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THE HON. JOHN C. COUGHENOUR

8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON, SEATTLE

10 **JAMES S. GORDON, Jr., a married**
11 **individual; OMNI INNOVATIONS,**
12 **LLC., a Washington limited**
13 **liability company,**

14 **Plaintiffs,**

15 v.

16 **VIRTUMUNDO, INC, a Delaware**
17 **corporation, d/b/a**
18 **ADNOWLEDGEMAIL.COM;**
19 **ADKNOWLEDGE, INC., a Delaware**
20 **corporation, d/b/a**
21 **ADKNOWLEDGEMAIL.COM;**
22 **SCOTT LYNN, an individual; and**
23 **JOHN DOES, I-X,**

24 **Defendants.**

NO. CV06-0204JCC

DECLARATION OF JAMES S.
GORDON, JR. IN RESPONSE AND
OPPOSITION TO DEFENDANTS'
MOTION TO COMPEL DISCOVERY
RE LYNN INTERROGATORIES

James S. Gordon, Jr. declares as follows:

- 1) I, James S. Gordon, Jr., am the Plaintiff in the above captioned lawsuit, and am the managing member of Plaintiff Omni Innovations, LLC. I am over the age of 18, of sound mind, and am otherwise competent to testify.
- 2) I have done my best to respond to Defendants' discovery requests and to be

DECLARATION OF JAMES S. GORDON, JR. IN RESPONSE
TO MOTION TO COMPEL DISCOVERY RE LYNN
INTERROGATORIES
GORDON v. VIRTUMUNDO GROUP, INC. - 1

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1 completely forthcoming and honest with my answers. Once again I apologize for
2 any confusion resulting from my attempts to monitor and manage the voluminous
3 amount of unwanted spam email received from Defendants and other spammers.
4 It is a truly daunting task for me as an individual , and it has had an extremely
5 negative impact on my ability to conduct my interactive computer service
6 business.

7 3) **Plaintiffs' Theories Re Statutory Violations.** Regarding Defendants' allegation
8 that Plaintiffs have failed to advise them of the factual basis for our claims, I can
9 only say that I have done my best to identify the many thousands of Defendants'
10 emails that I claim have violated the referenced statutes. As part of Plaintiffs'
11 First Supplemental Responses we provided Defendants with a 267 page analysis
12 of 2,000 thousand of their emails. The DVD containing the supplemental
13 responses included, in addition to the then latest updated iteration of the emails,
14 the following: A Table of Contents of the DVD; A 267 page analysis of some
15 2,000 of Defendants' emails entitled "Email Analysis – Virtumundo"; A Legend
16 entitled "Normal or Valid 'Transport Path' Protocol (Visualware)". (See **Exhibit**
17 **"A"** attached hereto). This information and these tools were intended to be a
18 representative example of the categories of violations contained in Defendants'
19 emails. Looking at the representative 5 page example of the Email Analysis
20 shows an example of a few of the analyzed emails, with portions alleged to
21 violate the statutes indicated with coding (inserted by the Visualware program),
22 and explained in the "Legend". These emails were analyzed using a program
23 called EmailTrackerPro by Visualware, which I routinely use to help me monitor
24 and identify spam email.

25 4) **Other Theories Identified.** A review of the internet RFCs (Request For
Comments) upon which internet protocols have been built – starting with
numbers 2821 and 2822 along with the software mentioned (by Visualware)
indicates that email creation and transmission has certain protocols dating back
to the Department Of Defense early days of the internet. As Defendants claim to

1 be one of, if not “the” leading email marketing company in the country, I would
2 expect that they are quite familiar with the RFCs. I cite the current accepted
3 protocols in my Legend, which was submitted to Defendants. When their email
4 violates accepted protocols, e.g. a clear hand off of email from one server to the
5 next, I contend that that email violates the law, because information in the
6 transmission path is missing or altered, or “obscured” under the statutes. The
7 legend provides examples of each of the hypotheses, or theories of the case.

8 5) **The Deceptive/Misleading Subject Line Theory.** Those subject lines that I
9 believe to be deceptive and/or misleading, or to have “the tendency or capacity”
10 to deceive are also indicated by highlighting on the legend. I cannot say “how” I
11 was misled by these, but only that these have the capacity to mislead. I believe
12 that is all the statutes require. Attached hereto as **Exhibit “B”** is a page from the
13 Washington State Attorney General’s webpage on Junk Email found on the web
14 at www.atg.wa.gov/junkemail/deceptive.shtml. The Attorney General states:
15 *“Generally, a subject line is considered legally deceptive if it has a tendency or*
16 *capacity to deceive consumers. It need not actually deceive or harm consumers*
17 *and there need not be intent to deceive.”*

18 6) **The “From” Line Violation Theory.** We recently filed a Motion for Partial
19 Summary Judgment which explains yet another theory, that of using materially
20 false information in the “From” line of the email header, which fails to accurately
21 identify the sender of the email.

22 7) **AutoResponder.** Regarding Defendants’ allegation that I have refused to
23 advise them of the name of the software used to generate my AutoResponder
24 cease and desist email messages that were sent to them in response to many of
25 their emails, I do not know the name of the software. The software is server side,
i.e. web-based. The web hosting company I used at that time (I believe it was
Webmasters.com) provided this web-based application for the use of its
customers. I did not know then nor do I know now what software was used by
this company in generating the AutoResponder messages. Further, no

1 documents other than the actual AutoResponder message was produced and it
2 did not take a contract to create and upload it to my web site, so I do not have
3 such documents or contracts.

4 8) **The "Opt-Out" Information.** Regarding Defendants' complaint that I told
5 them they already had, and were in possession of information and documents
6 related to Plaintiffs' attempts to "opt-out" from their and their affiliate websites,
7 attached hereto as **Exhibit "C"** are documents received from Defendants (as
8 indicated by their own Bates stamped numbers), all of which appear to be related
9 to this issue. Additionally, the DVD containing Plaintiffs' First Supplemental
10 Responses included files containing "Virtumundo Complaints" sent directly to
11 Defendants, "Contract Bounces", and "Spam Reports" all of which are also
12 responsive and relevant to this issue. I have also provided Defendants with
13 copies of my Autoresponder email notices requesting them to stop sending
14 emails, which are also responsive to this issue, and which are listed on the table
15 of contents provided with the DVD. I have also prepared a spreadsheet, which I
16 offer as further supplemental response to Defendants' discovery requests on this
17 issue. The spreadsheet is attached as **Exhibit "D"** and indicates Plaintiffs'
18 clients' email addresses, the so called "opt-in" date, and the "opt-out" dates.
19 Further, attached as **Exhibit "E"** are documents (provided previously) indicating
20 what Defendants apparently contend was the earliest "opt-in" from the
21 Gordonworks.com domain at one of their "affiliate" websites
22 "ValueWeb"/"Emailprize.com" on 9/4/03; email messages sent to Virtumundo
23 addresses requesting them to "Please help me to stop the spamming by the
24 sender below." sent in September/October 2003; A confirmation of "unsubscribe",
25 or "opt-out" from that website dated 10/1/03; Notices sent directly to Virtumundo
addresses entitled "Notice Of Offer To Receive Unsolicited Commercial Email
(Spam) which includes the statement "YOU AGREE TO CEASE AND DESIST
ANY FURTHER ATTEMPTS TO SEND ANY ADVERTISING MATERIAL
WHATSOEVER TO THE DOMAIN GORDONWORKS.COM;" Accordingly, I

1 believe that I have responded to this question.

2 9) **The “Opt-In” “Opt-Out” Scam.** I ask the Court to take note that
3 although Defendants like to use the term “opt-in” to justify their conduct in
4 sending voluminous amounts of spam emails to anyone who happens to
5 unwittingly visit one of their so-called “affiliate” websites offering prizes, I can
6 assure you that I for one had no idea at the time of the actual consequences of
7 visiting the Emailprize.com website. Apparently, there was some very “fine print”
8 that I must have missed, if any such warning was really there at all. In any event,
9 it was certainly not prominently displayed, and did not accurately inform me and
10 describe the potential consequences. Such practices are patently deceptive and
11 reprehensible. Shortly after I started receiving the tidal wave of spam as a
12 consequence of my first visit in September, 2003, I started sending notices to
13 Virtumundo and to their affiliates in an attempt to stop the onslaught. As the
14 Court can see, such attempts were futile, and not even the bringing of this lawsuit
15 succeeded in stopping the flood of spam, which has continued for over 3 years,
16 until as recently as November 30, 2006 attached as **Exhibit “F”**. The Court
17 should also note that this latest email was sent to
18 ‘JAMES@GORDONWORKS.COM’ an address that was successfully
19 “unsubscribed” or “opted-out” over 3 years earlier (See first two pages of Exhibit
20 “E”, clearly showing the fraudulent nature of Defendants’ “opt-in/opt-out” scam.

21 10) **Plaintiffs’ Domain Registration.** Apparently, I may have inadvertently
22 overlooked providing the dates on which the two domain names I identified as
23 having registered were actually registered. I registered ‘gordonworks.com’ on
24 5/19/98, and ‘rcw19190020.com’ on 6/2/05.
25

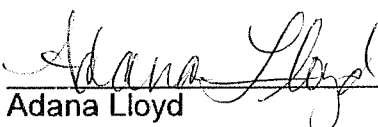
1
2 I declare under penalty of perjury under the laws of the United States that the
3 foregoing is true and correct.

4
5 EXECUTED this 2nd day of January, 2007 at Pasco, Washington.

6 
7 _____
8 James S. Gordon, Jr.

9
10 Certificate of Service

11 I, hereby, certify that on January 2, 2007, I filed this affidavit with this Court via
12 approved electronic filing, and served the following:
13 Attorneys for Defendants: Newman & Newman, Derek Newman

14 
15 _____
16 Adana Lloyd