

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WASHINGTON

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4
5 JAMES S. GORDON,

6 Plaintiff,

7 v.

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9 IMPULSE MARKETING, INC., JEFFREY
10 GOLDSTEIN, PHILLIP HUSTON, and
11 KENNETH ADAMSON,

12 Defendants.

No. CV-04-5125-FVS

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
AMEND

13 **THIS MATTER** comes before the Court on the Plaintiff's Motion to
14 Amend Complaint, Ct. Rec. 417. The Plaintiff is represented by Robert
15 J. Siegal. The Defendants are represented by Floyd Ivey, Sean A.
16 Moynihan, and Peter Glantz.

17 **BACKGROUND**

18 The Plaintiff initiated the present lawsuit on November 23, 2004.
19 On March 29, 2006, the Plaintiff sought permission to amend the
20 Complaint to include additional claims. (Ct. Rec. 313.) The
21 Plaintiff also sought to add additional defendants, Jeffrey Goldstein,
22 Kenneth Adamson, and Phillip Huston, officers and/or directors of
23 Defendant Impulse. On May 2, 2006, the Court granted the Plaintiff
24 leave to amend the complaint to include the additional claims and
25 Defendants, but denied his request to name an additional party
26 plaintiff. (Ct. Rec. 356).

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO AMEND- 1

1 The Plaintiff filed his First Amended Complaint ("FAC") on June
2 13, 2006. One of the new claims asserted in the FAC is a claim under
3 Washington's Prize Statute. The Prize Statute claim in the FAC does
4 not allege damages. The Plaintiff also amended the case caption in
5 the FAC to identify the Plaintiff as, "James S. Gordon, Jr., a married
6 individual d/b/a 'gordonworks.com,'" rather than "James S. Gordon, an
7 individual residing in Benton County, Washington."

8 On August 31, 2006, the Defendants filed a second motion to
9 dismiss, arguing that dismissal of the FAC is appropriate on a number
10 of grounds. Three of these arguments are relevant to the Plaintiff's
11 motion to amend. First, the Defendants argue that the vagueness of
12 the FAC makes it impossible for them to file a meaningful response.
13 (Ct. Rec. 404 at 14-17.) Second, the motion to dismiss argues that
14 the Plaintiff improperly added gordonworks.com as a party without
15 seeking leave of the Court. Finally, the Defendants seek dismissal of
16 the Prize Statute claim based on the Plaintiff's failure to plead
17 damages.

18 Without seeking leave of the Court, the Plaintiff filed a Second
19 Amended Complaint ("SAC"), Ct. Rec. 448-3, along with their response
20 to the motion to dismiss. The SAC differs from the FAC in two
21 significant respects. First, the SAC removes "d/b/a gordonworks.com"
22 from the case caption. Second, the SAC includes three paragraphs
23 concerning the Plaintiff's Prize Statute claim that were not in the
24 FAC. Paragraphs 4.3.3 and 4.3.4 provide more specific factual
25 allegations concerning the Prize Statute claim. Paragraph 4.3.5
26 alleges that the Plaintiff suffered damages as a result of the Prize

1 Statute violations. The other changes in the SAC are minor, adding
2 phrases from the relevant statutes to the Plaintiff's allegations.

3 The Defendants objected to the SAC as an unauthorized pleading.
4 (Ct. Rec. 414.) The Plaintiff now seeks leave to amend the complaint
5 by filing the SAC.

6 **DISCUSSION**

7 Under the Federal Rules of Civil Procedure, a party may amend its
8 pleadings only with leave of the court once a responsive pleading has
9 been served. Fed. R. Civ. P. 15(a). Courts should grant permission
10 to amend pleadings "freely when justice so requires." *Id.* However, a
11 court need not grant leave to amend when the proposed amendment would
12 prejudice the opposing party, is sought in bad faith, would produce an
13 undue delay in the litigation, or would be futile. *AmerisourceBergen*
14 *Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir.
15 2006) (citing *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir.
16 1990)). The court may also deny leave to amend where the moving party
17 knew of the facts it wishes to allege in the proposed amendment at the
18 time of the original complaint and failed to include them. *EEOC v.*
19 *Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir. 1988).

20 Under the circumstances of this case, justice does not require
21 the Court to grant the Plaintiff leave to amend the pleadings by
22 filing the SAC. The Plaintiff has disregarded both an order of this
23 Court and Rule 15 of the Federal Rules of Civil Procedure. As the
24 Defendants observe, the Plaintiff amended the caption of the FAC in
25 direct contravention of this Court's May 2, 2006 order. The Plaintiff
26 then filed the SAC without seeking permission from the Court.

1 Moreover, permitting the Plaintiff to file the SAC would largely
2 be futile, as the majority of the changes in the SAC do not cure any
3 of the deficiencies observed by the Defendants. With the exception of
4 the new paragraphs concerning the Prize Statute claim, the new
5 language in the SAC consists of conclusory allegations that mirror the
6 language of the governing statutes. Such language does nothing to
7 protect a claim from dismissal on a 12(b)(6) motion, as a court ruling
8 upon a 12(b)(6) motion need not "assume the truth of legal conclusions
9 cast in the form of factual allegations." *Ileto v. Glock Inc.*, 349
10 F.3d 1191, 1200 (9th Cir. 2003).

11 However, the Court will permit the Plaintiff to amend the FAC by
12 adding Paragraphs 4.3.3, 4.3.4, and 4.3.5 of the SAC to Section 4.3 of
13 the FAC. This change will not prejudice the Defendants, as the FAC
14 gave them notice that the Plaintiff intended to pursue a claim under
15 the Prize Statute. Nor will including these paragraphs in the
16 complaint prove futile. Paragraphs 4.3.3 and 4.3.4 will give the
17 Defendants additional notice of the Plaintiff's claim. Paragraph
18 4.3.5 will serve to allege damages, a necessary element of the Prize
19 Statute claim. The Court being fully advised,

20 **IT IS HEREBY ORDERED**

21 1. The Plaintiff's Motion to Amend Complaint, **Ct. Rec. 417**, is
22 **GRANTED IN PART** and **DENIED IN PART**.

23 2. The Plaintiff may not file his proposed Second Amended
24 Complaint.

25 3. The Plaintiff may amend Section 4.3 of the First Amended
26 Complaint to include paragraphs 4.3.3, 4.3.4, and 4.3.5 of his

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proposed Second Amended Complaint.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this 10th day of May, 2007.

s/ Fred Van Sickle
Fred Van Sickle
United States District Judge