

The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

OMNI INNOVATIONS, LLC, a
Washington limited liability company;
and JAMES S. GORDON, JR., a married
individual,

Plaintiffs,

v.

BMG COLUMBIA HOUSE, INC., a New
York corporation; and JOHN DOES, 1-X,

Defendants.

No. 06-cv-01350-JCC

**DEFENDANT BMG COLUMBIA
HOUSE, INC.’S ANSWER TO
PLAINTIFFS’ SECOND AMENDED
COMPLAINT**

Defendant, BMG Columbia House, Inc. (“Defendant”) answers and asserts affirmative defenses to Plaintiffs’ Second Amended Complaint (the “SAC”), as follows:

I. ANSWER

1. Defendant is without knowledge and information sufficient to form a belief with respect to the veracity of the allegations in Paragraph 1 of Plaintiffs’ SAC, and therefore DENIES the same.

2. Defendant is without knowledge and information sufficient to form a belief with respect to the veracity of the allegations in Paragraph 2 of Plaintiffs’ SAC, and therefore DENIES the same.

3. Defendant ADMITS that Defendant is a corporation incorporated pursuant to the

1 laws of the State of Delaware and has its principal place of business in New York, New
2 York. Defendant DENIES all other allegations contained in Paragraph 3 of Plaintiffs’
3 SAC.

4 4. Defendant provides the statutes cited in Paragraph 4 of Plaintiffs’ SAC speak for
5 themselves, and Plaintiffs’ interpretation of those statutes is not a factual allegation which
6 must be admitted or denied. Defendant DENIES all allegations contained in Paragraph 4
7 of Plaintiffs’ SAC.

8 5. Defendant provides the statute cited in Paragraph 5 of Plaintiffs’ SAC speaks for
9 itself, and Plaintiffs’ interpretation of that statute is not a factual allegation which must be
10 admitted or denied. Defendant DENIES all allegations contained in Paragraph 5 of
11 Plaintiffs’ SAC.

12 6. Defendant provides the statute cited in Paragraph 6 of Plaintiffs’ SAC speaks for
13 itself, and Plaintiffs’ interpretation of that statute is not a factual allegation which must be
14 admitted or denied. Defendant DENIES all allegations contained in Paragraph 6 of
15 Plaintiffs’ SAC.

16 7. Defendant DENIES Plaintiff James S. Gordon, Jr. (“Gordon”) is an interactive
17 computer service or Internet access service. Defendant is without knowledge and
18 information sufficient to form a belief with respect to the veracity of the remaining
19 allegations in Paragraph 8 of Plaintiffs’ SAC, and therefore DENIES the same.

20 8. Defendant DENIES Plaintiff Omni Innovations, LLC (“Omni”) is an interactive
21 computer service or Internet access service. Defendant is without knowledge and
22 information sufficient to form a belief with respect to the veracity of the remaining
23 allegations in Paragraph 8 of Plaintiffs’ SAC, and therefore DENIES the same.

24 9. Defendant is without knowledge and information sufficient to form a belief with
25 respect to the veracity of the allegations in Paragraph 9 of Plaintiffs’ SAC, and therefore
26 DENIES the same.

27 10. Defendant DENIES all allegations contained in Paragraph 10 of Plaintiffs’ SAC.

28 11. Defendant is without knowledge and information sufficient to form a belief with

1 respect to the veracity of the allegations in Paragraph 11 of Plaintiffs' SAC, and therefore
2 DENIES the same.

3 12. Defendant is without knowledge and information sufficient to form a belief with
4 respect to the veracity of the allegations in Paragraph 12 of Plaintiffs' SAC, and therefore
5 DENIES the same.

6 13. Defendant DENIES all allegations contained in Paragraph 13 of Plaintiffs' SAC.

7 14. Defendant DENIES all allegations contained in Paragraph 14 of Plaintiffs' SAC.

8 15. Defendant DENIES all allegations contained in Paragraph 15 of Plaintiffs' SAC.

9 16. Defendant DENIES all allegations contained in Paragraph 16 of Plaintiffs' SAC.

10 17. Defendant DENIES all allegations contained in Paragraph 17 of Plaintiffs' SAC.

11 18. Defendant DENIES all allegations contained in Paragraph 18 of Plaintiffs' SAC.

12 19. Defendant DENIES all allegations contained in Paragraph 19 of Plaintiffs' SAC.

13 20. Defendant DENIES all allegations contained in Paragraph 20 of Plaintiffs' SAC.

14 21. Defendant provides the section of Plaintiffs' SAC titled "Request for Relief" does
15 not contain factual allegations which must be admitted or denied. Defendant DENIES all
16 allegations contained in the section of Plaintiffs' SAC titled "Request for Relief", and
17 further DENIES Plaintiffs are entitled to any of their requested relief.

18 19 **II. AFFIRMATIVE DEFENSES**

20 Without admitting any of the allegations described in Plaintiffs' SAC, Defendant
21 raises the following affirmative defenses:

22 1.1. Plaintiffs are barred from obtaining any relief sought in the SAC because the SAC
23 fails to state any claim upon which relief may be granted.

24 1.2. Plaintiffs are barred from obtaining any relief because Plaintiffs failed to mitigate
25 their alleged damages, if any.

26 1.3. Plaintiffs are barred from obtaining any relief because Plaintiffs subscribed to
27 receive commercial emails on which Plaintiffs base their SAC.

28 1.4. Plaintiffs are barred from obtaining any relief sought in the SAC by reason of their

1 own unclean hands.

2 1.5. Plaintiffs are barred from obtaining any relief sought in the SAC because Plaintiffs
3 failed to unsubscribe utilizing unsubscribe links in the emails or other means reasonably
4 calculated to communicate to Defendant an intent to unsubscribe.

5 1.6. Plaintiffs waived their claims.

6 1.7. Plaintiffs are not entitled to damages from Defendant where Plaintiffs have already
7 been compensated by another entity for alleged damages allegedly caused by Defendant.

8 1.8. Plaintiffs consented to all actions they complain about in their SAC, and therefore
9 Plaintiffs are not entitled to any relief.

10 1.9. Plaintiffs ratified and approved all actions they complain about in their SAC, and
11 therefore Plaintiffs are not entitled to any relief.

12 1.10. Plaintiffs' claims, and each of them, are barred by the doctrine of estoppel.

13 1.11. Plaintiffs' claims, and each of them, are barred by the doctrine of laches.

14 1.12. The damages alleged in Plaintiffs' SAC, if any, were not caused by Defendant;
15 rather, any damages suffered by Plaintiffs were caused by one or more third parties whose
16 activities were not approved, ratified, or controlled by Defendant.

17 1.13. Plaintiffs have failed to join one or more necessary and indispensable parties.

18 1.14. Defendant established and implemented, with due care, commercially reasonable
19 practices and procedures designed to effectively prevent the violations alleged in the
20 SAC.

21 1.15. Defendant made commercially reasonable efforts to maintain compliance with
22 their practices and procedures designed to effectively prevent the violations alleged in the
23 SAC.

24 1.16. To the extent any action by Defendant violates CAN-SPAM, Defendant acted
25 without actual knowledge, or knowledge fairly implied on the basis of objective
26 circumstances, of the act or omission that constitutes the violation.

III. PRAYER FOR RELIEF

WHEREFORE, Defendant requests that this Court:

- 1. DISMISS Plaintiffs' SAC against Defendant alleged herein;
- 2. DENY Plaintiffs the relief they seek;
- 3. GRANT Defendant its reasonable costs and attorneys' fees incurred in defending against Plaintiff's SAC; and
- 4. GRANT such other and further relief to Defendant as the Court shall deem just and equitable.

DATED this 16th day of April, 2007.

Respectfully Submitted,

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



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