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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

DECLARATION OF ROGER M. TOWNSEND IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL DISCOVERY

NOTE ON MOTION CALENDAR:
January 5, 2007

I, Roger M. Townsend, declare and testify as follows:

1. I am over eighteen years of age, counsel for defendants in the above captioned action, competent to testify to the matters stated in this declaration, and make this declaration from personal knowledge of those matters.

2. On November 15, 2006, Defendant Scott Lynn ("Lynn") propounded his First Set of Interrogatories and Requests for Production to Plaintiff Gordon (the "Gordon Requests") and his First Set of Interrogatories and Requests for Production to Plaintiff

1 Omni Innovations, LLC (the “Omni Requests”) (together, the “Discovery Requests”).
2 True and correct copies of the Discovery Requests are attached hereto as **Exhibit A-1** (the
3 Gordon Requests) and **Exhibit A-2** (the Omni Requests).

4 3. On December 20, 2006, Plaintiffs provided a discovery response
5 (“Discovery Response”) which was almost entirely unresponsive, evasive, and
6 inadequate. A true and correct copy of Plaintiffs’ Discovery Response is attached as
7 **Exhibit B**.

8 4. Plaintiffs’ Discovery Responses are hopelessly vague and inadequate. For
9 example, Interrogatory No. 7 asks Plaintiffs to explain why they believe certain email
10 subject headers are misleading. Unfortunately, Plaintiffs chose not to explain how they
11 were misled by the headers of the allegedly offending Emails. Both Gordon and Omni
12 responded to Interrogatory No. 7 as follows:

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

21 This evasive response continues Plaintiffs’ history of asking Defendants to do their work
22 for them.

23 5. To date, Plaintiffs have provided Defendants with electronic copies of over
24 thirty-eight thousand (38,000) Emails. Plaintiffs have never provided an explanation of
25 why they consider these emails to have violated various provisions of the Email Statutes,
26 WCPA, or Prize Statute. What they have done is require Defendants to spend
27 considerable amount of money hiring lawyers to work full-time preparing an analysis of
28 the thirty-eight thousand (38,000) Emails. This week – after Defendants had spent a great
deal of money in reviewing those Emails – defendant Gordon admitted two-thirds (2/3) of
the Emails were superfluous. In other words, Plaintiffs required Defendants to sift
through twenty-four thousand (24,000) superfluous Emails, wasting a vast amount of

1 Defendants' time and money.

2 6. Defendants spent this time and money attempting to understand Plaintiffs'
3 claims because Plaintiffs have not bothered to do that themselves. Plaintiffs' claims in
4 their above answer to Interrogatory No. 7 are totally inaccurate – they have not provided a
5 “detailed analysis of the headers of each [Email]”, and their purported “legend” provides
6 no useful information. The response to Interrogatory No. 7 is an apparent reference to
7 Plaintiffs' First Supplemental Responses to Defendant [Virtumundo]'s First Discovery
8 Requests, which they provided to Plaintiffs on September 11, 2006. A true and correct
9 copy of Defendants' transmittal letter served with their September 11 supplemental
10 responses is attached as **Exhibit C**.

11 7. Virtumundo's Discovery Requests, like Scott Lynn's current Discovery
12 Requests, asked detailed factual questions concerning why Plaintiffs believed certain
13 Email headers were misleading, which Email transmission paths were allegedly obscured,
14 and so forth. A true and correct copy of Virtumundo's discovery requests to Plaintiff
15 Gordon is attached as **Exhibit D**.

16 8. In response to the Virtumundo discovery requests, Plaintiffs provided an
17 “Email Analysis” (the “Analysis”) which does not actually “analyze” anything; rather, it
18 highlights certain portions of certain Emails and requires Defendants to decipher them.
19 For example, the first page of the “Email Analysis” highlights the words “Location:
20 Chicago, IL” in one Email, but does not explain how that is misleading. Moreover, the
21 Analysis purports to “analyze” only approximately two thousand (2,000) of the thirty-
22 eight thousand (38,000) Emails Plaintiffs have provided to Defendants. A true and
23 correct copy of the Analysis is attached as **Exhibit E**.

24 9. Plaintiffs' “Legend” is equally vague, confusing, and inadequate. For
25 example, on page 3 of the Legend, Plaintiffs highlight the line “Subject: Test your
26 internet connection speed lynkstation”, but they do not specify how this subject line
27 misled them. A true and correct copy of the Legend is attached as **Exhibit F**.

28 10. In sum, Plaintiffs' responses to Interrogatory No. 7 of the Discovery

1 Requests do not explain how any subject lines allegedly misled them. Instead, they
2 continue to force Defendants to wade through a massive, disorganized document
3 production Plaintiffs admit was three times as large as it should have been. They also
4 refer Defendants to an Analysis and Legend which do not explain the factual basis of
5 Plaintiffs' claims. Their response to the Discovery Requests is seriously inadequate, and
6 they should be required to supplement it without delay.

7 11. Interrogatory No. 3 in both sets of Discovery Requests asked for
8 registration dates which Plaintiffs failed to provide. Also, the responses to Interrogatory
9 No. 6 in the Gordon Requests and Interrogatory No. 5 in the Omni Requests claim
10 Plaintiffs "do not know the name of the particular software" they used to generate the
11 complaint messages in their September 11, 2006 supplemental responses. This lacks
12 credibility. In addition, both Plaintiffs claim, in their responses to Requests for
13 Production Nos. 2 and 3, that they have no documents relating to their configuration of
14 "auto-responder" files, nor can they produce any contracts which relate to their email
15 accounts. These are documents Plaintiffs should easily be able to obtain.

16 12. On December 21, 2006, counsel for Defendants attempted to contact
17 Plaintiffs' counsel for a CR 37 discovery conference. He was informed that Plaintiffs'
18 counsel was unavailable. A true and correct copy of a letter Defendants' counsel sent
19 concerning his attempt to reach Plaintiffs' counsel, as well as Plaintiffs' discovery
20 deficiencies, is attached as **Exhibit G**.

21 13. Plaintiffs' counsel has a long history of being unavailable for long periods
22 of time for discovery conferences and other matters. Accordingly, Defendants' counsel
23 reasonably expects further attempts to resolve this matter without the Court's involvement
24 will be futile.

25 14. Attached as **Exhibit H** is a true and correct copy of excerpts from the
26 recent deposition of Brett Brewer in the above captioned matter. Those excerpts (at
27 83:20-25) indicate Plaintiffs' counsel feels he must "check with [his] client" before
28 complying with discovery deadlines. Those excerpts also indicate Defendants' and

1 Plaintiffs' counsel previously met and conferred regarding Plaintiffs' discovery responses,
2 and agreed Defendants could move to compel discovery in the event Plaintiffs' responses
3 to the Discovery Requests were incomplete, which they are.

4
5
6 I certify and declare under the penalty of perjury under the laws of the State of
7 Washington and the United States that to my knowledge the foregoing is true and correct.

8
9 Executed on this 21st day of December, 2006, at Seattle, Washington.

10 

11 _____
12 Roger M. Townsend