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DOUGLAS E. MCKINLEY, JR.  
Attorney At Law  
P.O. Box 202  
Richland, Washington 99352  
Phone 628-0809 Fax (509) 628-2307

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON  
AT RICHLAND

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

Plaintiff,

vs.

IMPULSE MARKETING  
GROUP, INC.,  
a Nevada Corporation

Defendant.

NO. CV-04-5125-FVS

Plaintiff's Second Response to  
Defendant's Motion to Dismiss  
Plaintiff's Complaint;  
Certificate of Service

JURY TRIAL DEMANDED

1 COMES NOW the plaintiff, James S. Gordon, Jr., and files this  
2 Second Response to the Defendant's Motion to Dismiss Plaintiff's  
3 Complaint.  
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5 **BACKGROUND**

6 The Defendant previously brought a motion to dismiss the Plaintiff's  
7 complaint under FRCP 12(b)(6) arguing that 1) the Plaintiff's claims were  
8 barred by Res Judicata, 2) the Plaintiff's claims were barred by federal  
9 preemption, and 3) the Plaintiff's claims were barred because the  
10 Defendant "could not have violated" Washington's Commercial Electronic  
11 Mail Act "as a matter of law." Oral argument on the Defendant's motion  
12 was held March 31, 2005, and the Court advised the Parties that the Court  
13 was not persuaded by the Defendant's arguments on any of these grounds,  
14 and that the Court was therefore inclined to deny the Defendant's motion  
15 to dismiss under FRCP 12(b)(6).  
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20 The March 31 hearing then turned to an argument that the Defendant  
21 had made in its reply brief related to the heightened pleading requirements  
22 of FRCP 9(b). The Court correctly noted that this argument had not been  
23 raised in the Defendant's original motion and, as such, the Plaintiff had not  
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1 been given the opportunity to brief the issue to the Court. In its ruling of  
2 March 31, 2005, the Court directed the Plaintiff to file this memoranda  
3 briefing the Court on the applicability of the heightened pleading  
4 requirements of FRCP 9(b) to the Plaintiff's complaint.  
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8 **THE HEIGHTENED PLEADING REQUIREMENTS OF FRCP 9(b)**  
9 **DO NOT APPLY TO THE PLAINTIFF'S CLAIMS UNDER RCW**  
10 **19.190 et seq BECAUSE THE PLAINTIFF'S CLAIMS UNDER RCW**  
11 **19.190 et seq ARE NOT "GROUNDED IN FRAUD"**  
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15 The Plaintiff's complaint does not allege fraud. Instead, the  
16 Plaintiff's complaint alleges that the Defendant violated the provisions of  
17 RCW 19.190 et seq. FRCP 9(b) provides: "In all averments of fraud or  
18 mistake, the circumstances constituting fraud or mistake shall be stated  
19 with particularity. Malice, intent, knowledge, and other condition of mind  
20 of a person may be averred generally." Thus, the question before the court  
21 is whether violations of RCW 19.190 constitute "averments of fraud or  
22 mistake" and thus trigger the applicability of FRCP 9(b). A comparison of  
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1 the elements of fraud and the requirements of a violation of RCW 19.190  
2 makes plain that they do not.

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4 The elements of fraud consist of 1) a false representation in  
5 reference to 2) a material fact made with 3) knowledge of its falsity and  
6 with 4) the intent to deceive with 5) action taken in reliance upon the  
7 representation. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir.1976) (citing  
8 Pence v. United States, 316 U.S. 332, 338, 62 S.Ct. 1080, 86 L.Ed. 1510  
9 (1942)). In contradistinction, a violation of both RCW 19.190.020 and  
10 RCW 19.190.030 occurs when a person initiates the transmission,  
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conspires with another to initiate the transmission, or assists the  
transmission, of a commercial electronic mail message from a computer  
located in Washington or to an electronic mail address that the sender  
knows, or has reason to know, is held by a Washington resident that:

(a) Uses a third party's internet domain name without permission of the  
third party, or otherwise misrepresents or obscures any information in  
identifying the point of origin or the transmission path of a commercial  
electronic mail message; or

(b) Contains false or misleading information in the subject line.

1 Accordingly, there is no requirement that the Plaintiff establish the  
2 elements of fraud to prove a violation of RCW 19.190. RCW 19.190 does  
3 not require that the sender “know” that the information in the subject line  
4 or transmission path is “false or misleading.” RCW 19.190 does not  
5 require that “false or misleading information” in the subject line or  
6 transmission path be “material.” RCW 19.190 does not require that the  
7 person who sent the message have “knowledge” of the “falsity” in the  
8 subject line or transmission path. RCW 19.190 does not require that the  
9 person sending an email that violates the statute do so with “the intent to  
10 deceive.” RCW 19.190 does not require that the recipient of an email that  
11 violates the statute take any “action” in “reliance upon the representation.”  
12 In short, RCW 19.190 requires none of the scienter, intent, damages, or  
13 interplay between the actors, that are all required in an action for fraud.  
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16 Instead, RCW 19.190 simply imposes strict liability for violations of  
17 the statute. Neither intent on the part of the sender, nor reliance or  
18 damages on the part of the recipient, are required. All a successful  
19 complaint for a violation of RCW 19.190 must prove is that a commercial  
20 electronic mail message was sent that violated the technical requirements  
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1 of the statute, and that it was received by a Washington resident. Applying  
2 the heightened pleading requirements of FRCP 9(b) would thus force the  
3 Plaintiff to plead numerous facts that the Plaintiff will NOT be required to  
4 prove at trial to establish that the Plaintiff is entitled to relief under RCW  
5 19.190 et seq. Such a result is plainly not warranted under FRCP 9(b).  
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9 In addition to RCW 19.190.020, Plaintiff has also complained of  
10 violations of RCW 19.190.030, and RCW 19.86, the Washington  
11 Consumer Protection Statute. However, all of these statutes amount to the  
12 same complaint, as the language of RCW 19.190.030 simply repeats RCW  
13 19.190.020, and defines a violation of RCW 19.190.030 as a violation of  
14 RCW 19.86. RCW 19.190.030 also extends liability those who “assist in  
15 the transmission of a commercial electronic mail message, when the person  
16 providing the assistance knows, or consciously avoids knowing, that the  
17 initiator of the commercial electronic mail message is engaged, or intends  
18 to engage, in any act or practice that violates the consumer protection act.”  
19 Liability for “providing assistance” to one violating RCW 19.190.030 and  
20 RCW 19.86 is thus triggered by “knowing” that the initiator is violating the  
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1 statute, but it can also be triggered simply by “consciously avoiding  
2 knowing.” Accordingly, this element of the Plaintiff’s complaint also does  
3 not trigger the heightened pleading requirements of FRCP 9(b), as it is also  
4 not an allegation of fraud, and it further falls squarely within the exception  
5 of the second sentence in the rule; “Malice, intent, knowledge, and other  
6 condition of mind of a person may be averred generally.” (underline  
7 added)  
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10 In setting forth Defendant’s argument, the Defendant relies on  
11 Fidelity Mortgage Corp. V. Seattle Times Company, 213 F.R.D. 573; 2003  
12 U.S. Dist. LEXIS 4508; 32 Media L. Rep. 1094. However, Fidelity is  
13 readily distinguished from the instant case, and, as a decision of the US  
14 District Court for the Western District of Washington, is not binding  
15 precedent on this Court even if it were not. Unlike the present case, the  
16 complaint in Fidelity specifically alleged an "ongoing consumer fraud."  
17 The Court in Fidelity further found that all three of the additional statutory  
18 claims were “premised on the allegation that the Seattle Times Co.  
19 ‘knowingly publish[ed] false, deceptive, and/or misleading information’  
20 damaging to the plaintiff,” and that “this cause of action, while plead under  
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1 federal and state statutes, mirrors the elements of an action for fraud.” Id.  
2 In contradistinction, the Plaintiff has made no allegation of fraud, nor has  
3 the Plaintiff complained of being damaged by the misleading acts of the  
4 Defendant. Instead, the Plaintiff has claimed that he is entitled to relief  
5 because RCW 19.190 imposes strict liability for violations of the Act. As  
6 has already pointed out, the elements of fraud are simply NOT required in  
7 proving a violation of the statutes that form the basis of the Plaintiff’s  
8 complaint.  
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12 To the knowledge of the undersigned, the United States Court of  
13 Appeals for the Ninth Circuit has not considered whether a complaint for a  
14 violation of RCW 19.190 triggers the heightened pleading requirements of  
15 FRCP 9(b). The Court did consider the application of FRCP 9(b) to a  
16 diversity class action complaint against psychiatric associations and  
17 manufacturers of prescription pharmaceuticals alleging that defendants  
18 increased sales of particular prescription drug in violation of California  
19 Consumers Legal Remedies Act (CLRA) and California's unfair business  
20 practice laws. In Vess v. Ciba-Geigy Corp., 317 F.3d 1097, (9<sup>TH</sup> Cir.  
21 2003), 54 Fed.R.Serv.3d 1032, 3 Cal. Daily Op. Serv. 970, 2003 Daily  
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1 Journal D.A.R. 1265 the Ninth Circuit established the framework for  
2 analyzing the applicability of FRCP 9(b). In pertinent part, the Court  
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4 states:

5 “The text of Rule 9(b) requires only that in "all *averments of fraud*  
6 ..., the circumstances constituting fraud ... shall be stated with  
7 particularity." Fed.R.Civ.P. 9(b) (emphasis added). The rule does not  
8 require that allegations supporting a claim be stated with  
9 particularity when those allegations describe non-fraudulent  
10 conduct.” Id. at 1104.  
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14 Plainly, RCW 19.190 imposes liability for non-fraudulent conduct,  
15 and the only claims the Plaintiff has set forth in his complaint are for  
16 violations of RCW 19.190. Accordingly, the rule does not require that  
17 allegations supporting these claims be stated with particularity. Finally,  
18 the Plaintiff would bring to the attention a recent decision by the United  
19 States District Court for the Southern District of New York, In re: Initial  
20 Public Offering Securities Litigation, 241 F.Supp.2d 281, Fed. Sec. L. Rep.  
21 P 92,282, which analyzed the 9<sup>th</sup> Circuit’s opinion in Vess v. Ciba-Geigy  
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1 Corp. while considering a case, such as the one now before this Court,  
2 where a defendant sought to have the Court extend the pleading  
3 requirements of FRCP 9(b) to cases which do not allege fraud. Beginning  
4 with a quote from the United States Supreme Court, New York's Southern  
5 District Court observed:  
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8 "Whatever merits these and other policy arguments may have, it is  
9 not the province of [the courts] to rewrite the statute [or Rules] to  
10 accommodate them." Artuz v. Bennett, 531 U.S. 4, 10, 121 S.Ct.  
11 361, 148 L.Ed.2d 213 (2000). *See also* Badaracco v. Commissioner,  
12 464 U.S. 386, 398, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984) ("Courts  
13 are not authorized to rewrite a statute because they might deem its  
14 effects susceptible of improvement."). Indeed, in the last decade the  
15 Supreme Court has *twice* admonished the lower courts for  
16 augmenting federal pleading requirements: "A requirement of  
17 greater specificity for particular claims is a result that *'must* be  
18 obtained by the process of amending the Federal Rules, and *not* by  
19 judicial interpretation.'" Swierkiewicz, 534 U.S. at 515, 122 S.Ct.  
20 992 (quoting Leatherman, 507 U.S. at 168, 113 S.Ct. 1160)  
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1 (emphasis added). In fact, in Swierkiewicz, the Defendant tried to  
2 persuade the Court on policy grounds by asserting that "allowing  
3 lawsuits based on conclusory allegations of discrimination to go  
4 forward will burden the courts and encourage disgruntled employees  
5 to bring unsubstantiated suits." *Id.* at 514, 122 S.Ct. 992. The Court  
6 responded: "Whatever the practical merits of this argument, the  
7 Federal Rules do not contain a heightened pleading standard for  
8 employment discrimination suits." *Id.* at 514-15, 122 S.Ct. 992. *Id.*  
9 340-341.

10 Just as the Southern District Court in New York analyzed our own  
11 9<sup>th</sup> Circuit opinion in Vess v. Ciba-Geigy Corp. to find that the Court  
12 should not allow the heightened pleading standard for certain violations of  
13 securities law, so also should this Court decline to extend the heightened  
14 pleading standard for violations of RCW 19.190 and RCW 19.86.

### 20 CONCLUSION

21 Just as the Court found that none of the Defendant's purported  
22 grounds for dismissal under FRCP 12(b)(6) had any basis in law or fact,  
23 Defendant's purported grounds for dismissal under FRCP 9(b) is also  
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1 without merit. The Plaintiff therefore respectfully requests that the Court  
 2 deny the Defendant's motion to dismiss in its entirety, order the Defendant  
 3 to file its answer within twenty days, and enter an order of default in the  
 4 event that the Defendant does not file its answer within the time limit set  
 5 by the Court. In the event that the Court determines that the Plaintiff's  
 6 complaint is subject to the heightened pleading requirements of FR 9(b),  
 7 the Plaintiff respectfully requests that the Court grant the Plaintiff forty  
 8 days<sup>1</sup> leave to amend its Complaint to comply with FR 9(b). Finally, the  
 9 Plaintiff respectfully requests that the Court grant such other and further  
 10 relief as it deems just and proper.  
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15 DATED this 21st day of April, 2005

16  
 17 S/ DOUGLAS E. MCKINLEY, JR.  
 18 WSBA# 20806  
 19 Attorney for Plaintiff  
 20 P.O. Box 202  
 21 Richland, Washington 99352  
 22 Phone (509) 628-0809  
 23 Fax (509) 628-2307  
 24 Email: doug@mckinleylaw.com

25 Certificate of Service

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<sup>1</sup> At the Defendant's request, the Plaintiff allowed the Defendant numerous extensions of time to answer or otherwise plead prior to Defendant's Rule 12(b)(6) motion. In the event that the Court requires to the Plaintiff to amend its complaint, forty days time is fair time limit in light of those extensions.

1 I hereby certify that on April 21, 2005, I electronically filed the foregoing,  
2 together with a Declaration of James S. Gordon, Jr., with the Clerk of the  
3 Court using the CM/ECF System which will send notification of such filing  
4 to the following: Floyd Ivey, and I hereby certify that I have mailed by  
5 United States Postal Service the documents to the following non-CM/ECF  
6 participants: Peter J. Glantz, Sean A. Moynihan, David O. Klein.

7 S/ DOUGLAS E. MCKINLEY, JR.  
8 WSBA# 20806  
9 Attorney for Plaintiff  
10 P.O. Box 202  
11 Richland, Washington 99352  
12 Phone (509) 628-0809  
13 Fax (509) 628-2307  
14 Email: doug@mckinleylaw.com