

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 ADNOWLEDGEMAIL.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 OF TESTIMONY RE SETTLEMENTS

NOTE ON MOTION CALENDAR:
January 26, 2007

CONFIDENTIAL INFORMATION

I. INTRODUCTION

Defendants submit this motion to compel Plaintiffs James S. Gordon, Jr. ("Gordon") and Omni Innovations, LLC ("Omni") (together, "Plaintiffs") to provide further testimony regarding Gordon's prior settlement agreements in disputes involving his alleged receipt of unsolicited commercial email. The information Defendants seek is relevant for many reasons. In a recent deposition, Gordon admitted the settlement of lawsuits provides his sole source of income and has for several years (except for state

1 unemployment benefits). Further information concerning his prior settlements may
2 provide evidence of Gordon's improper motives in filing lawsuits, including the case at
3 bar. For example, Gordon admitted in deposition that he can block emails from
4 Defendants but did not do so. He also admitted he encourages so-called clients to send
5 him messages from email marketers in exchange for a share of case settlements. Further
6 testimony relating to Gordon's settlements will help to establish that Gordon makes no
7 efforts to mitigate alleged damages, but instead seeks to increase them to maintain his
8 sole source of income. Further testimony may also reveal admissions against interest in
9 Gordon's previous settlement agreements, and may provide evidence relating to his
10 ability to pay a potential award of attorneys' fees in favor of Defendants.

11 Defendants only seek discovery which may lead to the production of admissible
12 evidence, and will not offer the requested testimony to prove the invalidity of Gordon's
13 previous claims, as prohibited by Fed. R. Evid. 408. Defendants will maintain the
14 confidentiality of information consistent with the protective order in this case. The
15 discovery rights created by the Federal Rules of Evidence are broad, and the requested
16 information is relevant to Defendants' case. Accordingly, Defendants request this Court
17 allow them to question Gordon in deposition about his prior settlements, and compel Mr.
18 Gordon to testify truthfully and fully in response to such questions.

19 **II. FACTS**

20 **A. Gordon's sole source of income is settling cases like this one.**

21 On January 9, 2007 and January 10, 2007, Defendants deposed Plaintiff James S.
22 Gordon, Jr. ("Gordon") in the above-captioned lawsuit. (Declaration of Derek A.
23 Newman in Support of Defendants' Motion to Compel Discovery ("Newman Decl.") ¶ 2.)
24 Gordon testified that for years, he has made no income other than through settlement of
25 lawsuits (except for state unemployment benefits). (*Id.* ¶ 2 Ex. A at 31:12 - 32:21; 45:21-
26 23; 46:20-22.) Each of the lawsuits Gordon has settled were based upon allegations
27 relating to unsolicited commercial email, similar to Gordon's allegations in this matter.
28 (*Id.* ¶ 2 Ex. A at 36:1-25; 41:6 - 42:8; 49:16 - 50:8.)

1 In this lawsuit, Gordon seeks statutory damages, and admits he suffered no actual
2 damages, from the unsolicited commercial email he allegedly received from Defendants.
3 (Dkt. #15 at 19:18-20.) However, at his deposition he admitted that the receipt of
4 unsolicited commercial email actually *benefits* him. (Newman Decl. ¶ 2 Ex. A at 218:3 -
5 219:3 (“I’m doing research on the spam that I receive, and there is a benefit in receiving
6 spam because of that.”).) Indeed, Mr. Gordon was asked: “[t]he receipt of spam benefits
7 you, correct?” (Id. at 218:3). After several objections from his lawyer, Mr. Gordon
8 answered, “[y]es insofar as research and yes insofar as there have been settlement
9 agreements”. (Id. at 219:1-3.) Gordon also admitted he solicits unsolicited commercial
10 email from so-called “clients” for the purpose of collecting statutory damages, and shares
11 his litigation awards with them. (Id. ¶ 2 Ex. A at 416:5 - 417:6.)

12 **B. Gordon refuses to answer questions about his previous settlements**
13 **without a court order.**

14 Unless this Court orders him to do so, Gordon refuses to answer questions about
15 the terms of his settlements in other cases involving his alleged receipt of unsolicited
16 commercial email. (Newman Decl. ¶ 2 Ex. A at 33:7-8.) Gordon will not reveal this
17 information even though the parties have negotiated a protective order which would
18 ensure his settlement information remains confidential. (Id. ¶ 2 Ex. A at 34:3-6; see also
19 Dkt. #37.) During Gordon’s deposition, the parties sought the Court’s guidance regarding
20 this matter. (Newman Decl. ¶ 2 Ex. A at 43:18-25.) At that time, the Court indicated
21 Defendants could file a motion to compel further deposition inquiry regarding Gordon’s
22 prior settlement agreements. (Id. ¶ 2 Ex. A at 71:17 - 72:17.)

23 **III. ARGUMENT & AUTHORITY**

24 **A. The requested information may lead to the discovery of admissible**
25 **evidence.**

26 This Court should grant the relief Defendants seek. “The Federal Rules of
27 Evidence create a ‘broad right of discovery’ because ‘wide access to relevant facts serves
28 the integrity and fairness of the judicial process by promoting the search for the truth.’”

1 Epstein v. MCA, 54 F.3d 1422, 1423 (9th Cir. 1995) citing Shoen v. Shoen, 5 F.3d 1289,
2 1292 (9th Cir. 1993). “Litigants ‘may obtain discovery regarding any matter, not
3 privileged, that is relevant to the claim or defense of any party.’” Survivor Media, Inc. v.
4 Survivor Productions, 406 F.3d 625, 635 (9th Cir. 2005), *quoting* FED. R. CIV. P. 26(b)(1).
5 For purposes of discovery, relevance is defined broadly to include “all information
6 ‘reasonably calculated to lead to the discovery of admissible evidence’”. Brown Bag
7 Software v. Symantec Corp., 960 F.2d 1465, 1470 (9th Cir. 1992), *quoting* FED. R. CIV. P.
8 26(b)(1). Parties may obtain information which is inadmissible, provided there is a
9 reasonable chance that information will lead to the discovery of other evidence which is
10 admissible. FED. R. CIV. P. 26(b)(1). In this case, information concerning Gordon’s
11 prior settlements may well lead to the discovery of admissible evidence.

12 **B. The requested information may be admissible for specific purposes.**

13 As provided by FED. R. EVID. 408, information regarding Gordon’s previous
14 settlements may be admissible for certain purposes at trial. FED. R. EVID. 408 bars the
15 admission of settlement evidence “to prove liability for or invalidity of the claim or its
16 amount”, but does not “require the exclusion of any evidence otherwise discoverable
17 merely because it is presented in the course of compromise negotiations.”

18 In Fireman's Fund Ins. Co. v. City of Lodi, 296 F. Supp.2d 1197 (E.D.Cal. 2003),
19 the court determined a settlement agreement was admissible because Rule 408

20 does not require exclusion when the evidence is offered for another purpose
21 [aside from proving liability or the lack thereof], such as proving bias or
22 prejudice of a witness . . . The use of the phrase “such as” . . . implies that the
ensuing list is not exhaustive, but is only illustrative.

23 (Cites omitted.) 296 F.Supp.2d at 1208-09. The district court admitted the settlement
24 agreement in question because the document provided relevant evidence of the
25 obligations it imposed on the parties who signed it. *Id.* at 1209. *See also* Bennett v. La
26 Pere, 112 F.R.D. 136, 139 (D.R.I. 1986) (granting motion to compel disclosure of
27 settlement agreements because such discovery was the only method to determine whether
28 those documents were admissible pursuant to the exceptions in FED. R. EVID. 408).

1 The information Defendants request is relevant to the affirmative defenses they
2 allege in their Answer to the First Amended Complaint (Dkt. #31). For example,
3 Defendants allege failure to mitigate. (Id. ¶ 6.2.) Evidence pertaining to Gordon’s
4 previous settlements may indicate a strong motivation to create damages to increase his
5 income through settlements, rather than mitigating. Defendants also allege Gordon has
6 already been compensated for any damages he has allegedly suffered. (Id. ¶ 6.7.) It is
7 possible, for example, that Gordon released claims against the defendants in this case
8 through earlier settlement agreements. The information Defendants request may
9 substantiate that allegation. Unless Defendants have the opportunity to question Gordon
10 about his settlement agreements in past actions, Defendants cannot know what
11 exculpatory evidence or other relevant information is contained therein. Finally,
12 Gordon’s past settlements are germane to whether he has the ability to pay a judgment
13 against him, which is relevant to Defendants’ pending Motion for an Undertaking (Dkt.
14 No. 38).

15 **C. This Court should compel plaintiffs to produce the requested discovery.**

16 A party suffers prejudice if the opposing party’s failure to cooperate in discovery
17 “impair(s) the [discovering party’s] ability to go to trial.” Adriana Int’l Corp. v. Lewis &
18 Co., 913 F.2d 1406, 1412 (9th Cir. 1990); Henry v. Gill Industries, Inc., 983 F.2d 943,
19 948 (9th Cir. 1993) (A “defendant suffers prejudice if the plaintiff’s actions impair the
20 defendant’s ability to go to trial or threaten to interfere with the rightful decision of the
21 case”) (citation omitted). The information Defendants request is unquestionably relevant
22 to their defenses in this lawsuit, and Defendants will maintain its confidentiality to the
23 extent required by this Court and the parties’ prior agreements. However, unless this
24 Court orders Gordon to provide information relating to his prior settlement agreements,
25 Defendants’ ability to discover relevant evidence will be significantly impaired. This will
26 cause them substantial prejudice and interfere with the rightful decision of this case –
27 precisely the outcome the Ninth Circuit cautioned against in Adriana and Henry, supra.

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1 **IV. CONCLUSION**

2 Defendants respectfully request that this Court order Plaintiffs to provide further
3 testimony regarding Gordon’s prior settlement agreements in cases involving his alleged
4 receipt of unsolicited commercial email, and specifically to order Gordon to answer any
5 questions regarding those past settlements and settlement agreements.

6 DATED this 11th day of January, 2007.

7
8 **NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP**

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10 By: /s/ Derek A. Newman
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