

JUDGE MARSHA J. PECHMAN

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, )  
)  
*Plaintiff,* )  
)  
v. )  
)  
ROBERT ALAN SOLOWAY, )  
)  
*Defendant.* )

NO. CR07-187MJP

REPLY MEMORANDUM IN  
SUPPORT OF MOTION TO  
DISMISS COUNTS 19-25 OF  
THE SECOND SUPERSEDING  
INDICTMENT

The government largely responds to defendant's motion to dismiss Counts 19 through 25 by giving a general dissertation on spamming ("Spamming 101"). However, what the government has scrupulously avoided mentioning is that spamming is not unlawful. The CAN-SPAM Act of 2003 ("Controlling the Assault of Non-Solicited Pornography and Marketing Act"), which became effective January 1, 2004, established requirements regulating--but not banning--unsolicited bulk commercial electronic email (commonly known as spam). In its continuing effort to demonize Mr. Soloway, the government describes numerous malevolent spamming practices ("pernicious fraud and 'phishing' schemes, pornography, and a host of 'malware' that includes viruses, worms, trojans, and spyware" and "natural disaster and catastrophe fraud"), even though it knows that it lacks any evidence that Mr. Soloway was engaged in such activities.

1 Whether Mr. Soloway violated the CAN-SPAM Act is not the subject of this  
2 motion. What is the subject of this motion is whether or not Mr. Soloway committed  
3 aggravated identity theft. For the reasons set forth in the underlying motion, as well for  
4 the reasons hereinbelow set forth, it is clear that Mr. Soloway did not engage in  
5 aggravated identity theft to which that statute was intended to apply.  
6

7 **II. ARGUMENT.**

8 **A. FORGING A HEADER IN AN EMAIL DOES NOT CONSTITUTE AGGRAVATED IDENTITY**  
9 **THEFT.**

10 Mr. Soloway does not dispute that he sent bulk unsolicited emails that contained  
11 forged headers. That conduct, if it involved commercial email, is arguably prohibited by  
12 18 U.S.C. §1037.<sup>1</sup> Mr. Soloway used a macro option in a lawful email sending software  
13 program that automatically replaced his email address in the header with the email address  
14 of the intended recipient of the email. A copy of the macro option is attached hereto as  
15 Exhibit A. Each email in which a recipient's email address was placed in both the "To"  
16 and the "From" portion of the header was unique, and only one email with this unique  
17 combination was transmitted to the recipient by Mr. Soloway. Despite repeated, but  
18 unsupported, claims by the government, Mr. Soloway did not send emails to third parties  
19 using anyone else's email address in the header. The macro option used by Mr. Soloway  
20 (See Exhibit A) was not capable of inserting an email address other than that of the  
21 recipient's email address in the "From" header.  
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23  
24 Nevertheless, we concede that this motion may not be ripe for determination due  
25 to the government's as yet unsupported claim to have evidence that Mr. Soloway did more  
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27 <sup>1</sup> The CAN-SPAM Act, and 18 U.S.C. §1037 apply only to commercial electronic email.

1 than simply substitute the recipient's email address for his email address in a header. The  
2 government has been long on rhetoric and short on evidence in advancing this claim. With  
3 the exception of Count 19, the government has not produced to the defense in discovery  
4 a single email which it claims was sent by Mr. Soloway to a third party using someone  
5 else's email address (someone other than the recipient) in the "From" portion of the  
6 header. If Mr. Soloway was sending out millions of such emails as the government  
7 alleges, surely there would be some evidence to support its claims of forged headers in  
8 emails to third parties. Yet, with the exception of count 19, the government has failed to  
9 produce even a single copy of such an email. The reason for the failure of production is  
10 clear: no such emails were transmitted by Mr. Soloway.  
11  
12

13 Count 19 refers to an individual identified by the initials R.M. The government  
14 has produced copies of three emails that appear to have been sent to R.M.'s wife which  
15 identify some form of R.M.'s domain name in the header as being the sender of the emails  
16 to his wife.<sup>2</sup> However, if Mr. Soloway was using R.M.'s domain name to send spam  
17 email to third parties, R.M. should have received hundreds or even thousands of "bounce  
18 backs" of emails that could not be delivered due to invalid email addresses. The  
19 government has produced no evidence of such bounce backs.  
20

21 The government does claim that T.C., who is identified in Count 20, received  
22 "bounce backs to his addresses and domain names, indicating to him that spam with his  
23 addresses forged in the 'from' header fields had been transmitted to others." However,  
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25  
26 <sup>2</sup> Defendant believes that this occurred not as a result of anything intended by him, but  
27 rather as a result of some forwarding program between R.M's email and his wife's email. Both  
28 email domains were set up at the same time through the same ISP. The chances of this having  
occurred coincidentally are astronomical.

1 the government has not provided the defense with so much as a single copy of a bounce  
2 back message. T.C., like all of the people identified in the indictment, and like most  
3 people who have email addresses, received spam from more than one source. Lists of  
4 email addresses are routinely bought, sold, and traded over the internet, so if a person  
5 received spam from one source, it is likely that they also received spam from other sources  
6 as well. Thus, it is not enough for the government to proceed as though all spam on the  
7 internet came from Mr. Soloway. They must produce independent evidence to support  
8 each count of the indictment.  
9

10  
11 Although we acknowledge that the Court may not be able to resolve this motion at  
12 this time because of the government's claimed evidence of Mr. Soloway sending emails  
13 to third parties with forged headers, we believe that the Court can make an advisory ruling  
14 as to whether the narrow act of substituting a recipient's email address for Mr. Soloway's  
15 address in the header of an email constitutes aggravated identity theft pursuant to 18  
16 U.S.C. §1028A. Such a ruling could help the parties determine whether a disposition  
17 short of trial in this case is possible.  
18

19 **B. 18 U.S.C. §1037(a)(3) PROSCRIBES DEFENDANT'S CONDUCT.**

20 Under the government's theory, almost any violation of 18 U.S.C. §1037(a)(3) also  
21 constitutes aggravated identity theft. That is clearly not what Congress intended by the  
22 aggravated identity theft statute. The alleged "use" of someone's identity by inserting a  
23 person's email address in the "from" header of an email that is sent to the very same  
24 person is far too tenuous to come within the grasp of 18 U.S.C. §1028A. That statute was  
25 clearly intended to punish a person who uses another person's identity directly in  
26 connection with some fraudulent scheme (*e.g.*, to open bank accounts, obtain loans or  
27

28 **REPLY MEMORANDUM IN SUPPORT  
OF MOTION TO DISMISS COUNTS 19  
THROUGH 25; CR07-187MJP - 4**

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1 credit, obtain employment, etc.). The only thing that occurred in this case as a result of  
2 the forged header was that an email may have avoided a spam filter. Surely, that is not  
3 what Congress had in mind when enacting 18 U.S.C. §1028A. Indeed, the legislative  
4 history makes it absolutely clear that this was not the kind of conduct intended to be  
5 subject to the severe enhanced penalties for "aggravated" "identity" "theft."

7 The government's response to the argument that Mr. Soloway's conduct is already  
8 covered by 18 U.S.C. §1037(a)(3) is typical. The government claims that it can charge  
9 Mr. Soloway's conduct under both statutes, not because it is the right thing to do, but  
10 rather because it has the unchecked power to do so. We disagree. If the statute is not  
11 broad enough to encompass the conduct alleged, then no amount of power will support  
12 such a charging decision.

14 Accordingly, we respectfully request the Court to find that merely substituting the  
15 recipient's email address for the sender's email address in the header of an email does not  
16 constitute aggravated identity theft in violation of 18 U.S.C. §1028A.

17 DATED this 15<sup>th</sup> day of February, 2008.

19 RICHARD J. TROBERMAN, P.S.

20 By: 

21 RICHARD J. TROBERMAN  
22 WSBA #6379  
23 Attorney for Defendant  
24 Robert Alan Soloway

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**EXHIBIT A**

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Send Load Save Macros Priority

Message | E-mails | Mail servers | Proxy servers | Headers | Settings | Network

From name: [REDACTED]

From e-mail: %TO\_EMAIL

Subject: [REDACTED]

email advertise like this to 8,000,000 people... free..

<http://www.advertisingemailcorporation.com/>

advertise now for christmas... 15 days left...

the above noncommercial offer is only for noncommercial charities only. press on charity info on our web site for full and complete details. this offer is not a commercial service and is not at all for sale or lease or trade of any kind.

