The Honorable John C. Coughenour

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' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

I. INTRODUCTION

In his Response in Opposition to Defendants' Motion for Attorney Fees (Dkt, #135, the "Response"), James Gordon ("Gordon") did not address the following arguments in Defendants' Motion for Attorneys' Fees and Costs (Dkt. #127, the "Motion"): the rate and hours of Defendants' attorneys' fees were reasonable, the fees expended were reasonable, and Defendants' costs were reasonable. Accordingly, Gordon concedes all of those points.[1]

Instead of addressing Defendants' arguments, Gordon misrepresents both law and fact. He mischaracterizes this Court's May 15, 2007 order (Dkt. #121 (the "Order") by claiming, falsely, that the Court "never considered the merits of Plaintiff's claims". (Response at 2:4-5.) To the contrary, while the Court dismissed Plaintiffs' CAN-SPAM claim for lack of standing, the Court rejected Plaintiffs' frivolous "from line" theory, determined they suffered no actual damages, and emphasized their history of litigation for profit. Gordon also claims, falsely, that "Defendants continue to send Gordon commercial email to this day." (Response at 3:22-23.) Defendants take this allegation seriously, and have provided supplemental declarations explaining in detail why they did not send (and in fact cannot have sent) the email about which Gordon complains.

Plaintiffs filed a frivolous lawsuit motivated by greed, then caused Defendants' legal costs to skyrocket by refusing to explain their legal theories until the last minute. Now, they must face the consequences of their own actions. Defendants respectfully request this Court grant their Motion for Attorneys' Fees and Costs.

II. ARGUMENT

A. Plaintiffs Have Made Deliberate Misrepresentations to This Court

1. Defendants Are Not Sending Email to Plaintiffs.

Gordon's declaration attaches an email which he claims is a Virtumundo promotion for Charter Communications and calls "spam". (Dkt. #136 ¶ 4 Ex. B.) In

[1] Plaintiff Omni Innovations, LLC ("Omni") failed to file any opposition whatsoever – consequently, Omni concedes an award of fees and costs is appropriate.

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truth, none of the Defendants sent the email in question, and for at least one year, both Virtumundo and Adknowledge have directed their email systems not to send any messages to the domain <gordonworks.com>.[2]

2. There Is No Support for the Claim That An Award of Fees and Costs Will "Bankrupt" Gordon".

The rhetoric about bankruptcy (Response at 3:1; "Gordon will be financially ruined") is not supported by Gordon's own declaration (Dkt. #136), and should be disregarded as irrelevant and unauthenticated.

B. The Factors Cited by Plaintiffs Weigh Heavily in Favor of Granting Defendants' Motion

The only case Plaintiffs cite is Lieb v. Topstone Industries, Inc., 788 F.2d 151, 156 (3rd Cir. 1986) (cited in Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 n. 19, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994)). That case indicates courts should consider "frivolousness, motivation, objective unreasonableness... and ... considerations of compensation and deterrence" when determining whether to award attorneys' fees and costs. Id. In this case, all Lieb factors favor Defendants. Plaintiffs' claims were frivolous, Plaintiffs unreasonably drove up costs, were motivated by profit, and an award of fees and costs will deter a continuing waste of judicial resources.

1. This Court Considered and Rejected Plaintiffs' Frivolous Claims.

Plaintiffs argue, incorrectly, that the Court "never considered the merits of Plaintiff's claims." (Response at 2:4-5.) To the contrary, after Plaintiffs filed a summary judgment motion based on the premise that the "from" lines in Defendants' emails were misleading (Dkt. #53), the Court considered and rejected Plaintiffs' meritless theory as a matter of law.[3] The Court adopted the reasoning of Omega World Travel v.

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[2] *See* the Declarations of Scott Moore and Michael Fitzgerald in Support of Defendants' Motion for Attorneys' Fees and Costs which accompany this reply brief.

[3] Gordon also admitted he did not read the "from" lines and could not have been misled, which underscores the meritlessness of Plaintiffs' arguments. (Declaration of Derek Newman (Dkt. #93) ¶ 2 Ex. A at

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Mummagraphics, Inc., 469 F.3d 348, 353 (5th Cir. 2006) and held as follows:

> ...the Court cannot find that "from addresses" ending with a domain that facilitates an accurate identification of Defendants could in any sense be found "false" or "descriptive". Accordingly... Plaintiffs' claims here – for, at best, "incomplete" or less than comprehensive information – are for immaterial errors that may not be litigated under state law.

(Order at 20:2-6.) The Court also dismissed Plaintiffs' Washington Consumer Protection Act claim, noting "there is no genuine issue of material fact as to the injury element of Plaintiffs' CPA claim." (Id. at 21:3-4.) The Court's Order repeatedly discusses the absence of any real harm to Plaintiffs and further notes, "Plaintiffs admit to *benefitting* from spam by way of their research endeavors and prolific litigation and settlements." (Order at 15:9-10; emphasis original.) The Court found that Plaintiffs "collect spam and... generat[e] lawsuit-fueled revenue." (Order at 15:12-13.) In sum, the Court rejected all of Plaintiffs' claims, determined their damages were negligible and found Defendants' errors (if any) were immaterial. The Court also noted Plaintiffs' status as professional litigants. This is a classic example of a frivolous lawsuit.

Recently, this Court awarded attorneys' fees and costs to the prevailing party in a dispute which turned on the losing party's lack of standing. Sanai v. Sanai, 2007 U.S. Dist. LEXIS 20428, *9-11 (W.D.Wash. Mar. 21, 2007) (awarding attorneys' fees after dismissing claims based on lack of standing, after finding plaintiffs' arguments "were inventive, but wholly lacking in merit"). The Court should award them to the Defendants in this case as well. In this case, as in Sanai, Plaintiffs lost – but only after they imposed substantial and unnecessary costs on Defendants. Gordon spends considerable time speculating about what might have been had he prevailed. (Response at 5:4-6.) But as this Court expressly determined, Gordon did not prevail. "As the prevailing parties, Defendants may file a motion for attorneys fees..." (Order at 24:23-24.)

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377:21 - 378:2.)

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2. Plaintiffs Unreasonably Increased Plaintiffs' Attorneys' Fees and Costs.

Now that Defendants are the prevailing parties, Gordon attempts to re-brand his aggressive opportunism as "the mere act of trying" to "bring his claims under CAN SPAM." (Response at 3:4-5.) However, Plaintiffs did more than "try". They made vague claims which they refused to clarify, and dumped massive overproductions of documents on Defendants, forcing Defendants to sift through and analyze them. Had Defendants known about Plaintiffs' frivolous "from line" theory at the beginning, they could have filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) and incurred significantly lower expenses.

Defendants' Motion provided details concerning Plaintiffs' unfair litigation tactics, specifically their long-term refusal "to commit to any statutory provision which was allegedly violated." (Motion at 3:10-11.) Plaintiffs waited until the last possible day – the deadline for their filing summary judgment motion – before revealing their case was based on a frivolous "from line" theory. Until that date, Plaintiffs refused to explain why they believed Defendants' alleged emails generated liability. As a result, Defendants were forced to hire a team of lawyers to analyze thousands of emails in light of many different legal theories, in preparation for whichever claims Plaintiffs might later make. (Motion at 3:6-18.) Plaintiffs also failed to make reasonable efforts to comply with Defendants' discovery requests, and Gordon admitted the files he did <u>not</u> search might have contained emails confirming he subscribed to Defendants' mailing lists. (Newman Decl. ¶ 2 Ex. A at 405:7-25.) Plaintiffs' business model was to file a lawsuit seeking millions in damages, then pass through their own costs of discovery and legal analysis to Defendants. Plaintiffs' tactics were unreasonable and increased Defendants' legal costs tremendously.

3. Plaintiffs' Motivation Was To Profit from Litigating Their Frivolous Claims.

Gordon admitted he profits handsomely from the business of litigating, which confirms Plaintiffs' improper motive in filing this lawsuit:

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> Q. During these years when you were unemployed, how did you pay your bills?
>
> A. ...During the course of the last maybe two and a half years, the lawsuits that I have been involved with yielded settlements.
>
> *****
>
> Q. Have you obtained any income or revenue in the year 2006 or 2007 other than from settlements and disputes?
>
> A. No.

(Declaration of Derek Newman (Dkt. #93) ¶ 2 Ex. A at 32:16-21; 46:20-22.)

4. Granting Defendants' Motion Will Deter Plaintiffs From Further Improper Actions.

As Gordon admits, Plaintiffs are in the litigation business. (Newman Decl. ¶ 2 Ex. A at 32:16-21; 46:20-22; *see also* Motion at 5:2-7.) In this lawsuit alone, Plaintiffs have wasted hundreds of hours of time forcing Defendants' counsel to interpret their vague claims. They have required Defendants to respond to a summary judgment motion based on allegedly misleading emails which, Plaintiffs concede, did not mislead them. They have made every effort to keep their own costs down, which included neglecting their discovery obligations to Defendants.

Plaintiffs threaten to repeat their improper behavior in numerous other lawsuits. Accordingly, Defendants request this Court give thought to "considerations of compensation and deterrence" as discussed in Lieb, supra, 788 F.2d at 156. An award of attorneys' fees and costs to Defendants will compensate for the needless expenses Plaintiffs repeatedly imposed on them. It will also deter Plaintiffs from viewing this Court as a profit center rather than a public tribunal addressing legitimate grievances.

C. Plaintiffs Concede Defendants' Attorneys' Fees and Costs Were Reasonable

Omni and Gordon conceded the reasonableness of Plaintiffs' attorneys' fees and costs by neglecting to address that issue. LR 7(b)(2); *see also* Lexington Ins. Co. v. Swanson, 2007 U.S. Dist. LEXIS 37620, *29 n. 9 (W.D.Wash. May 23, 2007) ("The Court may consider Lexington's failure to respond to Swanson's argument on these two issues as an admission that Swanson's argument has merit" (citing LR 7(b)(2)).

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III. CONCLUSION

Plaintiffs' claims were frivolous. This Court's Order rejected all of Plaintiffs' claims and held their damages were negligible and their claims were based on "immaterial errors." Further, Plaintiffs inflated Defendants' legal costs considerably by unreasonably refusing to explain their legal theories until the last minute, were motivated by pure profit, and threaten to repeat the process over and over again until this Court deters them from doing so. Omni did not oppose Defendants' Motion, thereby conceding Defendants are entitled to an award of attorneys' fees and costs against Omni pursuant to LR 7(b)(2), and Gordon is equally responsible. Defendants respectfully request this Court put an end to Plaintiffs' blatant waste of resources by granting their Motion for Attorneys' Fees and Costs.

DATED this 6th day of July, 2007.

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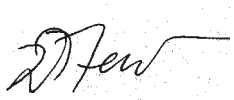

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