

1 ROBERT J. SIEGEL
Attorney At Law
2 1325 Fourth Avenue
Suite 940
3 Seattle, WA 98101
(206) 624-9410
4
5
6
7

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF WASHINGTON**

10
11 **JAMES S. GORDON, JR.,**

12 **Plaintiff,**

13 v.

14 **IMPULSE MARKETING GROUP,**
INC.,

15 **Defendant.**

NO. CV-04-5125-FVS

RESPONSE TO DEFENDANT'S
SECOND MOTION TO COMPEL

[HEARING: MAY 1, 2006]

16 Plaintiff respectfully responds as follows to Defendant's Second Motion To
17 Compel:

- 18 **1. Defendant's Motion Is Not Well Founded.** Once again, as in Defendant's
19 first Motion To Compel, Defendant continues to allege deficiencies in
20 Plaintiff's responses to Defendant's First Discovery, which "deficiencies"
21 are more accurately characterized as Defendant's improper demands, and its
22 failure to adequately analyze and/or understand the voluminous, detailed
23 data provided by Plaintiff, not to mention the very nature of its own actions,
24 i.e., the sending of unlawful commercial emails, which are by their very
25 nature difficult to trace. Defendant instead continues to make improper
26

RESPONSE TO DEFENDANT'S
SECOND MOTION TO COMPEL - 1

MERKLE SIEGEL & FRIEDRICHSEN, P.C.
ATTORNEYS AT LAW

1325 FOURTH AVENUE, SUITE 940
SEATTLE, WASHINGTON 98101-2509
PHONE: (206) 624-9392 FAX: (206) 624-0717

1 requests to state evidence upon which Plaintiff intends to rely, and/or to have
2 Plaintiff provide Defendant with his trial preparation.
3

4 **2. What Plaintiff Has Provided In Response To Discovery Requests.** (The
5 Court should note that any complexities, demanding voluminous documents
6 and extensive analysis by way of response in discovery, were wholly created
7 and caused by Defendant by virtue of its engaging in the sending of
8 voluminous unlawful email to Plaintiff). In accordance with Plaintiff's
9 obligations under the civil rules, and in further compliance with this Court's
10 Order Denying Defendant's first Motion To Compel. Plaintiff has now
11 provided the following by way of Plaintiff's First Supplemental Responses
12 ¹To Defendant's First Discovery Requests:

13 Two CD roms containing the following files:

14 **Disk #1:**

- 15 a. a pdf file (1,445 KB) containing bates stamped html copies,
16 with coded analysis of allegedly offending emails, prepared to
17 date;
- 18 b. 3 .mbx format files* (works with Eudora email application used
19 by Plaintiff) containing Plaintiff's bounced notice/demands to
20 all senders of spam for the noted period of time.
- 21 c. 3 .toc format files containing same information as in (b) in an
22 Adobe application format which works with Eudora.

23 **Disk #2:**

- 24 a. 4 files in .mbx format (the Eudora utility on which Plaintiff
25 stores his emails);
26

- 1 **b.** 4 files in .toc format (an Adobe format which works with
2 Eudora)
3 **c.** a Word document (25 KB) containing a legend explaining the
4 files contained on the CDs. (Also attached hereto as **Exhibit**
5 **“A”**).

6 * The Eudora email utility is what Plaintiff uses to receive and store his
7 emails in original format. Defendant has previously been provided with
8 this application to download for ease of viewing the emails, and only
9 need ask to receive it again.

10 (The voluminous nature of the data provided, and contained on the CD makes it
11 impractical to file contemporaneously herewith for the Court’s edification.
12 Nonetheless, Plaintiff is ready, willing and able to provide the Court with the
13 data in any format it deems appropriate). It is this extensive and responsive
14 data to which Defendant blithely refers as “nonresponsive”.

15
16 **3. Plaintiff Has Produced Virtually All Of His “Business Records”,**
17 **Which Pursuant To FRCP 33(d) Constitutes An Adequate Response.**

18 FRCP 33(d) states:

19 (d) OPTION TO PRODUCE BUSINESS RECORDS. Where the answer to an
20 interrogatory may be derived or ascertained from the business records of the
21 party upon whom the interrogatory has been served or from an examination,
22 audit or inspection of such business records, including a compilation, abstract or
23 summary thereof, and the burden of deriving or ascertaining the answer is
24 substantially the same for the party serving the interrogatory as for the party
25 served, it is a sufficient answer to such interrogatory to specify the records from
26 which the answer may be derived or ascertained and to afford to the party
 serving the interrogatory reasonable opportunity to examine, audit or inspect
 such records and to make copies, compilations, abstracts or summaries. A
 specification shall be in sufficient detail to permit the interrogating party to

1 locate and to identify, as readily as can the party served, the records from which
2 the answer may be ascertained.

3 Plaintiff has now provided Defendant with a copy of virtually all of his business
4 records relevant to this matter in the format in which they are stored. Moreover,
5 although, arguably, the burden to ascertain the alleged statutory violations
6 contained within each offending email is equal between the parties, Plaintiff has
7 nonetheless also provided Defendant with individually coded emails, setting
8 forth specific violations in each, as well as a legend explaining the coding
9 scheme. Thus, Plaintiff has more than satisfied its obligations under the rules of
10 discovery.
11
12
13
14

15 **4. Defendant Complains That Plaintiff Has Failed To Provide His Trial**
16 **Preparation, And/Or To Prepare Defendant's Case.** In correspondence,
17 Defendant has alleged specific deficiencies in response to Plaintiff's answers.
18 Essentially, what Defendant's alleged deficiencies boil down to is that Plaintiff has
19 failed to state with specificity as to each of the thousands of offending emails sent
20 by Defendant, which parts of each email violate which provisions of the
21 Washington CEMA. The emails speak for themselves as to how they violate the
22 applicable statutes, and determining that is a question of law for the Court, and/or
23 fact for the jury. Plaintiff alleges that each and every one of the identified emails
24 violates the statute. Further, Plaintiff has provided Defendant with extensive
25 forensic analyses (hundreds of pages) showing the transmission path tracing, and
26 noting misleading subject lines of the subject emails. Thus, Defendant has been

1 provided with everything in Plaintiff's possession insofar as the offending emails
2 are concerned and, with the exception of supplemental responses to be produced
3 when appropriate, nothing more should be required of him at this point.

4 The Washington CEMA speaks in terms of "false or misleading"
5 information in the 'subject' header field and/or which "obscures" information in
6 the transmission path or point of origin of commercial emails, "spam". Plaintiff
7 will, of course, be prepared at trial to establish that each of the offending emails
8 violated the applicable statutes in one or more ways, however, it is not Plaintiff's
9 burden at this point in the litigation to prepare his trial exhibits, or to prepare
10 Defendant's case for him.

11
12 [The Court should also note that Defendant has provided virtually nothing in the
13 way of responses to Third-Party Defendants' overdue and outstanding discovery
14 requests, nor has it responded at all to Plaintiff's First Discovery Requests.

15
16 **5. Defendant's Demand For "Paper" Responses Is Ironic, And Unjustified.**

17 Defendant has recently demanded that all discovery responses be provided in paper
18 format. Plaintiff views such a request as highly ironic, not to mention wasteful and
19 unnecessary. First, the subject emails, having been initiated by Defendant, or
20 others on its behalf, were electronic and digital in their original form, and in the
21 form received by Plaintiff on his computer. Thus, the subject matter has never
22 existed before in printed paper format. Plaintiff has provided Defendant with
23 electronic/digital copies of all of his responsive documents in their original format,
24 and in the form in which he maintains them in his ordinary course of business.
25 Next, due to the large volume of offending emails sent by Defendant (thousands),
26


1 to reduce them to paper would be unduly burdensome, wasteful and should be
2 unnecessary.

3
4 **6. Appointment of A Special Master.** In the event that the Court
5 determines that a Special Master is required in this matter, Plaintiff requests that
6 the costs associated with same be borne by Defendant. It was Defendant's
7 unlawful acts which gave rise to this matter in the first, and it is further
8 Defendant's unfounded complaints, and improper requests which give rise to
9 the need for a special master. Defendant simply refuses to take the time and
10 effort necessary, or to engage the services of a suitable expert on its behalf to
11 analyze and decipher both its own email transmissions, and Plaintiff's discovery
12 responses. Forcing Plaintiff to incur the costs of a special master, made
13 necessary by Defendant's own conduct, would only serve to embolden
14 Defendant in its war of attrition through litigation. Such tactics should not be
15 countenanced by the Court.

16
17 Accordingly, Plaintiff urges the Court to find that Plaintiff has met its
18 burden in responding to Defendant's written discovery requests, and to deny
19 Defendant's 2nd Motion To Compel.

20
21 **RESPECTFULLY SUBMITTED** this 19th day of April, 2006.

22
23 **MERKLE SIEGEL & FRIEDRICHSEN, P.C.**

24
25 
26 _____
Robert J. Siegel, WSBA #17312

RESPONSE TO DEFENDANT'S
SECOND MOTION TO COMPEL - 6

MERKLE SIEGEL & FRIEDRICHSEN, P.C.
ATTORNEYS AT LAW

1325 FOURTH AVENUE, SUITE 940
SEATTLE, WASHINGTON 98101-2509
PHONE: (206) 624-9392 FAX: (206) 624-0717

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Certificate of Service

I, hereby, certify that on April 19, 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

MERKLE SIEGEL & FRIEDRICHSEN, P.C.
1325 Fourth Ave., Suite 940
Seattle, WA 98101-2509
Phone: 206-624-9392
Fax: 206-624-0717

**Plaintiff's First Supplemental Responses To
Defendant's First Discovery Requests
INDEX – Highlighted**

Contract Bounces 001-007 are folders with email returned to the 'gordonworks.com' domain, sorted chronologically. These bounces were generated by an auto-responder message which was prompted by a spammer sending an email message to 'gordonworks.com'. In other words, 'gordonworks.com' (automatically) sends an auto-responder message via the return address of the email received by my domain. If the return address is valid, no bounce occurs. If the return address is non-existent, obscured, or otherwise not-functioning, a bounce is generated and sent back to my domain.

A non-existent or non-functioning return address is prima facie evidence of a violation of state and federal laws. One of two things is happening, either the sender is ignoring the auto-responder message that they receive, or they are using an invalid return addresses – thus the bounce.

As Impulse has not yet provided responses to our discovery requesting the identities of which spammers it uses, Plaintiff here includes all bounces from all spammers. **Contract Bounces 2005** folder contains the bounced emails from December 2005.

Additional IMG Email Bates (stamped) is another installment (one more to go) of email analysis, which details errors and omissions in the headers of the email sent to Plaintiff's domain.

Legend Email Analysis Generic is an explanation of what is wrong and why it is wrong in terms of email sent by Impulse.