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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, I-X,

Defendants.

No. CV06-0204JCC

**DECLARATION OF ROGER TOWNSEND IN SUPPORT OF DEFENDANTS' MOTION FOR AN UNDERTAKING**

NOTE ON MOTION CALENDAR:  
November 17, 2006

I, Roger Townsend, swear under penalty of perjury under the laws of the United States of America to the following:

1. I am counsel of record for defendants Virtumundo, Inc. ("Virtumundo") and Adknowledge, Inc. ("Adknowledge"), am over age 18, and competent to be a witness. I am making this Declaration based on facts within my own personal knowledge.

1 **VIRTUMUNDO EMAILS**

2 2. The Scooters Unlimited Email. Attached hereto as Exhibit A is a true and  
3 accurate copy of an email produced by plaintiffs James Gordon and Omni Innovations,  
4 LLC (together, "Plaintiffs" or "Gordon") in discovery in this lawsuit. Exhibit A identifies  
5 itself as being from "Scooters Unlimited" at an email address in the Virtumundo domain  
6 <vmadmin.com> and is dated June 20, 2004.

7 3. The Scooters Unlimited Email Unsubscribe Link. On October 27, 2006, I  
8 clicked on the unsubscribe link located in the footer of the Scooters Unlimited Email.  
9 After clicking on the unsubscribe link, I was hyperlinked to an Unsubscribe webpage  
10 located at the Virtumundo domain, <virtumundo.com>. Attached hereto as Exhibit B is a  
11 printout of the Unsubscribe webpage.

12 4. The Premier Bank Email. Attached hereto as Exhibit C is a true and  
13 accurate copy of an email produced by Plaintiffs in discovery in this lawsuit. Exhibit C  
14 identifies itself as being from "First Premier Bank" at an email address in the Virtumundo  
15 domain <vmadmin.com> and is dated June 8, 2004.

16 5. The Premier Bank Email Unsubscribe Link. On October 27, 2006, I clicked  
17 on the unsubscribe link located in the footer of the First Premier Bank Email. After  
18 clicking on the unsubscribe link, I was hyperlinked to an Unsubscribe webpage located at  
19 the Virtumundo domain, <virtumundo.com>. Attached hereto as Exhibit D is a printout  
20 of the Unsubscribe webpage.

21 6. The University of Phoenix Email. Attached hereto as Exhibit E is a copy of  
22 an email advertisement sent to a recipient at plaintiff Gordon's domain,  
23 <gordonworks.com> by defendant Virtumundo. Virtumundo obtained this email through  
24 discovery from Plaintiffs. Exhibit E identifies itself as being from "University of Phoenix  
25 Online" at an email address in the Virtumundo domain <vmadmin.com> and is dated  
26 June 14, 2004.

27 7. The University of Phoenix Email Unsubscribe Link. On October 27, 2006,  
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1 I clicked on the unsubscribe link located in the footer of the University of Phoenix Email.  
2 After clicking on the unsubscribe link, I was hyperlinked to an Unsubscribe webpage  
3 located at the Virtumundo domain, <virtumundo.com>. Attached hereto as Exhibit F is a  
4 printout of the Unsubscribe webpage.

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6 **ADKNOWLEDGE EMAILS**

7 8. The Las Vegas Weddings Email. Attached hereto as Exhibit G is a true and  
8 accurate copy of an email produced by Plaintiffs in discovery in this lawsuit. Exhibit G  
9 identifies itself as being from “Las Vegas Weddings” at an email address in the  
10 Adknowledge domain <adknowledgemail.com> and is dated October 16, 2005.

11 9. The Las Vegas Weddings Unsubscribe Link. On October 27, 2006, I  
12 clicked on the unsubscribe link located in the footer of the Las Vegas Weddings Email.  
13 After clicking on the unsubscribe link, I was hyperlinked to an Unsubscribe webpage  
14 located at the Adknowledge domain, <adknowledge.com>. Attached hereto as Exhibit H  
15 is a printout of the Unsubscribe webpage.

16 10. The Life Insurance Email. Attached hereto as Exhibit I is a true and  
17 accurate copy of an email produced by Plaintiffs in discovery in this lawsuit. Exhibit I  
18 identifies itself as being from “Life Insurance” at an email address in the Adknowledge  
19 domain <adknowledgemail.com> and is dated February 5, 2006.

20 11. The Life Insurance Email Unsubscribe Link. On October 27, 2006, I  
21 clicked on the unsubscribe link located in the footer of the Las Vegas Weddings Email.  
22 After clicking on the unsubscribe link, I was hyperlinked to an Unsubscribe webpage  
23 located at the Adknowledge domain, <adknowledge.com>. Attached hereto as Exhibit J  
24 is a printout of the Unsubscribe webpage.

25 12. The San Diego Tourism Email. Attached hereto as Exhibit K is a true and  
26 accurate copy of an email produced by Plaintiffs in discovery in this lawsuit. Exhibit K  
27 identifies itself as being from “Visit Sunny San Diego” at an email address in the  
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1 Adknowledge domain <adknowledgemail.com> and is dated January 13, 2006.

2 13. The San Diego Tourism Email Unsubscribe Link. On October 27, 2006, I  
3 clicked on the unsubscribe link located in the footer of the San Diego Tourism Email.  
4 After clicking on the unsubscribe link, I was hyperlinked to an Unsubscribe webpage  
5 located at the Adknowledge domain, <adknowledge.com>. Attached hereto as Exhibit L  
6 is a printout of the Unsubscribe webpage.

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8 **CAN-SPAM LEGISLATIVE HISTORY**

9 14. Attached hereto as Exhibit M is a true and accurate copy of an excerpt from  
10 the Congressional Record of extended remarks during the passage of the CAN-SPAM Act  
11 of 2003. 150 CONG. REC. E72 (daily ed. Jan. 28, 2004) (statement of Rep. Tauzin).

12 15. Attached hereto as Exhibit N is a true and accurate copy of the Report of  
13 the Committee on Commerce, Science, and Transportation on S.877. REPORT OF THE  
14 COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION on S.877, S. Rep. No. 102,  
15 108th Cong., 1st Sess. 2-3 (2003).

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17 **VERIZON BROADBAND TERMS OF SERVICE**

18 16. Attached hereto as Exhibit O is a true and accurate copy of the Terms of  
19 Service for broadband Internet access from the internet service provider, Verizon  
20 Communications, Inc. (“Verizon”).

21 17. I have reviewed the declarations of the representatives of Adknowledge and  
22 Virtumundo filed in support of this Motion for an Undertaking. Based upon those  
23 declaration, I understand that the IP addresses that users from email accounts located  
24 <@gordonworks.com> have consented to receive emails from computers located at the IP  
25 addresses at <4.5.74.214> and <4.5.88.163>.

26 18. Attached hereto as Exhibit V is a Reverse IP look up for the IP address  
27 <4.5.74.214>.

1 19. The Reverse IP look ups indicate that the IP address <4.5.74.214> is  
2 associated with Internet access provided via a Verizon DSL line.

3  
4 **WHOIS INTERNET ADDRESS INFORMATION**

5 20. WHOIS records are publicly available through websites and domain name  
6 registrars. According to the Internet Corporation for Assigned Names and Numbers  
7 ("ICANN"), "The purpose of the gTLD Whois service is to provide information sufficient  
8 to contact a responsible party for a particular gTLD domain name who can resolve, or  
9 reliably pass on data to a party who can resolve, issues related to the configuration of the  
10 records associated with the domain name within a DNS nameserver." (See  
11 <http://gns0.icann.org/issues/whois-privacy/>).

12 21. Access to the WHOIS database is available through every Internet Registrar  
13 (e.g., <[www.enom.com](http://www.enom.com)>, <[www.godaddy.com](http://www.godaddy.com)> and <[www.netsol.com](http://www.netsol.com)>) and many other  
14 independent Internet websites (e.g., <[www.domaintools.com](http://www.domaintools.com)> and <[www.dnsstuff.com](http://www.dnsstuff.com)>)

15 22. Attached hereto as Exhibit P is a true and accurate WHOIS record  
16 reflecting that Linkz Internet Services is the registrant of <msdsa.com>. The WHOIS  
17 record includes the address of Linkz Internet Services and identifies the Registrant as  
18 Linkz Internet Services.

19 23. Attached hereto as Exhibit Q is a true and accurate WHOIS record  
20 reflecting that WKI Data is the registrant of <prefersend.com>. The WHOIS record  
21 includes the address of WKI Data and identifies the Registrant as WKI Data.

22 24. Attached hereto as Exhibit R is a true and accurate WHOIS record  
23 reflecting that NOLDC, Inc. is the registrant of <ew01.com>. The WHOIS record  
24 includes the address of NOLDC, Inc. and identifies the Registrant as NOLDC, Inc.

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26 **PLAINTIFFS' RESPONSE TO INTERROGATORIES**

27 25. Attached hereto as Exhibit S is a true and accurate copy of Plaintiff  
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1 Gordon's Response to Interrogatory No. 15.

2 26. Attached hereto as Exhibit T is a true and accurate copy of Plaintiff Omni  
3 Innovations, LLC's Response to Interrogatory No. 15.

4 27. Attached hereto as Exhibit U is a true and accurate copy of Plaintiff Omni's  
5 Response to Interrogatory No. 22.

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7 **AMOUNT OF UNDERTAKING**

8 28. The Motion requests an undertaking amount of \$350,000.00 based upon  
9 anticipated attorneys' fees and costs in this litigation. This amount is conservative as  
10 compared to actual anticipated expenses. Plaintiffs have produced tens of thousands of  
11 emails (at one point claiming 17,000 emails), each of which must be logged and analyzed  
12 for compliance with CAN-SPAM. Plaintiffs have refused to identify any specific theory  
13 of liability. As a result, each email must be analyzed for each potential violation of  
14 CAN-SPAM.

15 29. Furthermore, this lawsuit will likely require an expert witness to testify  
16 regarding compliance with CAN-SPAM, transmission paths of emails and best practices  
17 for sending compliant emails. This expert will need to analyze each aspect of CAN-  
18 SPAM because plaintiffs have broadly alleged violations of the Act.

19 30. Defendants anticipate that there will be approximately ten depositions taken  
20 in defense of this matter. There are three named defendants, each of which will need to  
21 be deposed. The Fed. R. Civ. P. 30(b)(6) representatives of the corporate defendants'  
22 may be several different people. The defendants are located in Missouri and Kansas,  
23 which will increase costs and expenses as compared to a deposition in this forum.

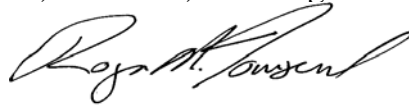
24 31. Additionally, there are two named plaintiffs and the plaintiff has  
25 subpoenaed a third party witness, Joel Hodgell, all of whom will need to be deposed.  
26 Accordingly, ten depositions is likely a conservative number.

27 32. Finally, if this case goes to trial, it will be before a jury and will likely be a  
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1 lengthy trial. Plaintiffs have claimed violations of up to 17,000 emails, each of which  
2 will need to be presented to the jury to determine whether they are, amongst other things,  
3 false and misleading.

4 33. Based upon the foregoing and the experience of this law firm, attorneys'  
5 fees and costs are likely to substantially exceed \$350,000.00.

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7 DATED this 2<sup>nd</sup> day of November, 2006, at Seattle, Washington

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10 Roger M. Townsend