

The Honorable Robert J. Bryan

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

11 Plaintiff,

12 v.

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

17 Defendants.

NO. C07-5378 RJB

REPLY TO PLAINTIFF'S RESPONSE
IN OPPOSITION TO DEFENDANT
QUINSTREET'S MOTION FOR
SUMMARY JUDGMENT

18
19
20
21
22
23
24
25
26
27
REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT QUINSTREET'S MOTION FOR SUMMARY
JUDGMENT
(NO. C07-5378RJB)
2310976.2

Williams, Kastner & Gibbs PLLC
601 Union Street, Suite 4100
Seattle, Washington 98101-2380
(206) 628-6600

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

I. INTRODUCTION

QuinStreet’s Motion for Summary Judgment presents admissible evidence that establishes: (1) Plaintiff has no standing to bring claims under CAN-SPAM or CEMA because he is not an ICS or an IAS that was adversely effected by a statutory violation; (2) QuinStreet did not violate CAN-SPAM, CEMA, or CPA because it had no knowledge or control over who receives the emails or what information is used to identify the emails’ point of origin; and (3) Plaintiff has not suffered any actual harm but rather seeks recovery based exclusively on statutory damages.

In opposition, Plaintiff fails to identify any specific facts showing there is a triable issue of material fact. Instead, Plaintiff consistently mischaracterizes QuinStreet’s arguments, attributes admissions to QuinStreet that were never made, argues issues that are irrelevant to QuinStreet’s Motion, and relies on conclusory and unsupported statements in a declaration that contradict his prior sworn deposition testimony. Since Plaintiff has failed to come forward with any admissible evidence showing a disputed issue of material fact exists, QuinStreet is entitled to judgment as a matter of law.

II. VALIDITY OF PHYSICAL ADDRESS

As a preliminary matter, Plaintiff’s opposition claims that the physical address identified on the relevant emails is fraudulent. This is the basis for Plaintiff’s Motion for Partial Summary Judgment (Dkt. 59). This argument is not only misplaced, since it has nothing to do with the issues raised in QuinStreet’s Motion, but it is also simply wrong. In order for Plaintiff to establish a violation of 15 U.S.C. §7704(a)(5)(A)(iii) (requiring “a valid physical postal address of the sender”), Plaintiff must prove that the physical postal address was invalid at the time the email was sent. It is irrelevant whether the address is currently invalid because CAN-SPAM does not require a sender to remain at the same physical address indefinitely.

As discussed in QuinStreet’s Opposition to Plaintiff’s Motion for Partial Summary Judgment (Dkt. 62), each of the subject emails accurately identified QuinStreet’s current address.

1 QuinStreet’s address was prominently displayed in the body of the email. The text in the body of
2 the email identifies the email as an advertisement and states that if the recipient preferred not to
3 receive future marketing messages, the recipient could opt out by using the link provided by the
4 third party publisher or opt out directly through QuinStreet by using QuinStreet’s valid physical
5 address.

6 Plaintiff ignores this fact, and instead focuses on the 222 Grace Church St. #302 address
7 identified by the third party publisher. This address is also contained in the body of the email
8 following QuinStreet’s physical address and is identified as that of a “third-party service.” [See
9 Decl. of Mark Ferguson in Supp. of Mot. for P. Sum. J., (Dkt. 60), Exh. A (A-1 through A-9).]
10 Plaintiff has failed to establish that the 222 Grace Church St. address was not the correct physical
11 address of the third party publisher at the time the email was sent. Rather, Plaintiff claims it
12 must be fraudulent because it is currently the address of the municipal government building for
13 the city of Port Chester. Plaintiff fails to meet his burden because whether it is currently the
14 address of the municipal government building is irrelevant. It was incumbent upon Plaintiff to
15 prove with admissible evidence that the physical address was invalid at the time the email was
16 sent. 15 U.S.C. §7704(a)(5)(A)(iii). Plaintiff offered no evidence to establish his claim.

17 Nevertheless, QuinStreet offered evidence to show that this address is not only occupied
18 by the Port Chester municipal government, but also by a number of tenants who occupy several
19 suites and sub-suites on the third floor. [Decl. of Stephan A. Barber in Supp. of QuinStreet’s
20 Opp. to Plf’s Mot. for P. Sum. J., (Dkt. 63), Exhs. A, B, and C.] This evidence was offered for
21 the sole purpose of disputing Plaintiff’s claim that the address is demonstrably fraudulent
22 because the Port Chester municipal government is currently at that address. In his Opposition to
23 QuinStreet’s Motion for Summary Judgment, Plaintiff makes the untenable argument that 222
24 Grace Church St., #302 does not exist because the realtor’s property listing (*Id.* at Exh. B) does
25 not list suite #302 as being currently available for rent or lease. [1:24-2:6 of Plf’s Opp. to
26 QuinStreet’s Mot. for Sum. J. (“Plf’s Opp.”) (Dkt. 64).] The realtor’s listing is evidence the
27

1 property is occupied by other tenants, not that Suite #302 does not exist. A cursory review of
2 the realtor's listing shows that there are three out of five suites available (e.g., 300, 301 and 303),
3 one of which has been separated into three separate sub-suites (i.e., 301, 301A, and 301B),
4 making a total of five available suites. This is consistent with evidence that other business
5 entities have in the past or are currently occupying Suite #302. Plaintiff's attempt to
6 mischaracterize the evidence only detracts from the substantive issues raised in QuinStreet's
7 Motion.

8 After failing to offer any credible evidence that the physical address identified in the
9 emails was not accurate, Plaintiff attempts to shift his burden of proving the address was invalid
10 to QuinStreet by arguing that "Defendant has produced no evidence whatsoever to indicate that
11 this was the valid address of the entity that sent the email in question." [2:14-15 of Plf's Opp.]
12 QuinStreet does not have the burden of proving this was a valid address at the time the emails
13 were sent. The burden rests exclusively with Plaintiff.

14 However, in an effort to put this issue to rest, this physical address belongs to a mail
15 forwarding service, www.myuspostbox.com. [Further Decl. of Stephan Barber in Supp. of
16 QuinStreet's Reply to Plaintiff's Opp. to QuinStreet's Mot. for Sum. J. ("Barber Further Decl."),
17 Exh. 1.] This allows individuals and companies to securely receive mail at a valid U.S. postal
18 address, specifically 222 Grace Church St., Suite 302, Port Chester, New York. [*Id.*] This
19 explains why there are numerous entities associated with this address. Incoming mail is
20 forwarded to the correct recipient by using the seven digit routing number following the suite
21 number. Here, the physical address of the third party publisher contained in each of the subject
22 emails has this routing number. [*See* Decl. of Mark Ferguson in Supp. of Mot. for P. Sum. J.,
23 (Dkt. 60), Exh. A (A-1 through A-9).] In order to establish mail forwarding via
24 www.myuspostbox.com, the subscriber must register the mail box with the United States Postal
25 Service ("USPS") by filling out USPS Form 1583. [Barber Further Decl., Exh. 2.] A Post
26
27

1 Office box registered with the USPS is a “valid physical postal address” under the CAN-SPAM
2 Act:

3 “Valid physical postal address” means the sender’s current street address, a Post
4 Office box the sender has accurately registered with the United States Postal
5 Service, or a private mailbox the sender has accurately registered with a
6 commercial mail receiving agency that is established pursuant to the United
7 States Postal Service regulation. Code of Federal Regulations, Title 16 §
8 316.2(p).

9 In approving this definition the Federal Trade Commission (“FTC”) specifically found
10 that a mail box accurately registered with USPS with Form 1583 is “valid physical postal
11 address” because Form 1583 requires all subscribers who receive mail to be identified and their
12 identity verified with two separate forms of identification. [Federal Register, 29668, fn 165,
13 Barber Further Decl., Exh. 3.] Therefore, Plaintiff cannot establish his claim that QuinStreet
14 violated CAN-SPAM or CEMA by using a fraudulent physical address because the emails
15 contain a “valid physical postal address” of the third party publisher.

16 **III. PLAINTIFF DOES NOT PROVIDE A SERVICE THAT ENABLES USERS TO** 17 **ACCESS THE INTERNET**

18 Plaintiff alleges that between October 2006 and July 27, 2007 he received emails that
19 violated CAN-SPAM and CEMA. Plaintiff lacks standing because he did not provide internet
20 access service during the relevant time period. In an attempt to portray himself as an IAS/ICS,
21 Plaintiff claims he is “[u]nlike a typical internet user” because he “hosts his own domains,
22 websites, and e-mail accounts” for himself and “third party customers, who in turn use these
23 websites as on-line commercial businesses.” [13:13-15 of Plf’s Opp.] Plaintiff supports this
24 assertion with his own declaration that simply makes the same unsupported assertions.

25 Plaintiff’s deposition testimony reveals that very little of his assertions are true.

26 Plaintiff testified under oath that since 2003, he has had only one “client,” Jessica Felix,
27 who he describes as “a friend.” [Decl. of Stephan A. Barber in Supp. of QuinStreet’s Mot. for
Sum. J., Exh. A (Plf’s Deposition) (Dkt. 57) at 38:22-39:14, 140:18-21, 200:8-12.] He rebuilt
her artandallthatjazz.com website in 2003 after receiving a deluge of threatening emails, but does

1 not charge her for any services. [Barber Further Decl., Exh. 4 (Plf's Deposition), at 37:4-7,
2 38:22-39:14, 44:14-23.] Moreover, while at one time he used to maintain her website, he does
3 not do that much work for her anymore because the website is self-contained. [Dkt. 57, Exh. A,
4 at 44:24-45:4.] Ms. Felix has never received any of the emails that are the subject of this
5 litigation. [Barber Further Decl., Exh. 4 (Plf's Deposition), at 37:8-11.]

6 Plaintiff further testified that he does not host websites and or handle emails for third
7 parties:

8 Q. Does Ferguson Graphics still do website construction?

9 A. I don't accept long-term new clients right now.

10 Q. Okay. What business or work does Ferguson Graphics do?

11 A. I will construct a website. I will build it for them, but I will no longer
12 host it for them. I will no longer handle their e-mail. [Dkt. 57, Exh. A, at
38:15-21.]

13 In fact, he pays \$9.95 a month to sonic.net for sonic.net, not Plaintiff, to host the
14 artandallthatjazz.com website. [*Id.* at 140:13-141:4.] Therefore, Plaintiff does not host websites
15 for any third parties, let alone third party "customers." Moreover, during the relevant time
16 period Plaintiff did not host his own website, Plaintiff paid sonic.net a monthly fee to host his
17 website:

18 Q. So I think you said from 2002 until about the end of 2007, you didn't
19 own or lease that server?

20 A. No.

21 Q. That's correct, right?

22 A. Yep.

23 Q. All right. You just paid sonic.net a service fee every month, right?

24 A. I paid for the hosting – the domain hosting for all my websites, my
25 client's sites, as well as my dial up, which is about \$60 or \$70 a month.
[*Id.* at 144:2-11.]

26 Plaintiff claims that this testimony was somehow taken out of context. However, this is
27 not supported by the deposition transcript which clearly defines the context of his testimony:

1 Q. All right. If you get some – because of the changes you have been
2 making, to get some context here, your lawsuit was filed on July 27th,
2007, correct?

3 A. Yes.

4 Q. All right. On that date, you had a sonic.net server?

5 A. In 2007, I still had a sonic.net – I was still using their hosting. [*Id.* at
6 130:8-14.]

7 Plaintiff clearly testified that during the relevant time period he was not hosting any
8 websites. Rather, sonic.net hosted the websites. Moreover, the fact that Plaintiff later leased a
9 server from sonic.net is irrelevant. Plaintiff testified that he stopped leasing (or “colocating”) a
10 server in 2002 and did not begin using a colocated server until February 2008. [*Id.* at 116:1-9.]
11 Additionally, the only purpose of that colocated server was for his personal use in the
12 development of the e-walkabout.com business venture that is still in the making. [*Id.*] Even so,
13 Plaintiff confirms that the colocated server does not accept email:

14 Q. Okay. The – Let’s go back to the server that you had at sonic.net. You
15 said it has a filter on it, correct?

16 A. No.

17 Q. Has it ever had a filter?

18 A. No, I don’t have an e-mail server. It’s not set up to accept e-mail.
19 There’s no STMP server on it. I decided whenever I did the server that I
20 was not going to accept e-mail through it.

21 Q. All right. Has the server ever accepted – been set up to – I’ll start over
22 again. Has the server ever been set up to receive e-mail?

23 A. I have no idea. It’s not my server. It’s a colocated server, so the
24 previous user might have had it set up with an STMP mail server.

25 Q. While you have been leasing it it has not been set up for e-mail?

26 A. No, and it won’t ever be. [Barber Further Decl., Exh. 4 (Plf’s
27 Deposition), at 142:16-143:9]

Although Plaintiff testified that he has on occasion temporarily forwarded on e-mails to
friends and family “just to be nice” [Dkt. 57, Exh. A, at 101:22-102:10], he confirms that he does
not, and will not, host email accounts. Additionally, Plaintiff testified that that since 2003 he

1 does not register websites for other people, and has only assisted one other person in making a
2 modification to his website:

3 Q. Can you tell me approximately what the annual income of Ferguson
4 Graphics has been for the last five years, on the average?

5 A. On the average, since I am not accepting new clients, I'm coming up
6 from California to Washington, and I have no clients up here, the – pretty
7 much the only client that I had was John. I don't advertise for clients...

8 Q. All right. Since you moved to Washington, is John the only person that's
9 either traded you for goods or paid you any money?

10 A. John is the only one that I have actually accepted as a new client. And I
11 was going to build his shopping cart completely, but he has a Go Daddy
12 account, and Go Daddy uses osCommerce. And osCommerce is not that
13 hard to learn.

14 So what I ended up doing was coming over – the reason I didn't charge
15 him for anything is because I come over there one morning when we
16 were supposed to set up and install, and I set it up so that his
17 osCommerce was now set up in his directory and everything, and then all
18 he had to do was start putting the stuff in.

19 It didn't make sense for me to charge him to do something that he was
20 going to be able to do himself. So I spent 15 minutes doing this and I
21 didn't charge him for it. [Barber Further Decl., Exh 4 (Plf's Deposition),
22 at 41:7-14, 43:12-44:5.]

23 Plaintiff's testimony confirms that he did not build any websites during the relevant time
24 period. Rather, he spent 15 minutes helping John "do something that he was going to be able to
25 do himself." [*Id.*] Despite Plaintiff's empty protestations that his deposition testimony has
26 somehow been distorted, the testimony is clear, unambiguous, and oftentimes volunteered as
27 opposed to a response to any particular question. Congress has made it clear that it intended to
limit standing under CAN-SPAM to "bona fide Internet service provider(s)" providing "actual
Internet access service to customers." [150 Cong. Rec. E72-73, Barber Further Decl., Exh. 5.]
Plaintiff's testimony confirms he is not a bona fide IAS because he does not "enable users to
access content, information, electronic mail, or other services offered over the Internet." His
declaration, likely drafted by counsel, is ineffective to dispute his sworn deposition testimony.
Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999) (holding that a declaration that

1 contradicts deposition testimony lacks credibility and should be given zero weight in summary
2 judgment proceedings).

3 Finally, Plaintiff claims under this Court's holding in *Gordon v. Virtumundo, Inc.*, 2007
4 U.S. Dist. LEXIS 35544 (2007), that he has standing as an IAS. The *Gordon* court relied on
5 *Hypertouch, Inc. v. Kennedy-Western Univ.*, 2006 U.S. Dist. LEXIS 14673 (2006), in finding the
6 CAN-SPAM's definition of an IAS was ambiguous. *Id.* at *17-19. Although the court did find
7 that the plaintiff had standing under the "ill-defined and broad definition" this was based entirely
8 on the fact that the plaintiff hosted domains and provided email accounts to its clients. *Id.* at
9 *13. Here, Plaintiff does neither. Therefore, the *Gordon* decision supports the conclusion that
10 Plaintiff is not an IAS under the statute.

11 **IV. PLAINTIFF WAS NOT ADVERSELY AFFECTED**

12 Plaintiff claims that this Court's prior decision regarding the extent and nature of
13 damages that Plaintiff must show to have standing is wrong and has not been followed by any
14 court. While this shows there is a lack of decisional authority relating to this topic, Plaintiff's
15 argument is simply wrong. Judge Coughenour's decision in *Gordon* was followed by the United
16 States District Court for the Northern District of California in the case of *Brosnan v. Alki*
17 *Mortgage, LLC*, case number C-07-04339-JL (Dkt. 18), the Honorable Judge James Larson
18 presiding. [Barber Further Decl., Exh. 6.] In granting the defendant's motion to dismiss, the
19 court held that the adverse effects of a statutory violation "must be significant:"

20 The effects need to be more than the time and money spent dealing with spam.
21 The effects must rise to a significant level of harm unique to an IAS. These
22 harms include a substantial decrease in bandwidth, expenditures or resources to
manage the spam (hired staff, purchased equipment, increased server costs) and
compromised network integrity. *Id.* at *5

23 Thus, the *Brosnan* court agreed with the *Gordon* court that the "adverse affects" must be
24 both significant and IAS-specific. Plaintiff argues his damages are significant and IAS-specific
25 because he has incurred "the cost of spam filters, the cost of purchasing more bandwidth, loss of
26 intellectual property including domains and email addresses and system crashes from spam."
27

1 [16:9-11 of Plf's Opp.] Again, Plaintiff ignores his own deposition testimony and instead relies
2 on his self-serving declaration.

3 Plaintiff testified that during the relevant time period he has never exceeded his
4 bandwidth. [Dkt. 57, Exh. A, at 121:1-7]. He has never lost internet service, his computer has
5 never crashed and it has not been physically damaged as a result of any emails he has received.
6 [Id. at 184:2-186:7.] Plaintiff has never hired anyone to help deal with the receipt of spam
7 emails nor has any of Plaintiff's software been damaged as a result of receiving spam emails.
8 [Id. at 186:21-187:15.] He only has one "client," Jessica Felix, who does not pay him because
9 she is his friend, and therefore he has not passed on any costs to consumers. [Id. at 44:6-12,
10 46:12-20.] Finally, he has not lost any customers because he has voluntarily only had one
11 "client" since 2003. [Id. at 38:22-39:14, 140:18-21, 200:8-12.]

12 Plaintiff's claim that he has incurred "the cost of spam filters" is a blatant
13 misrepresentation because he testified that sonic.net provides the spam filters for his email:

14 Q. All right. Let's talk about the -- the protection you are talking about now,
15 the SpamAssassin is on your own computer at home, right?

16 A. No, that's one the Sonic server.

17 Q. Okay. The Sonic server?

18 A. Yes. I get my e-mail through -- I use an online connection or online e-
19 mail reader for most of my stuff.

20 Q. All right. Correct me if I'm wrong, because I'm not as sophisticated
21 about filters and all that as you may be, do you pay sonic.net to have
22 SpamAssassin?

23 A. SpamAssassin and e-mail filtering is -- the e-mail filters are part of
24 sonic.net's cost of doing business. They pass that cost on to each end
25 user, so that, in the aggregate, each end user or the end users pay all of
26 Sonic's e-mail filtering cost.

27 Q. As part of your monthly fie [sic]?

A. As part of my monthly fee, correct. The ones that I pay to Sonic, not the
ones I pay to Advance Stream.

Q. Right. What additional filtering or protection do you have for your
sonic.net e-mail accounts over and above what Sonic provides you?

1 A. There's nothing else I can do. I have so much filtering on my Sonic e-
2 mail account there's nothing else I can do. If I start filtering any more, I
start rejecting e-mail.

3 Q. Have you installed on your computer at home, or the computers at home,
4 any individual security devices or filters?

5 A. No, because it's all handled online. [Barber Further Decl., Exh 4 (Plf's
6 Deposition), at 145:8-146:12.]

7 Plaintiff's sworn testimony confirms that sonic.net, not Plaintiff, has taken efforts to filter
8 spam. Plaintiff suggests that the final cost of the spam filtering is passed down to him as Sonic's
9 customer who pays a monthly service charge. Again, this supports the conclusion that sonic.net,
10 not Plaintiff, is the IAS. Nevertheless, SpamAssassin is a free program available for anyone to
11 download over the internet. [Barber Further Decl., Exh. 7.] Therefore, Plaintiff's assertion that
12 sonic.net passes the cost of SpamAssassin to its customers through its monthly fees is untrue.
13 SpamAssassin is free for all users.

14 Moreover, Plaintiff cannot establish that he was adversely affected by the subject emails
15 because he could have simply opted out from receiving them, but chose not to do so. As
16 discussed in QuinStreet's Opposition to Plaintiff's Motion for Partial Summary Judgment, each
17 email contained a link on which the recipient could click in order to be removed from future
18 mailings. Additionally, the emails contained a link to the publisher's website. Finally, all of the
19 emails contained a physical postal mailing address for both the publisher and QuinStreet which
20 explained that the emails were advertisements and the recipient could request to be removed
21 from future emails. Despite the various methods available to Plaintiff to locate the sender and
22 opt-out of receiving future emails, Plaintiff admits in his declaration that he does not use the opt
23 out link to request removal from future mailings. [Decl. of Mark Ferguson in Supp. of Mot. for
24 P. Sum. J. (Dkt. 60) at ¶¶6, 7 and 8.] Therefore, any adverse affects of receiving the subject
25 emails was caused by Plaintiff's own refusal to take advantage of the numerous methods
26 available to stop receiving those emails.

1 Even so, Plaintiff's argument that he has spent time sorting through emails is not the
2 significant and IAS-specific type of harm that establishes standing under CAN-SPAM. Rather,
3 courts have held that "the effects need to be more than the time and money spent dealing with
4 spam." *Brosnan v. Alki Mortgage, LLC*, case number C-07-04339-JL (Dkt. 18), relying on
5 *Gordon v. Virtumundo, Inc.*, 2007 U.S. Dist. LEXIS 35544 (2007). Moreover, Plaintiff can not
6 attribute the time that he spent sorting through emails that have no relation to QuinStreet. With
7 the exception of his wife purchasing broadband internet connection, Plaintiff testified that he has
8 not had any out of pocket expenses as a result of the subject emails. [Dkt. 57, Exh. A, at 244:23-
9 245:4.] Nevertheless, the \$30 monthly service fee associated with Plaintiff's wife purchasing a
10 higher speed internet connection, which is used by Plaintiff and his wife for all their internet
11 activity, is not a "significant" or "IAS-specific" adverse affect under any reasonable
12 interpretation of the law.

13 Therefore, the evidence undisputably proves that Plaintiff is not an IAS because
14 Plaintiff does not enable users to access the internet nor has he suffered any adverse effects
15 within the meaning CAN-SPAM.

16 **V. PLAINTIFF CAN NOT ESTABLISH HIS CLAIMS UNDER CEMA AND CPA**

17 **A. Plaintiff Does Not Have Standing**

18 For the same reasons discussed above, Plaintiff does not have standing under CEMA,
19 which requires an ICS to "enable computer access by multiple users to a computer server."
20 During the relevant time period Plaintiff did not enable anybody, let alone multiple users, to
21 access a computer server. Rather, sonic.net, who owned and hosted the server, enabled the users
22 to access its server.

23 **B. Plaintiff Cannot Establish that QuinStreet Knew or Consciously Avoided Knowing 24 of Statutory Violations**

25 Plaintiff argues: "[W]ithout providing any evidence to support the contention, Defendant
26 claims that they had 'no knowledge or control' over the content of the spam sent by these third
27 parties." [5:9-11 of Plf's Opp.] QuinStreet never argued that it had no knowledge or control

1 over the content of the emails sent by its third party publishers. To the contrary, the Declaration
2 of Ryan Simmons in Support of QuinStreet’s Motion for Summary Judgment is evidence that
3 while QuinStreet has knowledge and control over the creative content of the email which
4 includes the text in the “From” line prior to the “@” sign, the text in the subject lines, and the
5 text and graphics in the body of the email, QuinStreet has no knowledge or control over the
6 individuals whom the publisher sends the email, or what domain or domains are used by the
7 publishers to transmit the emails. This information is confidential and is protected as trade
8 secrets by the third party publishers. This evidence is consistent with the contractual language
9 cited by Plaintiff. Therefore, Plaintiff cannot establish that QuinStreet had knowledge or
10 consciously avoided knowing of statutory violations.

11 **C. Plaintiff Cannot Establish Actual Damages**

12 Plaintiff’s Opposition does not dispute that he has no actual damages and therefore can
13 not establish his CPA claim. Additional evidence of Plaintiff’s lack of damages can be found in
14 Plaintiff’s own Motion for Partial Summary Judgment, which seeks only statutory damages.

15 **VI. CONCLUSION**

16 Based on the foregoing reasons and authorities, defendant QuinStreet, Inc. respectfully
17 requests this court grant its Motion for Summary Judgment.

18 DATED this 25th day of July, 2008

19 s/John A. Knox
20 John A. Knox, WSBA #12707
21 Todd R. Sorensen, WSBA #35403
22 WILLIAMS, KASTNER & GIBBS PLLC
23 601 Union Street, Suite 4100
24 Seattle, WA 98101-2380
25 Telephone: (206) 628-6600
26 Fax: (206) 628-6611
27 Email: jknox@williamskastner.com
Email: tsorensen@williamskastner.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Stephan A. Barber (California SBN 70070)
(pro hac vice)
ROPERS, MAJESKI, KOHN & BENTLEY
80 North First Street
San Jose, CA 95113
Telephone: (408) 287-6262
Facsimile: (408) 918-4501
Email: sbarber@rmkb.com

Attorneys for Defendant QuinStreet, Inc.

1 CERTIFICATE OF SERVICE

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

4 PLAINTIFF'S COUNSEL:

4 Robert J. Sigel
5 i.Justice Law, PC
5 PO Box 25817
6 Seattle, WA 98165-1317
6 Tel.: (888) 839-3299

Douglas E. McKinley, Jr.
PO Box 202
Richland, WA 99352-0202
Tel. (509) 628-0809
Fax (509) 628-2307

7
8 DATED this 25th day of July, 2008.

9 s/John A. Knox
10 John A. Knox, WSBA #12707
11 Attorneys for Defendant QuinStreet, Inc.
12 WILLIAMS, KASTNER & GIBBS PLLC
13 601 Union Street, Suite 4100
14 Seattle, WA 98101-2380
15 Telephone: (206) 628-6600
16 Fax: (206) 628-6611