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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

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

Plaintiff,

v.

**ACTIVE RESPONSE GROUP, a 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. C07-5378

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

INTRODUCTION

Defendant knows that Plaintiff has already demonstrated that at least a portion of the commercial email (spam) at issue in this case unquestionably violates the law because it uses a fraudulent physical address. The address on the spam speaks for itself, and is also not in dispute. This address, 222 Grace Church St. #302-1000123

**PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT QUINSTREET'S MOTION FOR
SUMMARY JUDGMENT -1
FERGUSON v. QUINSTREET, INC.**

**i.Justice Law, PC
PO Box 25817
Seattle, WA 98165-1317
Phone/Fax: 888-839-3299**

1 Port Chester, NY 10573, does not exist. The Defendant's own "Exhibit B" filed with the
2 Declaration of Stephen Barber (Dkt. 61) corroborates that the address is fraudulent.
3 According to Mr. Barber "Exhibit B" is a description of the real estate posted by CJ
4 Pagano & Sons Realtors on May 22, 2008. According to the posting, there are "only 5
5 office suites" on the third floor of 222 Grace Church St., 300, 301, 301 A, 301 B, and
6 303. *Id.* Thus, according to the Defendant's own evidence, 222 Grace Church St. has
7 no suite 302, the false address listed in its spam. However, Defendant also produces
8 evidence that three separate companies claim to be located at the same, non-existent
9 address. See "Exhibit C" filed with the Declaration of Stephen Barber (Dkt. 61)
10 "PurityParcel" claims to have been there from 2006-2007. *Id.* "Marcaria.com" claims to
11 have been located at that address from 1999-2008. *Id.* "Rxsecurity.com" claims to
12 have that address currently. Notably, none of these companies are apparently
13 commercial email operations, although Defendant claims this is a valid address of the
14 commercial email operation Defendant hired to send the spam in question. More telling,
15 but not surprising, is the fact that despite Defendant's claims that this is the address of a
16 legitimate company that Defendant hired, Defendant does not identify that company.
17 As such, Defendant has produced no evidence whatsoever to indicate that this was the
18 valid address of the entity that sent the email in question. Quite the contrary, all the
19 evidence submitted by Defendant shows the opposite; that the 222 Grace Church St.
20 #302-1000123 Port Chester, NY 10573 address is indeed a fictional address.

21 Accordingly, it cannot rationally be disputed that Defendant is responsible for
22 spam that used a fraudulent physical address. Using a fraudulent address violates both
23 CAN-SPAM and CEMA.

24 The fact that Defendant is responsible for the spam is also not in dispute.
25 Defendant has admitted that it contracted with third parties who sent the spam on its
26 behalf. Defendant has provided copies of the contracts with at least two of its senders.
27 These contracts show clearly that Defendant is intimately involved with, and exercises

1 near total control over, the content of the unlawful spam, thereby conclusively
2 establishing Defendant's knowledge of the violations.

3 Should this Court ever evaluate Defendant's actions on the merits, Defendant will
4 lose this case. As a result, Defendant seeks to escape responsibility for violating the
5 law on two bases:

- 6 1) by asking this Court to deny Plaintiff standing, and
- 7 2) by asking this Court to hold that Defendant is somehow an innocent
8 bystander in its own core business, and should not be held liable for its
9 own business practices.

10 Defendant cannot prevail on either of these specious arguments.

11
12 In considering Defendant's motion for summary judgment, the Court is compelled
13 to consider the evidence in the light most favorable to the Plaintiff. However, even if the
14 Court construes the facts in the light most favorable to Defendant, Defendant still cannot
15 prevail on either of these arguments.

16 Reading the facts in the light most favorable to Defendant, (and applying the
17 narrowest possible interpretation of the CAN-SPAM Act), Plaintiff has standing to bring
18 its claims because he is an Internet Access Service. To provide just one example, it is
19 not disputed that Plaintiff leases a server connected to the internet. It is further not
20 disputed that Plaintiff uses that server to provide hosting services to third parties, and
21 that at least one third party customer operates a commercial, on-line storefront on
22 Plaintiff's leased server. These facts alone establish that Plaintiff meets the statutory
23 definition of an "Internet Access Service" (IAS) under CAN-SPAM.

1 Likewise, it is also incontrovertible that Plaintiff has experienced significant
2 adverse effects as a result of Defendant's spam. A plain reading of the CAN-SPAM
3 legislation indicates that any adverse affects are sufficient to give an IAS standing under
4 CAN-SPAM. However, as Defendant notes, at least one trial court has required a
5 higher level damages than actually required under the plain language of CAN-SPAM.
6 But even if the Court were to apply this more stringent standard, Plaintiff still has
7 standing because Plaintiff's damages meet this more stringent standard and were the
8 exact type Congress was seeking to remedy when Congress passed the CAN-SPAM
9 legislation.

10 To examine just one example of Plaintiff's damages, the spam sent on behalf of
11 Defendant obfuscated the identity of the sender. This forced Plaintiff to undertake a
12 costly and time consuming investigation to locate the sender in an attempt to bring it to
13 an end. These exhaustive efforts were set forth in detail in the declaration of Mark
14 Ferguson In Support Of Reply Re Motion To Compel (Dkt. No. 53)¹. This is exactly the
15 type of damage for which Congress sought to provide a remedy when Congress passed
16 the CAN-SPAM Act. Congress concern of these damages were set forth explicitly in the
17 Senate Report on the CAN-SPAM ACT of 2003, Report 108-102:

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Increasingly, ISPs are also undertaking extensive investigative and legal efforts to
track down and prosecute those who send the most spam, in some cases spending
over a million dollars to find and sue a single, heavy-volume spammer.

¹ The sworn statements of Mark Ferguson are entirely consistent with his deposition testimony. However, in Defendant's brief, Defendant has selectively excerpted portions of the transcript which Defendant then uses to mischaracterize those statements. Defendant's misuse of these selective portions of the transcript and mischaracterization of those same statements misleads the Court because it does not provide the context of the statements made, or the additional testimony necessary to provide an accurate description of the complete deposition testimony of Mr. Ferguson. However, regardless of Defendant's efforts to mislead the Court, Defendant has never shown that Mr. Ferguson's deposition testimony is in any way inconsistent with his sworn statements submitted to this Court. As such, Plaintiff will not engage in an argument to show that the sworn statements of Mark Ferguson are consistent with his deposition testimony beyond noting that the Defendant's mischaracterizations are unsubstantiated.

1 Accordingly, even if the Court were to construe the facts in the light most favorable
2 to Defendant, and to apply the most restrictive interpretation of the CAN-SPAM Act, it is
3 still clear that Plaintiff has standing to bring its claims under CAN-SPAM. Further, even
4 if Plaintiff lacked standing under CAN-SPAM, there is no question that Plaintiff has
5 standing to bring its claims under Washington's Commercial Email Act RCW 19.190 et
6 seq. (CEMA).

7 It is also clear that, regardless of the fact that Defendant hired third parties to
8 send the spam, Defendant is responsible for the spam in question.

9 Defendant admits that it hired third parties to send the spam at issue. Without
10 providing any evidence to support their contention, Defendant claims that they had "no
11 knowledge or control" over the content of the spam sent by these third parties.
12 However, this contention is entirely belied by Defendant's own contracts with these third
13 parties. A plain reading of these contracts demonstrates conclusively that Defendant
14 has both knowledge and control of all spamming activities of these third parties. The
15 contracts between Defendant and its third party spammers, Datran Media and Beliefnet
16 Inc., both provide as follows:

17 QuinStreet shall be responsible for the drafting and creative design of the content of
18 all e-mails campaigns, which may include materials ("QS Group Materials") sourced
19 from affiliates of QuinStreet (the "Campaigns"). Company shall not in any way alter
20 the content of Campaign e-mails without prior written consent from QuinStreet.
21 Company agrees to use the 'Subject' line and 'From' line provided by QuinStreet. If
22 Company wishes to use alternative 'Subject' lines or From' Lines, QuinStreet must
23 approve them in writing. QuinStreet must approve all test e-mails prior to any
24 Campaign. The test e-mails must include all the different variations that will be sent,
25 including variations to the 'From' line and 'Subject' line, header and footer
information and op-out language for each site where the names were derived.
Company agrees that it will not alter, delete or modify any links found in any
Campaign materials and that it will not make use of any QS Group Materials for any
purpose whatsoever other than as specifically authorized in writing by QuinStreet.

1 (See contracts provided by Defendant with their Supplemental Discovery Responses
2 attached as Exhibit A to the Declaration of Robert J. Siegel In Support Of Plaintiff's
3 Motion For Partial Summary Judgment, Dkt.61-3)
4

5 In light of this contractual language, there is no rational dispute that Defendant
6 had complete control over the content of the spam in question, and further had the right
7 to pre-approve all of the spam at issue. Thus, there are only two possibilities. Either
8 Defendant approved the spam in question, in which case it had actual knowledge of the
9 violations, or Defendant failed to exercise its contractual right to inspect and approve
10 the spam in question, in which case Defendant deliberately avoided knowing of, or
11 turned a blind eye on the violations. Both CAN-SPAM and CEMA explicitly contemplate
12 both these scenarios, and both CAN-SPAM and CEMA were explicitly written to impose
13 liability in either circumstance. Even if the Court construes the facts in the light most
14 favorable to Defendant, they cannot escape the plain language of their own contracts,
15 which give them complete control over the spam at issue, and thus make them liable for
16 that spam.

17 **Plaintiff Is An IAS Because He Meets The Definition In**
18 **15 USC 7702(11) And 47 USC 231(E)(4).**

19 Defendant's first theory for escaping liability for their spam is to deny Plaintiff
20 standing. To preface this argument, Defendant states that in enacting the CAN-SPAM
21 Act, Congress recognized that "commercial email" offers unique opportunities for the
22 development and growth of frictionless commerce. 15 USC § 7702(a)(1). This
23 statement is false.
24

1 While Congress recognized that email generally provides unique opportunities for
2 enhancing commerce, Congress made no such finding with respect to unwanted
3 commercial email, or spam as it is commonly known. In fact, quite the opposite.
4 Congress made it clear that *commercial* email such as the Defendant's spam was the
5 sand in the gears of the "frictionless commerce" that was facilitated by email generally,
6 and which Congress sought to promote and protect by enacting CAN-SPAM.

7 "The convenience and efficiency of electronic mail are threatened by the
8 extremely rapid growth in the volume of unsolicited commercial electronic mail." 15 USC
9 § 7702(a)(2). "The receipt of unsolicited commercial electronic mail may result in costs
10 to recipients who cannot refuse to accept such mail and who incur costs for the storage
11 of such mail, or for the time spent accessing, reviewing, and discarding such mail, or for
12 both." 15 USC § 7702(a)(3). "The receipt of a large number of unwanted messages
13 also decreases the convenience of electronic mail and creates a risk that wanted
14 electronic mail messages, both commercial and noncommercial, will be lost,
15 overlooked, or discarded amidst the larger volume of unwanted messages, thus
16 reducing the reliability and usefulness of electronic mail to the recipient." 15 USC §
17 7702(a)(4). "Many senders of unsolicited commercial electronic mail purposefully
18 disguise the source of such mail." 15 USC § 7702(a)(7). "(S)enders of commercial
19 electronic mail should not mislead recipients as to the source or content of such mail"
20 15 USC § 7702(b)(2) "(R)ecipients of commercial electronic mail have a right to decline
21 to receive additional commercial electronic mail from the same source." 15 USC §
22 7702(b)(3).

23 Defendant has admitted that it is engaged in all of the forgoing prohibited
24 conduct. Defendant admits that it sent messages that use demonstrably false
25 addresses. (The emails are set forth as Exhibit A to the Declaration of Mark Ferguson,
Dkt. 60. The website showing the address fraudulently used in the emails is set forth as
Exhibit C to the Declaration of Mark Ferguson, Dkt. 60. Defendant's admission that

1 Defendant is responsible for the emails is contained within the correspondence from
2 Defendant set forth as Exhibit A and B to Robert Siegel's Declaration, Dkt. 61).
3 Congress clearly intended to protect the public by outlawing Defendant's business
4 practice of misleading consumers by using fraudulent addresses.

5 Defendant admits Congress further intended to give Internet Access Services the
6 right to enforce the CAN-SPAM Act directly. 15 USC § 7706(g)(1). Defendant's narrow
7 basis for its motion is thus limited to the assertion that Plaintiff is not an Internet Access
8 Service. However, a plain reading of the CAN-SPAM Act shows that Plaintiff is exactly
9 the type of entity Congress sought to protect in enacting CAN-SPAM, and that Plaintiff
10 exactly fits the definition of an "Internet Access Service" that Congress provided in the
11 statute.

12 15 USC § 7702(11) states:

13 (11) Internet access service

14 The term "Internet access service" has the meaning given that term in section
15 231 (e)(4) of title 47.

16 47 USC § 231(e)(4) states:

17 (4) Internet access service

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

23 Plaintiff plainly meets the statutory definition. It cannot be rationally disputed that
24 Plaintiff "enables users to access content, information, electronic mail, or other services
25 offered over the Internet." While Defendants seek to mislead the Court and pretend that
26 Plaintiff is no different that any other internet user who merely accesses the internet,

1 Plaintiff is clearly engaged in behavior that goes far beyond simply accessing the
2 internet, and which clearly distinguishes Plaintiff from ordinary internet users.

3 For example, Plaintiff has registered domain names both on Plaintiff's own
4 behalf, and as a service for others. (declaration of Mark Ferguson In Support Of Reply
5 Re Motion To Compel (Dkt. No. 53)) Plaintiff has set up websites, both on Plaintiff's
6 own behalf, and as a service for others. *Id.* Plaintiff has leased dedicated and virtual
7 servers to house websites, both on Plaintiff's own behalf, and as a service for others.
8 *Id.* As a result of Plaintiff's activities securing domain names, building websites, and
9 arranging for leased servers to host these websites, the content Plaintiff has created
10 and placed on these servers is accessible by internet users on a world-wide basis. *Id.*
11 Users who are merely accessing the internet have done none of these things.

12 As a result of Plaintiff's actions, Plaintiff enjoys certain rights that he would not
13 enjoy were Plaintiff simply an ordinary internet user. For example, Plaintiff has a
14 property interest in Plaintiff's websites, as well as the original content placed on those
15 websites. Plaintiff has the exclusive control over these websites, and can earn revenue
16 from traffic that is driven to these websites. At least one of these websites,
17 artandallthatjazz.com, was set up by Plaintiff for his customer. *Id.* This website is
18 currently operated as an online store, offering sterling silver jewelry. Internet users with
19 simple access to the internet do not have customers who are operating commercial on-
20 line stores with unique domains owned by those users. Thus, Plaintiff is readily
21 distinguished from an ordinary internet user who merely purchases and account to
22 access the internet.

23 Along with the exclusive rights Plaintiff has acquired by setting up domain names
24 and websites associated with those domain names, Plaintiff also faces some non-
25 delegable duties associated with making content available on the internet. For
26 example, any and all spam sent to any email addresses associated with these websites

1 becomes a problem for Plaintiff. *Id.* Unlike ordinary internet users, who can simply
2 change their email address or rely on their access provider to filter and otherwise
3 dispose of spam, Plaintiff must either filter this spam for himself, pay someone else to
4 do so for him, or expend the considerable energy that is required to separate email
5 Plaintiff and his customer wishes to receive from spam sent by entities like Defendant.
6 Plaintiff can change hosts, but the spam is not directed at the host. It is directed at the
7 unique domain names that are Plaintiff's property. Accordingly, unlike the ordinary
8 internet user, Plaintiff cannot simply "flee" the spam by changing his email address or
9 changing providers. Plaintiff's only options are to either abandon his domain names
10 (together with all of the good will, customer brand recognition, links, and webtraffic
11 associated with those domains), or to deal with the spam himself. Plaintiff has chosen
12 to deal with the spam in a head-on manner; by exercising his rights under the CAN-
13 SPAM and CEMA statutes. Enabling plaintiffs like this Plaintiff to bring lawsuits like this
14 is the exact result Congress intended when it enacted the CAN-SPAM Act and gave
15 Internet Access Services standing to sue. *Id.*

16 As a result of Plaintiff's ownership of unique domain names, websites associated
17 with those domain names, and proprietary content placed on those domain names, it is
18 indisputable that Plaintiff "enables users to access content, information, electronic mail,
19 or other services offered over the Internet." It is likewise crystal clear that the burden of
20 spam falls squarely on Plaintiff's shoulders as a result of his enabling "users to access
21 content, information, electronic mail, or other services offered over the Internet."
22 Accordingly, the plain language of the CAN-SPAM Act shows Plaintiff is exactly the type
23 of entity that Congress intended to designate as an "Internet Access Service", and is
24 exactly the type of entity Congress intended to give standing to combat unwanted spam
25 that imposes unwanted costs on Plaintiff.

26 Defendant blithely alleges that language of 47 USC 231(e)(4) is "ambiguous," but
27 fails entirely to identify which portion of the language contains the alleged ambiguity, or

1 to provide any explanation whatsoever as to why any portion of the language is
2 ambiguous. Instead, Defendant simply invites the Court to ignore the plain language of
3 the statute in order to reach a result directly contrary to that same language.
4 Specifically, Defendant urges the Court to "exclude all but those who provide access to
5 the Internet (e.g., dial-up, DSL, cable modem, or T1 service providers)" from the
6 statutory definition. In making this argument, Defendant is in effect asking the Court to
7 limit the definition of "Internet access service" under 47 USC 231(e)(4) to include only
8 those entities that provide a direct, physical connection to the Internet, using "dial-up,
9 DSL, cable modem, or T1 service." Such a result is directly contrary to the plain
10 statement in 47 USC 231(e)(4) that provides that "such term ("internet access service")
11 does not include telecommunications services" and would frustrate completely the
12 Congressional intent.

13 All of the examples offered by Defendant (dial-up, DSL, cable modem, or T1
14 service) constitute "telecommunications services." Dial up services are accessed by
15 having a computer literally dial a telephone call to a modem connected to the Internet.
16 DSL services are provided by telephone companies as an "always on" connection to the
17 internet carried over normal phone lines. T1 service is a 1.544 Mbps point-to-point
18 dedicated, digital circuit provided by the telephone companies. While cable modems
19 are typically used to connect a computer to a cable TV service, voice over IP telephony
20 (VOIP) services depend on cable modems and DSL services, as these services provide
21 the "always-on connection" required for VOIP telephone service.

22 While it is obvious that many companies simultaneously provide "Internet access
23 services" and "telecommunications services," Congress explicitly defined "Internet
24 access service" in 47 USC 231(e)(4) to exclude a requirement that an "Internet access
25 services" provide "telecommunications services" so that the definition would not be
26 limited to only those entities that provided "telecommunications services." Accordingly,

1 Defendant is urging the Court to do the opposite of what is set forth in the plain
2 language of 47 USC 231(e)(4).

3 Defendant then invites the Court to simply abandon the language contained in 47
4 USC 231(e)(4), and to instead adopt a completely separate definition of “Internet access
5 service” contained in a different section of the bill under which the definition in 47 USC
6 231(e)(4) was introduced. Specifically, the Defendant urges the Court to adopt the
7 much narrower definition in subsection 1101(e)(2)(B) of HR 4328 which limits “Internet
8 access services” to “services through which a customer using a computer and a modem
9 or other communications device may obtain access to the Internet,” that is a physical
10 connection to the internet.

11 Defendant’s argument is fatally flawed, however, because the inclusion of this
12 narrower definition in subsection 1101(e)(2)(B) of HR 4328 in fact dictates that the Court
13 apply a broader definition as a matter of law. “Courts should not rely on inconclusive
14 statutory history as a basis for refusing to give effect to the plain language of an Act of
15 Congress, particularly when the Legislature has specifically defined the controverted
16 term.” *Hubbard v. United States*, 514 U.S. 695, 708, 115 S. Ct. 1754, 131 L. Ed. 2d 779
17 (1995). “Nor should we infer as much, as it is a general principle of statutory
18 construction that when “Congress includes particular language in one section of a
19 statute but omits it in another section of the same Act, it is generally presumed that
20 Congress acts intentionally and purposely in the disparate inclusion or exclusion.”
21 *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983)
22 (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972)). (underline
23 added.)

24 Plainly, Congress was aware of the narrower definition that required an “Internet
25 access service” to provide a physical connection to the internet, (a “service . . . using a
computer and a modem ...[to] obtain access to the Internet”). Equally plain is that

1 Congress deliberately chose the much broader definition, which does not require
2 provision of a physical connection, and which instead includes any “service that enables
3 users to access content, information, electronic mail, or other services offered over the
4 Internet.” Given that Congress provided two separate definitions for the same term in
5 two separate subsections of the legislation, for any Court to impose the narrow
6 definition from one subsection on the provisions of the other subsection, where a
7 different, broader definition was actually written into the legislation, would clearly violate
8 the rules of statutory construction and frustrate the intent of the Congress.

9 “Statutory construction must begin with the language employed by Congress and
10 the assumption that the ordinary meaning of that language accurately expresses the
11 legislative purpose.” *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 83 L.
12 Ed. 2d 582, 105 S. Ct. 658 (1985). The plain language of 47 USC 231(e)(4), provides
13 that the term “Internet access service” means “a service that enables users to access
14 content, information, electronic mail, or other services offered over the Internet.”
15 Plaintiff does exactly that. Unlike a typical internet user, Plaintiff hosts his own domains,
16 websites, and e-mail accounts. Plaintiff also hosts domains and websites for third party
17 customers, who in turn use these websites as on-line commercial businesses. Plaintiff
18 thereby “enables users to access content, information, electronic mail, or other services
19 offered over the Internet.”

20 The Defendants urge the Court to indulge in the fiction that Plaintiff is no different
21 that someone who “allows family members use of a computer” or who “inserts a
22 hyperlink into an email.” This line of argument insults the Court’s intelligence. Perhaps
23 the Defendants cannot distinguish between a company that creates and manages
24 commercial websites for third parties and an individual who writes an email, but if so,
25 they are perhaps the only ones who cannot.

1 Finally, to deny Plaintiff standing, Defendant relies on the decision in *Gordon v.*
2 *Virtumundo, Inc.*, 2007 U.S. Dist. LEXIS 35544 (2007). This reliance is misplaced. In
3 the Gordon decision, Judge Coughenour considered each and every one of Defendant's
4 arguments regarding the definition of an "Internet Access Service" and rejected them all.
5 In fact, while Judge Coughenour ultimately ruled that Gordon did not have standing,
6 Judge Coughenour also ruled Gordon was an Internet Access Service. Applying the
7 statutory definition, the Court stated:

8 "Nevertheless, it is fairly clear that Plaintiffs are, in the most general terms, a
9 "service that enables users to access" Internet content and e-mail, and accordingly,
10 they qualify as an IAS under the statute's capacious definition." (Cause No.
11 CV06-0204JCC, Court's May 15, 2007 Order, Dkt. 121, pg. 13, lines 10-12)

12 Even if the Court construes the facts in the light most favorable to the Defendant,
13 and even if the Court adopts the narrow statutory construction of the Gordon Court, it is
14 *still* clear that Plaintiff meets the statutory definition is an IAS under CAN-SPAM.

15 **Plaintiff Has Been Adversely Affected By The Defendants' Illegal Spam**

16 Defendant is simply wrong concerning the extent and nature of the damages that
17 have been incurred by Plaintiff. The Defendant is also wrong that the damages need be
18 "substantial" or "IAS specific." While it is true that Judge Coughenour created this
19 standard in the Gordon decision, that decision is on appeal, and no Court before or
20 since has adopted Judge Coughenour's reasoning. The reasons they have not are
21 fairly straightforward.

22 The plain language of the statute simply requires that Plaintiff be "adversely
23 affected" by spam. The language "adversely affected" is clear and unambiguous, and
24 when the statutory language is clear, the Court should not look the legislative history to
25 divine Congress' meaning. However, even if the Court does look to the legislative

1 history, it is plain that Congress intended the language that an IAS suffer an “adverse
2 affect” to be a minimum hurdle in granting standing. For example, Congress regarded
3 the mere act of carrying the spam on the IAS’s network as sufficient damages to
4 constitute an “adverse impact.” Congress stated:

5 Section 7(f) would allow a provider of Internet access service adversely affected
6 by a violation of section 5 to bring a civil action in Federal district court or other
7 court of competent jurisdiction. This could include a service provider who carried
8 unlawful spam over its facilities, or who operated a website or online service from
9 which recipient e-mail addresses were harvested in connection with a violation of
10 section 5(b)(1)(A)(i). The provider may obtain injunctive relief or actual or
11 statutory damages calculated in the same manner as section 7(e). The court
12 would be permitted to assess the costs of such an action, including reasonable
13 attorneys’ fees, against any party.

14 Can-Spam Act Of 2003; Report Of The Committee On Commerce, Science, And
15 Transportation, Report 108-102, p. 21 (emphasis added.)

16 Further, Congress regarded the very act of expending resources necessary to find
17 the spammer and sue them as one of the “adverse affects” that would grant standing.
18 Congress stated:

19 Spam imposes significant economic burdens on ISPs, consumers, and
20 businesses. Left unchecked at its present rate of increase, spam may soon
21 undermine the usefulness and efficiency of e-mail as a communications tool.
22 Massive volumes of spam can clog a computer network, slowing Internet service
23 for those who share that network. ISPs must respond to rising volumes of spam
24 by investing in new equipment to increase capacity and customer service
25 personnel to deal with increased subscriber complaints. ISPs also face high
26 costs maintaining e-mail filtering systems and other antispam technology on their
27 networks to reduce the deluge of spam. Increasingly, ISPs are also undertaking
28 extensive investigative and legal efforts to track down and prosecute those who
29 send the most spam, in some cases spending over a million dollars to find and
30 sue a single, heavy-volume spammer. (emphasis added.)

31 Can-Spam Act Of 2003; Report Of The Committee On Commerce, Science, And
32 Transportation, Report 108-102, p. 6

1 These are exactly the type of damages (undertaking extensive investigative and
2 legal efforts to track down and prosecute those who, like the Plaintiff, send spam)
3 incurred by Plaintiff set forth in the declaration of Mark Ferguson In Support Of Reply
4 Re Motion To Compel (Dkt. No. 53).

5 Finally, even if the Court adopts the stringent (and incorrect) standard urged by
6 the Defendants that the damages be “significant” and “IAS-specific,” it is still clear that
7 Plaintiff meets this standard. As is clearly shown in the declaration of Mark Ferguson In
8 Support Of Reply Re Motion To Compel (Dkt. No. 53) Plaintiff has incurred very
9 “significant” damages due to the receipt of spam generally, and specifically as a result
10 of the receipt of Defendant’s spam. The general damages attributable to spam include
11 incurring the cost of spam filters, the cost of purchasing more bandwidth, loss of
12 intellectual property including domains and email addresses, and system crashes from
13 spam. Again, despite Defendant’s intimations to the contrary, Mr. Ferguson’s
14 deposition testimony is entirely consistent with his sworn statements on each of these
15 points. The Court should note that qualitatively these are the very same types of
16 damages that any IAS, even the large ISPs such as Microsoft, AOL and Yahoo incur as
17 a result of having to deal with spam. It is merely a matter of scale, and CAN-SPAM is
18 silent on that point.

19 Perhaps most telling of all is the fact that despite Plaintiff having brought this
20 action, Defendant continues to send Plaintiff spam today! As recently as yesterday,
21 Defendant received more of Plaintiff’s spam. (See Declaration of Mark Ferguson in
22 response to Defendant Quinstreet’s Motion for Summary Judgment filed herewith)
23 Specific damages attributable to Defendant’s spam therefore include the ongoing
24 investigation to determine who is sending the spam, and the necessity of suing
25 Defendant in this action in a thus far unsuccessful attempt to have the spam stop. The
burden of continuing to clog Plaintiff’s network with spam from Defendant after
Defendant has unquestionably been put on notice that the spam was unwelcome and
unwanted, thereby forcing Plaintiff to investigate the source of this ongoing deluge of

1 spam to determine its source is both "significant" and "IAS-specific", not to mention
2 abhorrent.

3 Accordingly, Plaintiff has more than incurred the "adverse affects" required under
4 any interpretation of CAN-SPAM, and the Court should rule that Plaintiff has standing to
5 bring this action.

6 **Plaintiff Is An ICS Under The Washington CEMA Because He Meets The Definition**

7 **In RCW 19.190.010 (8)**

8 Even if the Court ruled Plaintiff did not have standing to sue under CAN-SPAM,
9 Plaintiff's claims still survive because he has standing to sue under CEMA.

10
11 RCW 19.190.010 (8) states:

12 (8) "Interactive computer service" means any information service, system, or access
13 software provider that provides or enables computer access by multiple users to a
14 computer server, including specifically a service or system that provides access to
15 the internet and such systems operated or services offered by libraries or
16 educational institutions.

17 Since Plaintiff owns operates websites on a computer server connected to the
18 World Wide Web, and since Plaintiff's server is accessed by thousands of visitors, as
19 well as Plaintiff's own customers, Plaintiff indisputably "enables computer access by
20 multiple users to a computer server" as defined by the Washington State legislature.
21 Accordingly, Plaintiff is also an "Interactive computer service" (ICS) because he meets
22 the definition in RCW 19.190.010 (8). Therefore, even if the Court were to dismiss
23 Plaintiff's claims under CAN SPAM, Plaintiff's claims under CEMA would survive.
24

DEFENDANTS ARE RESPONSIBLE FOR THEIR SPAM

1
2 Defendant's second theory for why they should be allowed to escape liability for
3 their actions is based on Defendant's assertion that they are not responsible for an
4 arcane subset of the actions of third parties they hire to send their spam. Specifically,
5 Defendant claims that "Quinstreet has no knowledge or control over a) which individuals
6 receive the emails, where an individual's email is set forth in the "To:" line of an email;
7 or b) what domain or domains are used to send the emails, where the information after
8 the "@" character in the "From:" line of an email is the email domain (such domain
9 references in the "To:" and "From:" lines, the "Header").

10 In the first instance, this claim is false. Defendant's contracts (excerpted in the
11 introductory section of this brief) make clear that they have near total control over all the
12 information contained in the emails. In the second instance, even if this claim was true,
13 it is not a defense. If Defendants turn a blind eye to the actions of the third party
14 spammers they hire to send spam on their behalf, they are liable under both CAN
15 SPAM and CEMA if they are on notice of ongoing violations.

16 As an obvious and applicable example, CAN SPAM requires that once a party is
17 on notice that a recipient does not want to receive any further spam, that party must
18 stop sending it, regardless of the information contained in the headers. "(R)ecipients of
19 commercial electronic mail have a right to decline to receive additional commercial
20 electronic mail from the same source." 15 USC § 7702(b)(3). As set forth in Declaration
21 of Mark Ferguson in response to Defendant Quinstreet's Motion for Summary Judgment
22 filed herewith, throughout the course of this litigation, Defendant has continued to send
23 Plaintiff spam. As recently as yesterday, Defendant received more of Plaintiff's spam.
24

1 Id. Having been sued for sending spam, Defendant's cannot rationally argue to the
2 Court that they were not on notice that Plaintiff did not want their spam. Accordingly,
3 even if Defendant did not previously have actual knowledge of the violations of third
4 parties sending spam on Defendant's behalf, they are nevertheless liable for the
5 subsequent violations. Once they have been put on notice, they can no longer plausibly
6 feign ignorance.

7
8 RESPECTFULLY SUBMITTED this 21st day of July, 2008.

9
10 i.JUSTICE LAW, P.C.

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12 Robert J. Siegel, WSBA #17312
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/S/ Douglas E. McKinley, Jr.
14 Douglas E. McKinley, Jr.,

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25 PLAINIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT QUINSTREET'S MOTION FOR
SUMMARY JUDGMENT -19
FERGUSON v. QUINSTREET, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2008, I electronically filed the attached document with the Clerk of the Court using the CM/ECF, which will provide notice to all counsel of record herein.

/s/ Robert J. Siegel
Robert J. Siegel, WSBA#17312