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10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON, SEATTLE

12 **JAMES S. GORDON, Jr., a married**
13 **individual, d/b/a**
14 **'GORDONWORKS.COM',**

NO. CV06-0204JCC

Plaintiff,

v.

PLAINTIFFS' SURREPLY TO
DEFENDANTS' REPLY RE
MOTION FOR UNDERTAKING

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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;**
SCOTT LYNN, an individual; and
JOHN DOES, I-X,

Defendants.

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PLAINTIFFS' SURREPLY TO DEFENDANTS' REPLY RE
MOTION FOR UNDERTAKING
GORDON v. VIRTUMUNDO GROUP, INC., ET AL.-i

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1 Plaintiffs file this Surreply pursuant to LR 7(g) of the Local Rules for the U.S. District
2 Court for Western District of Washington. Plaintiffs request the Court to strike the following
3 material contained in Defendants' Reply In Support Of Defendants' Motion For An Undertaking.

4 **1. Much Of Defendants' "Reply" Should Be Stricken.** Defendants' so-called
5 "Reply" is anything but. It is replete with new material, mostly redacted portions of Gordon's
6 deposition testimony, taken completely out of context from a "draft" transcript, and providing no
7 opportunity for Plaintiffs to respond, or for the Court to be appropriately advised of the totality
8 of Gordon's testimony. On that basis alone the cited deposition testimony should be stricken.
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10 **2. Plaintiffs' Motion For Partial Summary Judgment Constitutes And Should**
11 **Be Taken As A Substantive Response.** Defendants disingenuously claim that Plaintiffs have
12 failed to "Respond" to their Motion For An Undertaking. Plaintiffs move to strike Defendants'
13 claim in this regard. Plaintiffs moved for relief from deadline in response to Defendants' Motion
14 specifically in order that Plaintiffs be given the opportunity to first file their Motion For
15 Summary Judgment. Accordingly, Plaintiffs' pending Motion was intended and should be
16 considered as their Response to Defendants' Motion. Thus, Plaintiffs' clearly did not "fail" to
17 *contest* Defendants' Motion, and there is no basis to award attorney fees against them.
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19 **3. Defendants' Misstatements Re Plaintiffs' Status As An "IAS".** Defendants
20 erroneously assert that Plaintiffs have not advanced factual support for their claim that they
21 qualify as an Internet Access Service ("IAS") under the Act. Such an assertion should be
22 stricken or disregarded as it is plainly contradicted by the record. In support of their claim,
23 Defendants cite deposition testimony by Mr. Gordon which is, at best, unclear on its face.
24 However, even if the Court assumes the facts alleged, and accepts Defendant's characterization
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1 of Gordon's testimony, the Court need only look at the Declarations of both Gordon and his
2 client/customers submitted in support of Plaintiffs' Motion to recognize that the Plaintiffs have
3 advanced significant factual support for the claim that they are indeed an IAS. The Declarations
4 of the various clients/customers of Gordon and Omni clearly demonstrate that Plaintiffs provide
5 internet domain hosting services to these various clients/customers, and host their clients'
6 domains on their dedicated server. These facts alone qualify Plaintiffs as an IAS under the Act.
7 The issue of whether Plaintiffs *provide* email accounts, or whether that is more properly
8 characterized as something Go-Daddy does is irrelevant to this determination.
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10 **4. Defendants' Claim Re Plaintiffs' So-Called "Concession".** Never have
11 Plaintiffs stated, or otherwise indicated that their claims against Defendants are limited only to
12 the "from" line violations articulated in Plaintiffs' Motion. Defendants emphasize and rely upon
13 tortured, and equivocal testimony from Gordon concerning whether he was "actually" misled by
14 any of the "subject" or "from" lines in the subject emails. However, nowhere in either Can-
15 Spam, or CEMA is there any requirement that a particular plaintiff need be "actually" misled
16 about anything in order to sustain a statutory violation. Further, a reading of the transcript
17 testimony submitted by Defendants readily shows that Mr. Gordon, far from conceding that no
18 other violations exist, is replete with statements concerning his position that some of the
19 "subject" lines were misleading, and did "misrepresent". Again, whether or not Mr. Gordon read
20 any particular "subject" or "from" lines at the time he received them, or whether they "actually"
21 misled him in some way, is of no consequence to the merits of his statutory claims herein.
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23 **5. Plaintiffs Move To Strike Defendants' Statement "Gordon's testimony**
24 **indicates this lawsuit is frivolous".** Once again, Defendants completely misconstrue the Can-
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1 Spam Act, and choose to entirely ignore the Washington CEMA. Neither statute requires that
2 email be “unsolicited” in order that it may violate the statute. Both acts are wholly proscriptive
3 in that they prohibit certain conduct on the part of the senders of commercial email, but require
4 no affirmative acts whatsoever on the part of recipients of such email. That is, it is entirely
5 possible for senders such as Defendants to violate both statutes by virtue of how their emails are
6 constructed, regardless of whether a recipient may have “opted-in”, or “subscribed” to a website,
7 directly or indirectly, to receive marketing materials. Neither statute requires that for an email to
8 be actionable that it be “unsolicited”. The definition section of Can-Spam § 7702. states in
9 pertinent part: *(2) Commercial electronic mail message (A) In general*

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11 *The term "commercial electronic mail message" means any electronic mail message the primary
12 purpose of which is the commercial advertisement or promotion of a commercial product or
13 service (including content on an Internet website operated for a commercial purpose).*

14 Can-Spam only discusses the issue of “opting-in” or “subscribing” insofar as it provides a
15 wholly optional mechanism for recipients to “opt-out”. And, under CEMA, consistent with the
16 intent of the statute, there is conspicuously no mention of “opt-in”, or “opt-out” whatsoever.
17 Accordingly, even taking Defendants allegations as true, their allegations in this regard, and
18 defenses based thereon, are wholly irrelevant, and should therefore be stricken.

19 **6. Plaintiffs Move To Strike Defendants’ Statements Re “Gordon’s “status as a
20 professional plaintiff”.** Defendants contend that the fact that Mr. Gordon has sought in other
21 lawsuits to enforce his rights under the anti-spam statutes somehow makes his claims here
22 “frivolous”. Lacking any viable counterclaim that Mr. Gordon has violated any law, such a
23 statement is entirely irrelevant to the issues at hand, and should be stricken. Plaintiffs are in
24 good company with the likes of other IASs and ISPs such as Microsoft, AOL, Yahoo, Earthlink,
25 and others who routinely bring such actions against spammers such as Defendants.

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RESPECTFULLY SUBMITTED this 16th day of January, 2007.

DOUGLAS E. MCKINLEY, JR

MERKLE SIEGEL & FRIEDRICHSEN, P.C.

Attorney at Law

/S/ Douglas E. McKinley, Jr.

/S/ Robert J. Siegel

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Robert J. Siegel, WSBA #17312

Attorney for Plaintiffs

Attorney for Plaintiffs

Certificate of Service

I, hereby, certify that on January 16th, 2007, I filed this affidavit with this Court via approved electronic filing, and served the following:

Attorneys for Defendants: Derek A. Newman, Newman & Newman .



Adana Lloyd