

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MARK FERGUSON, a married individual,  
d/b/a WHEW.COM,

Plaintiff,

v.

ACTIVE RESPONSE GROUP, an New York  
company; THE BRADFORD EXCHANGE,  
LTD., an Illinois corporation; QUINSTREET,  
INC., a California corporation; VISION CARE  
HOLDINGS, LLC., a Florida Limited Liability  
Company; NAUTILUS, INC., a Washington  
corporation; and JOHN DOES, I-CC,

Defendants.

NO. CV07-5378 RJB

DEFENDANT QUINSTREET, INC.'S  
MOTION FOR SUMMARY  
JUDGMENT

NOTE ON MOTION CALENDAR:  
July 25, 2008

ORAL ARGUMENT REQUESTED

**I. INTRODUCTION**

Plaintiff MARK FERGUSON dba whew.com sued QUINSTREET, INC.  
("QuinStreet") and other defendants alleging that defendants' various emails violated the  
Federal CAN-SPAM Act of 2003, 15 U.S.C. §7701 et seq., and the Washington Commercial  
Electronic Mail Act ("CEMA"), RCW 19.190.020, and the Washington State Consumer  
Protection Action ("CPA"), RCW 19.86. [Dkt. 1.] Plaintiff voluntarily dismissed defendants

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1 Active Response Group [Dkt. 48], The Bradford Exchange Group [Dkt. 36], Vision Care  
2 Holdings, LLC [Dkt. 26], and Nautilus, Inc. [Dkt. 38], after extracting nuisance value  
3 settlements.

4 As the only remaining defendant, QuinStreet moves for summary judgment on the  
5 following grounds:

6 1) Plaintiff has no standing to bring claims under CAN-SPAM, CEMA or CPA  
7 because Plaintiff is not a bona fide internet access service (“IAS”) or interactive computer  
8 service (“ICS”) that was adversely affected by a statutory violation; and

9 2) QuinStreet has no knowledge of or control over: a) which individuals receive  
10 the emails, where an individual’s email address is set forth in the “To:” line of an email; or b)  
11 what domain or domains are used to send the emails, where the information after the “@”  
12 character in the “From:” line of an email is the email domain (such domain references in the  
13 “To:” and “From:” lines, the “Header”).

## 14 **II. STATEMENT OF FACTS**

15 QuinStreet is an online marketing, media, and technology services company that  
16 connects targeted consumers with products and services that are most relevant and valuable to  
17 their lives. [Decl. of Ryan Simmons in Support of QuinStreet’s Mot. for Summ. J. ¶2.]  
18 QuinStreet provides marketing services for some of the world’s leading brands, including  
19 DeVry University, ADT Security Services, DISH Network, Sears, VNUS Medical  
20 Technologies, Inc., and Career Education Corporation. [*Id.*] By valuing ethical online  
21 marketing practices that preserve brand integrity, QuinStreet has become one of the largest  
22 online media and marketing companies in the world. [*Id.*]

23 QuinStreet graphically designs online advertisements for products and services offered  
24 by its clients as well as QuinStreet’s internal websites which promote its clients, products and

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1 services. QuinStreet prepares the text and graphics (“creative content”) that are incorporated  
2 into the advertisement. [Simmons Decl. ¶3.] Some advertisements are web-based while others  
3 are incorporated into emails. [Id.] With regards to email advertisements, the creative content  
4 is sent to a third party publisher. [Id.] The third party publisher is a separate independent  
5 business entity that offers its services to online marketing companies such as QuinStreet. The  
6 third party publisher has confidential lists of email recipients which they protect as trade  
7 secrets (“confidential lists”). The publisher does not disclose these confidential lists to  
8 QuinStreet. [Id.]

9 The third party publisher decides which list(s) of recipients to use for a given email  
10 advertisement based on their own marketing research and data collection. [Simmons Decl. ¶4]  
11 QuinStreet does not know which domain or domains will be used by the publishers to transmit  
12 the emails and has no knowledge of or control over the individuals to whom the publisher  
13 sends the email. [Id.] QuinStreet does not create, see, or approve any domain references in the  
14 emails including any domain references in the Header<sup>1</sup>. [Id.] QuinStreet is advised by the  
15 publishers that the email advertisements are sent only to email addresses which have opted in  
16 or consented to the receipt of emails from a particular domain or domains controlled by the  
17 publisher. [Id. ¶5.] QuinStreet prohibits publishers from sending emails to those who have  
18 opted out or unsubscribed. [Id.]

19 Plaintiff Mark Ferguson is an individual who claims to be doing business as Ferguson  
20 Graphics. [Decl. of Stephan A. Barber in Support of QuinStreet's Mot. for Sum. J., Ex. A  
21 (Plaintiff's Deposition) at 36:3-4.] Whew.com is a d/b/a of Ferguson Graphics. [Id. at 57:19-  
22 20.] Since there is no actual or legal distinction between Mark Ferguson, the individual,  
23 Ferguson Graphics, or whew.com, they are referred to collectively herein as “Plaintiff.”  
24

25 <sup>1</sup> The email Header typically consists of the from, to, date, and subject line of the email.

1 In the early 1990s, Plaintiff did freehand illustrations, business cards, paste up  
2 production, and typesetting. [*Id.* at 34:12-35:1-2.] After taking some computer courses at a  
3 junior college, Plaintiff began doing website construction. [*Id.* at 34:14-35:12, 38:12-16.]  
4 Plaintiff claims that for a period of nine months beginning in 2002 he received a deluge of  
5 threatening emails that forced him to stop accepting any new clients and charging his one  
6 existing client. [*Id.* at 44:6-16.]

7 From 2003 to today, Plaintiff has had only one “client,” Jessica Felix, whom he  
8 describes as “a friend.” [*Id.* at 38:22-39:14, 140:18-21, 200:8-12.] Plaintiff built and  
9 maintains her website, artandallthatjazz.com. [*Id.* at 42:5-8, 44:14-23, 138:14-22.] However,  
10 Plaintiff does not charge her for any services. [*Id.* at 38:22-39:14, 44:14-23.] Plaintiff  
11 currently does very little work for her because she maintains her website herself. [*Id.* at 44:24-  
12 45:4.]

13 Plaintiff has not been employed by any company or business since 2005. [*Id.*]  
14 Although Plaintiff claims to be self-employed, Plaintiff has not received any income from  
15 Ferguson Graphics or any other source since at least November 2004. [*Id.* at 44:6-12, 46:12-  
16 20.] Currently, Plaintiff does not earn an income because he spends his time building an  
17 informational website for travel, art, culture, and restaurants called e-walkabout.com. [*Id.* at  
18 46:17-48:24.] Once completed, Plaintiff intends to market the e-walkabout.com website to  
19 restaurants, hotels, and possibly museums who want to advertise on the website. [*Id.* at 49:23-  
20 50:7.] However, in the last few years Plaintiff has received over \$100,000 in settlements  
21 related to anti-spam demands/lawsuits, including settlements from the other defendants in this  
22 case as well as a class action lawsuit in California. [*Id.* at 58:11-60:25, 68:19-69:18, 73:24-  
23 74:1.]

1 Plaintiff has never had any employees. [*Id.* at 98:24-25.] Plaintiff created the  
2 whew.com website in 1996. Plaintiff has never hired anyone to do work on whew.com. [*Id.*  
3 at, 99:1-23.] Whew.com was originally a business/pleasure travel site. [*Id.* at 99:22-25.] In  
4 1999, it was an anti-spam site that identified spammers and disseminated information regarding  
5 spam. [*Id.* at 100:3-101:4.]

6 For the last several months, the only thing whew.com is being used for is to post a short  
7 poem about a cat and a mouse. [*Id.* at 101:22- 102:10; *See also* Barber Decl., **Ex. B.**] Plaintiff  
8 intends to write and post “little short stories” on the whew.com website for entertainment, but  
9 has been too busy to write. [*Id.*] Plaintiff has never provided email accounts to anyone. [*Id.*  
10 at 104:11-106:9.] Rather, Plaintiff has on occasion and without pay done temporary email  
11 forwarding for a few friends and relatives “just to be nice.” [*Id.*]

12 Up until January 2007, Plaintiff subscribed to monthly internet access service through  
13 sonic.net at a cost of \$18.95 per month for dial-up service using his 56k modem. [*Id.* at  
14 113:16-23.] In January 2007, Plaintiff’s wife purchased broadband service through Advance  
15 Stream for \$30 per month. [*Id.* at 121:17-122:18, 126:23-127:23.] Plaintiff and his wife  
16 currently use broadband for all of their general internet activity. [*Id.* at 123:14-17, 137:20-22,  
17 251:2-6.] Plaintiff’s dial-up account with sonic.net is still functional and Plaintiff uses it when  
18 his broadband service is not functioning. [*Id.* at 250:22-251:1.]

19 From October 2006 through July 2007 (the relevant time period during which Plaintiff  
20 alleges he received the relevant emails), Plaintiff paid a monthly service charge to use a server  
21 owned and hosted by sonic.net. [*Id.* at 118:2-25, 130:2-14, 144:2-24.] He did not own the  
22 server, did not lease the server, and had no control over the server. [*Id.* at 144:2-24.] Plaintiff  
23 had previously rented or leased a separate server owned and maintained by sonic.net (called  
24 “colocating”), but changed back to using the server hosted by sonic.net in approximately 2002.

1 [Id. at 117:17-118:3.] In approximately February 2008, Plaintiff began colocating another  
2 server for his endeavors related to building the e-walkabout.com website. [Id. at 116:4-9.]

3 Plaintiff does not have access to any of the servers he uses and has never done any  
4 maintenance to the servers [Id. at 119:16-120:15.] Sonic.net is the only one who has access to  
5 the servers used by Plaintiff, and sonic.net staff handles any maintenance of the servers  
6 (including if a server crashes) which is covered as part of the monthly service fee. [Id.] The  
7 only additional cost that could potentially be incurred as a result of the servers is if the  
8 information passing through the server exceeded its allocated bandwidth. [Id.] With the  
9 exception of an occurrence in 2002, Plaintiff has never exceeded his bandwidth. [Id. at 121:1-  
10 7.]

11 Plaintiff has never lost internet service, his computer has never crashed, nor has it been  
12 physically damaged as a result of emails he has received. [Id. at 184:2-186:7.] Plaintiff has  
13 never hired anyone to help deal with the receipt of spam emails, nor has any of Plaintiff's  
14 software been damaged as a result of spam emails. [Id. at 186:21-187:15.] With the possible  
15 exception of purchasing broadband internet connection, Plaintiff has not incurred any out of  
16 pocket expenses as an alleged result of spam emails. [Id. at 244:23-245:4.]

### 17 **III. LEGAL ARGUMENT**

18  
19 Federal Rule of Civil Procedure, Rule 56(c) provides in relevant part:

20 The judgment sought shall be rendered forthwith if the pleadings, depositions,  
21 answers to interrogatories, and admissions on file, together with the affidavits, if  
22 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.

23 A defendant is entitled to a judgment as a matter of law if it can show the court that  
24 plaintiff's evidence is insufficient to establish an essential element of plaintiff's claim. *Celotex*  
25 *Corp. v. Catrett*, 477 U.S. 317 (1986); *High Tech Gays v. Defense Indus. Sec. Clearance*

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1 *Office*, 895 F.2d 563, 574 (9th Cir. 1990). As explained in *Chamberlan v. Ford Motor Co.*,  
2 369 F.Supp.2d 1138, 1143 (N.D. Cal. 2005):

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

15 *Id.* at 1143, citing *Celotex Corp. v. Catrett*, *supra*, 477 U.S. at 322-23; *Lujan v. Nat'l Wildlife*  
16 *Fed'n* 497 U.S. 871, 885 (1990); *Bhan v. NME Hosp. Inc.*, F.2d 1404, 1409 (9th Cir. 1991).

17 The moving party bears the burden of informing the court of the basis for its motion,  
18 together with evidence demonstrating the absence of any genuine issue of material fact.

19 *Celotex Corp. v. Catrett*, *supra*, 477 U.S. at 323. Once the moving party has met its burden,  
20 the party opposing the motion may not rest upon the mere allegations or denials of his  
21 pleadings but must set forth specific facts showing that there is a genuine issue for trial.

22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

23 A. **Plaintiff Does Not Have Standing to Assert Claims Under CAN-SPAM Because**  
24 **Plaintiff Is Not A Provider of Internet Access Service That Was "Adversely**  
25 **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. [See e.g., Barber Decl., Ex. C, Joint Open Letter on Spam Litigation,

1 Coalition Against Unsolicited Commercial Email, <http://www.cauce.org/archives/25-Joint-Open-Letter-on-Spam-Legislation.html>.]

3 Congress declined, and instead enacted a scheme to: 1) create a nationwide standard for  
4 commercial email; 2) prohibit senders of commercial electronic mail from misleading  
5 recipients as to the source or content of such mail; and 3) to ensure that recipients of  
6 commercial electronic mail have the right to decline additional email from a particular source.  
7 15 U.S.C. §7701(b). The Act does not create any private cause of action for individual  
8 recipients of unsolicited commercial email, even if those emails violate the requirements of the  
9 Act. Rather, the Act is enforceable only by the Federal Trade Commission and other specified  
10 federal agencies, by state Attorneys General, and by “provider(s) of Internet access service”  
11 who are “adversely affected by a violation of section 7704(a)(1), (b), or (d) of [the Act], or a  
12 pattern or practice that violates paragraph (2), (3), (4), or (5) of section 7704(a).” 15 U.S.C.  
13 §7706(g)(1).

14 **1. Plaintiff Does Not Provide Internet Access Service.**

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

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

20 In light of Congress declining to create a private cause of action for individual  
21 recipients of unsolicited commercial email under CAN-SPAM, the potentially all-inclusive  
22 language used to define “Internet access service” is ambiguous. If interpreted broadly, as  
23 Plaintiff urges, anyone can qualify as an “Internet access service.” For example, any person  
24 who allows another person to use their computer to access the Internet “enables users to access  
25

1 content, information, electronic mail...over the Internet.” An individual would have standing  
2 to sue under CAN-SPAM by virtue of allowing a friend, family member, or acquaintance to  
3 use their computer to access the internet to check the news, sports, weather, their email, shop,  
4 etc.

5 Likewise, a person who inserts a hyperlink on a blog post or in an email falls within the  
6 purview of a broad construction of the definition because the hyperlink would enable the user  
7 to access content, information, etc. over the Internet. Any business or public entity that allows  
8 its employees to access the internet via their work computer enables its employees to access  
9 content, information, etc. over the Internet. Institutions, such as banks, retail stores, hotels,  
10 etc., who enable patrons to pay for services/merchandise through access to their financial  
11 accounts (through ATM or credit card payments) would provide “Internet access service”  
12 because they enable users to access content, information, etc. over the Internet.

13 With Internet access becoming an indispensable part of our social and business  
14 activities, this broad interpretation of “Internet access service” would encompass vast numbers  
15 of persons upon whom Congress did not intend to confer standing. Such a standard would  
16 effectively create an unlimited private cause of action for CAN-SPAM violations.

17 In contrast, a narrow interpretation would exclude all but those who actually provide  
18 access to the Internet (e.g., dial-up, DSL, cable modem, or T1 service providers) and network  
19 based email services (e.g., Earthlink, Yahoo, MSN, and AOL). This interpretation has the  
20 advantage of meaningfully limiting standing under the Act, which is what Congress intended  
21 by declining to create a private cause of action for individuals who receive unsolicited  
22 commercial emails. Additionally, a narrow reading of the definition of “Internet access  
23 service” is consistent with other definitions contained in the Omnibus bill, H.R. 4328, from  
24 which this definition arose. *See* “Making omnibus consolidated and emergency appropriations  
25

1 for the fiscal year ending September 30, 1999, and for other purposes” which became Public  
2 Law No. 105-277. For example, the Internet Tax Freedom Act, also introduced in H.R. 4328,  
3 includes the following definition:

4 The term ‘Internet access services’ means the provision of computer and  
5 communications services through which a customer using a computer and a  
6 modem or other communications device may obtain access to the Internet, but  
7 does not include telecommunications services provided by a common carrier.

8 47 U.S.C . §151, note, section 1101(f)(2)(B).

9 This definition of “Internet access service” is consistent with a narrow interpretation of  
10 15 U.S.C. §7702(11). Unless we assume that Congress intended the term “Internet access  
11 service” to mean two wildly divergent things in the same bill, the narrow construction is the  
12 correct construction. The “normal rule of statutory construction” provides that “identical  
13 words used in different part of the same act are intended to have the same meaning.”

14 *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

15 In this case, Plaintiff is at best an online hobbyist who has built a few websites, is part  
16 of a community action group that maintains a list serve, and occasionally forwards emails for  
17 friends and family at no charge. He is not an “Internet access service” within the meaning of  
18 the CAN-SPAM Act. Plaintiff does not own any servers, and is not in the business of  
19 providing emails to customers:

20 Q. Has whew.com ever offered e-mail accounts to customers?

21 A. I did e-mail forwarding a while back.

22 Q. For what term – when did you do that?

23 A. Nothing that was paid or anything. It was basically to friends and stuff. It was  
24 not part of the business, but I did e-mail forwarding just to be nice – because I  
25 use a lot of filtering in my e-mails, so that I know some other people that are  
getting a lot of spam so I was offering them to use a whew.com e-mail address  
in order to get rid of some of their spam.

Q. All right. So during what years were providing e-mail forwarding?

1 A. It was nothing that was set up that I was doing as a business or anything, it was  
2 just, you know, doing it as a favor to other people.

3 [Barber Decl., Ex. A at 104:11-105:2.]

4 Plaintiff goes on to explain that: "I can't run a mail server" and "I don't have an e-mail  
5 server. It's not set up to accept e-mail. There's no STMP server on it." [*Id.* at 119:8-10,  
6 142:21-24.] Plaintiff further testified that whew.com never provided any permanent email  
7 accounts because it "was not intended for use for third parties." [*Id.* at 139:11-15.] Finally,  
8 Plaintiff confirms he is not a mail administrator: "I'm not a mail administrator either." [*Id.* at  
9 125:6-9.] As such, Plaintiff's forwarding of emails to friends and family and members of his  
10 community action group vis a vis a list serve does not make him an IAS. Rather, it makes him  
11 an internet user, just like the vast majority of individuals who pay a third party to receive  
12 internet access for their personal internet activities.

13 Plaintiff claims he is an "Internet access service" by virtue of colocating a server  
14 through sonic.net. [*Id.* at 95:25-96:2 ("Q. How long have you been an IAS? A. Since  
15 approximately 2000, since I first colocated my server.")] Colocating a server is nothing more  
16 than renting or leasing a server owned by another company. [*Id.* at 117:4-7.] Even assuming  
17 colocating a server makes an individual an IAS, it would not support Plaintiff's contention he  
18 is an IAS because Plaintiff was not colocating a server during the relevant time period  
19 (October 2006 when he alleges he began receiving spam emails and July 2007 when he filed  
20 the lawsuit). The server Plaintiff colocated in 2000 was not used after 2002 and he did not use  
21 another colocated server until approximately February 2008:

22 Q. Okay. And when did you start using the second server?

23 A. The second one was about three or four months ago.<sup>2</sup>

24 Q. Why did you change servers?

25 <sup>2</sup> Plaintiff's deposition was taken on May 9, 2008.  
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1 A. I stopped using the colocation server, the first one in 2002, I think it was  
2 because of all the crap going on. And then this one I decided that since  
3 I'm doing e-walkabout I need my own server for it.

4 [Id. at 116:1-9.]

5 Plaintiff's own testimony confirms that collocating a server has nothing to do with his  
6 claims herein because he stopped using it in 2002 and did not begin using another collocated  
7 server until approximately February 2008. Even so, the collocated server currently being used  
8 is for a completely separate purpose (i.e., the e-walkabout.com business venture in the making)  
9 and not anything having to do with his receipt of alleged spam emails.

10 Similarly, Plaintiff is not an IAS simply by virtue of maintaining the  
11 artandallthatjazz.com website for his friend, Jessica Felix. Rather than Plaintiff providing  
12 "services offered to consumers," Ms. Felix, Plaintiff's only "client", does not pay for any of his  
13 services. To the contrary, Plaintiff pays sonic.net \$9.95 a month to host the  
14 artandallthatjazz.com website:

15 Q. Now does it cost you anything in terms of paying sonic.net to host and maintain  
16 Jessica's website.

17 A. Yeah.

18 Q. What does it cost you?

19 A. \$17 – or \$9.95 a month is what it costs me.

20 Q. Have you ever had any discussions with Jessica about her at least paying the  
21 \$9.95 a month?

22 A. No. She's a friend of mine and I won't – after all the crap, I won't do that to  
23 her....

24 Q. So if Jessica stopped being your client you could save yourself ten bucks a  
25 month, right?

A. Yeah, not worth it. She likes her website.

[Id. at 140:13-141:4.]

1 Under these circumstances, sonic.net is the IAS and Plaintiff is the consumer. Plaintiff  
2 does not become an IAS by purchasing internet service for his friends. Even so, Plaintiff  
3 testified that his involvement with artandallthatjazz.com is minimal:

4 Q. And how much work do you do a year on average for Jessica?

5 A. I don't normally do that much work for her because it's usually self-  
6 contained....

7 [Id. at 44:24-45:1-2.]

8 When the technical hyperbole is boiled down, Plaintiff's sworn testimony reveals he is  
9 simply an internet user who pays a monthly fee to access the internet for his various internet  
10 activities. Plaintiff's claim to standing is fatally undermined by the fact that Plaintiff does not  
11 "provide" the services upon which he bases his claim to standing. Rather, sonic.net "enables"  
12 Plaintiff and his "client" "to access content, information, electronic mail, or other services  
13 offered over the Internet." Plaintiff's occasional website design and maintenance, off and on  
14 collocating servers, sporadic forwarding of emails to friends, family, and community list serve  
15 recipients does not amount to "Internet access service" for the purpose of CAN-SPAM.

16 Congress restricted standing under CAN-SPAM to those who "provide" bona fide  
17 Internet access services because those providers are actually burdened by unsolicited  
18 commercial email and must scale their networks up to handle the bandwidth and processing  
19 requirements associated with the billions of emails they process daily. [See Barber Decl.,  
20 Ex. D, Committee on Commerce, Science and Transportation on S. 877, S. REP. No. 102,  
21 108<sup>th</sup> Cong., 1st Sess. 2-3 (the "Committee Report") at 6-7 (2003).] To allow individual  
22 recipients of unsolicited commercial emails to bring a cause of action under the CAN-SPAM  
23 act would effectively override the Legislative intent to restrict standing to bona fide Internet  
24 access services. Such an unforeseen and unwanted anomaly would open the floodgates of

1 litigation and deter, rather than enhance, Congress' stated purpose of preserving frictionless  
2 commercial development of the Internet.

3 As such, summary judgment should be granted on the basis that Plaintiff lacks standing  
4 because he is not an "Internet access service" within the meaning of CAN-SPAM.

5 **2. Plaintiff Has Not Been Adversely Affected by a Violation of the Statute.**

6 Additionally, Plaintiff does not have standing because he was not adversely affected by  
7 a violation of CAN-SPAM. A provider of Internet access service does not have standing to sue  
8 under CAN-SPAM unless it is "adversely affected by a violation of" CAN-SPAM. 15 U.S.C.  
9 §7706(g)(1). Plaintiff has not experienced any adverse affect from a violation of the statute.  
10 The case of *Gordon v. Virtumundo, Inc.*, 2007 U.S. Dist. LEXIS 35544 (2007), The Honorable  
11 Judge John C. Coughenour presiding, is directly on point. [See Barber Decl., Ex. E.].

12 In *Gordon*, Judge Coughenour granted defendant's motion for summary judgment on  
13 the ground that the plaintiffs therein were not an IAS adversely affected by the unsolicited e-  
14 emails because the plaintiffs undisputedly suffered no harm related to bandwidth, hardware,  
15 internet connectivity, network integrity, overhead costs, fees, staffing, or equipment costs, and  
16 such plaintiffs have alleged absolutely no financial hardship or expense due to emails they  
17 allegedly received from defendants. Any inconvenience that may have been caused by receipt  
18 of the emails is not the "adverse effect" intended by Congress. *Id.* at \*25-26.

19 In assessing whether the plaintiffs had been adversely affected within the meaning of  
20 the statute, Judge Coughenour discussed the legislative history of CAN-SPAM and concluded:

21 The foregoing legislative history suggests several things with respect to the scope  
22 of the private right of action. First and foremost, the plain statutory language  
23 requiring that (1) an IAS (2) suffer "adverse effect" is confirmed. Specifically,  
24 the definition of an IAS ought to be considered in conjunction with the harm  
25 caused to IASs (or ISPs as Congress alternately refers to them) when trying to  
divine Congress's intent. The most significant harms enumerated by Congress  
were ISP- or IAS-specific, going well beyond the consumer-specific burden of  
sorting through an inbox full of spam. These harms to IASs or ISPs relate to  
network functioning, bandwidth usage, increased demands for personnel, and new

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1 equipment needs, which eventually cost consumers. S. REP. NO. 108-102, at 6.  
2 Because these harms were defined in terms of Internet access service providers,  
3 and because standing was conferred only in IASs (not consumers), it follows that  
4 such harms must be (1) possible and (2) actually occur, if a private entity is to  
5 have standing under the Act. *Id.* at 21 (reiterating that the private right of action is  
6 for a “provider of Internet access service adversely affected by a violation,” not  
individual e-mail users and not IASs experience no adverse effects). Thus, even  
if an entity could meet the ill-defined and broad definition of an IAS, the “adverse  
affect” to that entity must be both real and of the type uniquely experienced by  
IASs for standing to exist. Any other reading would expand the private right of  
action beyond what Congress intended.

7 *Id.* at \*22-23.

8 Here, with the exception of an occurrence in 2002, which is irrelevant to Plaintiff’s  
9 claims in this lawsuit, Plaintiff has never exceeded his bandwidth. [Barber Decl., Ex. A at  
10 121:1-7.] Plaintiff has never lost internet service, his computer has never crashed and it has not  
11 been physically damaged as a result of emails he has received. [*Id.* at 184:2-186:7.] Plaintiff  
12 has never hired anyone to help deal with the receipt of spam emails nor has any of Plaintiff’s  
13 software been damaged as a result of spam emails. [*Id.* at 186:21-187:15.] He has never been  
14 forced to pass on any costs to consumers because he has no clients that pay him for his  
15 services. [*Id.* at 44:6-12, 46:12-20.] Likewise, he has not lost any customers because he has  
16 had only one “client” since 2003. [*Id.* at 38:22-39:14, 140:18-21, 200:8-12.] With the possible  
17 exception of purchasing broadband internet connection, Plaintiff has not incurred any out of  
18 pocket expenses as an alleged result of spam emails:

19 Q. Besides having to buy broadband, are you out of pocket anything else that you  
20 can think of?

21 A. Other than the time lost.

22 Q. As far as dollars out of pocket where you have to physically spend money,  
23 besides buying broadband, anything else you are out of pocket?

24 A. No, just the added cost.

25 [*Id.* at 244:23-245:4.]

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1 Plaintiff admits that he has not been adversely effected by a violation of the statute.  
2 Rather, his only purported adverse effect is his upgrade to broadband at an additional \$30 a  
3 month. However, as held by Judge Coughenour in *Gordon*: “Not only must CAN-SPAM  
4 private plaintiffs allege a particular type of harm, the adverse effect they allege must be  
5 significant. To hold otherwise would lead to absurd results....Without a requirement of  
6 significant adverse impact, Congress’s “limited” private right of action would be available to  
7 almost anyone.” 2007 U.S. Dist. LEXIS 35544 at \*26-29.

8 It would be an absurd result to find that Plaintiff’s purchase of broadband so that he can  
9 go through his emails faster is the particular and significant type of harm that Congress  
10 intended when it limited standing to IASs that were adversely affected within the meaning of  
11 the statute. In fact, as held by Judge Coughenour, Congress expressly enumerated the types of  
12 harms targeted by the Act as those which are ISP- or IAS-specific and go “well beyond the  
13 consumer-specific burden of sorting through an inbox full of spam.” *Id.* at \*23. Although  
14 Plaintiff can simply delete the email, he chooses to download and sort it so that he can preserve  
15 evidence for his anti-spam lawsuits:

16 Q. Or you can delete it too if you want, right?

17 A. If I delete it and I decide to sue somebody who is sending me it, and I have – if I  
18 delete it then I have no evidence, so I have to make a choice. Do I download  
19 and deal with it and eat it? The spam is not going to stop if I do that, so I made  
20 a choice.

21 [Barber Decl., Ex. A at 184:9-14.]

22 Therefore, Plaintiff’s purchase of broadband is not the type of ISP- or IAS-specific  
23 harms that Congress was concerned with. Rather, it is a consumer-specific burden that he  
24 chose to incur so that he can download and sort through his emails faster. The purchase of  
25 broadband internet was completely unrelated to servicing the account of Plaintiff’s single  
“client,” but for personal purposes. Consequently, Plaintiff’s purchase of broadband was *not* a

1 service that “enables users to access content, information, electronic mail, or other services  
2 offered over the Internet, and may also include access to proprietary content, information, and  
3 other services as part of a package of services offered to consumers,” and, therefore, a cost  
4 wholly unrelated to an IAS provider as contemplated by CAN-SPAM. In fact, Plaintiff’s dial-  
5 up account with sonic.net is still functional and continues to be used by Plaintiff when his  
6 broadband service is not functioning. [*Id.* at 250:22-251:1.] Finally, Plaintiff and his wife  
7 currently use broadband for all of their general internet activity. [*Id.* at 123:14-17, 137:20-22,  
8 251:2-6.] Plaintiff concedes the additional benefits of upgrading to broadband:

9 Q. You can be on the phone and your computer at the same time with cable,  
10 right?

11 A. Yes.

12 Q. Could you do that when you had dial up?

13 A. Yes. I couldn’t initiate a outgoing calls, but I had incoming calls. I had  
14 modem interrupt which allowed me to receive incoming calls....

15 Q. I understand that, but I’m just –

16 A. I know what you are saying. No, I could not – I couldn’t talk on the phone  
17 and download a movie at the same time.

18 Q. Or could you surf the net and talk on the phone at the same time?

19 A. No.

20 [*Id.* at 246:5-247:8.]

21 As such, Plaintiff’s purchase of broadband cannot under any reasonable interpretation  
22 of CAN-SPAM establish standing based on the type and significant harm that adversely effects  
23 an IAS. Rather, as recognized by most internet users, including Judge Coughenour, dial-up is  
24 becoming obsolete as high-speed broadband usage becomes the norm. 2007 U.S. Dist. LEXIS  
25 35544 at \*26.

1 **B. Plaintiff Cannot Establish that QuinStreet Violated CAN-SPAM.**

2 Plaintiff's claims against QuinStreet are misplaced and cannot be maintained because  
3 QuinStreet did not transmit any of the relevant emails. The third party publisher decides  
4 which list(s) to use of the recipients of a given email advertisement based on their own  
5 marketing research and data collection. [Simmons Decl. ¶ 4.] QuinStreet does not know  
6 which domain or domains would be used by the publishers to send the emails and has no  
7 knowledge of or control over the individuals to whom the publisher sends the email. [Id.]  
8 QuinStreet does not create, see, or approve any domain references in the emails including any  
9 domain references in the Header. [Id.] QuinStreet is advised by the publishers that the email  
10 advertisements are sent only to email addresses which have opted in or consented to the receipt  
11 of emails from a particular domain or domains controlled by the publisher. [Simmons Decl.  
12 ¶ 5.] QuinStreet prohibits publishers from sending emails to those who have opted out or  
13 unsubscribed. [Id.]

14 Since QuinStreet has no knowledge or control over who receives the email, which  
15 domain or domains are used to send the emails, or the domain references in the emails  
16 including in the Header, Plaintiff cannot establish that QuinStreet violated CAN-SPAM.  
17 QuinStreet did not send any emails to Plaintiff. Rather, the publisher initiates the email by  
18 selecting recipients based on the confidential lists owned and controlled by the publisher. The  
19 publisher chooses what domain or domains are used to send the email and is exclusively  
20 responsible for the information used to identify the email's point of origin.

21 **C. Plaintiff Cannot Establish that QuinStreet Violated CEMA.**

22 1. **QuinStreet Has No Knowledge or Control Over Who Receives the Emails or**  
23 **What Information is Used to Identify the Emails' Point of Origin.**

24 Plaintiff's second cause of action alleges that QuinStreet violated RCW 19.190.20  
25 which prohibits transmitting a commercial email message that the "sender knows, or has reason

1 to know, is held by a Washington resident” that “misrepresents or obscures any information in  
2 identifying the point of origin” or contains “false or misleading information in the subject  
3 line.” Paragraph 16 of Plaintiff’s Complaint forms the factual allegations for Plaintiff’s CEMA  
4 claims by alleging that “the Emails intentionally misrepresents and or obscures any and all  
5 information that could be used in identifying the point of origin or the transmission path  
6 thereof,…” [Dkt. 1.]

7 Plaintiff cannot establish that QuinStreet knew or had reason to know the residency of  
8 any of the email recipients, including Plaintiff because QuinStreet has no knowledge or control  
9 over who receives the emails. Similarly, Plaintiff cannot establish that QuinStreet made any  
10 misrepresentation or obscured any information identifying the emails’ point of origin because  
11 QuinStreet has no knowledge or control over which domain is used to send the emails or the  
12 domain references in the emails including the Header. The publisher has exclusive control  
13 over what information is used to identify the emails’ point of origin.

14 2. The Complaint Does not Allege False or Misleading Subject Lines

15 Plaintiff does not allege that any of the emails subject lines were false or misleading.  
16 Rather, Plaintiff’s primary complaint is that he is receiving unsolicited emails that are being  
17 sent “from multiple domains so [he] can’t block them.” [Barber Decl., Ex. A at 236:2-6.]  
18 Again, QuinStreet has no knowledge or control over the domain(s) that the emails are sent  
19 from. With regards to the subject lines, *State v. Heckel*, 122 Wn. App. 60 (2004), is  
20 instructive.

21 In *Heckel*, an Oregon resident sent unsolicited commercial email to Washington  
22 residents in which the subject line read: “Did I get the right e-mail address?” and “For your  
23 review-HANDS OFF!” The *Heckel* court affirmed the trial court’s grant of summary judgment  
24 against Heckel for violation of CEMA, in that “reasonable minds could not differ” that

1 Heckel's subject lines were deceptive and misleading because they were "clearly designed to  
2 entice the recipient to open the message...by enticing the recipient to believe that the message  
3 might be from a friend or acquaintance or business contact" rather than a commercial email.

4 *Id.* at 70.

5 Here, Plaintiff confirms that he knew from the subject lines that the emails were  
6 commercial solicitations:

7 Q. Can you, without opening your e-mails, get any kind of an idea of who  
8 they are from?

9 A. Not who they are from, but I can tell what they are for, but I have been  
10 doing this for very long time. I've been online for long time and I've  
11 gotten a lot of e-mail.

12 Q. Without opening the e-mails, can you tell whether they are spam or not?

13 A. Of course. Almost all of them – one hundred – or 99 percent, I can tell  
14 whether they are spam from the subject line....

15 [Barber Decl., Ex. A at 160:22-161:7.]

16 Similarly, Plaintiff testified:

17 Q. All right. Can you tell from looking at the text of these e-mails that they re  
18 commercial e-mails, or commercial solicitations?

19 A. Yes.

20 Q. I mean, that's pretty obvious, isn't it?

21 A. Very obvious.

22 [*Id.* at 227:3-8.]

23 Therefore, even if Plaintiff was somehow making a claim related to false or misleading  
24 subject lines, under the standard set forth in *Heckel*, there is no dispute that the subject lines  
25 were not false or misleading.

**D. Plaintiff Cannot Establish a Violation Under Washington CPA.**

1 The five elements of a CPA claim are: 1) an unfair or deceptive act or practice; 2) in  
2 trade or commerce; 3) that impacts the public interest; 4) which causes injury to the party in his  
3 business or property; and 5) the injury must be causally linked to the unfair or deceptive act.  
4 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn2d 778, 784-88 (1986).  
5 As discussed in the factually similar case of *Gordon v. Virtumundo, Inc.*, 2007 U.S. Dist.  
6 LEXIS 35544, \*40-41 (2007), Plaintiff's CEMA claims are preempted by CAN-SPAM.  
7 Moreover, Plaintiff has not suffered any actual harm but rather seeks recovery based on the  
8 statutory damages. Finally, Plaintiff can not prove any injuries caused by QuinStreet because  
9 QuinStreet did not send Plaintiff any emails. Since Plaintiff's CPA claims are preempted and  
10 he cannot prove damages, his CPA claims must be dismissed.

#### 11 **IV. CONCLUSION**

12 Plaintiff's claims against QuinStreet are frivolous. Plaintiff is not an IAS as required  
13 by CAN-SPAM. Plaintiff has not been adversely effected by the type of harm that is essential  
14 to a private cause of action under CAN-SPAM. Plaintiff has not suffered any damages.  
15 Plaintiff's state claims under CEMA and CPA fail because QuinStreet has no knowledge or  
16 control over who receives the emails, the domain(s) used to send the emails, or any information  
17 related to the emails point of origin. Therefore, Plaintiff's claims should be dismissed and  
18 judgment

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1 should be entered in favor of defendant Quinstreet.

2 DATED this 1st day of July, 2008

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25 DEFENDANT QUINSTREET'S MOTION FOR  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I electronically filed the foregoing with the Clerk of the Court  
3 using the CM/ECF system, which will send notification of such filing to the following:

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