

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;

Plaintiff,

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' ANSWER AND
AFFIRMATIVE DEFENSES TO
THE FIRST AMENDED
COMPLAINT**

Defendants VIRTUMUNDO, INC. ("Virtumundo"), ADKNOWLEDGE, INC. ("Adknowledge") and SCOTT LYNN ("Lynn")(collectively, "Defendants") answer Plaintiffs' First Amended Complaint ("FAC") and assert affirmative defenses as follows:

I. ANSWER

1.1. Defendants are without knowledge and information sufficient to form a belief with respect to the veracity of the allegations contained in

1 Paragraph 1.1 of Plaintiffs' FAC, and therefore DENY the same.

2 1.2. Defendants are without knowledge and information sufficient to
3 form a belief with respect to the veracity of the allegations contained in
4 Paragraph 1.2 of Plaintiffs' FAC, and therefore DENY the same.

5 1.3. Defendants ADMIT that Adknowledge is a Delaware corporation
6 and has its principal place of business in the state of Missouri. Defendants
7 ADMIT that Virtumundo is a Delaware corporation and has its principal
8 place of business in the state of Kansas. Defendants DENY all other
9 allegations contained in Paragraph 1.3 of Plaintiffs' FAC.

10 1.4. Defendants ADMIT Scott Lynn is an individual and a resident of
11 Kansas City, Missouri. Defendants ADMIT Scott Lynn is a director of
12 Adknowledge. Defendants ADMIT Scott Lynn a shareholder in Virtumundo
13 and Adknowledge. Defendants are without knowledge and information
14 sufficient to form a belief with respect to the veracity of the following
15 allegations and therefore DENY the same: "All acts and practices undertaken
16 by Schran on behalf of Ascentive are and were for the benefit of his marital
17 community." Defendants DENY all other allegations contained in Paragraph
18 1.4 of Plaintiffs' FAC.

19 1.5. Defendants ADMIT Lynn is a resident of Missouri. Defendants
20 DENY all other allegations contained in Paragraph 1.5 of Plaintiffs' FAC.

21 1.6. Defendants DENY the allegations contained in Paragraph 1.6 of
22 Plaintiffs' FAC.

23 2.1. Defendants ADMIT the Court has original jurisdiction over
24 causes of action brought under the CAN-SPAM Act, 15 U.S.C. § 7701 *et seq.*
25 ("CAN-SPAM"). Defendants DENY all other allegations contained in
26 Paragraph 2.1 of Plaintiffs' FAC.

27 2.2. Defendants DENY the allegations contained in Paragraph 2.2 of
28 Plaintiffs' FAC.

1 2.3. Defendants ADMIT they send emails to persons who have
2 affirmatively indicated their desire to receive those emails. Defendants are
3 without knowledge and information sufficient to form a belief with respect to
4 the veracity of Plaintiffs' allegations that Defendants' emails "are received on
5 computers and other electronic devices owned and maintained by residents of
6 the State in the State", and therefore DENY the same. Defendants DENY all
7 other allegations contained in Paragraph 2.3 of Plaintiffs' FAC.

8 2.4. Defendants ADMIT Plaintiffs' FAC contains various allegations,
9 but provide those allegations speak for themselves; accordingly, Defendants
10 DENY all other allegations contained in Paragraph 2.4 of Plaintiffs' FAC.

11 2.5. Defendants are without knowledge and information sufficient to
12 form a belief with respect to the veracity of the allegations contained in
13 Paragraph 2.5 of Plaintiffs' FAC, and therefore DENY the same.

14 2.6. Defendants provide the statutes cited in Paragraph 2.6 of
15 Plaintiffs' FAC speak for themselves, and Plaintiffs' interpretation of those
16 statutes is not a factual allegation which must be admitted or denied.
17 Defendants DENY all allegations contained in Paragraph 2.6 of Plaintiffs'
18 FAC.

19 3.1. Defendants incorporate their answers to Paragraphs 1.1 through
20 2.6 above as though fully stated herein. Defendants DENY any allegations
21 contained in Paragraph 3.1 of Plaintiff's FAC.

22 3.2. Defendants DENY Plaintiff James S. Gordon, Jr. ("Gordon") is an
23 interactive computer service pursuant to the statutes cited in Paragraph 3.2
24 of Plaintiffs' FAC or any other definition of "interactive computer service".
25 Defendants are without knowledge and information sufficient to form a belief
26 with respect to the veracity of the remaining allegations contained in
27 Paragraph 3.2 of Plaintiffs' FAC, and therefore DENY the same.

28 3.3. Defendants DENY Plaintiff Omni Innovations, LLC ("Omni") is

1 an interactive computer service pursuant to the statutes cited in Paragraph
2 3.3 of Plaintiffs' FAC or any other definition of "interactive computer service".
3 Defendants are without knowledge and information sufficient to form a belief
4 with respect to the veracity of the remaining allegations contained in
5 Paragraph 3.3 of Plaintiffs' FAC, and therefore DENY the same.

6 3.4. Defendants are without knowledge and information sufficient to
7 form a belief with respect to the veracity of the allegations contained in
8 Paragraph 3.4 of Plaintiffs' FAC, and therefore DENY the same.

9 3.5. Defendants are without knowledge and information sufficient to
10 form a belief with respect to the veracity of the allegations contained in
11 Paragraph 3.5 of Plaintiffs' FAC, and therefore DENY the same.

12 3.6. Defendants DENY the allegations contained in Paragraph 3.6 of
13 Plaintiffs' FAC.

14 3.7. Defendants DENY the allegations contained in Paragraph 3.7 of
15 Plaintiffs' FAC.

16 **4.1. FIRST ALLEGED CAUSE OF ACTION**

17 Defendants incorporate their answers to Paragraphs 1.1 through 3.7 of
18 Plaintiffs' FAC as though fully stated herein. Defendants DENY any
19 allegations contained in the unnumbered first paragraph of Section 4.1 of
20 Plaintiffs' FAC.

21 4.1.1. Defendants DENY the allegations contained in Paragraph 4.1.1 of
22 Plaintiffs' FAC.

23 4.1.2. Defendants DENY the allegations contained in Paragraph 4.1.2 of
24 Plaintiffs' FAC.

25 4.1.3. Defendants DENY the allegations contained in Paragraph 4.1.3 of
26 Plaintiffs' FAC.

27 4.1.4. Defendants DENY the allegations contained in Paragraph 4.1.4 of
28 Plaintiffs' FAC.

1 4.1.5. Defendants DENY the allegations contained in Paragraph 4.1.5 of
2 Plaintiffs' FAC.

3 4.1.6. Defendants DENY the allegations contained in the first
4 "Paragraph 4.1.6" of Plaintiffs' FAC.

5 4.1.7. Defendants DENY the allegations contained in Paragraph 4.1.7 of
6 Plaintiffs' FAC.

7 4.1.8. Defendants DENY the allegations contained in Paragraph 4.1.8 of
8 Plaintiffs' FAC.

9 4.1.9. Defendants DENY the allegations contained in Paragraph 4.1.9 of
10 Plaintiffs' FAC.

11 4.1.10. Defendants ADMIT Plaintiffs seek injunctive relief but
12 DENY Plaintiffs are entitled to any such relief. Defendants DENY all other
13 allegations contained in Paragraph 4.1.10 of Plaintiffs' FAC.

14 4.1.11. Defendants ADMIT Plaintiffs seek their "attorney fees and
15 costs" but DENY Plaintiffs are entitled to them. Defendants DENY all other
16 allegations contained in the second paragraph of Plaintiffs' FAC numbered
17 "4.1.6".

18 **4.2. SECOND AND THIRD ALLEGED CAUSES OF ACTION**

19 Defendants incorporate their answers to Paragraphs 1.1 through the second
20 Paragraph "4.1.6" of Plaintiffs' FAC as though fully stated herein.

21 Defendants DENY any allegations contained in the unnumbered first
22 paragraph of Section 4.2 of Plaintiffs' FAC.

23 4.2.1. Defendants provide the statutes cited in Paragraph 4.2.1 of
24 Plaintiffs' FAC speak for themselves, and Plaintiffs' interpretation of those
25 statutes is not a factual allegation which must be admitted or denied.

26 Defendants DENY all allegations contained in Paragraph 4.2.1 of Plaintiffs'
27 FAC.

28 4.2.2. Defendants DENY the allegations contained in Paragraph 4.2.2 of

1 Plaintiffs' FAC.

2 4.2.3. Defendants provide the statute cited in Paragraph 4.2.3 of
3 Plaintiffs' FAC speaks for itself, and Plaintiffs' interpretation of that statute
4 is not a factual allegation which must be admitted or denied. Defendants
5 specifically DENY the following allegation: "Numerous emails sent by
6 Defendants and received by Plaintiffs violated this provision of the CEMA",
7 and further DENY all other allegations contained in Paragraph 4.2.3 of
8 Plaintiffs' FAC.

9 4.2.4. Defendants DENY the allegations contained in Paragraph 4.2.4 of
10 Plaintiffs' FAC.

11 4.2.5. Defendants DENY the allegations contained in Paragraph 4.2.5 of
12 Plaintiffs' FAC.

13 4.2.6. Defendants DENY the allegations contained in the unnumbered
14 final paragraph of Section 4.2 of Plaintiffs' FAC.

15 4.3. **FOURTH ALLEGED CAUSE OF ACTION**

16 Defendants incorporate their answers to Paragraphs 1.1 through the
17 unnumbered final paragraph of Section 4.2 of Plaintiffs' FAC as though fully
18 stated herein. Defendants DENY any allegations contained in the
19 unnumbered first paragraph of Section 4.3 of Plaintiffs' FAC.

20 4.3.1. Defendants provide the statutes cited in Paragraph 4.3.1 of
21 Plaintiffs' FAC speak for themselves, and Plaintiffs' interpretation of those
22 statutes is not a factual allegation which must be admitted or denied.
23 Defendants DENY all allegations contained in Paragraph 4.3.1 of Plaintiffs'
24 FAC.

25 4.3.2. Defendants DENY the allegations contained in Paragraph 4.3.2 of
26 Plaintiffs' FAC.

27 5. Defendants provide Plaintiffs' jury demand is not a factual
28 allegation which must be admitted or denied. Defendants DENY all

1 allegations contained in Paragraph 5 of Plaintiffs' FAC.

2
3 **II. AFFIRMATIVE DEFENSES**

4 Without admitting any allegations contained in Plaintiffs' FAC,
5 Defendants assert the following affirmative defenses:

6 6.1. Plaintiffs are barred from obtaining any relief sought in the FAC
7 because the FAC fails to state any claim upon which relief may be granted.

8 6.2. Plaintiffs are barred from obtaining any relief because Plaintiffs
9 failed to mitigate their alleged damages, if any.

10 6.3. Plaintiffs are barred from obtaining any relief because Plaintiffs
11 subscribed to receive commercial emails on which Plaintiffs base their FAC.

12 6.4. Plaintiffs are barred from obtaining any relief sought in the FAC
13 by reason of their own unclean hands.

14 6.5. Plaintiffs are barred from obtaining any relief sought in the FAC
15 because Plaintiffs failed to unsubscribe utilizing unsubscribe links in the
16 emails or other means reasonably calculated to communicate to Defendants
17 an intent to unsubscribe.

18 6.6. Plaintiffs waived their claims.

19 6.7. Plaintiffs are not entitled to damages from Defendants where
20 Plaintiffs have already been compensated by another entity for alleged
21 damages allegedly caused by Defendants.

22 6.8. Plaintiffs consented to all actions they complain about in their
23 FAC, and therefore Plaintiffs are not entitled to any relief.

24 6.9. Plaintiffs ratified and approved all actions they complain about in
25 their FAC, and therefore Plaintiffs are not entitled to any relief.

26 6.10. Plaintiffs' claims, and each of them, are barred by the doctrine of
27 estoppel.

28 6.11. Plaintiffs' claims, and each of them, are barred by the doctrine of

1 laches.

2 6.12. The damages alleged in Plaintiffs' FAC, if any, were not caused
3 by Defendants, or any of them; rather, any damages suffered by Plaintiffs
4 were caused by one or more third parties whose activities were not approved,
5 ratified, or controlled by any Defendant.

6 6.13. Plaintiffs have failed to join one or more necessary and
7 indispensable parties.

8 6.14. Defendants established and implemented, with due care,
9 commercially reasonable practices and procedures designed to effectively
10 prevent the violations alleged in the FAC.

11 6.15. Defendants made commercially reasonable efforts to maintain
12 compliance with their practices and procedures designed to effectively
13 prevent the violations alleged in the FAC.

14 6.16. To the extent any action by Defendants violate CAN-SPAM,
15 Defendants, each of them, acted without actual knowledge, or knowledge
16 fairly implied on the basis of objective circumstances, of the act or omission
17 that constitutes the violation.

18
19 **III. PRAYER FOR RELIEF**

20 WHEREFORE, Defendants VIRTUMUNDO, INC., ADKNOWLEDGE,
21 INC. and SCOTT LYNN respectfully request that the Court enter judgment
22 against Plaintiffs JAMES S. GORDON, Jr. and OMNI INNOVATIONS, LLC,
23 and in favor of Defendants, as follows:

24 1. Judgment Dismissing Plaintiffs' Claims. That the Court enter a
25 judgment dismissing Plaintiffs' claims against Defendants alleged in the FAC
26 and denying Plaintiffs' requested relief.

27 2. Attorneys' Fees and Costs. That the Court award Defendants
28 their reasonable attorneys' fees and costs incurred in defending this lawsuit.

