

1 Liebler, Ivey, Conner, Berry & St. Hilaire
2 By: Floyd E. Ivey
3 1141 N. Edison, Suite C
4 P.O. Box 6125
5 Kennewick, Washington 99336
6 Local Counsel for Defendant/Third-Party Plaintiff
7 Impulse Marketing Group, Inc.

8 Klein, Zelman, Rothermel & Dichter, L.L.P.
9 By: Sean A. Moynihan & Peter J. Glantz
10 485 Madison Avenue
11 New York, New York 10022
12 Telephone Number (212) 935-6020
13 Facsimile Number (212) 753-8101
14 Attorneys for Defendant/Third-Party Plaintiff
15 Impulse Marketing Group, Inc.

16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE EASTERN DISTRICT OF WASHINGTON**
18 **AT RICHLAND**

19 JAMES S. GORDON, JR.,)
20 an individual residing in)
21 Benton County, Washington,)
22 Plaintiff,)

No. CV-04-5125-FVS

23 vs.)

**DEFENDANT’S RESPONSE TO
PLAINTIFF’S STATEMENT OF
MATERIAL FACTS AND
MOTION TO STRIKE
STATEMENT OF FACTS**

24 IMPULSE MARKETING GROUP, INC.,)
25 A Nevada Corporation,)
26 Defendant.)

27 IMPULSE MARKETING GROUP, INC.,)
28 Third-Party Plaintiff,)

29 vs.)

30 BONNIE GORDON, JAMES S. GORDON, III,)
31 JONATHAN GORDON, JAMILA GORDON,)
32 ROBERT PRITCHETT, and EMILY ABBEY,)
33 Third-Party Defendants.)

DATE: October 14, 2005

34 Defendant’s Response to Plaintiff’s Statement of Material Facts
35 and Motion to Strike Statement of Facts - 1

Liebler, Ivey, Connor, Berry & St. Hilaire
Attorneys at Law
1141 N. Edison, Suite C
Kennewick, WA 99336

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37 Gordon\Pleadings\Plaintiff Motion for Summary
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3 **Motion to Strike Plaintiff’s Statement of Facts**

4 Defendant Impulse Marketing Group, Inc. (“Impulse” or “Defendant”) hereby
5 moves to strike the Rule 56.1 Statement of Facts (the “Statement”) submitted by
6 plaintiff James Gordon (“Plaintiff” or “Gordon”) based upon: (1) the form and
7 content of the Statement; and (2) Plaintiff’s lack of standing to submit the Statement
8 on behalf of third-party defendants Bonnie Gordon, James S. Gordon, III, Jonathan
9 Gordon, Jamila Gordon, Robert Pritchett and Emily Abbey (“Third-Party
10 Defendants”).
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14 Local Rule 56.1(a) provides, in pertinent part, that “any party filing a motion
15 for summary judgment shall set forth separately from the memorandum of law, and
16 in full, the specific facts relied upon in support of the motion. The specific facts
17 shall be set forth in **serial fashion and not in narrative form.** (emphasis added).
18 Plaintiff’s Statement violates Local Rule 56.1(a) because the Statement: (1) fails to
19 set forth Plaintiff’s Facts in a serial fashion; (2) contains narrative and comment; and
20 (3) includes inappropriate arguments and legal conclusions.
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23 Pursuant to Rule 56, the purpose of Local Rule 56 is to "free district courts
24 from the need to hunt through voluminous records without guidance from the
25

1 parties," See e.g., Holtz v. Rockefeller & Co., 258 F.3d 62, 74 (2d Cir. 2001).
2
3 Plaintiff has frustrated this purpose and wasted judicial economy by submitting a
4 Statement that contains legal conclusions, hearsay, immaterial facts, argument and
5 comment in violation of Local Rule 56.1(a).
6

7 As set forth more fully in our opposition to Plaintiff's Motion to dismiss
8 Impulse's Amended Counterclaims and Third-Party Amended Complaint, Gordon
9 lacks standing to submit the Statement on behalf of the Third-Party Defendants
10 because: (1) Gordon does not have a personal stake in the outcome of the third-party
11 action; (2) there is no direct relationship between the factual claims asserted against
12 Gordon and those brought against Third-Party Defendants; (3) Gordon cannot bind
13 Third-Party Defendants to his representations, admissions and positions; and (4) the
14 interests of Gordon and Third-Party Defendants may vary.
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18 In view of the foregoing, Defendant respectfully requests that this Court:

- 19 1. Strike the Statement in its entirety;
- 20 2. Award Defendant its attorneys' fees and costs associated with
21 responding to Plaintiff's Statement; and
- 22 3. Grant such other and further relief as this Court deems
23 appropriate.
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Counter-Statement of Facts

Notwithstanding the foregoing motion to strike Plaintiff’s Statement in its entirety, Defendant hereby submits the following response to the Statement. Please be advised that Defendant did not correct any typographical errors contained in the Statement. Therefore, Defendant only responds to Plaintiff’s Facts and not to any legal conclusions, hearsay, narrative, comment or argument contained in the Statement.

For purposes of streamlining Defendant’s response to Plaintiff’s Statement, please be advised that: (a) Defendant’s Amended Answer ¶¶ 3.1-3.12.3 generally denies Plaintiff’s Statement in its entirety or denies sufficient knowledge or information to respond to Plaintiff’s allegations; (b) Plaintiff has refused to provided Defendant with any emails he allegedly received that he claims violate Washington law; and (c) there has been no discovery whatsoever in this lawsuit. Based on the foregoing, there are several questions of material fact that need to be resolved prior to the granting of summary judgment pursuant to Rule 56. Such questions include, but are not limited to:

- Whether or not Gordon, Third-Party Defendants, or anyone else allegedly received the commercial e-mail messages at issue;
- Whether or not Defendant transmitted the alleged emails at issue;

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- 2 • Whether or not the emails at issue violated Washington law;
- 3
- 4 • Whether Gordon and/or Third-Party Defendants provided Impulse, and/or its
- 5 marketing partners, with untruthful and inaccurate registration information;
- 6 and
- 7 • Whether Gordon and/or Third-Party Defendants misrepresented their
- 8 identities to Impulse and/or its marketing partners.
- 9

10 To prevail on a motion for summary judgment the evidence must reveal no

11 genuine issue of material fact when viewed in the light most favorable to the

12 party opposing summary judgment. S.D. Myers, Inc. v. City & County of San

13 Francisco, 253 F.3d 461, 466 (9th Cir 2001). The court in S.D. Meyers, Inc.,

14 stated that the threshold inquiry is whether "there are any genuine factual issues

15 that properly can be resolved only by a finder of fact because they may

16 reasonably be resolved in favor of either party." S.D. Meyers, Inc. at 466. In

17 making this determination, a court must view the evidence in the light most

18 favorable to the non-moving party. Eichacker v. Paul Revere Life Ins. Co., 354

19 F.3d 1142, 1145 (9th Cir. 2004).

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1 Plaintiff's Fact #1:

2 On or about May of 1998, Mr. Gordon registered the domain name
3 "gordonworks.com" and began using it to make information relating to job
4 searching and career development available to the general public on the internet.
5

6 Mr. Gordon also began using the email address gordonworks@gordonworks.com.
7

8 Gordon Declaration ¶¶ 2.

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11 Response:

12 Based upon the lack of any discovery in this lawsuit, Defendant denies
13 knowledge or information as to Plaintiff's Fact #1. Defendant's Amended Answer
14 ¶¶ 3.1-3.4. Notwithstanding the foregoing, Plaintiff's Fact #1 is immaterial to
15 Plaintiff's Motion for Summary judgment to dismiss Defendant's amended
16 counterclaims and third-party amended complaint ("Plaintiff's Motion").
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19 Plaintiff's Fact #2:

20 In addition to the email address "gordonworks@gordonworks.com" Mr. Gordon
21 created numerous other email addresses, all using the gordonworks.com domain.
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23 These included msm@gordonworks.com, cash@gordonworks.com,
24 goals@gordonworks.com, business@gordonworks.com, jobs@gordonworks.com,
25

1 marketer@gordonworks.com, localbusiness@gordonworks.com,
2 peace@gordonworks.com, postmaster@gordonworks.com,
3 referral@gordonworks.com, webmaster@gordonworks.com,
4 genesis@gordonworks.com, teen@gordonworks.com, telecom@gordonworks.
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6 Gordon Declaration, ¶ 4.

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8 Response:

9 Based upon the lack of any discovery in this lawsuit, Defendant denies
10 knowledge or information as to Plaintiff's Fact #2. Defendant's Amended Answer
11 ¶¶ 3.1-3.4.
12

13 Plaintiff's Fact #3:

14 Many of these email addresses were published on the internet on various web
15 pages Mr. Gordon created. Gordon Declaration, ¶ 5.
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17 Response:

18 Based upon the lack of any discovery in this lawsuit, Defendant denies
19 knowledge or information as to Plaintiff's Fact #3. Defendant's Amended Answer
20 ¶¶ 3.1-3.4. Notwithstanding the foregoing, Plaintiff's Fact #3 is immaterial to
21 Plaintiff's Motion.
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23 Plaintiff's Fact #4:

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26 Defendant's Response to Plaintiff's Statement of Material Facts
27 and Motion to Strike Statement of Facts - 7

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Attorneys at Law
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1 Almost as soon as each of these email addresses was published on the
2 internet, Mr. Gordon began receiving commercial email at these addresses. Gordon
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4 Declaration, ¶ 5.
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26 Defendant's Response to Plaintiff's Statement of Material Facts
27 and Motion to Strike Statement of Facts - 8

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Liebler, Ivey, Connor, Berry & St. Hilaire
Attorneys at Law
1141 N. Edison, Suite C
Kennewick, WA 99336

1 Response:

2 Genuine issues of material fact exist regarding Plaintiff's Fact #4.
3
4 Specifically, there are genuine issues of material fact as to: (a) whether Gordon,
5 Third-Party Defendants, or anyone else allegedly received the commercial e-mail
6 messages at issue; (b) whether or not Defendant transmitted the alleged emails at
7 issue; (c) whether or not the emails at issue violated Washington law; (d) whether
8 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing
9 partners, with untruthful and inaccurate registration information; and (e) whether
10 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse
11 and/or its marketing partners. Defendant's Amended Answer ¶¶ 3.1-3.4. The Court
12 is respectfully further referred to the Gordon Initial Disclosures in the Related
13 Action (the "Gordon Initial Disclosures") attached to the Declaration of James
14 Bodie, dated September 23, 2005 (the "Bodie Declaration"), of which this Court has
15 taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey,
16 rather than Gordon himself, received commercial e-mail. (emphasis added). As the
17 Gordon Initial Disclosures were subject to F.R.C.P. § 11 requiring, at the time of the
18 disclosure, reasonable inquiry and evidentiary support, the contradictory
19 representations in the Gordon Declaration and the Gordon Initial Disclosures raises
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1 triable issues of material fact in this third-party action and counterclaims.

2 Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

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4 Plaintiff's Fact #5:

5 The addresses for Mr. Gordon's family members, bonnie@gordonworks.com,
6 jay@gordonworks.com, jamila@gordonworks.com, jonathan@gordonworks.com,
7 jim@gordonworks.com, james@gordonworks.com, were all published on the
8 internet on web pages Mr. Gordon built for his family. Gordon Declaration, ¶ 6.

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11 Response:

12 Based upon the lack of any discovery in this lawsuit, Defendant denies
13 knowledge or information as to Plaintiff's Fact #5.

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15 Plaintiff's Fact #6:

16 Although the web pages are related to Mr. Gordon's family members, all of
17 them were created and maintained by Mr. Gordon, and email sent to any of these
18 email addresses is and was received by Mr. Gordon. Gordon Declaration, ¶ 7.

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21 Response:

22 Genuine issues of material fact exist regarding Plaintiff's Fact #6.
23 Specifically, there are genuine issues of material fact as to: (a) whether Gordon,
24 Third-Party Defendants, or anyone else allegedly received the commercial e-mail

1 messages at issue; (b) whether or not Defendant transmitted the alleged emails at
2 issue; (c) whether or not the emails at issue violated Washington law; (d) whether
3 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing
4 partners, with untruthful and inaccurate registration information; and (e) whether
5 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse
6 and/or its marketing partners. Defendant's Amended Answer ¶¶ 3.1-3.4. Further,
7 the Court is respectfully referred to the Gordon Initial Disclosures attached to Bodie
8 Declaration, of which this Court has taken judicial notice, that provides, *inter alia*,
9 Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial
10 e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were
11 subject to F.R.C.P. § 11 requiring, at the time of the disclosure, reasonable inquiry
12 and evidentiary support, the contradictory representations in the Gordon Declaration
13 and the Gordon Initial Disclosures raises triable issues of material fact in this third-
14 party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

15 Plaintiff's Fact #7:

16 In response to commercial emails purporting to offer free products, on or
17 about September 1, 2003, Mr. Gordon requested to receive the free products
18 advertised in these offers. Gordon Declaration, ¶¶ 8 & 9.

1 Response:

2 Based upon the lack of any discovery in this lawsuit, Defendant denies
3 knowledge or information as to Plaintiff's Fact #7.

4 Plaintiff's Fact #8:

5 These submissions were made by visiting a website advertised in these emails,
6 and entering an email address and other information into an online form. Mr.
7 Gordon used the following email addresses james@gordonworks.com,
8 faye@gordonworks.com, jamila@gordonworks.com, jay@gordonworks.com,
9 jonathan@gordonworks.com, emily@gordonworks.com Gordon Declaration, ¶ 9.

10 Response:

11 Based upon the lack of any discovery in this lawsuit as well as Plaintiff's
12 refusal to provide Defendant's with the alleged violative emails, Defendant denies
13 knowledge or information as to Plaintiff's Fact #8. Notwithstanding the foregoing,
14 genuine issues of material fact exist regarding Plaintiff's Fact #8. Specifically, there
15 are genuine issues of material fact as to: (a) whether Gordon, Third-Party
16 Defendants, or anyone else allegedly received the commercial e-mail messages at
17 issue; (b) whether or not Defendant transmitted the alleged emails at issue; (c)
18 whether or not the emails at issue violated Washington law; (d) whether Gordon

1 and/or Third-Party Defendants provided Impulse, and/or its marketing partners, with
2 untruthful and inaccurate registration information; and (e) whether Gordon and/or
3 Third-Party Defendants misrepresented their identities to Impulse and/or its
4 marketing partners. Defendant's Amended Answer ¶¶ 3.1-3.4. Further, the Court
5 is respectfully referred to the Gordon Initial Disclosures attached to Bodie
6 Declaration, of which this Court has taken judicial notice, that provides, *inter alia*,
7 Robert Pritchett and Emily Abbey, rather than Gordon himself, received commercial
8 e-mail allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were
9 subject to F.R.C.P. § 11 requiring, at the time of the disclosure, reasonable inquiry
10 and evidentiary support, the contradictory representations in the Gordon Declaration
11 and the Gordon Initial Disclosures raises triable issues of material fact in this third-
12 party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

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18 Plaintiff's Fact #9:

19 Mr. Gordon never received any of the free products advertised in the emails.

20 Response:

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22 Based upon the lack of any discovery in this lawsuit as well as Plaintiff's
23 refusal to provide Defendant with the alleged violative emails, Defendant denies
24 knowledge or information as to Plaintiff's Fact #9 and Plaintiff's Fact #9 is

1 immaterial to Plaintiff's Motion. Further, there are genuine issues of material fact
2 as to: (a) whether Gordon, Third-Party Defendants, or anyone else allegedly
3 received the commercial e-mail messages at issue; (b) whether or not Defendant
4 transmitted the alleged emails at issue; (c) whether or not the emails at issue violated
5 Washington law; (d) whether Gordon and/or Third-Party Defendants provided
6 Impulse, and/or its marketing partners, with untruthful and inaccurate registration
7 information; and (e) whether Gordon and/or Third-Party Defendants misrepresented
8 their identities to Impulse and/or its marketing partners. Further, the Court is
9 respectfully referred to the Gordon Initial Disclosures attached to Bodie Declaration,
10 of which this Court has taken judicial notice, that provides, *inter alia*, Robert
11 Pritchett and Emily Abbey, rather than Gordon himself, received commercial e-mail
12 allegedly at issue. (emphasis added). As the Gordon Initial Disclosures were subject
13 to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable inquiry and
14 evidentiary support, the contradictory representations in the Gordon Declaration and
15 the Gordon Initial Disclosures raises triable issues of material fact in this third-party
16 action and counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.
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1 Plaintiff's Fact #10:

2 Nowhere on any of these websites was Mr. Gordon asked to give his consent
3
4 to receive any commercial email from Defendant. Gordon Declaration ¶ 11.

5 Response:

6 Genuine issues of material fact exist regarding Plaintiff's Fact #10.
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8 Specifically, there are genuine issues of material fact as to: (a) whether Gordon,
9 Third-Party Defendants, or anyone else allegedly received the commercial e-mail
10 messages at issue; (b) whether or not Defendant transmitted the alleged emails at
11 issue; (c) whether or not the emails at issue violated Washington law; (d) whether
12 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing
13 partners, with untruthful and inaccurate registration information; and (e) whether
14 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse
15 and/or its marketing partners.
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19 Further, the Court is respectfully referred to the Gordon Initial Disclosures
20 attached to Bodie Declaration, of which this Court has taken judicial notice, that
21 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,
22 received commercial e-mail allegedly at issue. (emphasis added). As the Gordon
23 Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the
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1 disclosure, reasonable inquiry and evidentiary support, the contradictory
2 representations in the Gordon Declaration and the Gordon Initial Disclosures raises
3 triable issues of material fact in this third-party action and counterclaims.
4 Declaration of James Bodie ¶¶ 25, 26, 29 and 30. In support of Defendant's
5 contention that a material issue of fact exists with respect to Plaintiff's Fact #10, this
6 Court is respectfully referred to: (a) page 9, lines 17-19 of Plaintiff's Statement,
7 wherein Plaintiff admits that Defendant's counterclaims and third-party claims
8 contain allegations contrary to this fact; (b) Defendant's First Amended
9 Counterclaim ¶¶ 1-15; (c) Defendant's Fourth Amended Counterclaim ¶ 33; (d)
10 Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; (e) Exhibit F of the
11 Declaration of Phil Huston in support of Impulse's Motion to Dismiss Plaintiff's
12 Complaint (the "Huston Declaration"); (f) ¶¶ 22 and 23 of the Huston Declaration;
13 and (g) ¶ 48 of the Bodie Declaration.

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19 Plaintiff's Fact #11:

20 At not time did Mr. Gordon give his consent to receive any commercial email
21 from the Defendant. Gordon Declaration ¶ 11.

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23 Response:

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26 Defendant's Response to Plaintiff's Statement of Material Facts
27 and Motion to Strike Statement of Facts - 16

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1 Genuine issues of material fact exist regarding Plaintiff's Fact #11.
2 Specifically, there are genuine issues of material fact as to: (a) whether Gordon,
3 Third-Party Defendants, or anyone else allegedly received the commercial e-mail
4 messages at issue; (b) whether or not Defendant transmitted the alleged emails at
5 issue; (c) whether or not the emails at issue violated Washington law; (d) whether
6 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing
7 partners, with untruthful and inaccurate registration information; and (e) whether
8 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse
9 and/or its marketing partners.
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13 Further, the Court is respectfully referred to the Gordon Initial Disclosures
14 attached to Bodie Declaration, of which this Court has taken judicial notice, that
15 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,
16 received commercial e-mail. (emphasis added). As the Gordon Initial Disclosures
17 were subject to F.R.C.P. §11 requiring, at the time of the disclosure, reasonable
18 inquiry and evidentiary support, the contradictory representations in the Gordon
19 Declaration and the Gordon Initial Disclosures raises triable issues of material fact
20 in this third-party action and counterclaims. Declaration of James Bodie ¶¶ 25, 26,
21 29 and 30.
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1 In support of Defendant's contention that material issues of fact exist with
2 respect to Plaintiff's Fact #11, this Court is respectfully referred to: (a) page 10,
3 lines 10-14 of Plaintiff's Statement, wherein Plaintiff admits that Defendant has
4 contested this fact at paragraph 48 of the Bodie Declaration; (b) Defendant's First
5 Amended Counterclaim ¶¶ 1-15; (c) Defendant's Fourth Amended Counterclaim ¶
6 33; (d) Defendant's Third-Party Complaint ¶¶ 8, 15-21 and 38; (e) Exhibit F to the
7 Huston Declaration; (f) ¶¶ 22 and 23 of the Huston Declaration; and (g) ¶ 48 of the
8 Bodie Declaration.
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12 Plaintiff's Fact # 12:

13 Almost immediately after Mr. Gordon had filled out the online forms which
14 purported to offer free products, Mr. Gordon began to receive a torrent of
15 commercial email from the Defendant at the email addresses Mr. Gordon had used
16 to try to accept the offers for free prizes. Gordon Declaration, ¶ 12.
17
18

19 Response:

20 Genuine issues of material fact exist regarding Plaintiff's Fact #12.
21 Specifically, there are genuine issues of material fact as to: (a) whether Gordon,
22 Third-Party Defendants, or anyone else allegedly received the commercial e-mail
23 messages at issue; (b) whether or not Defendant transmitted the alleged emails at
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1 issue; (c) whether or not the emails at issue violated Washington law; (d) whether
2 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing
3 partners, with untruthful and inaccurate registration information; and (e) whether
4 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse
5 and/or its marketing partners. Further, the Court is respectfully referred to the
6 Gordon Initial Disclosures attached to Bodie Declaration, of which this Court has
7 taken judicial notice, that provides, *inter alia*, Robert Pritchett and Emily Abbey,
8 rather than Gordon himself, received commercial e-mail allegedly at issue.
9 (emphasis added). Defendant's First Amended Counterclaim ¶¶ 1-15; Defendant's
10 Fourth Amended Counterclaim ¶ 33; Defendant's Third-Party Complaint ¶¶ 8, 15-21
11 and 38. As the Gordon Initial Disclosures were subject to F.R.C.P. § 11 requiring,
12 at the time of the disclosure, reasonable inquiry and evidentiary support, the
13 contradictory representations in the Gordon Declaration and the Gordon Initial
14 Disclosures raises triable issues of material fact in this third-party action and
15 counterclaims. Declaration of James Bodie ¶¶ 25, 26, 29 and 30.
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1 Plaintiff's Fact #13:

2 Within a few weeks of his requests for free products, Mr. Gordon attempted
3
4 to stop the resulting torrent of commercial email by unsubscribing from these email
5 lists. Gordon Declaration, ¶ 13.

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7 Response:

8 A genuine issue of material fact exists regarding Plaintiff's Fact #13.
9
10 Specifically, there is a genuine issue of material fact as to if and when Gordon
11 and/or his family member's "opted-in" again after such "opt-out" occurred. Bodie
12 Declaration ¶ 35.

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14 Plaintiff's Fact #14:

15 In October of 2003, Mr. Gordon began submitting "unsubscribe" requests to
16 the Defendants, and continued to do so through Spring of 2005. Gordon
17 Declaration, ¶ 14.

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19 Response:

20 Based upon the lack of any discovery in this lawsuit, Defendant denies
21
22 knowledge or information as to Plaintiff's Fact #14. Further genuine questions of
23 material fact exist regarding Plaintiff's Fact #14. Specifically, there are genuine
24 issues of material fact as to: (a) whether Gordon, Third-Party Defendants, or anyone
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1 else submitted “unsubscribe” requests to anyone, let alone the Defendant; (b)
2 whether Gordon, Third-party Defendants, or anyone else allegedly received the
3 commercial e-mail messages at issue; (c) whether or not Defendant transmitted the
4 alleged emails at issue; (d) whether or not the emails at issue violated Washington
5 law; (e) whether Gordon and/or Third-Party Defendants provided Impulse, and/or
6 its marketing partners, with untruthful and inaccurate registration information; and
7 (f) whether Gordon and/or Third-Party Defendants misrepresented their identities
8 to Impulse and/or its marketing partners. Defendant’s First Amended Counterclaim
9 ¶¶ 1-15; Defendant’s Fourth Amended Counterclaim ¶ 33; Defendant’s Third-Party
10 Complaint ¶¶ 8, 15-21 and 38; Huston Declaration, Exhibit “F.”

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12 Further, the Court is respectfully referred to the Gordon Initial Disclosures
13 attached to Bodie Declaration, of which this Court has taken judicial notice, that
14 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,
15 received commercial e-mail allegedly at issue. (emphasis added). As the Gordon
16 Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the
17 disclosure, reasonable inquiry and evidentiary support, the contradictory
18 representations in the Gordon Declaration and the Gordon Initial Disclosures raises
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1 triable issues of material fact in this third-party action and counterclaims.

2 Declaration of James Bodie ¶¶ 25, 26, 29 and 30.

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4 Plaintiff's Fact #15:

5 Exhibit F of the Declaration of Phil Huston filed with the Court January 21,
6 2005, shows that the Plaintiff "opted out" of receiving future commercial emails
7 from the Defendant on October 15, 2003.

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9 Response:

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11 A genuine issue of material fact exists regarding Plaintiff's Fact #15.
12 Specifically, there is a genuine issue of material fact as to whether Plaintiff "opted
13 out" of receiving future commercial emails from the Defendant on October 15, 2003.
14 Contrary to Plaintiff's Fact #15, Exhibit "F" does not reflect that Gordon and/or his
15 family members "opted-out" to receiving "all" e-mails. Rather, Exhibit "F" of the
16 Huston Declaration supports the proposition that "some" of the e-mails had been
17 requested to be stopped being transmitted. Bodie Declaration ¶¶ 32-35.

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20 Plaintiff's Fact #16:

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22 Mr. Gordon's "unsubscribe" requests were ignored, and in fact, the amount
23 of emails Mr. Gordon received increased after these requests were sent.

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25 Response:

26 Defendant's Response to Plaintiff's Statement of Material Facts
27 and Motion to Strike Statement of Facts - 22

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Attorneys at Law
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1 Specifically, there are genuine issues of material fact as to: (a) whether
2 Gordon, Third-Party Defendants, or anyone else submitted “unsubscribe” requests
3 to anyone, let alone the Defendant; (b) whether Gordon, Third-party Defendants, or
4 anyone else allegedly received the commercial e-mail messages at issue; (c) whether
5 or not Defendant transmitted the alleged emails at issue; (d) whether or not the
6 emails at issue violated Washington law; (e) whether Gordon and/or Third-Party
7 Defendants provided Impulse, and/or its marketing partners, with untruthful and
8 inaccurate registration information; and (f) whether Gordon and/or Third-Party
9 Defendants misrepresented their identities to Impulse and/or its marketing partners.
10 Defendant’s First Amended Counterclaim ¶¶ 1-15; Defendant’s Fourth Amended
11 Counterclaim ¶ 33; Defendant’s Third-Party Complaint ¶¶ 8, 15-21 and 38; Huston
12 Declaration, Exhibit “F.”

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18 Further, the Court is respectfully referred to the Gordon Initial Disclosures
19 attached to Bodie Declaration, of which this Court has taken judicial notice, that
20 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,
21 received commercial e-mail allegedly at issue. (emphasis added). As the Gordon
22 Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the
23 disclosure, reasonable inquiry and evidentiary support, the contradictory
24
25

1 representations in the Gordon Declaration and the Gordon Initial Disclosures raises
2 triable issues of material fact in this third-party action and counterclaims.
3
4 Declaration of James Bodie ¶¶ 25, 26, 29 and 30. Frankly, Defendant has no
5 knowledge of what emails and unsubscribe requests Plaintiff refers to.
6

7 Plaintiff's Fact #17:

8 All of the emails that form the basis for Mr. Gordon's lawsuit against the
9 Defendant were received by Mr. Gordon after Mr. Gordon had submitted these
10 "unsubscribe" requests.
11

12 Response:

13 There are genuine issues of material fact as to: (a) whether Gordon, Third-
14 Party Defendants, or anyone else submitted "unsubscribe" requests to anyone, let
15 alone the Defendant; (b) whether Gordon, Third-party Defendants, or anyone else
16 allegedly received the commercial e-mail messages at issue; (c) whether or not
17 Defendant transmitted the alleged emails at issue; (d) whether or not the emails at
18 issue violated Washington law; (e) whether Gordon and/or Third-Party Defendants
19 provided Impulse, and/or its marketing partners, with untruthful and inaccurate
20 registration information; and (f) whether Gordon and/or Third-Party Defendants
21 misrepresented their identities to Impulse and/or its marketing partners. Defendant's
22
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1 First Amended Counterclaim ¶¶ 1-15; Defendant’s Fourth Amended Counterclaim
2 ¶ 33; Defendant’s Third-Party Complaint ¶¶ 8, 15-21 and 38; Huston Declaration,
3 Exhibit “F.”
4

5 Further, the Court is respectfully referred to the Gordon Initial Disclosures
6 attached to Bodie Declaration, of which this Court has taken judicial notice, that
7 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,
8 received commercial e-mail allegedly at issue. (emphasis added). As the Gordon
9 Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the
10 disclosure, reasonable inquiry and evidentiary support, the contradictory
11 representations in the Gordon Declaration and the Gordon Initial Disclosures raises
12 triable issues of material fact in this third-party action and counterclaims.
13 Declaration of James Bodie ¶¶ 25, 26, 29 and 30.
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18 Plaintiff’s Fact #18:

19 Throughout the fall of 2003, Mr. Gordon continued to receive emails from the
20 Defendant, and Mr. Gordon brought complaints about this unwanted and ongoing
21 commercial email to the Federal Trade Commission, the Attorney General for
22 Washington State, Tier 1 backbone internet providers, Mr. Gordon’s local ISP, and
23 the local, Richland, Washington police department. Gordon Declaration, ¶ 17.
24
25

1 Response

2 Based upon the lack of any discovery in this lawsuit, Defendant denies
3 knowledge or information as to whether Mr. Gordon brought complaints about
4 unwanted and ongoing commercial email to the Federal Trade Commission, the
5 Attorney General for Washington State, Tier 1 Backbone Internet Providers and the
6 local, Richland, Washington police department
7

8 Further, any factual evidence that Mr. Gordon brought complaints about
9 unwanted and ongoing commercial email to the Federal Trade Commission, the
10 Attorney General for Washington State, Tier 1 Backbone Internet Providers and the
11 local, Richland, Washington police department is: (a) hearsay; and (b) immaterial
12 to Defendant's Amended Counterclaims and Third-Party Amended Complaint.
13
14

15 Notwithstanding the foregoing, there are genuine issues of material fact as to:
16 (a) whether Gordon, Third-Party Defendants, or anyone else submitted
17 "unsubscribe" requests to anyone, let alone the Defendant; (b) whether Gordon,
18 Third-party Defendants, or anyone else allegedly received the commercial e-mail
19 messages at issue; (c) whether or not Defendant transmitted the alleged emails at
20 issue; (d) whether or not the emails at issue violated Washington law; (e) whether
21 Gordon and/or Third-Party Defendants provided Impulse, and/or its marketing
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1 partners, with untruthful and inaccurate registration information; and (f) whether
2 Gordon and/or Third-Party Defendants misrepresented their identities to Impulse
3 and/or its marketing partners. Defendant's First Amended Counterclaim ¶¶ 1-15;
4 Defendant's Fourth Amended Counterclaim ¶ 33; Defendant's Third-Party
5 Complaint ¶¶ 8, 15-21 and 38; Huston Declaration, Exhibit "F."

6
7
8 Further, the Court is respectfully referred to the Gordon Initial Disclosures
9 attached to Bodie Declaration, of which this Court has taken judicial notice, that
10 provides, *inter alia*, Robert Pritchett and Emily Abbey, rather than Gordon himself,
11 received commercial e-mail allegedly at issue. (emphasis added). As the Gordon
12 Initial Disclosures were subject to F.R.C.P. §11 requiring, at the time of the
13 disclosure, reasonable inquiry and evidentiary support, the contradictory
14 representations in the Gordon Declaration and the Gordon Initial Disclosures raises
15 triable issues of material fact in this third-party action and counterclaims.
16 Declaration of James Bodie ¶¶ 25, 26, 29 and 30. Frankly, Defendant has no
17 knowledge of what emails Plaintiff refers to.

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21 Plaintiff's Fact #19:

22
23 At the local Richland, Washington police department, Mr. Gordon was put in
24 contact with Officer Lew Reed, a police officer specializing in cybercrimes

1 investigations. Officer Reed personally examined about 2,000 emails sent by the
2 Defendant, and confirmed to Mr. Gordon that information in the transmission paths
3 of the emails in question had been omitted and/or mischaracterized. Gordon
4 Declaration, ¶ 18.

5
6 Response:

7
8 Based upon the lack of any discovery in this lawsuit as well as Plaintiff's
9 refusal to provide us with the allegedly violative emails at issue, Defendant denies
10 knowledge or information as to Plaintiff's Fact #19. Defendant further objects and
11 moves to strike Plaintiff's Fact #19 on the ground that such a factual representation
12 is immaterial, contains hearsay and is thus inadmissible.

13
14 Plaintiff's Fact #20:

15
16 In November of 2004, having confirmed that the emails in question violated
17 RCW 19.190 et seq., and having exhausted all avenues Mr. Gordon could conceive
18 of to stop the sending of this illegal spam to his domain short of litigation, Mr.
19 Gordon brought this suit against the Defendant. Gordon Declaration, ¶ 19.

20
21 Response:

22
23 Based upon the lack of any discovery in this lawsuit and Plaintiff's refusal to
24 provide Defendant with the alleged violative emails, Defendant denies knowledge
25

1 or information as to Plaintiff's Fact #20 but does not contest that Mr. Gordon
2 brought suit against the Defendant. Further, Defendant objects and moves to strike
3 Plaintiff's Fact #20 on the grounds that such a factual representation violates Local
4 Rule 56.1(a) because: (a) it is immaterial to Defendant's amended counterclaims and
5 third-party amended complaint; and (b) it contains inappropriate legal conclusions,
6 argument and comment.
7

8
9 Plaintiff's Fact #21:

10
11 Despite all of these efforts, and the fact that Mr. Gordon's lawsuit against the
12 Defendant has been pending for 10 months, to this day the Defendant continues to
13 send Mr. Gordon commercial email that violates RCW 19.190 et seq. Gordon
14 Declaration ¶ 20.
15

16 Response:

17
18 Defendant objects and moves to strike Plaintiff's Fact #21 on the ground that
19 such a statement is an opinion as well as an invalid statement and inappropriate legal
20 conclusion pursuant to Local Rule 56.
21
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1 Plaintiff's Fact #22:

2 In his prior lawsuit against Commonwealth Marketing Group, Inc., Mr.
3 Gordon identified his wife, Mrs. Bonnie Gordon; his children, Mr. James. S. Gordon
4 III, Mr. Jonathan Gordon, and Ms. Jamila Gordon; his friends, Mr. Robert Pritchett,
5 and Ms. Emily Abbey; and Officer Lew Reed as witnesses.
6
7

8 Response:

9 Defendant does not dispute that in his prior lawsuit against Commonwealth
10 Marketing Group, Inc., Mr. Gordon identified his wife, Mrs. Bonnie Gordon; his
11 children, Mr. James. S. Gordon III, Mr. Jonathan Gordon, and Ms. Jamila Gordon;
12 his friends, Mr. Robert Pritchett, and Ms. Emily Abbey; and Officer Lew Reed as
13 witnesses.
14
15

16 Plaintiff's Fact #23:

17 Defendant has now sued all of these individuals as "Third Party Defendants,"
18 although the Defendant has moved to dismiss Officer Lew Reed.
19

20 Response:

21 Defendant does not dispute that it has now sued all of these individuals as
22 "Third Party Defendants" based upon: (a) their participation in a scheme to, *inter*
23 *alia*, defraud Defendant; and (b) their providing Defendant with inaccurate and
24
25

1 untruthful information. Defendant has moved to dismiss Officer Lew Reed. Mr.
2 Reed's dismissal was granted by this Court.
3

4 Plaintiff's Fact #23:¹

5 To the extent that Mr. Gordon ever had any conversations with any of the
6 Third Party Defendants related to commercial emails sent by the Defendant, Mr.
7 Gordon expressed his desire that they stop sending these emails, and his frustration
8 that the Defendant would not. Gordon Declaration, ¶24.
9

10
11 Response:

12 To the extent that the Defendant can make sense out of the awkward sentence
13 structure contained in Plaintiff's Fact #23, Defendant objects and moves to strike
14 Plaintiff's Fact #23 on the ground that such a factual representation is inadmissible
15 as hearsay.
16

17
18 Plaintiff's Fact #24:

19 To the best of Mr. Gordon's knowledge, at no time have any of the Third
20 Party Defendants ever solicited any of the commercial email to the
21 "gordonworks.com" email addresses that form the basis of this lawsuit.
22

23 Response:
24

25 _____
26 ¹ Please be advised that Plaintiff has erroneously set forth two (2) factual statements that contain the heading "Plaintiff's
27 Fact #23."

1 A genuine issue of material fact exists regarding Plaintiff's Fact #24.
2
3 Specifically, there is a genuine issue of material fact as to whether any of the Third
4 Party Defendants ever solicited any of the commercial email to the
5 "gordonworks.com" email addresses. In support of Defendant's contention that a
6 material issue of fact exists with respect to Plaintiff's Fact #24, this Court is
7 respectfully referred to: (a) page 16 of Plaintiff's Statement, wherein Plaintiff admits
8 that Defendant's counterclaims and third-party claims contain allegations contrary
9 to this fact; (b) Defendant's Third-Party Complaint ¶¶ 1, 2, 8, 11, 15-21, 31 and 44;
10 and (c) ¶ 20 of the Bodie Declaration.

11
12 Plaintiff's Fact #25:

13
14
15 At no time did any of the Third Party Defendants and Mr. Gordon ever
16 discuss any "scheme" whereby they would solicit any commercial emails to any
17 "gordonworks.com" email address that forms the basis of this lawsuit, as such would
18 have been directly contrary to Mr. Gordon's often stated desire that the Defendant
19 stop sending me commercial email.
20

21
22 Gordon Declaration, ¶ 26.

23 Response:

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26 Defendant's Response to Plaintiff's Statement of Material Facts
27 and Motion to Strike Statement of Facts - 32

Liebler, Ivey, Connor, Berry & St. Hilaire
Attorneys at Law
1141 N. Edison, Suite C
Kennewick, WA 99336

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pondStatementMaterialFact\Defendants Response to Plaintiff's
Statement of Material Facts and Strike.wpd

1 Defendant denies Plaintiff's Fact #25. First, Gordon lacks standing to submit
2 the Statement on behalf of the Third-Party Defendants because: (1) Gordon does not
3 have a personal stake in the outcome of the third-party action; (2) there is no direct
4 relationship between the factual claims asserted against Gordon and those brought
5 against Third-Party Defendants; (3) Gordon cannot bind Third-Party Defendants to
6 his representations, admissions and positions; and (4) the interests of Gordon and
7 Third-Party Defendants may vary. Bodie Declaration ¶¶ 3-5.
8
9
10

11 Second, Impulse alleges that: (a) Third Party Defendants assisted in the
12 transmission of commercial electronic messages to the "gordonworks.com" domain
13 (the "Domain") by actively and affirmatively soliciting commercial emails for the
14 sole purpose of filing multiple lawsuits arising out of the receipt of these
15 commercial email messages (the "Scheme"); (b) Third Party Defendants knew or
16 consciously avoided knowing that by actively and affirmatively soliciting
17 commercial emails for the sole purpose of filing multiple lawsuits arising out of the
18 receipt of these commercial email messages that they would receive commercial
19 email messages to the Domain; (c) Third Party Defendants provided substantial
20 assistance or support that enabled the formulation, composition, origination,
21 initiation, or transmission of commercial email messages to the Domain; (d) Third
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1 Party Defendants knew or consciously avoided knowing that they were participating
2 in the Scheme; and (e) Third Party Defendants knew or consciously avoided
3 knowing that Plaintiff was providing Third Party Plaintiff with inaccurate and
4 untruthful registration information. Defendant's third-party amended complaint ¶¶
5 1-5.
6

7
8 Plaintiff's Fact #26:

9 The Defendant's claims against the Third Party Defendants thus appear to be
10 nothing more than an attempt to harm Mr. Gordon by exposing his friends, family
11 and law enforcement witnesses to the costs of defending themselves in civil
12 litigation. Gordon Declaration, ¶ 27.
13

14
15 Response:

16 Defendant objects and moves to strike Plaintiff's Fact #26 as containing
17 inappropriate narrative, comment and hyperbole in violation of Local Rule 56.1(a).
18

19 Defendant's Fact #1:

20 The Defendant has alleged that "to the extent any emails referenced in
21 Gordon's complaint are indirectly attributable to Impulse, said emails were
22 transmitted by CMG." Bodie Declaration ¶ 7.
23

24
25 Response:

26 Defendant's Response to Plaintiff's Statement of Material Facts
27 and Motion to Strike Statement of Facts - 34

Liebler, Ivey, Connor, Berry & St. Hilaire
Attorneys at Law
1141 N. Edison, Suite C
Kennewick, WA 99336

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pondStatementMaterialFact\Defendants Response to Plaintiff's
Statement of Material Facts and Strike.wpd

1 Defendant maintains that the Bodie Declaration speaks for itself. ¶ 7 of the
2 Bodie Declaration.
3

4 Dated: October 14, 2005

5 s/ Floyd E. Ivey
6 Liebler, Ivey, Conner, Berry & St. Hilaire
7 By: Floyd E. Ivey
8 1141 N. Edison, Suite C
9 P.O. Box 6125
10 Kennewick, Washington 99336
11 Local Counsel for Defendant
12 Impulse Marketing Group, Inc.

13 s/ Sean A. Moynihan & s/ Peter J. Glantz
14 Sean A. Moynihan, Esq. & Peter J. Glantz
15 (admitted pro hac vice)
16 Klein, Zelman, Rothermel & Dichter, LLP
17 485 Madison Avenue, 15th Floor
18 New York, NY 10022
19 (212) 935-6020
20 (212) 753-8101 Fax
21 Attorneys for Defendant
22 Impulse Marketing Group, Inc.

23 I hereby certify that on October 14, 2005, I electronically filed
24 **Defendant's Response to Plaintiff's Statement of Material Facts and Motion**
25 **to Strike Statement of Facts** with the Clerk of the Court using the CM/ECF
26 System which will send notification of such filing to Douglas E. McKinley, Jr.,
27 Peter J. Glantz and Sean A. Moynihan. I hereby certify that I have served the
28 foregoing to the following non-CM/ECF participants by other means: Bonnie
Gordon, Jonathan Gordon, James S. Gordon, III and Robert Prichett. I hereby
certify that I have served the foregoing to the following persons who are non-
CM/ECF participants named in this lawsuit, but who have not yet been served or
entered an appearance in this lawsuit by other means: Emily Abbey and Jamila

26 Defendant's Response to Plaintiff's Statement of Material Facts
27 and Motion to Strike Statement of Facts - 35

Liebler, Ivey, Connor, Berry & St. Hilaire
Attorneys at Law
1141 N. Edison, Suite C
Kennewick, WA 99336

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Statement of Material Facts and Strike.wpd

1 Gordon.

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26 Defendant's Response to Plaintiff's Statement of Material Facts
and Motion to Strike Statement of Facts - 36

Liebler, Ivey, Connor, Berry & St. Hilaire
Attorneys at Law
1141 N. Edison, Suite C
Kennewick, WA 99336

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