address portion of the “from” line). Defendant further argues  
24 that a recipient may then use that domain name to look up Defendant’s name and address in the  
25 “WHOIS” database. However, there is no support whatsoever either in the Act or the legislative  
history that Congress intended that consumers be required to undertake this sort of investigative  
procedure just to determine who sent an email, and Defendant offers none. Instead, Congress  
required that the “from” line portion of the email header itself accurately identify “the person  
who sent the email”. If the “from” name portion of an email doesn’t on its face accurately say  
who sent it, it violates the Act, and the inquiry is over. The violation exists even if a

1 consumer/recipient could somehow manage to figure it out after conducting the type of process  
2 suggested by Defendant - investigating the source of the sending domain and looking up the  
3 domain name from the return email address in the WHOIS directory.

4 Moreover, the FTC does not even consider the email address as relevant to it's analysis of  
5 the "from" line. Instead, the FTC exclusively analyzes the "from" name (which the FTC refers  
6 to as the "identifier") to determine whether or not a particular email complies with the Act.  
7 Thus, the FTC's analysis stands in direct contradiction to Defendant's position. The "identifier"  
8 is the only portion of the "from" line that the FTC even mentions at all in its discussion. This is  
9 hardly surprising since, as pointed out in Plaintiffs' Motion, email addresses generally are not  
10 even seen by the recipient, and "from" names generally are.

11 Accordingly, since the FTC analyzes compliance from the viewpoint of the recipient, it is  
12 not surprising that the email address portion of the "from" line is simply not a part of the FTC's  
13 analysis. According to the FTC, the only way an email may comply with the Act is to give the  
14 recipient enough accurate information in the "from" name identifier to know on its face who is  
15 sending the message, which would render the investigation process suggested by Defendant  
16 superfluous, as the sender's name would already appear in the recipient's inbox. Thus, applying  
17 the FTC's guidance to the emails at issue only serves to cement the conclusion that Defendant's  
18 emails violate the Act.

## 19 **2.2 To "Imply A Commercial Solicitation" Does Not Constitute Compliance.**

20 Next Defendant argues that even though Virtumundo doesn't state its name in the "from"  
21 line, it has nevertheless complied with the Act because it provides "from names" such as  
22 "Criminal Justice" which, according to Defendant, "imply a commercial solicitation." This  
23 argument directly contradicts Defendant's prior contention that the emails "identify" the  
24 Defendant. Defendant then argues, without any factual support at all, that since "most  
25

1 consumers would not recognize the Virtumundo name anyway,” Defendant should be allowed to  
2 ignore the Act’s requirement that Defendant provide its name, and use the space where  
3 consumers expect to see the sender’s name to instead tout Defendant’s commercial message as a  
4 matter of policy.

5 Gordon notes that Defendant’s policy proposal is entirely self-serving. Even if it weren’t,  
6 the merits of Defendant’s proposal are highly dubious. What standard would Courts use to  
7 determine whether a particular “from” name “implied a commercial solicitation?” Even if the  
8 Courts could make this determination, it is unlikely that such a policy would aid spam filtering  
9 software, ISPs, and consumers in detecting and deleting spam, the plain intent and purpose of the  
10 Act. However, regardless of the merits of Defendant’s policy proposals in effectuating the  
11 purpose of the Act, Congress chose a different strategy. Congress chose to provide the public,  
12 the Courts, and internet marketers such as Defendant with a bright line to determine if a  
13 commercial email complies with the Act. The Court should embrace and enforce that bright line.

14 Testimony from the Committee's hearings indicated that the use of falsified identity  
15 information is something that legitimate marketers and retailers will never do; however, it  
16 is exactly what volume spammers will continue to do in order to get their e-mails past  
17 ISP filters. As such, the use of false headers for commercial e-mail is a bright-line,  
18 objective standard that all parties can agree identifies the message as "spam". Sen. Rep.  
19 No. 108-102, at 20 (2003) (emphasis added).

20 Defendant should make its policy arguments to Congress, not to the Court. The fact of the  
21 matter is that Congress required Defendant to accurately identify the person who sent the email  
22 in the “from” line of their email. The Act was intentionally crafted such that if there is any  
23 information that would “imply a commercial solicitation,” it should be in the *subject line* of the  
24 email, not the “from” line. If Defendants want to re-write the Act, they should lobby Congress to  
25 do so, not the judiciary.

1 "[i]f Congress enacted into law something different from what it intended, then it should  
2 amend the statute to conform it to its intent. It is beyond our province to rescue Congress  
3 from its drafting errors, and to provide for what we might think . . . is the preferred result."  
4 Lamie v. United States Trustee, 540 U.S. 526, 542 (2004).

### 5 **2.3 Generic Ad Copy Is Not A "Separate Line Of Business Or Division".**

6 Still searching desperately for a theory, Defendant then contradicts both the argument that  
7 the "from" lines identify Defendant, and the argument that the "from" lines identify "a  
8 commercial solicitation," and argues that the "from names" are actually Defendant's "business  
9 lines," and 15 USC 7702 (16)(B) allows them to identify themselves using "separate lines of  
10 business or divisions."

11 15 USC 7702 (16)(B) requires that:

12 If an entity operates through separate lines of business or divisions and holds itself out to  
13 the recipient throughout the message as that particular line of business or division rather  
14 than as the entity of which such line of business or division is a part, then the line of  
15 business or the division shall be treated as the sender of such message for purposes of this  
16 Act. (emphasis added)

17 Even a cursory examination of Defendant's own sworn statements demonstrate  
18 conclusively that this section (16)(B) of the Act does not apply. Defendant admits that "In the  
19 course of its business, Virtumundo creates and transmits emails as a part of promotional  
20 campaigns for its customers." Shopmaker Decl. ¶ 9 (Dkt. 83) Defendant further admits that  
21 "Virtumundo does not advertise its own services to others." Shopmaker Decl. ¶ 13 (Dkt. 83)  
22 Finally, Defendant provides a concrete example, and admits that "an email advertising police  
23 training might have the "from name" of "Criminaljustice." Shopmaker Decl. ¶ 10 (Dkt. 83)

24 Taken together, Defendant Virtumundo thus admits that it does not have "separate lines  
25 of business or divisions." Rather, according to Defendant's own sworn statements, Defendant  
operates a single line of business - sending commercial email, a/k/a "spam".

Even if Defendant had "separate lines of business or divisions," the false and misleading  
language Defendant routinely uses in the "from" lines of its spam does not identify those



1 “separate lines of business or divisions.” Instead, according to Defendant’s sworn statements,  
2 the “from” lines are used to identify Defendant’s various customer’s marketing campaigns.  
3 Further, Defendant does not even attempt to establish that it “holds itself out to the recipient  
4 throughout the message as that particular line of business or division rather than as the entity of  
5 which such line of business or division is a part.” Quite the contrary, Defendant states that  
6 Virtumundo “identifies itself...in the content of the emails it sends, for informational rather than  
7 branding purposes.” Shopmaker Decl. ¶ 12 (Dkt. 83). Accordingly, Defendants false and  
8 misleading “from” names meet none of the requirements of 15 USC 7702 (16)(B).

9  
10 **2.4 Plaintiffs’ Status As An Internet Access Service Is Plain And Irrefutable.**

11 Unable to establish any plausible theory that might convince the Court that Defendant’s  
12 deliberate failure to identify itself is not also a violation of the Act, Defendant then seeks to  
13 escape the consequences of its wrongful conduct by attacking Plaintiffs’ standing to bring this  
14 action, contending that Gordon does not qualify as an Internet Access Service (“IAS”) under the  
15 Act. Not surprisingly, Defendant, a multi-million dollar corporation, expresses the opinion that  
16 Gordon should not be given access to the remedies in the Act because Gordon is not also a multi-  
17 million dollar corporation. However, Defendant’s analysis of the standing provisions of the Act  
18 are patently erroneous.

19 At its core, Defendant’s argument amounts to the assertion that Gordon must charge  
20 people to use their email services to qualify as an IAS. Gordon requests that the Court take  
21 judicial notice of the fact that Microsoft, Google, and Yahoo all provide free email services.  
22 While the services provided by Gordon might differ from these services in scale, in substance  
23 they do not. Free email is free email. Content posted on the internet is content posted on the  
24 internet. (See, Gordon Declaration in Support of Plaintiff’s Motion for Partial Summary  
25 Judgment (Dkt. No. 64) for a description of Gordon’s IAS services). Presumably, Defendant

1 would not even attempt to convince the Court to rule that Microsoft, Google, and Yahoo are not  
2 Internet Access Services under the Act because these corporate titans are not charging people to  
3 use their email services. In Hypertouch, Inc. v. Kennedy-Western University, 2006 U.S. Dist.  
4 LEXIS 14673, 2006 WL 648688 (N.D. Cal. Mar. 8, 2006) Hypertouch, a small internet access  
5 service's standing to bring suit under the Act was challenged on virtually the same basis as  
6 Defendant's challenge here, that it "does not offer service packages or monthly rates and  
7 allegedly has no customers". Defendants there also sought to distinguish the large corporate  
8 ISPs, such as Microsoft, AOL and Earthlink from that plaintiff. In holding that plaintiff did  
9 qualify as an IAS under the Act, the Court found: "The plain language of the statute indicates  
10 that a provider of e-mail service alone, without any other services, qualifies as an ISP. *See* 47  
11 U.S.C. 231(e)(4)." and further "That Hypertouch provides e-mail service at no charge does  
12 nothing to change this fact".

### 13           **2.5     There Is No Duty to Mitigate Statutory Damages.**

14           Defendant argues that an issue of fact exists related to Gordon's activities "opting-in"  
15 and/or "opting-out" to receive the emails at issue. Defendant argues that such facts are relevant,  
16 because they create a duty for Gordon to mitigate his damages. However, Gordon's "opt-in" and  
17 "opt-out" activity is entirely irrelevant, as neither the Can-Spam Act nor CEMA excuses  
18 violations of the statute, regardless of the actions, or lack thereof, of the recipient. Both Can-  
19 Spam and CEMA solely regulate the *Defendant's* conduct, and even if the Court assumes that  
20 Gordon "opted-in" to receive the emails, and never "opted-out", the Defendant is nevertheless  
21 obligated to comply with both statutes. Defendant's obligations to accurately identify itself are  
22 absolute, and therefore not excused whether Gordon "opted-in", "opted-out" and regardless of  
23 whether he did so in a manner acceptable to the Defendant. Moreover, there is no duty to  
24 "mitigate" statutory damages or penalties as a matter of law.

1 The Court finds that the statutory damages provision in the CAN-SPAM act is a penalty  
2 and, as such, the award of such damages is not subject to the doctrine of mitigation of  
3 damages.

4 Phillips v. Netblue, Inc., 2006 U.S. Dist. LEXIS 91662 (N.D. Cal., Dec. 8, 2006)

5 **2.6 Defendant's Email "Misrepresents or Obscures" Information In "Identifying**  
6 **The Point Of Origin" Under CEMA.** With respect to Plaintiffs' claims under CEMA,  
7 Defendant simply ignores the plain language of the statute. RCW 19.190.020 prohibits the  
8 sending of email that "misrepresents or obscures any information in identifying the point of  
9 origin... of a commercial electronic mail message." Under any reasonable interpretation, failing  
10 to identify the name of the sender would be included in the category of "any" information that  
11 would "identify the point of origin" of an email. Since it is equally plain that Defendant fails to  
12 accurately identify itself as the sender, it follows that Defendant misrepresents or obscures its  
13 name in its email messages, and that Defendant's emails thus violate CEMA.

14 **2.7 Congress Did Not Intend To Preempt CEMA.** With respect to Defendant's  
15 arguments related to federal preemption, Gordon merely notes that to reach the conclusion that  
16 Congress intended to preempt the Washington Statute, one must start with the premise that  
17 Congress intended the Can-Spam Act to *exclusively* occupy the regulation of all aspects of  
18 commercial email, including the "falsity and deception" prohibited by CEMA. Such a  
19 conclusion is completely at odds with the express language of 15 U.S.C. 7707(b)(1), as well as  
20 the legislative history, which is recited in Gordon's brief and will not be repeated here. In  
21 another Gordon lawsuit, the US District Court for the Eastern District of Washington has already  
22 considered the issue of preemption, and has determined that CEMA was not preempted by the  
23 Can-Spam Act. Gordon v. Impulse Marketing Group, Inc., 375 F. Supp. 2d 1040, (E.D. Wash.  
24 July 11, 2005). Thus, the Fourth Circuit's opinion in Omega notwithstanding, and in light of the

1 differences between the Oklahoma and Washington statutes discussed in Gordon's Motion,  
2 CEMA is not preempted by the Can-Spam Act.

3           **2.8 Defendant Attempts To Mislead The Court.** Defendant claims that  
4 "Plaintiffs admitted that they "were not 'adversely affected' (as that term is used in 15 USC  
5 7706(g)(1)) by the [emails they allege Defendants sent]" and that "Plaintiffs made this surprising  
6 admission in "Plaintiff Omni's Answers and Responses to Defendant Virtumundo's First  
7 Requests for Admission to Omni" in response to Request for Admission No. 7". This statement,  
8 made in apparent desperation, is patently false. Reading Defendants' exhibit is all that is  
9 necessary to show that Defendant attempts to mislead the Court. (Exhibit C to Defendant's  
10 Counsel Derek Newman's Declaration (Dkt. 84). In his response to Request for Admission No.  
11 7, Gordon first objects and then recites that "Omni is only seeking statutory damages in this  
12 action." Neither an objection, nor the fact that Omni seeks only statutory damages constitutes an  
13 admission that it hasn't incurred other damages. Gordon recites those other damages in detail in  
14 the Declaration of James Gordon in Support of Plaintiffs' Motion (Dkt. No. 64).

15  
16           **2.9 The Statutory "Penalties" Sought By Plaintiffs Are Substantial,  
17 Commensurate With The Substantial Harm Perpetrated By Defendant.**

18           The Defendant's conduct was deliberate, it has been pervasive over a period of more than  
19 three years, and it was done to generate substantial profits for the Defendant by perpetrating the  
20 exact harm both CAN SPAM and CEMA sought to prevent; hiding the Defendant's identity.  
21 Defendant blithely characterizes this as a "hyper-technical" violation. Gordon disagrees. The  
22 Act's requirement that Defendant honestly and accurately reveal its identity in their commercial  
23 email is an incredibly straightforward proposition.  
24

1 Defendant points out that the statutory damages Gordon seeks are substantial. Gordon  
2 agrees. Both the Congress and the Washington state legislature set up CAN SPAM and CEMA  
3 respectively to impose very harsh penalties on illegal spammers. They had good reasons for  
4 doing so. The profits earned by those, like Defendant, who regularly send billions of unlawful  
5 emails are substantial, and the damages caused to the economy by such unlawful conduct are  
6 astronomical, and dwarf the damages sought by Gordon here.

7  
8 Unless and until Courts are willing to award the very substantial penalties provided for in  
9 CAN SPAM and CEMA, thereby putting teeth into these statutes, spammers like Defendant will  
10 have no incentive to follow the law, and will instead continue to engage in the intentional  
11 violations of the law that line their pockets, while shifting the cost burden of their conduct to  
12 their victims.

13 The Court should consider the cavalier attitude exhibited by Defendant's president,  
14 Micheal Shopmaker, in his sworn declaration. At paragraph 15, Mr. Shopmaker states "13,000  
15 emails received over the course of more than three years is not enough to place a burden on any  
16 computer server manufactured within the last two decades at least." Plainly, as far as Defendant  
17 is concerned, any damage that might be caused by the billions of spam emails it sends out are  
18 simply not their concern, and will remain so until the courts act to strictly enforce the statutes  
19 meant to regulate such conduct.

20  
21 **RESPECTFULLY SUBMITTED** this 12<sup>th</sup> day of January, 2007.

22 DOUGLAS E. MCKINLEY, JR.  
23 Attorney at Law

MERKLE SIEGEL & FRIEDRICHSEN, P.C.

24 /S/ Douglas E. McKinley, Jr.  
25 Douglas E. McKinley, Jr., WSBA #20806  
Attorney for Plaintiffs

/S/ Robert J. Siegel  
Robert J. Siegel, WSBA #17312  
Attorney for Plaintiffs

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Certificate of Service

I, hereby, certify that on January 12th, 2006, I filed the foregoing with this Court via approved electronic filing, and served the following:  
Attorney for Defendants: Derek A. Newman, Newman & Newman .

  
Adana Lloyd