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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON, SEATTLE

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

10 **Plaintiff,**

11 v.

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

22 **Defendants,**

NO. C07-5378

PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
JULY 25, 2008

ORAL ARGUMENT REQUESTED

23
24
25 **Introduction**

The matter before the Court concerns a claim by the Plaintiff that the Defendant is responsible for commercial electronic mail that violates the federal CAN SPAM Act, 15 USC

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT -1
FERGUSON v. QUINSTREET, INC.

i.Justice Law, PC
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1 7701 et seq. (the “Act” or “the CAN SPAM Act”) and the Washington State Commercial
2 Electronic Mail Act, RCW 19.190 (“CEMA”).

3
4 To prevail on this motion under CEMA, the Plaintiff need show only two things: First,
5 that the Defendant or others acting on the Defendant’s behalf sent the Plaintiff commercial
6 electronic emails, and second, that the emails in question violate the provisions of CEMA.

7
8 To prevail on this motion under CAN SPAM, the Plaintiff need show only three things:
9 First, that the Defendant or others acting on the Defendant’s behalf sent the Plaintiff commercial
10 electronic emails. Second, that the emails violate the provisions of CAN SPAM, and third, that
11 the Plaintiff has standing as an Internet Access Service to bring its CAN SPAM claims.

12
13 Using only undisputed facts, the Plaintiff can easily meet this burden.

14
15 **Facts**

16 The facts before the Court necessary to decide this motion are not complicated, nor are
17 they disputed. Plaintiff has received a series of hundreds of thousands of commercial email
18 messages. The Defendant has admitted that it is responsible for a portion of these emails. To
19 insure there are no disputed facts, the Plaintiff has limited its motion to that portion of the emails
20 for which the Defendant has already admitted responsibility.

21
22 Plaintiff will show at trial that the Defendant is responsible for a much larger number of
23 emails than those at issue in this motion. However, for purposes of this motion, the only emails
24 that the Court is asked to consider are ten emails that the Defendant has admitted to sending.

1 (The emails are set forth as Exhibit C to the Declaration of Mark Ferguson. Defendant's
2 admission that Defendant is responsible for the emails is set forth as Exhibit A and E to Robert
3 Siegel's Declaration. Both Declarations are filed herewith.) Accordingly, for purposes of this
4 motion, there is no dispute that the Defendant sent the ten emails that form the basis of this
5 motion for summary judgment to the Plaintiff.

6
7 The actual emails speak for themselves and the contents of these emails cannot be
8 rationally disputed. 9 of the 10 emails list a demonstrably false mailing address. Each of these 9
9 emails contain the following statement:

10 To cease messages go here:

11 http://lostgreenmonkey.com/1/yi862.py?e=washington_resident@whew.com&m=705316
12 , or snailmail us at: 222 Grace Church St. #302-1000123 Port Chester, NY 10573.

13 The address 222 Grace Church St. #302-1000123 Port Chester, NY 10573 is demonstrably
14 fraudulent. In fact, the address 222 Grace Church St. Port Chester, NY 10573 is the street
15 address for the municipal government of the Village of Port Chester New York. See Exhibit C to
16 the Declaration of Mark Ferguson.

17
18 **Argument**

19 **CEMA VIOLATIONS**

20 CEMA contains a prohibition against sending commercial email that misrepresents or
21 obscures any information in identifying the point of origin or the transmission path of the
22 commercial electronic mail message. RCW 19.190.020 reads:

23 (1) No person may initiate the transmission, conspire with another to initiate the
24 transmission, or assist the transmission, of a commercial electronic mail message from a
25 computer located in Washington or to an electronic mail address that the sender knows,

1 or has reason to know, is held by a Washington resident that:

2 (a) Uses a third party's internet domain name without permission of the third party, or
3 otherwise misrepresents or obscures any information in identifying the point of origin or
4 the transmission path of a commercial electronic mail message; or

5 (b) Contains false or misleading information in the subject line.

6 (2) For purposes of this section, a person knows that the intended recipient of a
7 commercial electronic mail message is a Washington resident if that information is
8 available, upon request, from the registrant of the internet domain name contained in the
9 recipient's electronic mail address.

10 Each of the first 9 emails before the Court violates CEMA because they each list a
11 fraudulent address as the sender's address. Each of the emails "misrepresents or obscures the
12 point of origin" of the email because each email fraudulently claims to have been sent from 222
13 Grace Church St. Port Chester, NY 10573.

14 In fact, the address 222 Grace Church St. Port Chester, NY 10573 is the street address for
15 the municipal government of the Village of Port Chester New York. The use of a fraudulent
16 address misrepresents and obscures the identity of the sender, and thus constitutes a violation of
17 RCW 19.190.020 (a).

18 CAN-SPAM VIOLATIONS

19 15 USC 7704(a) sets forth the requirement that commercial electronic mail include the
20 physical address of the sender. Subsection (5) states:

21 (5) Inclusion of identifier, opt-out, and physical address in commercial electronic mail

22 (A) It is unlawful for any person to initiate the transmission of any commercial electronic
23 mail message to a protected computer unless the message provides—

24 (i) clear and conspicuous identification that the message is an advertisement or
25 solicitation;

1 (ii) clear and conspicuous notice of the opportunity under paragraph (3) to decline to
2 receive further commercial electronic mail messages from the sender; and
3 **(iii) a valid physical postal address of the sender.**

4 A simple examination of the messages in question conclusively demonstrates that the
5 messages do not contain “(iii) a valid physical postal address of the sender.”

6
7 Each of the first 9 emails before the Court also violate CAN SPAM because, again, they
8 each list a fraudulent address purporting to be the sender’s address. As such, none of the emails
9 contain “a valid physical postal address of the sender.” Instead, each of the first 9 emails
10 fraudulently claims to have been sent from 222 Grace Church St. Port Chester, NY 10573, the
11 street address for the municipal government of the Village of Port Chester, New York. The use
12 of a fraudulent address fraudulently identifying the sender constitutes a violation of 15 USC
13 7704 (a) (3).

14
15 **DEFENDANT IS LEGALLY RESPONSIBLE FOR THE EMAILS IN QUESTION**

16
17 Under both CEMA and the CAN SPAM Act, it doesn’t matter if Defendant sent the
18 emails itself or paid others to send the emails. Under either of these scenarios, Defendant is
19 liable, because in both cases it is indisputable that Defendant’s acts that caused the emails to be
20 sent.

21 Both Congress and the Washington State legislature plainly intended that the CAN
22 SPAM Act and CEMA respectively extend liability to parties who didn’t actually “send” the
23 emails, to include parties like Defendant who hired others to do it for them.

1 **CAN SPAM**

2
3 As set forth in the CAN SPAM Act, when used with respect to a commercial electronic
4 mail message,

5
6 “initiate” means to originate or transmit such message *or to procure the origination or
transmission of such message*. 15 USC 7702(9)

7 “Procure” is defined in the CAN SPAM Act as follows:

8 (12) Procure

9 The term “procure”, when used with respect to the initiation of a commercial electronic
10 mail message, means intentionally to pay or provide other consideration to, or induce,
another person to initiate such a message on one’s behalf. 15 USC 7702(12)

11
12 Accordingly, it is plain that Congress intended to hold parties who “procure” commercial
13 email liable, even if those parties did not “send” the emails themselves.

14
15 15 USC 7706(g) authorizes an Internet Access Service to bring an action seeking
16 statutory damages under the Act. In addition to the violations set forth under 15 USC 7704(a),
17 15 USC 7706(g)(2) sets for the an additional requirement that to be liable under the Act, a person
18 who procures emails from a person who is violating of the Act do so “with actual knowledge, or
19 by consciously avoiding knowing, whether such person is engaging, or will engage, in a pattern
20 or practice that violates this chapter.” 15 USC 7706(g)(2) reads as follows:

21 (2) Special definition of “procure”

22 In any action brought under paragraph (1), this chapter shall be applied as if the definition
23 of the term “procure” in section 7702 (12) of this title contained, after “behalf” the words
24 “with actual knowledge, or by consciously avoiding knowing, whether such person is
engaging, or will engage, in a pattern or practice that violates this chapter”.

1
2 As shown below, it is beyond dispute that Defendant consciously avoided knowing that
3 the emails in question violated the Act.

4
5 **CEMA**

6
7 Defendant would have the Court believe that they are somehow not liable for the e-mails
8 in question under CEMA because they hired third parties to actually press the “send” button
9 when they initiated the transmission of their spam. However, the mere fact that Defendant
10 outsourced this function to third-parties does not absolve the Defendant from liability under the
11 statute.

12 Just as with the federal CAN SPAM statute, the Washington legislature specifically
13 amended CEMA to extend liability to persons and/or entities like Defendant, who coordinate the
14 initiation of commercial e-mail, provided the commercial e-mail violates CEMA. An
15 examination of the history of CEMA makes clear the intent of the legislature.

16 When CEMA was originally passed, only the actual sender of a commercial email
17 message was liable for violations of CEMA. However, at the time of its passage, the legislature
18 set up a task force to study the efficacy of CEMA, and to return with a report giving
19 recommendations for changing CEMA at the end of one year. In the winter of 1999, the
20 legislature considered the report from the task force, together with the testimony of numerous
21 interested parties regarding proposed amendments to CEMA. Included among those who
22 testified were representatives from the Attorney General’s Office who had been charged with
23 enforcing CEMA in its original form.

1 The testimony from the Attorney General's office and the final report of the task force
2 both explained to the legislature that because commercial emailers routinely obscured the
3 identity of the actual sender of the commercial email, (the exact conduct prohibited by CEMA
4 and performed by Defendant), it was often very difficult, if not impossible, to locate the actual
5 sender of a particular spam message.¹ As a result, the purpose of the Act was being frustrated
6 since only spammers were liable under the Act, and they were adept at hiding themselves from
7 law enforcement. However, vendors, such as Defendant and its customers, who hired and paid
8 these spammers, often had to make their whereabouts known in order to consummate
9 transactions with victims. Since vendors, (like Defendant), provided the financial incentive for
10 spammers to send the spam in the first place, the task force and the Attorney General's office
11 both recommended that the legislature specifically amend the Act to extend liability to vendors
12 like Defendant. In 1999, the legislature took the advice of the task force and the Attorney
13 General's office and passed into law an amendment to the Act that extended liability to any
14 person who "assisted the transmission" of a commercial email message that violates the Act.
15 The final House Bill Report showing this change is attached to the Declaration of Robert Siegel
16 as Exhibit D. The legislative intent was clearly set forth in the committee report:

17 Persons who actually click or push a "send" button are no longer the only persons liable
18 for violating the Consumer Protection Act. Persons who assist or conspire with others to
19

20 ¹ The hearing was held on January 26, 2005 before the House Technology, Telecommunications, and Energy
21 Committee. No official transcripts of these hearings are prepared. Instead, the official record is an actual
22 recording of the hearing, which the legislature makes available for free online at
<http://www.tvw.org/MediaPlayer/Archived/REAL.cfm?EVNum=1999011128&TYPE=A>

23 Testifying for the Washington State Attorney General's office was Paul Selis, Senior Counsel with the Consumer
24 Protection Division. Ms. Selis' testimony explained in detail why it was necessary to amend the Act to extend
25 liability to entities who hire spammers, such as the Defendant, in order to allow effective enforcement of the Act.
Ms. Selis testimony begins at 10:55 into the transcript. To listen to the transcript requires that a user install the
Real Media Player, which is available for free at
<http://www.real.com/freeplayer/?rppr=tvw.org>

1 initiate commercial electronic messages containing certain types of misleading or
2 obscuring information are also liable for violating the Consumer Protection Act.

3 Thus, both the plain language of CEMA and the legislative history both demonstrate that
4 defendants' conduct was prohibited and punishable by CEMA.

5 As with CAN SPAM, CEMA also requires knowledge, or the conscious avoidance of
6 knowing, to extend liability. RCW 19.190.030(2) states:

7 (2) It is a violation of the consumer protection act, chapter 19.86 RCW, to assist in the
8 transmission of a commercial electronic mail message, when the person providing the
9 assistance knows, or consciously avoids knowing, that the initiator of the commercial
10 electronic mail message is engaged, or intends to engage, in any act or practice that
11 violates the consumer protection act.

12 **DEFENDANTS CONSCIOUSLY AVOIDED KNOWING OF THE STATUTORY**
13 **VIOLATIONS OF THEIR THIRD PARTY PUBLISHERS**

14 It is beyond dispute that Defendant consciously avoided knowing that the emails in
15 question violated the law. The Declaration of Ryan Simmons, Dkt. 58, makes plain that
16 Defendant goes to extraordinary lengths to deliberately avoid any knowledge of the illegal acts
17 of Defendant's third party publishers. Mr. Simmons declaration thus makes plain that Defendant
18 engages in exactly the type of willful ignorance prohibited by both CAN SPAM and CEMA,
19 which is the exact conduct to which both the Congress and the Washington State legislature
20 attached liability.

21 In the first instance, Mr. Simmons makes it plain that Defendant is intimately involved in
22 the creation and sending of the emails. Mr. Simmons states that:

23 QuinStreet graphically designs online advertisements for products and services offered by
24 its clients as well as QuinStreet's internal websites which promote its clients products and
25 services. QuinStreet prepares the text and graphics ("creative content") that are

1 incorporated into the advertisement... With regards to e-mail advertisements, the creative
2 content is sent to a third party publisher.

3 Mr. Simmons then makes it plain that having set the gears in motion, Defendant then
4 deliberately turns a blind eye to the further conduct of their third party publishers. Mr. Simmons
5 states:

6 QuinStreet does not know which domain or domains will be used by the publishers to
7 transmit the emails and has no knowledge of or control over the individuals to whom the
8 publisher sends the e-mail. QuinStreet does not create, see, or approve any domain
9 references in the e-mails including any domain references in the Header.

10 Mr. Simmons thus admits that once Defendant has insured that the emails will be sent,
11 Defendant then remains deliberately ignorant of the legality, or lack thereof, of the emails
12 themselves. As such, Defendant admits that it “consciously avoids knowing” of the violations at
13 issue. Consequently, Defendants are liable under both CAN SPAM and CEMA.

14 **IN ADDITION TO LIABILITY FOR “CONSCIOUSLY AVOIDING KNOWING”**
15 **UNDER CAN SPAM AND CEMA, DEFENDANTS ARE ALSO LIABLE FOR THE**
16 **ACTS OF THEIR THIRD PARTY PUBLISHERS UNDER GENERAL PRINCIPLES OF**
17 **AGENCY**

18
19 It is settled black letter law that statutory duties are non-delegable. Defendant cannot
20 avoid liability simply by trying to blame its third party publishers.

21 Employers are routinely held liable for breach of statutory duties, even where the failings
22 are those of an independent contractor, and even where the party seeking redress is other than the
23 government. See RESTATEMENT [SECOND] OF TORTS § 409, comment b at 371.

1 In the Matter of Long Distance Direct, Inc., 15 FCC Rcd 3297, 3307, 2000 WL 177864
2 (2000) the Federal Communications Commission fined LDDI \$2 million because an independent
3 contractor it hired switched consumers' long distance carrier selection to LDDI without their
4 permission and imposed charges for unauthorized services. Id. at 3300. In short, a marketer is
5 liable for advertising in unlawful commercial electronic mail even if its third party agents
6 actually hit the "send" button and even if the terms & conditions of the contract between the two
7 purport to require its agents to comply with applicable anti-spam laws.

8 A principal [cannot] automatically escape liability for the tortious acts of its agent
9 committed in the course of its employment, even if the principal did not authorize or
10 know of the acts complained of, and even if the principal expressly forbade or
11 disapproved of the act. *Beyond Systems*, 422 F. Supp. 2d at 546.

12 If Defendants want the financial benefits of contracting with third parties to act as their
13 agents and do their advertising for them, then Defendants should reasonably expect to bear the
14 risks and liability that may arise from "outsourcing" their marketing functions. Here,
15 Quinstreet's marketing strategy clearly includes hiring third parties to act as its marketing agents
16 by sending spam advertising its client's products and websites. Quinstreet benefits financially
17 from this program, and compensates its marketing agents for sending spam.

18 The Federal Trade Commission concurs with this interpretation: an advertiser who uses
19 third party agents is the "sender" as is the actual agent who hit the "send" button. *FTC,*
20 *Effectiveness and Enforcement of the CAN-SPAM Act*, supra, at 16.

21 The Federal Trade Commission held Global Net Solutions liable for email sent by its
22 agents/affiliates. *Federal Trade Commission v. Global Net Solutions, Inc.*, No. CV-S-05-2002-
23 PMP (LRL), *1, *7-11 (Nev. 2005), available at [http://www.ftc.gov/os/caselist/
24 0423168/051116stip_0423168.pdf](http://www.ftc.gov/os/caselist/0423168/051116stip_0423168.pdf). According to the FTC press release:

1 While [Global Net Solutions Inc.'s] affiliate sent many of the e-mails that allegedly
2 violated federal law, under the CAN-SPAM Act all of the defendants are responsible for
3 the e-mails, including the defendants who paid others to send the e-mails on their behalf.

4 *Federal Trade Commission, Spammers Barred from Violating Federal Law – Operators*
5 *Required to Keep Closer Eye on Affiliated E-mail Programs*, Nov. 17, 2005, available at
6 <http://www.ftc.gov/opa/2005/11/globalnet.htm> (emphasis added).

7 The California Superior Court held in *Infinite Monkeys & Co., LLC v. Global Resource*
8 *Systems Corp.*, No. 1-05-CV039918, *1, *2 (Cal. Super. Ct., County of Santa Clara Sep. 14,
9 2005) (Order re: Demurrer, Motion to Strike, and Motion for Preliminary Injunction) that the
10 sponsor of a commercial email (i.e., the advertiser featured in the commercial email) is
11 responsible for the actions of the actual sender.

12 The Court finds that the Legislature intended the phrase “advertise in a commercial e-
13 mail advertisement” contained in Business and Professions Code § 17529.5(a) to be
14 construed broadly and to include all entities involved in the creation and dissemination of
15 an e-mail advertisement. Thus the entity that sponsored a commercial email-
16 advertisement, the parties that prepared and organized the dissemination of the
17 advertisement, and the parties that effected delivery of the e-mail to recipients are all
18 proper defendants in a Business & Professions Code § 17529.5(a) cause of action. Any
19 other construction of the statute would . . . fail to achieve the Legislative purpose stated
20 in Business & Professions Code § 17529. *Infinite Monkeys & Co., LLC v. Global*
21 *Resource Systems Corp.*, No. 1-05-CV039918, *1, *2 (Cal. Super. Ct., County of Santa
22 Clara Sep. 14, 2005) (Order re: Demurrer, Motion to Strike, and Motion for Preliminary
23 Injunction)

24 *America Online Inc. v. National Health Care Discount Inc.* held that NHCD was liable
25 for the actions of its third party e-mailers for sending spam through AOL’s network to AOL
members; even though the spammers were independent contractors, they were acting as NHCD’s
agents. *America Online Inc. v. National Health Care Discount Inc.* 174 F. Supp. 2d 890, 897-
898 (N.D. Iowa, 2001). The court issued a permanent injunction against NHCD and awarded
AOL over \$400,000 in actual and punitive damages. *Id.* at 901-902.

1 The CAN SPAM Act requires that the sender of commercial email identify themselves,
2 and allow the recipient a mechanism to request that no more emails be sent to the recipient. 15
3 USC 7701 (b) sets forth the Congressional determination of public policy. This section states:
4 On the basis of the findings in subsection (a), the Congress determines that—

- 5
- 6 (1) there is a substantial government interest in regulation of commercial electronic mail
7 on a nationwide basis;
 - 8 (2) senders of commercial electronic mail should not mislead recipients as to the source
9 or content of such mail; and
 - 10 (3) recipients of commercial electronic mail have a right to decline to receive additional
11 commercial electronic mail from the same source.
- 12

13 The emails in question frustrate that public policy, and violate both the spirit and letter of
14 the CAN SPAM Act.

15 The emails violate the CAN SPAM Act and CEMA because they obfuscate the identify
16 the sender. They fail to include the sender's physical address. Instead, they list a fake address.
17 As a result of these omissions and mischaracterizations, it is impossible to tell from inspecting
18 the emails who sent them. Even the Defendant had great difficulty determining who actually
19 sent the emails. (See Exhibit C to the Declaration of Robert Siegel). This frustrates the public
20 policy that senders of commercial electronic mail should not mislead recipients as to the source
21 of email.

22 By and through these emails, Defendant's impose costs on Plaintiff by appropriating the
23 use of Plaintiff's computer resources. The costs imposed on Plaintiff are exactly the type that
24 Congress sought to reduce through the Act. At 15 USC 7701(a)(3) and (4), the Act states:

1
2 (3) The receipt of unsolicited commercial electronic mail may result in costs to recipients
3 who cannot refuse to accept such mail and who incur costs for the storage of such
4 mail, or for the time spent accessing, reviewing, and discarding such mail, or for both.

5 (4) The receipt of a large number of unwanted messages also decreases the convenience
6 of electronic mail and creates a risk that wanted electronic mail messages, both
7 commercial and noncommercial, will be lost, overlooked, or discarded amidst the
8 larger volume of unwanted messages, thus reducing the reliability and usefulness of
9 electronic mail to the recipient.

10 As set forth in detail in the Declaration of Mark Ferguson, Dkt. 53, Plaintiff has been
11 harmed by Defendant's conduct because the emails in question have imposed exactly these types
12 of costs on Plaintiff. To stop this illegal email and to seek redress for Defendants repeated,
13 willful, and knowing violation of the Act, Plaintiff has no viable alternative except to seek
14 redress in this Court.

15 Damages

16 15 USC 7706(g)(3)(A)(ii) provides for damages of "up to \$100, in the case of a violation
17 of 5(a)(1)." 15 USC 7706(g)(4) provides that the court may require the payment of reasonable
18 attorney fees. RCW 19.190.040(2) provides that "(d)amages to an interactive computer service
19 resulting from a violation of this chapter are one thousand dollars, or actual damages, whichever
20 is greater."

21 CONCLUSION

22 By the Defendant's own admission, it is one of the largest and most sophisticated email
23 marketing companies in the world. The spam emails in question were created by them, and sent
24 at their request. Accordingly, for each spam email message sent to Plaintiff, Plaintiff is entitled
25 to \$100 under CAN SPAM, plus \$1,000 under CEMA, (\$1,000 + \$100 = \$1,100) plus attorney
fees, or 10 times \$1,100 = \$11,000. Plaintiff therefore respectfully requests that the Court enter

1 an Order awarding Gordon judgment in the amount of eleven thousand dollars, plus reasonable
2 attorney fees.

3
4 RESPECTFULLY SUBMITTED this 1st day of July, 2008

5
6 i.JUSTICE LAW, P.C.

7 Attorney at Law

8 /S/ Robert J. Siegel

9 Robert J. Siegel, WSBA #17312

DOUGLAS E. MCKINLEY, JR

Attorney at Law

/S/ Douglas E. McKinley, Jr.

Douglas E. McKinley, Jr., WSBA#20806

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 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