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

JAMES S. GORDON, JR., an individual
residing in Benton County, Washington,

Plaintiffs

vs.

IMPULSE MARKETING GROUP, INC.,
a Nevada Corporation,

Defendants

NO. CV-04-5125-FVS

DEFENDANT'S
ADDITIONAL
SUPPLEMENTAL RESPONSE
RE: DEFENDANT'S MOTION
TO DISMISS

Defendant Impulse Marketing Group, Inc. now submits Additional
Supplemental Response regarding Defendant's Motion to Dismiss.

On or about March 31, 2005, the Court directed the parties to provide it with
Supplemental Memoranda of Law with respect to whether Federal Rule of Civil
Procedure §9(b) applies to Washington's Commercial Electronic Mail Statute,
RCW §19.190 et seq. and the Washington Consumer Protection Act, RCW §19.86
et seq. (collectively, the "Washington Statutes"). Both parties briefed the Court on
this issue.

The Defendant respectfully submits this Additional Supplemental Response
to further clarify Defendant's Supplemental Memorandum of Law.

Defendant continues to maintain that Plaintiff's allegations arising out of

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Defendant's Motion to Dismiss Pursuant to FRCP
12(b)(6) - 1.

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1 Defendant's violations of the Washington Statutes are preempted by the CAN-
2 SPAM Act of 2003 ("CAN-SPAM"). There are only two (2) limited exceptions
3 where CAN-SPAM would not arguably bar Plaintiff's Complaint. Said exceptions
4 are found in Sections 8(b)(2)(A)&(B) of CAN-SPAM wherein the express
5 language provides:

6 (A) This Act shall not be construed to preempt the applicability of State laws
7 that are not specific to electronic mail, including State trespass, contract, or
8 tort law; or (B) other State laws to the extent that those laws relate to acts of
9 **fraud** or computer crime (emphasis added).

10
11 In the above-referenced matter, Section 8(b)(2)(A) is inapplicable because
12 Plaintiff's Complaint specifically alleges that his damages arise from Defendant's
13 transmission of electronic mail. Further, none of Plaintiff's causes of action sound
14 in trespass, contract, or tort law.

15 Should the Court hold that Plaintiff's allegations arising out of Defendant's
16 violations of the Washington Statutes are not barred by CAN-SPAM then any and
17 all of Plaintiff's allegations must necessarily relate to acts of **fraud** or computer
18 crime by definition. As Plaintiff does not have standing to allege that Defendant
19 committed any computerized criminal act whatsoever, the allegations with respect
20 to Defendant's violations of the Washington Statutes must necessarily relate to acts
21 of fraud, thus triggering the applicability of the heightened pleading requirement
22 under Federal Rule of Civil Procedure §9(b).

23 The Defendant submits that are novel and have, to Defendant's knowledge,
24 never before been adjudicated.

25 DATED this 20th day of May, 2005.

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

27
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Defendant's Motion to Dismiss Pursuant to FRCP
12(b)(6) - 2.

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By /s/ FLOYD E. IVEY
FLOYD E. IVEY, WSBA #6888
Local Counsel for Defendant

KLEIN, ZELMAN, ROTHERMEL & DICHTER, LLP

By PETER J. GLANTZ by telephone authority by
/S/FLOYD E. IVEY
PETER J. GLANTZ
Attorneys for Defendant

I hereby certify that a copy of the foregoing was
sent via facsimile and electronically filed EFS on this
20th day of May, 2005, to:

Douglas E. McKinley, Jr.
P.O. Box 202
Richland, WA 99352

Secretary to Floyd E. Ivey

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