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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NOV 15 2005

JAMES R. LARSEN, CLERK

DEPUTY
RICHLAND, WASHINGTON

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON AT RICHLAND

James S. Gordon, Jr.,
Plaintiff,

vs.

Impulse Marketing Group, Inc.,
Defendant

Case No.: CV-04-5125-FVS
MOTION TO DISMISS

Impulse Marketing Group, Inc.,
Third-Party Plaintiff,

v.

Emily Abbey,
Third-Party Defendant

TO: Clerk of the Court

AND TO: Floyd E. Ivey, Attorney for Third-Party Plaintiff

AND TO: Peter J. Glantz and Sean A. Moynihan

1 COMES NOW the Third-Party Defendant, Emily Abbey, and
2 files this motion to dismiss Third-Party Plaintiff's claims under
3 FRCP 12(b)(6).

4 Introduction

5
6 The undersigned is a pro se Third-Party Defendant in the
7 above captioned case. Even if all of the allegations of the Third-
8 Party Plaintiff are assumed to be true, the allegations nevertheless
9 fail to state a claim upon which relief can be granted.
10

11 The Third-Party Plaintiff has articulated claims against me for
12 "indemnification and contribution", "fraud and deceit," "tortious
13 interference with business relationships," "breach of contract," and
14 "injunctive relief." Each claim amounts to nothing more than an
15 allegation that I "actively and affirmatively solicited commercial
16 email messages" from the Third-Party Plaintiff, and "represented"
17 myself as myself in so doing. Such allegations are insufficient to
18 form a basis for liability under any of the theories offered by the
19 Third-Party Plaintiff.
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24 The Third-Party Plaintiff's claims for "indemnification and
25 contribution" fail to state a claim upon which relief may be granted

1 The Third-Party Plaintiff has brought a claim for
2 “indemnification and contribution” against me. Through this claim,
3 the Third-Party Plaintiff is asking the Court to assign liability to me
4 for emails the Third-Party Plaintiff sent to me. As the Third-Party
5 Plaintiff has not explicitly pled RCW 19.190 et seq., absent the
6 statute, there is no basis in law for recovery. Perhaps recognizing
7 this, the Third-Party Plaintiff has pled most of the elements of the
8 statute and has asked the Court to extend liability to those who
9 provide “assistance or support” in the sending of emails, as is
10 outlined in RCW 19.190 et seq.

11 While I believe this claim should be dismissed, I ask the Court
12 to also note the Third-Party Plaintiff’s own view of RCW 19.190 et
13 seq. in advancing these claims. By arguing that the mere act of
14 subscribing to a spam list is all that need be done to establish
15 liability for “assisting” the transmission of commercial electronic
16 mail under the statute, the Third-Party Plaintiff has conceded that
17 its own much more involved conduct in transmitting the subject
18 emails constitutes “assisting” the transmission of prohibited
19 commercial electronic mail.

20 I do not agree that the mere act of subscribing oneself or
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1 another to a spam list constitutes "assisting" the transmission of a
2 commercial electronic email message under RCW 19.190 et seq - or
3 that such conduct by me ever occurred. Even if it did, the Court
4 should still dismiss this claim under FRCP 12(b)(6).
5

6 RCW 19.190 et seq. requires that the party providing the
7 assistance knows or has reason to know that the email (a) uses a
8 Third-Party's internet domain name without permission of the
9 Third-Party, or otherwise misrepresents or obscures any
10 information in identifying the point of origin or the transmission
11 path of a commercial electronic mail message; or (b) contains false
12 or misleading information in the subject line. The Third-Party
13 Plaintiff's pleading "wholly denies" that any such violations are
14 present when it "wholly denies" any liability for any of these emails.
15 Since the Third-Party Plaintiff's pleading does not include an
16 allegation that the emails in question violated the statute, and in
17 fact denies that this underlying violation occurred, it fails to state a
18 claim upon which relief can be granted.
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24 The Third-Party Plaintiff's claims for "fraud and deceit"

25 fail to state a claim upon which relief may be granted

1 Within its amended pleadings, Third-Party Plaintiff alleges that
2 I “affirmatively solicited commercial email messages” from the
3 Third-Party Plaintiff and misrepresented my identity in so doing.
4
5 However, the Third-Party Plaintiff’s sole factual allegation
6 concerning that misrepresentation is that I “fraudulently
7 represented” that I was myself.

8 Under Washington law, to be entitled to recovery founded in
9 fraud the Third-Party Plaintiff must show the following nine
10 elements: (1) representation of an existing fact; (2) materiality; (3)
11 falsity; (4) the speaker's knowledge of its falsity; (5) intent of the
12 speaker that it should be acted upon by the plaintiff; (6) plaintiff’s
13 ignorance of its falsity; (7) plaintiff’s reliance on the truth of the
14 representation; (8) plaintiff’s right to rely upon it; and (9) damages
15 suffered by the plaintiff. *Stiley v. Block* 130 Wn.2d 486, 505
16 (1996). If the Court accepts as true the Third-Party Plaintiff’s sole
17 factual allegation that I represented myself as myself, the allegation
18 does not and cannot constitute fraud. If I represented myself as
19 myself, such would be a true statement, and therefore, it could not,
20 by definition, be fraudulent. Thus, the Third-Party Plaintiff has
21 failed to present a claim for which relief can be granted.
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1 I also note that the Third-Party Plaintiff repeatedly alleges that
2 I and the other Third-Party Defendants solicited emails for the "sole
3 purpose of filing multiple lawsuits." However, even if we "intended"
4 to file suit, no cause of action could possibly arise until and unless
5 the Third-Party Plaintiff actually sent emails that violate the RCW
6 19.190 (the statute). Since neither I nor any of the Third-Party
7 Defendants had any control whatsoever over the Third-Party
8 Plaintiff's sending of emails or compliance with the statute, our
9 "intent" prior to the Third-Party Plaintiff's act of sending email that
10 violated the statute is irrelevant to any and all of the Third-Party
11 Plaintiff's claims and counterclaims, including the fraud claim.
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15 Finally, if the Court declines to strike the Third-Party Plaintiff's
16 claim for relief against me for fraud under FRCP 12(b)(6), the Court
17 should require that the Third-Party Plaintiff comply with the
18 requirements of FRCP 9(b) and state with particularity the
19 circumstances constituting fraud by identifying the content of any
20 and all statements made by me that the Third-Party Plaintiff alleges
21 were fraudulent, together with the date, time, place, mode of
22 communication, and recipients of any such statements. Since the
23 only factual allegation the Third-Party Plaintiff has made that I
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1 “fraudulently represented” that I was myself is a true statement by
2 definition, the Third-Party Plaintiff’s complaint for fraud should be
3 dismissed on this basis.

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6 The Third-Party Plaintiff’s claims for “tortious interference with
7 business relationships” fail to state a claim upon which relief may
8 be granted

9
10 Under Washington law, to be entitled to recovery founded in
11 tortious interference with a business relationship, the Third-Party
12 Plaintiff must show the following five elements: (1) the existence of a
13 valid contractual relationship or business expectancy; (2) that
14 Third-Party Defendants had knowledge of that relationship; (3) an
15 intentional interference inducing or causing a breach or termination
16 of the relationship or expectancy; (4) that Third-Party Defendants
17 interfered for an improper purpose or used improper means; and (5)
18 Resultant damages. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 28, (1992).

19
20 Within its pleadings, the Third-Party Plaintiff’s sole allegation
21 related to element 4 is the allegation that I “affirmatively solicited
22 commercial email messages” from the Third-Party Plaintiff and
23 misrepresented my identity in so doing. As it cannot be an
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1 "improper purpose" or an "improper means" to accurately represent
2 oneself as oneself, the Third-Party Plaintiff's claim for relief for
3 tortious interference with a business relationship fails to state a
4 claim upon which relief should be granted and should be stricken
5 under FRCP 12(b)(6).
6

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8 The Third-Party Plaintiff's claims for "breach of contract" fail
9 to state a claim upon which relief may be granted
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11 The Third-Party Plaintiff's claims for "breach of contract" again
12 rest solely on the factual allegation concerning that alleged
13 misrepresentation is that I "fraudulently represented" that I was
14 myself. As discussed above, such cannot form the basis of a
15 breach, because even if I represented myself as myself, it could not,
16 by definition, constitute a "breach." Further, as set forth by the
17 Washington Supreme Court, "the burden of proving a contract,
18 whether express or implied, is on the party asserting it, and he
19 must prove each essential fact, including the existence of a mutual
20 intention." *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840,
21 (1983) (citing *Johnson v. Nasi*, 50 Wn.2d 87, 91, (1957))." Within its
22 pleadings, the Third-Party Plaintiff alleges that I "never intended to
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1 allow Third-Party Plaintiff to have a proper bargained for exchange
2 of consideration.” The Third-Party Plaintiff’s pleadings thus
3 demonstrate conclusively that there was no mutual intention or
4 exchange of consideration, and thus that no contract was ever
5 formed.
6

7 Even if, for the sake of argument, there was a mutual assent,
8 an exchange of consideration and a contract formed, the question
9 then becomes where is the breach? If the Court accepts the Third-
10 Party Plaintiff’s pleadings as true, that I ”solicit[ed] commercial
11 emails for the sole purpose of filing multiple lawsuits,” then the
12 filing of lawsuits cannot possibly form the basis for a breach, as the
13 filing of lawsuits forms the very basis upon which the contracts
14 were formed!
15
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17 The Third-Party Plaintiff cannot have it both ways. If the
18 Third-Party Plaintiff wants to allege the fact that the Plaintiff filing a
19 lawsuit somehow constitutes a breach of a contract, then the Third-
20 Party Plaintiff must plead that the Plaintiff somehow agreed not to
21 file suit as a condition for ”soliciting commercial emails.” Perhaps
22 the Third-Party Plaintiff recognizes the absurdity of arguing that
23 everyone who ever opted into their spam list somehow agreed not to
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1 sue them for their future illegal conduct in the process. Instead,
2 the Third-Party Plaintiff has pled that the Plaintiff entered into
3 contracts "for the sole purpose of filing multiple lawsuits." If the
4 Third-Party Plaintiff's pleadings are accepted as true, then the right
5 to file those lawsuits was intended to be a term of the contract.
6 Accordingly, there can be no breach.
7

8 The Third-Party Plaintiff's claim for relief against me for breach
9 of contract should therefore be stricken under FRCP 12(b)(6). If the
10 court accepts as fact everything contained within the Third-Party
11 Plaintiff's allegations, the sole factual allegation of breach in the
12 pleading is an allegation that I "misrepresented" myself as myself.
13 If I had somehow misrepresented myself as someone else, no
14 evidence of this misrepresentation has been entered into the record
15 of this case. Even if a contract was formed, the conduct alleged to
16 be a breach was in fact a requirement of the contract. However,
17 even if the Court accepts the dubious proposition that "contracts"
18 were somehow formed as a result of our actions of opting into the
19 Third-Party Plaintiff's spam lists, the Third-Party Plaintiff has not
20 articulated any conduct by us that would constitute a breach of
21 those alleged contracts.
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2 The Third-Party Plaintiff's claims for "injunctive relief" fail
3 to state a claim upon which relief may be granted
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5 By virtue of the fact that Third-Party Plaintiff has not stated a
6 claim on which relief can be granted concerning its first four claims,
7 it is counterintuitive to seek or be granted an injunction based on
8 the absence of a single actionable event by me.
9

10 The Third-Party Plaintiff's claims for "injunctive relief" allege
11 that if the Third-Party Plaintiff is "unable to stop" our alleged
12 "scheme and further schemes," the Third-Party Plaintiff will suffer
13 "irreparable damages." The Third-Party Plaintiff has asked the
14 Court to enter a preliminary injunction enjoining me from "actively
15 and affirmatively soliciting commercial emails." However,
16 regardless of whether I or any of the Third-Party Defendants
17 "actively and affirmatively solicit commercial emails," it is entirely
18 within the Third-Party Plaintiff's control whether any such emails
19 are actually sent. And, it is entirely within their control to have all
20 emails compliant with the strict requirements of state and federal
21 laws. In fact, compliance with the federal CAN SPAM statute
22 *requires* that the Third-Party Plaintiff have the capability to remove
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1 email addresses from the Third-Party Plaintiff's spam lists. The
2 Plaintiff has consistently sought to have the Third-Party Plaintiff
3 stop sending spam, (the polar opposite of the conduct alleged by the
4 Third-Party Plaintiff). There is no statutory or common law
5 prohibition against soliciting commercial email, even if it is done
6 with the intention to sue the sender. The Third-Party Plaintiff's
7 pleadings admit this, stating "Third-Party Plaintiff has no adequate
8 remedy at law." Any such law would be entirely unnecessary, as a
9 spammer faced with such solicitations has a ready and simple
10 defense; simply refrain from sending commercial email that violates
11 the statute.
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15 Accordingly, the Third-Party Plaintiff's claims for injunctive
16 relief against me should be stricken under FRCP 12(b)(6). Even if
17 the court accepts as fact everything contained within the Third-
18 Party Plaintiff's allegations, the mere act of requesting emails,
19 whether by the Plaintiff, the Third-Party Defendants, or anyone else,
20 is perfectly legal conduct even if the person requesting emails
21 intends to sue the sender. Further, the mere act of requesting
22 emails, whether by the Plaintiff, the Third-Party Defendants, or
23 anyone else, is insufficient by itself to expose the Third-Party
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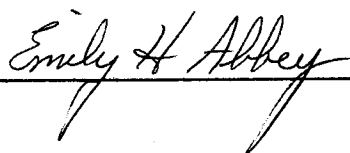
1 Plaintiff to any liability. It is only when the Third-Party Plaintiff
2 actually sends spam, an act over which the Third-Party Plaintiff is
3 in complete, total, and sole control, and further sends spam that
4 does not comply with the statute, that any liability attaches.
5

6 **CONCLUSION**

7 The undersigned respectfully requests that the Court grant
8 this motion to dismiss with prejudice the Third-Party Plaintiff's
9 counterclaims against me under FRCP 12(B)(6).
10

11
12 Emily H. Abbey
13 1407 2nd Ave West Apt. 608
14 Seattle, WA 98119
15 206-217-0466
16

17 Dated this 10th day of November, 2005

18 
19 _____

20 I, hereby, certify that on November 15th, 2005, I filed with this Court
21 a Motion to Dismiss Third-Party Plaintiff's Claims Against Third-
22 Party Defendants. The Clerk of the Court will provide electronic
23 notification using the CM/ECF, which will send an electronic copy
24 of this Certificate of Service to Douglas E. McKinley, Jr., Peter J.
25 Glantz, Sean A. Moynihan, and Floyd E. Ivey. I have served all non-
CM/ECF participants, Jamila Gordon, James Gordon III, Jonathan
Gordon, Bonnie Gordon, and Robert Pritchett by other means.