Appeal No. 07-35487

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES S. GORDON, JR.

Appellants/Plaintiffs,

vs.

VIRTUMUNDO, INC. ADKNOWLEDGE, INC.,

SCOTT LYNN and JOHN DOES I-X,

Appellees/Defendants.

On Appeal from the United States District Court
Supplemental Brief of Appellants in Response to *Amicus Brief*

For the Western District of Washington
Hon. John C. Coughenour

Case No. CV06-0204JCC

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I. INTRODUCTION

This is a reply brief in response to the *amicus* brief filed by ASIS Internet Services on or about October 20, 2008. This Court ordered that the "parties may file supplemental briefing addressing the arguments of the amicus curiae" (Order dated October 28, 2008.) Appellees filed their response to the *amicus* brief on November 14, 2008. Also, there has been a recent case law development that Appellants wish to bring to this Court's attention. This brief encompasses the issues raised in the *Amicus* brief. The District Court below erred in determining causation and standing and ignored the distinction between offending emails and the resulting adverse effects.

In one recent decision, a federal district court decided that an Internet service provider ("ISP") is damaged when it is forced to use spam filters or investigate deceptive email. Appellants were damaged because they were forced to use filters and had to investigate deceptive emails to improve filters, and received 13,800 emails from Appellees. This Court should consider the reasoning of the recent federal decisions in *ASIS Internet Services v. Active Response Group*, Case No. C076211 TEH, United States District Court for the Northern District of California and *Haselton v. Quicken Loans, Inc.* Case No. C07-1777RSL, United States

District Court, Seattle, Washington, Order Granting Motion for Partial Summary Judgment.

II. STATEMENT OF FACTS

The Honorable Thelton Henderson of the U.S. District Court for the Northern District of California ruled[1] that a plaintiff, ASIS Internet Services, had standing as a provider of Internet access services to its customers (the opinion is hereinafter referred to as "*ASIS*"). This ruling, dated July 30, 2008, came fourteen months after the decision of the Honorable John Coughenour in the instant case and more than nine months after filing of the opening brief by Appellants.

The issues are strikingly similar between *ASIS* and the instant case as each case pled damages under the CAN-SPAM Act of 2003 as well as their respective state anti-spam statutes. The primary difference between *ASIS* and instant action is that the *ASIS* court elucidated the adverse effects to which plaintiffs were subjected and the court below in the instant case did not or, at best hinted at, the adverse effects which were evidenced in the record.

Judge Henderson acknowledged the rulings in three cases[2] which were

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[1] *Asis Internet Services v. Active Response Group*, Case No. C076211 TEH, United States District Court for the Northern District of California.

[2] *Hypertouch Inc. v.Kennedy-Western University*, 2006 WL 648688 (N.D. Cal. 2006), *Brosnan v. Alki Mortgage, L.L.C.*, 2008 WL 413732, (2008), and *ASIS Internet Services v. Optin Global, Inc.*, 2008 WL 1902217 (N.D. Cal. 2008)

similar to the case at bar. However, he refused to be swayed by "an artifact of courts" paraphrasing each other, without an explicit analysis of what, in reality, would be required to show causation (between offending emails and the resulting adverse effects). (*See ASIS* at 7:1-2.) The *ASIS* court found that "a provider of Internet access services has standing if it can show that it suffered spam-related harm or costs of the type typically experienced by ISP rather than consumers, and carried the allegedly unlawful deceptive email over its facilities". (*Id.* 2:23-26.)

The lower court in the instant case stated that Appellants did not have standing as their harm was similar in nature to a regular user of the Internet. In fact, the evidence in the record below contains details of the harm actually sustained by Appellants and which was not similar to what a non-ISP would experience. (*See e.g.*, Appellees Supplemental Excerpts of Record "ER") at 060:8-12, 063-64, 067:4-9, 067:21-068: 4 and 493:14-20 (Appellants had to replace computers), 268:23-269:5 (Appellants had to purchase software to deal with spam sent by Appellees), 365:19 (purchase of spam filters), 472:2 and 475:14-15 (server cost tripled), and 481:14-15 (several other adverse effects).)

The court below said that the harm must be significant. But Judge Henderson realized that such a requirement was leading to the "progressively more restrictive interpretations of the Act, inconsistent with the statutory structure and purpose." *(ASIS* at 2:21-23.)

The *ASIS* court wrote:

> The Senate Report on the CAN-SPAM Act provides, *in the section on enforcement*, that: Section 7(f) would allow a provider of Internet access service adversely affected by a violation of section 5 to bring a civil action in Federal district court or other court of competent jurisdiction. *This could include a service provider who carried unlawful spam over its facilities*, or who operated a website or online service from which recipient email addresses were harvested in connection with a violation of section 5(b)(1)(A)(I). This language equates "carrying unlawful spam" with adverse effects caused by the violation. (*ASIS* order at 7:23-8:2.)

It was uncontested that Gordon's server "carried" the unlawful spam, which Judge Henderson stated is equated to adverse effects caused by the violation. Appellants can show that they spent thousands of dollars on five new computers, on annual server fees. (*See* ER493:14-20, 268:23-269:5, 365:19.) Appellants spent thousands of dollars on forensic software, lost scores of customers (*see* ER 226:7-15), and spent an inordinate amount of time contacting law enforcement, regulatory bodies, and spammers seeking the cessation of the increasing spam load they endured. (*See* ER 63:24-64-:7 (describing difficulties and stating costs); *see also* ER 649:2-7 (noting irony that one of the adverse effects of the spam was loss of customers, which Defendants below argued eliminated the Plaintiffs' standing).) The *ASIS* court also stated, "an ISP is wronged when it is forced to carry, filter, or investigate deceptive email". *(ASIS.* at 8:8-9.) Appellants were wronged because they were forced to do all those things.

It is also uncontested that domains on Appellants' server received spam. Appellants were forced to create filters. (*See e.g*. 227:25-228:7 and 482:20-483:1) Appellants had to investigate senders of email. *(Id.* at ER 263:25-264:6 and 447:8-10.) It would be incongruous for the Court to find that only those ISPs that failed to investigate spam had standing to complain about it.

A holding that an ISP which successfully protects its consumers with filters and other spam management has no standing to bring suit would emasculate the private right of action (particularly given the individual's lack of standing under CAN-SPAM), undercut the deterrent purposes of the Act, and inappropriately shift to the victim the responsibility to avoid spam by somehow not receiving it.

III. DISCUSSION

A. THIS COURT SHOULD NOT AFFIRM DISMISSAL BECAUSE PLAINTIFFS PLED FACTS SUFFICIENT TO STATE A CLAIM

A court should not grant dismissal unless the plaintiff has failed to plead "enough facts to state a claim to relief that is plausible on its face." (*Asis Internet Services v. Active Response Group*, Case No. C076211TEH, United States District Court for the Northern District of California, Order Denying Motion to Dismiss at 3:18 (*citing Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)).) Moreover, dismissal should be with leave to amend unless it is clear that

amendment could not possibly cure the complaint's deficiencies. *(Id. at* 3:20-22 (*citing Steckman v. Hart Brewing, Inc*., 143 F.3d 1293, 1296 (9th Cir. 1998)).)

B. APPELLANTS ARE PROVIDERS OF INTERNET ACCESS SERVICES AND WERE ADVERSELY AFFECTED BY RESPONDENTS' VIOLATIONS OF LAW

"The CAN-SPAM Act protects the interests of plaintiffs that are (1) 'providers of Internet access service' and (2) 'adversely affected' by a violation of specific provisions of the Act." (*Haselton v. Quicken Loans, Inc.* Case No. C07-1777RSL, United States District Court , Seattle, Washington, Order Granting Motion for Partial Summary Judgment ("*Haselton* Order") at 2:17-19.)

Here, Appellants are an Internet access service provider (*see* ER 004:24-005:7) and are adversely affected by Respondent's violations of the Act. (*See* ER 60:4-8, 481:14-15.)

1. Appellants Provide Internet Access Services

"[A] service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers." (*Haselton* Order at 3:2-8 (quoting 47 U.S.C § 231 (e)(4)).)

"Internet access service encompasses a wider range of entities than the term Internet Service Provider." (*Id.* at 3:15-17.) "The plain language of the CAN-

SPAM Act does not require an Internet access service to provide Internet connectivity to the end users." *(Id. at* 3:20-21.) "[A] CAN-SPAM cause of action is not limited to entities that provide Internet connectivity." *(Id. at* 4:6-7 (citing *Facebook, Inc. v. ConnectU LLC,* 489 F. Supp. 2d 1087, 1094 (N.D. Cal. 2007) and *MySpace, Inc. v. The Globe.com, Inc.*, No. 06-3391, 2007 WL 1686966 (C.D. Cal. Feb. 27, 2007 (finding Internet access service "includes traditional Internet Service Provider")).)

Appellants provide "email addresses, build[] web sites for others, and maintain[] a website that acts as a clearinghouse for job-search information and small business resources on the World Wide Web." (*See* ER at 060:4-8, *see also* 004:24-005:7.) Therefore, the first prong of *Haselton* test is met.

2. Appellants Were Adversely Affected

The CAN-SPAM Act provides a private right of action only to an Internet access service that is adversely affected by a violation of Section 7704. (15 U.S.C. § 7706(g)(1).) "Unsolicited commercial electronic mail imposes significant monetary costs on providers of Internet access services that carry and receive such mail". (*Haselton* Order at 5:13-15 (quoting the Congressional findings).)

The *Haselton* court identified harms such as "slower Internet speeds, lost productivity, network system upgrades, unrecoverable data, expensive spam filter

maintenance, and increased personal costs." (*Haselton* Order at 6:9-12 (quoting Congressional findings).)

"Congress found that there was significant harm in the sending of bulk email with certain characteristics such as false headers, misleading subject lines, pornography and other harms." (*Amicus* Brief at 7 referring to 15 USC § 7701(1)-(2).) Appellants alleged false headers, misleading subject lines and other kind of harms. (*See* ER at 006:10- 20,008:18-25, 009:11-011:17.)

Appellants were harmed by slower Internet speeds, lost productivity, the need to constantly upgrade network systems (*see* ER at 493: 14-20, 268:23-269:5), install expensive spam filters (*see* ER at 365:19), permanently lost data and spend more in maintenance costs due to Respondents' spam. (*See* ER at 472:2 and 475:14-15.)

Respondents' spam has reduced Appellants' network speeds, impaired his ability to notify subscribers about new ways to access services, and required an increase server and memory capacity. (*See* ER at 060-064, 067:21-069:11.) The amount of spam Appellants receive directly impedes the responsiveness of their servers and their ability to communicate with their subscribers to send them the locations of new proxy servers. Moreover, the mail that Appellants attempted to send to their subscribers, and the mail that business contacts attempted to send them, was sent more slowly, with random delays, and sometimes did not get sent

or received at all. The tremendous amount of emails sent to Appellants "thwarts the efficacy" of their computers. (*See* ER at 067:21-68:11.)

C. INTERNET SERVICE PROVIDERS HAVE A RIGHT OF ACTION UNDER 15 U.S.C. § 7706

The CAN-SPAM Act makes it unlawful to "initiate the transmission" of a commercial email message that has false or misleading header information, or a deceptive subject line. (15 U.S.C. § 7704.) The Act is enforced by the Federal Trade Commission, other federal agencies, and state attorneys general. (15 U.S.C. § 7706(a), (b), (f).) The also creates a limited right of action for injunctive relief or damages by any "provider of Internet access service adversely affected by a violation" of sections 7704(a)(1), 7704(b), or 7704(d) of the Act. (15 U.S.C. § 7706(g)(1).)

D. SPAM IMPOSES SIGNIFICANT ECONOMIC BURDENS ON INTERNET SERVICE PROVIDERS

Considering both the definition of an Internet access provider and the requisite adverse effect, the court below looked to the legislative history of the CAN-SPAM Act. (Order at ER 659:20 - 667:3.) It noted that Congress focused on harm specific to Internet access providers, going beyond the "burden of sorting through an inbox of spam" borne by the ordinary consumer. (*Id.*) The Report of the Senate Committee on Commerce, Science and Transportation found that spam

"imposes significant economic burdens on ISPs" by clogging computer networks, slowing service, and forcing Internet Access Providers to invest in new equipment to increase capacity and hire customer service personnel to deal with subscriber complaints. (*ASIS, supra*, at 4:22-28 (*citing* S. REP. NO. 108-102, at 6 (2003) (Comm. Rep. on CAN-SPAM Act of 2003 (S. 877)).)

The "deceptive email causes the adverse effect". *(Id.* at 6:27.) The *ASIS* court explained that

> "[t]his requirement appears to have evolved as an artifact of courts' paraphrasing each other, without an explicit analysis of what, in reality, would be required to show causation. All courts[3] that have construed the statute agree that the "adverse effects" on which standing can be predicated include network crashes, higher bandwidth utilization, and increased costs for hardware and software upgrades, network expansion and additional personnel." *(Id.* at 7:1-7; *see also* 15 USC § 7701(6).)

Appellants suffered adverse affects under any reasonable reading of the statute. The adverse effects described in the record below are not such as would be typical of the regular Internet users. (*See* e.g. ER at 007:22-27, 009:18-19 and 493:14-20 (replace computers), 268:23-269:5 (purchase software to deal with spam sent by

[3] *Hypertouch Inc. v. Kennedy-Western University*, 2006 WL 648688, at 4 (N.D. Cal. 2006), *Gordon v. Virtumundo, Inc.* 2007 WL 1459395 (W.D. Wash. 2007), at 6 and 8, *Brosnan v. Alki Mortgage, L.L.C.*, 2008 WL 413732, at 3 (2008), and *ASIS Internet Services v. Optin Global, Inc.*, 2008 WL 1902217 (N.D. Cal. 2008) at 17.

Appellees), 365:19 (purchase spam filters), 472:2 and 475:14-15 (servers cost tripled), and 481:14-15 (several other adverse effects).)

E. PLAINTIFF WAS HARMED AND IS THEREFORE ENTITLED TO DAMAGES PROVIDED BY THE STATUTE

"[A]n ISP is wronged when it is forced to carry, filter, or investigate deceptive email." *(ASIS at* 8:9) The *ASIS* court held that a provider of internet access services is "adversely affected by a violation" of the CAN-SPAM Act within the meaning of § 7706(g)(1) if it has suffered specific harms, such as network problems or increased costs, and has carried the unlawful spam over its facilities. *(Id. at* 8:10-12.)

Providers of Internet access services can seek an injunction and collect damages of up to a hundred dollars per email for each CAN-SPAM violation or actual damages, together with attorneys' fees. (*Id.* at 8: 13-20 (*citing* 15 U.S.C. § 7706(g)(1), (3) and (4)).)

The CAN-SPAM Act even orders the Federal Trade Commission to create a bounty payable to those who track down spammers and provide information leading to the FTC's collection of a civil penalty. *(Id.* at 8:21-25 (*citing* 15 U.S.C. § 7710 (suggesting that punishment and deterrence, rather than compensating harm, are the Act's primary goals)).) A broad interpretation of the standing provision which allows Internet access providers to join in enforcing the Act is

consonant with this statutory purpose, and more fully effectuates the purpose of the private right of action than a more restrictive construction. *(Id. at* 8:25-9:2 (*citing Resident Councils of Washington v. Leavitt*, 500 F.3d 1025, 1032 (9th Cir. 2007) (*quoting Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (courts should construe remedial legislation broadly to effectuate its purposes)).)

There is no reason to hold that Internet access services that block deceptive email (and incur costs doing so) cannot enforce the CAN-SPAM Act's prohibitions. (*See id.* at 9:8-9.) On the contrary, a holding that an Internet access services which successfully protects its consumers by using filters and other spam management has no standing to bring suit would emasculate the private right of action, undercut the deterrent purposes of the Act, and inappropriately "shift to the victim the responsibility to avoid spam." *(Id. at* 9:10) Such a holding also flies in the face of statutory protections for Internet access providers that attempt to protect Internet users from unlawful material (*see* e.g., 47 U.S.C. § 230) and would punish such providers for attempting to filter unwanted and unlawful email advertising and would benefit those bad actors that go to great lengths to hide, by immunizing them from any suit based upon investigation of available evidence.

Here, Appellants alleged facts sufficient to show they were "adversely affected by a violation" of the Act. (*See* ER at 007:22-27, 009:18-19, 60:8-12, 063:24-64:7, 067:4-9 and 067:21-68:4 and 493:14-20 (replace computers),

268:23-269:5 (purchase software), 365:19 (purchase spam filters), 472:2 and 475:14-15 (servers cost tripled), and 481:14-15 (adverse effects).) Appellants were adversely affected because they received, processed, and stored the spam emails at issue in this suit; they spent significant time dealing with spam, incurred cost in spam filtering; have been forced to expand their server and network capacity because of spam; and have experienced network slowdowns because of spam. (*See* ER at 007: 60:8-12, 63:24-64:6, 007:22-27, 009:18-19, 067:4-9 and 067:21-68:4, 493:14-20, 268:23-269:5, 365:19, 472:2, 475:14-15, and 481:14-15.)

Moreover, Appellants were forced to purchase a new filtering system because of spam, in part because of the emails at issue in this case, and Appellants and their system administrator collectively spent many hours a week working on problems caused by spam. Appellants suffered specific harm because they incurred spam-related expenses for filtering systems, expanded server and network capacity, and personnel time. They carried Appellees unlawful emails over their facilities. Appellants have standing under 15 U.S.C. § 7706(g)(1). (*See ASIS at* 10:1-4.)

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IV CONCLUSION

This Court should consider the recent decisions by the Northern District of California and of the Washington District Court and reverse the findings below.

WALTON & ROESS LLP

Dated: November 25, 2008

/s/ Timothy J. Walton
Timothy J. Walton

CERTIFICATE OF SERVICE: I certify that a copy of this document was mailed, by placing a copy in a sealed envelope first class postage thereon fully prepaid, in the United States Postal Service for collection and mailing this day in accordance with my ordinary business practices, on November 25, 2008, to the other party's attorneys at these address:

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