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 REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT** **NOTE ON MOTION CALENDAR: JULY 25, 2008** **ORAL ARGUMENT REQUESTED**

In essence, Defendant presents 5 arguments against Plaintiffs Motion for Partial Summary Judgment. Each of these arguments is directly contradicted by the evidence before the Court.

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1) Defendant argues that "Plaintiff does not have standing to bring a private cause of action under CAN-SPAM."

This argument fails because Plaintiff is an Internet Access Service with damages caused by Defendant's spam. Plaintiff will not re-hash the arguments already before the Court, except to provide the portions of the transcript of Mark Ferguson's deposition testimony that both provide context and completely contradict Defendant's prior mischaracterizations of that same testimony, and which Defendant "conveniently" omitted from their prior exhibits. As an example, contrary to Defendant's mischaracterizations, Mr. Ferguson testified at his deposition that he did in fact control, and assign the IP addresses connected to the domains he was managing, including 'whew.com', the domain at which the subject emails were received. (See deposition excerpts, pages 166-170, attached to the Declaration of Robert J. Siegel submitted herewith). The Court should also note that Mr. Ferguson testified that he was forced to abandon some of his valuable domains as a result of decreased utility due to the receipt of spam.

2) Defendant argues that "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."

Defendant does not contest that CAN-SPAM requires a valid physical address for the sender. (Plaintiff notes that in its Reply to its own summary judgment motion Defendant cites a very recently enacted(July 7, 2008, FTC rule (16 CFR Part 316)

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allowing *accurately* registered postal drop boxes as acceptable as a physical address under CAN-SPAM. However, nowhere does Defendant assert that such rule is retroactive, making it applicable at the time of the violations alleged herein, nor does Defendant advise the Court that the Rule was effective as of July 7, 2008 [First page of Rule attached to Declaration of Robert J. Siegel submitted herewith])

Defendant does not contest it hired others to send the spam in question, nor does Defendant contest that Defendant's "publishers" used the address contained on the spam that Plaintiff asserts is fraudulent. Defendant purports to contest that the address in question "may have" been a valid address, but produces no evidence showing the "publishers" Defendant hired were ever located at the address in question. Instead, Defendant produces evidence that the address does not exist, or that others have overlapping claims to have used the address.

Thus, at best, Defendant's own exhibits indicate that the address in question does not exist, or even if it did, it was not used by Defendant's publishers. In addition, Plaintiff propounded interrogatories asking for all valid addresses of any party who sent commercial email on behalf of Defendant. Defendant initially posed unfounded objections to this clearly relevant, if not critical information. Subsequently, Defendant produced the identities of only 2 of its third party publishers, including their physical addresses. Notably, the physical addresses provided by Defendant did not include the address contained on the emails. Plaintiff has a right to rely on Defendant's interrogatory answers. Accordingly, the address of the "sender" (or "third party publisher" to use Defendant's vernacular) was not valid according to Defendant's own interrogatory responses. Any speculation by Defendant's counsel in its brief to the

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contrary should be afforded little weight. There is no evidence at all before the Court to indicate that the address in question was the valid physical address of any of Defendant's "publishers", and both Defendant's own interrogatory responses and their exhibits indicate that it was not.

3) Defendant argues that Plaintiff never attempted to "opt-out" of receiving future emails even though the emails purportedly contained mechanisms to do so.

This argument fails first because there is no requirement whatsoever under CAN-SPAM that Plaintiff "opt-out" of receiving spam. CAN-SPAM simply creates liability if Defendant sends, or causes to be sent, commercial email that fails to comply with the requirements of the CAN-SPAM Act, regardless of whether anyone "opts-out" of receiving Defendant's illegal spam. Further, this case has been ongoing for almost a year, and even today Defendant continues to send Plaintiff illegal spam. (See Declaration of Mark Ferguson In Response To Defendant's Motion For Summary Judgment, Dkt. 65). Thus, even if Defendant somehow had a responsibility to "opt-out" of receiving future emails, all the evidence before the Court indicates that "opting out" of Defendant's illegal spam is futile. Who is Defendant kidding? If suing Defendant in Federal court does not constitute "opting-out", then it is difficult to see what would. Moreover, Plaintiff did in fact opt out using the link provided in the subject email! The evidence is before this Court. (See Exhibit "B" to the Declaration of Mark Ferguson In Reply Re Plaintiff's Motion To Compel, Dkt. 53). Further, Mr. Ferguson specifically testified to the fact that he "opted-out" at his deposition. And still, counsel for Defendant

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blatantly attempts to mislead this Court by making unsubstantiated statements to the contrary. (See pages 70-71 of Mr. Ferguson's deposition transcript attached to the Declaration of Robert J. Siegel submitted herewith.)

4) and 5) Defendant argues that "Quinstreet did not know or consciously avoid knowing any alleged violation by its third party publishers; and 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."

As explained in detail in Plaintiff's Response To Defendant's Motion For Summary Judgment, this argument fails because the plain language of Defendant's contracts with their own "publishers" give Defendant near total control over their publisher's activities. Defendant has produced no evidence whatsoever that would contradict the plain language contained within their own contracts. The self-serving statements of Defendant's executives that they did not have control over these publishers should not be given any weight, since they are unsupported by any evidence, and these statements are flatly contradicted by the language contained within Defendant's own agreements.

RESPECTFULLY SUBMITTED this 25th day of July, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 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.

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