

1 FLOYD E. IVEY
 2 Liebler, Ivey, Connor, Berry & St. Hilaire
 3 P. O. Box 6125
 4 Kennewick, WA 99336-0125
 5 509-735-3581
 6 Attorneys for Defendant
 7 Impulse Marketing Group, Inc.
 8 and Third Party Plaintiff

9 Klein, Zelman, Rothermel, & Dichter, L.L.P.
 10 By: Sean Moynihan, Esq.; Peter Glantz
 11 485 Madison Avenue
 12 New York, New York 10022
 13 Telephone Number (212) 935-6020
 14 Facsimile Number (212) 753-8101
 15 Attorneys for Defendant
 16 Impulse Marketing Group, Inc.
 17 and Third Party Plaintiff

18 Robert J. Siegel
 19 1325 4th Ave. Suite 940
 20 Seattle, Wa. 98101-2509
 21 Telephone: 206 624 9392
 22 Facsimile Number 206 624 0717
 23 Attorney for Plaintiff

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

26 JAMES S. GORDON, JR.,

27 Plaintiff,

28 vs.

IMPULSE MARKETING GROUP,
 INC.,

Defendant

IMPULSE MARKETING GROUP,
 INC.,

Third-Party Plaintiff,

vs.

BONNIE GORDON, et al.,

Third-Party Defendants.

No. CV-04-5125-FVS

MEMORANDUM OF LAW IN
 SUPPORT OF MOTION TO DISMISS
 THIRD PARTY DEFENDANTS'
 AMENDED COUNTERCLAIMS

Noted for Hearing May 18, 2006 at
 10:00 a.m.

WITH ORAL ARGUMENT

1
2 **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**
3 **THIRD PARTY DEFENDANTS' AMENDED COUNTERCLAIMS**

4 **PRELIMINARY STATEMENT**

5
6 Defendant and Third Party Plaintiff has noted its Motion to Dismiss Third
7 Party Defendants' Counterclaims with the motion set for oral argument May 18, 2006
8 at 10 a.m. Third Party Defendants have filed First Amended Counterclaims
9 subsequent to the noting of the Third Party Plaintiff's Motion to Dismiss. The Third
10 Party Defendant's have revised their original counterclaims and have added one or
11 more counterclaim. The Third Party Plaintiff now responds to the revised original
12 counterclaims and the newly added counterclaims and seeks to have the argument as
13 presently scheduled on May 18, 2006.
14
15
16

17 Pursuant to Rule 12(b)(6), Third Party Plaintiff, Impulse Marketing Group, Inc.
18 ("Impulse" or the "Third Party Plaintiff") submits this Memorandum of Law in
19 support of its motion to dismiss numerous Amended Counterclaims brought by
20 Bonnie Gordon, James S. Gordon, III, Jonathan Gordon, Jamila Gordon, Robert
21 Pritchett and Emily Abbey (collectively, "Third Party Defendants") against Impulse
22 on the ground that Third Party Defendants have not stated and cannot state claims for
23 which relief can be granted.¹
24
25
26
27

28

¹ Third Party Defendant Robert Pritchett only alleges the first six (6) Counterclaims, which Counterclaims are identical to the other Third Party Defendants.

1 Further, pursuant to Rule 11, Impulse respectfully requests that this Court
2 impose sanctions upon Third Party Defendants on the ground that Third Party
3 Defendants' Amended Counterclaims are frivolous and would have been understood
4 to be frivolous upon a reasonable investigation by Third Party Defendants.² In fact,
5 Third Party Defendants had actual knowledge that their claims were frivolous based
6 upon Impulse's previous motion to dismiss their Counterclaims. Yet, Third Party
7 Defendants still failed to withdraw most of their Counterclaims after having months
8 to reasonably investigate whether their claims. As such, Impulse requests that this
9 Court impose sanctions upon Third Party Defendants in an amount equal to the time
10 and money expended by counsel for Impulse in researching, preparing and filing a
11 response to Third Party Defendants' claims.

12 Impulse further requests that this Court grant Impulse its attorneys' fees and
13 reasonable costs expended in responding to Third party Defendants' baseless
14 Counterclaims and Amended Counterclaims. Impulse's attorneys have spent a total
15 of thirty-five (35) hours researching and preparing their motion to dismiss Third Party
16 Defendants' Counterclaims and ten (10) hours researching and preparing for the
17 instant motion. Specifically, Peter Glantz has expended nine (9) billable hours
18 researching and preparing the instant motion and twenty (20) hours researching and
19 preparing Impulse's previous motion to dismiss, Sean Moynihan has spent ten (10)

20
21
22
23
24
25
26
27
28

² Third Party Defendants simultaneously filed associated affidavits with their Counterclaims. By separate motion, Impulse is respectfully requesting that this Court strike these affidavits from the record as such affidavits are improper and do not comply with the Federal Rules of Civil Procedure.

1 billable hours reviewing and preparing the previous motion and Floyd Ivey has billed
2 five (5) hours researching, reviewing and filing the previous motion and one (1)
3 reviewing and revising the instant motion.
4

5 **PROCEDURAL HISTORY**

6
7 On November 18, 2005, Impulse filed a Second Third Party Amended
8 Complaint against each of the Third Party Defendants arising out of Third Party
9 Defendants' wrongful and fraudulent conduct in connection with James Gordon's
10 ("Plaintiff") claims. Third Party Defendants failed to interpose a timely Answer to
11 the Second Amended Third Party Complaint. Instead, *pro se* Third Party Defendants,
12 after the time to respond to the Second Third Party Amended Complaint expired,
13 moved to dismiss the Second Third Party Amended Complaint.
14
15

16 On March 9, 2006, this Court denied Third Party Defendants' motion to
17 dismiss the Second Amended Complaint in its entirety, holding that Impulse's Second
18 Amended Complaint stated a prima facie case for indemnity and contribution, breach
19 of contract, tortious interference with business relations, fraud and deceit and
20 injunctive relief. On or about March 10, 2006, March 13, 2006 and March 14, 2006,
21 respectively, Third Party Defendants answered the Second Amended Complaint and
22 asserted fifteen (15) identical Counterclaims against Impulse. On May 9, 2006, Third
23 Party Defendants amended their Answer and Counterclaims.
24
25
26

27 **INTRODUCTION**

1 Notwithstanding Third Party Defendants' Amended Counterclaims, Third Party
2 Defendants have still failed to state claims for which relief can be granted. Third
3 Party Defendants' attempt to portray themselves as victims, rather than co-
4 conspirators in a scheme to defraud Impulse is without merit. In fact, this Court has
5 already ruled that Impulse pled valid causes of action against Third Party Defendants
6 for, indemnification and contribution, fraud and deceit, breach of contract and
7 tortious interference with business relationships.
8

9
10
11 Third Party Defendants are not innocent parties to the transactions underlying
12 Plaintiff's Complaint. Rather, Third Party Defendants are complicit in a premeditated
13 and systematic effort to cause harm to Impulse by, *inter alia*, providing Impulse with
14 false and/or inaccurate subscriber profiles at various Impulse-related websites,
15 conspiring with Plaintiff to provide Impulse with false and/or inaccurate subscriber
16 profiles, and repeatedly soliciting, unsubscribing and then repeatedly re-soliciting
17 email from Impulse and/or its marketing partners in a scheme to fabricate and
18 exacerbate claims against Impulse based upon their subjective belief that Impulse
19 violated RCW 19.190 et seq. Third Party Defendants' actions were undertaken in
20 deliberate bad faith and there was no legitimate reason for Third Party Defendants to
21 engage in such a premeditated and systematic scheme to cause harm to Impulse.³
22
23
24
25
26
27

28 ³ This Court has already taken judicial notice of the related action brought by Plaintiff against Commonwealth Marketing Group, Inc. in its Order Denying Impulse's Motion To Dismiss Plaintiff's Complaint, dated July 11, 2005. As this Court will recall, Plaintiff's Rule 26 disclosures reveal, *inter alia*, that Third Party Defendants registered to receive email from Impulse.

1 Further exacerbating Third Party Defendants' improper conduct, Third Party
2 Defendants asserted fifteen (15) baseless Counterclaims against Impulse and then
3 amended their Counterclaims to add two (2) new frivolous causes of action against
4 Impulse without withdrawing all of their baseless claims. By way of example, Third
5 Party Defendants admit that their claims are "civil" in nature and "not criminal"
6 matters. Notwithstanding this, Third Party Defendants' asserted criminal
7 Counterclaims and Amended Counterclaims against Impulse for the sole purpose of
8 forcing Impulse to expend time and money dismissing same. Every single
9 Counterclaim and Amended Counterclaim follows a similar pattern in that they all
10 lack any factual or legal basis whatsoever. By conducting a reasonable investigation
11 into the merits of their allegations, as federal law mandates, Third Party Defendants
12 would have understood that all of their claims were entirely without merit. What
13 makes the Third party Defendants' conduct even worse, is the fact that they had
14 actual notice that their claims were baseless based upon Impulse's motion to dismiss
15 and they still failed to withdraw all of their claims prior to amending their pleading.
16 Although Third Party Defendants failed to expressly incorporate by reference their
17 Counterclaims into their Amended Counterclaims, Impulse will assume that Third
18 Party Defendants intended to do same.

19 Accordingly, Impulse respectfully requests that this Court: (1) dismiss Third
20 Party Defendants' Amended Counterclaims pursuant to Rule 12(b)(6); (2) impose
21 sanctions against Third Party Defendants under Rule 11 for interposing baseless
22

1 Counterclaims and Amended Counterclaims; and (3) grant Impulse reasonable costs
2 and attorneys fees expended in responding to Third Party Defendants Counterclaims
3 and Amended Counterclaims.
4

5 **ARGUMENT**
6

7 For purposes of simplicity and judicial economy, Impulse will address Third
8 Party Defendants' Amended Counterclaims *seritim*. 18 USC 1514 is a tool available
9 to United States District Attorneys to prevent the harassment of victims or witnesses
10 in a federal criminal case. There is no indication in Third Party Defendants'
11 Amended Counterclaims that their claims under 18 USC 1514 were withdrawn.
12 Rather, Third Party Defendants amended their First Counterclaim to allege that
13 Impulse violated yet another criminal statute under Washington State law namely,
14 RCW 9A 72.110(1)(a). Thus, Impulse will address both 18 USC 1514 and RCW 9A
15 72.110(1)(a) in Section I.
16
17
18

19 **I. THIRD PARTY DEFENDANTS FAILED TO STATE A VALID CLAIM FOR**
20 **WHICH RELIEF CAN BE GRANTED UNDER 18 USC 1514 (CRIMINAL**
21 **OBSTRUCTION OF JUSTICE)**
22

23 **A. THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE**
24 **A FEDERAL PROSECUTION UNDER 18 USC 1514 (CRIMINAL**
25 **OBSTRUCTION OF JUSTICE)**
26
27
28

1 Third Party Defendants allege that Impulse breached 18 USC 1514(c).⁴
2 However, Third Party Defendants are well aware that 18 USC 1514 has no
3 application in the instant matter. Third Party Defendants even admit that the instant
4 lawsuit “is a civil not a criminal matter.”
5

6 Even if Third Party Defendants had pled a violation of the statute, rather than
7 a definitional provision, Third Party Defendants would obviously still lack standing,
8 since private citizens have no authority to institute a federal criminal prosecution
9 under a federal criminal statute under these circumstances. Cok v. Cosentino, 876
10 F.2d 1, 2 (1st Cir. 1989); Winslow v. Romer, 759 F. Supp. 670, 673-74 (D. Colo.
11 1991). Applicable authorities within the United States government are the only
12 entities that can enforce federal criminal statutes. Id. For example, in Kennan v.
13 McGrath, 328 F.2d 610 (1st Cir. 1964), the court held that a private person could not
14 initiate a criminal prosecution in his own name in federal court. See also U.S. v.
15 Panza, 381 F. Supp. 1133 (W.D. Pa. 1974), where the court held that a private citizen
16 was not entitled to file a criminal complaint before the court against another alleging
17 violation of federal law.
18
19
20
21
22

23 As private citizens, Third Party Defendants lack standing to initiate a criminal
24 prosecution under 18 USC 1514 and, therefore, Third Party Defendants’ claims under
25 18 USC 1514 should be dismissed. Moreover, since Third Party Defendants’ admit
26
27

28

⁴ Please be advised that 18 USC 1514(c), as alleged by Third Party Defendants, simply defines the term “harassment” for purposes of 18 USC 1514. Title 18 USC 1514(c) does not set forth a specific cause of action or violation and is therefore groundless by definition.

1 that there is no basis for their allegations, sanctions, attorneys fees and reasonable
2 costs are warranted.
3

4 B. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A
5 VALID CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER
6 18 USC 1514 (OBSTRUCTION OF JUSTICE)

7 Although this may be superfluous, Third Party Defendants have not pled the
8 necessary elements of the statute.
9

10 18 USC 1514 provides, in part, that:

11 A United States district court, upon application of the
12 attorney for the Government, shall issue a temporary
13 restraining order prohibiting harassment of a victim or
14 witness in a Federal criminal case if the court finds, from
15 specific facts shown by affidavit or by verified complaint,
16 that there are reasonable grounds to believe that
17 harassment of an identified victim or witness in a Federal
18 criminal case exists or that such order is necessary to
19 prevent and restrain an offense under section 1512 of this
20 title, other than an offense consisting of misleading
21 conduct, or under section 1513 of this title.

22 Third Party Defendants have failed to allege, *inter alia*, that: (1) they are
23 victims or witnesses in a Federal criminal case; and/or (2) a United States
24 Government attorney filed an application to this Court for the issuance of a temporary
25 restraining order prohibiting harassment as defined in 18 USC 1514(c). Accordingly,
26 Third Party Defendants have failed to state a valid claim for which relief can be
27 granted under 18 USC 1514.
28

1 C. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A
2 VALID CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER
3 RCW 9A.72.110(1)(a) (INTIMIDATION OF WITNESSES)

4 Title 9 of the Revised Code of Washington sets forth the Criminal Code for the
5 State of Washington. Violations of RCW 9A.72.110(1)(a) makes a person “guilty”
6 of intimidating a witness if a person, by use of a threat against a current or
7 prospective witness, attempts to influence the testimony of that person. Violations
8 of RCW 9A.72.110 et seq. are Class “B” felonies pursuant to RCW 9A.72.110(4).
9 As such, Third Party Defendants lack standing to assert a claim under RCW
10 9a.72.110(1)(a).
11
12
13

14 Moreover, a private citizen has no right under RCW 9A.72.110 et seq. to bring
15 a criminal charge. Prosecution under RCW 9A.72.110 et seq. is the right of those
16 with prosecutorial discretion, namely the district attorneys of the various counties in
17 the State of Washington. A private citizen has no constitutional, statutory, or
18 common law right to require a public official to investigate or prosecute a crime.
19 Linda R.S. v. Richard D., 410 U.S. 614 (1973). The remedy to a private citizen who
20 fails to persuade a prosecutor to bring a criminal charge is to file a complaint with the
21 county police department. A Washington county District Attorney may, in his or her
22 discretion, petition the superior court to summon a grand jury in accordance with the
23 Criminal Investigatory Act of 1971 (RCW 10.27.030). Accordingly, Third Party
24 Defendants lack standing to assert a claim under RCW 9A.72.110 et seq.
25
26
27
28

1 II. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
2 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER 18 USC 1037
3 (CRIMINAL FRAUD AND RELATED ACTIVITY IN CONNECTION WITH
4 ELECTRONIC MAIL)

5 Third Party Defendants assert an Amended Counterclaim against Impulse
6 arising out of Impulse's alleged violations of 18 USC 1037 (Criminal Fraud and
7 Related Activity In Connection With Electronic Mail). 18 USC 1037, once again, is
8 a federal criminal statute. 18 USC 1037 is intended to protect the public against
9 individuals that, *inter alia*, knowingly, fraudulently and intentionally transmit email.
10 Penalties for violations of 18 USC 1037 are, *inter alia*, fines and punishment.
11

12
13 A. THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE
14 A FEDERAL PROSECUTION UNDER 18 USC 1037

15
16 Third Party Defendants' attempt to prosecute criminal offenses under 18 USC
17 1037 is without any merit since private citizens have no authority to institute a federal
18 criminal prosecution under a federal criminal statute under these circumstances. Cok,
19 876 F.2d at 2; Winslow, 759 F.Supp. at 673-74; see also Kennan, 328 F.2d at 611;
20 Panza, 381 F.Supp. at 1133, where the court held that a private citizen was not
21 entitled to file a criminal complaint before the court against another alleging violation
22 of federal law.
23

24
25 As private citizens, Third Party Defendants lack standing to initiate a criminal
26 prosecution under 18 USC 1037.
27
28

1 B. THIRD PARTY DEFENDANTS HAVE FAILED TO PLEAD A
2 VALID CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER
3 18 USC 1037

4 Moreover, even assuming Third Party Defendants had standing under the 18
5 USC 1037, Third Party Defendants have still failed to plead the necessary elements
6 of the federal criminal statute.
7

8 18 USC 1037 provides, in part that:

9 (a) In general.--Whoever, in or affecting interstate or
10 foreign commerce, knowingly-- (1) accesses a protected
11 computer without authorization, and intentionally initiates
12 the transmission of multiple commercial electronic mail
13 messages from or through such computer, (2) uses a
14 protected computer to relay or retransmit multiple
15 commercial electronic mail messages, with the intent to
16 deceive or mislead recipients, or any Internet access
17 service, as to the origin of such messages, (3) materially
18 falsifies header information in multiple commercial
19 electronic mail messages and intentionally initiates the
20 transmission of such messages, (4) registers, using
21 information that materially falsifies the identity of the
22 actual registrant, for five or more electronic mail accounts
23 or online user accounts or two or more domain names, and
24 intentionally initiates the transmission of multiple
25 commercial electronic mail messages from any
26 combination of such accounts or domain names, or (5)
27 falsely represents oneself to be the registrant or the
28 legitimate successor in interest to the registrant of 5 or
more Internet Protocol addresses, and intentionally initiates
the transmission of multiple commercial electronic mail
messages from such addresses, or conspires to do so, shall
be punished as provided in subsection (b).

Third Party Defendants have failed to allege, *inter alia*, that Impulse: (1)
criminally accessed a protected computer without authorization, and intentionally

1 initiated the transmission of multiple commercial electronic mail messages from or
2 through such computer; (2) criminally used a protected computer to relay or
3 retransmit multiple commercial electronic mail messages, with the intent to deceive
4 or mislead recipients, or any Internet access service, as to the origin of such
5 messages; (3) criminally materially falsified header information in multiple
6 commercial electronic mail messages and intentionally initiated the transmission of
7 such messages; (4) criminally registered, using information that materially falsified
8 the identity of the actual registrant, for five or more electronic mail accounts or online
9 user accounts or two or more domain names, or intentionally initiated the
10 transmission of multiple commercial electronic mail messages from any combination
11 of such accounts or domain names; (5) criminally and falsely represented itself to be
12 the registrant or the legitimate successor in interest to the registrant of 5 or more
13 Internet Protocol addresses, and intentionally initiated the transmission of multiple
14 commercial electronic mail messages from such addresses, or conspired to do so; and
15 (6) affected interstate or foreign commerce. Based on the foregoing, Third Party
16 Defendants have failed to state a valid claim for which relief can be granted under 18
17 USC 1037.

18
19
20
21
22
23
24
25 C. THIRD PARTY DEFENDANTS HAVE NOT MET THE RULE 9(b)
26 HEIGHTENED PLEADING REQUIREMENT

27
28 Even if Third Party Defendants could plead criminal causes of action, they fail
to comply with the heightened pleading requirement of Rule 9(b). Rule 9(b) sets

1 forth more stringent pleading requirements in cases involving allegations of fraud or
2 mistake. “In all averments of fraud or mistake, the circumstances constituting fraud
3 or mistake shall be stated with particularity.” See Rule 9(b). Rule 9(b) serves three
4 (3) purposes: (a) to assure a defendant of fair notice of the nature of claims and the
5 ground upon which they rest; (b) to protect a defendant from harm that would befall
6 its goodwill when it is charged with serious wrongdoing; and (c) to diminish the
7 possibility that plaintiff with a largely groundless claim will be able to use the threat
8 of extensive discovery to impose an *in terrorem* increase on a settlement value. See
9 Cowen & Co. v. Merriam, 745 F. Supp. 925 (S.D.N.Y. 1990); U.S. ex rel. Stinson,
10 Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc., 755
11 F.Supp. 1055 (S.D.Ga. 1990) (see also The Segal Comp. v. Amazon.com, 280 F.
12 Supp. 2d 1229 (9th Cir. 2003)).

13
14
15
16
17
18 Third Party Defendants maintain that the submission of two (2) emails
19 allegedly transmitted by Impulse satisfy the heightened pleading requirement under
20 Rule 9(b). They further contend that they have obtained additional evidence of fraud
21 that they will ultimately produce. As such, Third Party Defendants have tacitly
22 admitted that they have not, at this juncture, alleged facts specific enough to comply
23 with Rule 9(b). Since Third Party Defendants have failed to plead their Second
24 Amended Counterclaim with any specificity whatsoever, Third Party Defendants’
25 Second Amended Counterclaim should be dismissed as a matter of law.
26
27
28

1 III. THIRD PARTY DEFENDANTS FAILED TO STATE A VALID CLAIM FOR
2 WHICH RELIEF CAN BE GRANTED UNDER RCW 4.24.510 (WASHINGTON
3 ANTI-SLAPP STATUTE)

4
5 RCW 4.24.510 is the Washington state whistleblower statute. RCW 4.24.510
6 provides that:

7 A person who communicates a complaint or information to
8 any branch or agency of federal, state, or local government,
9 or to any self-regulatory organization that regulates persons
10 involved in the securities or futures business and that has
11 been delegated authority by a federal, state, or local
12 government agency and is subject to oversight by the
13 delegating agency, is immune from civil liability for claims
14 based upon the communication to the agency or
15 organization regarding any matter reasonably of concern to
16 that agency or organization. A person prevailing upon the
17 defense provided for in this section is entitled to recover
18 expenses and reasonable attorneys' fees incurred in
19 establishing the defense and in addition shall receive
20 statutory damages of ten thousand dollars. Statutory
21 damages may be denied if the court finds that the
22 complaint or information was communicated in bad faith.

19 The purpose of the Washington Anti-SLAPP statute is to protect individuals
20 who report, *inter alia*, fraud to governmental agencies and are then sued to stop the
21 reporting. The Anti-SLAPP statute was designed to allow early dismissal of a lawsuit
22 where the individual making a report to a governmental agency is sued. See
23 Legislative Intent of RCW 4.24.510 (“Notes Intent -- 2002 c. 232”). Third Party
24 Defendants allege that Impulse sued them since they were prospective witnesses to
25 a lawsuit. However, Third Party Defendants are not a class of people that this statute
26
27
28

1 was designed to protect. The statute is not intended to protect witnesses in a lawsuit.

2
3
4 Moreover, Third Party Defendants’ attempt to portray themselves as victims
5 of a whistleblower statute, rather than co-conspirators in a scheme to defraud Impulse
6 is baseless. This Court has already ruled that Impulse has pled valid causes of action
7 against Third Party Defendants for fraud and deceit, indemnification and contribution,
8 breach of contract and tortious interference with business relationships.
9

10
11 IV. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A CLAIM FOR
12 WHICH RELIEF CAN BE GRANTED UNDER RCW 9.35.005 (CRIMINAL
13 IDENTITY THEFT)

14
15 Again, Title 9 of the Revised Code of Washington sets forth the Criminal Code
16 for the State of Washington. RCW 9.35 et seq. is entitled “Identity Crimes.”
17 Violations of RCW 9.35 et seq. are “Class C” felonies pursuant to RCW 9.35.010(5).
18 The legislative intent as set forth in RCW 9.35 et seq. is to criminally penalize
19 unscrupulous people for improperly obtaining financial information.
20

21 A. THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE A
22 CRIMINAL PROSECUTION UNDER RCW 9.35 ET SEQ.
23

24
25
26 A private citizen has no right under RCW 9.35 to bring a criminal charge.
27 Prosecution under RCW 9.35 et seq. is the right of those with prosecutorial
28

1 discretion, namely the district attorneys of the various counties in the State of
2 Washington. A private citizen has no constitutional, statutory, or common law right
3 to require a public official to investigate or prosecute a crime. Linda R.S. v. Richard
4 D., 410 U.S. 614 (1973). The remedy to a private citizen who fails to persuade a
5 prosecutor to bring a criminal charge is to file a complaint with the county police
6 department. A Washington county District Attorney may, in his or her discretion,
7 petition the superior court to summon a grand jury in accordance with the Criminal
8 Investigatory Act of 1971 (RCW 10.27.030). Accordingly, Third Party Defendants
9 lack standing to assert a claim under RCW 9.35.

13 B. THIRD PARTY DEFENDANTS ALLEGE THAT IMPULSE
14 VIOLATED RCW 9.35.005, WHICH PROVISION MERELY SETS
15 FORTH A DEFINITIONAL TERM

16
17 Third Party Defendants allege that Impulse violated the specific provision
18 located at RCW 9.35.005. However, RCW 9.35.005 simply sets forth a definitional
19 term (“Means of Identification”) within a criminal statute. Given that the Washington
20 State legislature did not specifically create any violation whatsoever under RCW
21 9.35.005, Third Party Defendants’ Fourth Counterclaim should be dismissed, as a
22 matter of law.⁵

23
24
25 Moreover, Third Party Defendants’ Amended Counterclaim is even more
26 puzzling. Again, Third Party Defendants contend that that they can show that
27

28

⁵ Third Party Defendants refer to a subsection “(3)” in its Counterclaim. However, there does not appear to be a subsection “(3)” under RCW 9.35.005.

1 Impulse has caused addresses of third parties to be exchanged among five hundred
2 (500) domains without their permission and in violation of RCW 9.35 et seq. If this
3 is true, why haven't they pled facts demonstrating same? In truth, Third Party
4 Defendants have failed to plead any facts demonstrating that Impulse violated RCW
5 9.35 et seq. Rather, Third Party Defendants make conclusory statements that they
6 "can" show that Impulse violated RCW 9.35 et seq.
7

8
9 V. THIRD PARTY DEFENDANTS HAVE NOT STATED AND CANNOT
10 STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 10.14
11 (WASHINGTON CRIMINAL ANTI-HARASSMENT STATUTE)

12
13 Third Party Defendants Fifth Amended Counterclaim is based upon Impulse's
14 alleged harassment of Third Party Defendants, pursuant to RCW 10.14. RCW 10.14
15 is a criminal statute. Title 10 of The Revised Code of Washington sets forth
16 Washington State's Criminal Procedures including, but not limited to, the process for
17 obtaining an anti-harassment protection order. Violation of such a protective order
18 is a gross misdemeanor.
19

20
21 It is self evident that this Court is not the proper forum to obtain relief under
22 RCW 10.14. A petition for a protective order must be submitted by a county district
23 attorney to the Superior Court of a Washington County. See RCW 10.14. The form
24 of petition is specified by RCW 10.14.040. RCW 10.14.020 states the elements
25 required for harassment under RCW 10.14 et seq. as follows:
26
27

28 "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which

1 seriously alarms, annoys, harasses, or is detrimental to such
2 person, and which serves no legitimate or lawful purpose.
3 The course of conduct shall be such as would cause a
4 reasonable person to suffer substantial emotional distress,
5 and shall actually cause substantial emotional distress to
6 the petitioner, or, when the course of conduct would cause
7 a reasonable parent to fear for the well-being of their child.

8 Third Party Defendants do not allege that they have met any of the
9 requirements for a protective order, nor have Third Party Defendants submitted a
10 petition for a protective order. Regardless, this Court does not have jurisdiction to
11 consider such a petition. Further, the conduct Third Party Defendants complain of
12 does not rise to the level of causing substantial emotional distress as required under
13 RCW 10.14.020. As such, Third Party Defendants' Fifth Amended Counterclaim
14 should be dismissed as a matter of law.⁶

15
16 VI. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
17 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 19.170
18 (PROMOTIONAL ADVERTISING OF PRIZES)

19
20 Third Party Defendants allege that Impulse violated RCW 19.170 by falsely
21 advertising prizes without meeting the statutory requirements.⁷

22
23 RCW 19.170 provides, in pertinent part, that:

- 24 1) The legislature finds that deceptive promotional
25 advertising of prizes is a matter vitally affecting the public
26 interest for the purpose of applying the consumer

27
28 ⁶ Third Party Defendants allegations in its Fifth Counterclaim and Amended Counterclaim relate to emails that Third Party Defendants intentionally solicited.

⁷ Third Party Defendants allege that Impulse did not fulfill its obligation of providing prizes to "Plaintiff" had won. However, Third Party Defendants lack standing to assert claims on behalf of Plaintiff.

1 protection act, chapter 19.86 RCW. (2) Deceptive
2 promotional advertising of prizes is not reasonable in
3 relation to the development and preservation of business.
4 A violation of this chapter is an unfair or deceptive act in
5 trade or commerce for the purpose of applying the
6 consumer protection act, chapter 19.86 RCW, and
7 constitutes an act of deceptive promotional advertising. (3)
8 This chapter applies to a promotion offer: (a) Made to a
9 person in Washington; (b) Used to induce or invite a
10 person to come to the state of Washington to claim a prize,
11 attend a sales presentation, meet a promoter, sponsor,
12 salesperson, or their agent, or conduct any business in this
13 state; or (c) Used to induce or invite a person to contact by
14 any means a promoter, sponsor, salesperson, or their agent
15 in this state.

12 Third Party Defendants have not, *inter alia*, alleged: (1) what promotional
13 advertisements they have personally received; and (2) what advertisements that they
14 have personally viewed. As such, Third Party Defendants' Sixth Counterclaim
15 should be dismissed for failing to meet even the basic pleading requirements.
16

17
18 Moreover, any and all allegations against Defendant for violations of RCW
19 19.170 "sound in," or are "grounded in fraud." See Fidelity Mortgage Corp. v.
20 Seattle Times Company, 213 F.R.D. 573; 2003 U.S. Dist. LEXIS 4508; 32 Media L.
21 Rep.1094. (holding that cases that are "grounded in fraud" or "sound in fraud" must
22 satisfy the particularity requirement of Rule 9(b)). In fact, the express language of
23 RCW 19.170 et seq. uses terms such as "deceptive," "unfair" and "induce". The use
24 of these adjectives is not coincidental. In truth, the essence of these terms certainly
25 "sound in" or are "grounded in fraud." As such, Third Party Defendants should be
26 subject to a heightened pleading requirement under Rule 9(b).
27
28

1 VII. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
2 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 18.86.090
3 (DEFINITION OF VACARIOUS LIABILITY IN THE CONEXT OF REAL
4 ESTATE BROKERAGE RELATIONSIPS)⁸

5 RCW 18.86 is entitled “Real Estate Brokerage Relationships” and is entirely
6 inapplicable to any type of relationship between Third Party Defendants and Impulse.
7
8 RCW 18.86 pertains to the provisioning of real estate brokerage services as defined
9 under RCW 18.86.010(11). Given that the Third Party Defendants have failed to
10 allege that any real estate brokerage relationship existed between Third Party
11 Defendants and Impulse, Third Party Defendants’ Seventh Counterclaim should be
12 dismissed as a matter of law.
13
14

15 Moreover, RCW 18.86.090 simply sets forth a definitional term for violations
16 relating to real estate brokerage relationships. Specifically, RCW 18.86.090 defines
17 the term “vicarious liability” in the context of violations under RCW 18.86 et seq.
18 Additionally, RCW 18.86.090 does not create any liability whatsoever. Given that
19 the Washington State legislature did not create any violation whatsoever under RCW
20 18.86.090, Third Party Defendants’ Seventh Counterclaim should be dismissed as a
21 matter of law.
22
23
24

25 A. THIRD PARTY DEFENDANTS’ AMENDED COUNTERCLAIM
26 PURSUANT TO RCW 9A.08 ET SEQ. IS WITHOUT MERIT
27
28

⁸ Third Party Defendants have failed to expressly withdraw this Counterclaim in their Amended Counterclaims. As such, Impulse reiterates its motion to dismiss Third Party Defendants Counterclaim under RCW 18.18.090.

1 Yet again, Third Party Defendants allege that Impulse violated Title 9 of the
2 Revised Code of Washington, which provision sets forth the Criminal Code for the
3 State of Washington.⁹

4
5 Further, Third Party Defendants allege that Impulse violated the specific
6 provisions located at RCW 9A.08.010(1)(b)(c)(d). However, the provisions located
7 at RCW 9A.08.010(1)(b)(c)(d) simply set forth definitional terms (“Kinds of
8 Culpability Defined” including, “Knowledge,” “Recklessness” and “Criminal
9 Negligence”) within a criminal statute. Given that the Washington State legislature
10 did not specifically create any violations whatsoever under RCW
11 9A.08.010(1)(b)(c)(d), Third Party Defendants’ Seventh Amended Counterclaim
12 should be dismissed, as a matter of law.

13
14
15
16 In addition, a private citizen has no right under RCW 9A.08 et seq. to bring a
17 criminal charge. Prosecution under RCW 9A.08 et seq. is the right of those with
18 prosecutorial discretion, namely the district attorneys of the various counties in the
19 State of Washington. A private citizen has no constitutional, statutory, or common
20 law right to require a public official to investigate or prosecute a crime. Linda R.S.
21 v. Richard D., 410 U.S. 614 (1973). The remedy to a private citizen who fails to
22 persuade a prosecutor to bring a criminal charge is to file a complaint with the county
23 police department. A Washington county District Attorney may, in his or her
24 discretion, petition the superior court to summon a grand jury in accordance with the
25
26
27
28

⁹ Third Party Defendants bring this cause of action against Mssrs. Goldstein, Greenstein, Huston and Adamson. However, as of the time of this motion, none of these individuals are parties to this lawsuit.

1 Criminal Investigatory Act of 1971 (RCW 10.27.030). Accordingly, Third Party
2 Defendants lack standing to assert a claim under RCW 9A.08 et seq.
3

4 VIII. THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE A
5 CRIMINAL_PROSECUTION UNDER RCW 9A.60.040 (CRIMINAL
6 IMPERSONATION IN THE FIRST DEGREE)

7 Third Party Defendants' Eighth Amended Counterclaim against Impulse arises
8 out of Impulse's alleged violations of RCW 9A.60.040 (Criminal Impersonation in
9 the First Degree). A person is guilty of criminal impersonation in the first degree if,
10 *inter alia*, the person assumes a false identity and does not act in his or her assumed
11 character with intent to defraud another or for any other unlawful purpose. See RCW
12 9A.60.040(1)(a). Violations of RCW 9A.60.040(1)(a) are class "C" felonies.
13
14

15 Third Party Defendants' attempt to prosecute criminal offenses under RCW
16 9A.60.040 is baseless, since private citizens have no authority to institute a criminal
17 prosecution under Title 9 of the Revised Code of Washington. The private citizen has
18 no constitutional, statutory, or common law right to commence a criminal action
19 under these circumstances or to require a public official to investigate or prosecute
20 a crime. Linda R.S., 410 U.S. at 619. As Third Party Defendants are private citizens,
21 Third Party Defendants lack standing to initiate a criminal prosecution under RCW
22 9A.60.040 and, therefore, Third Party Defendants' Eighth Counterclaim should be
23 dismissed as a matter of law.
24
25
26
27
28

1 IX. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE VALID
2 CLAIMS FOR ESTOPPEL AND UNCLEAN HANDS¹⁰

3
4 The doctrines of unclean hands and estoppel are generally affirmative defenses
5 and not separate causes of action. As such, Third Party Defendants' Ninth
6 Counterclaim should be dismissed, as a matter of law.
7

8 Even assuming that such claims somehow create liability, Third Party
9 Defendants have failed to plead any facts which would in any way make out a cause
10 of action against Impulse.
11

12 A. THIRD PARTY DEFENDANTS' AMENDED COUNTERCLAIM
13 PURSUANT TO RCW 9.61.260(1)(a)(b)(4)(5) (CYBERSTALKING) IS WITHOUT
14 MERIT

15 Not surprisingly, Third Party Defendants allege that Impulse, once again,
16 violated Title 9 of the Revised Code of Washington, which provision sets forth the
17 Criminal Code for the State of Washington. Violations of RCW 9.61.260 et seq. are
18 either "gross misdemeanors" or class "C" felonies pursuant to RCW 9.61.260(1)(c)(2)
19 and (3), respectively.
20
21

22 A private citizen has no right under RCW 9.61.260 et seq. to bring a criminal
23 charge. Prosecution under RCW 9.61.260 et seq. is the right of those with
24 prosecutorial discretion, namely the district attorneys of the various counties in the
25 State of Washington. A private citizen has no constitutional, statutory, or common
26 law right to require a public official to investigate or prosecute a crime. Linda R.S.
27
28

¹⁰ Third Party Defendants have failed to expressly withdraw this Counterclaim in their Amended pleading. As such, Impulse reiterates its motion to dismiss Third Party Defendants Counterclaims for estoppel and unclean hands.

1 v. Richard D., 410 U.S. 614 (1973). The remedy to a private citizen who fails to
2 persuade a prosecutor to bring a criminal charge is to file a complaint with the county
3 police department. A Washington county District Attorney may, in his or her
4 discretion, petition the superior court to summon a grand jury in accordance with the
5 Criminal Investigatory Act of 1971 (RCW 10.27.030). Accordingly, Third Party
6 Defendants lack standing to assert a claim under RCW 9.61.260 et seq.
7

8
9 Moreover, Third Party Defendants failed to plead facts demonstrating that
10 Impulse violated RCW 9.61.260 et seq. Accordingly, Third Party Defendants cannot
11 state a valid claim under RCW 9.61.260 et seq.
12

13
14 X. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
15 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 9.58.010
(CRIMINAL LIBEL)

16 Third Party Defendants Tenth Amended Counterclaim against Impulse arises
17 out of Impulse's alleged violations of RCW 9.58.010 (Criminal Libel). The gist of
18 criminal libel is malice. See State v. Sefrit, 82 Wash. 520 (1914). Criminal libel
19 involves, *inter alia*, the malicious publication that exposes a living person to hatred,
20 contempt, ridicule or obloquy. See RCW 9.58.010(1).
21

22
23 A. THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE
24 A CRIMIAL PROSECUTION UNDER RCW 9.58.010

25 Third Party Defendants' attempt to prosecute criminal offenses under RCW
26 9.58.010 is without any merit since private citizens have no authority to institute a
27 criminal prosecution under Title 9 of the Revised Code of Washington in these
28

1 circumstances. The private citizen has no constitutional, statutory, or common law
2 right to require a public official to investigate or prosecute a crime. Linda R.S., 410
3 U.S. at 619. The remedy to a private citizen, who fails to persuade a prosecutor to
4 bring a criminal charge, is to petition the superior court to summon a grand jury in
5 accordance with the Criminal Investigatory Act of 1971 (RCW 10.27.030).
6
7

8 **B. THIRD PARTY DEFENDANTS HAVE NOT PLED THE REQUISITE**
9 **ELEMENTS FOR CRIMINAL LIBEL IN ACCORDANCE WITH BASIC AND**
10 **HEIGHTENED PLEADING REQUIREMENTS AND IMPULSE'S ALLEGED**
11 **LIBELOUS MATERIAL IS PRIVILEGED**

12 RCW 9.58.010 provides, in pertinent part, that:

13 Every malicious publication by writing, printing, picture,
14 effigy, sign[,] radio broadcasting or which shall in any
15 other manner transmit the human voice or reproduce the
16 same from records or other appliances or means, which
17 shall tend: (1) To expose any living person to hatred,
18 contempt, ridicule or obloquy, or to deprive him of the
19 benefit of public confidence or social intercourse; or (2) To
20 expose the memory of one deceased to hatred, contempt,
21 ridicule or obloquy; or (3) To injure any person,
22 corporation or association of persons in his or their
23 business or occupation, shall be libel. Every person who
24 publishes a libel shall be guilty of a gross misdemeanor.

25 Initially, Third Party Defendants have failed to allege that Impulse proffered
26 any libelous or malicious publication by writing, printing, picture, effigy, etc., which
27 publication: (1) exposed Third Party Defendants to hatred, contempt, ridicule or
28 obloquy, or to deprive him of the benefit of public confidence or social intercourse;
or (2) exposed the memory of one deceased to hatred, contempt, ridicule or obloquy;

1 or (3) injured any person, corporation or association of persons in his or their business
2 or occupation.
3

4 Secondly, allegedly libelous statements, spoken or written by a party or counsel
5 in course of judicial proceeding, are absolutely privileged if they are pertinent or
6 material to redress or relief sought, whether or not statements are legally sufficient
7 to obtain that relief. Mcneal V. F. F. Allen, 621 P.2d 1285, 1285-87 (Sup. Ct. WA
8 1980). The privilege of attorneys is based upon a public policy of securing to them
9 as officers of the court the utmost freedom in their efforts to secure justice for their
10 clients. Id. In the case at bar, Impulse has not proffered any writings whatsoever
11 about Third Party Defendants, which writings are outside or beyond the scope of this
12 litigation. In fact, Third Party Defendants failed to identify what the alleged libelous
13 writing even is other than what amounts to some third party postings and/or
14 discussions about this lawsuit on unidentified websites. As such, Third Party
15 Defendants' Tenth Counterclaim should be dismissed as a matter of law.
16
17
18
19

20 XI. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
21 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER 18 USC 1962(c)
22 (CRIMINAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
23 ACT, A/K/A RICO).

24
25 Third Party Defendants admit that they have withdrawn this Counterclaim.

26 XII. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
27 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER THE CAN-SPAM
28 ACT OF 2003

Third Party Defendants admit that they have withdrawn this Counterclaim.

1
2
3 XIII. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
4 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 19.190 ET SEQ.
5 (WASHINGTON ANTI-SPAM STATUTE)

6 The Washington Anti-Spam Act, *inter alia*, prohibits the transmission
7 of a commercial electronic mail message “to an electronic mail address that the sender
8 knows, or has reason to know, is held by a Washington State resident that: (a) uses
9 a third party’s internet domain name without permission of the third party, or
10 otherwise misrepresents or obscures any information in identifying the point of origin
11 or the transmission path of a commercial electronic mail message; or (b) contains
12 false or misleading information in the subject line.” RCW 19.190.020.

13
14
15 Third Party Defendants have not alleged any factual allegations relating
16 to violations of RCW 19.190 et seq. Unsupported conclusions of law in a complaint
17 are not sufficient to withstand a motion to dismiss. “Although this standard for Rule
18 12(b)(6) dismissals is quite liberal, more than bare assertions of legal conclusions are
19 ordinarily required to satisfy federal notice pleading requirements.” Scheid v. Fanny
20 Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). Third Party
21 Defendants’ Counterclaim contains nothing but conclusory allegations and further,
22 asks the Court to draw unwarranted inferences from them. Based on the foregoing,
23 Third Party Defendants cannot state a claim for which relief can be granted.
24
25
26
27
28

1 XIV. THIRD PARTY DEFENDANTS HAVE FAILED TO SATTE A VALID
2 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 19.86
3 (WASHINGTON CONSUMER PROTECTION ACT)

4
5 Should the Court dismiss Third Party Defendants' allegations for Impulse's
6 violations of RCW 19.190 et seq. for the reasons set forth hereinabove, Third Party
7 Defendants' claim for Impulse's breach of RCW 19.86 should also be dismissed as
8 a matter of law. In fact, practices covered by the Washington Anti-Spam Act are
9 matters vitally affecting the public interest for the purpose of applying the Consumer
10 Protection Act, RCW 19.86. Third Party Defendants have failed to plead basic notice
11 in support of their Amended Counterclaim. The entire Amended Counterclaim
12 consists of one (1) conclusory legal conclusion. Accordingly, Third Party
13 Defendants' Fourteenth Amended Counterclaim should be dismissed.

14
15
16
17 XV. THIRD PARTY DEFENDANTS HAVE FAILED TO PLEAD THE
18 ELEMENTS NECESSARY TO OBTAIN A PERMANENT INJUNCTION

19
20 The Third Party Defendants seek the issuance of a permanent injunction. A
21 party seeking the issuance of an injunction must show that: (1) there is a clear legal
22 or equitable right to an injunction; (2) there is a well-grounded fear of immediate
23 invasion of that right; and (3) the acts complained of are either resulting in or will
24 result in an actual and substantial injury. Port of Seattle v. International
25 Longshoremen's & Warehousemen's Union, 325 P.2d 1099, 1101 (Wash. 1958);
26 County of Spokane v. Local No. 1553, American Federation of State Employees, 76
27 Wash. App. 765, 771 888 P.2d 735 (Wash. App. 1995); Beacon Theatres, Inc. v.
28

1 Westover, 359 U.S. 500, 506-07 (1959). Third Party Defendants have literally failed
2 to plead any of these elements. As such, Third Party Defendants have not stated a
3 claim for which relief can be granted.
4

5 **XVI. THIS COURT SHOULD IMPOSE SANCTIONS AGAINST THIRD PARTY**
6 **DEFENDANTS PURSUANT TO RULE 11**

7
8 Third Party Defendants admit that their claims are “civil” in nature and “not
9 criminal” matters. Notwithstanding this, Third Party Defendants’ repeatedly asserted
10 criminal causes of action against Impulse for the sole purpose of forcing Impulse to
11 expend time and money dismissing same. All fifteen (15) Counterclaims followed
12 a similar pattern in that they lacked any factual or legal basis whatsoever. By
13 conducting a reasonable investigation into the merits of their allegations, as federal
14 law mandates, Third Party Defendants would have understood that all of their claims
15 were entirely without merit. What makes the Third party Defendants’ conduct even
16 worse, is the fact that they had actual notice that their claims were frivolous based
17 upon Impulse’s motion to dismiss and they still failed to withdraw all of their claims
18 prior to their amended pleading.
19
20
21
22

23 *Pro se* litigants are generally held to the same standard as attorneys. Westberg
24 v. All-Purpose Structures Inc., 936 P.2d 1175, 1177-78 (Wash. 1997); In re Pers.
25 Restraint Pet. of Connick, 28 P.3d 729, 736 (Wash. 2001) (*pro se* petitioner held to
26 the same responsibility as a lawyer and required to follow applicable statutes and
27 rules). Courts hold *pro se* litigants to the same standard as attorneys, and an
28

1 attorney's incompetence or neglect is not excusable. In re Marriage of Olson, 850
2 P.2d 527, 530 (Wash. 1993); Lane v. Brown & Haley, 912 P.2d 1040, 1043 (Wash.
3 1996). In fact, sanctions may be imposed on anyone who signs a pleading, motion,
4 or other paper which is filed in a federal case, whether that person be an attorney, a
5 client, or a pro se litigant. Shrock v. Altru Nurses Registry, 810 F2d 658 (7th Cir.
6 1987). In the case at bar, the fact that the Third Party Defendants in this case filed
7 fifteen (15) Counterclaims without the assistance of counsel does not excuse them
8 from having to investigate the factual basis of their Counterclaims. Id. For example,
9 explaining that Rule 11 does not establish a lesser duty to make a reasonable inquiry
10 for *pro se* litigants, the court imposed Rule 11 sanctions on a *pro se* plaintiff who
11 filed a civil rights action against a state trial judge for denying a motion in a previous
12 action regarding a speeding ticket. Dyson v. Sposeep, 637 F Supp 616 (N.D. Ind.
13 1986).

14
15
16
17
18
19 Further, *pro se* litigants are subject to Rule 11 sanctions, and their filings, like
20 those of attorneys, are judged by an objective standard of reasonableness. Cook v.
21 Peter Kiewit Sons, Co., 775 F.2d 1030, 1037 n. 13 (9th Cir. 1985); Business Guides
22 v. Chromatic Communications, Enterprises, 892 F.2d 802, 811 (9th Cir. 1989), aff'd
23 111 S. Ct. 922 (1991).
24

25
26 Impulse has placed Third Party Defendants on notice that they should withdraw
27 their Counterclaims. Third Party Defendants have continuously failed to withdraw
28 most of their frivolous claims. As such, Impulse requests that this Court impose

1 sanctions upon Third Party Defendants in an amount equal to the time and money
2 expended by counsel for Impulse in researching, preparing and filing a response to
3 Third Party Defendants' Counterclaims and Third Party Defendants' Amended
4 Counterclaims.
5

6
7 Impulse further requests that this Court grant Impulse its attorneys' fees and
8 reasonable costs expended in responding to Third party Defendants' baseless claims
9 on two (2) separate occasions. Impulse's attorneys have spent a total of forty-five
10 (45) hours researching and preparing their motion to dismiss Third Party Defendants'
11 Counterclaims and ten (10) hours researching and preparing for the instant motion.
12 Specifically, Peter Glantz has expended nine (9) billable hours researching and
13 preparing the instant motion and twenty (20) hours researching and preparing the
14 previous motion, Sean Moynihan has spent ten (10) billable hours reviewing and
15 preparing the previous motion and Floyd Ivey has billed five (5) hours researching,
16 reviewing and filing the previous motion and one (1) reviewing and revising the
17 instant motion.
18
19
20
21

22 A. PUBLIC POLICY OF RULE 11(c)

23 Rule 11(c) requires attorneys and *pro se* litigants to conduct a reasonable
24 inquiry into the law and facts before signing, *inter alia*, pleadings. Rule 11 sets forth
25 the responsibility that litigants have toward the Court and requires litigants to stop
26 and think before initially making legal or factual contentions. One purpose of Rule
27
28
11 sanctions is to streamline the litigation process by discouraging the use of dilatory

1 or abusive tactics, such as the filing of frivolous claims or defenses or the use of
2 pleadings to harass or delay. Golden Eagle Distributing Corp. v. Burroughs Corp.,
3
4 801 F2d 1531 (Cal. CA. 1986).

5 Based on the foregoing, Impulse respectfully requests that the Court impose
6 sanctions against Third Party Defendants pursuant to Rule 11 and grant Impulse
7 reasonable costs and attorneys fees for the amount of cost and time devoted to
8 researching, preparing and filing this response and the previous response.
9

10
11 **CONCLUSION**

12 Pursuant to Rule 12(b)(6), Impulse requests that the Court dismiss Third Party
13 Defendants' Counterclaims on the ground that Third party Defendants have not
14 stated, and cannot state, claims for which relief can be granted. Further, pursuant to
15 Rule 11, Impulse respectfully requests that this Court impose sanctions upon Third
16 Party Defendants on the ground that Third Party Defendants' Counterclaims are
17 frivolous and would have been understood to be frivolous upon a reasonable
18 investigation by Third Party Defendants.
19
20
21

22 DATED this 12th day of May, 2006.

23
24 S/FLOYD E. IVEY

25 _____
26 Liebler, Ivey, Conner, Berry &
27 St. Hilaire

28 By: Floyd E. Ivey
1141 N. Edison, Suite C
P.O. Box 6125
Kennewick, Washington 99336

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

Local Counsel for Defendant
Impulse Marketing Group, Inc.

S/FLOYD E. IVEY for SEAN
MOYNIHAN and PETER GLANTZ

Sean A. Moynihan
Peter J. Glantz
Klein, Zelman, Rothermel & Dichter,
LLP
485 Madison Avenue, 15th Floor
New York, New York 10022
(212) 935-6020
(212) 753-8101 (fax)

I hereby certify that on May 12, 2006, I electronically filed
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THIRD
PARTY DEFENDANTS' AMENDED COUNTERCLAIMS with the Clerk of the
Court using the CM/ECF System which will send notification of such filing to
Robert J. 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