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MERKLE SIEGEL &
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THE HONORABLE FRED VAN
SICKLE

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

James S. Gordon, Jr.,
Plaintiff,
v.
Impulse Marketing Group, Inc.,
Defendant
Impulse Marketing Group, Inc.,
Third-Party Plaintiff,
v.
Bonnie F. Gordon, Jamila Gordon,
James Gordon III, and Jonathan
Gordon,
Third-Party Defendants

NO. CV-04-5125-FVS

PLAINTIFF'S MOTION FOR LEAVE TO
FILE A FIRST AMENDED COMPLAINT

[JURY DEMAND]

TO: Clerk of the Court

AND TO: Floyd E. Ivey, Sean Moynihan, Peter Glantz, Attorneys for Defendants.

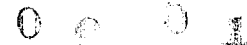
Plaintiff, James S. Gordon, Jr., by and through his undersigned attorney,

Robert J. Siegel, pursuant to FRCP 15, and FRCP 20 hereby moves the Court for an

NO. CV-05-5079-FVS
PLAINTIFF'S MOTION FOR LEAVE TO
FILE A FIRST AMENDED COMPLAINT

Page 1 of 9

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1 order granting him leave to file and serve his First Amended Complaint. (See copy
2 of First Amended Complaint attached hereto as **Exhibit "A"**).

3
4 **STATEMENT OF FACTS**

5 1. In 2004, Plaintiff properly commenced this action against the Defendant
6 Impulse Marketing Group, Inc. ("Impulse").

7
8 2. Defendants have appeared and defended the action. Discovery is
9 ongoing.

10 3. There is good cause to believe, and the evidence thus far supports that
11 additional parties should be named in this action, both plaintiffs and defendants,
12 and that additional claims should be brought, to wit:

13
14 **Additional Claims:**

15 Numerous violations of the Federal Can-Spam Act of 2003 (15 USC § 7701 et seq.);
16 Numerous violations of RCW 19.170 (Deceptive Offers statute); violations of
17 RCW 9.35 et seq. (Identity Crimes statute); violations of 19.190.080 (a CEMA
18 provision enacted after the filing of this lawsuit).

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21 **Additional Plaintiff:** Omni Innovations, LLC; a Washington limited liability
22 company, which owns the servers on which the domains hosting some of the email
23 addresses which received some of the unlawful emails at issue reside, and which is
24 entitled to assert its claims under the Federal Can-Spam Act of 2003 (15 USC §
25 7701 et seq.), and RCW 19.170 et seq. the Washington CEMA.

1 **Additional Defendants:** Jeffrey Goldstein, Kenneth Adamson, and Phillip Huston
2 are officers and/or directors of Impulse, who had knowledge of, and participated in,
3 and/or approved the unlawful conduct of the defendant corporation, and as such are
4 personally and individually liable. These culpable parties directly and individually
5 liable, and should not be entitled to hide behind the corporate shield in light of their
6 knowledge of, and participation in such patently unlawful acts.
7
8

9 **AUTHORITIES**

10 FRCP 15 and Washington case law provide that leave to amend a complaint
11 should be granted liberally in the interests of justice, "and leave shall be freely
12 given when justice so requires." Civil Rule 15(a) permits a party to amend a
13 pleading by leave of court, and leave shall be freely given when justice so requires.
14
15 The purposes of CR 15 are to "facilitate a proper decision on the merits", *CARUSO*
16 *v. LOCAL 690, INT'L BHD. OF TEAMSTERS*, 100 Wn.2d 343, 670 P.2d 240
17 (1983), at 349, and to provide each party with adequate notice of the basis of the
18 claims or defenses asserted against him. *PIERCE CY. SHERIFF v. CIVIL SERV.*
19 *COMM'N*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). SEE GENERALLY 6 C.
20 Wright & A. Miller, FEDERAL PRACTICE 1471 (1971); Trautman, PLEADING
21 PRINCIPLES AND PROBLEMS IN WASHINGTON, 56 Wash. L. Rev. 687, 711-
22 14 (1981). Leave to amend should be freely given "except where prejudice to the
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1 opposing party would result." CARUSO, at 349; SEE ALSO 6 C. Wright & A.
2 Miller 1473. The amendment of pleadings is left to the sound discretion of the trial
3 court, whose determination will be overturned on review only for an abuse of that
4 discretion. Herron v. Tribune Pub. Co., 108 Wn.2d 162, 165, 736 P.2d 249 (1987).
5 Discretion is abused if it is manifestly unreasonable, or exercised on untenable
6 grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26,
7 482 P.2d 775 (1971).
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11 Plaintiff submits that allowing him to amend his Complaint is in the interest
12 of justice. Plaintiff can then litigate the similar alleged violations, which arise out
13 of the same series of occurrences and transactions, and which, pursuant to FRCP
14 20(a) all parties added and joined share in common at least one question of law or
15 fact.
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17
18 In a recent unpublished opinion by the U.S. Federal Western District court
19 (No. C04-0515P) Microsoft Corp. v. JDO Media, Inc., et al the Court there, in the
20 context of a summary judgment motion granted in favor of plaintiff, considered the
21 issue of the individual liability of a corporate officer/principal, Mr. Lampert, in the
22 context of the Washington CEMA statute, finding:
23

24 "Washington's Commercial Electronic Mail Act, which was in effect prior to
25 the creation of the 1Up Program, states that "no person may initiate the
26 transmission, conspire with another to initiate the transmission, or assist the
27 transmission, of a commercial electronic mail message from a computer located in

1 Washington or to a electronic mail address that the sender knows, or has reason to
2 know, is held by a Washington resident ...”RCW § 19.190.020(1). “Person” is
3 defined by the statute as a person, corporation, partnership, or association. RCW §
4 19.190.010(9). Mr. Lampert qualifies under CEMA because he, as an individual
5 and as a principal of a corporation, assisted in the transmission of unlawful emails.”
(See decision attached hereto as Exhibit “A” to the Declaration of Robert J. Siegel
submitted herewith).

6 In the instant case, Plaintiff has obtained evidence, and should be allowed to
7 prove that each of the corporate principals and/or officers of Defendant Impulse
8 named in his First Amended Complaint, had knowledge of the unlawful acts of
9 Impulse, and participated in and/or “assisted” in the transmission of unlawful
10 emails. Indeed, as has been admitted by Defendant elsewhere in the record, the
11 sending of commercial emails is its primary business. That undisputed fact alone
12 should suffice to establish the potential liability of any corporate principals and/or
13 officers who may have knowingly participated in and assisted in the transmission of
14 such emails, which Plaintiff alleges were unlawful.
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19 IN GRAYSON v. NORDIC CONSTR. CO., 92 Wn.2d 548, 599 P.2d 1271
20 the Washington Supreme Court, found in favor of that plaintiff on the issue of
21 individual liability of corporate officers for the wrongful conduct of the
22 corporation, and cited State v. Ralph Williams’ Northwest Chrysler Plymouth, Inc.,
23 Wn. 2d 298, 553 P. 2d 423 (1976), a case squarely holding that consumer
24 protection violations (such as those in the instant case) could constitute the
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1 wrongful conduct necessary to impose personal liability on corporate officers,
2 stating in pertinent part:
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4 “Although the trial court improperly pierced Nordic's corporate veil on the alter ego
5 theory, we nonetheless find that personal liability was properly imposed on
6 Bergstrom under the rule enunciated in STATE v. RALPH WILLIAMS' NORTH
7 WEST CHRYSLER PLYMOUTH, INC., 87 Wn.2d 298, 553 P.2d 423 (1976). **If a
8 corporate officer participates in wrongful conduct or with knowledge approves
9 of the conduct, then the officer, as well as the corporation, is liable for the
10 penalties.** STATE v. RALPH WILLIAMS' NORTH WEST CHRYSLER
11 PLYMOUTH, INC., SUPRA; JOHNSON v. HARRIGAN-PEACH LAND DEV.
12 CO., 79 Wn.2d 745, 489 P.2d 923 (1971). In RALPH WILLIAMS, this court
13 considered a deceptive practice in violation of the Consumer Protection Act to be a
14 type of wrongful conduct which justified imposing personal liability on a
15 participating corporate officer.”, emphasis added.
16

17 In Ralph Williams, the Washington Supreme Court held that a corporate
18 officer could be personally liable for the deceptive practices of his automobile
19 dealership, where he formulated and supervised its activities. Among other things,
20 the dealership in that case falsely claimed it sold cars at prices lower than other area
21 car dealers and relied on advertisements that concealed defects in its vehicles. It
22 also used "a comprehensive sales system designed to confuse and deceive the
23 customer," which included quoting prices lower than actual sales prices,
24 misrepresenting the value that would be given on trade-in models, and giving the
25 customer little opportunity to even read the contract. [Footnotes omitted] The court
26 accordingly determined that such deceptive practices, which violated the Consumer

1 Protection Act, constituted the type of wrongful conduct that warranted the
2 imposition of personal liability on a participating corporate officer. (fn32)
3

4 In the instant case, Defendant Impulse together with the named corporate
5 officers and directors, not only violated the Washington CEMA, and CPA, but
6 pursuant to the First Amended Complaint have violated RCW 10.170 et seq. the
7 Deceptive Offers statute, which, like the CEMA, also constitutes per se violations
8 of the CPA. Thus, here too, these numerous violations of the CPA and related
9 consume fraud statutes constitute the type of wrongful conduct that warrants the
10 imposition of personal liability on participating corporate officers.
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14 In *HOMEOWNERS' ASS'N v. HAL REAL ESTATE*, 108 Wn. App. 330, 30
15 P.3d 504 the Washington State Court of Appeals said:
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17 "Corporate officers may indeed face personal liability outside the theory of piercing
18 the corporate veil under certain circumstances. Corporate officers may be
19 personally liable for torts committed in the course of their duties. (fn27) "If a
20 corporate officer participates in wrongful conduct or with knowledge approves of
21 the conduct, then the officer, as well as the corporation, is liable for the
22 penalties."(fn28)

23 Additional defendants named herein will not be substantially prejudiced by
24 Plaintiff's amendment since they have all had direct knowledge of this action since
25 its inception, and have been intimately involved in the defense hereof. The claims
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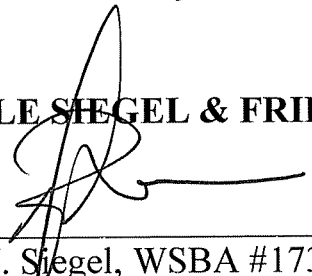
1 against them arise from the same nexus of factual allegations, and are part of the
2 same claims that have been, and are now being pled by Plaintiff.
3

4 Further, and perhaps most importantly, allowing Plaintiff to amend will
5 conserve valuable judicial time and expense of having to adjudicate new and
6 additional actions.
7

8 Plaintiff requests that the Court grant its Motion For Leave To File First
9 Amended Complaint.

10 DATED this 29th day of March, 2006.

11
12 **MERKLE SIEGEL & FRIEDRICHSEN, P.C.**
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15 _____
16 Robert J. Siegel, WSBA #17312
17 Attorneys for Plaintiffs
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Certificate of Service

I, hereby, certify that on March 29, 2006, we filed this pleading with this Court.
The Clerk of the Court will provide electronic notification system using the
CM/ECF, which will send an electronic copy of this Notice to: Floyd E. Ivey.

/s/ Robert J. Siegel
Robert J. Siegel, WSBA #17312
Attorneys for Plaintiffs