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THE HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

JAMES S. GORDON, Jr., a married individual; 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, I-X,

Defendants.

NO. CV06-0204JCC

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DISCLOSURE OF CONFIDENTIAL SETTLEMENT AGREEMENTS

[Hearing Noted Without Oral Argument for January 26, 2007]

Plaintiffs James S. Gordon, Jr., and Omni Innovations, LLC by and through their undersigned attorney of record, respond to Defendants' Motion Compel Discovery as follows:

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL DISCLOSURE OF CONFIDENTIAL SETTLEMENT AGREEMENTS -1
GORDON v. VIRTUMUNDO, INC., ET AL

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Phone: 206-304-5400
Fax: 206-624-0717**

1 Defendants seek to compel Plaintiffs to disclose the contents of confidential
2 settlement agreements. This request is improper, not calculated to lead to the
3 discovery of admissible evidence, and is wholly irrelevant to the issues presented in this
4 lawsuit.

5 **1. Defendants' Request Is *Irrelevant* – Not Calculated To Lead To The**
6 **Discovery Of Admissible Evidence.** Defendants' request is not calculated to lead to
7 the discovery of admissible evidence, and is only posed to intimidate and harass
8 Plaintiffs. In support of their Motion, Defendants make much of deposition statements
9 by Mr. Gordon indicating that his settlements in anti-spam lawsuits have provided him
10 with a source of income. Of course, Gordon has never denied this. In fact, Mr. Gordon,
11 much like his much larger anti-spam ISP counterparts such as Microsoft, AOL,
12 Earthlink, takes pride in his efforts in this regard. Nonetheless, the terms of settlements
13 with other defendants, which are all understandably confidential pursuant to those
14 settlement agreements, are completely irrelevant to the issues at hand in this lawsuit.
15 Whether Gordon has brought 1 or 1 million other spam lawsuits, and whether he has
16 settled those for \$1 or \$1 million dollars, has no bearing whatsoever on the claims
17 asserted in this lawsuit, ie., whether Defendants' commercial emails violate the anti-
18 spam statutes. Defendants simply have not pled any affirmative defenses or
19 counterclaims against Plaintiff to which the confidential settlement agreements would be
20 relevant.

21 **2. The Confidential Settlements Are Not Relevant To Defendants'**
22 **Affirmative Defenses.** Defendants' arguments in this regard are a desperate ruse.

23 **a. Failure To Mitigate – There Is No Duty To Mitigate.**

24 Defendants claim that Gordon's testimony about and disclosure of the
25 confidential settlements may "indicate a strong motivation to create damages to
increase his income through settlements, rather than mitigating." However, as

1 Plaintiffs have argued in other briefs to this Court, it is axiomatic that statutory
2 damages such as those sought here by Plaintiffs are not subject to the defense
3 of failure to mitigate.

4 **b. Accord And Satisfaction.** Defendants argue that if they are
5 allowed to know the details of the confidential settlements, they may find out that
6 Gordon has already been compensated by some other party for the unlawful email
7 alleged against them. However, even if Gordon has already been compensated by
8 some other party for the unlawful email sent by the Defendants, such is irrelevant to
9 Gordon's claims in the instant action.

10 First, taking Defendants' contention as true on its face indicates that Defendants
11 anticipate possibly discovering a prior Gordon settlement agreement that somehow
12 releases them – Defendants. That is, that somehow, unknown to them, they were made
13 a party to a prior Gordon settlement. If that were the case, they would presumably have
14 known of that privity relationship previously. *Accord and satisfaction* is a doctrine and/or
15 defense that would only apply as to parties in such contractual privity. Thus, lacking
16 that privity, the defense asserted does not create relevance here as Defendants would
17 argue.

18 Washington's Commercial Electronic Email Statute, RCW 19.190 et seq.
19 (hereafter the "Act") generally prohibits falsity and deception in commercial electronic
20 mail messages. Overlapping prohibitions in the Act simultaneously apply to those who
21 "initiate the transmission" of false or deceptive messages, to those who "conspire with
22 another to initiate the transmission" of false or deceptive messages, and to those who
23 "assist [in] the transmission" of false or deceptive messages. See RCW 19.190.020. It
24 is obvious from a plain reading of the Act that several persons may each violate

1 separate prohibitions in the Act in the transmission of a single commercial electronic
2 mail message, (eg. one individual may have liability for “initiating” transmission, and
3 another for “assisting” transmission of the same message). The provisions of CAN
4 SPAM also provide for this same, overlapping liability.

5
6 The purpose of the both statutes are clearly punitive in nature. Before passing
7 the Act, both the Washington State legislature and Congress heard copious testimony
8 that the specific conduct prohibited by the statutes cost businesses thousands of hours
9 in lost productivity and millions of dollars in wasted costs. Both Congress and the
10 Washington legislature sought to discourage that conduct by exposing persons sending,
11 assisting in sending, and conspiring to send false and deceptive commercial mail
12 messages to significant financial liability, often vastly exceeding actual damages.

13
14 Thus, as prescribed by both statutes, Mr. Gordon is seeking to impose a penalty
15 for the Defendant’s ongoing violations. The Defendants stand accused as separate
16 entities, each of whom are accountable for their own violations of the Act. Just as the
17 prior conviction of a criminal does not operate to prevent the subsequent prosecution of
18 a different criminal, even if Gordon had at some point settled claims with others for their
19 violations of the statutes, such an act would simply not excuse separate entities, who
20 were not parties to the agreements, for their own violations of the statutes.

21
22 Generally speaking, the pursuit of a claim against one individual will not bar the
23 pursuit of the same claim against another. See Restatement (Second) of Judgments §
24 49 (1982) (“A judgment against one person liable for a loss does not terminate a claim
25

1 that the injured party may have against another person who may be who may be liable
2 therefore.”); *id.* § 49 cmt. a (“Accordingly, a judgment for or against one obligor does
3 not result in merger or bar of the claim that the injured party may have against another
4 obligor.”). Each defendant is liable for their own conduct regardless of the disposition of
5 a separate prosecution against a different party for their separate conduct, even if the
6 various defendants’ prohibited acts were related. Any prior settlements are therefore
7 simply not relevant to the claims at issue.

8
9 **2. Mr. Gordon’s Ability To Pay A Judgment For Fees.** Again,

10 Defendants are reaching into the absurd for this argument. They attempt to justify their
11 request for confidential settlements arguing that how much Gordon may have received
12 in those settlements is somehow relevant to their wholly unfounded motion for an
13 undertaking, to force Gordon to post a prohibitive bond for their fees. Although amusing
14 for its brazenness and creativity, this argument is plainly not seeking information that is
15 relevant to the claims and defenses, as Gordon’s ability to post a bond is not relevant to
16 the legal determination that he be required to do so. Under the Defendant’s theory,
17 every litigant before the Federal Court would be exposed to having all of their entire
18 financial information, including tax returns and related records, available to the opposing
19 side in discovery, simply because the opposing party included a prayer for attorney
20 fees.

21
22 **3. There Will Be No Prejudice To Defendants If They Are Kept From**
23 **Knowing The Terms Of The Confidential Gordon Settlements.** Defendants argue
24 without any explanation that they will somehow be prejudiced if the Court denies this
25

1 Motion. However, there will be no prejudice to Defendants if the confidentiality of the
2 Gordon settlements is protected. In fact, in denying Defendants' Motion, the Court will
3 be avoiding prejudice to Gordon, and to those other parties with whom Gordon has
4 contracted for confidentiality.

5 In light of the foregoing, Plaintiffs request the Court to deny Defendants' Motion.

6 **RESPECTFULLY SUBMITTED** this 22nd day of January, 2007.

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8 **i.Justice Law, P.C.**

9
10 /S/ Robert J. Siegel
11 Robert J. Siegel, WSBA #17312
12 Attorneys for Plaintiffs
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