

No. 07-35487

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**JAMES S. GORDON,
Appellant - Plaintiff,**

v.

**VIRTUMUNDO, INC., ADKNOWLEDGE, INC.,
SCOTT LYNN, JOHN DOES, I-X.**

Appellees - Defendants.

**APPEAL FROM THE UNITED STATES COURT FOR THE WESTERN DISTRICT
OF WASHINGTON AT SEATTLE
(Hon. John C. Coughenour)
No. CV06-0204JCC**

**BRIEF OF APPELLEES VIRTUMUNDO, INC.,
ADKNOWLEDGE, INC. AND SCOTT LYNN**

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Virtumundo, Inc. certifies the following:

Virtumundo has no parent corporations. No publicly held company owns 10 percent or more of the stock of Virtumundo.

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Adknowledge, Inc. certifies the following:

Adknowledge has no parent corporations. No publicly held company owns 10 percent or more of the stock of Adknowledge.

REQUEST FOR ORAL ARGUMENT

Appellees Virtumundo, Inc., Adknowledge, Inc., and Scott Lynn request oral argument in this matter.

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I. JURISDICTIONAL STATEMENT

A. JURISDICTION IN THE DISTRICT COURT

On February 9, 2006, Appellant James S. Gordon, Jr. (“Appellant” or “Gordon”), together with co-plaintiff Omni Innovations LLC (“Omni”) filed a Complaint in the United States District Court for the Western District of Washington. (Dkt. # 1.¹) Appellees Virtumundo, Inc. (“Virtumundo”), Adknowledge, Inc. (“Adknowledge”) and Scott Lynn (together, “Appellees”) were the defendants. (Id.) Appellant and Omni² brought suit, *inter alia*, under the CAN-SPAM Act of 2003 (Controlling the Assault of Non-Solicited Pornography and Marketing Act) (“CAN-SPAM”), 15 U.S.C. §7701-7713. Accordingly, the District Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 based on the existence of a federal question. (Dkt. # 1 at 2.)

B. JURISDICTION IN THE APPELLATE COURT

On May 15, 2007, the District Court entered an Order (“Order”) granting Appellees’ Motion for Summary Judgment and dismissing all claims against Defendants/Appellees (Dkt. #121 at 21:7-9.) Subsequently, on June 6, 2007, the

¹ Citations to the record include docket number and page number (“Dkt. # __ at __”) with the following exception: pursuant to Fed. R. App. P. 28(e), references to Supplemental Excerpts of Record filed by Appellees are designated “ER _____”.

² On November 16, 2007, the Ninth Circuit dismissed Omni, a corporate appellant which was not represented by licensed counsel. Consequently, the Order and Judgment remain in full force and effect against Omni.

District Court entered its Judgment in a Civil Case (“Judgment”), confirming the final dismissal of all causes of action against Defendants/Appellees. (Dkt. #122.) Appellant now seeks review of the District Court’s Order and Judgment.

The Ninth Circuit has appellate jurisdiction pursuant to 28 U.S.C. §1291 (“The courts of appeals... shall have jurisdiction of appeals from all final decisions of the district courts of the United States”). Appellant filed his Notice of Appeal (ER 682) on June 15, 2007, within thirty (30) days after the Judgment was entered, pursuant to Fed. R. App. P. 4(a)(1)(A).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly determined that Appellants lack standing to bring a private cause of action under CAN-SPAM.
2. Whether the District Court correctly determined that Appellants’ claims under Washington’s Commercial Electronic Mail Act (“CEMA”), Wash. Rev. Code § 19.190, were pre-empted by CAN-SPAM.

III. STATEMENT OF THE CASE

Appellant is an individual who claims to have done business as an interactive computer service known as “gordonworks.com.” ER 2. Appellant describes himself as being in the “spam business,” which is “notifying spammers

that they're violating the law . . . and . . . we file lawsuits.” ER 264 at 2-6.

Appellant receives no income other than from settling CAN-SPAM lawsuits and, before the “spam” business, his sole source of income was state unemployment benefits. ER 178-79 (Dkt. #101 Ex. A at 32:9 - 33:19).

Appellees Virtumundo and Adknowledge are Delaware corporations which provide online marketing services to third-party clients. Dkt. #31. Virtumundo markets products for its clients by transmitting e-mails to interested consumers. Id. Adknowledge maintains a real-time marketplace used by advertisers to bid on keywords or categories in which consumers have demonstrated interest; the highest bidder's advertisements are displayed. One of the manners of display is via email. Appellee Scott Lynn is a director of Adknowledge, and is a shareholder of Virtumundo. Id.

In the District Court, Appellant filed a First Amended Complaint (“FAC”) alleging he received materially false or misleading, unsolicited e-mail advertisements from Appellees that were transmitted through Omni's domain server to his e-mail address <jim@gordonworks.com,> as well as to other individuals using Gordonworks for domain hosting. ER 5. The FAC alleged violations of CAN-SPAM, CEMA, the Washington Consumer Protection Act (“WCPA”), Wash. Rev. Code §§ 19.86.010-.920, and Washington's “Prize

Statute,” Wash. Rev. Code §§ 19.170.010-.900. ER 5-11.

On December 8, 2006, the district court granted in part and denied in part Appellees’ motion to dismiss various claims for pleading deficiencies, dismissing Appellant’s Prize Statute claims entirely, and eliminating portions of Appellant’s CEMA and WCPA claims relating to “personally identifying information”. Dkt. #51. The district court granted leave for Appellant to further amend his FAC to cure the identified defects. Id. Appellant never did so. ER 683.

Subsequently, on January 22, 2007, Appellees moved for summary judgment on all of Appellant’s remaining claims. Dkt. #98. Those included CAN-SPAM claims, CEMA claims, and WCPA claims as they related to surviving CEMA claims (but not to the dismissed Prize Statute or CEMA claims). Id.

For their summary judgment motion, as evidence of the lack of support for Appellant’s remaining claims, Appellees submitted a transcript of James Gordon’s deposition, amounting to nearly five hundred (500) pages. ER 145. Throughout his lengthy deposition, Gordon was unable to identify any harm he had suffered as a result of Appellees’ alleged emails, admitted he had not personally found any of those emails misleading, and affirmed he actually profited from alleged “spam” emails. ER 368; ER 541 at 18-20. Appellees also submitted a declaration from expert witness Neal Krawetz, who testified that all emails Appellant attributed to

Appellees (a variety of the emails submitted by Appellants to the record were not related to Appellees at all), could easily be traced to Appellees with a WHOIS search.³ ER 116-17 at ¶ 21-22. In his response, Appellant again raised no allegation of actual damages. ER 632.

On May 15, 2007, the district court granted Appellees' motion for summary judgment. The court determined Appellant had no standing to sue under CAN-SPAM, 15 U.S.C. § 7706(g)(1), because he was not an "Internet access service" ("IAS") that was "adversely affected" by Appellees' alleged CAN-SPAM violations. Dkt. # 121 at 9:5-6, 13:12-16. The district court explained its holding as follows:

Plaintiffs... admit to *benefitting* from spam by way of their research endeavors and prolific litigation and settlements. This belies any suggestion that Plaintiffs are "bona fide Internet service providers" that have been "adversely affected" by spam. Instead, Plaintiffs' continued use of other people's e-mail addresses to collect spam and their undisputed ability to separate spam from other e-mails for generating lawsuit-fueled revenue directly contradicts any hint of adverse effect that otherwise might exist. Plaintiffs are not the type of entity that Congress intended to possess the limited private right of action it conferred on adversely affected bona fide Internet access service providers.

Id. at 15:9-16 (emphasis original).

³ A WHOIS search is a network based protocol through which users can access contact information for the registrants of domain names and network addresses.

The district court also dismissed Appellant's two remaining CEMA claims. These claims related to "from lines" in the "headers" of emails, which Appellant claimed were misleading "because the 'from name' alone does not identify [Appellees]." Dkt. # 121 at 17:23 - 18:9. They also concerned "subject lines" which were allegedly false and misleading. Id. at 17:15-16. The court noted that Appellant had failed to provide any evidence relating to his subject line claims, and concluded those claims "must fail." Id. at 17:19-20. The court also determined that CAN-SPAM pre-empted CEMA claims which did not specifically address "falsity or deception" in emails. Id. at 16:10-14, 19:5-11. Since Appellant did not dispute that Appellees could be identified through use of the "from line" information in their alleged emails, the court concluded as follows:

...the Court cannot find that "from addresses" ending with a domain that facilitates an accurate identification of Defendants could in any sense be found "false" or "deceptive." Accordingly, while claims actually alleging falsity or deception under CEMA would not be preempted, Plaintiffs' claims here – for, at best, "incomplete" or less than comprehensive information – are for immaterial errors that may not be litigated under state law. Plaintiffs have not raised any issues of material fact that could prove Defendants' e-mails materially "false or deceptive" as those terms are used in the CAN-SPAM Act. Accordingly, Plaintiffs' CEMA claims are preempted by CAN-SPAM.

Id. at 20:2-8.

The district court further dismissed Appellant's WCPA claim, which was based on his pre-empted CEMA claim, and added that

the record has now been developed and it is undisputed that Plaintiffs have suffered no actual harm and are instead seeking only statutory damages. Accordingly, there is no genuine issue of material fact as to the injury element of Plaintiffs' CPA claim.

Id. at 21:2-4. Accordingly, the district court dismissed all of Appellant's remaining causes of action. The court later issued a final judgment in favor of Appellees. ER 681. Appellant filed a notice of appeal and this appeal followed.

IV. STATEMENT OF FACTS

A. APPELLANT PROFITS FROM OPERATING HIS "SPAM BUSINESS"

Through his website at <gordonworks.com>, Appellant provided e-mail accounts to at least six persons "free for the first year, subject to data collection" for his "research purposes." ER 33 (Plaintiffs' Response to Interrogatory No. 22). His clients "relinquished control" of their e-mail accounts in 2003. ER 111 (Dkt. # 93 Ex. A at 465:6-8). At the time the district court issued its final judgment, the only person other than himself who used a "Gordonworks" e-mail address was Appellant's wife. Id. at 9-14. Nevertheless, Appellant did not disable the relinquished e-mail accounts; instead, he kept them active for "spam research". ER 343 at 19-23. Appellant testified that the "benefits" of receiving spam could be

quantified in terms of his dissertation research, as well as “settlement agreements for people who have said that they wouldn't spam me any longer.” ER 368. All of Appellant’s entire income or revenue for 2006 and 2007 has been from “settlements and disputes.” ER 78 at 20-22.

B. APPELLANT SUFFERED NO HARM RESULTING FROM APPELLEES’ ALLEGED ACTIONS

Appellant alleged that “[d]ue to the limited technological resources available to me as a small business, the sheer volume of the spam sent by Defendants has made it extremely difficult to manage, and has cost me untold hours of manpower, and substantial resources.” ER 64 at ¶26. However, Appellant never hired any staff to deal with this administrative situation, and never elaborated on the “resources” he allegedly spent. Appellant admitted to using spam filters, which catch and mark spam before it arrives in Appellant’s inboxes. ER 223-24; 359; 362. All evidence of record suggests the time and resources expended by Appellant are exclusively directed toward litigation preparation. ER 67 at ¶3 (“The job of collecting, sorting, and compiling records on this and other defendants is a very time-consuming process.”). Appellant spends his time sorting batches of emails *that have already been identified as spam*, sent to him by clients “unsorted in lots of 10-50,000” for use in his multiple spam lawsuits. Id.

Appellant was presented with evidence that people had opted in to receive commercial email using the same email addresses that Appellant now complained were the target of Appellee's alleged spam emails. ER 274-75; 364-47. Appellant conceded in deposition testimony that he had opted into receive such email using at least some of those email addresses, and may have "opted in" subsequent to "opting out". ER 607-09. Appellant was unable to show he had opted out of receiving commercial email in the manner directed in each contested email allegedly sent by Appellees (ER 232; 239-40), although Appellant purportedly sent opt-out demands to email addresses he knew or should have known were not monitored by human beings. ER 239-40; 400-01.

Nor did Appellant prove the emails allegedly sent by Appellees had any technical impact on his purported business. Appellant did not dispute that Omni's lease to a server from a third party provided access to 500 gigabytes of data transfer space ("bandwidth") per month through server-host GoDaddy.com, Inc. ER 252 at 16-22. Appellant acknowledged he has not "come close" to using all of that bandwidth. *Id.* at 22.

Appellant testified he was not seeking actual damages (because none existed) and that he sought only statutory damages for each e-mail allegedly sent by Appellees. ER 461-62 (Dkt. #101 at 319:18-320:22). In his motion for partial

summary judgment, Appellant sought CAN-SPAM statutory damages for seven thousand eight hundred ninety (7,890) allegedly illegal emails, pursuant to 15 U.S.C. § 7706(g), of one hundred dollars (\$100) per email, to be tripled for violations committed “willfully and knowingly.” ER 56-57. By itself, the CAN-SPAM portion of Appellant’s statutory damages request was therefore two million three hundred sixty-seven thousand dollars (\$2,367,000). In his final opportunity at dispositive briefing, Appellant again raised no allegation of actual damages and did not dispute the facts described above. ER 648-49.

C. APPELLANT ADMITTED HE WAS NOT MISLED BY ANY “FROM LINES” IN APPELLEES’ ALLEGED EMAILS, AND OFFERED NO EVIDENCE REGARDING HIS “SUBJECT LINE” CLAIMS

Appellant testified that, despite his allegations that Appellees’ emails were false or misleading, he has not been misled or confused by any “from lines” in Appellees’ emails. ER 541 at 18-20. Further, as the Court noted, Appellant did not offer any evidence which indicated the subject lines of any emails allegedly sent by Appellees were false or misleading.

V. SUMMARY OF ARGUMENT

The district court correctly dismissed all of Appellant’s claims. The court correctly applied CAN-SPAM’s “adverse effect” requirement to the extensive

factual record, concluded Appellant suffered no such effect, and consequently dismissed his CAN-SPAM claim. Appellant's novel arguments regarding CAN-SPAM's constitutionality should not be considered and, even if true, provide another reason to dismiss Appellant's CAN-SPAM claim.

Further, the district court properly concluded Appellant's CEMA claims were pre-empted by CAN-SPAM, which restricts state email statutes to the prohibition of fraudulent or deceptive emails. The court reviewed the record and reasonably determined none of the errors which Appellant attributed to Appellees amounted to fraud or deceit. Accordingly, the district court made the correct decision and dismissed Appellant's CEMA claims.

Appellees respectfully request that the Ninth Circuit affirm the district court's Order and Judgment. Additionally, the Ninth Circuit should decline the invitation of the Washington State Attorney General ("Amicus") to address an issue which Appellant did not raise and the district court did not create – namely, whether CEMA is pre-empted by CAN-SPAM. The district court expressly acknowledged that "some CEMA claims are not preempted" (Dkt. #121 at 20:14); accordingly, the Amicus's requested ruling is overbroad and outside the scope of appeal.

VI. STANDARD OF REVIEW

Generally, a district court's summary judgment order is reviewed de novo. Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996). In such cases, the appellate court's review is governed by the same standard used by the trial court under FED.R.CIV.P. 56(c). Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054 (9th Cir. 1997). The appellate court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 834 (9th Cir. 1997). The appellate court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. Covey, supra, 116 F.3d at 834. A bare contention that an issue of fact exists is insufficient to create a factual dispute. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983). The appellate court may affirm the district court's grant of summary judgment on any basis supported by the record, even if not relied on by the district court. United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall, 355 F.3d 1140, 1144 (9th Cir. 2004).

When a mixed question of law and fact involves undisputed underlying facts, summary judgment is appropriate. Han v. Mobil Oil Corp., 73 F.3d 872, 874 (9th Cir. 1995). Further, if the application of the law to the facts requires an

inquiry that is “essentially factual”, as in this case, review is for clear error.

United States v. Marbella, 73 F.3d 1508, 1515 (9th Cir. 1996), cert. denied, 518 U.S. 1020, 116 S. Ct. 2555, 135 L. Ed. 2d 1073 (1996).

“Review under the clearly erroneous standard is significantly deferential, requiring a ‘definite and firm conviction that a mistake has been committed.’”

Concrete Pipe & Prod. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993). Thus, an appellate court must accept the lower court’s factual findings unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. Sawyer v. Whitley, 505 U.S. 333, 346 n.14 (1992).

VII. ARGUMENT

Under the applicable standards of review, the district court correctly held that Appellant lacks standing to bring a private cause of action under CAN-SPAM, and that Appellant’s CEMA claims were pre-empted by CAN-SPAM.⁴ The issue briefed by the Amicus – whether “CEMA is consistent with CAN-SPAM” (Amicus Brief (“Amicus Br.”) at 3) – is not before the Ninth Circuit on appeal, and this Court should decline to rule on that issue. Further, Appellant may not raise new issues and submit new and unauthenticated evidence on appeal.

⁴ Appellant has not presented any arguments for reversing the district court’s dismissal of his WCPA claim, which the Ninth Circuit should affirm.

Accordingly, this Court should affirm the judgment below.

A. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT LACKS STANDING TO BRING A PRIVATE CAUSE OF ACTION UNDER CAN-SPAM

The district court dismissed Appellant's CAN-SPAM claims after determining that Appellant lacked standing to raise them. Dkt. #121 at 15:17-19. Appellant's contrary arguments are incoherent, but appear to be as follows: 1) CAN-SPAM is purportedly unconstitutional (Appellant's Brief ("App. Br.") at 1-3); 2) Appellant was allegedly deprived of his 7th Amendment right to a jury trial when the district court granted summary judgment (App. Br. at 4); and 3) the district court allegedly erred in interpreting CAN-SPAM (App. Br. at 4-7). Most of Appellant's arguments are not properly raised on appeal and should not be considered, and all of them are unpersuasive for the reasons discussed below.

1. The District Court properly concluded that Appellant did not suffer any "adverse effect" resulting from Appellees' alleged actions.

As the District Court noted, CAN-SPAM allows an action by a "provider of Internet access service ["IAS"] adversely affected by a violation of" 15 U.S.C. §§ 7704(a)(1), 7704(b), or 7704(d) 4 or "a pattern or practice that violates" § 7704(a)(2), (3), (4), or (5). 15 U.S.C. § 7706(g)(1). Consequently, the district court was required to determine whether Appellant was an IAS which was adversely affected by Appellees' alleged CAN-SPAM violations.

CAN-SPAM, at 15 U.S.C. § 7702(11), defines “Internet access service” by referring to another statute, 47 U.S.C. § 231(e)(4), which provides as follows:

The term "Internet access service" means 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. Such term does not include telecommunications services.

Id. The district court read this statute and determined it was ambiguous⁵:

It is not clear what exactly the exceedingly broad phrase "service that enables users to access" means, and the parties dispute whether this definition incorporates any technical, hardware, or space requirements, and ultimately, whether it includes Plaintiffs. The Court finds that, although "Internet access service" is defined (by incorporation) in the CAN-SPAM Act, the statutory definition of an IAS is nevertheless ambiguous.

Dkt. #121 at 9:16-20. Since the district court held CAN-SPAM’s definition of “Internet access service” was ambiguous, it properly relied on the statute’s legislative history when determining whether Appellant had standing to bring a private cause of action under CAN-SPAM. *See United States v. Curtis-Nev. Mines, Inc.*, 611 F.2d 1277, 1280 n.1 (9th Cir. 1980) (holding it is proper for courts to review legislative history when a statute is ambiguous).

⁵ As the district court noted, another Ninth Circuit district court also determined CAN-SPAM’s definition of IAS was ambiguous, and reviewed the legislative history when reaching its conclusion. *See Hypertouch, Inc. v. Kennedy-Western Univ.*, No. C04-5203-SI, 2006 WL 648688 (N.D.Cal. Mar. 8, 2006) (cited in Order at 10).

The district court made an extensive and thorough review of the relevant legislative history before reaching its conclusions on the standing issue. The court noted Congress had indicated CAN-SPAM's standing provision "provides for a *limited* right of action by bona fide Internet service providers." 150 Cong. Rec. E72 (January 28, 2004) (emphasis added). "The most significant harms enumerated by Congress, the Court further explained, "were ISP [Internet service provider] - or IAS-specific, going well beyond the consumer-specific burden of sorting through an inbox full of spam." Dkt. #121 at 12:8-9. The district court concluded as follows:

These harms to IASs or ISPs relate to network functioning, bandwidth usage, increased demands for personnel, and new equipment needs, which eventually cost consumers. S. REP. NO. 108-102, at 6... Thus, even if an entity could meet the ill-defined and broad definition of an IAS, the "adverse effect" to that entity must be both real and of the type uniquely experienced by IASs for standing to exist. Any other reading would expand the private right of action beyond what Congress intended.

Dkt. #121 at 12:9-19.

After it made its reasonable interpretation of Congressional intent regarding CAN-SPAM, the district court undertook an essentially factual inquiry in determining whether Appellant had standing to bring its CAN-SPAM claims. Two full pages of its May 15, 2007 Order are devoted to this factual analysis. Dkt.

#121 at 13-15. The district court's factual findings were based on the parties' "extensive summary judgment briefing and a record that clarifie[d] the nature of [Appellant's] claims." Id. at 20:16-17. The record included a lengthy deposition of Appellant in which he had numerous opportunities to establish a factual basis for his claims and failed to do so. ER 145. When Appellees moved for summary judgment, they provided the district court with the entire deposition transcript. Id.

Based on its review of the extensive factual record, the district court concluded as follows:

Plaintiffs undisputedly have suffered no harm related to bandwidth, hardware, Internet connectivity, network integrity, overhead costs, fees, staffing, or equipment costs, and they have alleged absolutely no financial hardship or expense due to e-mails they received from Defendants. Plaintiffs have spam filters available to them, and such filters continue to become more sophisticated. Nor do Plaintiffs allege that they use "dial-up," the costs associated with which were specifically discussed by Congress (and likely are becoming an obsolete concern as high-speed broadband usage becomes the norm). Moreover, even if there is some negligible burden to be inferred from the mere fact that unwanted e-mails have come to Plaintiffs' domain, it is clear to the Court that whatever harm might exist due to that inconvenience, it is not enough to establish the "adverse effect" intended by Congress. Indeed, the only harm Plaintiffs have alleged is the type of harm typically experienced by most e-mail users. The fact that Congress did not confer a private right of action on consumers at large means that "adverse effect" as a type of harm must rise beyond the level typically experienced by consumers – i.e., beyond the annoyance of spam...

Finally, Congress's reference to “bona fide Internet service providers” merits comment. Plaintiffs' clients are few... Plaintiffs also admit to *benefitting* from spam by way of their research endeavors and prolific litigation and settlements. This belies any suggestion that Plaintiffs are “bona fide Internet service providers” that have been “adversely affected” by spam. Instead, Plaintiffs' continued use of other people's e-mail addresses to collect spam and their undisputed ability to separate spam from other e-mails for generating lawsuit-fueled revenue directly contradicts any hint of adverse effect that otherwise might exist. Plaintiffs are not the type of entity that Congress intended to possess the limited private right of action it conferred on adversely affected bona fide Internet access service providers.

Dkt. #121 at 13:17-14:4, 15:8-16 (emphasis original). The district court’s Order provides an abundance of details indicating its holding was based on a factual inquiry as to whether the harm allegedly suffered by Appellant qualified him as an “adversely affected” IAS pursuant to 15 U.S.C. § 7706(g)(1). As the court explained at considerable length, the factual record overwhelmingly indicated Appellant was not adversely affected and had no standing to bring his CAN-SPAM claim.

The district court’s legal analysis was reasonable, and its application of the law to the facts was straightforward. Since the lower court engaged in an extensive factual analysis when determining the issue of CAN-SPAM standing, the Ninth Circuit should apply the “significantly deferential” standard of clear error in Concrete Pipe, *supra*. 508 U.S. at 623. A review of the record below will confirm the district court’s factual conclusions were reasonable and that it did not

commit any mistakes. Accordingly, the Ninth Circuit should affirm the district court's holding that Appellant does not have standing to bring his CAN-SPAM claims as an "adversely affected" Internet access service.

2. Appellant may not make new arguments on appeal.

The first portion of Appellant's brief is devoted to a rambling discussion of why he believes CAN-SPAM is an unconstitutional statute. This is an issue Appellant never raised before the district court. Appellant's new theories unrelated to the specific rulings in the Order and Judgment, such as the constitutionality of CAN-SPAM, should be rejected. In Dream Palace v. County of Maricopa, 384 F.3d 990, 1005 (9th Cir. 2004), the Ninth Circuit held as follows:

Ordinarily, we decline to consider arguments raised for the first time on appeal. This rule serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers appellate courts the benefit of the district court's prior analysis, and prevents parties from sandbagging their opponents with new arguments on appeal.

Id. (cites omitted); *see also Ritchie v. United States*, 451 F.3d 1019, 1026 & n.12 (9th Cir. 2006) (concluding that failure to raise an issue before district court resulted in waiver on appeal).

3. The District Court's holding was correct regardless of whether CAN-SPAM is constitutional.

Appellant cited CAN-SPAM as a basis for one of his claims against Appellees. Now, Appellant claims CAN-SPAM is unconstitutional, for reasons that are hard to decipher. If this is true, then there is no basis for Appellant's CAN-SPAM claim, since an unconstitutional statute may not be enforced. *See, e.g., Lind v. Grimmer*, 30 F.3d 1115, 1117 (9th Cir. 1995), cert. denied, 513 U.S. 1111, 115 S. Ct. 902, 130 L. Ed. 2d 786 (1995) (upholding district court's permanent injunction against enforcement of unconstitutional statute.)

None of Appellant's arguments, even if convincing, would affect the decision reached by the district court. Appellant seemingly argues that receipt of an unsolicited email is the equivalent of an unreasonable search and seizure – a conclusion which is nonsensical and unsupported by legal authority. App. Br. at 1. He also claims receipt of alleged spam emails “is tantamount to the court granting a dynamic easement... to trespass onto [Appellant's] computer hard drive...” *Id.* The district court did not grant Appellees any affirmative relief; it merely dismissed Appellant's claims. Dkt. #121.

Appellant further argues that Congress's decision to limit the private right of action conferred under CAN-SPAM, violates “the Equal Protection Clause of

the 14th Amendment to the U.S. Constitution.” App. Br. at 2. Appellant offers no authority in support of this argument, because there is none.⁶

Even assuming CAN-SPAM were unconstitutional, however, that would only mean Appellant relied on an invalid statute in district court. Appellant’s argument, if true, provides this Court with another, independent reason for affirming the dismissal of Appellant’s CAN-SPAM claims.

4. Summary judgment was proper, since the District Court correctly determined there were no triable issues of fact.

Appellant claims the district court’s summary judgment deprived him of his “7th Amendment right to a trial by jury.” App. Br. at 4. It is established law that the Seventh Amendment right to a trial by jury does not preclude the granting of a summary judgment where there is no genuine issue of material fact. *See Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 627, 88 L. Ed. 967, 64 S. Ct. 724 (1944); *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 47 L. Ed. 194, 23 S. Ct. 120 (1902); *Lindsey v. Leavy*, 149 F.2d 899, 902 (9th Cir. 1945); *Burnham Chemical Co. v. Borax Consolidated*, 170 F.2d 569, 573 (9th Cir. 1948); *M2 Software, Inc. v. Madacy Entm’t*, 421 F.3d 1073, 1078 (9th Cir.

⁶ Appellant adds some unsupported, rambling, defamatory allegations about Appellees, which Appellees deny. App. Br. at 3. This Court should not consider them and, in any event, they are irrelevant to the issues presented for review.

2005)(affirming district court’s summary judgment when “there was no triable issue”).

In this case, the record confirms summary judgment was appropriate. The district court made a careful review of the extensive record, and concluded as follows:

Plaintiffs have not raised any issues of material fact that could prove Defendants' e-mails materially “false or deceptive” as those terms are used in the CAN-SPAM Act. Accordingly, Plaintiffs’ CEMA claims are preempted by CAN-SPAM.

Dkt. #121 at 20:6-8. The district court also found that “[t]aking the facts as a whole... Plaintiffs lack standing to sue under [15 U.S.C.] § 7706(g)(1)”, the relevant provision in CAN-SPAM. *Id.* at 15:17-18. Regarding Appellant’s remaining WCPA claim, the court held as follows:

... the record has now been developed and it is undisputed that Plaintiffs have suffered no actual harm and are instead seeking only statutory damages. Accordingly, there is no genuine issue of material fact as to the injury element of Plaintiffs' CPA claim. For the foregoing reasons, Plaintiffs' CPA claims must be DISMISSED.

Dkt. #121 at 21:2-5.

Appellant had the opportunity in district court to prevent a summary dismissal of his claims by raising a genuine issue of material fact. He failed to do that. Consequently, dismissal was appropriate. As the cases cited above indicate,

the Seventh Amendment does not require courts to waste their resources on jury trials in cases like this one, with no genuine issues of material fact.

5. The district court correctly interpreted CAN-SPAM.

Appellant's final argument regarding CAN-SPAM appears to be that the district court incorrectly interpreted the "adverse effect" requirement imposed by 15 U.S.C. § 7706(g)(1). The district court reasonably interpreted the statute as requiring more than a "negligible burden", and dismissed Appellant's CAN-SPAM claim because he could not show his alleged burdens were more than negligible. Dkt. #121 at 13:23-25. On appeal, Appellant seems to argue that Congress meant to impose a strict liability standard. App. Br. at 4-7.

Appellant emphasizes the district court's use of the word "significant" in describing the level of harm for which Congress intended to impose liability under CAN-SPAM. Disingenuously, Appellant suggests the district court "insert[ed] or append[ed]" that word to the statute. App. Br. at 5. The district court did no such thing – it merely used the word "significant" as a synonym for "more than negligible." As the court properly concluded, imposition of a strict liability standard would nullify Congress's intent in passing CAN-SPAM, by making its "limited" private right of action available to almost anyone:

Not only must CAN-SPAM private plaintiffs allege a particular type of harm, the adverse effect they allege must be significant. To hold

otherwise would lead to absurd results... If Congress's "limited" provision of a private right of action is to have any traction at all, the quantum of harm for Plaintiffs... or any other purported IAS must be significant...

The necessity of a showing of significant adverse effect is particularly evident in the instant case, where Plaintiffs seek solely statutory damages. Indeed, Plaintiffs seek nearly \$2.4 million in what amount to punitive fines on Defendants, calculated per e-mail. Because Congress provided a private right of action only to "provider[s] of Internet access service *adversely affected*," 15 U.S.C. § 7706(g)(1) (emphasis added), it must be that Congress intended standing to require a showing of some significant harm to justify such steep statutory damages pursuant to §7706(g)(3). Statutory damages under CAN-SPAM never would be a function of actual damages. However, "adverse effect" is a textual prerequisite to claiming these damages. Any other construction would impose strict liability on spammers for e-mails received by any IAS regardless of adverse impact, thereby rendering the "adversely affected" language of the private right of action provision superfluous. Such is an impermissible result in any statutory construction.

Dkt. #121 at 14:5-25.

The district court applied the only reasonable construction of "adverse effect". Appellant's suggested interpretation would render a key provision of CAN-SPAM superfluous. "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Market Co. v. Hoffman, 101 U.S. 112, 115-16, 25 L. Ed. 782 (1879) (internal quotation marks omitted) (cited with approval in Syverson v. IBM, 472 F.3d 1072, 1086 (9th Cir. 2007)). The district court's construction of

CAN-SPAM, unlike Appellant's, gives equal weight to all provisions of the statute without rendering any of them superfluous. This court should confirm the soundness of the district court's judgment, and affirm the denial of Appellant's CAN-SPAM claims.

B. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT'S CEMA CLAIMS WERE PRE-EMPTED BY CAN-SPAM

The district court properly dismissed Appellant's CEMA claims because Appellant failed to establish a genuine issue of material fact for one of them, and the other was pre-empted by CAN-SPAM, as discussed below. Dkt. #121 at 17:19-20, 20:15-18. Appellant's arguments to the contrary are unavailing (App. Br. at 7-10).

Further, the Amicus's arguments are irrelevant and request declaratory relief which is well outside the scope of the appeal. This court should affirm the district court's dismissal of Appellant's CEMA claims and abstain from writing the superfluous advisory opinion requested by the Amicus.

1. The District Court limited its ruling on pre-emption to the specific facts of the case.

Generally, the Ninth Circuit does not consider on appeal an issue raised only by an amicus. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1581 n.9 (9th Cir. 1986) (amicus may not frame the issues for appeal); Preservation Coalition, Inc. v.

Pierce, 667 F.2d 851, 862 (9th Cir. 1982) (same). Appellant’s brief did not raise the issue of whether CAN-SPAM pre-empts all CEMA claims in their entirety, as the Amicus argues: “Amicus... is concerned that the opinion could be read so broadly as to preempt the provisions of [CEMA].” Amicus Br. at 1. The Amicus requests the Ninth Circuit “hold that CEMA is consistent with CAN-SPAM”, an overbroad conclusion that is outside the issues framed by Appellant and unrelated to the district court’s express legal conclusions. Amicus Br. at 3.

The district court dismissed Appellant’s CEMA claims after determining that those claims fell into two categories, neither of which was supported by the factual record. The Court noted it was “undisputed” that the basis for Appellant’s CEMA claims was the following italicized language:

(1) No person may initiate the transmission, conspire with another to initiate the transmission, or assist the transmission, of a commercial electronic mail message from a computer located in Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that:

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

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

Dkt. #121 at 17:2-7 (citing Wash. Rev. Code 19.190.020). The court dismissed Appellant’s “subject line” claims (Wash. Rev. Code 19.190.020 (1)(b)) because

Appellant did “not allege that any genuine issue of material fact exists as to the subject line claims or offer any evidence going to these claims.” *Id.* at 17:19-20.

The court then turned to Appellant’s remaining “from line” claim, which alleged Appellants’ email “headers violate[d] both CAN-SPAM and CEMA because the ‘from line’ does not include [Appellants’] company names or the names of company personnel.” Dkt. #121 at 18:2-4. The court held CAN-SPAM pre-empts CEMA claims which do not specifically address “falsity or deception” in emails. *Id.* at 16:10-14, 19:5-11. The court dismissed Appellant’s remaining CEMA claim because it did not involve falsity or deception. *Id.* at 20:17-18.

Significantly, the district court expressly restricted its holding to the facts of this case:

This Court does not disagree with the general proposition that some CEMA claims are not preempted. Indeed, as noted above, CEMA claims that allege “false or deceptive” e-mail headers would fit into Congress’s savings clause. However, **in the instant case**, the Court has the benefit of extensive summary judgment briefing and a record that clarifies the nature of Plaintiffs’ claims. **The claims in the instant case are not for “falsity or deception,”** and therefore they are preempted and must be DISMISSED.

Dkt. #121 at 20:13-18 (emphasis added). Given the clear limitations the district court imposed on its legal conclusions, there is no credible basis for the Amicus to claim “that the opinion could be read so broadly as to preempt the provisions of CEMA.” Amicus Br. at 19. The district court considered the extensive factual

record in this case, and this case alone, and concluded that Appellant's claims – not all potential claims brought by future CEMA claimants – were pre-empted. Accordingly, this Court should follow Sanchez-Trujillo, supra, and refrain from ruling on an issue which was presented only by the Amicus and is unwarranted given the limited scope of the district court's Order and Judgment.

2. The District Court and the Fourth Circuit properly focused on whether the emails at issue were false or deceptive.

Appellant's arguments are no more convincing than those raised by the Amicus. Appellant claims the district court erred in dismissing Appellant's CEMA claims because they were based on "immaterial errors" and were not "false" or "deceptive" as required by CEMA. App. Br. at 7-10; *see also* Dkt. #121 at 20:2-6. Disingenuously, Appellant claims the district court (and the Fourth Circuit, whose opinion the district court cited with favor) "creat[ed] an artificial standard known as 'immaterial error.'" App. Br. at 7. In truth, the district court simply determined CEMA claims are preempted to the extent they do not allege falsity or deception. Dkt. #121 at 16:10-13. Then, after reviewing the record, it concluded Appellant's CEMA claims (not all CEMA claims) were pre-empted because they relied on "immaterial errors" which did not amount to "falsity or deception." Id. at 20:5-17.

The district court cited with approval Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F. 3d 348 (4th Cir. 2006). The Omega court found that because only “materially false or materially misleading” header information was actionable under CAN-SPAM, Congress could not have intended to allow states to undermine that choice by imposing “strict liability for insignificant inaccuracies.” Omega, supra, 469 F. 3d at 355. The Amicus admits a strict liability standard is inappropriate under CEMA. *See* Amicus Br. at 14 (“CEMA... does not impose a ‘strict liability’ standard. Instead, CEMA contains an ‘unfair or deceptive’ standard...”).

As the Amicus admits but Appellant denies, the district court properly focused on the question of whether Appellee’s alleged emails were false or deceptive. In order to avoid applying an inappropriate strict liability standard, the district court was required to engage in a factual analysis of Appellant’s CEMA claims:

Specifically, Plaintiffs allege that Defendants’ headers violate both CAN-SPAM and CEMA because the “from line” does not include Defendants’ company names or the names of company personnel...

The parties agree that identification [of the sender of Appellees’ alleged emails] can be achieved by reverse-look-up using, for example, the “WHOIS” database... Plaintiffs do not dispute that WHOIS data can identify Defendants, and they have pointed to no e-mails that fail to provide information useful to a correct WHOIS look-up. Plaintiffs instead contend that this extra step should not be

required of consumers. Regardless of the merits of that argument, the Court cannot find that “from addresses” ending with a domain that facilitates an accurate identification of Defendants could in any sense be found “false” or “deceptive.”

Dkt. #121 at 18:2-4, 19:18-20:3. The district court found that the immaterial errors Appellant alleged were not false or deceptive, and Appellant’s CEMA claims were therefore pre-empted by CAN-SPAM. The court did not create a new “materiality” standard. It only applied the relevant statutes and determined that Appellant had not raised any genuine issues of material fact regarding the alleged falsity or deceptiveness of the emails in question. It reasonably concluded an immaterial error does not deceive the recipient and that Appellant could easily identify the senders of the emails it received. Consequently, the district court properly joined the Omega court by declining to impose “strict liability for insignificant inaccuracies.” Omega, supra, 469 F. 3d at 355.

Appellant’s argument is essentially that if he claims to suffer any inconvenience whatsoever from the receipt of emails, that is sufficient to allege a credible CEMA claim. App. Br. at 7-10. To the contrary, Appellant’s suggested reading of the statute would impose liability even for minor errors which do not defraud or deceive email recipients. This would render CAN-SPAM’s pre-emption clause invalid and superfluous:

This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, *except to the extent that any such statute, regulation, or rule prohibits falsity or deception* in any portion of a commercial electronic mail message or information attached thereto.

15 U.S.C. § 7707(b)(1) (emphasis added). Courts may not interpret a statute in a way which renders a key provision superfluous. Market Co., *supra*, 101 U.S.

115-16. This court should affirm the district court’s dismissal of Appellant’s CEMA claims.

C. THE DISTRICT COURT’S INTERPRETATION OF THE RECORD IS ENTITLED TO DEFERENCE

In applying the law to the facts, the district court undertook an inquiry that was “essentially factual”, which makes the “clear error” standard of review appropriate. Marbella, *supra*, 73 F.3d at 1515. When reviewing a case under this standard, “[i]f the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it” even if convinced it would have reached a different conclusion. Phoenix Engineering and Supply Inc. v. Universal Elec. Co., 104 F.3d 1137, 1141 (9th Cir. 1997) (quoting Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985)). Consequently, this court should affirm the district court’s plausible findings even if it disagrees with them.

In this case, however, the record provides no reasonable basis to even disagree with the district court's conclusions. Appellant argues the district court misunderstood Appellant's testimony and accordingly erred in issuing the Order and Judgment. App. Br. at 10-11. Appellant does not provide any specific examples, which is unsurprising given that Appellees provided the district court with the entire transcript of Appellant's lengthy deposition. ER 145. This argument, like all of Appellant's other arguments, is unavailing.

D. APPELLANT'S "PERVERSION OF JUSTICE" ARGUMENT IS INCOMPREHENSIBLE

Appellant's next argument is that "[a] perversion of the judicial process took place wherein the victim was blamed and the perpetrator was exonerated." App. Br. at 11. To put it charitably, this argument is incomprehensible. The district court did not "blame" or "exonerate" anyone. Appellant seems to imply that Appellees' alleged actions violate third party service contracts. However, he does not explain how the alleged emails violated these contracts, which provisions they violated, or why Appellant believes he has standing to allege claims on the behalf of third parties. The court should disregard this argument.

E. APPELLANT WAIVED HIS ARGUMENT REGARDING IMPROPER VENUE

Appellant's final argument is that the lawyer he chose to represent him filed the lawsuit in a jurisdiction which Appellant now finds inconvenient. App. Br. at

11-12. However, by choosing the Western District of Washington as the forum to commence this lawsuit, Appellant waived any venue objection as to Appellees.

Manley v. Engram, 755 F.2d 1463, 1468 (11th Cir. 1985). This waiver is effective even though Appellant alleges his previous counsel acted improperly by filing the lawsuit in the Western District of Washington. In Nichols v. G. D. Searle & Co., 991 F.2d 1195, 1201 (4th Cir. 1993), the court cited with approval several other cases “premised on the notion that”

a district court acts within its discretion when it finds that the interest of justice is not served by allowing a plaintiff whose attorney committed an obvious error in filing the plaintiff’s action in the wrong court, and thereby imposed substantial unnecessary costs on both the defendant and the judicial system, simply to transfer his/her action to the proper court, with no cost to him/herself or his/her attorney.

Id.; see also King v. Russell, 963 F.2d 1301, 1304 (9th Cir. 1992) (citing Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1523 (9th Cir. 1983)):

“Justice would not have been served by transferring Wood’s claims back to a jurisdiction that he purposefully sought to avoid through blatant forum shopping.”)

In addition, Appellant’s venue argument is irrelevant to this appeal, as it has nothing to do with the district court’s opinion. Therefore, this court should disregard it.

F. APPELLANT MAY NOT SUPPLEMENT THE RECORD ON APPEAL

The final pages of Appellant's brief are devoted to a belated attempt to supplement the record with new facts. App. Br. at 12-19. Most of these facts merely rehash Appellant's deposition testimony (see Dkt. #101 Ex. A), none of them support a reversal of the district court's decision, and all of them should be disregarded by this court.

Normally, the reviewing court will not supplement the record on appeal with material not considered by the trial court. Karmun v. C.I.R., 749 F.2d 567, 570 (9th Cir. 1984), cert. denied, 474 U.S. 819, 106 S. Ct. 66, 88 L. Ed. 2d 53 (1985); United States v. Canon, 534 F.2d 139, 140 (9th Cir.) (per curiam), cert. denied, 429 U.S. 991 (1976). There is no reason to deviate from the standard procedure in this case. FED. R.APP. P. 10(e) allows "correction or modification of the record" when "anything material... is omitted from or misstated in the record by error or accident." Id. In this case, there was no inadvertent omission. As the record indicates, the parties undertook extensive discovery, and Appellant had numerous opportunities to provide the court with all relevant evidence.

Moreover, Appellant has not authenticated his purported new evidence, and it is therefore inadmissible. See Official Airline Guides v. Goss, 6 F.3d 1385, 1399 (9th Cir. 1993) (unauthenticated evidence is inadmissible). This court should

disregard it, and should affirm the district court's ruling in its entirety.

VIII. CONCLUSION

For these reasons, this Court should affirm the district court's Order and Judgment dismissing Appellant's claims under CAN-SPAM, CEMA, and the WCPA.

DATED this 3rd day of December, 2007.

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By: _____



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CERTIFICATE OF COMPLIANCE
Pursuant to Fed.R.App. 32(a)(7)(C) and Circuit Rule 32-1
for Case No. 07-35487

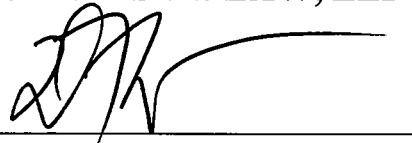
I CERTIFY THAT:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 7,774 words.

DATED this 3rd day of December, 2007.

**NEWMAN & NEWMAN,
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PROOF OF SERVICE

The undersigned hereby certifies that on this 3rd day of December, 2007, I caused the foregoing document **BRIEF OF APPELLEES VIRTUMUNDO, INC., ADKNOWLEDGE, INC. AND SCOTT LYNN (original and 15 copies), AND APPELLEES VIRTUMUNDO, INC., ADKNOWLEDGE, INC., AND SCOTT LYNN'S SUPPLEMENTAL EXCERPTS OF RECORD (original and 5 copies), AND PROOF OF SERVICE** to be served via Federal Express overnight to the Clerk, United States Court of Appeals for the Ninth Circuit at the following address:

Clerk,
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

and I also caused two copies of the same to be served via Federal Express overnight and U.S. mail on the following parties:

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I declare under penalty of perjury under the laws of the United States and the State of

Washington that the forgoing is true and correct and that this declaration was executed on
December 3rd, 2007, at Seattle, Washington.

DIANA AU
Diana Au