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18 **UNITED STATES DISTRICT COURT FOR THE**
 19 **EASTERN DISTRICT OF WASHINGTON**

20 JAMES S. GORDON, JR.,

21 Plaintiff,

22 vs.

23 IMPULSE MARKETING GROUP,
 24 INC.,

25 Defendant

No. CV-04-5125-FVS

DEFENDANT'S REPLY
 MEMORANDUM OF LAW IN
 RESPONSE TO PLAINTIFF'S
 OPPOSITION TO IMPULSE
 MARKETING GROUP INC.'S
 MOTION TO COMPEL AND FOR
 SANCTIONS

26 IMPULSE MARKETING GROUP,
 27 INC.,

28 Third-Party Plaintiff,

vs.

BONNIE GORDON, et al.,

Third-Party Defendants.

REPLY MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFF'S
OPPOSITION TO IMPULSE MARKETING GROUP INC.'S MOTION TO
COMPEL AND FOR SANCTIONS

1 This Reply Memorandum of Law is submitted by defendant, Impulse
2 Marketing Group, Inc. (“Impulse” or the “Defendant”) in further support of
3 Defendant’s Motion to Compel Discovery and for Sanctions (“Defendant’s Motion”).
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7 **INTRODUCTION**

8 On December 23, 2005, Defendant served its Request for the Production of
9 Documents (“Document Request”) and First Set of Interrogatories (“Interrogatories”)
10 upon Plaintiff. See Exhibit “A” annexed hereto for a copy of Defendant’s Document
11 Requests and Interrogatories, pages 11-29. Plaintiff failed to timely respond to
12 Defendant’s Document Request and Interrogatories.
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15 On February 21, 2006, only after scores of good faith correspondence from
16 Defendant’s local counsel to Plaintiff’s counsel demanding that Plaintiff immediately
17 respond to Defendant’s Document Requests and Interrogatories, Defendant moved
18 to compel Plaintiff’s response. Plaintiff made a conscious decision to bring
19 thousands of causes of action causing Defendant an incredible amount of time and
20 money. Now, Plaintiff refuses to provide Defendant with adequate discovery to
21 support his claims.
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24 Faced with a pending motion to compel and potential sanctions, Plaintiff
25 provided a partial response to Defendant’s Document Requests by disclosing to
26 Defendant a CD containing scores of emails and a purported analysis of these emails.
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3 In addition, Plaintiff disclosed an evasive and incomplete response to
4 Defendant's Interrogatories. See Exhibit "B" annexed hereto for a copy of Plaintiff's
5 responses to Defendant's Document Requests and Interrogatories attached as pages
6 30-32.
7

8 As additional measures of good faith, Defendant has repeatedly advised
9 Plaintiff's counsel that Plaintiff's responses to Defendant's Interrogatories were
10 deficient, evasive and incomplete. Plaintiff has declined to clarify his Interrogatory
11 responses. As such, Defendant did not withdraw its motion to compel.
12

13 By failing to adequately respond to Defendant's Interrogatories, Plaintiff's
14 counsel expressly intends to shift the burden onto Defendant to make out Plaintiff's
15 prima facie case and Plaintiff's refusal to provide factual support for his allegations,
16 has effectively taken away Defendant's ability to defend this case. Plaintiff maintains
17 that the production of documents in response to Defendant's Document Request is an
18 adequate and sufficient response to Defendant's Interrogatories. However, Defendant
19 is left to guess how the thousands of emails violated RCW 19.190 et seq. For
20 example, Plaintiff's counsel has repeatedly stated that:
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- 25 • "[P]laintiff is required to do nothing more than provide the offending emails.
26 If your client [Defendant] does not understand how they have violated the
27 Washington CEMA, then I [Plaintiff's counsel] suggest that you provide them
28 with a copy of it [the Washington CEMA]. See Exhibit "C" annexed hereto for
a copy of an email sent by Plaintiff's counsel, Robert Siegel to Floyd Ivey,
Defendant's local counsel, dated February 23, 2006, pages 33-37.

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- Defendant’s contention that Plaintiff insist that Defendant “explain in detail how each alleged offending email violated the [Washington] CEMA statute is improper.” See Exhibit “D” annexed hereto for a copy of an email sent by Plaintiff’s counsel, Robert Siegel to Floyd Ivey, Defendant’s local counsel, dated March 6, 2006, pages 38-40 attached hereto.
- “[A]nything beyond the information already provided [the CD]...is simply a demand for Plaintiff to provide his trial preparation materials, and is clearly inappropriate.” See Exhibit “D.”, pages 38-40 attached hereto.
- “We [Plaintiff and his counsel] believe that the voluminous evidence [the CD] we [Plaintiff and his counsel] have already provided is responsive, and in fact, is all to which you [Defendant and its counsel] are entitled, and constitutes all that Plaintiff is obligated to provide.” See Exhibit “D.”, pages 38-40 attached hereto.

However, the very purpose of requesting answers to Interrogatories is to clarify matters of evidence and help to determine in advance what facts will be presented at any trial in the case. By not adequately responding to Defendant’s Interrogatories and by shunning Defendant’s good faith attempts to obtain adequate responses to its Interrogatories, Plaintiff’s counsel ignores the very purpose of Interrogatories as an essential discovery mechanism and cripples Defendant’s ability to defend this case.

ARGUMENT

I. PLAINTIFF’S RESPONSE TO DEFENDANT’S INTERROGATORIES IS EVASIVE AND INCOMPLETE

Defendant moves to compel Plaintiff to adequately, non-evasively and completely respond to Defendant’s Interrogatories pursuant to FRCP 37(a)(2). FRCP 37(a)(3) makes clear that an evasive or incomplete answer to discovery demands, is

1 to be considered for purposes of FRCP(a), a failure to answer. The courts have
2 consistently held that they have the power to compel adequate answers. See, e.g.,
3 Cone Mills Corp. v. Joseph Bancroft & Sons Co., 33 F.R.D. 318 (D. Del. 1963). This
4 power is recognized and incorporated into the Rule.
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7 **A. PLAINTIFF'S RESPONSE TO DEFENDANT'S**
8 **INTERROGATORIES 5 THROUGH 13 IS EVASIVE AND**
9 **INCOMPLETE**

10 Plaintiff's response to Defendant's Interrogatories 5 through 13 is evasive and
11 incomplete because Plaintiff failed:

- 12 • To demonstrate for each email that any alleged transmission was by Impulse
13 to an email address used by Plaintiff (Interrogatory No. 5);
- 14 • To demonstrate how Plaintiff determined that the emails were transmitted by
15 Defendant to Plaintiff (Interrogatory No. 6);
- 16 • To provide the factual basis of how each individual email violated RCW
17 19.190 et seq. and RCW 19.86 ((Interrogatory No. 7);
- 18 • To identify how and with whom Defendant conspired to transmit each of the
19 emails to Plaintiff (Interrogatory No. 8);
- 20 • To explain how and why Defendant knew or avoided knowing that an entity
21 transmitted email such that the transmission of the email violated RCW 19.86
22 or that Impulse knew or avoided knowing that the entity transmitting the email
23 was engaged in practices violating RCW 19.86 (Interrogatory No. 9);
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- 1 • To establish the factual basis of how Plaintiff believes each email allegedly
2 violated RCW 19.190 et seq. (Interrogatory No. 10);
- 3
- 4 • To indicate which email identified in Interrogatories Nos. 5 and 8 correspond
5 with each individual recipient (Interrogatory No. 11)¹;
- 6
- 7 • To advise whether or not Plaintiff has previously recovered any damages
8 related to any identified email (Interrogatory No. 12); and
- 9
- 10 • To disclose at which websites Plaintiff opted in to receive the emails at issue
11 in this lawsuit (Interrogatory No. 13).² See Exhibit “B.”, pages 30-32.

12 **B. PLAINTIFF’S RESPONSE TO INTERROGATORIES 14, 15, 20**
13 **AND 22 IS EVASIVE AND INCOMPLETE**

14 Plaintiff’s response to Defendants Interrogatories 14, 15, 20 and 22 simply
15 refer Defendant to the CD, which CD was produced by Plaintiff in response to
16 Defendant’s Document Requests. Plaintiff’s response to this group of Interrogatories
17 suggest that Defendant has the burden of sorting through the material provided on the
18 CD in order to answer Interrogatories 14, 15, 20 and 22. However, such a response
19 improperly shifts the burden of disclosing and clarifying the evidence contained on
20 the CD to help to determine in advance what facts will be presented by Plaintiff at any
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25 ¹ There are thousands of emails and thousands of pages of documents that purportedly analyze the violative
26 emails. However, the email and the analysis of the emails do not correspond to one another.

27 ² Plaintiff objects to Interrogatory No. 13. However, the objection was not timely and was
28 waived by the Plaintiff’s failure to respond in the time allowed. Davis v. Fendler, 650 F.2d 1154,
1160 (9th Cir. Ariz. 1981); FRCP 33(b)(4).

1 trial in the case. The correspondence from Plaintiff's counsel to Defendant's local
2 counsel set forth in the Introduction illustrates this point. See Exhibits "C", pages 33-
3 37 hereto, and "D", pages 38-40 hereto.

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5 **C. PLAINTIFF'S RESPONSE TO INTERROGATORIES 16, 17, 18,**
6 **AND 19 IS EVASIVE AND INCOMPLETE**

7 Moreover, Plaintiff asserts that a response to Interrogatory No. 16, which asks
8 Plaintiff to state whether Plaintiff has filed, initiated or commenced lawsuits against
9 any third person, company, or entity arising out of each individual email, is privileged
10 information based upon the existence of an unknown settlement agreement, yet
11 Plaintiff does not state any authority for the purported privilege, nor does he identify
12 the settlement agreement referred to. As such, Defendant is prejudiced because, *inter*
13 *alia*, Defendant's res judicata defense is hampered by Plaintiff's failure to disclose
14 the requested information. Specifically, previous lawsuits arising from the same
15 emails are highly relevant to Defendant's res judicata defense in the instant litigation.
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20 Plaintiff's response to Interrogatory No. 17, which asks Plaintiff to identify
21 how Plaintiff came to the determination that each individual email was sent by
22 Defendant, is even more puzzling. Plaintiff responds to Interrogatory No. 17 by
23 stating that:
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25 [T]he name of the Defendant is in the email or the email is
26 or was linked to a web site advertising products which
27 Defendant was contracted to market for Commonwealth
28 Marketing Group, Inc. of Uniontown, Pennsylvania. The
emails have all been provided (See Response to No. 5) and

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the emails speak for themselves. Defendant can easily determine on its own which emails it sent, and on whose behalf. See Exhibit “B”, pages 30-32.

Based on this evasive and incomplete response to Interrogatory No. 17, Plaintiff refuses to “identify how plaintiff came to the determination that each individual electronic mail message was sent by Defendant...” and urges that the Defendant must once again make that determination on its own. Moreover, Plaintiff’s response is proof positive that at least some of the emails to which Plaintiff’s seeks damages under this lawsuit, are identical to the emails that Plaintiff sued upon in the related action brought by Plaintiff against Commonwealth Marketing Group, Inc. Damages on behalf of these emails must be barred by the doctrine of res judicata. As such, Defendant is severely prejudiced by Plaintiff’s evasive and incomplete response to Interrogatory No. 17 in not being able to determine whether its defense of res judicata is justified.

Further, Plaintiff solely offers a legal conclusion in response to Interrogatory No. 18 by stating that the emails contained in the CD that Plaintiff produced to Defendant “violate statutory prohibitions.” The statement of opinion by an “expert” in the form of Plaintiff himself is a non-responsive, evasive and incomplete response.

In response to Interrogatory No. 19, Plaintiff advises that perhaps thousands of emails violating Washington Statutes exist and seeks the statutory penalty for each. However, Plaintiff must be required to demonstrate the dollar amount sought and the

1 basis on which each individual claim is founded.

2 **II. DEFENDANT IS ENTITLED TO SANCTIONS UNDER FRCP 37(a)(4)**

3
4 Defendant also seeks sanctions under FRCP 37(a)(4) given that Plaintiff,
5 despite Defendant’s continued notification to the contrary, repeatedly maintains that
6 Plaintiff does not have the “obligation” to provide Defendant with adequate discovery
7 including, but not limited to, non-evasive and complete responses to Defendant’s
8 Interrogatories. See Exhibits “C”, pages 33-37, and “D”, pages 38-40. Defendant’s
9 lead and local attorneys have expended numerous hours at a significant cost to
10 Defendant addressing Plaintiff’s failure to adequately, non-evasively and completely
11 respond to Defendant’s Interrogatories.
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15 Defendant merely requests that Plaintiff provide it with the factual basis for
16 how Defendant allegedly violated RCW 19.190 et seq. and RCW 19.86.
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18 **CONCLUSION**

19 Based on the foregoing, Defendant requests that this Court compel Plaintiff to
20 adequately respond to Defendant’s Interrogatories and grant sanctions against
21 Plaintiff pursuant to Rule 37(a)(4).
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23
24 DATED this 7th day of March, 2006.

25 LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE
26

27 By s/ FLOYD E. IVEY
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14 I hereby certify that on March 7, 2006, I electronically filed
15 DEFENDANT'S REPLY MEMORANDUM OF LAW IN RESPONSE TO
16 PLAINTIFF'S OPPOSITION TO IMPULSE MARKETING GROUP INC.'S
17 MOTION TO COMPEL AND FOR SANCTIONS with the Clerk of the Court
18 using the CM/ECF System which will send notification of such filing to Robert
19 Siegel, Peter J. Glantz and Sean A. Moynihan. I hereby certify that I have served
20 the foregoing to the following non-CM/ECF participants by other means: Bonnie
21 Gordon, Jonathan Gordon, James S. Gordon, III, Robert Pritchett, Jamila Gordon
22 and Emily Abbey.

23 S/ FLOYD E. IVEY

24 FLOYD E. IVEY