

MERKLE SIEGEL & FRIEDRICHSEN, P.C.
Robert J. Siegel
1325 Fourth Ave., Suite 940
Seattle, WA 98101
206-624-9392

THE HON. FRED VAN SICKLE

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

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

James S. Gordon, Jr., Plaintiff,
vs.
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

Case No.: CV-04-5125-FVS

PLAINTIFF'S MOTION TO COMPEL
[HEARING NOTED WITHOUT
ORAL ARGUMENT ON
AUGUST 21, 2006]
[For Resolution By Discovery Master
The Hon. Harold D. Clarke]

TO: Clerk of the Court
AND TO: Floyd E. Ivey, Sean Moynihan, Peter Glantz, Attorneys for Defendants.

1 Plaintiff, James S. Gordon, Jr., by and through his undersigned attorney,
2 Robert J. Siegel, pursuant to FRCP 37 hereby moves the Court for an order
3 compelling Defendants to provide full and complete responses to Plaintiff's
4 outstanding discovery.

5
6 **STATEMENT OF FACTS**
7

8 1. In 2004, Plaintiff Jim Gordon, an individual computer and internet user
9 who provides basic internet interactivity to a group of customers via his domains,
10 properly commenced this action against the Defendant Impulse Marketing Group,
11 Inc., a large Georgia based internet marketing firm ("Impulse"). The essence of
12 Plaintiff's complaint alleges Defendants' numerous violations of the Washington
13 CEMA (RCW 19.190) and CPA (RCW 19.86), as well as, pursuant to Plaintiff's
14 First Amended Complaint, violations of the Federal Can-Spam Act of 2003.
15
16

17 Plaintiff's First Interrogatories and Requests for Production of Documents
18 were served on Defendants March 2, 2006. (See **Exhibit "A"**). Despite repeated
19 demands, Defendants failed to respond or provide any discovery responses until
20 April 24, 2006. Defendant's initial responses were grossly deficient, not a single
21 discovery request answered substantively, posing unfounded, boilerplate objections
22 to each and every question! (See Defendants' initial responses at **Exhibit "B"**).
23 Consequently, on May 9, 2006 undersigned counsel initiated and held an FRCP 37
24 discovery conference with counsel for Defendants (to which undersigned counsel
25 hereby certifies as true). During that conference both parties agreed to provide
additional time to reconsider their previous discovery responses, and to provide

1 supplemental responses. Plaintiff provided Defendants with his supplemental
2 responses in the form of a more detailed analysis of the offending emails. When
3 finally received, Defendants' supplemental responses were once again grossly
4 deficient and non-responsive. (See Defendants' Supplemental Responses at
5 **Exhibit "C"**). Attached to Defendants' Supplemental Responses To Plaintiff's
6 First Request For Production Of Documents is the sum total of all documents
7 produced by Defendants. What should arguably be the production of boxes of
8 documents, is instead merely 14 pages, largely consisting of a *current* print out of
9 its own terms and conditions from its website.

10 Defendants' continued stonewalling and utter disregard for the discovery
11 rules by Defendants has necessitated this Motion.

12 **III. STATEMENT OF ISSUES**

- 13 1. Should the Court enter an order compelling Defendant to provide full
14 and complete responses to Plaintiff's discovery requests, and
15 particularly addressing those issues identified and discussed below;
- 16 2. Should the Court award Plaintiff sanctions and attorney fees for
17 Defendant's intransigence, making this Motion necessary?
18

19 **IV. EVIDENCE RELIED UPON**

20
21 This Motion is based upon the files and records herein, and the legal
22 authority cited herein.
23
24
25

1
2
3 **V. DISCUSSION**

4 **5.1 Applicable Law.** Plaintiff relies upon FRCP 37 and 26, and
5 applicable case law. Under FRCP 26(b)(1), parties are generally entitled to broad
6 discovery of any matter that is relevant to the subject matter of the lawsuit and is
7 not privileged. The scope of discovery is much broader than the standard of
8 relevance required under the rules of evidence for admissibility at trial. Federal
9 Courts have defined “relevant” to encompass “any matter that bears on, or that
10 reasonably could lead to other matters that could bear on, any issue that is or many
11 be in the case.” Oil, Chemical & Atomic Workers Local Union v. N.L.R.B., 711 F.
12 2d 348, 360 (D.C. Cir. 1983). Washington courts have noted the “broad right of
13 discovery is necessary to ensure access to the party seeking discovery. It is
14 common legal knowledge that extensive discovery is necessary...” Doe v Puget
15 Sound Blood Ctr., 117 Wn. 2d 772, 782 (1991).

16 In Washington State Physicians Insurance Exchange & Assn. v. Fisons
17 Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993), the Washington Supreme Court held
18 that the spirit of cooperation and the search for the truth should prevail over older
19 notions that a trial should be an adversarial game in which ducking and dodging
20 discovery requests was the norm, and did not hesitate in awarding sanctions against
21 the non-responsive party. Here, the Defendants have demonstrated a pattern of
22 stonewalling and non-responsiveness in relation to discovery.

23 The Plaintiff has now propounded two sets of reasonable interrogatories and
24 requests for production, all of which were calculated to elicit information from
25 Defendants regarding the basis and facts supporting his lawsuit, the defenses
alleged by Defendants, and basic background information on Defendants’ business

1 activities and involvement with affiliates, agents, or subcontractors. Contrary to
2 Defendant's boilerplate objections, these requests were not, vague or ambiguous,
3 unduly burdensome nor did they seek information not calculated to lead to the
4 discovery of admissible evidence.

5 In its initial responses, Defendants incredibly failed to substantively answer
6 even one Interrogatory or Request For Production. Choosing instead to pose
7 unfounded boilerplate objections to every discovery request! Thus, Defendants
8 have clearly abused their right to object to discovery requests by using the
9 identical, boilerplate objection to virtually every one of Plaintiff's requests.

10 Under FRCP 37(a)(3) each answer to an interrogatory must be full,
11 complete, and non-evasive. Evasive or incomplete answers may be treated as a
12 failure to answer, or respond. Here, Defendants' redundant posing of unfounded
13 boilerplate objections to each and every discovery request can be seen as nothing
14 more than a blatant disregard for the rules of discovery, and a complete abrogation
15 of their obligations thereunder.

16 **5.2 Defendants Make A Mockery Of The Discovery Rules.** How can
17 Defendants in good faith argue that they have in good faith complied with their
18 obligations under the FRCs? In response to 21 separate and distinct requests for
19 production of documents, and lieu of what arguably should be numerous boxes of
20 business records, Defendants have produced a sum total of 14, largely irrelevant
21 and non-responsive pages. In response to 25 separate and distinct Interrogatories
22 Defendants have failed to provide substantive responses to virtually every inquiry,
23 instead asserting boilerplate objections. Plaintiff submits that it is just this type of
24 evasiveness and disregard for the rules of discovery for which the sanction
25 provisions of the FRCs were intended, Defendants having now established a clear
pattern of stonewalling and evasiveness. Such tactics, by a well-healed defendant,

1 can only be seen as an attempt to wage a war of attrition through litigation. Such
2 tactics should not be tolerated by the Court.

3 **5.3 Defendants' Own Policies Belie Their Objections.** The Court should take
4 particular note of certain documents provided by Defendants as part of their very
5 limited, and wholly deficient supplemental document production. Particularly,
6 bates stamped documents IMG-000004 – 000010, which purport to be pages from
7 Defendants' website setting forth its "Terms & Conditions" for "Affiliate
8 Advertising". IMG-000006 at section 10 sets forth IMG's "Anti-Spam Policy",
9 which language includes numerous statements indicating that IMG does not
10 tolerate unlawful spam. However, despite such lofty language, Defendants have
11 thus far failed and refused to provide any actual evidence of their "taking every
12 step" to insure their affiliate advertiser's compliance.

13 Moreover, despite their self-serving representations in their own Terms &
14 Conditions document, Defendants themselves regularly violate the Federal Can-
15 Spam Act, not to mention the Washington CEMA. Under **15 USC 7701, section**
16 **4(a)(4) and (5)** using false information to register domains and/or IP addresses
17 which are used to send numerous unsolicited commercial emails is strictly
18 prohibited. Plaintiff has substantial evidence that Defendants have violated this
19 provision repeatedly. Accordingly, Defendants should be required, as inquired
20 about in **Interrogatory Nos. 7, 17 and 19** to provide a list of all domains it has
21 registered, and all IP addresses which have been registered on its behalf, and/or
22 from which they have sent multiple emails. Instead, as per its usual course,
23 Defendants have objected, and failed and refused produce such information.

5.4 Identity of Defendants' Vendors, Agents, Affiliates, Marketing

1 **Partners.** Throughout their responses, Defendants repeatedly state "In
2 connection with the allegations contained in Plaintiff's Complaint, Impulse, upon
3 information and belief, did not itself send any emails to Plaintiff's email address."
4 and further "Upon information and belief, Impulse had no knowledge that
5 noncompliant emails would be sent to Plaintiff's email address." Nonetheless, in
6 response to Interrogatory No. 11 Defendants admit "occasionally" initiating the
7 transmission of commercial email on behalf of third parties, but then in response to
8 Interrogatory No. 12 refuse to identify those parties on whose behalf they send the
9 emails, and further in response to Interrogatory No. 13 refuse to identify its
10 "vendors, agents, affiliates, contractors, and subcontractors that assist or assisted in
11 the transmission of commercial email on the defendant's behalf for the past five
12 years." Here, Defendants' motives and their intransigence become transparent. On
13 one hand asserting that they don't actually send the offending emails, while on the
14 other refusing to identify those who do.

15 Again, despite the language in its own contract with its "affiliates" upon
16 which Defendants seek to rely, Defendants have failed and refused to produce the
17 correspondence between itself and its "affiliates" such as Commonwealth
18 Marketing Group ("CMG") and others. There is simply no legitimate basis upon
19 which to withhold such information to which Plaintiff is clearly entitled, and which
20 would go to establish Defendants' knowledge of, and participation in the sending
21 of the offending emails at issue in the lawsuit.

5.5 Defendants Refuse To Answer Questions Fundamental To Their Own

22 **Defenses.** One of Defendants' primary defenses alleged in this action is that
23 Plaintiff "opted-in" to receiving the offending emails at issue. In fact, incredibly,
24 Defendants have even gone so far as to allege a "conspiracy" to solicit their spam
25

1 just in order to sue them. Nonetheless, in response to Plaintiff's Interrogatory No.
2 15, asking Defendants to "describe the process by which you obtain "opt-in" email
3 addresses, and identify each every source of such email addresses." Defendants
4 again pose boilerplate objections, and refuse to provide the information.

5 **5.6 Defendants Refuse To Divulge The Internet Domains From Which They**

6 **Send Commercial Email.** In response to Interrogatory No.s 7, and 17,
7 Defendants again pose their boilerplate objections when asked to identify any
8 domains from which they, or others on their behalf send commercial email, and in
9 response to Interrogatory No. 18 inquiring as to whether Defendants have
10 "permission" from the owners of any of the domains used. This information is, of
11 course, fundamental to Plaintiff's case in order to prove certain violations of the
12 applicable statutes.

13
14 **5.7 Defendants Refuse To Identify The IP Addresses Assigned To Them.**

15 In response to Interrogatory No. 19, Defendants again pose their boilerplate
16 objections, and fail and refuse to identify the IP addresses assigned to them since
17 2000. This, of course, again is highly relevant to prove who actually sent the
18 offending emails, the relationship which may have existed between conspiring
19 parties, and to properly analyze the extent to which Defendants may have obscured
20 the transmission path and/or point of origin of the subject emails.

21 **5.8 Defendants Refuse To Identify The Software It Uses To Send Spam.**

22 In response to Interrogatory No. 24, and in response to Plaintiff's Second
23 Requests For Production of Documents, Defendants once again have failed and
24 refused to identify and/or provide copies of the email systems, software, and
25 applications it uses to send commercial email. All of which are obviously highly

1 relevant to Plaintiff's allegations, and to show that Defendants are notorious
2 spammers.

3
4
5
6 **CONCLUSION**

7
8 In conclusion, despite that they have been given every opportunity to do so,
9 it is apparent that Defendant has no intention of abiding by the civil rules
10 governing their discovery obligations. Plaintiff respectfully requests that this
11 Court enter an order compelling Defendant to immediately and fully respond to
12 Plaintiff's discovery requests, and awarding Plaintiff sanctions against Defendant
13 for its intransigence and refusal to comply with its discovery obligations.

14
15
16 RESPECTFULLY SUBMITTED, this 30th day of June, 2006.

17
18 MERKLE SIEGEL & FRIEDRICHSEN, P.C.

19
20 /s/ Robert J. Siegel
21 Robert J. Siegel, WSBA #17312
22 Attorneys for Plaintiffs
23
24
25

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

Certificate of Service

We, hereby, certify that on June 30, 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: Peter J. Glantz, Sean A. Moynihan, and Floyd E. Ivey. I have served all non-CM/ECF participants and third-party defendants by other means.

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