

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 ADNOWLEDGEMAIL.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 DEREK LINKE IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL**

NOTE ON MOTION CALENDAR:  
January 5, 2007

I, Derek Linke, swear under penalty of perjury under the laws of the United States of America to the following:

1. I am a contract attorney for Newman and Newman, Attorneys at Law, LLP, 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.

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1 **A. PLAINTIFFS' FIRST AND SECOND PRODUCTION OF EMAILS**

2 2. On or about February 24, 2006, Defendants received Plaintiffs' First  
3 Production ("First Production") with a cover letter dated February 16th, 2006.

4 3. Attached hereto as **Exhibit A** is a true and accurate copy of the cover letter  
5 received by Defendants' counsel that accompanied the First Production.

6 4. Plaintiffs' First Production consists of a CD-ROM disc containing two (2)  
7 mailbox archives in Eudora format containing email allegedly giving rise to Plaintiffs'  
8 cause of action.

9 5. On or about July 25, 2006, Defendants received Plaintiffs' Second  
10 Production ("Second Production") with no accompanying cover letter.

11 6. Plaintiffs' Second Production consists of a CD-ROM disc containing an  
12 additional two (2) Eudora mailbox archives containing email allegedly giving rise to  
13 Plaintiffs' cause of action.

14 7. The mailbox archives contained in the Second Production are  
15 "Virtumundo.mbx," containing 5,047 emails, and "Virtumundo - Omni.mbx," containing  
16 7,016 emails.

17 **B. DEFENDANTS REVIEW OF PLAINTIFFS' EMAILS**

18 8. Beginning on or about November 16, 2006, Defendants' counsel engaged a  
19 team of seven contract attorneys to create a comprehensive log of all of the emails  
20 contained in the First Production and the Second Production and their compliance with 15  
21 U.S.C. § 7701 ("CAN-SPAM") and the Washington Commercial Email Act, RCW  
22 19.190.

23 9. We trained the contract attorneys on the review process and the relevant law  
24 and spent nearly two weeks reviewing all of the emails in the First Production and the  
25 Second Production.

26 10. The review of all of the emails in the First Production and the Second  
27 Production required approximately 500 hours of work by the contract attorneys at a cost  
28 of tens of thousands of dollars to Defendants.

1 11. Upon completion of the project on or about December 3, 2006, the contract  
2 attorneys terminated their involvement with Defendant's counsel.

3 **C. PLAINTIFFS' THIRD PRODUCTION OF EMAILS**

4 12. On or about November 29, 2006, Defendants received Plaintiffs' ("Third  
5 Production"). Although the Third Production was accompanied by a cover letter dated  
6 November 14, 2006, Plaintiffs included an additional note about the production dated  
7 September 27, 2006, and digital files with modification dates of September 9, 2006 and  
8 September 13, 2006.

9 13. The dates on the additional note included in the Third Production and on the  
10 produced archives indicate that Plaintiffs could have produced the evidence contained in  
11 The Third Production much earlier than they actually did.

12 14. Attached hereto as **Exhibit B** is a true and accurate copy of the cover letter  
13 received by Defendants' counsel that accompanied Plaintiffs' Third Production.

14 15. Attached hereto as **Exhibit C** is a true and accurate copy of the additional  
15 note from Plaintiffs, dated September 27, 2006, detailing the contents of the Third  
16 Production.

17 16. Plaintiffs' Third Production consists of a CD-ROM disc containing email  
18 stored in Eudora's mailbox archive format.

19 17. The archives produced in Plaintiffs' Third Production have the same file  
20 names as archives produced in the First Production and the Second Production but  
21 contain many additional emails. The archives are "Virtumundo.mbx," containing 8,124  
22 emails, and "Virtumundo - Omni.mbx," containing 11,201 emails.

23 18. We estimate that around 9,000 messages in the Third Production were  
24 previously produced in the First Production and the Second Production, these emails must  
25 also be individually analyzed by Defendants to assess potential liability in this case.

26 19. Attached hereto as **Exhibit D** is a true and accurate copy of a letter sent by  
27 Defendants to Plaintiffs' counsel on November 29, 2006, containing objections to the  
28 form and manner of Plaintiffs' Third Production.

1 20. As of this date, Defendants have been unable to segregate any new emails  
2 contained in the Third Production from emails previously provided.

3 21. Attached hereto as **Exhibit F** is a true and accurate copy of a letter from  
4 Plaintiffs' counsel dated December, 20, 2006 in which Defendants appear to be unwilling  
5 to assist us in understanding their production in this case.

6 22. The emails in Plaintiffs' Third Production are hopelessly disorganized and  
7 unduly burdensome for Defendants to parse and understand.

8 **D. DEFENDANTS' BURDEN TO REVIEW PLAINTIFFS' THIRD**  
9 **PRODUCTION**

10 23. If Defendants' counsel had received Plaintiffs' Third Production prior to  
11 November 16, by the beginning of our comprehensive review, the new messages could  
12 have been included in our review process, thus avoiding substantial prejudice to  
13 Defendants.

14 24. Attached hereto as **Exhibit E** is a true and accurate copy of an email sent by  
15 Plaintiffs' counsel to Derek Newman, of this firm, advising that Eudora provided a  
16 software utility relating to sorting mail by date that would automatically segregate the  
17 emails which had been previously produced.

18 25. I have performed a diligent inquiry and have concluded that Eudora does  
19 not contain any utility to compare mailboxes, not any utility to remove duplicate emails,  
20 nor any utility that could segregate the previously produced emails unless information  
21 identifying such emails were already available.

22 26. Additionally, the process of sorting by date will not permit us to identify all  
23 additional emails because while a date sort might identify any new emails, which would  
24 appear at the end of the date range, it would not suffice to identify any new emails within  
25 the date range of the emails from the First Production or the Second Production.

26 27. Attached hereto as **Exhibit F** is a true and accurate copy of a letter sent by  
27 Plaintiffs' counsel on December 20, 2006, in which he refused to commit to producing  
28 only the new emails, they have not in fact been produced.

1 28. In a final attempt to eliminate the Court's involvement in this dispute,  
2 Roger Townsend of this firm sent a letter to Plaintiffs' counsel, dated December 21, 2006,  
3 a true and accurate copy of which is attached as **Exhibit G**.

4 29. Attached hereto as **Exhibit H** is a true and accurate copy of an email sent  
5 by Plaintiffs' counsel to Derek Newman and Roger Townsend, of this firm, on December  
6 21, 2006, in which Plaintiffs' counsel stated that he would consult with his client, but  
7 refused to commit to producing only the new emails.

8 30. Thus, there was and remains no obvious means of segregating any new  
9 emails that may be contained in the Third Production from the thousands of duplicative  
10 messages that had previously been produced in the First Production and the Second  
11 Production. The only means of comparing them appears to be by undertaking a manual,  
12 one-by-one review of all of the thousands of emails included in the Third Production.

13 31. Furthermore, even if we were able to segregate any new emails contained in  
14 the Third Production, Plaintiffs' inexplicable delay in producing the emails contained in  
15 the Third Production until the end of our comprehensive review meant that we were  
16 unable to have the contract team review them prior to ending our relationship with them.

17 32. In order to review those additional messages now, Defendants would have  
18 to compare all of the new messages contained in Plaintiffs' Third Production, with our  
19 completed log or begin a new extensive document review. Either option would cost the  
20 client tens of thousands of dollars in additional fees.

21 33. Also, it is unknown whether the contract attorneys that have already been  
22 trained to review the emails in this case would be available again or whether we would  
23 have to locate and train a new group of attorneys, at considerable expense to Defendants.

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

DATED this 21th day of December, 2006, at Seattle, Washington

  
Derek Linke