

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON, JR., an individual
residing in Benton County, Washington,

Plaintiff,

v.

IMPULSE MARKETING GROUP, INC., a Nevada
Corporation,

Defendant.

No. CV-04-5125-FVS

ORDER GRANTING MOTIONS
TO DISMISS THIRD-PARTY
DEFENDANTS'
COUNTERCLAIMS

IMPULSE MARKETING GROUP, INC.,

Third-Party Plaintiff,

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

Third-Party Defendants.

BEFORE THE COURT is Defendant/Third-Party Plaintiff Impulse Marketing's Motion to Dismiss Third-Party Defendants' Counterclaims (Ct. Rec. 320) and Motion to Dismiss Third-Party Defendants' Amended Counterclaims (Ct. Rec. 365). Impulse Marketing is represented by Floyd Ivey, Sean Moynihan and Peter Glantz. Third-Party Defendants are proceeding *pro se*.

BACKGROUND

On November 18, 2005, Impulse Marketing filed a Second Amended Third-Party Complaint ("SATC") against each of the Third-Party

1 Defendants. Third-Party Defendants did not file timely Answers, but
2 filed separate motions to dismiss the SATC. The Court denied those
3 motions to dismiss, holding that the SATC stated claims for
4 indemnity and contribution, breach of contract, tortious
5 interference with business relations, fraud and deceit and
6 injunctive relief. Thereafter, Third-Party Defendants answered the
7 SATC and asserted 15 identical counterclaims against Impulse
8 Marketing.¹ Impulse Marketing filed a motion to dismiss these
9 counterclaims. Without seeking permission from the Court, Third-
10 Party Defendants filed an Answer and Amended Counterclaims. Impulse
11 Marketing then filed a second Motion to Dismiss Third-Party
12 Defendants' Amended Counterclaims.

13 Third-Party Defendants assert the following counterclaims
14 against Impulse Marketing: (1) Intimidation of Witnesses in
15 violation of RCW 9A.72.110(1)(a) and Obstruction of Justice in
16 violation of 18 U.S.C. § 1514(c); (2) Fraud and related activity in
17 connection with electronic email in violation of 18 U.S.C. § 1037;
18 (3) violation of Washington's Anti-SLAPP Statute, RCW 4.24.510; (4)
19 Identity Theft in violation of RCW 9.35.005; (5) Harassment in
20 violation of RCW 10.14; (6) Promotional Advertising of Prizes in
21 violation of RCW 19.170; (7) Vicarious Liability, RCW 18.86.090, RCW
22 9A.08.010(1)(b)(c)(d), and RCW 9A.08.030(2); (8) Criminal
23 Impersonation in the First Degree in violation of RCW 9A.60.040; (9)

24
25 ¹ Third-Party Defendant Robert Pritchett only alleges the
26 first six (6) counterclaims, which are identical to the
counterclaims of every other Third-Party Defendant.

1 Unclean Hands and Estoppel and Cyberstalking in violation of RCW
2 9.61.260(1); (10) Libel in violation of RCW 9.58.010; (11) violation
3 of RICO statute, 18 U.S.C. § 96²; (12) violation of the Can-Spam Act,
4 15 U.S.C. § 7705³; (13) violation of Washington's Commercial
5 Electronic Mail Statute, RCW 19.190 et seq.; (14) violation of
6 Washington's Consumer Protection Act, RCW 19.86 et seq.; and (15)
7 Permanent Injunction.

8 Pursuant to Federal Rule of Civil Procedure 12(b), Impulse
9 Marketing requests the Court dismiss Third-Party Defendants'
10 counterclaims for failure to state a claim upon which relief can be
11 granted. Further, Impulse Marketing requests the Court impose
12 sanctions pursuant to Federal Rule of Civil Procedure 11(c).

13 **STANDARD OF REVIEW**

14 A complaint should not be dismissed for failure to state a
15 claim upon which relief may be granted under Federal Rule of Civil
16 Procedure 12(b)(6) unless it "appears beyond doubt that the
17 plaintiff can prove no set of facts in support of his claim which
18 would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46,
19 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). When the legal
20 sufficiency of a complaint's allegations are tested with a motion
21 under Rule 12(b)(6), "[r]eview is limited to the complaint."
22 *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993).

24 ² Third-Party Defendants withdrew their counterclaims for
25 violation of RICO statute, 18 U.S.C. 96.

26 ³ Third-Party Defendants withdrew their counterclaims for
violation of the Can-Spam Act, 15 U.S.C. § 7705.

1 All factual allegations set forth in the complaint are taken as true
2 and construed in the light most favorable to the plaintiff. *Epstein*
3 *v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). The Court
4 must give the plaintiff the benefit of every inference that
5 reasonably may be drawn from well-pleaded facts. *Tyler v. Cisneros*,
6 136 F.3d 603, 607 (9th Cir. 1998). "However, the court is not
7 required to accept legal conclusions cast in the form of factual
8 allegations as true if those conclusions cannot reasonably be drawn
9 from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d
10 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265,
11 286, 106 S.Ct. 2932, 2944, 92 L.Ed.2d 299 (1986)).

12 DISCUSSION

13 Obstruction of Justice in violation of 18 U.S.C. §1514(c)

14 Third-Party Defendants' original Answer and Counterclaims
15 alleged Impulse Marketing violated 18 U.S.C. § 1514(c), which
16 defines "harassment" for purposes of 18 U.S.C. § 1514, the federal
17 statute creating a civil action to prevent the harassment of a
18 victim or witness in a federal criminal case. Thus, technically,
19 Third-Party Defendants have not pled a violation of any statute, but
20 rather a violation of a definition. Further, 18 U.S.C. § 1514 is
21 inapplicable because this is not a criminal case. However, even if
22 they had pled a violation of an applicable statute creating a legal
23 remedy, Third-Party Defendants lack standing to bring such a claim.

24 The Court is not aware of any authority for permitting a
25 private individual to initiate a criminal prosecution in his own
26 name in United States District Court. Generally, a private party

1 has no right to enforce federal criminal statutes. See *Bass Angler*
2 *Sportsman Soc'y v. United States Steel Corp.*, 324 F.Supp. 412, 415
3 (D.Ala.) (outlining "the firmly established principle that criminal
4 statutes can only be enforced by proper authorities of the United
5 States Government and a private party has no right to enforce these
6 sanctions"), *aff'd*, 447 F.2d 1304 (5th Cir. 1971); *accord*, *Keenan v.*
7 *McGrath*, 328 F.2d 610, 611 (1st Cir. 1964); *Cok v. Cosentino*, 876
8 F.2d 1, 2 (1st Cir. 1989). Thus, Third-Party Defendants'
9 counterclaims for obstruction of justice are dismissed. For these
10 same reasons, the Court also dismisses Third-Party Defendants'
11 counterclaims under 18 U.S.C. § 1037, which criminalizes fraud and
12 related activity in connection with electronic email.

13 **Intimidation of Witnesses**

14 Third-Party Defendants' also assert counterclaims for
15 violations of RCW 9A.72.110(1)(a), which states that a "person is
16 guilty of intimidating a witness, if a person, by use of a threat
17 against a current or prospective witness, attempts to: (a) Influence
18 the testimony of that person; (b) Induce that person to elude legal
19 process summoning him or her to testify; (c) Induce that person to
20 absent himself or herself from such proceedings; or (d) Induce that
21 person not to report the information relevant to a criminal
22 investigation...." Intimidating a witness in violation of RCW
23 9A.72.110 is a Class B felony. RCW 9A.72.110(4).

24 Third-Party Defendants lack standing to assert a claim under
25 this criminal statute. See *Linda R.S. v. Richard D.*, 410 U.S. 614,
26 619, 93 S.Ct. 1146 (1973) (noting that a "private citizen lacks a

1 judicially cognizable interest in the prosecution or nonprosecution
2 of another"). In the State of Washington, if a private citizen is
3 unhappy about a public official's refusal to investigate or
4 prosecute criminal activity, the citizen has a right to petition the
5 Washington state superior court to summon a grand jury. RCW
6 10.27.030.⁴ Thus, Third-Party Defendants' counterclaims for
7 violations of RCW 9A.72.110 are dismissed because they lack standing
8 to assert claims under Washington's criminal code.⁵

9 **Washington's Anti-SLAPP Statute, RCW 4.24.510**

10 Third-Party Defendants assert counterclaims under RCW 4.24.510,
11 which is often characterized as Washington's anti-SLAPP statute.
12 SLAPP is an acronym for Strategic Lawsuits Against Public
13 Participation. *Gontmakher v. City of Bellevue*, 120 Wash.App. 365,
14 85 P.3d 926, 927 n.1 (Div. 1, 2004). The statute provides:

15 A person who communicates a complaint or information to
16 any branch or agency of federal, state, or local
17 government ... is immune from civil liability for claims
based upon the communication ... regarding any matter
reasonably of concern to that agency....

18 The purpose of anti-SLAPP statutes is to protect the First
19 Amendment right of citizens to petition the government for redress

21 ⁴ The Criminal Investigatory Act of 1971, RCW 10.27.030,
22 states that a grand jury shall be summoned by the superior court,
23 where the public interest so demands, whenever in its opinion
24 there is sufficient evidence of criminal activity or corruption
with in the country....

25 ⁵ In their response to Impulse Marketing's motion to dismiss
26 Third-Party Defendants' Answer and Amended Counterclaims, Third-
Party Defendants concede to the dismissal of all counterclaims
asserted under Washington's criminal code.

1 of grievances. *Reid v. Dalton*, 124 Wash.App. 113, 126, 100 P.3d 349
2 (Div. 3, 2004). The Anti-SLAPP statute protects "individuals who
3 make good-faith reports to appropriate governmental bodies" from the
4 threat of a "civil action for damages." RCW 4.24.500.

5 Third-Party Defendants allege they were sued by Impulse
6 Marketing because they were prospective witnesses in this lawsuit.
7 However, RCW 4.24.510 does not apply to Third-Party Defendants
8 because there is no showing that they are being sued for making
9 reports to "governmental bodies." Accordingly, Third-Party
10 Defendants' counterclaims under Washington's Anti-SLAPP statute are
11 dismissed.

12 **Identity Theft in violation of RCW 9.35.005**

13 Third-Party Defendants assert counterclaims for violation of
14 RCW 9.35.005, which sets forth the definitions for terms used in
15 Chapter 9.35 of the RCW, which is entitled "Identity Crimes." Thus,
16 technically, Third-Party Defendants have not pled a violation of any
17 statute, but rather a violation of a statutory definition. Even if
18 they had properly alleged a violation of RCW 9.35, the claim would
19 be dismissed because as explained previously by the Court, Third-
20 Party Defendants lack standing to institute claims under
21 Washington's criminal code. Accordingly, Third-Party Defendants'
22 counterclaims for violation of RCW 9.35 are dismissed.

23 **Harassment in violation of RCW 10.14**

24 Third-Party Defendants assert counterclaims against Impulse
25 Marketing for violation of RCW 10.14, which provides a mechanism for
26

1 obtaining a civil⁶ anti-harassment protection order. This Court is
2 not the proper forum for obtaining relief under RCW 10.14. See
3 *State v. Noah*, 103 Wash.App. 29, 38, 9 P.3d 858 (Div. 1, 2000)
4 (noting that RCW 10.14.150 provides Washington state district and
5 superior courts with concurrent jurisdiction over civil anti-
6 harassment orders). Further, Third-Party Defendants have not
7 complied with RCW 10.14.040, which provides the mechanism to
8 petition for an order for protection from unlawful harassment. To
9 obtain an order of protection under the anti-harassment statute, the
10 petition for relief "shall allege the existence of harassment and
11 shall be accompanied by an affidavit made under oath stating the
12 specific facts and circumstances from which relief is sought." RCW
13 10.14.040(1). Accordingly, Third-Party Defendants' counterclaims
14 under RCW 10.14 are dismissed because they have not complied with
15 the necessary procedural requirements and because this Court is not
16 the proper forum to petition for an order for protection under RCW
17 10.14.

18 **Promotional Advertising of Prizes, RCW 19.170.010**

19 Third-Party Defendants allege Impulse Marketing violated RCW
20 19.170.010 by falsely advertising prizes without meeting statutory
21 requirements "and by not fulfilling its obligations of the prizes
22 claimed to have been won by Plaintiff and Third-Party Defendants."
23 RCW 19.170.010 provides:

24 (1) The legislature finds that deceptive promotional

25 ⁶ Impulse Marketing mistakenly argues that RCW 10.14 is a
26 "criminal" statute.

1 advertising of prizes is a matter vitally affecting the
2 public interest for the purpose of applying the consumer
protection act, chapter 19.86 RCW.

3 (2) Deceptive promotional advertising of prizes is not
4 reasonable in relation to the development and preservation
of business. A violation of this chapter is an unfair or
5 deceptive act in trade or commerce for the purpose of
applying the consumer protection act, chapter 19.86 RCW, and
constitutes an act of deceptive advertising.

6 (3) This chapter applies to a promotion offer:

7 (a) Made to a person in Washington;

8 (b) Used to induce or invite a person to come to the state
of Washington to claim a prize ... or conduct any business
9 in [Washington]; or

10 (c) Used to induce or invite a person to contact by any means
a promoter, sponsor, salesperson, or their agent in
[Washington].

11 Impulse Marketing moves to dismiss these counterclaims on the basis
12 that Third-Party Defendants have not alleged "(1) what promotional
13 advertisements they have personally received; and (2) what
14 advertisements they have personally viewed."

15 The Court concludes that Third-Party Defendants have not
16 asserted any factual allegations supporting their counterclaims
17 under RCW 19.17.010. Therefore, these counterclaims claims are
18 dismissed with leave to renew if Third-Party Defendants can assert
19 sufficient factual allegations to state a claim for relief under RCW
19.17.010.

20 **Vicarious Liability, RCW 18.86.090**

21 Chapter 18.86 of the RCW is entitled "Real Estate Brokerage
22 Relationships" and is not applicable to the relationship between any
23 of the parties in this action. Moreover, RCW 18.86.090 simply sets
24 forth the definition of the term "vicarious liability" as it
25 pertains to real estate brokerage relationships. Thus, RCW
26 18.86.090 does not allege any specific statutory violation.

1 Accordingly, Third-Party Defendants' counterclaims under RCW
2 18.86.090 are dismissed.

3 **RCW 9A.08.010(1)(b)(c)(d), and RCW 9A.08.030(2)**

4 Third-Party Defendants also assert counterclaims under RCW
5 9A.08.010(1)(b)(c)(d) and RCW 9A.08.030(2) but the provisions
6 located in these statutory sections simply set forth definitions for
7 the general requirements of culpability under the Washington
8 Criminal Code. Thus, Third-Party Defendants' counterclaims under
9 these statutes are dismissed because the statutes don't specifically
10 create any liability. Furthermore, as the Court has already noted,
11 Third-Party Defendants lack standing to bring claims under
12 Washington's criminal code.

13 **Criminal Impersonation in violation of RCW 9A.60.040**

14 RCW 9A.60.040, makes "criminal impersonation" in the first-
15 degree a Class C Felony. As discussed previously, Third-Party
16 Defendants lack standing to institute criminal charges under
17 Washington's criminal code. Therefore, Third-Party Defendants'
18 counterclaims under RCW 9A.60.040 are dismissed.

19 **Unclean Hands and Estoppel**

20 The doctrine of unclean hands and estoppel may be asserted by
21 Third-Party Defendants as affirmative defenses, but are not separate
22 causes of action. Thus, their counterclaims for unclean hands and
23 estoppel are dismissed.

24 **Cyberstalking and Libel**

25 Third-Party Defendants assert counterclaims for cyberstalking,
26 in violation of RCW 9.61.260(1)(a)(b)(4)(5), and libel, in violation

1 of RCW 9.58.010. The Court determines that these counterclaims are
2 dismissed because Third-Party Defendants do not have standing to
3 assert claims under Washington's criminal code.

4 **RCW 19.190 & RCW 19.86**

5 Third-Party Defendants assert counterclaims under Washington's
6 Commercial Electronic Mail Statute, RCW 19.190 et seq., and
7 Washington's Consumer Protection Act, and RCW 19.86 et seq. "To
8 survive a motion to dismiss under Rule 12(b)(6), a complaint must
9 contain either direct or inferential allegations respecting all the
10 material elements to sustain a recovery under some viable legal
11 theory." *Advocacy Org. for Patients & Providers v. Auto Club Ins.*
12 *Ass'n*, 176 F.3d 315, 319 (6th Cir. 1999). "Although this standard
13 for Rule 12(b)(6) dismissals is quite liberal, more than bare
14 assertions of legal conclusions is ordinarily required to satisfy
15 federal notice pleading requirements." *Id.* Here, Third-Party
16 Defendants' counterclaims contain only the summary conclusion that
17 Impulse Marketing violated Washington's Anti-Spam statute, and
18 thereby violated Washington Consumer Protection Act. Third-Party
19 Defendants do not present any facts in their Answer and Amended
20 Counterclaims or their responsive pleading concerning the elements
21 required to prove violations of any of aforementioned statutes.
22 Thus, the Court dismisses these counterclaims with leave to renew if
23 Third-Party Defendants can assert sufficient factual allegations to
24 state a claim for relief under these statutes.

25 **Permanent Injunction**

26 Third-Party Defendants seek the issuance of a permanent

1 injunction. "One who seeks relief by temporary or permanent
2 injunction must show (1) that he has a clear legal or equitable
3 right, (2) that he has a well-grounded fear of immediate invasion of
4 that right, and (3) that the acts complained of are either resulting
5 in or will result in actual and substantial injury to him." *Kucera*
6 *v. Dept. of Transp.*, 140 Wash.2d 200, 209, 995 P.2d 63, 68 (2000)
7 (citation omitted). Third-Party Defendants' counterclaims for
8 permanent injunctions are dismissed for failure to plead factual
9 allegations with respect to any of the three required elements.

10 **Sanctions**

11 Impulse Marketing requests the Court to impose sanctions under
12 Rule 11 on the basis that Third-Party Defendants' counterclaims are
13 frivolous. Rule 11(c)(1)(A) provides strict procedural
14 requirements. To comply with those requirements, Impulse Marketing
15 was required to file a motion for sanctions under Rule 11 separately
16 from any other motions. *Id.* Further, Impulse Marketing was
17 required to serve its Rule 11 motion on Third-Party Defendants with
18 a demand that they retract or suspend their allegedly offending
19 behavior, and then allow at least 21 days before filing the Rule 11
20 motion. *Id.* Here, Impulse Marketing did not follow these
21 procedural requirements. It did not file a separate motion, but
22 included the request for sanctions under Rule 11 within its motion
23 to dismiss Third-Party Defendants' counterclaims. Therefore,
24 Impulse Marketing served and filed its Rule 11 motion on the same
25 day. The 21-day hold is a required prerequisite. *Radcliffe v.*
26 *Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001) (holding 21-

1 day safe harbor mandatory). Since Impulse Marketing failed to
2 follow the required procedure, it is not entitled to an award of
3 sanctions under Rule 11. Accordingly,

4 **IT IS HEREBY ORDERED** that Impulse Marketing's Motion to Dismiss
5 Third-Party Defendants' Counterclaims (**Ct. Rec. 320**) and Motion to
6 Dismiss Third-Party Defendants' Amended Counterclaims (**Ct. Rec. 365**)
7 are **GRANTED**. Third-Party Defendants' counterclaims are **DISMISSED**
8 **with leave to renew** their claims for Promotional Advertising in
9 violation of RCW 19.170.010, violations of Washington's Commercial
10 Electronic Mail Statute, RCW 19.190 et seq., Washington's Consumer
11 Protection Act, and RCW 19.86 et seq., and a permanent injunction if
12 Third-Party Defendants can assert sufficient factual allegations to
13 adequately state a claim upon which relief can be granted.

14 **IT IS SO ORDERED.** The District Court Executive is hereby
15 directed to enter this Order and furnish copies to counsel and to
16 the Third-Party Defendants proceeding *pro se*.

17 **DATED** this 19th day of May, 2006.

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