

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

DEFENDANTS' MOTION TO COMPEL DISCOVERY

NOTE ON MOTION CALENDAR:
January 5, 2007

I. INTRODUCTION

Defendants submit this motion to compel Plaintiffs James S. Gordon, Jr. ("Gordon") and Omni Innovations, LLC ("Omni") (together, "Plaintiffs") to produce complete and accurate responses to Defendants' discovery requests in the above-captioned matter. Since the inception of this lawsuit, Defendants have made repeated requests for Plaintiffs to explain the factual basis of their claims. Plaintiffs have consistently refused to respond. Instead, they refer Defendants to their massive

1 overproduction of alleged email messages, two-thirds of which they recently admitted are
 2 irrelevant. They also refer to an “analysis” and “legend” which do not provide any
 3 meaningful information concerning, for example, why Plaintiffs believe certain subject
 4 lines are misleading.

5 If Plaintiffs believe a subject line is misleading or an email transmission path is
 6 obscured, the burden is on them to explain why. In fact, the burden is on them to explain
 7 all factual bases for their claims. Their repeated failure to do so leaves Defendants with
 8 only one alternative – a motion to compel discovery.

9 II. FACTS

10 A. Plaintiffs’ complaint does not identify their theories.

11 In their First Amended Complaint (“FAC”) (Dkt. # 15) Plaintiffs seek statutory
 12 damages arising out of emails allegedly received from Defendants (the “Emails”). The
 13 FAC alleges violations of 15 U.S.C. 7705 *et seq.* (“CAN-SPAM”) (FAC ¶¶ 4.1.1 - 4.1.6);
 14 the Washington Commercial Electronic Mail Act, RCW 19.190 *et seq.* (“CEMA”) and the
 15 Washington Consumer Protection Act (“WCPA”) (FAC ¶¶ 4.2.1 - 4.2.5); and the
 16 Washington state law governing the promotional advertising of prizes, RCW 19.170 *et*
 17 *seq.* (the “Prize Statute”) (FAC ¶¶ 4.3.1 - 4.3.2).

18 The FAC is replete with conclusory legal allegations but provides no substantive
 19 factual support for them. Plaintiffs merely parrot the elements of CAN-SPAM and
 20 CEMA (the “Email Statutes”) and follow that litany with a conclusory sentence stating
 21 that Defendants have violated the statutes. The following is a representative example:
 22 Plaintiffs merely allege, without elaboration or explanation, that the Emails violate
 23 CEMA because they obscure information identifying the point of origin or the
 24 transmission path of a commercial electronic mail message.¹ (FAC at ¶ 4.2.1.) These
 25 allegations are not enough to provide Defendants a fair opportunity to receive notice and
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27
 28 ¹ Defendants’ Motion to Dismiss provides more analysis of the lack of substance in
 Plaintiffs’ claims based on the Email Statutes. (Dkt. # 30 at 2:10 - 3:15.)

1 an opportunity to respond to the allegations in this Lawsuit.

2 Plaintiffs do not allege how, which, or how many of the Emails violate either of
3 the Email Statutes. It is not clear whether the Emails allegedly include false and
4 misleading subject lines, have obscured transmission paths, utilize IP address spoofing, or
5 any other theory of liability under the Email Statutes. The FAC did not attach any copies
6 of Emails and, without pleading how each of the Emails violates the Email Statutes,
7 Defendants cannot ascertain the nature of Plaintiffs' allegations. Plaintiffs' WCPA claim
8 is based entirely on Defendants' alleged violations of CEMA. (FAC ¶ 4.2.4.)
9 Consequently, Defendants' only possible means of understanding the factual basis for
10 Plaintiff's WCPA claim is through discovery.

11 Plaintiffs' Prize Statute allegations are equally vague. Plaintiffs merely paraphrase
12 the subsections of RCW 19.170.030 and allege the Emails violated one provision
13 "and/or" other provisions of the Prize Statute. (FAC ¶ 4.3.2.) Since the FAC does not
14 provide any relevant facts, Defendants were required to propound discovery requests
15 seeking the factual basis for Plaintiffs' Prize Statute claim.

16 **B. Defendants' discovery requests seek the factual basis for Plaintiffs' claims,**
17 **but Plaintiffs' responses are incomplete and evasive.**

18 On November 15, 2006, Defendant Scott Lynn ("Lynn") propounded his First Set
19 of Interrogatories and Requests for Production to Plaintiff Gordon (the "Gordon
20 Requests") and his First Set of Interrogatories and Requests for Production to Plaintiff
21 Omni Innovations, LLC (the "Omni Requests") (together, the "Discovery Requests").
22 (Declaration of Roger Townsend in Support of Defendants' Motion to Compel Discovery
23 ("Townsend Decl.") ¶ 2 Exs. A-1 and A-2.) On December 20, 2006, Plaintiffs provided
24 a discovery response ("Discovery Response") which was almost entirely unresponsive,
25 evasive, and inadequate. (Townsend Decl. ¶ 3 Ex. B.)

26 **1. Plaintiffs refuse to explain how the emails allegedly violate the above**
27 **statutes.**

28 Plaintiffs' entire case is that the Emails allegedly violate the Email Statutes, the

1 WCPA, and the Prize Statute. Consequently, Defendants' Discovery Requests ask
2 Plaintiffs to explain how the Emails violated them. These are all questions of fact.

3 a. Interrogatory No. 7.

4 By way of example, Interrogatory No. 7 in both sets of Discovery Requests seeks
5 the following information:

6 Please identify (including date, subject line, sender email and recipient email)
7 any [Email] that you contend was initiated by Defendants that contained, or
8 were accompanied by header information that was materially false or
misleading. For each such [Email], please explain how the header information
was materially false or misleading.

9 (Townsend Decl. ¶ 2 Exs. A-1 and A-2.) This information is highly relevant to Plaintiff's
10 claims, and Defendants are entitled to it. It is insufficient to refer Defendants to thousands
11 of Emails, claim the headers are misleading, and force Defendants to guess why Plaintiffs
12 believe they are misleading. If Plaintiffs were misled by certain Email headers, only they
13 can explain how they were misled. This is clearly a question of fact, and Defendants
14 must depend on Plaintiffs to answer it.

15 Unfortunately, Plaintiffs chose not to explain how they were misled by the headers
16 of the allegedly offending Emails. Both Gordon and Omni responded to Interrogatory
17 No. 7 as follows:

18 Plaintiff has provided copies, in at least 2 different formats, of the subject
19 [Emails]. Each [Email] is alleged to contain false, and/or misleading
20 information in the headers. The information provided by Plaintiff includes a
21 detailed analysis of the headers of each [Email], indicating those particular
portions of the headers containing allegedly false and/or misleading
information. Plaintiff has also provided a legend explaining how the
designations were made...

22 (Townsend Decl. ¶ 3 Ex. B.)

23 This evasive response continues Plaintiffs' history of asking Defendants to do their
24 work for them. (Townsend Decl. ¶ 4.) To date, Plaintiffs have provided Defendants with
25 electronic copies of over thirty-eight thousand (38,000) Emails. (Id. ¶ 5.) Plaintiffs have
26 never provided an explanation of why they consider these emails to have violated various
27 provisions of the Email Statutes, WCPA, or Prize Statute. (Id.) What they have done is
28 require Defendants to spend considerable amount of money hiring lawyers to work full-

1 time preparing an analysis of the thirty-eight thousand (38,000) Emails. (Id.) This week –
2 after Defendants had spent a great deal of money in reviewing those Emails – defendant
3 Gordon admitted two-thirds (2/3) of the Emails were superfluous: “Due to the
4 voluminous number of spams received from Defendants, a precise number has been
5 difficult to ascertain, and I apologize to the Court for having stated different numbers at
6 different times in this litigation... The most recent count, after making my best effort to
7 further sort and delete any duplicates appears to be 13,800 emails.” (Declaration of
8 James S. Gordon, Jr. in Support of Plaintiff’s Motion for Partial Summary Judgment (Dkt.
9 # 63) ¶ 26.) In other words, Plaintiffs required Defendants to sift through twenty-four
10 thousand (24,000) superfluous Emails, wasting a vast amount of Defendants’ time and
11 money. (Townsend Decl. ¶ 5.)

12 Defendants spent this time and money attempting to understand Plaintiffs’ claims
13 because Plaintiffs have not bothered to do that themselves. (Townsend Decl. ¶ 6.)
14 Plaintiffs’ claims in their above answer to Interrogatory No. 7 are totally inaccurate – they
15 have not provided a “detailed analysis of the headers of each [Email]”, and their
16 purported “legend” provides no useful information. (Id.) The response to Interrogatory
17 No. 7 is an apparent reference to Plaintiffs’ First Supplemental Responses to Defendant
18 [Virtumundo]’s First Discovery Requests, which they provided to Plaintiffs on September
19 11, 2006. (Id. Ex. C.) Virtumundo’s Discovery Requests, like Lynn’s current Discovery
20 Requests, asked detailed factual questions concerning why Plaintiffs believed certain
21 Email headers were misleading, which Email transmission paths were allegedly obscured,
22 and so forth. (See, e.g., Townsend Decl. ¶ 7 Ex. D, Interrogatory No. 4.) In response,
23 Plaintiffs provided an “Email Analysis” (the “Analysis”) which does not actually
24 “analyze” anything; rather, it highlights certain portions of certain Emails and requires
25 Defendants to decipher them. (Townsend Decl. ¶ 8 Ex. E.) For example, the first page of
26 the “Email Analysis” highlights the words “Location: Chicago, IL” in one Email, but does
27 not explain how that is misleading. (Id.) Moreover, the Analysis purports to “analyze”
28 only approximately two thousand (2,000) of the thirty-eight thousand (38,000) Emails

1 Plaintiffs have provided to Defendants. (Id.)

2 Plaintiffs' "Legend" is equally vague, confusing, and inadequate. (Townsend
3 Decl. ¶ 9 Ex. F.) For example, on page 3 of the Legend, Plaintiffs highlight the line
4 "Subject: Test your internet connection speed lynkstation", but they do not specify how
5 this subject line misled them. (Id.)

6 In sum, Plaintiffs' responses to Interrogatory No. 7 of the Discovery Requests do
7 not explain how any subject lines allegedly misled them. (Townsend Decl. ¶ 10.)
8 Instead, they continue to force Defendants to wade through a massive, disorganized
9 document production Plaintiffs admit was three times as large as it should have been.
10 (Id.) They also refer Defendants to an Analysis and Legend which do not explain the
11 factual basis of Plaintiffs' claims. (Id.) Their response to the Discovery Requests is
12 seriously inadequate, and they should be required to supplement it without delay.

13 b. Plaintiffs' Other Responses Concerning the Allegedly Offending
14 Emails Are Similar to Interrogatory No. 7 or Incorporate It by
15 Reference.

16 Plaintiffs continue their pattern of evasion in other discovery responses. Gordon
17 incorporates his answer to Interrogatory No. 7 in his responses to the following Gordon
18 Requests: Interrogatory No. 8, and apparently Interrogatories Nos. 16 and 17.²
19 (Townsend Decl. ¶ 3 Ex. B.) Omni incorporates its answer to Interrogatory No. 7 in its
20 responses to the following Gordon Requests: Interrogatories Nos. 8 and 15-17. (Id.) As
21 indicated above, Interrogatory No. 7 specifically asks about misleading Email headers. It
22 is therefore nonresponsive when Defendants reference their answer to that interrogatory
23 when responding to (for example) Interrogatory No. 8, which asks about return email
24 addresses and "opt-out" mechanisms. (Id. ¶ 2 Exs. A-1 and A-2.)

25 ² Gordon numbered two responses "10". The second "10", through his response
26 to Interrogatory No. 22, actually appear to be responses to Interrogatories 11 through 23.
27 Accordingly, Defendants assume for purposes of this motion that Gordon's responses
28 numbered "15" and "16" are responses to Interrogatories Nos. 16 and 17. In the event
Plaintiffs do not provide clarification before the noting date of this motion, Defendants
request this Court order them to do so.

1 Other nonresponsive answers include the following:

2 Interrogatory No. 9 in both sets of Discovery Requests asks for information
3 relating to Emails with subject headers Defendants should have know were misleading.
4 Both Plaintiffs respond by claiming the Emails speak for themselves. (Townsend Decl.
5 ¶ 2 Exs. A-1 and A-2; Id. ¶ 3 Ex. B.)

6 Interrogatory No. 10 in both sets of Discovery Requests seeks information
7 regarding Plaintiffs' attempts to "opt out" of receiving Emails. Both Plaintiffs respond by
8 claiming Defendants already have this information, which they do not. (Townsend Decl.
9 ¶ 2 Exs. A-1 and A-2; Id. ¶ 3 Ex. B.)

10 Gordon's response to either Interrogatory No. 17 or No. 18 refers to "all emails
11 sent by Defendants on behalf of First Premier Bank, all of which are contained in
12 previously provided discovery responses." Both interrogatories ask Gordon to provide
13 specific information about specific Emails, and he failed to do that in his response to
14 those Discovery Requests. (Townsend Decl. ¶ 2 Exs. A-1 and A-2; Id. ¶ 3 Ex. B.)

15 Interrogatory No. 18 asks Plaintiffs to identify Emails sent to addresses improperly
16 obtained by third parties using automated means. Both Plaintiffs claim not to understand
17 the question³, which is at least as clear as their allegations in the FAC. (Townsend Decl.
18 ¶ 2 Exs. A-1 and A-2; Id. ¶ 3 Ex. B.) The question is clear, and both Plaintiffs should be
19 ordered to provide a meaningful response.

20 **2. Plaintiffs' discovery responses are deficient in numerous other respects.**

21 Interrogatory No. 3 in both sets of Discovery Requests asked for registration dates
22 which Plaintiffs failed to provide. (Townsend Decl. ¶ 11.) Also, the responses to
23 Interrogatory No. 6 in the Gordon Requests and Interrogatory No. 5 in the Omni Requests
24 claim Plaintiffs "do not know the name of the particular software" they used to generate
25 the complaint messages in their September 11, 2006 supplemental responses. (Id.) This
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28 ³ It is unclear whether Gordon's response numbered "18" is a response to
Interrogatory No. 18 or 19.

1 lacks credibility. (Id.) In addition, both Plaintiffs claim, in their responses to Requests
 2 for Production Nos. 2 and 3, that they have no documents relating to their configuration
 3 of “auto-responder” files, nor can they produce any contracts which relate to their email
 4 accounts. (Id.) These are documents Plaintiffs should easily be able to obtain. (Id.)

5 **C. The parties’ Fed. R. Civ. P. 37 efforts to meet and confer.**

6 On December 21, 2006, counsel for Defendants attempted to contact Plaintiffs’
 7 counsel for a CR 37 discovery conference. (Townsend Decl. ¶ 12 Ex. G.) He was
 8 informed that Plaintiff’s counsel was unavailable. (Id.) Plaintiffs’ counsel has a long
 9 history of being unavailable for long periods of time for discovery conferences and other
 10 matters. (Id. ¶ 13.) Accordingly, Defendants’ counsel reasonably expects further
 11 attempts to resolve this matter without the Court’s involvement will be futile. (Id.)

12 **III. ARGUMENT & AUTHORITY**

13 **A. Standards for granting discovery motions.**

14 FED. R. CIV. P. 37(a)(2) provides: “If . . . a party fails to answer an interrogatory
 15 submitted under rule 33 . . . the discovering party may move for an order compelling an
 16 answer.” FED. R. CIV. P. 34(b) further provides: “The party submitting the request (for
 17 production) may move for an order under Rule 37(a) with respect to any objection to or
 18 other failure to respond to the request or any part thereof.” An “evasive or incomplete
 19 disclosure, answer, or response is to be treated as a failure to disclose, answer, or
 20 respond.” FED. R. CIV. P. 37(a)(3). In short, Rule 37 authorizes the Court to make any
 21 order it deems just in connection with Plaintiffs’ failure to respond to Defendants’
 22 Discovery Requests.

23 “The Federal Rules of Evidence create a ‘broad right of discovery’ because ‘wide
 24 access to relevant facts serves the integrity and fairness of the judicial process by
 25 promoting the search for the truth.’” Epstein v. MCA, 54 F.3d 1422, 1423 (9th Cir. 1995)
 26 citing Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993). “Litigants ‘may obtain
 27 discovery regarding any matter, not privileged, that is relevant to the claim or defense of
 28 any party.’” Survivor Media, Inc. v. Survivor Productions, 406 F.3d 625, 635 (9th Cir.

1 2005), *quoting* FED. R. CIV. P. 26(b)(1). For purposes of discovery, relevance is defined
 2 broadly to include “all information ‘reasonably calculated to lead to the discovery of
 3 admissible evidence’”. Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th
 4 Cir. 1992), *quoting* FED. R. CIV. P. 26(b)(1).

5 **B. This Court should compel plaintiffs to produce the requested discovery.**

6 A party suffers prejudice if the opposing party’s failure to cooperate in discovery
 7 “impair(s) the [discovering party’s] ability to go to trial.” Adriana Int’l Corp. v. Lewis &
 8 Co., 913 F.2d 1406, 1412 (9th Cir. 1990); Henry v. Gill Industries, Inc., 983 F.2d 943,
 9 948 (9th Cir. 1993) (A “defendant suffers prejudice if the plaintiff’s actions impair the
 10 defendant’s ability to go to trial or threaten to interfere with the rightful decision of the
 11 case”) (citation omitted). Here, Plaintiffs’ refusal to produce essential documents and
 12 information causes Defendants substantial prejudice. Defendants cannot prepare an
 13 adequate defense if Plaintiffs do not provide them with the factual basis for their claims.
 14 It is plainly insufficient to force Defendants to search through a massive overproduction
 15 of documents, make guesses about what facts Plaintiffs will allege at trial, and then face
 16 trial by ambush. Defendants will be severely prejudiced at trial unless this Court orders
 17 Plaintiffs to provide accurate and complete supplemental discovery responses.

18 **IV. CONCLUSION**

19 Defendants respectfully request that this Court order Plaintiffs to produce the
 20 information and documents requested without further delay.

21
 22 DATED this 21st day of December, 2006.

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

25
 26 By:



27 _____
 Derek A. Newman, WSBA No. 26967
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28 Attorneys for Defendants