

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 DENYING MOTIONS
TO DISMISS

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 Plaintiff's Motion to Dismiss Third-Party Defendants and Counterclaims Under FRCP 12(b)(6) or in the Alternative Motion for Summary Judgment under FRCP 56 or in the Alternative to Dismiss under FRCP 9(b) (Ct. Rec. 40); Jonathan Gordon's Motion to Dismiss (Ct. Rec. 155); Bonnie Gordon's Motion to Dismiss (Ct. Rec. 158); Robert Pritchett's Motion to Dismiss (Ct. Rec. 161); Motion to Dismiss by James S. Gordon, III (Ct. Rec. 164); Jamila Gordon's Motion to Dismiss (Ct. Rec. 167); and Emily Abbey's Motion to Dismiss (Ct. Rec. 177). Plaintiff is represented by Douglas McKinley. Defendant is represented by Floyd Ivey, Sean

1 Moynihan, and Peter Glantz. The Third-Party Defendants are
2 proceeding *pro se*.

3 **I. BACKGROUND**

4 Plaintiff, James Gordon, is a Washington resident and the
5 registered user of the internet domain name "Gordonworks.com."
6 Defendant, Impulse Marketing Group, Inc. ("Impulse Marketing"), a
7 Nevada corporation, is an electronic marketing company that transacts
8 business with Washington by sending commercial electronic mail
9 messages (email) to Washington state residents. Impulse Marketing
10 operates by collecting personally identifiable information from
11 individuals who sign up to receive free products and/or services at
12 websites run by Impulse Marketing and/or its marketing partners. In
13 consideration for receiving free products and/or services from an
14 Impulse Marketing related website, it requires that individuals using
15 its websites agree to submit accurate personal subscriber information
16 ("Subscriber Profile"). By submitting their Subscriber Profile,
17 individuals grant Impulse Marketing the right transfer the Subscriber
18 Profiles to third parties for marketing purposes. Impulse Marketing
19 subscribes revenue from the licensing and/or use of accurate
20 Subscriber Profiles.

21 Plaintiff's Complaint alleges Impulse Marketing violated
22 Washington's Commercial Electronic Mail Act, RCW § 19.190 et seq.,
23 and Washington's Consumer Protection Act, RCW § 19.86 et seq., by
24 initiating and/or conspiring with others to initiate unsolicited
25 commercial emails to various addresses at Plaintiff's domain,
26 "Gordonworks.com". On July 1, 2005, the Court denied Impulse

1 Marketing's motion to dismiss Plaintiff's Complaint. On September 6,
2 2005, Impulse Marketing filed five counterclaims against Plaintiff
3 and five separate causes of action against each of the Third-Party
4 Defendants. On November 28, 2005, Impulse Marketing filed a Second
5 Amended Third-Party Complaint, which alleges claims against the
6 Third-Party Defendants for (1) fraud and deceit; (2) tortious
7 interference with business relationships; (3) contribution and
8 indemnity; (4) breach of contract; and (5) injunctive relief.
9 Impulse Marketing asserts these same causes of action as
10 counterclaims against Plaintiff.

11 Plaintiff now moves to dismiss the counterclaims and the third-
12 party defendants. Because Plaintiff lacks standing to bring a motion
13 to dismiss on behalf of the Third-Party Defendants, his motion will
14 be construed by the Court only as a motion to dismiss Impulse
15 Marketing's counterclaims against Plaintiff. The Third-Party
16 Defendants have each filed their own motion to dismiss. These
17 motions assert the same legal arguments.

18 **II. DISCUSSION**

19 **A. Standard of Review**

20 A complaint should not be dismissed for failure to state a claim
21 upon which relief may be granted under Federal Rule of Civil
22 Procedure 12(b)(6) unless it "appears beyond doubt that the plaintiff
23 can prove no set of facts in support of his claim which would entitle
24 him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99,
25 101-02, 2 L.Ed.2d 80 (1957). When the legal sufficiency of a
26 complaint's allegations are tested with a motion under Rule 12(b)(6),

1 "[r]eview is limited to the complaint." *Cervantes v. City of San*
2 *Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993). All factual allegations
3 set forth in the complaint are taken as true and construed in the
4 light most favorable to the plaintiff. *Epstein v. Wash. Energy Co.*,
5 83 F.3d 1136, 1140 (9th Cir. 1996). The Court must give the
6 plaintiff the benefit of every inference that reasonably may be drawn
7 from well-pleaded facts. *Tyler v. Cisneros*, 136 F.3d 603, 607 (9th
8 Cir. 1998). As a general rule, the Court "may not consider any
9 material beyond the pleadings in ruling on a Rule 12(b)(6) motion.
10 *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

11 **B. Tortious Interference Claim**

12 Under Washington law, there are five elements to the tort of
13 interference with a business expectancy or contract. A plaintiff
14 must establish: (1) the existence of a valid contractual
15 relationship or business expectancy; (2) that the defendant(s) had
16 knowledge of the relationship or expectancy; (3) an intentional
17 interference inducing or causing breach or termination of the
18 relationship or expectancy; (4) that the defendant interfered for an
19 improper purpose or used improper means; and (5) resultant damages.
20 *Leingang v. Pierce County Med. Bureau*, 131 Wash.2d 133, 930 P.2d 288
21 (1997).

22 As to the first element, a valid business expectancy "includes
23 any prospective contractual or business relationship that would be of
24 pecuniary value." *Newton Ins. Agency v. Caledonian Ins. Group*, 114
25 Wash. App. 151, 158, 52 P.3d 30 (2002). Here, Impulse Marketing
26 alleges it transfers its clients' Subscriber Profiles to third

1 parties for marketing purposes and that in doing so, Impulse
2 Marketing created business relationships and contract relationships
3 with these on-line business partners. Second Amend. Complaint
4 (hereinafter "Complaint"), ¶¶ 1-4, 43-44. Tortious interference with
5 a contractual relationship requires a showing of a particular
6 relationship or expectations and will not compensate a claimant for
7 speculative or wishful thinking. Although Impulse Marketing has not
8 pointed to any specific employers or relationships that were
9 affected, its allegations are sufficient under general pleading
10 standards to survive a motion to dismiss.

11 As to the second element, knowledge of the existence of a
12 business relationship is an essential element in establishing
13 liability for interference therein, but "it is sufficient if the
14 evidence reveals that the alleged interferor had knowledge of facts
15 giving rise to the existence of the relationship. It is not
16 necessary that the interferor understand the legal significance of
17 such facts." *Calbom v. Knudtzon*, 65 Wash.2d 157, 165, 396 P.2d 148,
18 153 (1964). Here, Impulse Marketing alleges the Third-Party
19 Defendants had knowledge of the contracts and business relationships
20 between Impulse Marketing and its on-line marketing partners.
21 Complaint, ¶ 45. More specifically, Impulse Marketing maintains that
22 the Third-Party Defendants submitted their Subscriber Profile to
23 Impulse Marketing and/or its third-party marketing partners,
24 certified that their Subscriber Profiles were accurate and truthful
25 pursuant to the applicable terms and conditions, and entered into a
26 Privacy Policy that permitted Impulse and/or its marketing partners

1 to share the applicable participant's Subscriber Profile with
2 contractually-bound third party marketers. Complaint, ¶¶ 8-14, 43-
3 51. These allegations are sufficient to survive the second element
4 of a tortious interference cause of action.

5 As to the third element, interference with a business expectancy
6 is intentional if "the actor desires to bring about or if he knows
7 that the interference is certain or substantially certain to occur as
8 a result of his action." *Newton*, 114 Wash. App. at 158, 52 P.3d 30.
9 Impulse Marketing seems to be arguing that since the Third-Party
10 Defendants' act of providing inaccurate and untruthful Subscriber
11 Profiles was intentional, their interference is deemed intentional in
12 light of the terms of the Privacy Policy that permitted Impulse
13 and/or its marketing partners to share the applicable participant's
14 Subscriber Profiles. If Impulse Marketing can show the Third-Party
15 Defendants knew, or were substantially certain, their inaccurate
16 Subscriber Profiles would interfere with Impulse Marketing's business
17 relationships with its on-line marketing partners, intentional
18 interference would be sufficiently pled.

19 Although Impulse Marketing's responsive memorandum does not
20 address the fourth element, its Complaint adequately alleges facts
21 supporting this element. Impulse Marketing argues that the Third-
22 Party Defendants interfered for an improper purpose because they
23 intended to purposefully entice Impulse Marketing to send emails to
24 the "gordonworks.com" domain that the Third-Party Defendants believed
25 violated RCW 19.190 et seq., in an attempt to exacerbate legal
26 claims. Complaint, ¶¶ 22-30.

1 With respect to the fifth element, Impulse Marketing alleges it
2 has sustained money damages. Complaint, ¶ 50. Thus, Impulse
3 Marketing has alleged facts sufficient to satisfy this final element.

4 The Court concludes Impulse Marketing has adequately alleged a
5 cause of action for tortious interference, and the motions to dismiss
6 are denied with respect to this claim.

7 **B. Fraud & Deceit**

8 To establish fraud, a plaintiff must prove, by clear and
9 convincing evidence, (1) representation of an existing fact; (2)
10 materiality; (3) falsity; (4) speaker's knowledge of its falsity; (5)
11 speaker's intention that it shall be acted upon by the plaintiff; (6)
12 plaintiff's ignorance of falsity; (7) reliance; (8) right to rely;
13 and (9) damages. *Tran v. State Farm Fire and Cas. Co.*, 136 Wash.2d
14 214, 236, 961 P.2d 358, 369 (1998).

15 Impulse Marketing has adequately pled a cause of action for
16 fraud. With respect the first four elements of fraud, the Complaint
17 alleges the Third-Party Defendants knowingly provided Impulse
18 Marketing with false Subscriber Profiles at various websites.
19 Complaint, ¶¶ 22-24, 28. With respect to the fifth element, Impulse
20 Marketing alleges the Third Party Defendants purposely intended to
21 solicit email messages to the "gordonworks.com" domain that
22 Plaintiff's believed were in violation of RCW 19.190, for the sole
23 purpose of causing Impulse Marketing pecuniary harm and harm to its
24 reputation, while attempting to create legal claims. Complaint, ¶
25 25-30. Impulse Marketing also alleges the Third-Party Defendants
26 repeatedly solicited, unsubscribed, then repeatedly re-solicited

1 email from Impulse Marketing and/or its marketing partners in an
2 effort to fabricate and exacerbate claims against Impulse Marketing
3 based on the Third-Party Defendants' belief that the emails received
4 from Impulse Marketing violated RCW 19.190 et seq. Complaint, ¶¶ 31-
5 37. With respect to the sixth element, Impulse Marketing alleges it
6 was unaware of the inaccurate Subscriber Profiles provided by the
7 Third-Party Defendants. Complaint, ¶ 39. With respect to the final
8 three elements of fraud, Impulse Marketing alleges it justifiably
9 relied upon Third-Party Defendants' untruthful, inaccurate and
10 fraudulent representations in their Subscriber Profiles by
11 negotiating and fulfilling marketing agreements with Impulse
12 Marketing's third-party business partners, thereby causing Impulse
13 Marketing to incur excessive business operational costs and
14 associated expenditures with running its business. Complaint, ¶ 38.

15 Alternatively, Third Party Defendants argue Impulse Marketing
16 failed to plead the elements of fraud with the required particularity
17 required by Federal Rule of Civil Procedure 9(b). However, Impulse
18 Marketing alleges specific dates throughout the month of September
19 2003, on which the Third-Party Defendants allegedly directed,
20 permitted, or conspired with Plaintiff to provide inaccurate or
21 untruthful Subscriber profiles. See Complaint, ¶¶ 31-37. The Court
22 concludes this is sufficient to satisfy the heightened pleading
23 standards for fraud. Accordingly, the motions to dismiss are denied
24 with respect to Impulse Marketing's claim for fraud and deceit.

25 **C. Contribution and Indemnification**

26 Impulse Marketing asserts a claim against the Third-Party

1 Defendants for indemnity and contribution if Impulse Marketing is
2 found liable in any way to Plaintiff. The Third-Party Defendants
3 move to dismiss this cause of action because the Complaint does not
4 allege or acknowledge that the emails in question violated Washington
5 statute. However, this argument misinterprets Impulse Marketing's
6 claims for contribution and indemnification. Contribution
7 "distributes the loss among the tortfeasors by requiring each to pay
8 his proportionate share" and indemnity "shifts the entire loss from
9 one tortfeasor who has been compelled to pay it to the shoulders of
10 another who should bear it instead." *Zamora v. Mobil Corp.*, 104
11 Wash.2d 211, 218, 704 P.2d 591, 596 (1985) (citation omitted).
12 Impulse Marketing simply requests that if it is found liable for the
13 emails sent to Plaintiff, it be permitted to seek indemnity and
14 contribution from the Third-Party Defendants because they (1)
15 specifically intended to drive email messages to the gordonworks.com
16 domain; and (2) repeatedly solicited, unsubscribed, and then
17 repeatedly re-solicited email from Impulse Marketing and its
18 marketing partners with the sole intention of fabricating and
19 exacerbating claims against Impulse Marketing based on the Third
20 Party Defendants' belief that the emails violated RCW 19.190 et seq.
21 Complaint, ¶¶ 17-20. The Court determines these allegations are
22 sufficient to satisfy the general pleading standards. Therefore, the
23 motions to dismiss Impulse Marketing's claims for indemnity and
24 contribution are denied.

25 **D. Breach of Contract**

26 Impulse Marketing alleges the Third-Party Defendants violated

1 the terms and conditions of Impulse Marketing's website and its
2 Privacy Policy by failing to accurately and truthfully complete their
3 Subscriber Profiles and by failing to accept the commercial email
4 received in a proper manner without negating the benefit conferred
5 upon them by Impulse Marketing. Complaint, ¶¶ 53-64. Further,
6 Impulse Marketing alleges it sustained monetary damages as a
7 consequence of the alleged breach. Complaint, ¶ 65.

8 At the motion to dismiss stage the Court does not engage in
9 debating the terms of the applicable contract. Rather, the Court is
10 only concerned with whether the Complaint alleges facts that, if
11 proven, are sufficient to state a claim for relief. The Court
12 concludes that Impulse Marketing has alleged facts sufficient to
13 state a cause of action for breach of contract. Therefore, the
14 motions to dismiss are denied with respect to Impulse Marketing's
15 breach of contract claim.

16 ***E. Injunctive Relief***

17 "The granting or withholding of an injunction is addressed to
18 the sound discretion of the trial court to be exercised according to
19 the circumstances of each case." *Wash. Federation of State Employees*
20 *v. State*, 99 Wash.2d 878, 887, 665 P.2d 1337, 1343 (1983). In order
21 to obtain injunctive relief, the plaintiff must establish (1) that he
22 or she has a clear legal or equitable right, (2) that he or she has a
23 well grounded fear of immediate invasion of that right by the one
24 against whom the injunction is sought, and (3) that the acts
25 complained of are either resulting in or will result in actual and
26 substantial injury. *Id.* at 888, 665 P.2d at 1343.

1 Impulse Marketing requests the Court enjoin the Third-Party
2 Defendants from soliciting, unsubscribing, and re-soliciting email
3 from Impulse Marketing and/or its marketing partners. The Third-
4 Party Defendants argue Impulse Marketing is not entitled to an
5 injunction because the act of requesting commercial emails is
6 perfectly legal conduct, even if the person requesting the emails
7 intends to later sue the sender. Further, they argue that the mere
8 act of requesting emails is insufficient to expose Impulse Marketing
9 to liability. Rather, it is only when Impulse Marketing sends
10 commercial email, an act over which the Third-Party Defendants
11 contend they have no control, that liability attaches.

12 The Court determines that Impulse Marketing's Complaint
13 satisfies the second and third elements necessary to establish
14 injunctive relief. Although Impulse Marketing might not have a
15 "legal" right to prevent the Third-Party Defendants from requesting
16 commercial email, assuming the truth of the facts alleged in the
17 Complaint, Impulse Marketing may have an equitable right. Thus, the
18 Court denies the motions to dismiss Impulse Marketing's claim for
19 injunctive relief. Accordingly,

20 **IT IS HEREBY ORDERED:**

- 21 1. Plaintiff's Motion to Dismiss Third-Party Defendants and
22 Counterclaims Under FRCP 12(b)(6) or in the Alternative
23 Motion for Summary Judgment under FRCP 56 or in the
Alternative to Dismiss under FRCP 9(b) (**Ct. Rec. 40**) is
DENIED.
- 24 2. Motion to Dismiss by Jonathan Gordon (**Ct. Rec. 155**) is
DENIED.
- 25 3. Motion to Dismiss by Bonnie Gordon (**Ct. Rec. 158**) is
26 **DENIED.**

1 4. Motion to Dismiss by Robert Pritchett (Ct. Rec. 161) is
DENIED.

2 5. Motion to Dismiss by James S. Gordon, III (Ct. Rec. 164) is
3 DENIED.

4 6. Motion to Dismiss by Jamila Gordon (Ct. Rec. 167) is DENIED.

5 7. Motion to Dismiss by Emily Abbey (Ct. Rec. 177) is DENIED.

6 **IT IS SO ORDERED.** The District Court Executive is hereby
7 directed to enter this Order, furnish copies to counsel and to the
8 **Third Party Defendants who are proceeding pro se.**

9 **DATED** this 9th day of March, 2006.

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