

The Honorable John C. Coughenour

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

JAMES S. GORDON, Jr., a married individual, d/b/a 'GORDONWORKS.COM'; OMNI INNOVATIONS, LLC., a Washington limited liability company,

Plaintiffs,

v.

VIRTUMUNDO, INC, a Delaware corporation d/b/a ADKNOWLEDGEMAIL.COM; ADKNOWLEDGE, INC., a Delaware corporation, d/b/a ADKNOWLEDGEMAIL.COM; SCOTT LYNN, an individual; and JOHN DOES, 1-X,

Defendants.

NO. CV06-0204JCC

**DECLARATION OF DEREK LINKE
IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

NOTE ON MOTION CALENDAR:
February 16, 2007

I, Derek Linke, declare and testify as follows:

1. I am over eighteen years of age and am an attorney associated with counsel for defendants in the above captioned action. My education before entering law school was primarily scientific and technical, including course work in computer science. I am competent to testify to the matters stated in this declaration, and make this declaration from personal knowledge of those matters.

2. On or about February 24, 2006, plaintiffs James Gordon and Omni

1 Innovations, LLC, (together "Plaintiffs") produced an archive of emails named
2 "virtumundo.mbx" (hereinafter "VM1") which contained 5,101 email messages and an
3 archive named "adknowledgmailcom.mbx" ("ADK") which contained 1,695 email
4 messages.

5 3. On or about July 25, 2006, Plaintiffs produced another archive named
6 "virtumundo.mbx" ("VM2") which contained 5,047 email messages and an archive
7 named "Virtumundo-Omni.mbx" ("VO1") which contained 7,106 email messages.

8 4. The emails in VM2 were nearly all previously produced in VM1.

9 5. On or about November 29, 2006, Plaintiffs produced yet another archive
10 named "virtumundo.mbx" ("VM3") which contained 8,124 email messages and another
11 archive named "Virtumundo-Omni.mbx" ("VO2") which contained 11,201 email
12 messages.

13 6. VM3 appears to contain many emails previously produced in VM1 and
14 VM2. VO2 appears to contain many emails previously produced in VO1.

15 7. To evaluate the contents of Plaintiffs' archives, beginning on or about
16 November 16, 2006, defendants' counsel engaged a team of seven licensed attorneys to
17 review all of the emails then produced by Plaintiffs including those in: VM1, VM2,
18 VMO, and ADK, a total of nearly 19,000 emails.

19 8. Under my direction, the contract team reviewed all of the 19,000 emails for
20 their compliance with the federal CAN-SPAM Act of 2003, 15 U.S.C. § 7701 et seq.
21 ("CAN-SPAM") and the Washington Commercial Electronic Mail Act (RCW 19.190)
22 ("CEMA").

23 9. The team worked twelve to fourteen hour days for more than two weeks,
24 including weekends, to review all of the emails and create logs of the results..

25 10. In addition to participating in the reviewing and logging, I spent a
26 significant amount of time planning and implementing the logistics by which the review
27 proceeded.

28 11. Upon completion of the team's review, I collated and merged all of the

1 contract attorneys' work product, reviewed and corrected the work, and assembled the
2 work product into a manageable format consisting of a single log for each of Plaintiffs'
3 archives.

4 12. Attached hereto as Exhibit A is a true and accurate copy of the log we
5 produced of Plaintiffs' emails contained in VM1.

6 13. Attached hereto as Exhibit B is a true and accurate copy of the log we
7 produced of Plaintiffs' emails contained in VM2.

8 14. Attached hereto as Exhibit C and Exhibit D are true and accurate copies of
9 the log we produced of Plaintiffs' emails contained in VMO, parts 1 and 2, respectively..

10 15. Attached hereto as Exhibit E is a true and accurate copy of the log we
11 produced of Plaintiffs' emails contained in ADK.

12 16. We determined from our review, as recorded in the logs, that of the emails
13 in VM1 and VM2, some 6,000 (3,000 in each archive) predate January 1, 2004, the
14 effective date of CAN-SPAM.

15 17. Also, nearly 1,000 of the reviewed emails have had their content stripped
16 out by Plaintiffs' spam processing program, and therefore cannot be evaluated for
17 compliance with regulations that pertain to content. Other emails have had images
18 removed by Plaintiffs' spam processing program, including images relevant to
19 Defendants' CAN-SPAM compliance (such as images containing a postal address).

20 18. Except for those emails with some or all of their content stripped out by
21 Plaintiffs, none of the emails lacked a postal address or an "unsubscribe" link or other
22 opt-out mechanism; and all emails were identified or are identifiable as advertisements.

23 19. For each email reviewed, we logged whether the subject line was false or
24 misleading. In almost every instance, our review found that reading the emails' subject
25 lines in the context of their associated from name rendered the subject line obviously
26 commercial in nature and clear as to the product or service referred to in the ad. For
27 example, one email we reviewed has the subject line "Attention Moms." This email is
28 from "Work From Home." That subject line and from name combination clearly indicates

1 both the commercial nature of the email and indicates the kind of content provided in the
2 email. Another email, with the subject line “Just what you’re looking for -
3 understanding” is from “First Premier Bank.” That combination of subject line and from
4 name when read together left no doubt as to the commercial nature of the email or to the
5 fact that the email related to financial or banking services.

6 20. Defendants’ subject lines when viewed in context (*i.e.*, with the associated
7 “from” name) are not materially false or misleading.

8 21. Attached hereto as Exhibit F is a true and accurate copy of the signature
9 page from Plaintiff Gordon’s Answers and Responses to Defendant Adknowledge’s First
10 Interrogatories and Requests for Production of Documents to Gordon.

11 22. Attached hereto as Exhibit G is a true and accurate copy of the first page
12 from Plaintiff Omni’s Answers and Responses to Defendant Virtumundo’s First
13 Interrogatories and Requests for Production of Documents to Omni.

14 23. Attached hereto as Exhibit H is a true and accurate copy of Defendant
15 Virtumundo’s First Interrogatories and Requests for Production of Documents to Omni,
16 Interrogatory No. 22.

17 24. Attached hereto as Exhibit I is a true and accurate copy of Plaintiff Omni’s
18 Answers and Responses to Defendant Virtumundo’s First Interrogatories and Requests
19 for Production of Documents to Omni, Answer to Interrogatory No. 22.

20 25. Attached hereto as Exhibit J is a true and accurate copy of Defendant
21 Virtumundo’s First Interrogatories and Requests for Production of Documents to Gordon,
22 Interrogatory No. 22.

23 26. Attached hereto as Exhibit K is a true and accurate copy of Plaintiff
24 Gordon’s Answers and Responses to Defendant Virtumundo’s First Interrogatories and
25 Requests for Production of Documents to Gordon, Answer to Interrogatory No. 22.

26 27. Microsoft Corp., through its MSN division, is an internet access service
27 provider that offers dial-up internet access. A true and correct copy of a page from
28 MSN’s web site describing this internet access service is attached as Exhibit L hereto.

1 28. EarthLink, Inc. is an internet access service provider that offers broadband
2 and dial-up internet access. A true and correct copy of a page from EarthLink’s web site
3 describing this internet access service is attached as Exhibit M hereto.

4 29. AOL, LLC is an internet access service provider that offers broadband and
5 dial-up internet access. A true and correct copy of a page from AOL’s web site
6 describing this internet access service is attached as Exhibit N hereto.

7 30. Yahoo, Inc. is an internet access service provider that offers broadband
8 internet access. A true and correct copy of a page from Yahoo’s web site describing this
9 internet access service is attached as Exhibit O hereto.

10 I certify and declare under the penalty of perjury under the laws of the State of
11 Washington and the United States that to my knowledge the foregoing is true and correct.

12
13 Executed on this 22nd day of January, 2007, at Seattle, Washington.

14
15 /S/ Electronic Signature

16 _____
17 Derek Linke