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' MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: February 16, 2007

ORAL ARGUMENT REQUESTED

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

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I. INTRODUCTION

Plaintiffs James S. Gordon ("Gordon") and Omni Innovations, LLC ("Omni") ("Plaintiffs")[1] allege that defendants Virtumundo, Inc. ("Virtumundo") and Adknowledge, Inc. ("Adknowledge") (together, Adknowledge and Virtumundo alone[2] are referred to herein as "Defendants") transmitted thousands of commercial email messages in violation of the federal CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq*. ("CAN-SPAM") and the Washington Commercial Electronic Mail Act (RCW 19.190) ("CEMA"). As a threshold matter, Plaintiffs cannot establish they have standing to bring claims under CAN-SPAM. The federal statute provides for a limited private cause of action available only to a *bona fide* Internet access service that is adversely affected by a statutory violation. Plaintiffs are neither an Internet access service nor were they adversely affected by the alleged statutory violations.

Assuming *arguendo* Plaintiffs had standing, Plaintiffs cannot identify any email at issue in violation of a statutory requirement. Instead, Plaintiffs repeat the same broad, conclusory assertions made in their Complaint. Under oath, Plaintiffs cannot recall any email Defendants sent that violate CAN-SPAM or CEMA in any way other than being generally "misleading" in their headers or subject lines. Plaintiffs admit, however, that they were not actually misled by any of Defendants' email, nor did they have any difficulty locating Defendants in order to bring their action. This is important because a violation of the statutes only occurs if there is a "material" misrepresentation to a consumer "acting reasonably under the circumstances". Plaintiffs' naked allegations of trivial and hyper-technical violations do not rise to the level of a private party cause of action.

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[1] As set forth in section IIA hereof, Plaintiff Gordon frequently cannot distinguish between himself and Omni. Defendants therefore use "Plaintiffs" to refer to Gordon and/or Omni, as appropriate from the context. When discussing Plaintiffs' knowledge, however, "Plaintiffs" is always intended collectively, as Gordon's knowledge is coextensive with that of Omni and vice-versa. Defendants do not intend for their use of the term "Plaintiffs" to waive any right, defense or assertion of fact that may apply to one plaintiff only, and such rights, defenses and assertions are expressly reserved.

[2] As discussed below, Plaintiffs have no basis to assert that Defendant Scott Lynn assisted, procured, or initiated any email at issue in this suit. Plaintiffs do not allege that Mr. Lynn engaged in any conduct outside the scope of his employment, nor is there any evidence that would militate in favor of piercing the corporate veil. Accordingly, he is excluded from the definition of "Defendants" unless the context clearly indicates otherwise.

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Seattle, Washington 98104
(206) 274-2800

Plaintiffs' failure to support their allegations renders this case ripe for summary judgment. Plaintiffs' evidence is simply insufficient to establish Plaintiffs' claims against Defendants. Indeed, the facts of this case are almost identical to the facts upon which appellate courts have in the past few months affirmed dismissing CAN-SPAM and CEMA claims[3]. Like those recent cases, the Court should grant this motion and judgment should be entered in favor of Defendants and Mr. Lynn.

II. FACTS

A. Plaintiffs James Gordon & Omni Innovations are one and the same.

Plaintiff Gordon is an individual who claims to have done business as an interactive computer service known as "gordonworks.com." First Amended Complaint (Dkt. No. 15) ("FAC") ¶ 1.1. Gordon is also the managing member of plaintiff Omni. (Declaration of James S. Gordon, Jr. In Response and Opposition to Defendants' Motion to Compel Discovery Re Lynn Interrogatories. (Dkt. No. 76) ("Gordon Decl. 76") ¶ 1. Gordon describes himself as being in the "spam business," which is "notifying spammers that they're violating the law . . . and . . . we file lawsuits." (Gordon Dep. at 118:2-6, which is attached as Exhibit A to the Declaration of Derek A. Newman filed concurrently herewith.) Plaintiffs receive no income other than from settling CAN-SPAM lawsuits and, before the "spam" business, Gordon's sole source of income was state unemployment benefits. (See Gordon Dep. at 32:9 - 33:19.)

Although Omni designated Gordon to testify on its behalf, Gordon stated repeatedly that he is unable to distinguish between himself individually and himself in his capacity as manager of Omni. (Gordon Dep. at 404:21) ("I can't distinguish between Omni and Jim Gordon at this point in time in terms of the reasonable inquiry and information known and readily attainable.") Gordon signed Responses to Interrogatories to himself personally "on behalf of Omni Innovations, LLC."

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[3] See e.g., Benson v. Or. Processing Serv., 2007 Wash. App. LEXIS 31 (Wash. Ct. App. 2007) (affirming trial court dismissal of CEMA claims because defendants had included their domain names in email headers and physical address in email messages, even though they sent messages from an inoperable email address); Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F. 3d 348 (4th Cir. 2006) (affirming district court dismissal of CAN-SPAM claims notwithstanding some technical statutory violations because "[t]he CAN-SPAM Act prohibits some material misstatements and imposes opt-out requirements, but it does not make every error or opt-out request into grounds for a lawsuit" and "does not impose liability at the mere drop of a hat.")

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(Gordon's Answers to Adknowledge's Interrogatories, Set One, attached as Exhibit F to Linke Decl.) Similarly, "Plaintiff Gordon answer[ed]" interrogatories propounded upon Omni. (Omni's Answers to Virtumundo's Interrogatories, Set One, attached as Exhibit G to Linke Decl.) Gordon, Omni and "gordonworks" all share an address and telephone number. (Gordon Dep. 143:20-144:6.)

B. An Internet access service provides actual Internet services and does not simply administer others' services.

The Internet is an interconnected network of computer networks. (Krawetz Decl. ¶ 4.) Each computer connected to the Internet has a network address, commonly represented by a unique 32 bit number called an Internet protocol address (an "IP address"). Id. at ¶ 5. The IP address is usually represented by four decimal numbers (octets) separated by periods. Id. at ¶ 6. The IP address system is a part of a communication architecture standard known as TCP/IP (i.e., Transmission Control Protocol (TCP) and Internet Protocol (IP)) first developed in 1969. Id. at ¶ 7. The architecture of today's Internet is based on the TCP/IP concept. Id. at ¶ 8. Communications over the Internet are made possible in large part because of network development based on the TCP/IP communication architecture. Id. at ¶ 9. The "domain name system" (or "DNS") was developed to convert between machine-readable IP addresses and user-friendly alphanumeric host names (hostnames). Id. at ¶ 10.

Sets of related computers are grouped by domain names, such as "example.com". Related hostnames include "host1.example.com" and "www.example.com". The use of hostnames dates to 1971 and DNS was conceived in 1981. Id. at ¶ 11. The domain name system operates through a series of databases that "resolve" or link domain names with the IP addresses with which they are associated. Id. at ¶ 12. In order to connect to the Internet, a user's computer must have an IP address. Consumers' computers are typically provisioned with IP addresses by their Internet service provider, or "ISP". Id. at ¶ 13.

The term "ISP" generally refers to organizations or entities that provide Internet connectivity through means such as dial-up, cable modem, and digital subscriber line ("DSL") connections, although it also encompasses companies that provide server hosting and other

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connectivity services. Id. at ¶ 14. A server is a computer (in this context, connected to the Internet) that provides services to other computers or applications. A server may be dedicated to this role, or it may be used simultaneously for other purposes, such as a desktop workstation. Services provided over the Internet (network services), such as Web sites and email, generally consist of software running on server computers . Id. at ¶ 15.

Gordon does not have access to the "root account" on the server he leases. (Gordon Dep. 112:14-25.) The "root account" is the administrator on the type of server he leases. (See Initial Expert Report of Dr. Neal Krawetz, attached to Krawetz Decl. at Exhibit 2 (hereinafter "Krawetz Rpt." at 17.)[4] Without root access, the user cannot be the system administrator. (Root for Unix is similar to the Microsoft Windows "Administrator" account.) Id. However, some system services may be managed by user accounts (non-root). Id. For example, GoDaddy provides an administrative tool called Plesk (http://www.swsoft.com/plesk/) for managing DNS information. Id. Gordon states that he uses Plesk (Gordon Dep. 109:9-20) to administer the domains that he has registered or manages. In particular, GoDaddy only permits the management of domains registered through GoDaddy (http://help.godaddy.com/article.php?article_id=663&topic_id=163&&); this excludes third-party hosting. Id. Although Gordon may administrate some domains, he depends upon GoDaddy for Internet access and hosting of the domains he registered. Id.

C. Plaintiffs are not an Internet access service.

Plaintiffs claim they are an Internet access service because they 1) operate the Web site located at <<www.gordonworks.com>>, and 2) provided e-mail accounts to seven individuals. (Omni Response to Interrogatory No. 22, Gordon Response to Interrogatory 22, attached as Exhibits "I" and "K" to Linke Decl.) These accounts were provided free of charge "subject to data collection" by Plaintiff Gordon. Id. Plaintiffs are not compensated by their "clients." (Gordon Dep. 118:19-119:25.) In truth, Gordon's "clients" relinquished their email accounts in 2003, and

[4] Defendants' expert witness, Dr. Neal Krawtz, is a computer security researcher with a Ph.D. in Computer Science from Texas A&M University (1998). Among his many qualifications, he is the author of the college textbook *Introduction to Network Security*, Charles River Media, 2006 (ISBN 1-58450-464-1).

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since that time Gordon has maintained these accounts only to collect unsolicited email in them. (Gordon Dep. 472:14; 197:19-23.) Omni first had customers in May, 2005. (Omni's Answer to Virtumundo's Interrogatory No. 22) (Linke Decl. Ex. I.) Plaintiffs have not contended that either of them had customers between 2003 and May, 2005. There is no evidence that Plaintiffs' "clients" actually used their email accounts for any other purpose other than fishing for emails to support Plaintiffs' spam business.

Even after founding their claims upon providing email services, Gordon recently testified "I don't provide e-mail accounts." (Gordon Dep at 474:10-11). Now, their claim of providing an Internet access service is for "hosting domains" and putting up a Web site. (Gordon Dep. 476:12-18.) However, Plaintiffs do not operate their own DNS server. (Gordon Dep. 113:15-24) ("Q: You don't operate your own DNS server, correct?" "A: My understanding is no, I don't. But who knows? That's my understanding."). Defendants' expert confirmed that Plaintiffs cannot host domain names because they do not operate a DNS server. (Krawetz Rpt. at 17.) The expert also verified that GoDaddy, a third party, hosts the domain names for Plaintiffs' "clients". Id.

Plaintiffs lease the server upon which they claim to provide their services from GoDaddy. (Gordon Dep. 108:22-109:7.) GoDaddy provides Plaintiffs with a technical assistance program whereby GoDaddy does the "behind the scenes" work on the server. (Gordon Dep. 109:2.) Plaintiffs' $103 per month service from GoDaddy includes the Plesk domain control panel, a consumer oriented interface that enables Gordon to administer up to 30 domain names using GoDaddy's name servers. (See Krawetz Rpt.) Plaintiffs do not know what kind of computer their server is. (Gordon Dep. 111:17.) GoDaddy, not Plaintiffs, chose the operating system used on their server. (Gordon Dep. 111:25-112:4.) Plaintiffs do not have root access to their server. (Gordon Dep. 112:10.)

Plaintiffs' account with GoDaddy includes 500 gigabytes of data transfer per month. (Gordon Dep. 110:16-20.) Plaintiffs "haven't come close" to ever using 500 gigabytes of data transfer. Id. Plaintiffs do not know the means by which their "clients" could access the Internet and retrieve their e-mail. (Gordon Dep. 212:13-213:12.) GoDaddy, Plaintiffs' Web hosting company, rather than Plaintiffs themselves, provides their "clients" the ability to log on to an

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Internet website and access mail. (Gordon Dep. 213:25-214:2.) The extent of Plaintiffs' involvement in the free e-mail accounts they claim to have "provided" is to assign user names and passwords on the consumer oriented user control panel GoDaddy provides. (Gordon Dep. 214:14-19.) Plaintiffs themselves cannot articulate which services they provide and which are provided by GoDaddy. (Gordon Dep. 473:13 ("Q: Do you know the distinction between what Omni provides and what Godaddy provides? A: A lot of it's blurred.").) In light of these facts, Plaintiffs do not provide Internet access services. (Krawetz Rpt. at 17, 23.)

D. Plaintiffs did not suffer an adverse impact from the email at issue.

Plaintiffs are not seeking recovery of any actual damages resulting from Defendants' purported violations. (Gordon Dep. 319:15-320:3.) Plaintiffs refused to answer whether they have experienced any actual damages as a result of any violation of CAN-SPAM or CEMA. Far from suffering any adverse impact, Mr. Gordon was asked: "[t]he receipt of spam benefits you, correct?" Id. at 221:17. After several objections from his lawyer, Mr. Gordon answered, "[y]es insofar as research and yes insofar as there have been settlement agreements". Id. at 222:17. Plaintiffs actually solicit spam (Gordon Decl. 76 at Ex. D, Dkt. No. 76-5) and willingly spend hours sorting email in connection with their "spam business" rather than simply leaving it unreviewed in the spam filters that intercept it. (*See* Gordon Dep. 220:21-24.)

Plaintiffs testified they had to confer with counsel in order to know whether they were confused or misled by any "from" line in Defendants' email. (Gordon Dep. 381-394.) Plaintiffs finally acknowledged they have not identified in this lawsuit any "from" lines that misled them and, in deposition, could not think of any that did. Id. at 394:18-20. Plaintiffs further acknowledged that they would not have gained any additional information had Defendants used their corporate name in the "from name" field of an email as opposed to a domain name. (Gordon Dep. 472:10-13.)

E. The email Plaintiffs produced identify Defendants in the header and body of the messages and contain opt-out links.

Plaintiffs produced three successive iterations of the supposedly "authoritative" files containing the email allegedly underlying their claims. (See Defendants' Motion to Compel

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Segregation of Emails (Dkt. No. 71).) In the production to date, Plaintiffs produced, among other things, five "folders" of email messages[5]. Under the supervision of Derek Linke, Esq., Defendants engaged a team of attorneys who undertook a thorough analysis of every one of the more than 17,000 emails contained in VM1, VM2, and VO1. The review entailed analysis of each element of each email's header and content for compliance with CAN-SPAM and CEMA. In connection with this review. Defendants created a log (the "Linke Log") detailing this information for each email. As a review of the Linke Log reveals:

- VO1 contains six email messages not from Virtumundo or Adknowledge. (Krawetz Rpt. at 14.)
- VM1 contains 15 emails not from Virtumundo or Adknowledge, including one email from Plaintiff Gordon and one email using a forged Virtumundo email address in the Reply-To field. Id.
- VM2 contains 17 emails not from Virtumundo or Adknowledge. Id.
- With the exception of those emails identified above as not sent by Virtumundo or Adknowledge, the emails in VM1, VM2, and VO1 originate from email addresses at the following domains managed by Virtumundo and/or Adknowledge: <<adknow-net.com>> (1,198 emails), <<virtumundo.com>> (25 emails), <<vm-mail.com>> (6,987 emails), <<vmadmin.com>> (5,643 emails), <<vmamdin.com (8 emails)>>, <<vmlocal.com>> (3,165 emails), and <<vtarget.com>> (100 emails). (Krawetz Rpt. at 15.)
- Of the email in VM1 and VM2, some 6000 (3000 in each archive) predate January 1, 2004, the effective date of CAN-SPAM. (Linke Decl. ¶ 16.)
- Nearly 1,000 of the emails have had their content stripped out by Plaintiff's spam processing program, and therefore cannot be evaluated for compliance with regulations that pertain to content. (Linke Decl. ¶ 17; Krawetz Rpt. at 10-11). Other email have had images removed by Plaintiffs' spam processing program, including images relevant to Defendants' CAN-SPAM compliance (such as images containing a postal address). Id.

Plaintiffs provided the emails alleged against Adknowledge in an email archive named adknowledgemailcom.mbx, which contains 1,695 email messages and which was also reviewed

[5]On or about February 24, 2006, Plaintiffs produced a file named "virtumundo.mbx" (hereinafter "VM1") which contained 5,101 email messages. On or about July 25, 2006 Plaintiffs produced another file named "virtumundo.mbx" ("VM2") which contained 5,047 messages, as well as a file named "Virtumundo-Omni.mbx" ("VO1") which contained 7,016 emails. On or about November 29, 2006, Plaintiffs produced a third iteration of "virtumundo.mbx" (hereinafter "VM3") containing 8,124 emails, among which are apparently intermingled those from VM1 and VM2. Plaintiffs also produced a second iteration of "Virtumundo-Omni.mbx" ("VO2") which contains 11,201 emails, among which are apparently intermingled some or all of those contained in VO1.

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and logged. (Linke Decl. ¶ 2.) There are 14 email messages not from Adknowledge. These appear to come from a different company: Digital Connexxions (aka WKI Data). (Krawetz Rpt. at 13-14.) Emails dated 2-June-2005 to 11-June-2005 and 15-December-2005 to 16-December-2005 were processed by Plaintiffs' program, SpamAssassin, which removed the email's content. (Krawetz Rpt. at 9.)

1. All email attributable to Defendants contained Defendants' publically registered domain names.

The WHOIS database is a publically available source of the registrant contact information for any .com domain name. (Gordon Dep. at 142:21-23) ("Q: What is a Whois record?" "A: It provides information to the general public as to who owns a particular domain.") The registrant provides its own contact information in the WHOIS database. Id. at 143:7.

At all times relevant to this action, the domain name <<adknowledgemail.com>> has been registered to Adknowledge, and accurate contact information has been publicly available through the WHOIS database. With the exception of the eight emails from <<vmamdin.com>>, which appear to be the result of a typographical error from <<vmadmin.com>>, each of the domain names in the VM1, VM2, and VO1 folders was registered to Virtumundo or Adknowledge. (Krawetz Rpt. at 15; Gordon Dep. at 312:23-313:14.) A WHOIS query on any of these domain names returns information including Virtumundo's and/or Adknowledge's name, correct physical address, and telephone number. (Krawetz Rpt. at 14; Gordon Dep. at 144:25-145:2). Moreover, a reverse IP lookup in the WHOIS database accurately identifies Virtumundo and/or Adknowledge. (Krawetz Decl. ¶ 22.)

With the exception of the 14 email messages not from Adknowledge, all of the email messages in adknowledge.mbx originate from email addresses at the domains <<adknowledgemail.com>> (1,673 emails) or <<my-freemail.com>> (8 emails). (Krawetz Rpt. at 13.) The <<my-freemail.com>> domain name is registered to Adknowledge's customer, Venture Direct. Id. at 15. The messages using that domain name were sent by Venture Direct through Adknowledge's network pursuant to agreement. (Geroe Decl. ¶ 2.)

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2. The email attributable to Defendants have accurate physical addresses, unsubscribe links, and "from" lines.

Except for the email messages that Plaintiffs stripped of content, none of the email lacked a postal address or an "unsubscribe" link or other opt-out mechanism; and each email was identified or is identifiable as an advertisement. (Gordon Dep. at 418:11-13; Gordon Dep. at 416:11-17). All of the email attributed to Defendants (other than those from which Plaintiffs' "SpamAssasin" program deleted the content)[6] clearly identify the sender in the email's content. (Krawetz Rpt. at 15-6.) Reasonable minds cannot disagree that the overwhelming majority of Defendants' subject lines when viewed in context (*i.e.*, together with the associated "from" name) are not materially false or misleading. (See generally, Linke Log.)

F. Plaintiffs admit they have no facts that indicate Scott Lynn participated in the statutory violations they allege.

Scott Lynn is Chief Executive Officer of Defendant Adknowledge, Inc. He is not an officer of Virtumundo, Inc. Other than a general allegation that Lynn "had knowledge of, and participated in the unlawful acts of the corporate Defendants", (FAC at 2:18), there are no allegations supporting liability against Lynn. Indeed, Plaintiffs admit that they have no idea why Mr. Lynn is named as a defendant in the action, except that their lawyer thought it advisable:

Q. You're suing Scott Lynn in this lawsuit, correct?

A. I believe he's been named.

Q. Why?

A. That was a decision my attorneys and I came up with.

Q. What basis do you have to file a lawsuit against Scott Lynn?

A. Again, that was the decision that my attorneys and I came up with.

Q. What basis do you have to file a lawsuit against Scott Lynn?

A. I guess you would have to ask Mr. Siegel. I don't understand the legal --

(Gordon Dep. at 151:2-13.) Plaintiffs subsequently acknowledge that they have no basis for

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[6] As described in Dr. Krawetz' report, Plaintiffs' "SpamAssasin" software apparently deleted content from certain of the emails provided by Plaintiffs. (Krawetz Rpt. at 15.)

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believing that Mr. Lynn had any personal involvement in the conduct underlying their lawsuit:

> Q. You allege that Adknowledge and Virtumundo sent you e-mail, correct?
>
> A. I do.
>
> Q. Do you believe that there was a human being who was responsible for initiating those e-mails?
>
> A. There was.
>
> . . .
>
> Q. Do you have any basis to believe Scott Lynn in particular initiated those e-mails?
>
> A. No.

(Gordon Dep. at 156:1-7; Id. at 156:13-15.) Finally, Plaintiffs admit that their only theory of liability against Mr. Lynn relates to conduct he performed in his capacity as CEO:

> Q. Do you believe that Scott Lynn violated any laws with respect to you?
>
> A. I believe that he's responsible for his company.
>
> Q. What do you mean, he's responsible for his company?
>
> A. He's responsible -- if in fact I'm trying to unsubscribe and contact the company, contact the company's legal department and so forth and he ignores it, I think that he's been, I guess, negligent or somehow he hasn't been diligent in terms of his responsibility as a CEO.

(Gordon Dep. 152:18-153:1.)

G. Procedural history.

Plaintiffs commenced this action on February 9, 2006, alleging, inter alia, receipt of 6000 unsolicited emails. (Dkt. No. 1). Plaintiff filed a First Amended Complaint on April 4, 2006 alleging violations of the Federal CAN-SPAM Act of 2003 ("CAN-SPAM"), 15 U.S.C. §§ 7701–7711; the Washington Commercial Electronic Mail Act ("CEMA"), Wash. Rev. Code §§ 19.190.010–.110; the Washington "Prize Statute," Wash. Rev. Code §§ 19.170.010–.900; and the Washington Consumer Protection Act ("CPA"), Wash. Rev. Code §§ 19.86.010–.920. (Dkt. No. 15) (the "FAC").

On August 8, 2006, Defendants filed a Motion to Dismiss with a noting date of September 15, 2006 seeking dismissal of Plaintiffs' FAC (Motion to Dismiss 12:18-19) (Dkt. No. 30). On December 8, 2006, the Court granted Defendants' Motion to Dismiss Plaintiffs' claims under a

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portion of CEMA (*i.e.*, RCW § 19.190.080), the Prize Statute, and all related CPA claims (Dkt. No. 51). Plaintiffs never filed an amended pleading. Accordingly, Defendants only move on the surviving claims and request that the Court rule the dismissed claims have been waived[7] since Plaintiff failed to timely file a second amended complaint.

III. ARGUMENT

FED. R. CIV. P. 56(c) provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

A defendant is entitled to a judgment as a matter of law if it can show the court that Plaintiffs' evidence is insufficient to establish an essential element of Plaintiffs' claim. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990). As explained in Chamberlan v. Ford Motor Co., 369 F.Supp.2d 1138, 1143 (N. D. Cal. 2005),

> Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that there is an absence of evidence to support the nonmoving party's case. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the opposing party to produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists. A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Chamberlan, 369 F.Supp.2d at 1143 (citing, Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991)).

The moving party bears the burden of informing the court of the basis for its motion,

[7]If Plaintiffs have leave to file an amended complaint, then Defendants request leave to conduct discovery and file a motion for summary judgment on those claims.

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together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, *supra*, 477 U.S. at 323. Once the moving party has met its burden, the party opposing the motion may not rest upon the mere allegations or denials of his pleadings but must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., *supra*, 477 U.S. at 248.

A. Plaintiffs cannot assert claims under CAN-SPAM because Plaintiffs are not providers of Internet access service "adversely affected".

In enacting the CAN-SPAM act,15 U.S.C.§ 7701 *et seq*., Congress expressly recognized that commercial email offers "unique opportunities for the development and growth of frictionless commerce." 15 U.S.C. § 7701(a)(1). Anti-spam and consumer groups urged Congress to ban all unsolicited commercial email, and to create a private right of action for liquidated damages[8]. Congress declined, and instead enacted a scheme 1) to create a nationwide standard for commercial email; 2) to prohibit senders of commercial electronic mail from misleading recipients as to the source or content of such mail; and 3) to ensure that recipients of commercial electronic mail have the right to decline additional email from a particular source. 15 U.S.C. § 7701(b). The Act does not create any private cause of action for individual recipients of unsolicited commercial email, even if those emails violate the requirements of the Act. Rather, the Act is enforceable *only* by the Federal Trade Commission and other specified federal agencies, by state Attorneys General; and by "provider(s) of Internet access service" who are "adversely affected by a violation of section 7704 (a)(1), (b), or (d) of [the Act], or a pattern or practice that violates paragraph (2), (3), (4), or (5) of section 7704 (a)." 15 U.S.C. § 7706(g)(1) (emphasis added).

1. Plaintiffs do not provide an Internet access service.

CAN-SPAM defers to section 231(e)(4) of title 47 for the definition of "Internet access service":

> "The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part

[8]See. e.g., Joint Open Letter on Spam Litigation, Coalition Against Unsolicited Commercial Email, http://www.cauce.org/legislation/openletter (Last accessed 1/17/07).

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> of a package of services offered to consumers. Such term does not include telecommunications services."

This language is ambiguous. If interpreted broadly, as Plaintiffs urge, anyone can qualify as an "Internet access service". For example, a person allowing family members use of a computer in the home connected to the Internet "enables users to access content, information, electronic mail . . . over the Internet." Likewise, a person who inserts a hyperlink on a blog post or in an email falls within the purview of a broad construction of the definition. Banks, since ATM machines enable users to access balances via an Internet connection, would be Internet access services with standing to sue for CAN-SPAM violations. This broad interpretation of "Internet access service" would encompass vast numbers of persons Congress did not intend to have standing. Such a standard would effectively create an unlimited private cause of action for CAN-SPAM violations.

A narrow interpretation, in contrast, would exclude all but those who provide *access* to the Internet (*e.g.*, dial-up, DSL, cable modem, or T1 service providers) and network based email services (such as Earthlink, Yahoo, MSN, and AOL). This interpretation has the advantage of meaningfully limiting standing under the Act. Additionally, a narrow reading of the definition of "Internet access service" is consistent with other definitions contained in the Omnibus bill, H.R.4328, from which this definition arose. See "Making omnibus consolidated and emergency appropriations for the fiscal year ending September 30, 1999, and for other purposes" which became Public Law No. 105-277. For example, the Internet Tax Freedom Act, also introduced in H.R. 4328, includes the following definition:

> [t]he term 'Internet access services' means the provision of computer and communications services through which a customer using a computer and a modem or other communications device may obtain access to the Internet, but does not include telecommunications services provided by a common carrier.

47 U.S.C. § 151, note, section 1101(f)(2)(B). This definition of "Internet access service" is consistent with a narrow interpretation of 15 U.S.C. § 7702 (11). Unless we assume that Congress intended to define the term "Internet access service" in two wildly divergent ways in the

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same bill, the narrow construction is the correct construction[9]. Had Congress intended to allow the broader standing under CAN-SPAM, it would have provided a private right of action.

In this case, Gordon once claimed he operated a web site and "provided" email accounts to five people beginning in 2003. (Gordon Response to Virtumundo Interrogatory No. 22) (attached as Exhibit "K" to Linke Decl.) These accounts were provided free of charge "subject to data collection" by Plaintiff Gordon. Id.; (*see also* Gordon Dep. 119:21-120:2.) Plaintiffs contend that their minimal act of assigning user names and passwords to provide free email accounts for their family members and others renders them within the statutory definition of "Internet access service" that appears in CAN-SPAM. In light of the legislative history and context, such an interpretation seems wildly overbroad and wholly unfounded.

Even assuming *arguendo* that free email accounts are an "Internet access service" within the meaning of the act, then, Plaintiffs' claim to standing is fatally undermined by the fact that Plaintiffs do not "provide" the services upon which they base their claim to standing. Plaintiffs' involvement with those accounts is limited to assigning user names and passwords using an interface provided by GoDaddy. (Gordon Dep. 214:14-19.) GoDaddy, rather than Plaintiffs themselves, provides Plaintiffs' "clients" the ability to log on to an Internet website and access mail, a fact which Gordon admits (Gordon Dep. 474:6-11) ("I don't provide email accounts.").

In fact, Plaintiffs do not even know the means by which their "clients" can access the Web and get their e-mail. (Gordon Dep. 212:13-213:12.) Plaintiffs do not have root access to their server (Gordon Dep. 112:10), which means they cannot be the service provider for the server (Krawetz Rpt. at 17). Plaintiffs themselves cannot articulate which services they provide and which are provided by GoDaddy. (Gordon Dep. 473:13) ("Q: Do you know the distinction between what Omni provides and what GoDaddy provides? A: A lot of it's blurred. Q. Do you believe that anybody currently, other than yourself, uses an e-mail account that Omni or you personally provide? A: Okay. I'm still confused.") Gordon's clients relinquished their email

[9] The "normal rule of statutory construction" provides that "identical words used in different parts of the same act are intended to have the same meaning." Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (internal quotations omitted).

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accounts in 2003, and since that time Gordon has maintained their accounts only in order to collect unsolicited email in them. (Gordon Dep. 472:14; 197:19-23.)

Plaintiffs' services do not amount to "providing" an "Internet access service" for the purpose of CAN-SPAM. Congress restricted standing under CAN-SPAM to those who "provide" bona fide Internet access services, in the narrow sense. Those providers are most burdened by unsolicited commercial email and must scale their networks up to handle the bandwidth and processing requirements associated with the billions of emails they process daily. *See* Committee on Commerce, Science and Transportation on S. 877, S. REP. No. 102, 108th Cong., 1st Sess. 2-3 (2003) (the "Committee Report") (Exhibit N to Townsend Decl. in Support of Defendants' Motion for an Undertaking) (Dkt. No. 41-14) at 6-7. To allow persons similarly situated to Gordon to file suit would open the floodgates of litigation and deter, rather than enhance, commercial development of the Internet. Based on the undisputed evidence, Plaintiffs are not providers of Internet access service. (Krawetz Rpt. at 16) ("I see no evidence suggesting that Gordon is an Internet access service") and summary judgment should be entered in Defendants' favor on Plaintiffs' CAN-SPAM claims for lack of standing.

2. Plaintiffs have not been adversely affected by a violation of the statute.

A provider of Internet access service does not have standing to sue under CAN-SPAM unless it is "adversely affected by a violation of" CAN-SPAM. 15 U.S.C. § 7706(g)(1) (emphasis added). Plaintiffs have not experienced any adverse affect from a violation of the statute. Plaintiffs certainly have not had to expand their network to accomodate the unsolicited email they receive; they "haven't come close" to ever using the 500 gigabytes of data transfer provided with their GoDaddy account. (Gordon Dep. at 110:16-22.) They have not had to add technical personnel; GoDaddy provides Plaintiffs with a technical assistance program whereby GoDaddy does the "behind the scenes" work on the server. (Gordon Dep. 109:2.) After a protracted exchange, Gordon admitted he did not suffer actual damages. (*See* Gordon Dep. at 319-321) ("Q: you suffered actual damages; is that right? A: No, that's not true"; "Q: My question is whether you suffered actual damages. Did you? A: We've not enumerated any actual damages."; Q: Did you suffer any actual damages? A: I don't have anything to add.").

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Plaintiffs' inability to present evidence they were adversely affected by a violation of the statute demonstrates there is no genuine issue as to any material fact relating to that issue. Plaintiffs experienced no adverse affect. To the contrary, Gordon testifies that he considers unsolicited email to provide him with a benefit, both because he plans to base a doctoral dissertation on research relating to the email he receives, and because he uses it in his spam business as the basis for lawsuits. For these reasons, he solicits such email from his "clients" and maintains unused email mailboxes as "spam traps." (Gordon Decl. at 439:20-440:3.) Having admitted that he considers commercial email beneficial, and that he takes affirmative steps to receive and collect it, he cannot be heard to argue that has any adverse affect on any aspect of his business. Accordingly, Gordon does not have standing under CAN-SPAM and the Court should dismiss those claims.

B. Plaintiffs cannot establish that Defendants volated CAN-SPAM.

1. Defendants did not initiate the transmission of commercial electronic mail with false or misleading headers.

a. CAN-SPAM requires consideration of the header as a whole.

CAN-SPAM prohibits sending a commercial electronic mail message "that contains, or is accompanied by, header information that is materially false or materially misleading". 15 U.S.C. § 7704 (a)(1).

> The term "header information" means the source, destination, and routing information attached to an electronic mail message, including the originating 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.

15 U.S.C. § 7702(8). The statute uses "and" as opposed to "or" when discussing the elements of the header information. The plain language of section 7704(a)(1) thus pertains to the header as a whole, and not to any particular element of it. The statute then defines a practical standard for determining whether header information is materially false or materially misleading:

> For purposes of paragraph (1), the term "materially", when used with respect to false or misleading header information, includes the alteration or concealment of header information in a manner that would impair the ability of an Internet access service processing the message on behalf of a recipient, a person alleging a violation of this section, or a law enforcement agency to identify, locate, or respond to a person who

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> 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.

The Committee Report makes clear the concern that led to this requirement:

> Compounding these problems is the fact that nearly all spam being sent today is considered untraceable back to its original source without extensive and costly investigation. Although many ISPs try to locate spammers in order to shut down their operations, spammers can rather easily disguise their whereabouts, quickly move to other ISPs, or set up websites at new domains in order to avoid being caught.

Committee Report at 4.

Plaintiffs urge the Court to review each element of a header (*e.g.*, From-Name, From-Address, Receive-Path, etc.) with mutually exclusive scrutiny. *See. e.g.*, Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 53) (arguing that "From-Name" field must contain "actual name" of the sender, regardless of whether sender can be identified in other fields of the "From Line" or other portions of the header). CAN-SPAM does not support Plaintiffs' interpretation because the statute requires review of the header as a whole to determine whether there is information sufficient to identify and locate the original sender.

The header is not *materially* false or misleading if the original initiator of the email message can be easily ascertained from the header or email itself. In Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F. 3d 348 (4th Cir. 2006), the defendant sent email messages with headers that included non-functional "from" addresses. The defendant also incorrectly identified the server from which its email originated. Id. Nonetheless, the district court ruled the email did not violate CAN-SPAM, and the Fourth Circuit affirmed:

> We agree with the district court that these inaccuracies do not make the headers "materially false or materially misleading." Id. § 7704(a)(1). The e-mails at issue were chock full of methods to "identify, locate, or respond to" the sender or to "investigate [an] alleged violation" of the CAN-SPAM Act. Id. § 7704(a)(6). Each message contained a link on which the recipient could click in order to be removed from future mailings, in addition to a separate link to Cruise.com's website. Each message prominently displayed a toll-free number to call, and each also listed a Florida mailing address and local phone number for the company. Several places in each header referred to the Cruise.com domain name, including one line listing Cruise.com as the sending organization.

Omega, *supra*, 469 F. 3d at 357. Like the email under consideration in Omega, the email at issue in this case is "chock full of methods to 'identify, locate or respond to' the sender". Defendants'

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messages all contain "a link on which the recipient could click in order to be removed from future mailings". Id. All messages contained either a separate link to Defendants' web site or to the web site of its advertiser. Most messages prominently displayed a number at which to call Defendants and/or the advertiser. Finally, all of the messages contained a mailing address for the Defendants and/or the advertiser. In addition, each of the emails at issue contain valid originating IP addresses permitting reverse IP lookups, and valid domain names permitting WHOIS lookups. (Krawetz Rpt. at 15.) The Fourth Circuit's conclusion is directly on point:

> If the alleged inaccuracies in a message containing so many valid identifiers could be described as "materially false or materially misleading," we find it hard to imagine an inaccuracy that would not qualify as "materially false or materially misleading." Congress' materiality requirement would be rendered all but meaningless by such an interpretation.

Id.

This argument applies with particular force to Plaintiffs' claim that Defendants' email contain "bad" header information, which Plaintiffs conclude is misleading. Gordon Dep. at 307:3. Plaintiffs' determination that such headings are "bad" is based entirely on analysis of the email by a software program called "EmailTrackerPro". (Declaration of James S. Gordon, Jr. In Response and Opposition to Defendants' Motion to Compel Discovery Re Lynn Interrogatories. (Dkt. No. 76) ¶ 3.) However, Plaintiffs do not (and cannot) present any evidence that EmailTrackerPro's criteria to evaluate email headers are consistent with any applicable legal requirements. Indeed, most of EmailTrackerPro's identified issues were out of Defendants' control, but instead are attributable to Plaintiffs and intermediary servers. (*See* Krawetz Rpt. at 20.)

Gordon further alleges that Defendants' email headers reveal that Defendants violate "RFCs" and are therefore illegal. (Gordon Decl. 76 at ¶ 4.) "RFCs" are memoranda published by the Internet Society. Some, but not all, RFCs are subsequently adopted as "standards" by the Internet Engineering Task Force. RFCs, however, do not have the force of law, and failure to comply with RFCs does not render an email "illegal." (Krawetz Report at 6.) Most significantly, even if Plaintiffs' allegations are accepted as true, the supposedly "bad" headers do not prevent the easy identification of Defendants as the initiators of the messages. (*See* Gordon Dep. at 314:7-11) (Gordon cannot remember any email from Defendants that did not have a physical address or

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telephone number); Id. at 312:23-313:24 (cannot remember any email lacking a domain name registered to Adknowledge or Virtumundo; Id at 425:6-22 (cannot identify any email lacking email address in header).

Plaintiffs' argument regarding Defendants' "From-Name" fields fails for the same reason: Defendants are easily identifiable from other information in the headers, and as such any failure of the "from" line to accurately identify the initiator of the email (which Defendants in any case deny) is not ultimately material. As determined by Defendants' expert:

> 1. None of the emails in the archives that are attributed to Adknowledge and Virtumundo contain intentionally false or misleading header information. There are only 8 emails that appear to represent a one-time typographical error rather than any intentional misrepresentation; these emails were all sent within the same minute to multiple recipient accounts. There are some emails in the archives that do contain false or misleading headers, but they were not sent by Adknowledge or Virtumundo and it is unclear why they were included in these archives.
>
> 2. None of the emails attributed to Adknowledge or Virtumundo contain information used to obscure or misrepresent the email's point of origin.
>
> 3. All of the emails attributed to Adknowledge or Virtumundo have "From:" lines that appear to accurately identify the sender, with the exception of the previously mentioned 8 typographical errors. In these 8 emails, other header fields correctly and accurately identify the sender. In all cases, I have made no attempt to contact the provided email addresses and I cannot attest to the validity of the email addresses.
>
> 4. All of the emails attributed to Adknowledge or Virtumundo clearly identify the sender in the email header.
>
> 5. All of the emails with content and attributed to Adknowledge or Virtumundo clearly identify the sender in the email's content.

(Krawetz Rpt. at 24.) Defendants can easily be identified from their header information and email content. Consequently, their headers cannot be materially misleading. Any other conclusion would elevate form to the exclusion of substance.

To the extent that Plaintiffs believe any of these conclusions to be incorrect, they must identify specific, admissible evidence in support of their position. Plaintiffs do not present an expert witness, and Gordon is not qualified to testify about technical issues. Plaintiffs do not authenticate the EmailTrackerPro reports with testimony from an EmailTrackerPro employee. In truth, Plaintiffs do not substantiate any of their conclusory allegations about email headers. The vague, general allegations upon which Plaintiffs have relied to date are insufficient to create any

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genuine issue of material fact, and summary judgment should be entered in Defendants' favor.

b. Defendants qualify for the safe harbor because Defendants' "from" lines identify the sender of the message.

15 U.S.C section 7704(a)(1)(B) provides in relevant part:

> a "from" line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message shall not be considered materially false or materially misleading;

This "safe harbor" is the basis for Plaintiffs' erroneous conclusion that CAN-SPAM requires the "actual name" in the "from name" field of the "from" line. Although Plaintiffs' interpretation of the statute is incorrect, their mistake is inconsequential because Defendants' "from" lines do accurately identify "any person who initiated the message". Defendants are therefore entitled to a finding that their email headers comply with CAN-SPAM.

As is apparent from the Committee Report, the FTC is primarily concerned with whether a sender of commercial email can be identified and located. By using a publically registered domain name, a sender allows the recipient to obtain the sender's address and phone number from the publically available WHOIS database. A "from" line that contains the sender's actual email address, at a domain name with accurate contact information listed in WHOIS, should be held to "accurately identify" the person who initiated the message for the purpose of 15 U.S.C. § 7704(A)1(b). Any other result would punish legitimate email marketers and reward the dishonest emailers that CAN-SPAM was intended to punish.

c. The First Amended Complaint does not include any CAN-SPAM claims alleging false or misleading headers.

Notwithstanding Plaintiffs' filing of a Motion for Partial Summary Judgment on the issue, the First Amended Complaint does not contain any allegation that Defendants violated 15 U.S.C. § 7704(a)(1). Accordingly, Plaintiffs' Motion should be denied as to its purported claims under section 7704(a)(1) of CAN-SPAM.

2. There is no "pattern or practice" of email with materially misleading subject lines, or without notice of advertisement.

Without factual support, Plaintiffs allege Defendants initiated commercial electronic mail with materially misleading subject lines and/or which lacked identification that the message is an

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advertisement. Standing under the Act is limited to providers of Internet access service adversely affected by . . .a *pattern or practice* that violates paragraph (2), (3), (4), or (5) of section 7704 (a)." 15 U.S.C. § 7706(g)(1) (emphasis added). In order to prevail, Plaintiffs cannot point to a few messages that may violate the statute, but must show a pattern or practice violating CAN-SPAM.

Plaintiffs have failed to offer evidence sufficient to establish that Defendants' subject lines are anything but accurate, and clearly identify the messages to which they pertain as advertisements. Section 7704(a)(2) of the CAN-SPAM prohibits a person from transmitting commercial email:

> if such person has actual knowledge, or knowledge fairly implied on the basis of 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[.]

Section 7704(a)(5)(i), in turn, requires commercial email to include "clear and conspicuous identification that the message is an advertisement or solicitation".

In this case, Plaintiffs rely on asserting the legal conclusion that the Subject lines of Defendants' emails have a "tendency to mislead." *See. e.g.*, Declaration of James S. Gordon, Jr. In Response and Opposition to Defendants' Motion to Compel Discovery Re Lynn Interrogatories. (Dkt. No. 76) ¶ 5 ("I cannot say 'how' I was misled by these, but only that these have the capacity to mislead"). This is not evidence, it is a mere legal conclusion. Plaintiffs admit that they could readily identify Defendants' email as commercial solicitations, and could identify the products or services to which they pertain. (*See* Gordon Dep. at 376:8-23.)

In construing the meaning of the term "false and misleading" with respect to subject lines, it is helpful to consider the legislative history of CAN-SPAM. The Committee Report noted,

> spammers often lure consumers to open their email by adding appealing or misleading email subject lines. The FTC reported that 42 percent of spam contains misleading subject lines that trick the recipient into thinking that the email sender has a personal or business relationship with the recipient. Typical examples are subject lines such as, "Hi, it's me" and "Your order has been filled". Moreover, email messages with deceptive subject lines may still lead unsuspecting consumers to websites promoting completely unrelated products or even scams, such as pornography or get-rich-quick pyramid schemes.

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Committee Rpt. at 4. This suggests that the primary concern underlying CAN-SPAM as it relates to subject lines concerns those that falsely purport to be from someone personally known to the recipient. The Supreme Court of Washington cited the same concern in State v. Heckel, 143 Wash. 2d 824 (2001). In Heckel, an Oregon resident sent unsolicited commercial email to Washington residents in which the subject line read: "Did I get the right e-mail address?" and "For your review-HANDS OFF!". The Court affirmed the trial court's award of summary judgment against Heckel for violation of CEMA, in that "reasonable minds could not differ" that Heckel's subject lines were deceptive and misleading because they were "clearly designed to entice the recipient to open the message . . . by enticing the recipient to believe that the message might be from a friend or acquaintance or business contact..." State v. Heckel, 122 Wash. App. 60 (Div. 1 2004).

In order to bring a claim for violation of section 7704(a)(2) of CAN-SPAM, Plaintiffs must establish that Defendants are engaged in a "pattern or practice" of violating that subsection. 15 U.S.C. §7706 (g)(1). Here, the most Plaintiffs can point to are a few isolated instances of subject lines they believe might mislead, in the context of undisputedly thousands of accurate and truthful subject lines. Moreover, even those subject lines that Plaintiff alleges are particularly misleading (*see* Plaintiffs' Response in Opposition to Defendants' Motion to Compel Discovery Re Lynn Interrogatories at 4:3-4:10) are not misleading at all when viewed in conjunction with their respective "from" lines. For instance, the subject line "Attention Moms" is not misleading when viewed in conjunction with the "from" name "Work From Home"; it is plainly an advertisement for work-at-home business opportunities. (*See* Linke Decl. ¶ 19.) A recipient "acting reasonably under the circumstances" would not simply ignore this clarifying information.

Moreover, CAN-SPAM requires consideration of whether a subject heading of the message would likely mislead a recipient, acting reasonably under the circumstances, about a material *fact* regarding the contents or subject matter of the message. This restriction - that a misleading statement pertain to a factual representation - is a meaningful threshold inquiry in other contexts. *See, e.g.*, Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 129 (1st Cir. 1997) (observing that the vaguer a term is, and the more meanings it reasonably can convey, the less

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likely it is to be actionable); *see also* In re Apple Computer Sec. Litig. v. Vennard, 886 F.2d 1109, 1113 (9th Cir. 1989) (stating that forward-looking statements or statements of belief, made in good faith and with a reasonable factual basis, cannot form the basis of liability).

In the context of commercial electronic mail the courts have apparently discarded this restriction and adopted a different standard, namely, whether an email purports to be from someone known to the recipient. State v. Heckel, 143 Wash. 2d 824 (2001). This is an extremely difficult standard to apply, as reasonable people may have entirely different understandings of what constitutes appropriate use of a subject line. Depending on one's social circle, life context, gender, and family makeup, the subject line "Hey Sister!" may be either obviously from a stranger or apparently from a family member. Most importantly, without context relating to the identity of the recipient, it cannot be determined whether a factual assertion is implied by a particular statement.

The Linke log details the subject lines of the vast majority of the emails upon which Plaintiffs' claims are based. When read in conjunction with their associated "from" names (as CAN-SPAM requires them to be), they are simply not false or misleading as a matter of law. In the rare instance when a subject line is not obviously a commercial solicitation, it is obvious puffery or simply meaningless (but certainly not false or misleading). No reasonable person could confuse them with personal correspondence from friends, acquaintances, or business contacts.

3. Defendants did not initiate commercial email without an unsubscribe mechanism and notice of the opportunity to opt out.

Plaintiffs cannot identify any of Defendants' emails that fail to contain an unsubscribe link. (Gordon Dep. at 312:15-22.) As such, Plaintiffs cannot establish any "pattern or practice" of violation of CAN-SPAM section 7704(a)(5)(2), and summary judgment should be entered in Defendants' favor on those claims.

4. Defendants did not initiate commercial email to a recipient who had previously opted out using a mechanism provided by the sender.

Gordon admits that he opted in to receive Defendants' email messages. (Gordon Decl. 76 at Ex. D.) Although late in the case he claims to have subsequently opted out, he has no evidence

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to that effect. (Gordon Dep. 408:16-409:19.) He cannot recall the specific web sites (if any) on which he unsubscribed, or the date. (Gordon Dep. at 84:1:85:1.) Indeed, Gordon claims that when he opts out of email requests, he typically keeps a copy of opt-out confirmations. (Gordon Dep. at ("Q: Do you generally save unsubscribe confirmations? A: Generally.") But, he cannot present any evidence or record of opting out with Defendants. (Gordon Dep. at 408:16-409:19 ("Q: You didn't, however, retain any evidence of clicking on those links [opting out], correct? A: That's correct.")

Gordon admits that he may have opted in again since opting out. (Gordon Dep. at 461:10-462:19.) This ambiguity compels the conclusion that Plaintiffs cannot establish that Defendants initiated the transmission of a commercial electronic mail to a recipient who had previously opted out using a mechanism provided by the sender. Defendants have evidence that Gordon opted in, but Plaintiffs have no evidence they ever opted out.

5. Defendants did not initiate commercial email lacking a valid physical postal address of the sender.

Throughout the litigation, Plaintiffs have failed to identify any email that Defendants sent lacking a physical postal address of the sender. (*See* Gordon Dep. at 314) ("Q. As you sit here today, do you recall -- in other words, do you remember -- any e-mail that you allege you received from Adknowledge or Virtumundo that did not have a physical address or telephone number on it? A. No."). This is because all of Defendants' email contain a postal address. (*See* Krawetz Report at 15-16.) Plaintiffs cannot identify any email Defendants sent lacking a valid physical address of the sender. Accordingly, the Court should grant summary judgment in favor of Defendants on Plaintiffs' claims under 15 U.S.C. § 7704 (a)(5)(A)(iii).

C. Plaintiffs cannot establish that Defendants violated CEMA.

1. CAN-SPAM preempts Plaintiffs' state law theories.

RCW 19.190.020 prohibits transmitting a commercial email message that "misrepresents or obscures any information in identifying the point of origin" of the message. Plaintiffs contend that Defendants' alleged "bad headers," combined with their purported failure to include their

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employees' legal names or their full corporate name in the "from name" field, "misrepresents or obscures" information in identifying the point of origin.

However, to the extent, if any, that CEMA purports to prohibit such content in circumstances in which the initiator of the email is nonetheless readily identifiable, it prohibits *immaterial* misrepresentations and falsehoods preempted by CAN-SPAM.

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

> This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to 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.

15 U.S.C. 7707(b)(1). In Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F. 3d 348 (4th Cir. 2006), the Fourth Circuit considered the CAN-SPAM preemption clause in relation to an Oklahoma law that prohibits, amount other things, sending a commercial email that "misrepresents any information in identifying the point of origin or the transmission path of the electronic mail message." This is virtually identical to the CEMA provision upon which Plaintiffs base their suit. The district court ruled that the Oklahoma statute created a cause of action for immaterial errors, and was preempted. The Fourth Circuit affirmed, reasoning "[r]ather than banning all commercial e-mails or imposing strict liability for insignificant inaccuracies, Congress targeted only e-mails containing something more than an isolated error." Omega, *supra*, 469 F.3d at 348.

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

> In sum, Congress' enactment governing commercial e-mails reflects a calculus that a national strict liability standard for errors would impede "unique 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.

Id. Like the Oklahoma statute, CEMA is preempted to the extent it purports to impose liability for minor errors that do not impede the ability of a recipient to locate the sender.

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2. Plaintiffs cannot establish that Defendants falsified or obfuscated any transmission path.

RCW 19.190.020(1)(a) prohibits initiating or assisting in commercial email that "[u]ses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message."

Two weeks ago, the Washington Court of Appeals published an opinion applying the proper application of this statute in Benson v. Or. Processing Serv., 2007 Wash. App. LEXIS 31 (Wash. Ct. App. 2007). In Benson, the defendant sent plaintiff hundreds of unsolicited commercial email messages. Id. at *2. Rather than use the "unsubscribe" links provided in the messages, the plaintiff replied to the email. Id. The reply address was non-functioning, and plaintiff brought suit, alleging that the non-functioning reply address constituted a violation of RCW 19.190.020. Id.

The trial court dismissed plaintiff's claims and the Court of Appeals affirmed, holding:

> Because all the e-mail identified one of [defendant]'s domain names and most of them contained an "unsubscribe link" and listed [defendant]'s physical address and telephone number, the e-mail did not misrepresent or obscure any information identifying their points of origin or transmission paths

Id. at *1. The plaintiff, Benson, admitted he made a decision not write to the physical address listed in the emails, nor did he make any attempt to contact the defendant by telephone. Id. at *3. He also admitted to identifying the defendant by its domain names. Id. at *4.

This Court should follow the holding in Benson because the facts of this case are strikingly similar. Other than messages that the expert witness testified did not come from Defendants, each email at issue in this matter identified one of Defendants' domain names. (Gordon Dep. at 313:11-14; Krawetz Rpt. at 15-16; Linke Decl. at 18; *see also* Declaration of Michael Shopmaker Filed by Defendant Virtumundo Inc re Motion for Partial Summary Judgment (Dkt. No. 83, hereinafter "Shopmaker Decl." at 8).) Like the Benson email, most (if not all) of the messages here contained an "unsubscribe link". (Gordon Dep. at 312:11-14; Linke Decl. at 18; Shopmaker Decl. at 8.) Each email listed Defendants' physical address, and most listed a telephone number.

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Seattle, Washington 98104
(206) 274-2800

Gordon Dep at 314:7-11 ("Q: As you sit here today, do you recall -- in other words, do you remember -- any e-mail that you allege you received from Adknowledge or Virtumundo that did not have a physical address or telephone number on it? A: No."); see also Shopmaker Decl. at 8. Like Benson, Gordon admits he never wrote to Defendants at their physical address, nor does he recall attempting to contact them by telephone. Gordon dep at 314:20-22 ("Q: Have you ever written to the physical address listed in any e-mail you received from Adknowledge or Virtumundo? A: Not to my knowledge, no"); Gordon Dep. 315:25-316:1-5 ("Q: Did you make a decision not to write to the physical address listed in the e-mails that Adknowledge and Virtumundo sent to you? A: Okay. I didn't write to them, so . . . I must have made a decision at some point."); Gordon Dep. 317:25-318:1-3 ("Q: Do you agree that you made the decision not to call the phone numbers listed in the Adknowledge and Virtumundo e-mails? A: My answer is the same. I don't recall.")

Defendants' emails are consistently "chock full" of ways for a recipient to locate and identify the initiator and/or sender of the email. See Omega, *supra*, 469 F. 3d at 457. Accordingly, any alleged deficiencies in the headers of their email are not "falsified or obfuscated" for the purposes of RCW 19.190.020, and those claims should be dismissed.

3. Plaintiffs cannot establish that defendants used any third party domain name without permission.

Plaintiffs cannot identify any of Defendants' emails that use a third party domain name without permission, and have not presented any evidence pertaining to any such alleged third party. As such, summary judgment should be entered in Defendants' favor on those claims.

4. Email harvested from inactive mailboxes retained by Gordon for the sole purpose of collecting spam is not actionable.

Gordon's clients "relinquished" their email accounts sometime in 2003. (Gordon Dep. 472:14-16.) At that time, those accounts ceased to be used for any legitimate purpose, and were no longer accessed by their users. (Gordon Dep. 470:20-471:8.) Rather than terminate these accounts, however, and thereby eliminate their ability to receive mail of any sort, Gordon decided to administer the accounts himself in order to collect the commercial email they received. To the extent that Gordon is considered as an individual, these email accounts do not belong to him. To

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505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

the extent that Gordon is considered as an ISP, it is not the legitimate holder of these accounts and cannot recover for them under the statute.

5. Plaintiffs cannot establish that Defendants used false or misleading subject lines.

Plaintiffs allege that Defendants' subject lines are false and misleading in violation of RCW 19.190.020. In order to avoid preemption by CAN-SPAM, the application of RCW 19.190.020 must incorporate CAN-SPAM's materiality requirement, which requires application of a reasonable person standard. 15 U.S.C. § 7704(a)(2) (standard is with regard to recipient acting "reasonably under the circumstances"); Omega, supra, 469 F.3d at 348 (interpreting state law in a manner that resulted in liability for immaterial error inconsistent with Congressional intent in enacting CAN-SPAM). When considered by this standard, Defendants' subject lines are neither false or misleading.

Defendants' subject lines, and accompanying from lines, are easily distinguished from those at issue in State v. Heckel, 143 Wash. 2d 824 (2001). Unlike the subject lines in Heckel, Defendants' subject lines relate truthfully to the content of the email, and, taken in context, could not reasonably be mistaken for messages from a friend or business contact. By the standard set forth by the Supreme Court of Washington in Heckel, Defendants' email subject lines are not false or misleading.

D. There is no evidence to support any claim against Scott Lynn, and summary judgment should be entered in his favor.

Plaintiffs admit they have no evidence to suggest that Scott Lynn is individually responsible for any of the emails underlying this lawsuit. (Gordon Dep. 156:13-15.) Plaintiffs further admit that their only theory of liability concerning Mr. Lynn relates to conduct he performed in his capacity as CEO:

Q. Do you believe that Scott Lynn violated any laws with respect to you?

A. I believe that he's responsible for his company.

Q. What do you mean, he's responsible for his company?

A. He's responsible -- if in fact I'm trying to unsubscribe and contact the company,

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505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

> contact the company's legal department and so forth and he ignores it, I think that he's been, I guess, negligent or somehow he hasn't been diligent in terms of his responsibility as a CEO.

(Gordon Dep. 152:18-153:1.) As a matter of law, this is not a sufficient basis upon which to impose individual liability on Mr. Lynn. In order to be liable under CAN-SPAM, Scott Lynn must have done some affirmative act to "initiate the transmission" of emails that violate the precepts of CAN-SPAM. *See* 15 USC § 7704. Similarly, in order to liable under CEMA, Scott Lynn must have done some affirmative act to "assist the transmission" of emails that violate the precepts of CEMA. *See* RCW § 19.190.010. However, the only evidence asserted by Plaintiffs for the personal liability of Scott Lynn is that he is an executive of a corporate defendant. Merely holding an executive position does not rise to the level of initiating or assisting in the transmission of improper email.

A corporation and its stockholders are generally to be treated as separate entities. Burnet v. Clark, 287 U.S. 410, 415; 53 S. Ct. 207; 77 L. Ed. 397 (1932). "Only under exceptional circumstances . . . can the difference be disregarded." Id. There are two requirements for piercing the corporate veil under Washington law: "First, the corporate form must be intentionally used to violate or evade a duty; second, disregard must be 'necessary and required to prevent unjustified loss to the injured party.'" Meisel v. M & N Modern Hydraulic Press Co., 97 Wn. 2d 403, 410; 645 P.2d 689 (Wash. 1982) (citation omitted). With regard to the first element, the court must find an abuse of the corporate form, which typically involves "fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment." Id. The doctrine can be understood as a judicial expansion of the principles of fraudulent conveyance law to circumstances in which that doctrine could not apply. Id. The second element provides wrongful corporate activities must actually harm the party seeking relief so that disregard is necessary. Id. Intentional misconduct must be the cause of the harm that is avoided by disregard. Id.

Plaintiffs have failed to present any evidence whatsoever regarding these issues. This is insufficient to create a genuine issue as to the issue of piercing the corporate veil, and Lynn is entitled to summary judgement in his favor. *See* Ruggiero v. AMR Corp., 1995 U.S. Dist. LEXIS

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505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

22149, 15-16 (N.D. Cal. 1995) (No triable issue of fact as to whether defendants AMR Corp. and AMR Eagle were alter egos of defendant Wings West where plaintiff "failed to present any evidence to suggest that Wings West is not an independent and financially stable corporation which is capable of paying its debts and the cost of this litigation, irrespective of the outcome," summary adjudication granted in favor of AMR Corp and AMR Eagle). Adknowledge and Virtumundo are financially stable corporations which are capable of paying their debts and the cost of this litigation, irrespective of the outcome. Plaintiff has no evidence to the contrary. Accordingly, this Court should summarily adjudicate the alter-ego issue, decline to disregard the corporate entity, and enter judgment in Mr. Lynn's favor on all claims.

IV. CONCLUSION

Plaintiffs' claims are frivolous. Defendants' email messages all contain their publically registered domain names, physical postal addresses, "from" and "subject" lines that relate to the content of the message, and opt-out links. The email messages Plaintiffs submit do not contain any false or misleading information, especially when read in context. Rather, Plaintiffs rely on alleged hyper technical statutory violations that CAN-SPAM does not support. The federal statute prohibits a "pattern or practice" of "material" misrepresentations requiring an analysis from the perspective of a recipient "acting reasonably under the circumstances". The state CEMA would be preempted if it exceeds the materiality requirements of CAN-SPAM. Therefore, Plaintiffs' claims should be dismissed and judgment should be entered into favor of Defendants.

DATED this 22nd day of January, 2007.

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP

By: 

Derek A. Newman, WSBA No. 26967
Roger M. Townsend, WSBA No. 25525

Attorneys for Defendants

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800