

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

[PROPOSED]
ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

THIS MATTER comes before the Court on the Motion for Summary Judgment of Defendants Virtumundo, Inc., Adknowledge, Inc., and Scott Lynn (collectively "Defendants"). Having reviewed the Complaint, Defendants' Motion for Summary Judgment and the Declarations of Dr. Neal Krawetz, Derek Linke and Derek Newman in support thereof, Plaintiff's Response to Defendants' Motion for Summary Judgment, and Defendants' Reply in Support of the Motion for Summary Judgment, the Court finds and rules as follows:

- 1 1. No genuine issue of material fact exists with respect to the issues raised by
2 Defendants in their Motion.
- 3 2. The effective date of CAN-SPAM, 15 U.S.C. § 7701 *et seq.*, was January 1, 2004.
4 15 U.S.C. § 7701 (note).
- 5 3. At some time prior to 2003, Plaintiff Gordon assigned email accounts at the
6 <<gordonworks.com>> host to family members and others. Gordon did not
7 charge users for such accounts. (Gordon’s Response to Virtumundo Interrogatory
8 No. 24.)
- 9 4. The technical aspects of providing email services in connection with such accounts
10 were accomplished not by Gordon himself, but by his hosting provider (currently
11 GoDaddy.com. Inc. (“GoDaddy”). (Gordon Dep. At 213:25.)
- 12 5. At some time in 2003, prior to the effective date of CAN-SPAM, the individuals to
13 whom Plaintiff Gordon had assigned email accounts at the <<gordonworks.com>>
14 host relinquished those accounts. (Gordon Dep. at 472:14.)
- 15 6. After May 2005, Plaintiff Omni Innovations, LLC (“Omni”) associated certain
16 domain names registered to third parties with the server it leases from GoDaddy,
17 and assigned users email accounts at those domains. Omni did not charge users for
18 these services. (Omni’s Response to Virtumundo Interrogatory No. 22.)
- 19 7. The technical aspects of providing such domain name services and email services
20 in connection with such accounts were accomplished not by Omni itself, but by its
21 hosting provider (currently GoDaddy). (Gordon Dep. at 109:2.)
- 22 8. Neither plaintiff has offered any evidence of actual damages or adverse affect.
23 (Gordon Dep. at 319-327.)
- 24 9. The “from” lines of Defendants’ emails include return addresses at domain names
25 registered to Defendants, contact information for which is available through
26 WHOIS. (Krawetz Rpt. at 15; Krawetz Decl. at 20.)
- 27 10. Defendants’ email headers allow Defendants to be easily identified and located.
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1 (Krawetz Rpt. at 24.)

2 11. Defendants are accurately identified in the “from” lines of their emails. (Krawetz
3 Rpt. at 15.)

4 12. Section 7704(a)(2) of CAN-SPAM prohibits a person from transmitting
5 commercial email:

6 if such person has actual knowledge, or knowledge fairly implied on the basis
7 of objective circumstances, that a subject heading of the message would be
8 likely to mislead a recipient, acting reasonably under the circumstances, about
9 a material fact regarding the contents or subject matter of the message

10 13. Plaintiffs have failed to establish that Defendants knew, or should have known on
11 the basis of objective circumstances, that any subject heading of their emails
12 would be likely to mislead a recipient, acting reasonably under the circumstances,
13 about a material fact regarding the contents or subject matter of the message.

14 14. Plaintiffs have failed to establish that Defendants initiated the transmission of a
15 commercial electronic mail message that does not contain a functioning return
16 electronic mail address. 15 U.S.C. §7704(a)(3)(a).

17 15. Plaintiffs have failed to establish that Defendants initiated the transmission of a
18 commercial electronic mail message to a recipient who had previously submitted,
19 in a manner specified in the message, a request not to receive future commercial
20 electronic mail messages from that sender at the electronic mail address where the
21 message was received, and who had not thereafter affirmatively consented to
22 receive such messages. 15 U.S.C. §7704(a)(4).

23 16. Plaintiffs have failed to establish that Defendants initiated the transmission of any
24 commercial electronic message to a protected computer in which the message did
25 not provide: i) clear and conspicuous identification that the message is an
26 advertisement or solicitation; (ii) clear and conspicuous notice of the opportunity
27 to decline to receive further commercial electronic mail messages from the sender;
28 or (iii) a valid physical postal address of the sender. 15 U.S.C. §7704(a)(5).

17. Plaintiffs have failed to establish that Defendants violated section 7704 (a)(1), (b),

1 or (d) of this title, or have engaged in a pattern or practice that violates paragraph
2 (2), (3), (4), or (5) of section 7704 (a).

3 18. Plaintiffs have failed to establish that Defendants initiated the transmission of any
4 emails that fail to contain a working unsubscribe link.

5 19. Plaintiff Gordon has failed to establish that he is a provider of Internet access
6 service adversely affected by a violation of section 7704 (a)(1), (b), or (d) of CAN-
7 SPAM, or by a pattern or practice that violates paragraph (2), (3), (4), or (5) of
8 section 7704 (a). Plaintiff Gordon therefore lacks standing under CAN-SPAM.

9 20. Plaintiff Omni has failed to establish that it is a provider of Internet access service
10 adversely affected by a violation of section 7704 (a)(1), (b), or (d) of CAN-SPAM,
11 or by a pattern or practice that violates paragraph (2), (3), (4), or (5) of section
12 7704 (a). Plaintiff Omni therefore lacks standing under CAN-SPAM.

13 21. Defendants' emails contain header information that is not materially false or
14 materially misleading. 15 U.S.C. § 7704(a)(1)(b).

15 22. Defendants' email headers are not false or misleading for the purposes of CAN-
16 SPAM. 15 U.S.C. § 7706(a)(1). Omega World Travel, Inc. v. Mummagraphics,
17 Inc., 469 F. 3d 348 (4th Cir. 2006).

18 23. Defendants have not falsified or obfuscated transmission paths for the purposes of
19 Washington's Commercial Electronic Mail Act, RCW 19.190.020. Benson v. Or.
20 Processing Serv., 2007 Wash. App. LEXIS 31 (Wash. Ct. App. 2007).

21 24. Email accounts that have been relinquished by their users are not "held by a
22 Washington resident" for the purposes of Washington's Commercial Electronic
23 Mail Act, RCW 19.190.020.

24 25. Plaintiff Gordon does not provide services to others and is thus not an "interactive
25 computer service" as defined in RCW 19.190.

26 26. Plaintiff Gordon's claims under RCW 19.190.20 are dismissed to the extent that
27 they are based on email messages received by accounts that had been relinquished
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1 by their users prior to the date and time the messages were received.

2 27. Washington's Commercial Electronic Mail Act is preempted to the extent that it
3 conflicts with the national standard established by CAN-SPAM. Omega World
4 Travel, Inc. v. Mummagraphics, Inc., 469 F. 3d 348 (4th Cir. 2006).

5 28. RCW 19.190.20 conflicts with CAN-SPAM to the extent that it seeks to impose
6 liability for false or misleading information in the subject line regardless of
7 whether the person initiating the message "has actual knowledge, or knowledge
8 fairly implied on the basis of objective circumstances, that a subject heading of the
9 message would be likely to mislead a recipient, acting reasonably under the
10 circumstances, about a material fact regarding the contents or subject matter of the
11 message."

12 29. RCW 19.190.20 conflicts with CAN-SPAM to the extent that it seeks to impose
13 liability for individual instances of false or misleading information in the subject
14 line, rather than a pattern or practice of false or misleading information in the
15 subject line as determined in a manner consistent with No. 28 above.

16 30. Plaintiffs have failed to establish a pattern or practice of false or misleading
17 subject lines by Defendants.

18 31. Plaintiffs have failed to offer any evidence that defendant Scott Lynn is directly or
19 indirectly liable for any of the acts complained of in the Complaint.

20 32. CAN-SPAM allows standing for providers of Internet access service "adversely
21 affected" by a violation of certain of its provisions. 15 U.S.C. § 7706(g)(1). Thus,
22 evidence of actual damages is required to establish standing, even if a plaintiff is
23 seeking only statutory damages under the Act. Id.

24 33. An account that has been "relinquished" by its user is inactive, notwithstanding the
25 fact that it can still receive and accumulate email messages.

26 34. Email messages sent to inactive accounts cannot provide a basis for standing under
27 CAN-SPAM, because they do not represent services provided to customers.

28 35. Defendants are entitled to summary judgment.

1 36. Plaintiffs' CAN-SPAM claims are dismissed with respect to emails sent before
2 January 1, 2004.

3 37. All claims against defendant Scott Lynn are dismissed with prejudice.

4 38. Plaintiff Omni's CAN-SPAM claims are dismissed with prejudice.

5 39. Plaintiff Gordon's CAN-SPAM claims are dismissed with prejudice.

6 40. Plaintiff Omni's CEMA claims are dismissed with prejudice.

7 41. Plaintiff Gordon's CEMA claims are dismissed with prejudice.

8 42. Defendants are entitled to their reasonable attorneys' fees and costs in defending
9 this lawsuit. Defendants are directed to file an accounting with respect thereto and
10 Plaintiff may respond within 7 calendar days of that accounting.

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12 It is HEREBY ORDERED. The Clerk of the Court is directed to enter judgment in
13 favor of Defendants.

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15 DATED this ____ day of ____ 2007.

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UNITED STATES DISTRICT JUDGE

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28 Presented by:


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CASE NO. CV06-0204C - 6

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