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. C07-5378 RJB DEFENDANT QUINSTREET, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ORAL ARGUMENT REQUESTED

I.
INTRODUCTION

Plaintiff MARK FERGUSON'S ("Plaintiff") Motion for Partial Summary Judgment appears to be a hasty response to defendant QUINSTREET'S ("QuinStreet") Motion for Summary Judgment filed and served several hours earlier. Plaintiff's motion is based on the argument that 9 out of 10 emails designed by QuinStreet and sent by third party publishers have

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a false mailing address thereby violating both CAN-SPAM and CEMA. Plaintiff argues he is therefore entitled to statutory damages of $11,000 and attorney's fees as a matter of law. Plaintiff's Motion for Partial Summary Judgment fails because: 1) Plaintiff does not have standing to bring a private cause of action under CAN-SPAM; 2) Plaintiff fails to establish that the emails contain a fraudulent address for the sender and in fact they contain a physical address for both the third party publisher and QuinStreet; 3) Plaintiff never attempted to opt out of receiving future emails even though the emails contained numerous valid identifiers to do so; 4) Quinstreet did not know or consciously avoid knowing any alleged violation by its third party publishers; 5) liability for the acts of the third party publishers can not be imputed to QuinStreet under an agency theory because Quinstreet had no knowledge or control over the publishers' activities.

Plaintiff's motion involves much of the same facts and legal argument as QuinStreet's Motion for Summary Judgment. In fact, the majority of Plaintiff's motion simply responds to several key points raised in QuinStreet's motion. In an effort to avoid redundancy, QuinStreet's opposition focuses only on the new arguments raised in Plaintiff's motion while referring the Court to its Motion for Summary Judgment for the relevant facts and issues that have already been fully briefed.

II.
LEGAL ARGUMENT

A. Summary Judgment Should Be Denied Because There Are Disputed Issues of Material Fact.

Summary judgment is appropriate only upon a showing that there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). A fact is "material" if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

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248 (1986). A dispute about a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party bears the burden of informing the court of the basis for its motion, together with the evidence demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett, supra*, 477 U.S. at 323. Only evidence that is admissible at trial may be considered by the trial court in ruling on a motion for summary judgment. Fed R. Civ. Pro. 56(c); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550-51 (9th Cir., 1990).

Here, Plaintiff has failed to support his Motion for Partial Summary Judgment with admissible evidence and otherwise meet his burden of showing there are no triable issues of material fact.

B. Plaintiff Does Not Have Standing to Assert Claims Under CAN-SPAM Because Plaintiff Is Not A Provider of Internet Access Service That Was "Adversely Affected."

Plaintiff does not have standing to assert claims under CAN-SPAM for the reasons set forth in detail in Section III A(1) and (2) of QuinStreet's Mot. for Sum. J. [Dkt. 56.] Plaintiff does not offer any legal analysis to support his conclusory statement that "Plaintiff has standing because Plaintiff meets the statutory definition of an Internet Access Service ("IAS") as set forth in the Act, and Plaintiff has been 'adversely effected' by email that violates the Act." [13:11-23 of Plf's Mot. for Part. Sum. J.] Rather, Plaintiff refers the court to his declaration filed in support of Plaintiff's Reply Re: Motion to Compel [Dkt. 53], which is devoid of any factual or legal analysis to support Plaintiff's assertion that he meets the statutory definition of an IAS. [*See e.g.*, Dkt. 53, ¶8 and 9.] Therefore, Plaintiff fails to offer any evidence that he has standing under CAN-SPAM.

On the other hand, Plaintiff's deposition testimony is conclusive evidence that Plaintiff does not meet the statutory definition of an IAS and therefore does not have standing under CAN-

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SPAM. [*See* Dkt. 56, Section III A(1) and (2).] To the extent his declaration attempts to contradict this deposition testimony, it lacks credibility and should be given zero weight in summary judgment proceedings. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999). Plaintiff's Motion for Partial Summary Judgment should be denied on this basis alone.

Finally, Plaintiff's Motion for Partial Summary Judgment actually supports the conclusion that Plaintiff does not have standing under CAN-SPAM because he was not adversely affected by any statutory violations. Rather, Plaintiff is seeking only statutory damages thereby conceding he has not incurred any IAS specific harm, a requirement for standing to bring claims under CAN-SPAM.

C. <u>Plaintiff Fails to Establish QuinStreet Violated CAN-SPAM.</u>

Plaintiff's sole argument is that 9 of the 10 subject emails violate 15 U.S.C. §7704(a)(5)(A)(iii) because the emails do not contain a valid physical postal address of the sender. [5:7-9 of Plf's Mot. Part. Sum. J.] As discussed in QuinStreet's Motion for Summary Judgment, Quinstreet did not send any emails to Plaintiff. Rather, a third party publisher initiates the email by selecting recipients based on the confidential lists owned and controlled by the publisher. The publisher chooses what domain or domains are used to send the email and is exclusively responsible for the information used to identify the email's point of origin. As such, the sender's address contained in the email header is the address of the publisher, not QuinStreet. Therefore, QuinStreet has no knowledge or control over that address and is not liable to Plaintiff to the extent Plaintiff can prove the address is invalid.

Nevertheless, Plaintiff fails to establish that the address identified in the emails is invalid. The emails identify the sender's physical address as 222 Grace Church St., #302, Port Chester, NY. [*See* Decl. of Mark Ferguson in Support of Motion for Partial Summary Judgment, Dkt. 60] ("Ferguson Decl."), Exh. A (A-1 through A-9).] Plaintiff claims this address belongs to the

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municipal government of the Village of Port Chester, New York, because an internet search shows that 222 Grace Church St., Port Chester, NY is currently the address for the Village of Port Chester municipal government. Without anything further, Plaintiff concludes that this is a fraudulent address. Plaintiff assumes the municipal government of the Village of Port Chester is the only tenant for this property address and therefore any email that identifies this address as the sender's address must be fraudulent. This is not true.

First, Plaintiff offers no admissible evidence that the municipal government occupied this space during the time he received the subject emails. Rather, the only evidence offered in support of Plaintiff's argument is a printout from a website dated July 2, 2008 purporting to show the current address of the Village of Port Chester municipal government as of July 2, 2008. [Ferguson Decl., Exh. C.] The subject emails were sent between February and April 2007. The fact that the municipal government is currently a tenant of 222 Grace Church St., Port Chester, NY, does not establish that this address was not occupied by the sender of the emails between February through April 2007. An internet search reveals several past or current tenants who identify this address as their place of business. [Decl. of Stephan A Barber in Support of QuinStreet's Opp. to Plf's Mot. for Part. Sum. J. ("Barber Decl."), Exh. A.]

Second, 222 Grace Church St., Port Chester, NY is a government and commercial center with several suites (and sub-suites) available for commercial office space. [Barber Decl., Exh. B.] While the government center occupies the first and second floors, the commercial suites occupy the third floor, beginning with Suite 301. [*Id.*] Plaintiff conveniently overlooks the true address in the subject emails which expressly identify the sender's suite number as "#302." Thus, it appears the sender of the subject emails occupied one of the commercial suites, specifically Suite 302, located at 222 Grace Church St., Port Chester, NY. In fact, a cursory

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internet search of this property address reveals several commercial tenants that have in the past or are currently occupying this space. [Barber Decl., Exh. C.]

As such, Plaintiff has offered absolutely no evidence that this was not an accurate address for the sender during the relevant time period. Rather, Plaintiff misrepresents the actual address identified in the emails to support his erroneous assertion that because the incorrectly identified address currently belongs to the municipal government center it is "a demonstrably false mailing address." [3:8 of Plf's Mot. Sum. J.] This argument is not supported by the evidence. Without more, Plaintiff has failed to meet his initial burden by offering any evidence that the sender's address identified in the emails is fraudulent.

Setting aside the validity of the sender's physical address, each of the emails also contain the physical address of QuinStreet, which is located 1051 E. Hillsdale Blvd., Foster City, CA 94404. [Barber Decl., Exh. E.] QuinStreet's physical address is prominently displayed in the body of the email. [Ferguson Decl., Exh. A.] The emails are identified as advertisements and if the recipient wants to opt out of receiving future emails the recipient is given the option of clicking on an opt out link or sending the request to QuinStreet's physical address. [*Id.*] Therefore, the emails not only contain a physical address for the sender, but also a valid physical address for QuinStreet. This directly contradicts Plaintiff's assertion that the emails did not contain a valid postal address.

D. <u>Plaintiff Fails to Establish QuinStreet Violated CEMA</u>.

Similarly, Plaintiff's sole argument is that 9 of the 10 subject emails violate RCW §19.190.020 because the emails misrepresent or obscures the point of origin by identifying the sender's address as 222 Grace Church St., Port Chester, NY 10573. Plaintiff relies on the same unfounded conclusory statement that this address belongs to the municipal government of the Village of Port Chester and therefore must be fraudulent. This argument fails for the same

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reasons discussed above. Additionally, this argument fails because Plaintiff's CEMA claim is preempted by CAN-SPAM.

As discussed in *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 2006), state law claims are preempted except to the extent they are for materially false or misleading information contained in an email. *Id.* at 353-355. An email is not materially false or misleading if the original initiator of the email message can be easily ascertained from the header or email itself. *Id.* at 358. In *Omega*, the defendant sent email advertisements to the plaintiff with headers that included non-functional "from" addresses and incorrectly identified the server from which its email originated. *Id.* at 357. However, each of the emails contained a link the recipient could click on as well as a postal address the recipient could write to in order to be removed from future mailings. The district court ruled and the Fourth Circuit affirmed that the inaccuracies in the emails did not make them materially false or misleading:

> We agree with the district court that these inaccuracies do not make the headers "materially false or materially misleading." Id. § 7704(a)(1). The e-mails at issue were chock full of methods to "identify, locate, or respond to" the sender or to "investigate [an] alleged violation" of the CAN-SPAM Act. Id. § 7704(a)(6). Each message contained a link on which the recipient could click in order to be removed from future mailings, in addition to a separate link to Cruise.com's website. Each message prominently displayed a toll-free number to call, and each also listed a Florida mailing address and local phone number for the company.

Id. at 357.

Like the emails in *Omega*, the 9 emails at issue in Plaintiff's Motion for Partial Summary Judgment are "chock full of methods to 'identify, locate, or respond to' the sender." Each email contained a link on which the recipient could click in order to be removed from future mailings. Additionally, the emails contained a link to the publisher's website. Finally, all of the emails contained a physical postal mailing address for both the publisher and QuinStreet which explained

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that the emails were advertisements and the recipient could request to be removed from future emails. The Fourth Circuit's conclusion is directly on point:

> If the alleged inaccuracies in a message containing so many valid identifiers could be described as "materially false or materially misleading," we find it hard to imagine an inaccuracy that would not qualify as "materially false or materially misleading." Congress' materiality requirement would be rendered all but meaningless by such an interpretation.

Id. at 357.

The subject emails are not materially false or misleading because they contain numerous valid identifiers that Plaintiff could have used to contact the publisher or QuinStreet. As such, Plaintiff's CEMA claims are preempted by CAN-SPAM. Moreover, the emails do not violate CAN-SPAM or CEMA because they are not materially false or misleading. Despite the various methods available to Plaintiff to locate the sender and opt-out of receiving future emails, Plaintiff admits in his declaration that he does not use the opt out link to request removal from future mailings. [Ferguson Decl., ¶¶6, 7 and 8.] Plaintiff states that he never contacted the publisher or QuinStreet to be removed from future mailings because according to Plaintiff it was "not clear to whom [he] would direct such a request." [*Id.* at ¶6.] This is likely because Plaintiff disables his ability to view the entire email, including information within the body of the email that identified ways to opt out of receiving future emails:

> Q. So any of the spam that you attribute to Quinstreet, you have not read?
>
> A. I have read parts of them. I don't read them in their HTML format like this. I see raw code....
>
> Q. So you would have to go through a number of clicks to get to the unsubscribe part?
>
> A. No, I would have to go through a number of steps to get to the unsubscribe part. I would have to download this off my server in order to unsubscribe.

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Q. You are aware that with some systems you just double click your e-mail and it just opens up and it has everything there?

A. Well, I understand that.

Q. Okay.

A. I would probably – I don't know if I would be able to see the unsubscribe if I viewed the email.

If I'm rendering HTML, which I'm not, then if I'm rendering it I might be able to see the unsubscribe, maybe....

[Barber Decl., Exh. D (Plaintiff's Deposition) at 197:12-15, 207:6-20.]

Although the subject emails contain valid identifiers that Plaintiff could have used to contact the publisher or QuinStreet, Plaintiff purposely disabled his ability to see the entire email, thereby obscuring information relating to the emails' point of origin. As such, Plaintiff purposely avoided access to valid contact information that was contained in the emails and never attempted to opt out of receiving future emails even though the emails contained numerous valid identifiers to do so.

E. <u>QuinStreet Did Not Consciously Avoid Knowing Of the Alleged Statutory Violations</u>.

Plaintiff relies exclusively on the declaration of Ryan Simmons submitted in support of QuinStreet's Motion for Summary Judgment to support his allegation that "Defendant goes to extraordinary lengths to deliberately avoid any knowledge of the illegal acts of Defendant's third party publishers." [9:15-16 of Plf's Mot. Part. Sum. J.] Mr. Simmons' declaration does not support this unfounded assertion. Rather, Mr. Simmons explains that QuinStreet graphically designs the online advertisements which are then sent to third party publishers, who send the email advertisements to recipients based on confidential lists of email addresses which are

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protected as trade secrets. This is not evidence that QuinStreet consciously avoided knowing of statutory violations. In fact, Plaintiff conveniently left out the portion of Mr. Simmons' declaration which states:

> QuinStreet is advised by the publishers that the e-mail advertisements are sent only to e-mail addresses which have opted in or consented to the receipt of e-mails from a particular domain or domains controlled by the publisher. QuinStreet prohibits publishers from sending e-mails to those who have opted out or unsubscribed.

[Decl. of Ryan Simmons in Support of QuinStreet's Motion for Summary Judgment, ¶5 (Dkt. 58).]

The fact that QuinStreet inquires and is advised by the publishers that the emails are sent only to recipients who have opted in or consented to receive those emails directly contradicts Plaintiff's assertion that QuinStreet consciously avoids knowing of any alleged statutory violations by the publishers. Moreover, Plaintiff's assertion is further contradicted by the fact that QuinStreet includes a valid physical postal address which is prominently displayed in the email in the email and encourages the recipients to contact QuinStreet for any reason including to be removed from future mailings. Therefore, Plaintiff has not offered any evidence that QuinStreet consciously avoided knowing of alleged statutory violations by its publishers. Rather, the evidence contradicts this assertion.

F. <u>Plaintiff Fails to Establish The Third Party Publishers Are QuinStreet's Agents</u>.

Plaintiff discusses general principles of agency at some length but fails to offer any evidence of a principal/agency relationship between third party publishers and QuinStreet. Plaintiff has the burden of establishing the agency relationship. *Barker v. Skagit Speedway, Inc.* 119 Wn. App. 807, 814 (2003). An agency relationship arises where one party submits to act on behalf of and be controlled by another party. Restatement of the Law, Third, Agency §1.01; *See also Meyer v. Holley*, 537 U.S. 280, 285-286 (2003); and *Rho Co. v. Dep't of Revenue*, 113

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Wn.2d 561 (1989) (holding that an "agency relationship generally arises when two parties consent that one shall act under the control of the other."). Additionally, control "is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract. Instead, control establishes agency only if the principal controls the manner of performance . . . ." *Uni-Com N.W., Ltd. v. Argus Publ'g Co.*, 47 Wn. App. 787, 796-97 (1987).

Here, Plaintiff has not offered any evidence that the third party publishers who allegedly sent him the emails were the agent of QuinStreet, let alone facts showing QuinStreet controlled the manner in which the third party publishers sent the emails. To the contrary, the declaration of Mr. Simmons' confirms that the third party publishers are not the agent of QuinStreet because QuinStreet has no knowledge or control over their activities. [Decl. of Ryan Simmons in Support of QuinStreet's Motion for Summary Judgment, ¶¶ 3, 4, and 5 (Dkt. 58).] Specifically, the evidence shows that QuinStreet does not control who receives the emails, what domain or domains are used to send the emails, or what information is used to identify the emails' point of origin. [*Id.*] Rather, these activities are all within the exclusive control of the third party publisher.

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IV. CONCLUSION

Based on the foregoing reasons and authorities Plaintiff's Motion for Partial Summary Judgment must be denied.

DATED this 21st day of July, 2008

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CERTIFICATE OF SERVICE

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

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