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The Honorable John C. Coughenour

**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

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY OF TESTIMONY RE SETTLEMENTS**

NOTE ON MOTION CALENDAR:  
January 26, 2007

**I. INTRODUCTION**

In their Response in Opposition (the "Opposition") to Defendants' Motion to Compel Discovery of Testimony re Settlements (the "Motion"), Plaintiffs broadly aver that the settlement agreements sought by Defendants (the "Settlement Agreements") are not relevant to Defendants' affirmative defenses and are not calculated to lead to the discovery of admissible evidence. Plaintiffs' argument is based on an impermissibly narrow interpretation of the standards governing discovery. "Litigants 'may obtain

1 discovery regarding any matter, not privileged, that is relevant to the claim or defense of  
2 any party.’” Survivor Media, Inc. v. Survivor Productions, 406 F.3d 625, 635 (9th Cir.  
3 2005), quoting FED. R. CIV. P. 26(b)(1). For purposes of discovery, relevance is defined  
4 broadly to include “all information ‘reasonably calculated to lead to the discovery of  
5 admissible evidence’”. Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470  
6 (9th Cir. 1992), quoting FED. R. CIV. P. 26(b)(1). The Settlement Agreements meet this  
7 broad standard because they will lead to evidence regarding Plaintiffs’ standing and  
8 Defendants’ affirmative defenses.

## 9 **II. ARGUMENT**

### 10 **A. The Settlement Agreements will lead to the discovery of admissible** 11 **evidence regarding plaintiffs’ standing under CAN-SPAM.**

12 Plaintiffs’ argument that Defendants can be penalized notwithstanding Plaintiffs’  
13 having received substantial settlements from other unrelated defendants misses the point.  
14 The CAN-SPAM act, 15 U.S.C. § 7701 *et seq.*, (“CAN-SPAM” or “the Act”) includes a  
15 limited private right of action for “provider(s) of Internet access service” who are  
16 “adversely affected” by a violation. 15 U.S.C. § 7706(g)(1).3. If Plaintiffs have been  
17 fully compensated - and more - for the damages they claim were caused by Defendants  
18 (such as load on their computers), they lack standing under CAN-SPAM because they  
19 were not adversely affected by Defendants’ alleged actions.

20 Although the Act authorizes statutory damages, the plain language of the precludes  
21 recovery by a provider who has not suffered actual damages in the first instance. The  
22 Settlement Agreements are reasonably calculated to lead to the discovery of admissible  
23 evidence on this issue. Plaintiff Gordon admits he suffered no actual damages from the  
24 unsolicited commercial email he allegedly received from Defendants, (Dkt. #15 at  
25 19:18-20), and at his deposition admitted that the receipt of unsolicited commercial email  
26 actually benefits him. (Newman Declaration In Support of Defendant’s Motion for  
27 Summary Judgment (“Newman Decl.”) (Dkt. No. 101), ¶ 2 Ex. A at 218:3 - 219:3 (“I’m  
28 doing research on the spam that I receive, and there is a benefit in receiving spam because

1 of that.”.)

2 Mr. Gordon’s testimony in this regard conflicts with his responses to  
3 Virtumundo’s Interrogatory No. 17, in which he claimed that he was adversely affected  
4 by Defendants’ emails because they “use up bandwidth on my server, interfere with my  
5 interactive service business, clog my computer, require wasted time to deal with, are  
6 unlawful; and violate my right to privacy and the sanctity of my personal space, and right  
7 to be free from intrusive solicitation.” (Dkt. 102-11). Omni made substantially identical  
8 claims in its response to Virtumundo Interrogatory No. 17. (Dkt. 102-9). The Settlement  
9 Agreements are likely to demonstrate that these are the same damages that Plaintiffs have  
10 alleged were caused by defendants to Plaintiffs’ past lawsuits. The Settlement  
11 Agreements are further likely to reveal that Plaintiffs have been compensated for these  
12 exact (alleged) damages, and that in any case Plaintiffs do not have any factual basis  
13 upon which to allocate such damages to any particular defendant.

14 By way of example, Mr. Gordon previously admitted that he has not come close to  
15 using the bandwidth provided with his account with his hosting provider, GoDaddy.  
16 (Gordon Dep. 110:16-20) (Dkt. No. 101, Exh. A). To the extent that the Settlement  
17 Agreements reveal that Mr. Gordon has already been compensated for *all* the bandwidth  
18 he used, he has no uncompensated damages in that regard, and thus has not been  
19 “adversely affected” by Defendants’ alleged use of his bandwidth. As such, the  
20 Settlement Agreements are relevant to whether Plaintiffs have been adversely affected by  
21 Defendants’ alleged violations of CAN-SPAM, and are properly discoverable under Rule  
22 26(b)(1) of the Federal Rules of Civil Procedure.

23  
24 **B. The Settlement Agreements will lead to the discovery of admissible  
evidence regarding Defendants’ affirmative defenses.**

25 Plaintiffs assert that statutory damages such as those sought by Plaintiff are not  
26 subject to the defense of failure to mitigate. The failure to mitigate defense is not briefed  
27 herein and is an unresolved issue. The court should not rule on whether there is a  
28 mitigation of damages defense until the issue becomes ripe for consideration. In the

1 meantime, evidence relevant to that defense is discoverable.

2 Whether or not Plaintiffs' position on mitigation of damages is correct, the  
 3 Settlement Agreements are relevant to other affirmative defenses. Defendants' Answer  
 4 (Dkt. No. 31) asserts numerous equitable defenses to Plaintiffs' claims, including, *inter*  
 5 *alia*, unclean hands. *Id.* at ¶ 6.4. This affirmative defense is based in part on Gordon's  
 6 admission that he trumps up lawsuits, solicits unsolicited commercial email from  
 7 so-called "clients" for the purpose of collecting statutory damages, and shares his  
 8 litigation awards with those who provide him with the email he claims damages him. (*Id.*  
 9 ¶ 2 Ex. A at 416:5 - 417:6.). The Court should discourage manufacturing lawsuits by  
 10 exercising its inherent equitable authority to declare that Plaintiffs' claims are barred by  
 11 the equitable doctrine of unclean hands. Again, whether the affirmative defense has merit  
 12 is not before the Court. Until the issue is ripe for consideration, the facts to support the  
 13 defense are discoverable. The Settlement Agreements are relevant to demonstrate the  
 14 extent of Plaintiffs' self-admitted "spam business" (Gordon Dep. 118:2-6), and thus are  
 15 properly discoverable to prove unclean hands.

### 16 **III. CONCLUSION**

17 The Settlement Agreements are reasonably calculated to lead to the discovery of  
 18 admissible evidence regarding Plaintiffs' standing under CAN-SPAM and the  
 19 applicability of Defendants' affirmative defenses. Defendants' Motion should therefore  
 20 be granted.

21 DATED this 26th day of January, 2007.

22  
 23 **NEWMAN & NEWMAN,  
 ATTORNEYS AT LAW, LLP**

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 25 By: 

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