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24 **UNITED STATES DISTRICT COURT FOR THE**
 25 **EASTERN DISTRICT OF WASHINGTON**

26 JAMES S. GORDON, JR.,

27 Plaintiff,

28 vs.

IMPULSE MARKETING GROUP,
 INC.,

Defendant

IMPULSE MARKETING GROUP,
 INC.,

Third-Party Plaintiff,

vs.

BONNIE GORDON, et al.,

Third-Party Defendants.

No. CV-04-5125-FVS

DEFENDANT'S SUPPLEMENTAL
 MEMORANDUM IN SUPPORT OF
 DEFENDANT'S MOTION TO
 COMPEL AND FOR SANCTIONS

TELEPHONIC HEARING 3/8/06

1 The Defendant has filed, on Tuesday, February 21, 2006, its Motion to
2 Compel Plaintiff's Response to Defendant's Discovery served on Plaintiff
3 December 6, 2005. Defendant has received on Wednesday, February 22, 2006,
4 from attorney Richard Siegel, the attached 3 pages titled "Answers to
5 Interrogatories" and "Responses to Defendant's First Requests for Production of
6 Documents". Counsel Douglas McKinley, for Plaintiff, has advised that he will
7 withdraw and or that counsel Richard Siegel will substitute. However, there has
8 been no evidence of substitution. Mr. McKinley appears to remain counsel of
9 record for Plaintiff.

10 The Plaintiff's Responses have been reviewed with answers and productions
11 deemed by Defendant to be non-responsive identified in a letter from Defendant
12 attorney Floyd E. Ivey to attorney Mr. McKinley with copy to Mr. Siegel delievered
13 by fax and email to Mr. McKinley at approximately 11:30 a.m. and to Mr. Siegel
14 by email on February 22, 2006. A copy of the letter is incorporated herein.

15 Attorney Ivey called Mr. McKinley prior to 12 noon on February 22, 2006,
16 received a answer machine and left a message inviting Mr. McKinley to respond
17 to the 37.1 conference request. Mr. Siegel has been requested by email to likewise
18 respond. Mr. Siegel has responded to advise that he is substituting and that he
19 should have an opportunity to respond specifically to the contended deficiencies.
20 Counsel for Defendant awaits a response.

21 Pages 5 and 6 of the Defendant's First Interrogatories are appended hereto.
22 The letter from Ivey to attorney Mr. McKinley, copied to substituting Mr. Siegel
23 and acknowledged by Mr. Siegel, of February 22, 2006, sets out the substance of
24 Interrogatories 2, 3, 4, 5 and 6 and the contention of non-responsiveness.
25 Likewise set out is page 1 of the Defendant's First Request for Production of
26 Documents. The substance of Requests No. 3, 4, 5 and 6 are stated along with the
27 contention of non-responsiveness.
28

1 Defendant's Motion to Compel is pursuant to FRCP 37(a)(2). Counsel for
2 Defendant certifies that a good faith attempt has been made to confer with
3 Plaintiff's counsel. Counsel Mr. Siegel has requested that this matter be continued
4 to Friday, March 3, 2006 to allow counsel sufficient time to respond.

5 Plaintiff's counsel states that "we have already provided you with virtually
6 all responsive documents in my client's possession, albeit perhaps not in the
7 precise format in which you would prefer." The statement indicates little prospect
8 of agreement on what must be produced and addressed in answers to
9 interrogatories.

10 Plaintiff alleges at 3.6 of Plaintiff's Complaint that Defendant has
11 transmitted thousands of commercial electronic mail messages to Plaintiff at
12 various addresses of the Plaintiff's domain "Gordonworks.com." Plaintiff has
13 provided, as a Rule 26 initial disclosure, a CD indicating to contain thousands of
14 email messages. Defendant's discovery specifically requires the Plaintiff to
15 demonstrate facts relative to each email alleged to offend the statute. Plaintiff's
16 response to Interrogatories and Plaintiff's Production refuses to address each
17 message. Rather, Plaintiff's approach is to require the Defendant to do the
18 forensics for each email. Plaintiff's fundamental burden is in demonstrating that
19 there are one or more electronic mail messages which affront the statute.
20 Plaintiff's responses are wholly non-responsive.

21 Defendant asks the Court to award Sanctions per FRCP 37(a)(4). *Freeman*
22 *v. San Diego Ass'n of Realtors* 322 F.3d 1133, 1156 (C.A.9 Cal. 2003).

23 DATED this 22st day of February, 2006.

24
25 LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE

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27
28 By s/ Floyd E. Ivey

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FLOYD E. IVEY, WSBA#6888
Attorneys for Defendant

I hereby certify that on February 22, 2006, I electronically filed **Defendant's Supplemental Memorandum in Support of Motion to Compel** with the Clerk of the Court using the CM/ECF System which will send notification of such filing to _____, Peter J. Glantz and Sean A. Moynihan. I hereby certify that I have served the foregoing to the following non-CM/ECF participants by other means: Bonnie Gordon, Jonathan Gordon, James S. Gordon, III, Robert Pritchett, Jamila Gordon and Emily Abbey. Also served is Robert Siegel, who has also been sent these pleadings by email.

S/ FLOYD E. IVEY

FLOYD E. IVEY