

1 Liebler, Ivey, Conner, Berry & St. Hilaire
 By: Floyd E. Ivey
 2 1141 N. Edison, Suite C
 P.O. Box 6125
 3 Kennewick, WA 99336
Local Counsel for Defendants Impulse Marketing
 4 *Group, Inc., Jeffrey Goldstein and Kenneth Adamson*

Hon. Fred Van Sickle

5 Klein, Zelman, Rothermel & Dichter, L.L.P.
 By: Sean A. Moynihan & Peter J. Glantz
 6 485 Madison Avenue, 15th Floor
 New York, NY 10022
 7 (212) 935-6020
Attorneys for Defendant Impulse Marketing
 8 *Group, Inc., Jeffrey Goldstein and Kenneth Adamson*

9
 10 **IN THE UNITED STATES DISTRICT COURT**
FOR THE EASTERN DISTRICT OF WASHINGTON
 11 **AT RICHLAND**

12 James S. Gordon, Jr.,
 13 Plaintiff,
 14 v.
 15 Impulse Marketing Group, Inc.,
 Jeffrey Goldstein, Phillip Huston,
 16 and Kenneth Adamson,
 17 Defendants.

Case No.: CV-04-5125-FVS

REPLY MEMORANDUM OF LAW
 IN SUPPORT OF DEFENDANTS'
 MOTION TO DISMISS
 PLAINTIFF'S FIRST
 AMENDED COMPLAINT
 PURSUANT TO FED. R. CIV. P.
 12(b)(1), (2) AND (6) OR, IN THE
 ALTERNATIVE, FOR A MORE
 DEFINITE STATEMENT
 PURSUANT TO FED. R. CIV. P. 12(e)

18
 19 Impulse Marketing Group, Inc.,
 20 Third-Party Plaintiff,
 21 v.
 22 Bonnie F. Gordon, Jamila Gordon,
 James Gordon, III, and Jonathan
 Gordon,
 23 Third-Party Defendants.

24 Defendants Impulse Marketing Group, Inc. ("Impulse"), Jeffrey Goldstein
 25 ("Goldstein") and Kenneth Adamson ("Adamson") (collectively, "Defendants"), by

26 DEFENDANTS' REPLY MEMORANDUM - 1

27 KLEIN, ZELMAN, ROTHERMEL & DICHTER, L.L.P.
 485 MADISON AVENUE, 15TH FLOOR
 NEW YORK, NEW YORK 10022
 28 (212) 935-6020

00080282;1

1 and through their counsel, Klein, Zelman, Rothermel & Dichter, L.L.P., hereby
2 submit this reply memorandum in support of their motion to dismiss Plaintiff's First
3 Amended Complaint (the "First Amended Complaint") pursuant to Fed. R. Civ. P.
4 12(b)(1), (2) and (6) or, in the alternative, for a more definite statement pursuant to
5 Fed. R. Civ. P. 12(e).

6
7 **Plaintiff Continues to Mislead this Court**

8 Contrary to Plaintiff's assertions, Defendants' objection to the addition of the
9 unregistered trade name, Gordonworks.com, is not untimely. Plaintiff surreptitiously
10 added the unregistered trade name to the caption in his motion for leave to file a first
11 amended complaint, but in his motion Plaintiff never requested permission from the
12 Court to amend the caption to include the unregistered trade name.¹ Therefore, it is
13 disingenuous for Plaintiff to argue that Defendants should have objected to an issue
14 that was not even before the Court. In fact, curiously, it appears that Plaintiff's
15 response to Defendants' objection that Plaintiff amended the caption and the
16 complaint without leave is to file a Second Amended Complaint, again without leave
17 of the Court. This second unauthorized amendment can only be seen as a willful
18 violation of Fed. R. Civ. P. 15(a).² See Pl.'s Resp. Opp'n Mot. Dismiss at 2

19 _____
20 ¹In fact, the Court specifically denied Plaintiff's request to add new plaintiffs to the action.
21 (Order Granting in Part & Den. in Part Pl.'s Mot. Am. Compl., May 2, 2006.)

22 ²On or about September 13, 2006, Defendants filed an objection to the Second Amended
23 Complaint, and, if necessary, Defendants will move to strike the pleading and for any other relief
24 that may be available to them as a result of Plaintiff's willful misconduct. (Moynihan Reply Decl.

25 ¶ 3.)

26 DEFENDANTS' REPLY MEMORANDUM - 2

KLEIN, ZELMAN, ROTHERMEL & DICHTER, L.L.P.
485 MADISON AVENUE, 15TH FLOOR
NEW YORK, NEW YORK 10022
(212) 935-6020

28 00080282;1

1 (“[a]ccordingly, Gordon has amended the caption of Gordon’s complaint, and
2 paragraph 1.1 . . . ”). However, this unilateral unauthorized amendment not only
3 changed the caption yet again, but it also made substantial material revisions to
4 Plaintiff’s factual allegations and causes of action.

5 As outlined in detail in Defendants’ motion and the memorandum in support
6 thereof, Gordon is a professional plaintiff, who has a known tendency to exaggerate
7 the facts. Plaintiff previously admitted³ on his website that his litigation tactics are a
8 scheme to shift the financial cost of email marketing from the recipient of the email to
9 the email marketers. (Moynihan Reply Decl. ¶ 4.) Now, Plaintiff admits in his
10 response to Defendants’ motion that his discovery production was intended to
11 “induc[e] IMG to settle.” (Pl.’s Resp. Opp’n Mot. Dismiss at 17.) Plaintiff dispenses
12 with the Federal Rules of Civil Procedure by continuing to amend his pleadings
13 without leave of this Court in an attempt to manipulate the facts to his favor. The
14 foregoing events confirm that Plaintiff’s modus operandi is to file vague and
15 ambiguous pleadings (contrary to the explicit mandates of the Federal Rules of Civil
16 Procedure) and to serve evasive and incomplete discovery responses in a scheme to
17 engage email marketers in protracted litigation, making the defense of such frivolous
18 actions cost-prohibitive.

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³Plaintiff’s admission is discussed in Defendants’ memorandum in support of their motion
24 to dismiss, and a copy of the website containing the admission is attached as Exhibit C to the
25 Moynihan Declaration in support of Defendants’ motion.

26 DEFENDANTS’ REPLY MEMORANDUM - 3

KLEIN, ZELMAN, ROTHERMEL & DICHTER, L.L.P.
485 MADISON AVENUE, 15TH FLOOR
NEW YORK, NEW YORK 10022
(212) 935-6020

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28 00080282;1

1 **Plaintiff is Not an Interactive Computer Service**

2 Initially, Plaintiff alleged in pleadings filed with the Court that he is the “owner”
3 of the servers on which the domain name Gordonworks.com resides (1st Am. Compl.
4 at ¶ 3.3); now, Plaintiff is alleging that he “leased” the servers. (Pl.’s Resp. Opp’n Mot.
5 Dismiss at 3.) Plaintiff continuously alters his allegations in a never-ending attempt to
6 manipulate the facts to his favor. Mr. Gordon is an individual. He is not an interactive
7 computer service. Mr. Gordon brought this action on behalf of himself, personally,
8 not on behalf of his Internet domain name, an unregistered trade name or any other
9 entity that he may control.

10 While Plaintiff cites to the correct definition for an “interactive computer
11 service” under RCW § 19.190, *et seq.* (collectively, “CEMA”), he clearly misinterprets
12 the definition. The mere operation of a website does not transform Mr. Gordon, the
13 individual, into an interactive computer service. Simply put, Mr. Gordon stands the
14 definition on its head. Mr. Gordon does not “provide or enable computer access by
15 multiple users.” RCW § 19.190.010(8). While libraries, schools and some businesses
16 make available computers to be accessed and used by the public, there is no evidence
17 that Plaintiff provides such a service. In fact, as evidenced by the copy of Plaintiff’s
18 website attached as Exhibit C to the Moynihan Declaration in support of Defendants’
19 motion and as described in Plaintiff’s own declaration, Plaintiff’s website simply
20 provides a list of links to other career search-related websites. (Moynihan Decl. Ex. C;
21 Gordon Decl. ¶ 12.) In short, his website does not qualify as an interactive computer
22 service.

23 In addition, Plaintiff misinterprets the purpose of the severability clause
24 included in CEMA (and included in virtually every contract and state or federal law,
25 rule or regulation in this country). A severability clause is simply “a provision that

1 keeps the remaining provisions of a contract or statute in force if any portion of that
2 contract or statute is judicially declared void or unconstitutional.” Black’s Law
3 Dictionary 1378 (7th ed. 1999). Clearly, the severability clause cited by Plaintiff simply
4 stands for the proposition that should a court find the definition of “web page”
5 unconstitutional, the remaining provisions in the statute will still be valid. The
6 separate and distinct definitions for “web page,” “Internet domain name” and
7 “interactive computer service” evidence a legislative intent that an interactive
8 computer service is neither a “web page” nor an “Internet domain name.” The fact
9 that millions of people may be able to access the “web pages” located at the “Internet
10 domain name,” Gordonworks.com, does not make Mr. Gordon an “interactive
11 computer service.”

12 Further, while Plaintiff cites to the correct standard for a motion to dismiss, he
13 fails to rebut the legal arguments, supported by case law in this Circuit, put forth by
14 Defendants. As discussed in detail in Defendants’ memorandum in support of their
15 motion, although factual allegations set forth in the complaint are “taken as true and
16 construed in the light most favorable to [p]laintiffs,” the Ninth Circuit has elaborated
17 on this rule, explaining that “courts should only accept as true the well-pleaded facts,
18 and ignore ‘legal conclusions,’ ‘unsupported conclusions,’ ‘unwarranted inferences,’
19 ‘unwarranted deductions,’ ‘footless conclusions of law’ or ‘sweeping legal conclusions
20 cast in the form of factual allegations.” Roe v. Nev., 332 F. Supp. 2d 1331, 1339 (D.
21 Nev. 2004) (emphasis added) (citing Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140
22 (9th Cir. 1996); quoting W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)).
23 Plaintiff’s entire First Amended Complaint consists of precisely those “facts” which
24 courts in the Ninth Circuit have suggested they should ignore— sweeping legal
25 conclusions that Defendants have violated CEMA, CPA, CAN-SPAM and/or the

1 Prize Statute, cast in the form of factual allegations. There are virtually no “well-
2 pleaded” facts in the First Amended Complaint for the Court to accept as true. Even
3 accepting any well-pleaded facts that may be contained in the First Amended
4 Complaint as true, Mr. Gordon, who brought this action on behalf of himself as an
5 individual, is not an interactive computer service as a matter of law.

6
7 **Plaintiff is Not an Internet Access Service**

8 There is no private right of action for individuals, such as Mr. Gordon, under
9 CAN-SPAM. Kevin P. Cronin & Ronald N. Weikers, Data Security & Privacy Law:
10 Combating Cyberthreats § 9:47:110 (2006). Similarly, there is no private right of
11 action for Internet domain names, such as Gordonworks.com. Plaintiff responds to
12 Defendants’ arguments by simply restating the definition of an Internet access service
13 contained in Section 231(e)(4) of the Communications Act of 1934 (the “CDA”) and
14 concluding that he, himself, is an Internet access service. Plaintiff fails to cite to a
15 single legal authority to support his novel conclusion. While Plaintiff cites to the
16 correct definition, he fails to properly apply the definition to the facts of the case.
17 Plaintiff brought this action on behalf of himself, as an individual, not on behalf of his
18 business, his unregistered trade name, or any other entity that he may control. As
19 discussed *supra* p. 5, Plaintiff’s unsupported legal conclusion, cast in the form of a
20 factual allegation, should not be accepted by the Court as true.

21 Defendants do not contest that business forms other than corporations could
22 be considered an Internet access service. In fact, Defendants agree with Plaintiff’s
23 statement that an Internet access service is defined by what it does, rather than what it
24 is. However, applying that principle to Plaintiff, Mr. Gordon does not qualify as an
25 Internet access service within the meaning of the CDA. Even assuming, *arguendo*, that

1 Plaintiff, an individual, could be an Internet access service or that he is entitled to
2 bring an action on behalf of his Internet domain name, in cases where courts
3 interpreting the CDA have held that a website could possibly qualify for immunity as
4 an Internet access service, the websites in question have allowed for the submission of
5 content by third parties. See Schneider v. Amazon.com, Inc., 108 Wash. App. 454
6 (2001) (“website enables visitors to the site to comment about authors and their work,
7 thus providing an information service that necessarily enables access by multiple user
8 to a server”); Optinrealbig.com, LLC v. Ironport Sys., Inc., 323 F. Supp. 2d 1057
9 (N.D. Cal. 2004) (Spamcop.net held to qualify as an interactive computer service
10 entitled to immunity under the CDA where it posted reports collected from users and
11 permitted users to add comments to their spam reports); Carafano v.
12 Metrosplash.com, Inc., 207 F. Supp. 2d 1055 (C.D. Cal. 2002) (Court found that
13 Matchmaker.com qualified as an interactive computer service because “users are able
14 to access and use a searchable database [of user-created profiles] maintained on
15 Defendants’ computer servers”). Here, Plaintiff and his website are easily
16 distinguished from the foregoing cases. Plaintiff does not maintain a searchable
17 database, there is no bulletin board feature, and there is no posting of content or
18 reviews by visitors to the website. As discussed *supra* p. 4, Plaintiff’s website simply
19 maintains a list of links to other career search-related websites. In fact, although
20 Plaintiff states that he “provided numerous email accounts using the
21 Gordonworks.com domain name,” (Gordon Decl. ¶ 15), he fails to state that such
22 email accounts are, upon information and belief, provided through and hosted by the
23 domain name registrar GoDaddy.com. (Moynihan Decl. ¶ 12, Ex. A; Moynihan Reply
24 Decl. ¶¶ 5, 6, Ex. A & B.) Thus, in light of the foregoing and as discussed *supra* p. 3-5,

1 clearly, Plaintiff's website does not possess the characteristics propounded by courts
2 as evidence that a website could qualify as an Internet access service.

3
4 **Plaintiff Does not Contest that He Failed to**
5 **State a Claim Under the Prize Statute**

6 Plaintiff does not contest the fact that he failed to state a claim under the Prize
7 Statute by, *inter alia*, failing to allege damages. Instead, Plaintiff simply attempts to
8 remedy his error by filing an unauthorized Second Amended Complaint concurrently
9 with his response! This is yet another glaring example of Plaintiff's scheme to
10 manipulate the judicial process and to usurp this Court's authority by simply
11 dispensing with the Federal Rules of Civil Procedure. As discussed *supra* p. 2-3, this is
12 the second time Plaintiff has amended his pleadings without leave of the Court.
13 (Moynihan Reply Decl. ¶ 2.) In his First Amended Complaint, Plaintiff attempted to
14 surreptitiously add an unregistered trade name as a plaintiff in the action, and now,
15 Plaintiff has filed a Second Amended Complaint without leave of the Court in blatant
16 disregard of Fed. R. Civ. P. 15(a), changing the caption and adding new factual
17 allegations.

18 Plaintiff's Second Amended Complaint, filed in willful violation of Fed. R. Civ.
19 P. 15(a), is a nullity and without legal effect. See Hoover v. Blue Cross & Blue Shield
20 of Ala., 855 F.2d 1538 (11th Cir. 1988) ("if an amendment that cannot be made as of
21 right is served without obtaining the court's leave or the opposing party's consent, it is
22 without legal effect . . ."); see also Crazy Eddie Sec. Litig., 792 F. Supp. 197 (E.D.N.Y.
23 1992) ("Nor did plaintiffs have leave to amend the Second Complaint. The court
24 therefore treats the Third Complaint as without legal effect."). As such, Plaintiff's
25 references to the Second Amended Complaint are a nullity; the balance of the

1 argument in his response is otherwise without merit and his cause of action under the
2 Prize Statute should be dismissed with prejudice.

3
4 **Plaintiff Does Not Contest that He Failed**
5 **to State a Claim Against Adamson & Goldstein**

6 As above, in lieu of contesting Defendants' arguments that Plaintiff failed to
7 state a claim against Adamson and Goldstein, Plaintiff again attempts to remedy the
8 facially deficient allegations contained in his First Amended Complaint by citing to
9 allegations contained in his unauthorized Second Amended Complaint. (Pl.'s Resp.
10 Opp'n Mot. Dismiss at 8, 10.) As discussed *supra* p. 2-3, 8, Plaintiff's Second
11 Amended Complaint, filed in blatant disregard of this Court's authority under Fed. R.
12 Civ. P. 15(a), is a nullity and without legal effect. See Hoover, 855 F.2d 1538 (11th Cir.
13 1988) ("if an amendment that cannot be made as of right is served without obtaining
14 the court's leave or the opposing party's consent, it is without legal effect . . ."); see
15 also Crazy Eddie Sec. Litig., 792 F. Supp. 197 (E.D.N.Y. 1992) ("Nor did plaintiffs
16 have leave to amend the Second Complaint. The court therefore treats the Third
17 Complaint as without legal effect.").

18 In addition, Plaintiff completely ignores the fact that, as pointed out by
19 Defendants in their motion and as contained in the public records maintained by the
20 Secretary of State of Nevada, Adamson is not now, nor has he ever been, an officer or
21 director of Impulse. As a result, any case law cited by Plaintiff in favor of corporate
22 officer liability is completely inapplicable insofar as Adamson is concerned. In
23 addition, any case law cited by Plaintiff in favor of corporate officer liability ignores
24 the fact that Plaintiff failed to plead any of the facts necessary in order to hold
25 Goldstein liable.

Plaintiff Misapplies the Standard for Liability Under CEMA & CAN-SPAM

Plaintiff misstates that “Goldstein and Adamson are liable because they ‘assisted others’” in sending commercial email. (Pl.’s Resp. Opp’n Mot. Dismiss at 11.) However, Plaintiff ignores the definition of “assist the transmission” explicitly provided by CEMA. RCW § 19.190.010(1) states that:

“Assist the transmission” means actions taken by a person to provide substantial assistance or support which enables any person to formulate, compose, send, originate, initiate, or transmit a commercial electronic mail message or a commercial electronic text message when the person providing the assistance knows or consciously avoids knowing that the initiator of the commercial electronic mail message or the commercial electronic text message is engaged, or intends to engage, in any practice that violates the consumer protection act.

RCW § 19.190.010(1) (emphasis added). If Plaintiff is alleging that Defendants assisted the transmission of commercial emails that violated CEMA, then Plaintiff must properly plead for each defendant, that the defendant knew, or consciously avoided knowing, that the actual sender of a commercial email message was engaged or intended to engage in practices in violation of CEMA or the CPA. Other than the conclusory statements made in Plaintiff’s response, Plaintiff has pleaded no facts to support such a claim.

Assuming, *arguendo*, that Mr. Gordon has standing to bring a cause of action pursuant to CAN-SPAM, Plaintiff misapplies the standards for liability under the statute. Under CAN-SPAM, a defendant may be liable if the defendant: (a) “knowingly” commits the violation and “intentionally initiate[s] the transmission of such messages” (15 U.S.C. § 7703); (b) the defendant “initiates the transmission” of an email in violation of the requirements in Section 5(a)(1) (15 U.S.C. § 7704); and/or (c) the defendant allows the promotion of its business in an email violating CAN-SPAM; the defendant knew, or should have known, that its business was being promoted in

1 such a message; the defendant received or expected to receive an economic benefit
2 from such promotion; and the defendant took no reasonable action to prevent the
3 transmission (15 U.S.C. § 7705).⁴ This contradicts Plaintiff's simplified representation
4 in his response that "CAN-SPAM explicitly provides a direct cause of action against
5 any person who 'assists' others in sending commercial electronic mail messages."
6 (Pl.'s Resp. Opp'n Mot. Dismiss at 10.)

7 In light of the foregoing, Plaintiff's First, Second and Third Causes of Action
8 must be dismissed.

9
10 **Plaintiff Fails to Contest the Deficiencies**
Contained in his First Amended Complaint

11 Having failed to address the specific deficiencies identified by Defendants in
12 Plaintiff's First Amended Complaint (see Mem. Mot. Dismiss at 14-19), Plaintiff
13 responds instead by arguing that "the emails speak for themselves." (Pl.'s Resp.
14 Opp'n Mot. Dismiss at 18.) However, Defendants are not asking Plaintiff to provide
15 an analysis of the incoherent discovery previously provided under the original
16 complaint. Rather, Defendants are simply asking Plaintiff, who chose to bring a new
17 First Amended Complaint naming new parties and new causes of action, to properly
18 plead such claims. Any causes of action arising under the Prize Statute and/or CAN-
19 SPAM are entirely new claims. The allegedly "detailed analysis" provided by Plaintiff
20 only addressed alleged violations of CEMA. Plaintiff could not possibly expect
21 Defendants to now rely upon the same production as evidence of new claims brought
22 pursuant to CAN-SPAM and/or the Prize Statute.

23
24

⁴In addition, if the Court finds that CAN-SPAM claims sound in fraud, Plaintiff must plead
25 such allegations with specificity, as required by Fed. R. Civ. P. 9(b).

1 In addition, contrary to the assertions in Plaintiff's response, because Plaintiff
2 completely fails in his First Amended Complaint to identify any specific email that
3 corresponds to a particular claim, it would be impossible for IMG to "look at the
4 'date' line of the email in question" because the "email in question" is never specified
5 by Plaintiff. (Pl.'s Resp. Opp'n Mot. Dismiss at 17.) In direct contradiction to
6 Plaintiff's disingenuous protest that he should not be required to pair each email with
7 the statutory provision(s) alleged to have been violated (Pl.'s Resp. Opp'n Mot.
8 Dismiss at 18), Plaintiff himself affirmatively represented in his First Amended
9 Complaint, that each alleged email constitutes a separate transaction and therefore a
10 separate claim. (See 1st Am. Compl. ¶¶ 4.2.4, 4.2.5.) As discussed in Defendants'
11 memorandum in support of their motion, Plaintiff alleges that Defendants have sent
12 anywhere from "at least one" (1st Am. Compl. ¶ 4.1.3) to "thousands" (1st Am. Compl.
13 ¶ 4.1.1) of emails in violation of various statutory provisions. At the very least,
14 Defendants' request that Plaintiff pair each email (each of which, in Plaintiff's own
15 words, constitutes a separate claim), with the statutory provision(s) alleged to have
16 been violated is entirely reasonable.

17 Again and again, Plaintiff cites to case law reiterating the standard for a motion
18 to dismiss, yet he fails to address the decisions in this Circuit, discussed *supra* p. 5, that
19 hold that although factual allegations set forth in the complaint are taken as true and
20 construed in the light most favorable to the plaintiff, "courts should only accept as
21 true the well-pleaded facts, and ignore . . . 'unsupported conclusions,' . . . or 'sweeping
22 legal conclusions cast in the form of factual allegations.'" Roe at 133\9 (D. Nev. 2004)
23 (emphasis added) (citing Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir.
24 1996); quoting W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)).
25 Plaintiff's entire First Amended Complaint consists of precisely those "facts" which

1 courts in the Ninth Circuit have suggested they should ignore — sweeping legal
2 conclusions that Defendants have violated CEMA, CPA, CAN-SPAM and/or the
3 Prize Statute, cast in the form of factual allegations. There are virtually no “well-
4 pleaded” facts in the First Amended Complaint for the Court to accept as true. In
5 addition, as discussed at length in Defendants’ memorandum in support of their
6 motion, we are fast-approaching the second anniversary of the filing of this lawsuit.
7 Having reached over 400 docket entries, rife with vague and ambiguous pleadings
8 asserting little more than legal conclusions cast in the form of factual allegations,
9 Defendants are no closer to being able to identify the precise allegations lodged
10 against them. This is an extraordinary and deliberate effort by Plaintiff to waste this
11 Court’s and Defendants’ resources.

12 In light of the foregoing, Plaintiff has failed to properly state a claim under any
13 of the statutory provisions pursuant to which he attempts to bring this action.
14 Instead, Plaintiff has deliberately crafted a pleading consisting entirely of unsupported
15 and sweeping legal conclusions cast in the form of factual allegations. As a result, in
16 line with previously cited Ninth Circuit authority, Plaintiff’s First Amended Complaint
17 should be dismissed under Fed. R. Civ. P. 12(b)(6).

18 Conclusion

19
20 Plaintiff’s First Amended Complaint should be dismissed in its entirety or, at a
21 minimum, Plaintiff should be required to provide a more definite statement pursuant
22 to Fed. R. Civ. P. 12(e). Defendants respectfully request that the Court: 1) dismiss
23 Plaintiff’s First Amended Complaint with prejudice, and award Defendants their costs
24 and fees incurred in responding to Plaintiff’s First Amended Complaint; or 2) grant
25

1 Defendants' motion for a more definite statement, and award Defendants their costs
2 and fees incurred in responding to Plaintiff's First Amended Complaint.

3
4 RESPECTFULLY SUBMITTED, this 18th day of September, 2006.

5
6 By: 

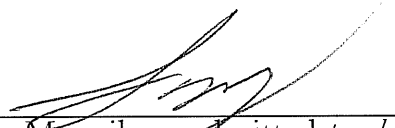
Sean A. Moylan, admitted *pro hac vice*
Peter J. Glantz, admitted *pro hac vice*
Klein, Zelman, Rothermel & Dichter, L.L.P.
485 Madison Ave., 15th Floor
New York, New York 10022
(212) 925-6020
(212) 753-8101 Fax
Attorneys for Defendants Impulse Marketing
Group, Inc., Jeffrey Goldstein and Kenneth
Adamson

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8
9
10
11
12 By: 

Floyd E. Ivey
Liebler, Conner, Ivey, Berry & St. Hilaire
1141 N. Edison, Suite C
P.O. Box 6125
Kennewick, WA 99336
Local Counsel for Defendants Impulse
Marketing Group, Inc., Jeffrey Goldstein and
Kenneth Adamson

Certificate of Service

I, hereby, certify that on September 18, 2006, I electronically filed this pleading with this Court. The Clerk of the Court will provide electronic notification using the CM/ECF system, which will send an electronic copy of Defendants' Reply Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for a More Definite Statement to: Robert J. Siegel and Floyd Ivey. I hereby certify that I have served the forgoing to the following non-CM/ECF participants by other means: Bonnie Gordon; Jonathan Gordon; James S. Gordon, III; Robert Pritchett; Jamila Gordon; Emily Abbey and Hon. Harold D. Clarke, Jr.


Sean A. Moynihan, admitted *pro hac vice*
Attorneys for Defendants Impulse
Marketing Group, Inc., Jeffrey Goldstein
and Kenneth Adamson