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24 **UNITED STATES DISTRICT COURT FOR THE**
25 **EASTERN DISTRICT OF WASHINGTON**

26 JAMES S. GORDON, JR.,

27 Plaintiff,

28 vs.

IMPULSE MARKETING GROUP,
INC.,

Defendant

IMPULSE MARKETING GROUP,
INC.,

Third-Party Plaintiff,

vs.

BONNIE GORDON, et al.,

Third-Party Defendants.

No. CV-04-5125-FVS

MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO DISMISS
THIRD PARTY DEFENDANTS'
COUNTERCLAIMS

Noted for Hearing May 12, 2006 at
1:30 p.m.

WITH ORAL ARGUMENT

1 **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**
2 **THIRD PARTY DEFENDANTS' COUNTERCLAIMS**

3 **PRELIMINARY STATEMENT**

4 Pursuant to Rule 12(b)(6), Third Party Plaintiff, Impulse Marketing Group, Inc.
5 (“Impulse” or the “Third Party Plaintiff”) submits this Memorandum of Law in
6 support of its motion to dismiss fifteen (15) Counterclaims brought by Bonnie
7 Gordon, James S. Gordon, III, Jonathan Gordon, Jamila Gordon, Robert Pritchett and
8 Emily Abbey (collectively, “Third Party Defendants”) against Impulse on the ground
9 that Third party Defendants have not stated and cannot state claims for which relief
10 can be granted.¹

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14 The Counterclaims brought by these Third Party Defendants have not been
15 filed pursuant to a motion under Fed. R. Civ. P. 15(a). The Counterclaims will
16 require an examination of the scheduling of this matter.
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18 Further, pursuant to Rule 11, Impulse respectfully requests that this Court
19 impose sanctions upon Third Party Defendants on the ground that Third Party
20 Defendants' Counterclaims are frivolous and would have been understood to be
21 frivolous upon a reasonable investigation by Third Party Defendants.² Impulse has
22 placed Third Party Defendants on notice that they should withdraw their
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26 ¹ Third Party Defendant Robert Pritchett only alleges the first six (6) Counterclaims, which
Counterclaims are identical to the other Third Party Defendants.

27 ² Third Party Defendants simultaneously filed associated affidavits with their Counterclaims.
28 By separate motion, Impulse is respectfully requesting that this Court strike these affidavits
from the record as such affidavits are improper and do not comply with the Federal Rules of
Civil Procedure.

1 Counterclaims. Third Party Defendants have failed to withdraw their Counterclaims.
2
3 As such, Impulse requests that this Court impose sanctions upon Third Party
4 Defendants in an amount equal to the time and money expended by counsel for
5 Impulse in researching, preparing and filing a response to Third Party Defendants'
6 Counterclaims.
7

8 Impulse further requests that this Court grant Impulse its attorneys' fees and
9 reasonable costs expended in responding to Third party Defendants' baseless
10 Counterclaims. Impulse's attorneys have spent a total of thirty-five (35) hours
11 researching and preparing this motion. Specifically, Peter Glantz has expended
12 twenty (20) billable hours researching and preparing the instant motion, Sean
13 Moynihan has spent ten (10) billable hours reviewing and preparing the instant
14 motion and Floyd Ivey has billed five (5) hours researching, reviewing and filing the
15 instant motion.
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19 **PROCEDURAL HISTORY**

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21 On November 18, 2005, Impulse filed a Second Third Party Amended
22 Complaint against each of the Third Party Defendants arising out of Third Party
23 Defendants' wrongful and fraudulent conduct in connection with James Gordon's
24 ("Plaintiff") claims. Third Party Defendants failed to interpose a timely Answer to
25 the Second Amended Third Party Complaint. Instead, *pro se* Third Party Defendants,
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1 after the time to respond to the Second Third Party Amended Complaint expired,
2 moved to dismiss the Second Third Party Amended Complaint.
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4 On March 9, 2006, this Court denied Third Party Defendants' motion to
5 dismiss the Second Amended Complaint in its entirety, holding that Impulse's Second
6 Amended Complaint stated a prima facie case for indemnity and contribution, breach
7 of contract, tortious interference with business relations, fraud and deceit and
8 injunctive relief. On or about March 10, 2006, March 13, 2006 and March 14, 2006,
9 respectively, Third Party Defendants answered the Second Amended Complaint and
10 asserted fifteen (15) identical Counterclaims against Impulse.
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13 INTRODUCTION

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15 Third Party Defendants have filed

16 Third Party Defendants have failed to state claims for which relief can be
17 granted. Third Party Defendants' attempt to portray themselves as victims, rather
18 than co-conspirators in a scheme to defraud Impulse is without merit. In fact, this
19 Court has already ruled that Impulse pled valid causes of action against Third Party
20 Defendants for, indemnification and contribution, fraud and deceit, breach of contract
21 and tortious interference with business relationships.
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25 Third Party Defendants are not innocent parties to the transactions underlying
26 Plaintiff's Complaint. Rather, Third Party Defendants are complicit in a premeditated
27 and systematic effort to cause harm to Impulse by, *inter alia*, providing Impulse with
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1 false and/or inaccurate subscriber profiles at various Impulse-related websites,
2 conspiring with Plaintiff to provide Impulse with false and/or inaccurate subscriber
3 profiles, and repeatedly soliciting, unsubscribing and then repeatedly re-soliciting
4 email from Impulse and/or its marketing partners in a scheme to fabricate and
5 exacerbate claims against Impulse based upon their subjective belief that Impulse
6 violated RCW 19.190 et seq. Third Party Defendants' actions were undertaken in
7 deliberate bad faith and there was no legitimate reason for Third Party Defendants to
8 engage in such a premeditated and systematic scheme to cause harm to Impulse.³

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12 Further exacerbating Third Party Defendants' improper conduct, Third Party
13 Defendants now assert fifteen (15) baseless Counterclaims against Impulse. By way
14 of example, Third Party Defendants admit in their Counterclaims that their
15 Counterclaims are "civil" in nature and "not criminal" matters. Notwithstanding this,
16 Third Party Defendants' asserted criminal causes of action against Impulse for the
17 sole purpose of forcing Impulse to expend time and money dismissing same. All
18 fifteen (15) Counterclaims follow a similar pattern in that they lack any factual or
19 legal basis whatsoever. By conducting a reasonable investigation into the merits of
20 their allegations, as federal law mandates, Third Party Defendants would have
21 understood that all of their Counterclaims were entirely without merit.
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27 ³ This Court has already taken judicial notice of the related action brought by Plaintiff against
28 Commonwealth Marketing Group, Inc. in its Order Denying Impulse's Motion To Dismiss Plaintiff's
Complaint, dated July 11, 2005. As this Court will recall, Plaintiff's Rule 26 disclosures reveal, *inter alia*, that
Third Party Defendants registered to receive email from Impulse.

1 Accordingly, Impulse respectfully requests that this Court: (1) dismiss Third
2 Party Defendants' Counterclaims pursuant to Rule 12(b)(6); (2) impose sanctions
3 against Third Party Defendants under Rule 11 for interposing fifteen (15) baseless
4 Counterclaims; and (3) grant Impulse reasonable costs and attorneys fees expended
5 in responding to this motion.
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8 **ARGUMENT**

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10 For purposes of simplicity and judicial economy, Impulse will address Third
11 Party Defendants' Counterclaims *seritim*. 18 USC 1514 is a tool available to United
12 States District Attorneys to prevent the harassment of victims or witnesses in a federal
13 criminal case.
14

15 I. **THIRD PARTY DEFENDANTS FAILED TO STATE A VALID CLAIM FOR
16 WHICH RELIEF CAN BE GRANTED UNDER 18 USC 1514 (CRIMINAL
17 OBSTRUCTION OF JUSTICE)**

18
19 A. **THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE
20 A FEDERAL PROSECUTION UNDER 18 USC 1514 (CRIMINAL
21 OBSTRUCTION OF JUSTICE)**

22 Third Party Defendants allege that Impulse breached 18 USC 1514(c)⁴.
23 However, Third Party Defendants are well aware that 18 USC 1514 has no
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28 ⁴ Please be advised that 18 USC 1514(c), as alleged in Third Party Defendants' Counterclaims, simply defines the term "harassment" for purposes of 18 USC 1514. Title 18 USC 1514(c) does not set forth a specific cause of action or violation and is therefore groundless by definition.

1 application in the instant matter. Third Party Defendants even admit that the instant
2 lawsuit “is a civil not a criminal matter.”
3

4 Even if Third Party Defendants had pled a violation of the statute, rather than
5 a definitional provision, Third Party Defendants would obviously still lack standing,
6 since private citizens have no authority to institute a federal criminal prosecution
7 under a federal criminal statute under these circumstances. Cok v. Cosentino, 876
8 F.2d 1, 2 (1st Cir. 1989); Winslow v. Romer, 759 F. Supp. 670, 673-74 (D. Colo.
9 1991). Applicable authorities within the United States government are the only
10 entities that can enforce federal criminal statutes. Id. For example, in Kennan v.
11 McGrath, 328 F.2d 610 (1st Cir. 1964), the court held that a private person could not
12 initiate a criminal prosecution in his own name in federal court. See also U.S. v.
13 Panza, 381 F. Supp. 1133 (W.D. Pa. 1974), where the court held that a private citizen
14 was not entitled to file a criminal complaint before the court against another alleging
15 violation of federal law.
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20 As private citizens, Third Party Defendants lack standing to initiate a criminal
21 prosecution under 18 USC 1514 and, therefore, Third Party Defendants’ First
22 Counterclaim should be dismissed. Moreover, since Third Party Defendants’
23 Counterclaims admit that there is no basis for their allegations, sanctions, attorneys
24 fees and reasonable costs are warranted.
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1 B. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A
2 VALID CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER
3 18 USC 1514 (OBSTRUCTION OF JUSTICE)

4
5 Although this may be superfluous, Third Party Defendants have not pled the
6 necessary elements of the statute.

7 18 USC 1514 provides, in part, that:

8
9 A United States district court, upon application of the
10 attorney for the Government, shall issue a temporary
11 restraining order prohibiting harassment of a victim or
12 witness in a Federal criminal case if the court finds, from
13 specific facts shown by affidavit or by verified complaint,
14 that there are reasonable grounds to believe that
15 harassment of an identified victim or witness in a Federal
16 criminal case exists or that such order is necessary to
17 prevent and restrain an offense under section 1512 of this
18 title, other than an offense consisting of misleading
19 conduct, or under section 1513 of this title.

20 Third Party Defendants have failed to allege, *inter alia*, that: (1) they are
21 victims or witnesses in a Federal criminal case; and/or (2) a United States
22 Government attorney filed an application to this Court for the issuance of a temporary
23 restraining order prohibiting harassment as defined in 18 USC 1514(c). Accordingly,
24 Third Party Defendants have failed to state a valid claim for which relief can be
25 granted under 18 USC 1514.
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1 II. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
2 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER 18 USC 1037
3 (CRIMINAL FRAUD AND RELATED ACTIVITY IN CONNECTION WITH
4 ELECTRONIC MAIL)

5 Third Party Defendants assert a Counterclaim against Impulse arising out of
6 Impulse's alleged violations of 18 USC 1037 (Criminal Fraud and Related Activity
7 In Connection With Electronic Mail). 18 USC 1037, once again, is a federal criminal
8 statute. 18 USC 1037 is intended to protect the public against individuals that, *inter*
9 *alia*, knowingly, fraudulently and intentionally transmit email. Penalties for violations
10 of 18 USC 1037 are, *inter alia*, fines and punishment.

13 A. THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE
14 A FEDERAL PROSECUTION UNDER 18 USC 1037

15 Third Party Defendants' attempt to prosecute criminal offenses under 18 USC
16 1037 is without any merit since private citizens have no authority to institute a federal
17 criminal prosecution under a federal criminal statute under these circumstances. Cok,
18 876 F.2d at 2; Winslow, 759 F.Supp. at 673-74; see also Kennan, 328 F.2d at 611;
19 Panza, 381 F.Supp. at 1133, where the court held that a private citizen was not
20 entitled to file a criminal complaint before the court against another alleging violation
21 of federal law.

22 As private citizens, Third Party Defendants lack standing to initiate a criminal
23 prosecution under 18 USC 1037.
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B. THIRD PARTY DEFENDANTS HAVE FAILED TO PLEAD A VALID CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER 18 USC 1037

Moreover, even assuming Third Party Defendants had standing under the 18 USC 1037, Third Party Defendants have not pled the necessary elements of the federal criminal statute.

18 USC 1037 provides, in part that:

(a) In general.--Whoever, in or affecting interstate or foreign commerce, knowingly-- (1) accesses a protected computer without authorization, and intentionally initiates the transmission of multiple commercial electronic mail messages from or through such computer, (2) uses a protected computer to relay or retransmit multiple commercial electronic mail messages, with the intent to deceive or mislead recipients, or any Internet access service, as to the origin of such messages, (3) materially falsifies header information in multiple commercial electronic mail messages and intentionally initiates the transmission of such messages, (4) registers, using information that materially falsifies the identity of the actual registrant, for five or more electronic mail accounts or online user accounts or two or more domain names, and intentionally initiates the transmission of multiple commercial electronic mail messages from any combination of such accounts or domain names, or (5) falsely represents oneself to be the registrant or the legitimate successor in interest to the registrant of 5 or more Internet Protocol addresses, and intentionally initiates the transmission of multiple commercial electronic mail messages from such addresses, or conspires to do so, shall be punished as provided in subsection (b).

1 Third Party Defendants have failed to allege, *inter alia*, that Impulse: (1)
2 criminally accessed a protected computer without authorization, and intentionally
3 initiated the transmission of multiple commercial electronic mail messages from or
4 through such computer; (2) criminally used a protected computer to relay or
5 retransmit multiple commercial electronic mail messages, with the intent to deceive
6 or mislead recipients, or any Internet access service, as to the origin of such
7 messages; (3) criminally materially falsified header information in multiple
8 commercial electronic mail messages and intentionally initiated the transmission of
9 such messages; (4) criminally registered, using information that materially falsified
10 the identity of the actual registrant, for five or more electronic mail accounts or online
11 user accounts or two or more domain names, or intentionally initiated the
12 transmission of multiple commercial electronic mail messages from any combination
13 of such accounts or domain names; (5) criminally and falsely represented itself to be
14 the registrant or the legitimate successor in interest to the registrant of 5 or more
15 Internet Protocol addresses, and intentionally initiated the transmission of multiple
16 commercial electronic mail messages from such addresses, or conspired to do so; and
17 (6) affected interstate or foreign commerce. Based on the foregoing, Third Party
18 Defendants have failed to state a valid claim for which relief can be granted under
19 USC 1037.
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1 C. THIRD PARTY DEFENDANTS HAVE NOT MET THE RULE 9(b)
2 HEIGHTENED PLEADING REQUIREMENT

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4 Even if Third Party Defendants could plead criminal causes of action, they fail
5 to comply with the heightened pleading requirement of Rule 9(b). Rule 9(b) sets
6 forth more stringent pleading requirements in cases involving allegations of fraud or
7 mistake. “In all averments of fraud or mistake, the circumstances constituting fraud
8 or mistake shall be stated with particularity.” See Rule 9(b). Rule 9(b) serves three
9 (3) purposes: (a) to assure a defendant of fair notice of the nature of claims and the
10 ground upon which they rest; (b) to protect a defendant from harm that would befall
11 its goodwill when it is charged with serious wrongdoing; and (c) to diminish the
12 possibility that plaintiff with a largely groundless claim will be able to use the threat
13 of extensive discovery to impose an *in terrorem* increase on a settlement value. See
14 Cowen & Co. v. Merriam, 745 F. Supp. 925 (S.D.N.Y. 1990); U.S. ex rel. Stinson,
15 Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc., 755
16 F.Supp. 1055 (S.D.Ga. 1990) (see also The Segal Comp. v. Amazon.com, 280 F.
17 Supp. 2d 1229 (9th Cir. 2003)). Since Third Party Defendants have failed to plead
18 their Second Counterclaim with any specificity whatsoever, Third Party Defendants’
19 Second Counterclaim should be dismissed as a matter of law.
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1 III. THIRD PARTY DEFENDANTS FAILED TO STATE A VALID CLAIM FOR
2 WHICH RELIEF CAN BE GRANTED UNDER RCW 4.24.510 (WASHINGTON
3 ANTI-SLAPP STATUTE)

4
5 RCW 4.24.510 is the Washington state whistleblower statute. RCW 4.24.510
6 provides that:

7 A person who communicates a complaint or information to
8 any branch or agency of federal, state, or local government,
9 or to any self-regulatory organization that regulates persons
10 involved in the securities or futures business and that has
11 been delegated authority by a federal, state, or local
12 government agency and is subject to oversight by the
13 delegating agency, is immune from civil liability for claims
14 based upon the communication to the agency or
15 organization regarding any matter reasonably of concern to
16 that agency or organization. A person prevailing upon the
17 defense provided for in this section is entitled to recover
18 expenses and reasonable attorneys' fees incurred in
19 establishing the defense and in addition shall receive
20 statutory damages of ten thousand dollars. Statutory
21 damages may be denied if the court finds that the
22 complaint or information was communicated in bad faith.

19 The purpose of the Washington Anti-SLAPP statute is to protect individuals
20 who report, *inter alia*, fraud to governmental agencies and are then sued to stop the
21 reporting. The Anti-SLAPP statute was designed to allow early dismissal of a lawsuit
22 where the individual making a report to a governmental agency is sued. See
23 Legislative Intent of RCW 4.24.510 (“Notes Intent -- 2002 c. 232”). Third Party
24 Defendants allege that Impulse sued them since they were prospective witnesses to
25 a lawsuit. However, Third Party Defendants are not a class of people that this statute
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1 was designed to protect. The statute is not intended to protect witnesses in a lawsuit.

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4 Moreover, Third Party Defendants' attempt to portray themselves as victims
5 of a whistleblower statute, rather than co-conspirators in a scheme to defraud Impulse
6 is baseless. This Court has already ruled that Impulse has pled valid causes of action
7 against Third Party Defendants for fraud and deceit, indemnification and contribution,
8 breach of contract and tortious interference with business relationships.
9

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11 IV. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A CLAIM FOR
12 WHICH RELIEF CAN BE GRANTED UNDER RCW 9.35.005 (CRIMINAL
13 IDENTITY THEFT)

14
15 Title 9 of the Revised Code of Washington sets forth the Criminal Code for the
16 State of Washington. RCW 9.35 et seq. is entitled "Identity Crimes." Violations of
17 RCW 9.35 et seq. are "Class C" felonies pursuant to RCW 9.35.010(5). The
18 legislative intent as set forth in RCW 9.35 et seq. is to criminally penalize
19 unscrupulous people for improperly obtaining financial information.
20

21 A. THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE
22 A CRIMINAL PROSECUTION UNDER RCW 9.35 ET SEQ.

23
24 A private citizen has no right under RCW 9.35 to bring a criminal charge.
25 Prosecution under RCW 9.35 et seq. is the right of those with prosecutorial
26 discretion, namely the district attorneys of the various counties in the State of
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1 Washington. A private citizen has no constitutional, statutory, or common law right
2 to require a public official to investigate or prosecute a crime. Linda R.S. v. Richard
3 D., 410 U.S. 614 (1973). The remedy to a private citizen who fails to persuade a
4 prosecutor to bring a criminal charge is to file a complaint with the county police
5 department. A Washington county District Attorney may, in his or her discretion,
6 petition the superior court to summon a grand jury in accordance with the Criminal
7 Investigatory Act of 1971 (RCW 10.27.030). Accordingly, Third Party Defendants
8 lack standing to assert a claim under RCW 9.35.
9

12 **B. THIRD PARTY DEFENDANTS ALLEGE THAT IMPULSE**
13 **VIOLATED RCW 9.35.005, WHICH PROVISION MERELY SETS**
14 **FORTH A DEFINITIONAL TERM**

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16 Third Party Defendants allege that Impulse violated the specific provision
17 located at RCW 9.35.005. However, RCW 9.35.005 simply sets forth a definitional
18 term (“Means of Identification”) within a criminal statute. Given that the Washington
19 State legislature did not specifically create any violation whatsoever under RCW
20 9.35.005, Third Party Defendants’ Fourth Counterclaim should be dismissed, as a
21 matter of law.⁵
22

24 **V. THIRD PARTY DEFENDANTS HAVE NOT STATED AND CANNOT**
25 **STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 10.14**
26 **(WASHINGTON CRIMINAL ANTI-HARASSMENT STATUTE)**

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28 ⁵ Third Party Defendants refer to a subsection “(3)” in its Counterclaim. However, there does not
appear to be a subsection “(3)” under RCW 9.35.005.

1
2 Third Party Defendants Fifth Counterclaim is based upon Impulse’s alleged
3 harassment of Third Party Defendants, pursuant to RCW 10.14. RCW 10.14 is a
4 criminal statute. Title 10 of The Revised Code of Washington sets forth Washington
5 State’s Criminal Procedures including, but not limited to, the process for obtaining
6 an anti-harassment protection order. Violation of such a protective order is a gross
7
8 misdemeanor.
9

10 It is self evident that this Court is not the proper forum to obtain relief under
11 RCW 10.14. A petition for a protective order must be submitted by a county district
12 attorney to the Superior Court of a Washington County. See RCW 10.14. The form
13 of petition is specified by RCW 10.14.040. RCW 10.14.020 states the elements
14 required for harassment under RCW 10.14 et seq. as follows:
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16

17 “Unlawful harassment” means a knowing and willful
18 course of conduct directed at a specific person which
19 seriously alarms, annoys, harasses, or is detrimental to such
20 person, and which serves no legitimate or lawful purpose.
21 The course of conduct shall be such as would cause a
22 reasonable person to suffer substantial emotional distress,
23 and shall actually cause substantial emotional distress to
24 the petitioner, or, when the course of conduct would cause
25 a reasonable parent to fear for the well-being of their child.

24 Third Party Defendants do not allege that they have met any of the
25 requirements for a protective order, nor have Third Party Defendants submitted a
26 petition for a protective order. Regardless, this Court does not have jurisdiction to
27
28

1 consider such a petition. Further, the conduct Third Party Defendants complain of
2 does not rise to the level of causing substantial emotional distress as required under
3
4 RCW 10.14.020. As such, Third Party Defendants' Fifth Counterclaim should be
5 dismissed as a matter of law.⁶

6
7 VI. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
8 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 19.170
9 (PROMOTIONAL ADVERTISING OF PRIZES)

10 Third Party Defendants allege that Impulse violated RCW 19.170 by falsely
11 advertising prizes without meeting the statutory requirements.⁷
12

13 RCW 19.170 provides, in pertinent part, that:

14 1) The legislature finds that deceptive promotional
15 advertising of prizes is a matter vitally affecting the public
16 interest for the purpose of applying the consumer
17 protection act, chapter 19.86 RCW. (2) Deceptive
18 promotional advertising of prizes is not reasonable in
19 relation to the development and preservation of business.
20 A violation of this chapter is an unfair or deceptive act in
21 trade or commerce for the purpose of applying the
22 consumer protection act, chapter 19.86 RCW, and
23 constitutes an act of deceptive promotional advertising. (3)
24 This chapter applies to a promotion offer: (a) Made to a
25 person in Washington; (b) Used to induce or invite a
26 person to come to the state of Washington to claim a prize,
27 attend a sales presentation, meet a promoter, sponsor,
28 salesperson, or their agent, or conduct any business in this
state; or (c) Used to induce or invite a person to contact by

26 ⁶ Third Party Defendants allegations in its Fifth Counterclaim relate to emails that Third Party
27 Defendants intentionally solicited.

28 ⁷ Third Party Defendants allege that Impulse did not fulfill its obligation of providing prizes to
Plaintiff' had won. However, Third Party Defendants lack standing to assert claims on behalf of Plaintiff.

1 any means a promoter, sponsor, salesperson, or their agent
2 in this state.

3 Third Party Defendants have not, *inter alia*, alleged: (1) what promotional
4 advertisements they have personally received; and (2) what advertisements that they
5 have personally viewed. As such, Third Party Defendants' Sixth Counterclaim
6 should be dismissed for failing to meet even the basic pleading requirements.
7

8
9 Moreover, any and all allegations against Defendant for violations of RCW
10 19.170 "sound in," or are "grounded in fraud." See Fidelity Mortgage Corp. v.
11 Seattle Times Company, 213 F.R.D. 573; 2003 U.S. Dist. LEXIS 4508; 32 Media L.
12 Rep.1094. (holding that cases that are "grounded in fraud" or "sound in fraud" must
13 satisfy the particularity requirement of Rule 9(b)). In fact, the express language of
14 RCW 19.170 et seq. uses terms such as "deceptive," "unfair" and "induce". The use
15 of these adjectives is not coincidental. In truth, the essence of these terms certainly
16 "sound in" or are "grounded in fraud." As such, Third Party Defendants should be
17 subject to a heightened pleading requirement under Rule 9(b).
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21 **VII. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID**
22 **CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 18.86.090**
23 **(DEFINITION OF VARIOUS LIABILITY IN THE CONEXT OF REAL**
24 **ESTATE BROKERAGE RELATIONSHIPS)**

25 RCW 18.86 is entitled "Real Estate Brokerage Relationships" and is entirely
26 inapplicable to any type of relationship between Third Party Defendants and Impulse.
27
28

1 RCW 18.86 pertains to the provisioning of real estate brokerage services as defined
2 under RCW 18.86.010(11). Given that the Third Party Defendants have failed to
3
4 allege that any real estate brokerage relationship existed between Third Party
5 Defendants and Impulse, Third Party Defendants' Seventh Counterclaim should be
6 dismissed as a matter of law.
7

8 Moreover, RCW 18.86.090 simply sets forth a definitional term for violations
9 relating to real estate brokerage relationships. Specifically, RCW 18.86.090 defines
10 the term "vicarious liability" in the context of violations under RCW 18.86 et seq.
11 Additionally, RCW 18.86.090 does not create any liability whatsoever. Given that
12 the Washington State legislature did not create any violation whatsoever under RCW
13 18.86.090, Third Party Defendants' Seventh Counterclaim should be dismissed as a
14 matter of law.
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18 VIII. THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE A
19 CRIMINAL PROSECUTION UNDER RCW 9A.60.040 (CRIMINAL
20 IMPERSONATION IN THE FIRST DEGREE)

21 Third Party Defendants' Eighth Counterclaim against Impulse arises out of
22 Impulse's alleged violations of RCW 9A.60.040 (Criminal Impersonation in the First
23 Degree). A person is guilty of criminal impersonation in the first degree if, *inter alia*,
24 the person assumes a false identity and does not act in his or her assumed character
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1 with intent to defraud another or for any other unlawful purpose. See RCW
2 9A.60.040(1)(a). Violations of RCW 9A.60.040(1)(a) are class “C” felonies.
3

4 Third Party Defendants’ attempt to prosecute criminal offenses under RCW
5 9A.60.040 is baseless, since private citizens have no authority to institute a criminal
6 prosecution under Title 9 of the Revised Code of Washington. The private citizen has
7 no constitutional, statutory, or common law right to commence a criminal action
8 under these circumstances or to require a public official to investigate or prosecute
9 a crime. Linda R.S., 410 U.S. at 619. As Third Party Defendants are private citizens,
10 Third Party Defendants lack standing to initiate a criminal prosecution under RCW
11 9A.60.040 and, therefore, Third Party Defendants’ Eighth Counterclaim should be
12 dismissed as a matter of law.
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16 **IX. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE VALID**
17 **CLAIMS FOR ESTOPPEL AND UNCLEAN HANDS**
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19 The doctrines of unclean hands and estoppel are generally affirmative defenses
20 and not separate causes of action. As such, Third Party Defendants’ Ninth
21 Counterclaim should be dismissed, as a matter of law.
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23 Even assuming that such claims somehow create liability, Third Party
24 Defendants have failed to plead any facts which would in any way make out a cause
25 of action against Impulse.
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1 X. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
2 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 9.58.010
3 (CRIMINAL LIBEL)

4 Third Party Defendants Tenth Counterclaim against Impulse arises out of
5 Impulse's alleged violations of RCW 9.58.010 (Criminal Libel). The gist of criminal
6 libel is malice. See State v. Sefrit, 82 Wash. 520 (1914). Criminal libel involves,
7 *inter alia*, the malicious publication that exposes a living person to hatred, contempt,
8 ridicule or obloquy. See RCW 9.58.010(1).

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11 A. THIRD PARTY DEFENDANTS LACK STANDING TO INSTITUTE
12 A CRIMIAL PROSECUTION UNDER RCW 9.58.010

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14 Third Party Defendants' attempt to prosecute criminal offenses under RCW
15 9.58.010 is without any merit since private citizens have no authority to institute a
16 criminal prosecution under Title 9 of the Revised Code of Washington in these
17 circumstances. The private citizen has no constitutional, statutory, or common law
18 right to require a public official to investigate or prosecute a crime. Linda R.S., 410
19 U.S. at 619. The remedy to a private citizen, who fails to persuade a prosecutor to
20 bring a criminal charge, is to petition the superior court to summon a grand jury in
21 accordance with the Criminal Investigatory Act of 1971 (RCW 10.27.030).
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1 B. THIRD PARTY DEFENDANTS HAVE NOT PLED THE REQUISITE
2 ELEMENTS FOR CRIMINAL LIBEL IN ACCORDANCE WITH BASIC AND
3 HEIGHTENED PLEADING REQUIREMENTS AND IMPULSE'S ALLEGED
4 LIBELOUS MATERIAL IS PRIVILEGED

5 RCW 9.58.010 provides, in pertinent part, that:

6
7 Every malicious publication by writing, printing, picture,
8 effigy, sign[,] radio broadcasting or which shall in any
9 other manner transmit the human voice or reproduce the
10 same from records or other appliances or means, which
11 shall tend: (1) To expose any living person to hatred,
12 contempt, ridicule or obloquy, or to deprive him of the
13 benefit of public confidence or social intercourse; or (2) To
14 expose the memory of one deceased to hatred, contempt,
15 ridicule or obloquy; or (3) To injure any person,
16 corporation or association of persons in his or their
17 business or occupation, shall be libel. Every person who
18 publishes a libel shall be guilty of a gross misdemeanor.

19 Initially, Third Party Defendants have failed to allege that Impulse proffered
20 any libelous or malicious publication by writing, printing, picture, effigy, etc., which
21 publication: (1) exposed Third Party Defendants to hatred, contempt, ridicule or
22 obloquy, or to deprive him of the benefit of public confidence or social intercourse;
23 or (2) exposed the memory of one deceased to hatred, contempt, ridicule or obloquy;
24 or (3) injured any person, corporation or association of persons in his or their business
25 or occupation.

26 Secondly, allegedly libelous statements, spoken or written by a party or counsel
27 in course of judicial proceeding, are absolutely privileged if they are pertinent or
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1 material to redress or relief sought, whether or not statements are legally sufficient
2 to obtain that relief. Mcneal V. F. F. Allen, 621 P.2d 1285, 1285-87 (Sup. Ct. WA
3 1980). The privilege of attorneys is based upon a public policy of securing to them
4 as officers of the court the utmost freedom in their efforts to secure justice for their
5 clients. Id. In the case at bar, Impulse has not proffered any writings whatsoever
6 about Third Party Defendants, which writings are outside or beyond the scope of this
7 litigation. In fact, Third Party Defendants failed to identify what the alleged libelous
8 writing even is other than what amounts to some third party postings and/or
9 discussions about this lawsuit on unidentified websites. As such, Third Party
10 Defendants' Tenth Counterclaim should be dismissed as a matter of law.

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15 **XI. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
16 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER 18 USC 1962(c)
17 (CRIMINAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS
18 ACT, A/K/A RICO).**

19 Third Party Defendants allege that Impulse violated Title 18, Part I, Chapter
20 96 (Criminal Racketeer Influenced and Corrupt Organizations Act, a/k/a RICO).⁸
21 Assuming Third Party Defendants are asserting a claim against Impulse arising out
22 of Impulse's alleged violation of 18 USC 1962(c) (which Impulse cannot determine
23 from the allegations contained in Third Party Defendants' Eleventh Counterclaim),
24 Third Party Defendants must allege that Impulse engaged in a pattern of racketeering
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28 ⁸ Once again, Third Party Defendants have no standing to bring federal criminal claims.

1 activity within the definition of 18 USC 1961(1)(A) and (D). Sun Savings and Loan
2 Ass'n v. Dierdorff, 825 F.2d 187, 191 (9th Cir.1987) (citing Sedima, S.P.R.L. v.
3 Imrex Co., 473 U.S. 479, 496 (1985)). “Racketeering activity” is any act indictable
4 under any of the several provisions of Title 18 of the United States Code. See 18
5 USC 1961. Third Party Defendants have not made, and cannot as a matter of law
6 make, such allegations against Impulse.
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9 Moreover, the Ninth Circuit has applied the particularity requirements of Rule
10 9(b) to RICO claims. Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392-93
11 (9th Cir. 1988); see also, Schreiber Distrib. v. Serv-Well Furniture Co., 806 F.2d 1393,
12 1400 (9th Cir.1986)). Rule 9(b) requires that the pleader state the time, place, and
13 specific content of the false representations as well as the identities of the parties to
14 the misrepresentation. Id. at 1401. The Third Party Defendants’ RICO Counterclaim
15 does not: (1) attribute specific conduct to the Third Party Plaintiff; (2) specify the
16 time or the place of the alleged wrongful conduct; (3) identify the time, place, and
17 manner of each fraud; and (4) set forth Impulse’s role in each scheme.
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22 Even is this matter was a civil RICO claim, Third Party Defendants have failed
23 to file the RICO Case Statement required by Local Rule 3.2.
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25 Based on the foregoing, Third Party Defendants’ Eleventh Counterclaim should
26 be dismissed as a matter of law.
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1 XII. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
2 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER THE CAN-SPAM
3 ACT OF 2003

4 The CAN-SPAM Act of 2003 (the “Act” or “CAN-SPAM”) does not create a
5 private right of action. Rather, the Federal Trade Commission, States Attorneys
6 General and Internet Service Providers (e.g., America Online, Earthlink, Microsoft
7 and Yahoo!) can commence lawsuits under CAN-SPAM. Further, CAN-SPAM does
8 not make it illegal to “appropriate” e-mail addresses at a personal domain as Third
9 Party Defendants allege.
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12 Even assuming that Third Party Defendants have standing under CAN-SPAM,
13 Third Party Defendants have not pled that Impulse violated any portion of CAN-
14 SPAM. As such, Third Party Defendants Twelfth Counterclaim should be dismissed
15 as a matter of law.
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18 XIII. THIRD PARTY DEFENDANTS HAVE FAILED TO STATE A VALID
19 CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 19.190 ET SEQ.
20 (WASHINGTON ANTI-SPAM STATUTE)

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22 The Washington Anti-Spam Act, *inter alia*, prohibits the transmission of a
23 commercial electronic mail message “to an electronic mail address that the sender
24 knows, or has reason to know, is held by a Washington State resident that: (a) uses
25 a third party’s internet domain name without permission of the third party, or
26 otherwise misrepresents or obscures any information in identifying the point of
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1 origin or the transmission path of a commercial electronic mail message; or (b)
2 contains false or misleading information in the subject line.” RCW 19.190.020.
3

4 Third Party Defendants have not alleged any factual allegations relating to
5 violations of RCW 19.190 et seq. Unsupported conclusions of law in a complaint
6 are not sufficient to withstand a motion to dismiss. “Although this standard for
7 Rule 12(b)(6) dismissals is quite liberal, more than bare assertions of legal
8 conclusions are ordinarily required to satisfy federal notice pleading
9 requirements.” Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th
10 Cir. 1988). Third Party Defendants’ Counterclaim contains nothing but
11 conclusory allegations and further, asks the Court to draw unwarranted inferences
12 from them. Based on the foregoing, Third Party Defendants cannot state a claim
13 for which relief can be granted.
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16 **XIV. THIRD PARTY DEFENDANTS HAVE FAILED TO SATTE A VALID**
17 **CLAIM FOR WHICH RELIEF CAN BE GRANTED UNDER RCW 19.86**
18 **(WASHINGTON CONSUMER PROTECTION ACT)**
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20 Should the Court dismiss Third Party Defendants’ allegations for Impulse’s
21 violations of RCW 19.190 et seq. for the reasons set forth hereinabove, Third Party
22 Defendants’ claim for Impulse’s breach of RCW 19.86 is also violated. In fact,
23 practices covered by the Washington Anti-Spam Act are matters vitally affecting the
24 public interest for the purpose of applying the Consumer Protection Act, RCW 19.86.
25
26 Third Party Defendants have failed to plead basic notice in support of their
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1 Counterclaim. The entire Counterclaim consists of one (1) conclusory legal
2 conclusion. Accordingly, Third Party Defendants' Fourteenth Counterclaim should
3 be dismissed.
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5 **XV. THIRD PARTY DEFENDANTS HAVE FAILED TO PLEAD THE**
6 **ELEMENTS NECESSARY TO OBTAIN A PERMANENT INJUNCTION**

7
8 The Third Party Defendants seek the issuance of a permanent injunction. A
9 party seeking the issuance of an injunction must show that: (1) there is a clear legal
10 or equitable right to an injunction; (2) there is a well-grounded fear of immediate
11 invasion of that right; and (3) the acts complained of are either resulting in or will
12 result in an actual and substantial injury. Port of Seattle v. International
13 Longshoremen's & Warehousemen's Union, 325 P.2d 1099, 1101 (Wash. 1958);
14 County of Spokane v. Local No. 1553, American Federation of State Employees, 76
15 Wash. App. 765, 771 888 P.2d 735 (Wash. App. 1995); Beacon Theatres, Inc. v.
16 Westover, 359 U.S. 500, 506-07 (1959). Third Party Defendants have literally failed
17 to plead any of these elements. As such, Third Party Defendants have not stated a
18 claim for which relief can be granted.
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22 **XVI. THIS COURT SHOULD IMPOSE SANCTIONS AGAINST THIRD PARTY**
23 **DEFENDANTS PURSUANT TO RULE 11**

24
25 Third Party Defendants admit in their Counterclaims that their Counterclaims
26 are "civil" in nature and "not criminal" matters. Notwithstanding this, Third Party
27 Defendants' asserted criminal causes of action against Impulse for the sole purpose
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1 of forcing Impulse to expend time and money dismissing same. All fifteen (15)
2 Counterclaims follow a similar pattern in that they lack any factual or legal basis
3 whatsoever. By conducting a reasonable investigation into the merits of their
4 allegations, as federal law mandates, Third Party Defendants would have understood
5 that all of their Counterclaims were entirely without merit.
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8 *Pro se* litigants are generally held to the same standard as attorneys. Westberg
9 v. All-Purpose Structures Inc., 936 P.2d 1175, 1177-78 (Wash. 1997); In re Pers.
10 Restraint Pet. of Connick, 28 P.3d 729, 736 (Wash. 2001) (*pro se* petitioner held to
11 the same responsibility as a lawyer and required to follow applicable statutes and
12 rules). Courts hold *pro se* litigants to the same standard as attorneys, and an
13 attorney's incompetence or neglect is not excusable. In re Marriage of Olson, 850
14 P.2d 527, 530 (Wash. 1993); Lane v. Brown & Haley, 912 P.2d 1040, 1043 (Wash.
15 1996). In fact, sanctions may be imposed on anyone who signs a pleading, motion,
16 or other paper which is filed in a federal case, whether that person be an attorney, a
17 client, or a *pro se* litigant. Shrock v. Altru Nurses Registry, 810 F.2d 658 (7th Cir.
18 1987). In the case at bar, the fact that the Third Party Defendants in this case filed
19 fifteen (15) Counterclaims without the assistance of counsel does not excuse them
20 from having to investigate the factual basis of their Counterclaims. Id. For example,
21 explaining that Rule 11 does not establish a lesser duty to make a reasonable inquiry
22 for *pro se* litigants, the court imposed Rule 11 sanctions on a *pro se* plaintiff who
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1 filed a civil rights action against a state trial judge for denying a motion in a previous
2 action regarding a speeding ticket. Dyson v. Sposeep, 637 F Supp 616 (N.D. Ind.
3 1986).

4
5 Further, *pro se* litigants are subject to Rule 11 sanctions, and their filings, like
6 those of attorneys, are judged by an objective standard of reasonableness. Cook v.
7 Peter Kiewit Sons, Co., 775 F.2d 1030, 1037 n. 13 (9th Cir. 1985); Business Guides
8 v. Chromatic Communications, Enterprises, 892 F.2d 802, 811 (9th Cir. 1989), *aff'd*
9 111 S. Ct. 922 (1991).
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12 Impulse has placed Third Party Defendants on notice that they should withdraw
13 their Counterclaims. Third Party Defendants have failed to withdraw their
14 Counterclaims. As such, Impulse requests that this Court impose sanctions upon
15 Third Party Defendants in an amount equal to the time and money expended by
16 counsel for Impulse in researching, preparing and filing a response to Third Party
17 Defendants' Counterclaims.
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20 Impulse further requests that this Court grant Impulse its attorneys' fees and
21 reasonable costs expended in responding to Third party Defendants' baseless
22 Counterclaims. Impulse's attorneys have spent a total of thirty-five (35) hours
23 researching and preparing this motion. Specifically, Peter Glantz has expended
24 twenty (20) billable hours researching and preparing the instant motion, Sean
25 Moynihan has spent ten (10) billable hours reviewing and preparing the instant
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1 motion and Floyd Ivey has billed five (5) hours researching, reviewing and filing the
2 instant motion.
3

4 A. PUBLIC POLICY OF RULE 11(c)

5 Rule 11(c) requires attorneys and *pro se* litigants to conduct a reasonable
6 inquiry into the law and facts before signing, *inter alia*, pleadings. Rule 11 sets forth
7 the responsibility that litigants have toward the Court and requires litigants to stop
8 and think before initially making legal or factual contentions. One purpose of Rule
9 11 sanctions is to streamline the litigation process by discouraging the use of dilatory
10 or abusive tactics, such as the filing of frivolous claims or defenses or the use of
11 pleadings to harass or delay. Golden Eagle Distributing Corp. v. Burroughs Corp.,
12 801 F2d 1531 (Cal. CA. 1986).
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16 Based on the foregoing, Impulse respectfully requests that the Court impose
17 sanctions against Third Party Defendants pursuant to Rule 11 and grant Impulse
18 reasonable costs and attorneys fees for the amount of cost and time devoted to
19 researching, preparing and filing this response.
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CONCLUSION

Pursuant to Rule 12(b)(6), Impulse requests that the Court dismiss Third Party Defendants' Counterclaims on the ground that Third party Defendants have not stated, and cannot state, claims for which relief can be granted. Further, pursuant to Rule 11, Impulse respectfully requests that this Court impose sanctions upon Third Party Defendants on the ground that Third Party Defendants' Counterclaims are frivolous and would have been understood to be frivolous upon a reasonable investigation by Third Party Defendants.

DATED this 31st day of March, 2006.

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I hereby certify that on March 31, 2006, I electronically filed MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THIRD PARTY DEFENDANTS' COUNTERCLAIMS with the Clerk of the Court using the CM/ECF System which will send notification of such filing to Robert J. Siegel, Peter J. Glantz and Sean A. Moynihan. I hereby certify that I have served the foregoing to the following non-CM/ECF participants by other means: Bonnie Gordon, Jonathan Gordon, James S. Gordon, III, Robert Pritchett, Emily Abbey and Jamila Gordon.

S/ FLOYD E. IVEY

FLOYD E. IVEY