

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON

Plaintiff,

V.

IMPULSE MARKETING, INC., JEFFREY
GOLDSTEIN, PHILLIP HUSTON, and
KENNETH ADAMSON,

Defendants.

No. CV-04-5125-FVS

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS

IMPULSE MARKETING, INC., JEFFREY
GOLDSTEIN, PHILLIP HUSTON, and
KENNETH ADAMSON,

Defendants.

THIS MATTER comes before the Court on the Defendants' Motion to Dismiss the First Amended Complaint, Ct. Rec. 403. The Plaintiff is represented by Robert J. Siegal. The Defendants are represented by Floyd Ivey, Sean A. Moynihan, and Peter Glantz.

BACKGROUND

The Plaintiff, James S. Gordon, is a Washington resident and the registered user of the internet domain name "gordonworks.com." The Defendants are Impulse Marketing Group, Inc. ("Impulse"), a Nevada corporation, and three of its employees: Kenneth Adamson, Jeffrey Goldstein, and Phil Huston. Impulse is an electronic marketing company that transacts business with Washington by sending commercial electronic mail messages ("email") to Washington state residents. Impulse operates by collecting personally identifiable information from individuals who sign up to receive free products and/or services

1 at websites run by Impulse and/or its marketing partners. In
2 consideration for receiving free products and/or services from an
3 Impulse related website, it requires that individuals using its
4 websites agree to submit accurate personal subscriber information
5 ("Subscriber Profiles"). By submitting their Subscriber Profiles,
6 individuals grant Impulse the right to transfer the Subscriber
7 Profiles to third parties for marketing purposes. Impulse Marketing
8 subscribes revenue from the licensing and/or use of accurate
9 Subscriber Profiles.

10 The Plaintiff initiated the present lawsuit on November 23, 2004,
11 alleging that Impulse violated Washington's Commercial Electronic Mail
12 Act ("CEMA"), RCW § 19.190 et seq., and Washington's Consumer
13 Protection Act ("CPA"), RCW § 19.86 et seq., by initiating and/or
14 conspiring with others to initiate unsolicited commercial emails to
15 various addresses at Plaintiff's domain, "gordonworks.com." On May 2,
16 2006, the Court granted the Plaintiff's request to amend the Complaint
17 to include claims under the Federal CAN-SPAM Act (15 U.S.C. § 7701 et
18 seq.), Washington's Deceptive Offers statute (RCW § 19.170),
19 Washington's Identity Crimes statute (RCW § 9.35), and a new
20 provision of CEMA (RCW § 19.190.080). The Court also gave the
21 Plaintiff leave to name additional defendants, Jeffrey Goldstein,
22 Kenneth Adamson, and Phillip Huston, officers and/or directors of
23 Impulse. (Ct. Rec. 356).

24 The Plaintiff filed his First Amended Complaint ("FAC") on June
25 13, 2006. On August 31, 2006, the Defendants moved to dismiss the FAC
26 on a number of grounds. Without seeking leave of the Court, the

1 Plaintiff filed a Second Amended Complaint ("SAC"), Ct. Rec. 448-3,
2 along with their response to the motion to dismiss. The Defendants
3 objected to the SAC as an unauthorized pleading. The Plaintiff then
4 sought leave to file the SAC. The Court has denied the Plaintiff's
5 request to file the Second Amended Complaint, but given the Plaintiff
6 leave to plead damages for his Prize Statute claim. The Defendants'
7 motion to dismiss the FAC is now before the Court.

8 **DISCUSSION**

9 **I. LEGAL STANDARD**

10 A complaint should not be dismissed for failure to state a claim
11 upon which relief may be granted under Federal Rule of Civil Procedure
12 12(b) (6) unless it "appears beyond doubt that the plaintiff can prove
13 no set of facts in support of his claim which would entitle him to
14 relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2
15 L. Ed. 2d 80, 84 (1957). When the legal sufficiency of a complaint's
16 allegations are tested with a motion under Rule 12(b) (6), all factual
17 allegations set forth in the complaint are taken as true and construed
18 in the light most favorable to the plaintiff. *Epstein v. Wash. Energy*
19 Co., 83 F.3d 1136, 1140 (9th Cir. 1996). The Court must give the
20 plaintiff the benefit of every inference that reasonably may be drawn
21 from well-pleaded facts. *Tyler v. Cisneros*, 136 F.3d 603, 607 (9th
22 Cir. 1998).

23 The parties have submitted a number of declarations in support of
24 their briefing on the motion to dismiss. The Court will consider
25 these materials only in ruling upon the Defendants' challenge to
26 personal jurisdiction. A court may not generally consider material

1 beyond the pleadings in ruling upon a motion to dismiss. *Thompson v.*
2 *Davis*, 295 F.3d 890, 896 n.3 (9th Cir. 2002). If the Court were to
3 rely on the declarations submitted by the parties, the Court would be
4 obliged to convert the motion to dismiss into a motion to for summary
5 judgment. *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 643
6 n.4 (9th Cir. 1989). This the Court declines to do, as the proper
7 time for consideration of declarations is generally at summary
8 judgment, after both parties have had an opportunity to conduct
9 discovery. The Court may and will consider the declarations and, if
10 necessary, resolve factual disputes in addressing the Defendants'
11 personal jurisdiction argument. *Inlandboatmens Union of the Pac. v.*
12 *Dutra Group*, 279 F.3d 1075, 1083 (9th Cir. 2002).

13 **II. SUBJECT MATTER JURISDICTION**

14 This Court has subject matter jurisdiction pursuant to 28 U.S.C.
15 § 1332. Under section 1332, the federal district courts have original
16 jurisdiction to hear civil cases where the parties are citizens of
17 different states and more than \$75,000 is in controversy. The
18 Plaintiff is a Washington resident. The Defendants are a Nevada
19 corporation and citizens of the State of Georgia. FAC ¶¶ 1.1-1.5.
20 The Plaintiff alleges more than \$75,000 in damages. FAC ¶ 2.5.
21 Subject matter jurisdiction is therefore proper in this case.

22 **III. COMMERCIAL ELECTRONIC MAIL ACT**

23 Under Washington's Commercial Electronic Mail Act ("CEMA"), it is
24 illegal to transmit email that misrepresents its point of origin,
25 misrepresents its transmission path, or contains false information.
26 Wash. Rev. Code § 19.190.020. The statute authorizes an individual

1 who receives emails that violate CEMA to bring an action to recover
2 damages. Wash. Rev. Code § 19.190.040(1). Interactive computer
3 services injured by such emails may also recover damages. Wash. Rev.
4 Code § 19.190.040(2). An "interactive computer service" is,

5 any information service, system, or access software provider
6 that provides or enables computer access by multiple users
7 to a computer server, including specifically a service or
system that provides access to the internet and such systems
operated or services offered by libraries or educational
institutions.

8 Wash. Rev. Code § 19.190.010(8). The statute provides separate
9 definitions for "domain name" and "web page." Wash. Rev. Code §
10 19.190.010 (10), (13). CEMA further provides that it is illegal to
11 use email to induce a person to provide identifying information.
12 Wash. Rev. Code § 19.190.080. Private individuals may bring civil
13 actions for damages for violations of this subchapter. Wash. Rev.
14 Code § 19.190.090(1). The owner of a web page who has been "adversely
15 affected" by a violation of Section 19.190.80 may also bring suit.
16 Wash. Rev. Code § 19.190.090(2).

17 The Defendants argue that Gordon, as an individual bringing suit
18 on behalf of himself, does not have standing to pursue his CEMA claim
19 because he does not qualify as an "interactive computer service." The
20 Plaintiff responds that Gordon qualifies as an interactive computer
21 service because he makes information available to thousands of
22 computer users on his website. The Court does not find either party's
23 briefing on this issue persuasive. The parties have neither cited
24 case law nor defined the technical terms at issue in the definition.
25 If the interpretation of the term "interactive computer service"
26

1 presents a question of first impression, analysis beyond recitation of
2 the statutory language will be necessary.

3 Moreover, even if the Plaintiff does not qualify as an
4 interactive computer service, he may still seek recovery under Section
5 19.190.020 for those emails he received personally. He may also seek
6 recovery for the injuries he suffered personally and the adverse
7 effects the Defendants' conduct had on him as a provider of internet
8 access service under Section 19.190.080. Dismissal of the Plaintiff's
9 CEMA claim is therefore denied.

10 **IV. CONSUMER PROTECTION ACT**

11 In order to state a cause of action under Washington's Consumer
12 Protection Act ("the CPA"), a plaintiff must allege five elements:

13 (1) an unfair or deceptive act or practice, (2) in trade or
14 commerce, (3) that impacts the public interest, (4) which
15 causes injury to the party in his business or property, and
causes injury to the party in his business or property, and
the injury must be causally linked to the unfair or
deceptive act.

16 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105
17 Wash. 2d 778, 785-86, 719 P.2d 531, 535-37 (Wash. 1986). Conduct that
18 violates CEMA constitutes "an unfair or deceptive act in trade or
19 commerce" for the purposes of the CPA. Wash. Rev. Code § 19.190.100.

20 The Defendants imply that the Plaintiff lacks standing to bring
21 his CPA claims because Gordon does not qualify as an interactive
22 computer service. Given that the Defendants have failed to persuade
23 the Court that the Plaintiff is not an interactive computer service,
24 the Plaintiff may yet be able to prove that the Defendants engaged in
25 an unfair or deceptive trade practice by violating CEMA. Dismissal of
26 the Plaintiff's CPA claim is therefore inappropriate.

1 **V. THE CAN-SPAM ACT**

2 The Controlling the Assault of Non-Solicited Pornography and
3 Marketing Act ("CAN-SPAM") attempts to decrease the problems
4 associated with commercial electronic mail by prohibiting a number of
5 emailing practices. 15 U.S.C. § 7701 *et seq.* While CAN-SPAM is
6 generally enforced by the Federal Trade Commission, providers of
7 "internet access service" may also seek relief under CAN-SPAM. 15
8 U.S.C. § 7706(g)(1). For the purposes of CAN-SPAM, "'Internet access
9 service' has the meaning given that term in section 231(e)(4) of the
10 Communications Act of 1934." 15 U.S.C. § 7702(11). The
11 Communications Act defines "internet access service" as

12 a service that enables users to access content, information,
13 electronic mail, or other services offered over the
14 Internet, and may also include access to proprietary
content, information, and other services as part of a
package of services offered to consumers. Such term does
not include telecommunications services.

15 47 U.S.C. § 231(e)(4).

16 The Defendants argue that the Plaintiff does not have standing to
17 bring claims under CAN-SPAM because Gordon, as an individual bringing
18 suit on behalf of himself, is not an internet access service. The
19 Plaintiff responds that he is an internet access service because, as
20 the sole proprietor of gordonworks.com, he enables the site's users to
21 access content and email on the Internet.

22 The Court is not persuaded that dismissal of the Plaintiff's CAN-
23 SPAM claim is appropriate. The parties agree that CAN-SPAM defines
24 "internet access service" in terms of what the entity in question does
25 rather than in terms of the entity's ownership structure. The

1 Plaintiff has made a logical argument that his activities qualify him
2 under this definition. In contrast, the Defendants have not provided
3 any analysis in support of their argument that an individual who
4 operates a domain name may not qualify as an internet access service.
5 While the Defendants do point to a secondary source that supports
6 their position, the persuasive value of this unbinding authority is
7 negated by the absence of analysis. Dismissal of the Plaintiff's CAN-
8 SPAM claim at this stage of the litigation would be premature.

9 **VI. THE PRIZE STATUTE**

10 Washington's Prize Statute prohibits the deceptive promotional
11 advertizing of prizes. Wash. Rev. Code § 19.170.010 et seq. "A
12 person who suffers damages" as a result of such advertizing practices
13 may bring a cause of action to recover damages. Wash. Rev. Code §
14 19.170.060. The FAC alleges that the Defendants transmitted many
15 emails that violated the Prize Statute in unspecified ways. FAC ¶¶
16 4.3.1-4.3.2. The Defendants argue that the Plaintiff does not have
17 standing to bring his Prize Statute claim because he has failed to
18 plead that the Defendants' alleged violations of the Prize Statute
19 caused him to suffer damages. However, the Court has granted the
20 Plaintiff permission to amend the First Amended Complaint to plead
21 damages under the Prize Statute. The motion to dismiss this claim is
22 denied.

23 **VII. PERSONAL JURISDICTION**

24 A trial court may only exercise personal jurisdiction over an
25 out-of-state defendant when the exercise of jurisdiction is both
26 consistent with due process and authorized by the state's long arm

1 statute. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154-55 (9th Cir.
2 2006). Due process is satisfied when a defendant has a sufficient
3 number of contacts with the forum state so that the exercise of
4 jurisdiction does not offend traditional notions of fair play and
5 substantial justice. *International Shoe Co. v. Washington*, 326 U.S.
6 310, 316, 66 S. Ct. 154, 159, 158 90 L. Ed. 2d 95, 102 (1945). When a
7 defendant has so many contacts with the forum state as to "approximate
8 physical presence," the courts within that state have general
9 jurisdiction over the defendant and may exercise it on any claim.
10 *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1168-69 (9th Cir.
11 2006). Where, however, a defendant has only limited contacts with the
12 forum state, the courts within it may only exercise specific
13 jurisdiction. *Pebble Beach Co. v. Caddy*, 453 F.3d at 1154 n.1.

14 The Ninth Circuit applies a three-part test in determining
15 whether a defendant has sufficient minimum contacts with the forum
16 state to establish specific jurisdiction. Minimum contacts exist
17 when,

18 (1) the defendant has performed some act or consummated some
19 transaction within the forum or otherwise purposefully
20 availed himself of the privileges of conducting activities
in the forum, (2) the claim arises out of or results from
the defendant's forum-related activities, and (3) the
exercise of jurisdiction is reasonable.

21 *Id.* at 1155.

22 The plaintiff in a civil action has the burden of proving that
23 the court has personal jurisdiction over a defendant. *Lee v. City of*
24 Los Angeles, 250 F.3d 668, 692 (9th Cir. 2001). Once the plaintiff
25 has satisfied the first two prongs of the minimum contacts test, the
26

1 burden shifts to the defendant to prove that the exercise of
2 jurisdiction would be unreasonable. *Schwarzenegger v. Fred Martin*
3 *Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004). In considering the
4 evidence, the court should take unchallenged allegations in the
5 complaint as true, conflicts in facts should be resolved in favor of
6 the plaintiff, and the evidence before the court should be construed
7 in the light most favorable to the plaintiff. *Id.* at 800; *Ochoa*, 287
8 F.3d at 1187.

9 While the Defendants do not contest the court's jurisdiction over
10 Impulse, they do challenge the court's jurisdiction over Goldstein and
11 Adamson. However, dismissal of the claims against Goldstein and
12 Adamson is inappropriate because the Plaintiff has plead facts
13 sufficient to confer personal jurisdiction. The Plaintiff has plead
14 that Adamson and Goldstein are officers or directors of Impulse who
15 exercise control over Impulse's policies and practices. FAC ¶ 1.5.
16 Assuming this allegation to be true, Adamson and Goldstein did
17 purposefully avail themselves of the privilege of conducting
18 activities in Washington. While the Defendants have submitted
19 evidence to the contrary, the Court must resolve such factual disputes
20 in favor of the Plaintiff under *Ochoa* and *Schwarzenegger*. 374 F.3d at
21 800; 287 F.3d at 1187.

22 **VIII. VAGUENESS**

23 Under the notice pleading requirements of the Federal Rules of
24 Civil Procedure, a complaint in a civil suit must contain "a short and
25 plain statement of the grounds upon which the court's jurisdiction
26 depends." Fed. R. Civ. P. 8(a)(1). "The 'short and plain statement,'

1 must provide the defendant with 'fair notice of what the plaintiff's
2 claim is and the grounds upon which it rests.'" *Dura Pharm., Inc. v.*
3 *Broudo*, 544 U.S. 336, 346, 125 S. Ct. 1627, 1634, 161 L. Ed. 2d 577,
4 588 (2005) (citing *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99,
5 103, 2 L. Ed. 2d 80, 85 (1957)). To satisfy this standard, the
6 plaintiff's complaint should set forth allegations respecting all
7 material elements of a particular claim. *Brennan v. Concord EFS,*
8 *Inc.*, 369 F. Supp. 2d 1127, 1130 (N.D. Cal. 2005).

9 A complaint may properly be dismissed when it is "vague,
10 conclusory, and general and does not set forth any material facts in
11 support of the allegations." *North Star Int'l v. Arizona Corp.*
12 *Comm'n*, 720 F.2d 578, 583 (9th Cir. 1983). More specifically,
13 dismissal is appropriate when "one cannot determine from the complaint
14 who is being sued, for what relief, and on what theory, with enough
15 detail to guide discovery." *Jacobson v. Schwarzenegger*, 357 F. Supp.
16 2d 1198, 1205 (C.D. Cal. 2004) (quoting *McHenry v. Renne*, 84 F.3d 1172,
17 1178 (9th Cir. 1996)).

18 The Defendants argue that the FAC fails to satisfy the
19 pleading requirements of Rule 8 because it is vague and consists
20 entirely of conclusory allegations. While the Court is troubled by
21 the vague and conclusory nature of the FAC, the FAC does provide the
22 Defendants with "fair notice" of the nature of the Plaintiff's claims.
23 Unlike the complaint dismissed in *Jacobson*, one can determine the
24 identity of the defendants, the relief sought, and the theories
25 alleged in the FAC. It is also possible to proceed with discovery by
26 seeking the emails at issue.

IX. MOTION FOR A MORE DEFINITE STATEMENT

A defendant may move for a more definite statement when the complaint is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Fed. R. Civ. P. 12(e). A motion for a more definite statement is not a remedy for a lack of detail, however. *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 414-15 (D. Or. 2002); *Castillo v. Norton*, 219 F.R.D. 155, 163 (D. Ariz. 2003). Motions for a more definite statement are disfavored, leading some district courts to conclude that such motions should be denied if the missing information may be obtained through discovery. *Castillo*, 219 F.R.D. at 163; *Davison v. Santa Barbara High School District*, 48 F. Supp. 2d 1225, 1228 (C.D. Cal. 1998).

The Defendants request an order compelling the Plaintiff to provide, for each and every allegedly offensive email:

1) The address to which it was sent;

2) The date on which it was sent;

3) The basis upon which the Plaintiff claims it violates a statute; and

4) The basis upon which the Plaintiff claims the Defendant sent it.

(Ct. Rec. 404 at 18-19.) The Plaintiff argues that all of the information the Defendants seek has been provided in discovery.

The Court finds that the nature of the Plaintiff's claims, combined with the vagueness of the FAC, presents an exceptional circumstance that warrants a more definite statement. While the FAC provides notice concerning the nature of the Plaintiff's claims, it is

1 nevertheless so ambiguous that the Defendants cannot reasonably be
2 expected to frame a responsive pleading. Specifically, the FAC does
3 not identify the emails at issue. Without such identification, the
4 Defendants have no way of knowing if they should "admit" or "deny"
5 sending the emails. Nor is it possible to "admit" or "deny" that an
6 email violates any of the statutes at issue without first knowing the
7 content of the email.

8 Even if the Defendants have been provided with the emails through
9 discovery, a more definite statement is necessary to prevent the
10 Plaintiff from presenting a moving target. While not all of the
11 information requested by the Defendants is necessary to achieve this
12 end, the Plaintiff must identify the emails at issue, the time frame
13 during which they were sent, and the basis upon which he claims the
14 Defendants sent the emails. Attempting to litigate a claim without
15 first identifying the acts and documents that gave rise to the claim
16 is contrary to the "just, speedy, and inexpensive determination of the
17 action" required by Federal Rule of Civil Procedure 1.

18 **CONCLUSION**

19 Following this Court's disposition of the Defendant's Second
20 Motion to Dismiss, the Plaintiff may continue to pursue his claims
21 under Washington's Commercial Electronic Mail Act, Washington's
22 Consumer Protection Act, Washington's Deceptive Offers statute,
23 Washington's Identity Crimes statute, Washington's Prize Statute, and
24 the federal Controlling the Assault of Non-Solicited Pornography and
25 Marketing Act. The Plaintiff must provide the Defendant with a more
26 definite statement as specified below. Accordingly,

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO
DISMISS- 13

1 **IT IS HEREBY ORDERED:**

2 1. The Defendants' Motion to Dismiss the First Amended Complaint,

3 **Ct. Rec. 403,** is **GRANTED IN PART** and **DENIED IN PART.**

4 2. The Plaintiff shall file a more definite statement

5 identifying:

6 a) The number of emails at issue;

7 b) The time frame during which the emails were sent;

8 c) The addresses and domain names that received the emails;
9 and

10 d) A brief summary of the factual basis upon which the
11 Plaintiff claims that Impulse sent the emails.

12 **IT IS SO ORDERED.** The District Court Executive is hereby
13 directed to enter this order and furnish copies to counsel.

14 **DATED** this 14th day of May, 2007.

15 _____
16 s/ Fred Van Sickle
17 Fred Van Sickle
18 United States District Judge