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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON, JR., an individual
residing in Benton County, Washington,

Plaintiff,

v.

IMPULSE MARKETING GROUP, INC., a Nevada
Corporation,

Defendant.

No. CV-04-5125-FVS

ORDER

IMPULSE MARKETING GROUP, INC.,

Third-Party Plaintiff,

v.

BONNIE GORDON, JAMES S. GORDON, III,
JONATHAN GORDON, JAMILA GORDON, ROBERT
PRITCHETT and EMILY ABBEY,

Third-Party Defendants.

BEFORE THE COURT is Plaintiff's Motion to Amend Complaint (Ct. Rec. 313). Plaintiff is represented by Robert Siegel. Defendant is represented by Floyd Ivey, Sean Moynihan, and Peter Glantz. The Third-Party Defendants are proceeding *pro se*.

BACKGROUND

Plaintiff, James Gordon, is a Washington resident and the registered user of the internet domain name "Gordonworks.com."

1 Defendant, Impulse Marketing Group, Inc. ("Impulse Marketing"), a
2 Nevada corporation, is an electronic marketing company that transacts
3 business with Washington by sending commercial electronic mail
4 messages (email) to Washington state residents. Impulse Marketing
5 operates by collecting personally identifiable information from
6 individuals who sign up to receive free products and/or services at
7 websites run by Impulse Marketing and/or its marketing partners. In
8 consideration for receiving free products and/or services from an
9 Impulse Marketing related website, it requires that individuals using
10 its websites agree to submit accurate personal subscriber information
11 ("Subscriber Profile"). By submitting their Subscriber Profile,
12 individuals grant Impulse Marketing the right transfer the Subscriber
13 Profiles to third parties for marketing purposes. Impulse Marketing
14 subscribes revenue from the licensing and/or use of accurate
15 Subscriber Profiles.

16 Plaintiff's Complaint alleges Impulse Marketing violated
17 Washington's Commercial Electronic Mail Act, RCW § 19.190 et seq.,
18 and Washington's Consumer Protection Act, RCW § 19.86 et seq., by
19 initiating and/or conspiring with others to initiate unsolicited
20 commercial emails to various addresses at Plaintiff's domain,
21 "Gordonworks.com". On July 1, 2005, the Court denied Impulse
22 Marketing's motion to dismiss Plaintiff's Complaint. On September 6,
23 2005, Impulse Marketing filed five counterclaims against Plaintiff
24 Gordon and five separate causes of action against each of the Third
25 Party Defendants. On November 28, 2005, Impulse Marketing filed a
26 Second Amended Third-Party Complaint, which alleges claims against

1 the Third-Party Defendants for (1) fraud and deceit; (2) tortious
2 interference with business relationships; (3) contribution and
3 indemnity; (4) breach of contract; and (5) injunctive relief.

4 Plaintiff now seeks leave to file an Amended Complaint. The
5 Amended Complaint seeks to add claims under the Federal Can-Spam Act
6 (15 U.S.C. § 7701 et seq.), Washington's Deceptive Offers statute
7 (RCW 19.170), Washington's Identity Crimes statute (RCW 9.35), and a
8 new provision of the CEMA (RCW 19.190.080). The Amended Complaint
9 also seeks to add additional defendants, Jeffrey Goldstein, Kenneth
10 Adamson, and Phillip Huston, officers and/or directors of Impulse
11 Marketing. Plaintiff alleges these individuals are personally liable
12 because they had knowledge of, participated in, and/or approved the
13 alleged unlawful conduct by the Defendant Impulse Marketing.
14 Finally, the Amended Complaint seeks to add an additional plaintiff,
15 Omni Innovations, LLC, a Washington company that owns the servers on
16 which the domains hosting some of the email addresses that received
17 some of the alleged unlawful emails at issue in this action.
18 Plaintiff contends Omni is entitled to assert claims under the
19 Federal Can-Spam Act.

20 **DISCUSSION**

21 When an answer has been filed, a plaintiff may amend its
22 complaint "only by leave of court or by written consent of the
23 adverse party" Fed.R.Civ.P. 15(a). The decision of whether to
24 grant a motion for leave to amend a complaint rests in the sound
25 discretion of the trial court. *Swanson v. United States Forest*
26 *Service*, 87 F.3d 339, 343 (9th Cir. 1996). Leave to amend "shall be

1 freely given when justice so requires." *Id.* In exercising its
2 discretion, the Court is to be guided by the purpose of Rule 15,
3 which is to facilitate decisions on the merits rather than a
4 determination based on pleadings or technicalities. *Lopez v. Smith*,
5 203 F.3d 1122, 1127 (9th Cir. 2000). Thus, the Ninth Circuit has
6 held like other courts that the rule is to be applied with extreme
7 liberality. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
8 1051 (9th Cir. 2003) (citations omitted). However, application of
9 this policy is subject to the qualification that the amendment not
10 cause the defendant undue prejudice, is not sought in bad faith, and
11 is not futile. *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999).
12 Additionally, the Court may consider the factor of undue delay. *Id.*
13 at 758. Undue delay by itself is insufficient to justify denying a
14 motion to amend. *See Howey v. United States*, 481 F.2d 1187, 1190
15 (9th Cir. 1973) (reversing denial of motion for leave to amend where
16 court made a finding of undue delay but did not provide a
17 contemporaneous specific finding of prejudice to the opposing party,
18 bad faith by the moving party or futility of amendment). It is the
19 consideration of prejudice to the opposing party that carries the
20 greatest weight. *Eminence Capital*, 316 F.3d at 1051 (citations
21 omitted). The opposing party "bears the burden of showing
22 prejudice." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th
23 Cir. 1987).

24 Here, Defendant argues it will be unduly prejudiced by the
25 filing of an amended complaint because additional causes of action
26 and the naming of additional parties will require additional

1 discovery. This is true, but the parties are currently still engaged
2 in a discovery dispute involving the existing claims. Moreover, the
3 existing scheduling order needs to be revised, regardless of whether
4 the Court allows the filing of an amended complaint. Defendant also
5 opposes the filing of an amended complaint on the basis that this
6 will necessitate the filing of a motion to dismiss because
7 Plaintiff's new claims are without merit.

8 The Court finds no evidence of bad faith on the part of the
9 Plaintiff. Further, the Court finds that Defendant will not be
10 prejudiced by the filing of the proposed amended complaint as long as
11 the case is rescheduled to allow for discovery of the new claims.
12 Further, at this juncture, the Court cannot determine that any of the
13 proposed new causes of action are futile. Therefore, in light of the
14 Ninth Circuit's command that Rule 15 is to be applied with "extreme
15 liberality", see *supra*, the Court grants Plaintiff's request to file
16 an amended complaint asserting additional causes of action and naming
17 an additional party defendant. However, Plaintiff's request to name
18 an additional party plaintiff is denied. Accordingly,

19 **IT IS HEREBY ORDERED:**

- 20 1. Plaintiff's Motion to Amend Complaint (**Ct. Rec. 313**) is
21 **GRANTED IN PART AND DENIED IN PART.**
- 22 2. Plaintiff's Motion to Expedite (**Ct. Rec. 317**) is **MOOT.**
- 23 3. Defendant's Expedited Motion for Hearing of Plaintiff's
24 Motion to Amend Complaint With Oral Argument (**Ct. Rec. 354**) is
25 **DENIED.** Pursuant to LR 7.1(h)(3), the Court exercises its discretion
26 and determines oral argument is not necessary.

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2 **IT IS SO ORDERED.** The District Court Executive is hereby
3 directed to enter this Order, furnish copies to counsel and to the
4 **Third Party Defendants who are proceeding pro se.**

5 **DATED** this 2nd day of May, 2006.

6
7 s/ Fred Van Sickle
8 Fred Van Sickle
9 United States District Judge
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