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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

MEMORANDUM OF LAW IN  
SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS  
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 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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## I. PRELIMINARY STATEMENT

Defendants Impulse Marketing Group, Inc. (“Impulse”), Jeffrey Goldstein (“Goldstein”) and Kenneth Adamson (“Adamson”) (collectively, “Defendants”), by and through their counsel, Klein, Zelman, Rothermel & Dichter, L.L.P., hereby submit this motion to dismiss Plaintiff’s First Amended Complaint (the “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).

## II. INTRODUCTION & PROCEDURAL HISTORY

This action was commenced by Plaintiff in his individual capacity by the filing of a summons and complaint on November 23, 2004 against Impulse (the “Original Complaint”). (Moynihan Decl. ¶ 2.) The Original Complaint, similar to the Amended Complaint, was rife with vague, ambiguous allegations that Impulse had violated “at least one” prohibition of RCW § 19.190, *et seq.* (collectively referred to as “CEMA”). (Moynihan Decl. ¶ 3.) In addition, Plaintiff’s allegations were and still are frequently separated by the term “and/or,” leaving Impulse to guess as to what provision of a particular statute, if any, it is alleged to have violated. (Am. Compl. ¶¶ 4.2.2, 4.3.2(a)-(e).) Plaintiff refuses, either in his pleadings or his discovery, to identify how Defendants allegedly violated CEMA, RCW § 19.86, *et seq.* (collectively referred to as “CPA”), 15 U.S.C. § 7701, *et seq.* (collectively referred to as “CAN-SPAM”) and/or RCW § 19.170, *et seq.* (collectively referred to as the “Prize Statute”). (Moynihan Decl. ¶ 10.) Further complicating matters, both the Original Complaint and the Amended Complaint fail to specify either a time frame during which such violations are alleged to have occurred, or the number of emails alleged to have been sent by Defendants in violation of CEMA, CPA, CAN-SPAM and/or the Prize Statute. (Moynihan Decl. ¶ 9.) Instead, Plaintiff employs terms ranging from “thousands of emails” (Am. Compl.

1 ¶ 4.1.1) to “numerous emails” (Am. Compl. ¶¶ 4.2.2, 4.2.3, 4.3.2) to “at least one (1)  
2 email” (Am. Compl. ¶ 4.1.3) to plead his case.

3 In an attempt to divine the precise allegations contained in Plaintiff’s Original  
4 Complaint, and the factual bases thereof, Impulse served its initial discovery requests  
5 on or about December 23, 2005. (Moynihan Decl. ¶ 4.) Plaintiff’s purported  
6 responses were so evasive and incomplete as to be considered non-responsive, and  
7 shed no light on the allegations contained in Plaintiff’s Original Complaint.<sup>1</sup>

8 (Moynihan Decl. ¶ 5.) To date, Plaintiff has steadfastly refused to properly respond to  
9 Impulse’s discovery requests, and has repeatedly reiterated that he will not disclose  
10 how Defendants allegedly violated the statutes; instead, telling Defendants to “figure it  
11 out” for themselves. (Moynihan Decl. ¶ 6.) Nearly two (2) years and over four  
12 hundred (400) docket entries after the filing of the Original Complaint (Moynihan  
13 Decl. ¶ 11), Defendants are still grasping at straws, attempting to determine both the  
14 number of emails that they are alleged to have sent and in what way, if at all, each  
15 unique email is alleged to have violated CEMA, CPA, CAN-SPAM and/or the Prize  
16 Statute. As discussed in this Part *supra*, this is all a part of Plaintiff’s scheme to avoid  
17 having to prove his case and instead to impose an enormous financial burden upon  
18 Defendants.

19 On or about June 13, 2006, Plaintiff filed his Amended Complaint (the subject  
20 of this motion) naming three (3) new defendants and adding new causes of action (the  
21 “Amended Complaint”).<sup>2</sup> (Moynihan Decl. ¶ 7.) Plaintiff disregards

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22  
23 <sup>1</sup>Impulse is in the process of preparing a motion to compel and anticipates filing such  
24 motion in the coming weeks, unless the Amended Complaint is dismissed in its entirety.

25 <sup>2</sup>To date, contrary to the requirements of LR 5.1(b), Plaintiff has failed to file with the Court  
26 affidavits evidencing service on the newly added individual defendants of the Summons and

1 Fed. R. Civ. P. 15 and attempts to sidestep this Court's specific order denying  
2 Plaintiff's request to add new plaintiffs (Order Granting in Part & Den. in Part Pl.'s  
3 Mot. Am. Compl., May 2, 2006) by changing the caption from "James S. Gordon, Jr.,  
4 an individual" to add "James S. Gordon, Jr., a married individual d/b/a  
5 'gordonworks.com.'" In his motion to amend the Original Complaint, Plaintiff never  
6 even sought leave of the court pursuant to Fed. R. Civ. P. 15 to add the alleged trade  
7 name Gordonworks.com as a plaintiff. (Moynihan Decl. ¶ 8.) In addition to is  
8 blatantly ignoring the requirements of Fed. R. Civ. P. 15, Plaintiff is disregarding the  
9 specific order of this Court. Plaintiff may not, in direct contradiction to the Court's  
10 order and Fed. R. Civ. P. 15, attempt to bring new causes of action against  
11 Defendants on behalf of an alleged d/b/a for which he failed to seek leave to add in  
12 the first place. Further, upon information and belief, such d/b/a is not properly  
13 registered as a trade name with the State of Washington Department of Licensing  
14 (Moynihan Decl. ¶ 8), and therefore, as discussed *supra* Part III.B, Plaintiff is not  
15 entitled to maintain an action in the State of Washington on behalf of unregistered  
16 d/b/a, Gordonworks.com.

17 Gordon is a professional plaintiff, whose tendency to exaggerate the facts has  
18 already been noted by one court.<sup>3</sup> (Moynihan Decl. ¶ 13; Ex. B.) Even Plaintiff  
19 himself admitted on his website that he has "developed a system that shifts the  
20 'financial' burden from [himself] back to those who choose to send [him] spam."  
21 (Moynihan Decl. ¶ 14 Ex. C.) This scheme or "system" is further evidenced by the  
22

23 \_\_\_\_\_  
Amended Complaint.

24 <sup>3</sup>In a footnote to his May 24, 2006 Order in Gordon v. Virtumundo, Inc. Case No. CV06-  
25 0204JCC, Judge Coughenour, of the Western District of Washington, noted Plaintiff's "tendency to  
26 exaggerate claims in its briefing."

1 fact that, upon information and belief, Plaintiff, has filed no less than eleven (11)  
2 lawsuits, not including the present action, against email marketers since 2004.  
3 (Moynihan Decl. ¶ 15.) Upon information and belief, his victims include: eFinancial;  
4 Insurance Only; Ascentive; Virtumundo, Inc.; Commonwealth Marketing Group, Inc.;  
5 Smart Bargains; American Homeowners Association; Theodore Hansson Co.; Ride  
6 Marketing Group, LLC; Video Processor and Kraft Foods. Plaintiff's modus  
7 operandi is to file vague and ambiguous pleadings and to serve evasive and incomplete  
8 discovery responses in an attempt to either coerce email marketers into a monetary  
9 settlement (which he can then use as a war chest to litigate against yet another  
10 potentially innocent email marketer), or to engage email marketers in protracted  
11 litigation, forcing them to incur significant legal fees to their detriment in defense of  
12 the action.

### 14 III. LEGAL ARGUMENT

#### 15 A. Plaintiff Failed to Comply with the Court's Order Denying His 16 Request to Add New Plaintiffs by Adding "d/b/a 'Gordonworks.com'"

17 On or about May 2, 2006 this Court granted in part and denied in part  
18 Plaintiff's motion to amend the Original Complaint. (Moynihan Decl. ¶ 7.) In its  
19 order, the Court specifically denied Plaintiff's request to add new plaintiffs to the  
20 action. (Order Granting in Part & Den. in Part Pl.'s Mot. Am. Compl., May 2, 2006.)  
21 Nonetheless, Plaintiff simply ignores the Court, attempting to sidestep the Court's  
22 prior order by unilaterally changing the caption to read "d/b/a Gordonworks.com" in  
23 a futile attempt to transform his website into a plaintiff in the action. Further,  
24 contrary to the requirements of Fed. R. Civ. P. 15, Plaintiff, in his motion to amend  
25 the Original Complaint, never sought leave of the Court to add "d/b/a  
26 Gordonworks.com" as a plaintiff in the action. Such blatant disregard of the Federal

1 Rules and an order of this Court, and such deliberately improper tactics should not be  
2 rewarded, and each of Gordon's causes of action asserted on behalf of  
3 Gordonworks.com must be dismissed.

4  
5 B. Plaintiff Lacks Standing to Bring an Action  
6 on Behalf of an Unregistered d/b/a (Trade Name)

7 Assuming *arguendo* that Gordon had been permitted by this Court to add new  
8 plaintiffs to the action (which as discussed in Part III.A *infra* he clearly was not),  
9 Gordon failed to properly register Gordonworks.com as a d/b/a ("trade name") as  
10 required by the State of Washington Department of Licensing. (Moynihan Decl. ¶ 8.)  
11 "Each person . . . who shall carry on, conduct or transact business in this state under  
12 any trade name shall register that trade name with the department of licensing . . . ."  
13 RCW § 19.80.010(1). Pursuant to RCW § 19.80.040, one must register a trade name in  
14 order to maintain a lawsuit on behalf of said business. In short, in light of the  
15 statutory provisions governing the registration of trade names, Gordonworks.com  
16 does not exist as a legal entity. Therefore, James S. Gordon, Jr. may not maintain an  
17 action in the State of Washington on behalf of unregistered trade name,  
18 Gordonworks.com. As a result, the Court should dismiss each of Plaintiff's causes of  
19 action asserted on behalf of Gordonworks.com.

20  
21 C. Plaintiff Lacks Standing to Bring a Cause of Action as  
22 an "Interactive Computer Service" Under CEMA and CPA

23 As an individual, James S. Gordon, Jr. clearly does not qualify as an "interactive  
24 computer service" under CEMA. CEMA defines an "interactive computer service" as  
25 "any information service, system, or access software provider that provides or enables  
26 computer access by multiple users to a computer server, including specifically a service  
27 or system that provides access to the internet and such systems operated or services

1 offered by libraries or educational institutions.” RCW § 19.190.010(5). In addition to  
2 defining an “interactive computer service,” CEMA was later amended to define the  
3 terms “Internet domain name” and “web page.” RCW § 19.190.010(5); RCW §  
4 19.190.010(14). By providing distinct definitions for each term, the plain language of  
5 the statute clearly states the legislative intent that an interactive computer service is  
6 neither an Internet domain name, nor a web page. Therefore, neither Gordon, the  
7 individual, nor the Internet domain name Gordonworks.com qualifies as an interactive  
8 computer service, as defined by CEMA.

9 In light of the foregoing, Plaintiff does not have statutory standing to assert his  
10 Second and Third Causes of Action, except perhaps as an individual “recipient of a  
11 commercial electronic mail message.” RCW § 19.190.040(1). Although the term  
12 “recipient” is undefined in CEMA, the definition provided in CAN-SPAM is  
13 instructive. Under CAN-SPAM, the “recipient” of a commercial email message is  
14 defined as the “authorized user of the electronic mail address to which the message  
15 was sent or delivered.” 15 U.S.C. § 7702(14). Thus, Gordon only has standing, if at  
16 all, to bring his Second and Third Causes of Action based on emails sent to his  
17 personal email address pursuant to RCW § 19.190.040(1), and his Second and Third  
18 Causes of Action brought pursuant to RCW § 19.190.040(2) should be otherwise  
19 dismissed.

20  
21 D. Plaintiff Lacks Standing to Bring a Cause of Action Under CAN-SPAM

22 CAN-SPAM adopts the definition provided in Section 231(e)(4) of the  
23 Communications Decency Act of 1934 (the “CDA”), which defines “internet access  
24 service” as “a service that enables users to access content, information, electronic mail  
25 or other services offered over the Internet, and may also include access to proprietary  
26 content, information, and other services as part of a package of services offered to

1 consumers.” 47 U.S.C. § 231(e)(4); see 15 U.S.C. § 7702(11). Common sense dictates  
2 that James S. Gordon, Jr., an individual person, clearly is not an internet access service  
3 as contemplated under CAN-SPAM.

4 “CAN-SPAM gives a private right of action to only ISPs . . . [t]here is no  
5 private right of action for individuals.” Kevin P. Cronin & Ronald N. Weikers, Data  
6 Security & Privacy Law: Combating Cyberthreats § 9:47:110 (2006). Similarly, there is  
7 no private right of action for Internet domain names, such as Gordonworks.com.  
8 Other than the limited instances in which ISPs may bring an action under CAN-  
9 SPAM, the provisions of CAN-SPAM are to be enforced by the Federal Trade  
10 Commission (“FTC”). 15 U.S.C. § 7706(a). Commonly known ISPs who have been  
11 permitted to assert causes of action under CAN-SPAM include AOL, Microsoft and  
12 Earthlink. Plaintiff, an individual, clearly cannot be categorized with the likes of  
13 AOL, Microsoft and/or Earthlink, and is not an internet access service (ISP) within  
14 the meaning of CAN-SPAM. In light of the foregoing, Plaintiff’s First Cause of  
15 Action fails in its entirety because there is no private right of action for individuals  
16 and/or Internet domain names under CAN-SPAM. Therefore, Plaintiff’s First Cause  
17 of Action should be dismissed with prejudice.

18  
19 E. Plaintiff Fails to State a Claim and Lacks  
20 Standing to Bring an Action Under the Prize Statute

21 In his Fourth Cause of Action, Plaintiff makes a blanket allegation that  
22 “numerous email advertisements . . . which Defendants transmitted to Plaintiff . . .  
23 violated [the Prize Statute].” (Am. Compl. ¶ 4.3.2.) Plaintiff then proceeds to parrot  
24 the requirements of RCW § 19.170.030, inserting “and/or” in between each and every  
25 subsection, leaving Defendants clueless as to which, if any, requirement they are  
26 alleged to have violated. Similarly, Plaintiff parrots the requirements of RCW §

1 19.170.040 and simply states that Defendants failed to comply with each subsection.  
2 Nowhere in his Fourth Cause of Action does Plaintiff allege that he suffered any  
3 damage from the alleged violation(s), or that he even read or responded to any of the  
4 emails alleged to include promotional advertising. The standing requirement to bring  
5 a private cause of action under the Prize Statute is specifically stated therein: “[a]  
6 person who suffers damage from an act of deceptive promotional advertising may  
7 bring an action against the sponsor or promotion of the advertising, or both.” RCW §  
8 19.170.060(1) (emphasis added). According to the plain language of the statute,  
9 Plaintiff, who does not allege to have suffered any damage as a result an alleged act of  
10 deceptive advertising, clearly fails to satisfy the standing requirement enumerated in  
11 RCW § 19.170.060(1). In light of the foregoing, Plaintiff’s Fourth Cause of Action  
12 should be dismissed with prejudice.

13  
14 F. Plaintiff Fails to State a Claim Against Goldstein and/or Adamson

15 Plaintiff is mistaken in his pleading. Contrary to the allegations contained  
16 paragraph 1.5 of the Amended Complaint, Adamson is neither an officer, director, nor  
17 majority shareholder of Impulse. (Adamson Decl. ¶ 7.) Rather, Adamson is a mere  
18 employee of Impulse, and does not control Impulse’s policies and/or practices.  
19 (Adamson Decl. ¶ 8.) As an employee, it is improper and contrary to law to attempt  
20 to pierce the corporate veil in order to hold an individual employee liable in this  
21 action. As such, any causes of action against Adamson must be dismissed with  
22 prejudice.

23 Even assuming *arguendo* that it is proper to pierce the corporate veil in order to  
24 hold an individual employee liable, Plaintiff fails to establish the elements necessary in  
25 order to pierce the corporate veil. In order to pierce the corporate veil, two separate,  
26 essential facts must be established: plaintiff “must demonstrate that the corporate

1 form was used to violate or evade a duty, and [second,] that [the corporate form] must  
2 be disregarded to prevent loss to an innocent party.” Wash. Water Jet Workers  
3 Assoc., et al. v. Yarbrough, 151 Wash. 2d 470, 503 (2004) (citing Meisel v. M & N  
4 Modern Hydraulic Press Co., 97 Wash. 2d 403, 409-10 (1982)); see Dickens v. Alliance  
5 Analytical Labs, LLC, 127 Wash. App. 433, 440-41 (2005). The first factor typically  
6 involves “fraud, misrepresentation, or some form of manipulation of the corporation  
7 to the stockholder’s benefit and creditor’s [plaintiff’s] detriment.” Meisel, 97 Wash.  
8 2d at 410 (quoting Truckweld Equip. Co. v. Olson, 26 Wash. App. 638, 645 (1980));  
9 see Strandley v. CNS Ins. Cos., 93 Wash. App. 1022 (1998); see also Dole Food Co.  
10 v. Patrickson, 538 U.S. 468, 475 (2003) (“The doctrine of piercing the corporate veil is  
11 the rare exception, applied in the case of fraud or certain other exceptional  
12 circumstances . . .”). In the case at bar, the Court has already ruled that the  
13 underlying CEMA claims do not sound in fraud.<sup>4</sup> (Order Den. Def.’s Mot. Dismiss,  
14 July 11, 2005 at 13.) Applying the Court’s line of reasoning to CAN-SPAM and the  
15 Prize Statute, one must conclude that claims asserted under CAN-SPAM and/or the  
16 Prize Statute are also not claims involving fraud. With regard to the second factor,  
17 “wrongful corporate activities must actually harm the party seeking relief so that  
18 disregard is necessary. Intentional misconduct must be the cause of the harm that is  
19 avoided by disregard.” Meisel, 97 Wash. 2d at 410 (1980); see Strandley, 93 Wash.  
20 App. 1022 (1998).

21 In Water Jet, plaintiff named the owners of a defendant corporation but failed  
22 to claim a specific wrongdoing against such owners. The trial court dismissed the  
23 claims against the individual owners, finding that plaintiff had an opportunity to  
24

25 <sup>4</sup>If the Court, however, finds that such claims do sound in fraud, then Plaintiff’s pleading is  
26 held to the heightened pleading requirements of Fed. R. Civ. P. 9(b).

1 submit facts to demonstrate that the corporate form had been abused and that  
2 piercing the corporate veil was justified and plaintiff failed to do so. Water Jet, 151  
3 Wash. 2d at 503 (2004). On appeal, the Supreme Court of the State of Washington  
4 affirmed the trial court's decision, concluding that dismissal of the claims against the  
5 individual owners was appropriate based on a failure to state a claim. Id.

6 The foregoing facts in Water Jet parallel those of the case at bar. Plaintiff  
7 simply recites that each of the individual defendants is "an officer, director, and/or  
8 majority shareholder of Impulse, and as such controls its policies, activities, and  
9 practices, including those alleged herein on behalf of Impulse." (Am. Compl. ¶¶ 1.3,  
10 1.4, 1.5.) "Piercing the corporate veil is an equitable remedy imposed to rectify an  
11 abuse of the corporate privilege." Dickens 127 Wash. App. at 440 (2005). Plaintiff  
12 does not allege that the individual defendants have abused the corporate privilege, nor  
13 has he alleged that Impulse is a sham corporation or that the corporation is an alter  
14 ego of any or all of the individual defendants. Even accepting the allegations  
15 contained in the Amended Complaint as true, nowhere in the Amended Complaint  
16 does Plaintiff attempt to incorporate any factual averments or circumstances in  
17 support of the two essential burdens of proof required to pierce the corporate veil—  
18 specifically, that the corporate form was used to violate or evade a duty and that the  
19 failure to hold the individuals liable would result in a loss to Plaintiff. Thus, as in  
20 Water Jet, the dismissal of Plaintiff's causes of action against Goldstein and Adamson  
21 is also appropriate based on the failure of Plaintiff to state a claim.

22  
23 G. Plaintiff Fails to Establish that Personal  
24 Jurisdiction Exists Over Goldstein and/or Adamson

25 Plaintiff bears the burden of establishing personal jurisdiction over a defendant.  
26 See Hirsch v. Blue Cross, Blue Shield of Kan., 800 F.2d 1474, 1477 (9th Cir. 1986);

1 Cognigen Networks v. Cognigen Corp., 174 F.Supp.2d 1134, 1137 (W.D. Wash. 2001)  
2 (On defendant's motion to dismiss for lack of personal jurisdiction, it is the plaintiff's  
3 burden to show that jurisdiction is proper); Langlois v. Deja Vu, Inc., 984 F.Supp.  
4 1327, 1332 (W.D. Wash. 1997) (plaintiff bears the burden of proving that jurisdiction  
5 exists as to each out-of-state defendant (emphasis added)). The Ninth Circuit Court  
6 of Appeals has held that through the presentation of affidavits and discovery  
7 materials, plaintiffs must prove a prima facie case of jurisdiction as to each and every  
8 out-of-state defendant. Brand v. Menlove Dodge, 746 F.2d 1070, 1072 (9th Cir.  
9 1986); see also Langlois, 984 F.Supp. at 1332-33 (W.D. Wash. 1997).

10 In order to exercise personal jurisdiction, a court must find that a defendant has  
11 a threshold level of "minimum contacts" with the forum state such that "traditional  
12 notions of fair play and substantial justice" are not offended. See Int'l Shoe Co. v.  
13 Wash., 326 U.S. 310, 316 (1945); see Burger King Corp. v. Rudzewicz, 471 U.S. 462,  
14 474 (1985). If a defendant has a continuous and systematic presence in the forum  
15 state, the court has "general jurisdiction" over the defendant; if the claim arises out of  
16 the defendant's forum directed activities, the court may exercise "specific jurisdiction"  
17 can be asserted over the defendant within the forum. See Helicopteros Nacionales de  
18 Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984). Based upon the allegations contained  
19 in the Amended Complaint, it appears that Plaintiff does not allege that the Court has  
20 general jurisdiction over Goldstein and/or Adamson.

21 The determination as to the existence of specific jurisdiction is made by looking  
22 to Washington's long-arm statute, RCW § 4.28.185. In order to exercise specific  
23 jurisdiction over a non-resident defendant under the Constitution and RCW §  
24 4.28.185, the courts of Washington have applied a three-part test: (1) the nonresident  
25 defendant must do some act or consummate some transaction with the forum or  
26 perform some act by which he purposefully avails himself of the privilege of

1 conducting activities in the forum, thereby invoking the benefits and protections of  
2 the forum's laws; (2) the claim must be one which arises out of or results from the  
3 defendant's forum-related activities; and (3) the exercise of jurisdiction must be  
4 reasonable. Omeluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 270 (9th Cir.  
5 1995). A defendant purposefully avails himself of the benefits of the forum if he has  
6 deliberately "engaged in significant activities within a state or has created 'continuing  
7 obligations' between himself and the residents of the forum, and the cause of action  
8 arises out of those obligations. Burger King Corp., 471 U.S. 475- 76 (1985).

9 Plaintiff's claims in the Amended Complaint are based upon his faulty assumption that  
10 Goldstein and Adamson sent emails to Gordon, a Washington resident, or that emails  
11 Gordon received were "from or on behalf of defendants." (Am. Compl. 4.1.1.) When  
12 in fact, no emails were sent by Goldstein and Adamson individually, and certainly no  
13 emails received by Plaintiff were "from or on behalf of" Goldstein and Adamson  
14 individually. (Goldstein Decl. ¶ 6; Adamson Decl. ¶ 6.) Even assuming *arguendo* that  
15 an email was sent to Plaintiff, any such email would have been sent by or on behalf of  
16 a corporation, and not the individuals themselves. Further, as discussed *infra* Part  
17 III.F, Adamson is neither an officer, director, nor majority shareholder of Impulse,  
18 and does not authorize or direct Impulse's activities. (Adamson Decl. ¶ 7.) Finally,  
19 both Goldstein and Adamson are residents of the State of Georgia, and neither  
20 individual owns property, maintains business or personal bank accounts or regularly  
21 transacts business in the State of Washington. (Goldstein Decl. ¶¶ 3-5; Adamson  
22 Decl. ¶¶ 3-5.) Thus, neither individual has purposefully availed himself of the benefits  
23 of the forum by engaging in significant activities within the State of Washington or by  
24 creating continuing obligations between themselves and Washington State residents.  
25 Therefore, Plaintiff has failed to prove that jurisdiction exists as to each out-of-state  
26 defendant. As a result, the Court should decline to exercise personal jurisdiction over

1 Goldstein and Adamson, and should dismiss the Amended Complaint as to Goldstein  
2 and Adamson.

3  
4 H. Plaintiff's Amended Complaint Should be Dismissed  
5 Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim

6 Even assuming *arguendo* that Plaintiff had standing to bring any of his causes of  
7 action, he has failed to satisfy the basic pleading requirements of CR 8(a) and Fed. R.  
8 Civ. P. 8(a). The Original Complaint, discussed *infra* Part I, consisted of vague and  
9 ambiguous blanket allegations that Defendant violated “at least one” provision of  
10 CEMA. (Compl. ¶¶ 3.7, 3.9 and 3.12.) Now again the Amended Complaint suffers  
11 from the same vagueness and ambiguity. For example, Plaintiff alleges that  
12 “Defendants” sent anywhere from “at least one” to “thousands” of emails in violation  
13 of CEMA (and CPA), and/or CAN-SPAM and/or the Prize Statute.

14 In order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a  
15 “complaint must contain either direct or inferential allegations respecting all the  
16 material elements to sustain a recovery under some viable legal theory.” Roe v. Nev.,  
17 332 F. Supp. 2d 1331, 1339 (D. Nev. 2004) (citing Scheid v. Fanny Farmer Candy  
18 Shops, Inc., 859 F.2d 434 (6<sup>th</sup> Cir. 1988). Although factual allegations set forth in the  
19 complaint “taken as true and construed in the light most favorable to [p]laintiffs”, the  
20 Ninth Circuit has elaborated on this rule, explaining that “courts should only accept as  
21 true the well-pleaded facts, and ignore ‘legal conclusions,’ ‘unsupported conclusions,’  
22 ‘unwarranted inferences,’ ‘unwarranted deductions,’ ‘footless conclusions of law’ or  
23 ‘sweeping legal conclusions cast in the form of factual allegations.’” Id. (emphasis  
24 added) (citing Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9<sup>th</sup> Cir. 1996);  
25 quoting W. Mining Council v. Watt, 643 F.2d 618, 624 (9<sup>th</sup> Cir. 1981)).

26 As Plaintiff himself points out, each alleged email constitutes a separate

1 transaction and therefore a separate claim. (See Am. Compl. ¶¶ 4.2.4, 4.2.5.)  
 2 Notwithstanding the foregoing, Plaintiff fails to identify anywhere in his pleading the  
 3 number of emails alleged to have been sent by Defendants in violation of each  
 4 separate and distinct provision of the aforementioned statutes. (Am. Compl. ¶¶ 4.1.1-  
 5 4.1.6, 4.2.2, 4.2.3, 4.3.2). Further, Plaintiff fails to separate each allegation made on  
 6 behalf of Gordonworks.com from those allegations asserted by the recipient of an  
 7 email. Rather, Gordon simply lumps his claims on behalf of unregistered trade name  
 8 Gordonworks.com together with his claims arising out of being an individual recipient  
 9 of email, alleging collectively that “Defendants” transmitted emails to “Plaintiff.” (See  
 10 Am. Compl. ¶¶ 4.2.3, 4.3.2.) Plaintiff even fails to identify a time the time frame  
 11 during which such alleged violations are alleged to occur.<sup>5</sup>

12 Plaintiff’s entire Amended Complaint consists of precisely those “facts” which  
 13 courts in the Ninth Circuit have suggested they should ignore— sweeping legal  
 14 conclusions that Defendants have violated CEMA, CPA, CAN-SPAM and/or the  
 15 Prize Statute, cast in the form of factual allegations. There are virtually no “well-  
 16 pleaded” facts for the Court to accept as true. Without limiting the foregoing,  
 17 Defendants address the following specific deficiencies and unsupported conclusions,  
 18 *inter alia*, in the order in which they appear in Plaintiff Amended Complaint:

- 19 • Plaintiff fails to distinguish between alleged violations by the  
 20 individual defendants and alleged violations by the corporate  
 21 defendant;

22 \_\_\_\_\_  
 23 <sup>5</sup>In the absence of such basic information, Defendants are unable to determine, *inter alia*,  
 24 whether they are entitled to assert a statute of limitations defense. Based upon Plaintiff’s Amended  
 25 Complaint it is unclear when the emails in question were sent, and is therefore possible that they  
 26 were sent before the enactment of the statutory provisions Plaintiff seeks to enforce.

- 1 • Plaintiff states that he has received “thousands of commercial  
2 email messages from or on behalf of Defendants, sent to  
3 Plaintiff’s electronic mail server<sup>6</sup> located in Benton and Franklin  
4 Counties, Washington, and/or its registered domain names,  
5 including ‘gordonworks.com’ in violation of<sup>7</sup> CAN-SPAM (Am.  
6 Compl. 4.1.1), but fails to identify the registered domain names  
7 alleged to have received emails, the specific email addresses  
8 alleged to have received the emails, the provision of CAN-SPAM  
9 alleged to have been violated or the factual basis for his  
10 conclusion that each or any email received violated any provision  
11 of CAN-SPAM;
- 12 • Plaintiff alleges that his unsubscribe requests “went unheeded for  
13 a substantial amount of time” (Am. Compl. 4.1.2), but fails to  
14 identify the email address(es) on behalf of which such requests  
15 were sent, to whom such requests were sent and for how long  
16 such requests allegedly “went unheeded” or the email from which  
17

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18 <sup>6</sup>Although Plaintiff claims in this action to own the server, in a separate action against  
19 Virtumundo, Inc. Gordon stated that the server on which Gordonworks.com resides is owned by  
20 third party Omni Innovations, LLC. However, in actuality, the domain Gordonworks.com is, upon  
21 information and belief, hosted by Webmasters.com, on a server located in Tampa, Florida.  
22 (Moynihan Decl. ¶ 12; Ex B.) In addition, upon information and belief, the internet domain server  
23 ns.gordonworks.com has been assigned by the registrar, Go Daddy Software, Inc., the Internet  
24 Protocol (“IP) address 68.178.150.119, and this IP address is believed to be located in Scottsdale,  
25 Arizona. (Moynihan Decl. ¶ 12; Ex. B.)  
26

1 the request arose;

- 2 • Plaintiff vaguely alleges that “at least one” email was sent by  
3 Defendants to an address “most likely harvested from domain  
4 name registration and/or by other means of anonymous  
5 information harvesting.” (Am. Compl. 4.1.3). It is unclear from  
6 this statement whether Plaintiff is even alleging that he believes  
7 Defendants harvested “an address.” Further, Plaintiff fails to  
8 identify the email address alleged to have been harvested or the  
9 facts supporting his conclusion that such email address was  
10 harvested.

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

17  
18 I. If the Amended Complaint is not Dismissed, Plaintiff Should be Required  
19 to Provide a More Definite Statement Pursuant to Fed. R. Civ. P. 12(e)

20 With the filing of the Amended Complaint, Plaintiff continues his pattern of  
21 filing vague and ambiguous pleadings. “If a pleading to which a responsive pleading  
22 is permitted is so vague or ambiguous that a party cannot reasonably be required to  
23 frame a responsive pleading, or if more particularity in the pleading will further the  
24 economical disposition of the case, the party receiving the pleading may move for a  
25 more definite statement before serving a responsive pleading.” CR 12(e); see Fed. R.  
26 Civ. P. 12(e) (emphasis added). Although notice pleading requires only that the

1 complaint contain a short and plain statement showing that the plaintiff is entitled to  
2 relief (CR 8(a); Fed. R. Civ. P. 8(a)), this does not dispense with the necessity, as  
3 occasion may require, for a statement of certain details which would enable the  
4 defendant more readily to prepare and file a responsive pleading. Fed. Proc. § 62:421  
5 (2006). In fact, unless facts are “simply and concisely stated in lucid fashion, and  
6 support [plaintiff’s] conclusion” the action fails. Washburn, et al. v. Moorman Mfg.  
7 Co., 25 F.Supp. 546, 546 (S.D. Cal. 1938).

8 Nowhere in the Amended Complaint does Plaintiff simply and concisely state  
9 in lucid fashion the facts supporting, *inter alia*, the number of emails alleged to have  
10 been sent by Defendants to Plaintiff or his belief that Defendants are responsible for  
11 sending the alleged emails to Plaintiff. As outlined in Part III.H *infra*, Plaintiff’s  
12 Amended Complaint is intentionally replete with vague and ambiguous allegations.  
13 To date, as a result of Plaintiff’s improper pleading, nearly two (2) years into the  
14 action and over four hundred (400) docket entries later, Defendants are no closer to  
15 being able to identify and defend the specific allegations being lodged against them.  
16 (Moynihan Decl. ¶11.) As a result, Plaintiff’s action should fail under the court’s  
17 analysis in Washburn. However, if the Court does not dismiss the action, Plaintiff  
18 should be required to provide a more definite statement.

19 In order to interpose a responsive pleading and to further the economical  
20 disposition of the case, if necessary following this motion to dismiss, Defendants  
21 require, at a minimum, the following additional details: the number of emails alleged  
22 to have been sent in violation of each separate and distinct provision of CEMA and  
23 CPA, CAN-SPAM and RCW § 19.170, *et seq.*; the manner in which each email is  
24 alleged to have violated any subsection of the aforementioned statutes (e.g., deceptive  
25 subject line, etc.); to what specific email addresses each email is alleged to have been  
26 sent; which claims are being asserted against the individuals and which claims are

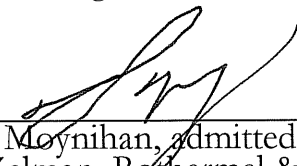
1 being asserted against the corporate defendant; which claims are being asserted by  
2 Plaintiff as an (alleged) interactive computer service, and which claims are being  
3 asserted by Plaintiff as a recipient of an allegedly violative email.

4 In sum, if Plaintiff's action is not dismissed, Plaintiff should be required to  
5 state for each and every email: 1) the email address to which it was sent; 2) the date  
6 on which it was sent; 3) the specific ways in which the email is alleged to violate any  
7 provision of any statute and the factual basis or bases for such a conclusion; 4) the  
8 factual basis upon which Plaintiff bases his conclusion that the email was sent or  
9 initiated by or on behalf of a particular Defendant.

10  
11 **IV. CONCLUSION**

12 In light of the foregoing arguments, Plaintiff's Amended Complaint should be  
13 dismissed in its entirety or, at a minimum, Plaintiff should be required to provide a  
14 more definite statement pursuant to Fed. R. Civ. P. 12(e). Defendants respectfully  
15 request that the Court: 1) dismiss Plaintiff's First Amended Complaint with  
16 prejudice, and award Defendants their costs and fees incurred in responding to  
17 Plaintiff's First Amended Complaint; or 2) grant Defendants' motion for a more  
18 definite statement, and award Defendants their costs and fees incurred in responding  
19 to Plaintiff's First Amended Complaint.

20 RESPECTFULLY SUBMITTED, this 31<sup>st</sup> day of August, 2006.

21  
22 By:   
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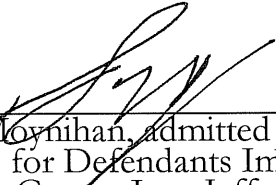
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Certificate of Service

I, hereby, certify that on August 31, 2006, I electronically filed this pleading with this Court. The Clerk of the Court will provide electronic notification system using the CM/ECF, which will send an electronic copy of: 1) Notice of Hearing of Defendants' Motion to Dismiss or, in the Alternative, for a More Definite Statement; 2) Defendants' Motion to Dismiss or, in the Alternative, for a More Definite Statement; 3) Proposed Order Dismissing the First Amended Complaint; 4) Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for a More Definite Statement; and 5) Declarations of Sean A. Moynihan, Esq., Jeffrey Goldstein and Kenneth Adamson in Support of Defendants' Motion 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 and Emily Abbey.



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

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