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 17 and Third Party Plaintiff

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 22 Attorney for Plaintiff

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

27 JAMES S. GORDON, JR.,

28 Plaintiff,

29 vs.

30 IMPULSE MARKETING GROUP,
 31 INC.,

32 Defendant

No. CV-04-5125-FVS

MEMORANDUM: DEFENDANT
 AND THIRD PARTY PLAINTIFF'S
 RESPONSE TO THIRD PARTY
 DEFENDANT'S ASSERTIONS RE:
 DISQUALIFICATION

WITHOUT ORAL ARGUMENT

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IMPULSE MARKETING GROUP,
 INC.,

Third-Party Plaintiff,

vs.

BONNIE GORDON, et al.,

Third-Party Defendants.

1 **I. INTRODUCTION**

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3
4 Ms. Jamila Gordon and Mrs. Bonnie Gordon make assertions in their
5 Declarations respectively of March 17, 2006 and March 20, 2006 regarding the
6 issue of disqualification of attorney Floyd E. Ivey from this matter. The assertions
7 by Mrs. Bonnie Gordon appear to duplicate or overlap those found in the
8 Declaration of Ms. Jamila Gordon.

9 Attorney Ivey appeared for defendants in the present matter in January,
10 2005 and thereafter in the Eastern District Court matter of Gordon v. Ascentive
11 CV-05-5079-FVS and the Benton County case of Gordon v. Efinancials LLC.

12 Argument and law have been previously provided by Defendant and Third
13 Party Plaintiff specifically directed to the issue of disqualification. The
14 subsequent assertions by Ms. Jamila Gordon and Mrs. Bonnie Gordon are now
15 addressed.

16
17 **II. PARTIES SELECTING COUNSEL OF CHOICE**

18 Ms. Jamila Gordon's Declaration, page 1/paragraph 2 lines 5-page 2/line 3,
19 found as Exhibit 1, pages 8 to 28, to this Memorandum, have been objected to in
20 Defendant and Third Party Plaintiff's separate Motion to Strike Portions of
21 Declarations and Defendant has asked the Court to disregard the specific portions
22 of the Declaration of Ms. Jamila Gordon. These portions of Ms. Gordon's
23 Declaration of March 20, 2006 relate to the issue of a party having counsel of its
24 choice. Ms. Gordon argues that Ivey is not the counsel of choice but is a
25 subcontractor to primary counsel. Ms. Gordon cites no authority for the position
26 taken.

27 Ms. Godson does not acknowledge Mr. Ivey's representation of the defense
28 in the cases of Gordon v. Ascentive and Gordon v. Efinancials, the role therein

1 played by attorney Ivey and the absence of issues raised by Plaintiff Gordon
2 regarding Conflict.

3 The arguments fail. There was no conflict in representation. If there is a
4 question of prior representation the Plaintiff has waived the issue by the failure to
5 timely bring the matter of disqualification to the attention of the court. The
6 Motion to Disqualify should be denied.

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9 **III. PRIVILEGED COMMUNICATIONS ALLEGED**

10
11 Ms. Jamila Gordon's Declaration, page 5, paragraph 9 alleges an attorney
12 client relationship between Mr. Gordon and attorney Ivey by her discussions with
13 Plaintiff Mr. Gordon. Ms. Gordon's Declaration has been objected to with the
14 request that the testimony be disregarded as hearsay, conclusory and
15 argumentative. However, the court is referred to The Declaration of Floyd E. Ivey,
16 regarding the issue of disqualification, and Exhibit C which is the email between
17 attorney Ivey and attorney McKinley of November 2, 2005, some eleven months
18 after an initial discussion of any contention by Mr. Gordon of a conflict and with
19 the conclusion that there would be no further contention of conflict raised.

20 The court is also again referred to Exhibit I to the Declaration of Floyd E.
21 Ivey which comprises the email from Mr. Gordon to then Attorney General
22 Gregoire, State Representatives Shirley Hankins and Jerome Delvin and State
23 Senator Patricia Hale wherein Mr. Gordon addresses his concern and legislative
24 proposals regarding unwanted electronic mail messages. Mr. Gordon's
25 communications negate arguments that Mr. Gordon retained confidentiality
26 regarding his efforts relative to electronic mail messages.

27 Additionally, regarding confidentiality, Ms. Jamila Gordon's Declaration at
28 paragraph 9 and paragraph 11, references her Exhibit 7 and knowledge by attorney

1 Mr. Ivey as evidence that attorney Ivey demonstrated awareness of confidential
2 information. Ms. Gordon asserts that "...The actual mention of CMG was via
3 hyperlink to a web site created by my father, which contained...I believe the web
4 site has been taken down. on the surface, it appears that Mr. Ivey has direct
5 intimate knowledge of both sides in the instant conflict..."

6 However, the web sites referenced at Exhibit 7 have not been taken down.
7 Exhibit 2, pages 29 to 30, to this Memorandum illustrates the extensive presence
8 of Mr. James Gordon's litigation efforts including reference to American
9 Homeowners Assn, Commonwealth Marketing Group and Theodore Hansson Co.
10 Reference, in
11 Exhibit 2, pages 29 to 30, is made to ORDER DENYING DEFENDANT'S
12 MOTION TO DISMISS relative to Mr. Gordon's December 2001 filing of Gordon
13 v. Commonwealth.

14 Exhibit 3, pages 31 to 37, to this Memorandum demonstrates the results of a
15 search of Ms. Gordon's reference to the Exhibit 7 web site found at
16 www.gordonworks.com/spam where the Complaint of Gordon v. Kraft CV 05-
17 5002-EFS is found.

18 Exhibit 4, pages 38 to 56, is the Exhibit 7 web site where Gordon v.
19 Commonwealth Complaint is found at
20 www.gordonworks.com/spam/commonwealthmarketinggroup.htm. Additionally,
21 Defendant Impulse's attorneys Mr. Sean Moynihan and Mr. Peter Glantz were
22 long before aware of the matter of Gordon v. Commonwealth as evidenced by the
23 recitation to the case in the Impulse Motion to Dismiss brought in the current
24 matter.

25 Exhibit 5, pages 57 to 60, is a January 4, 2004 reference to Mr. Gordon's
26 litigation in Commonwealth.

27 Exhibit 6, pages 61 to 64, is a reference dated September 24, 2004 of Mr.
28 Gordon's formation of "Informal Coalition of Private Anti-spam Litigants

1 (ICPAL). Mr. Gordon's formation of ICPAL is seen at the second page of Exhibit
2 6, pages 61 to 64.

3 Exhibit 7, pages 65 to 67, refers to Mr. Gordon's filing of the
4 Commonwealth case. Page 2 of Exhibit 7 indicates that Mr. Gordon awaited news
5 of a settlement, on September 12, 2006, in the Commonwealth case.

6 Exhibit 8, pages 68-71, indicates the approaches taken by Mr. Gordon in
7 analyzing electronic mail messages to determine if statutory violations had
8 occurred.

9
10 **IV. CONCLUSION-DISQUALIFICATION FAILS AND SANCTIONS ARE**
11 **SOUGHT**

12
13 It is asserted that there was no representation by attorney Ivey of Mr.
14 Gordon relative to Mr. Gordon's Anti-spam efforts. The issue was addressed prior
15 to attorney Ivey engaging to represent Defendants relative to Mr. Gordon's efforts.
16 The first reference to a possible conflict was made November 2, 2005 in email
17 from attorney Mr. McKinley. The reference was immediately challenged by
18 attorney Ivey and Mr. McKinley advised that the issue would be dropped.
19 Attorney Ivey, at the time of Mr. McKinley's comment, was representing
20 Defendants in Impulse Marketing Group, Ascentive LLC and Efinancials LLC.
21 and had then represented Impulse for some eleven months. Motions challenging
22 jurisdiction and venue were brought by attorney Ivey in Ascentive LLC and
23 Efinancials LLC. Venue was changed, in Efinancials LLC, from Benton County
24 to King County.

25 Further, pursuant to Rule 11(c)(1)(B), Defendant and Third Party Plaintiff
26 Impulse respectfully requests that this Court impose sanctions upon Third Party
27 Defendants on the ground that Third Party Defendants' raising of the issue of
28 Disqualification was frivolous and would have been understood to be frivolous

1 upon a reasonable investigation by Third Party Defendants. Defendant has given
2 notice to the Third Party Defendants, by correspondence and by this reference, that
3 sanctions will be sought and that the issue of disqualification should be
4 withdrawn. Impulse requests that this Court impose sanctions upon Third Party
5 Defendants in an amount equal to the time and money expended by counsel for
6 Impulse in researching, preparing and filing responses to the issue of
7 Disqualification. Attorney Ivey has previously addressed the time for research and
8 drafting associated with the initial response. This reply to the Declarations of Mrs.
9 Bonnie Gordon and Ms. Jamila Gordon has required an additional five hours of
10 research and drafting by attorney Ivey. Further, the Initial Response by Defendant
11 and Third Party Plaintiff constituted notice under Fed. R. Civ. P. 11(c)(1)(A) more
12 than 21 days prior to the date of the scheduled hearing on April 10, 2006.
13 Sanctions should be imposed. *Cook v. Peter Kiewit Sons, Co.*, 775 F.2d 1030,
14 1037 n. 13 (9th Cir.1985); *Business Guides v. Chromatic Communications,*
15 *Enterprises*, 892 F.2d 802, 811 (9th Cir.1989), *aff'd* 111 S.Ct. 922 (1991).

16
17
18 DATED this 2nd day of April, 2006.

19
20 **LIEBLER, IVEY, CONNOR, BERRY & ST.
21 HILAIRE**

22
23 **s/ FLOYD E. IVEY**
24 **Floyd E. Ivey, WSBA #6888**
25 **Attorneys for the Defendant Impulse**

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28 I hereby certify that on April 2, 2006, I electronically filed DEFENDANT

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AND THIRD PARTY PLAINTIFF'S RESPONSE TO THIRD PARTY DEFENDANT'S ASSERTIONS RE: DISQUALIFICATION with the Clerk of the Court using the CM/ECF System which will send notification of such filing to Robert Siegel, 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, Emily Abbey and Jamila Gordon.

S/ FLOYD E. IVEY

FLOYD E. IVEY