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THE HONORABLE FRED VAN SICKLE

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

JAMES S. GORDON, JR,

Plaintiff,

v.

IMPULSE MARKETING GROUP,  
INC.,

Defendant

IMPULSE MARKETING GROUP,  
INC.,

Third Party Plaintiff

v.

BONNIE GORDON, JAMES S.  
GORDON, III, JONATHAN  
GORDON, JAMILA GORDON,  
ROBERT PRITCHETT, EMILY  
ABBEY, and LEW REED

Third Party Defendants

NO. CV-04-5125-FVS

PROPOSED ORDER DISMISSING  
COUNTERCLAIMS AND THIRD  
PARTY DEFENDANTS UNDER FRCP  
12(b)(6) OR IN THE ALTERNATIVE  
FOR SUMMARY JUDGMENT UNDER  
FRCP 56 OR IN THE ALTERNATIVE  
TO DISMISS UNDER FRCP (9)(b)

Jury Trial Demanded

THIS MATTER comes before the court on the Motion to Dismiss

1 Counterclaims and Third Party Defendants under FRCP 12(b) (6) or in the  
2 alternative for summary judgment under FRCP 56 or in the alternative to dismiss  
3 under FRCP (9)(b) filed by Plaintiff James S. Gordon, Jr., the Court hereby finds as  
4 follows:  
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6  
7 1. The Plaintiff never authorized the Defendant to send the Plaintiff  
8 commercial electronic messages (spam).

9 2. All of the spam that form the basis of the Plaintiff's claims in this  
10 matter were sent by the Defendant after the Plaintiff had requested that the  
11 Defendant stop sending spam to the Plaintiff.

12 3. Even if the Defendant's assertion that the Third Party Defendants  
13 "actively and affirmatively solicited commercial emails for the sole purpose of  
14 filing multiple lawsuits arising out of the receipt of these commercial email  
15 messages" were true, such conduct does not form the basis of a cognizable claim  
16 for any of the five causes of action, captioned "fraud and deceit," "tortious  
17 interference with business relationships," "breach of contract," "injunctive relief,"  
18 and "indemnification and contribution," as set forth in the Defendant's claims  
19 against the Third Party Defendants.

20 4. Even if the Defendant's assertion that the Third Party Defendants  
21 "actively and affirmatively solicited commercial emails for the sole purpose of  
22 filing multiple lawsuits arising out of the receipt of these commercial email  
23 messages" formed the basis of a cognizable claim for the Defendant's claims  
24 captioned "fraud and deceit," "tortious interference with business relationships,"  
25 "breach of contract," "injunctive relief," and "indemnification and contribution" as  
26 set forth in the Defendant's claims against the Third Party Defendants, such claims

1 are defeated by the fact that all of the spam that form the basis of the Plaintiff's  
2 claims in this matter were sent by the Defendant after the Plaintiff had requested  
3 that the Defendant stop sending spam to the Plaintiff.

4 5. Even if the Defendant's assertion that the Plaintiff "actively and  
5 affirmatively solicited commercial emails for the sole purpose of filing multiple  
6 lawsuits arising out of the receipt of these commercial email messages" were true,  
7 such conduct does not form the basis of a cognizable claim for any of the five  
8 causes of action, captioned "fraud and deceit," "tortious interference with business  
9 relationships," "breach of contract," "injunctive relief," and "malicious  
10 prosecution," as set forth in the Defendant's counterclaims against the Plaintiff.

11 6. Even if the Defendant's assertion that the Plaintiff "actively and  
12 affirmatively solicited commercial emails for the sole purpose of filing multiple  
13 lawsuits arising out of the receipt of these commercial email messages" formed the  
14 basis of a cognizable claim for the Defendant's counterclaims captioned "fraud and  
15 deceit," "tortious interference with business relationships," "breach of contract,"  
16 "injunctive relief," or "indemnification and contribution" as set forth in the  
17 Defendant's counterclaims against the Plaintiff, such claims are defeated by the fact  
18 that all of the spam that form the basis of the Plaintiff's claims in this matter were  
19 sent by the Defendant after the Plaintiff had requested that the Defendant stop  
20 sending spam to the Plaintiff.

21 7. The Defendant's counterclaims against the Plaintiff titled "fraud and  
22 deceit" fail to comply with the requirements of FRCP 9(a).

23 8. The Defendant's claims against the Third Party Defendants captioned  
24 "fraud and deceit" fail to comply with the requirements of FRCP 9(a).

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26 **WHEREFORE, it is hereby ORDERED that:**

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- a. The Defendant’s claims against the Third Party Defendants captioned “fraud and deceit,” “tortious interference with business relationships,” “breach of contract,” “injunctive relief,” and “indemnification and contribution” each fail to state a claim upon which relief may be granted under FRCP 12(b)(6), and are therefore stricken.
- b. When the evidence is read in the light most favorable to the Defendant, the evidence cannot sustain any of the Defendant’s claims against the Third Party Defendants captioned, “fraud and deceit,” “tortious interference with business relationships,” “breach of contract,” “injunctive relief,” and “indemnification and contribution.” Accordingly, the Plaintiff’s request for Summary Judgment is granted, and the Defendant’s claims against the Third Party Defendants are dismissed with prejudice.
- c. The Defendant’s counterclaims against the Plaintiff captioned “fraud and deceit,” “tortious interference with business relationships,” “breach of contract,” “injunctive relief,” and “indemnification and contribution” each fail to state a claim upon which relief may be granted under FRCP 12(b)(6), and are therefore stricken.
- d. When the evidence is read in the light most favorable to the Defendant, the evidence cannot sustain any of the Defendant’s counterclaims against the Plaintiff, captioned “fraud and deceit,” “tortious interference with business relationships,” “breach of contract,” “injunctive relief,” and “indemnification and

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contribution.” Accordingly, the Plaintiff’s request for Summary Judgment is granted, and the Defendant’s counterclaims against the Plaintiff are dismissed with prejudice.

e. The Defendant’s counterclaims against the Plaintiff titled “fraud and deceit” fail to comply with the requirements of FRCP 9(a) and are therefore stricken.

f. The Defendant’s claims against the Third Party Defendants captioned “fraud and deceit” fail to comply with the requirements of FRCP 9(a) and are therefore stricken.

IT IS HEREBY ORDERED

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

\_\_\_\_\_  
HON. FRED VAN SICKLE  
UNITED STATES DISTRICT JUDGE

Presented by:

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