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Hon. Fred Van Sickle

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9  
 10 **IN THE UNITED STATES DISTRICT COURT**  
 11 **FOR THE EASTERN DISTRICT OF WASHINGTON**  
**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 FOR SANCTIONS  
 PURSUANT TO FED. R. CIV. P. 11

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

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 26  
 27 REPLY MEMORANDUM OF LAW IN SUPPORT OF  
 DEFENDANTS' MOTION FOR SANCTIONS - 1

KLEIN, ZELMAN, ROTHERMEL & DICHTER, L.L.P.  
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I. INTRODUCTION

1  
2 Defendants Impulse Marketing Group, Inc. (“Impulse”), Jeffrey Goldstein  
3 (“Goldstein”) and Kenneth Adamson (“Adamson”) (collectively, “Defendants”), by  
4 and through their counsel, Klein, Zelman, Rothermel & Dichter, L.L.P., hereby submit  
5 this reply memorandum in support of their motion for sanctions against Plaintiff James  
6 S. Gordon, Jr. (“Plaintiff” or “Gordon”), Plaintiff’s counsel, Robert J. Siegel (“Siegel”),  
7 and Siegel’s law firm, Merkle, Siegel & Friedrichsen, P.C., pursuant to Fed. R. Civ. P.  
8 11. Defendants respectfully request that the Court sanction Plaintiff, Siegel and  
9 Siegel’s law firm by striking Plaintiff’s unauthorized Second Amended Complaint and  
10 awarding reasonable attorney’s fees incurred in responding to the baseless,  
11 unauthorized pleading.

12 Plaintiff dispenses with the Federal Rules of Civil Procedure by continuing to  
13 amend his pleadings without leave of this Court in an attempt to manipulate the facts  
14 to his favor. As outlined in Defendants’ Memorandum in Support of their Motion for  
15 Sanctions, Plaintiff has, in bad faith, repeatedly disobeyed the Federal Rules of Civil  
16 Procedure, the Civil and Local Rules of this Court, and an Order of the Court. In his  
17 response, Plaintiff attempts to completely trivialize such behavior. To date, despite  
18 repeated demand, Plaintiff has failed/refused to withdraw the unauthorized pleading.  
19 (Moynihan Decl. ¶ 10.) As a result of this pattern of deliberate misconduct, Plaintiff,  
20 Siegel and the law firm of Merkle, Siegel & Friedrichsen, P.C. must be subject to  
21 sanctions pursuant to Fed. R. Civ. P. 11.

## II. LEGAL ARGUMENT

Plaintiff's Counsel's Repeated Misconduct  
is Valid Basis for the Imposition of Rule 11 Sanctions

Plaintiff cites to no legal authority to rebut the arguments put forth by Defendants in their motion and memorandum in support thereof. As discussed in detail in Defendants' motion and the memorandum in support thereof, Plaintiff's unauthorized Second Amended Complaint, unilaterally filed without seeking leave of the Court, is not the first time that Plaintiff's counsel has acted in direct disregard of normal court procedures and the Federal Rules of Civil Procedure. Plaintiff's repeated disregard for the rules of this Court is precisely the type of misconduct Rule 11 sanctions are intended to deter. It is critical to note that, despite at least four (4) written demands by Defendants, Plaintiff's unauthorized Second Amended Complaint remains on file.

The only plausible explanation for Plaintiff's repeated disregard of the Federal Rules of Civil Procedure is that counsel desires to harass and to punish Defendants unnecessarily by requiring Defendants to respond to the unauthorized pleading thereby expending significant amounts of time and money. This is entirely consistent with the way Plaintiff has prosecuted this case thusfar. Plaintiff disingenuously attempts to trivialize his blatant disregard for the Federal Rules of Civil Procedure as "harmless errors" (Pl.'s Response to Defs.' Mot. Sanctions at 2). However, given the repeated pattern of misconduct, it is clear that Plaintiff's acts are hardly "harmless errors." Even assuming, *arguendo*, that Plaintiff's repeated misconduct was a mere "error," "counsel can no longer avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head." Smith v. Ricks, 31 F.3d 1478, 1488 (9<sup>th</sup> Cir. 1994) (quoting Zuniga v. United Can Co., 812 F.2d 443, 452 (9<sup>th</sup> Cir. 1987)). In addition, where, as here, counsel "ha[s] shown a more than tolerable amount of disregard' for

1 normal court procedures” the Ninth Circuit has affirmed an award of sanctions. See  
2 Id. at 1485 (9<sup>th</sup> Cir. 1994).

3 In Smith, the Ninth Circuit Court of Appeals affirmed the district court’s award  
4 of sanctions “in light of the entire ‘pattern of misconduct.’” Smith, 31 F.3d at 1488 (9<sup>th</sup>  
5 Cir. 1994). As in Smith, it is proper for this Court to rely on Siegel’s pattern of  
6 misconduct, including the filing of the unauthorized Second Amended Complaint and  
7 his refusal, after repeated demand, to withdraw same. As a result of these violations of  
8 Rule 11, and consistent with Ninth Circuit authority, Plaintiff, Siegel and the law firm  
9 of Merkle, Siegel & Friedrichsen, P.C. must be subject to sanctions pursuant to Fed. R.  
10 Civ. P. 11 and the unauthorized Second Amended Complaint should be stricken.

#### 11 12 Plaintiff Misapplies the Rule 15 Standard for Amendment

13 Plaintiff misapplies the standard set forth in Fed. R. Civ. P. 15. Rule 15 clearly  
14 states that “a party may amend the party’s pleading once as a matter of course at any  
15 time before a responsive pleading is served . . . . Otherwise, a party may amend the  
16 party’s pleading only by leave of court or by written consent of the adverse party . . . .”  
17 Fed. R. Civ. P. 15(a) (emphasis added). Plaintiff appears to rely on the fact that  
18 Defendants, have not yet answered the First Amended Complaint, instead choosing to  
19 file their currently pending motion to dismiss, as a basis for filing his Second Amended  
20 Complaint without leave of court or written consent of the adverse party. However,  
21 Plaintiff has already amended his Original Complaint once (when he filed his First  
22 Amended Complaint); therefore, any further amendments of the Original Complaint  
23 (i.e., the Second Amended Complaint) can only occur after leave of court or written  
24 consent of the adverse party is obtained. Here, without justification or explanation,  
25 Plaintiff has obtained neither.

III. CONCLUSION

In light of the foregoing arguments and legal authority, Defendants respectfully request that the Court award sanctions against Plaintiff, Robert J. Siegel, and the lawfirm of Merkle, Siegel & Friedrichsen, P.C., pursuant to Fed. R. Civ. P. 11., by striking Plaintiff's unauthorized Second Amended Complaint and awarding reasonable attorney's fees incurred in responding to the baseless, unauthorized pleading.

RESPECTFULLY SUBMITTED, this 27<sup>th</sup> day of November, 2006.

By: 

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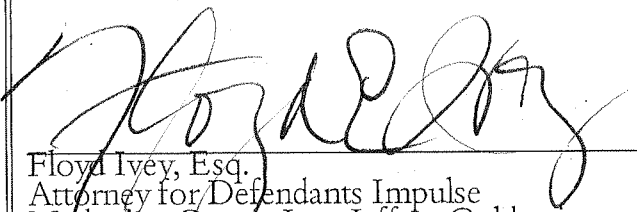
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Certificate of Service

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I, hereby, certify that on November 27, 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 the Reply Memorandum in Support of Defendants' Motion for Sanctions to: Robert J. Siegel and Sean Moynihan. 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.

  
Floyd Ivey, Esq.  
Attorney for Defendants Impulse  
Marketing Group, Inc., Jeffrey Goldstein  
and Kenneth Adamson