

Hon. David G. Estudillo

**UNITED STATES DISTRICT COURT
IN AND FOR THE WESTERN DISTRICT OF WASHINGTON**

NATHEN BARTON,

Plaintiff,

v.

JOE DELFGAUW, XANADU MARKETING,
INC, and STARTER HOME INVESTING, INC.,
ET AL

Defendants

AND RELATED COUNTERCLAIMS

NO. 3:21-cv-05610-DGE

MOTION TO FILE OVERLENGTH BRIEF IN
RESPONSE TO SHOW CAUSE ORDER re:
STIPULATED FACTS/ADMISSIONS

Noted for: March 11, 2024

COMES NOW defendants/counterclaimants JOE DELFGAUW, XANADU MARKETING,
INC, and STARTER HOME INVESTING, INC, but and through their undersigned attorney of
record and move this court for an order allowing the filing of an overlength brief in response to the
OSC re: stipulated facts/admissions. This motion is based on the following and the records and files
herein.

This briefing prepared by defendants/counterclaimants addresses 71 of the 130 or so
admissions that Mr. Barton submitted as “stipulated facts” in Nos. 299, 301, 303, which requires
case law, recitation of the admission and a response thereto. Counsel has tried to be as concise as
possible; however, the briefing is 22 pages and consists of 6,547 words, exclusive of caption and

1 signature block.

2 Local Civil Rule 7 € (4) states that (“All other motions noted under LCR 7(d)(3) and briefs in
3 opposition shall not exceed 4,200 words or, if written by hand or with a typewriter, twelve pages.
4 Reply briefs shall not exceed 2,100 words or, if written by hand or with a typewriter, six pages.”

5 And at (f) states that motions for leave to file an overlength brief:

6
7 (1) The motion shall be filed as soon as possible but no later than three days before the
8 underlying motion or brief is due, and shall be noted for consideration for the day on which it is filed,
9 pursuant to LCR 7(d)(1).

10 (2) The motion shall be no more than 700 words or, if written by hand or with a typewriter,
11 two pages in length and shall request a specific number of additional words or pages.

12 (3) No opposition to the motion shall be filed unless requested by the court.

13 (4) If the court grants leave to file an over-length motion, the brief in opposition will
14 automatically be allowed an equal number of additional pages. In all cases, the reply brief shall not
15 exceed one-half the total length of the brief filed in opposition.
16

17 Defendants/counterclaimants respectfully request the court allow leave to file its overlength
18 brief.
19

20 Respectfully submitted this 9th day of March, 2024,

21 s/ Donna Gibson

22 Donna Gibson, WSBA #33583

23 Attorney for Defendants/Counterclaimants

24 JOE DELFGAUW, XANADU MARKETING INC.

25 AND STARTER HOME INVESTING, INC

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On January 29, 2024, a Show Cause Hearing was held, in which the court ordered that Defendants file a briefing discussing which of the 130 Requests for Admissions in Plaintiff’s Notice of Stipulated Facts (Dkt. Nos. 299, 301, 303) are improper. Defendants respond to this order as follows.

Federal Rule of Civil Procedure 36(a) states, “A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.” The rule also states, “Each matter of which an admission is requested shall be separately set

1 forth.”

2 Plaintiff, throughout his Notices of Stipulated Facts improperly seeks admission of facts and
3 events not related to the pending action and not alleged in plaintiff’s Amended Complaint Dkt. 83.
4 Likewise, Plaintiff continually attempts to combine multiple occurrences into one request, despite the
5 fact that FRCP 36(a) states that “Each matter of which an admission is requested shall be separately
6 set forth”. Such game-playing by the Plaintiff is designed to force the Defendants into an all or
7 nothing admission and is improper under the Federal Rule of Civil Procedure.
8

9 I. Improper Request for Admissions
10 Docket Entry No. 299

11 a. Each Matter of Which an Admission is Requested Shall be Separately Set Forth

12 Federal Rules of Civil Procedure rule 36(a), states that, “Each matter of which an admission is
13 requested shall be separately set forth”. In each of the following requests for admission, Plaintiff
14 improperly attempts to combine multiple occurrences into each request. These improper requests
15 were made with the intent of forcing Defendants into an all or nothing admission. Had Plaintiff
16 followed the requirements of FRCP 36(a), each occurrence would have been “separately set forth”
17 allowing Defendant to respond to each individual occurrence based on the facts of each occurrence.
18 Therefore, the following requests for admission were submitted in violation of FRCP 36(a) and
19 cannot be stipulated to as fact.
20
21

22 ADMISSON NO. 40: Admit or deny that during the times relevant to this Lawsuit, the first
23 day an entity or entities under your control texted (360) 910-1019, those entities texted that phone
24 number 7 times.

25 Improper Request: Federal Rules of Civil Procedure rule 36(a), states that, “Each matter of
26 which an admission is requested shall be separately set forth”. Plaintiff is attempting to combine 7
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1 separate occurrences into one request. Plaintiff's request does not comply with Federal Rule of Civil
2 Procedure rule 36(a), which states that, "Each matter of which an admission is requested shall be
3 separately set forth". This is not a properly presented request that can be stipulated too as fact.

4 ADMISSION NO. 41: Admit or deny that that you do not dispute the date that the Complaint
5 lists each text message as having been received.
6

7 Improper Request: Plaintiff, who alleges in his Amended Complaint Dkt 83, to have received
8 thirteen text messages and six phone calls, two of which were missed and went unanswered, now
9 attempts to combine the dates of each of the nineteen alleged communications into one request.
10 According to Plaintiff, these alleged communications took place over five months. This is not a
11 properly presented request.
12

13 ADMISSION NO. 42: Admit or deny that that you do not dispute that the date the Complaint
14 lists each text message as having been received is the date that the text message was sent.

15 Improper Request: This request, nearly identical to the previous request, again attempts to
16 combine the dates of each of the nineteen alleged communications into one request, each of which is
17 required to be separately set forth. This is not a properly presented request.
18

19 ADMISSION NO. 53: Admit or deny that for in exchange for receiving the information
20 contained in one or more rows of "opt in" data (of the six) shown on Exhibit A, some person or entity
21 was paid or given something of value by you or an entity under your control.

22 Improper Request: In this request, Plaintiff attempts to combine six separate lines, each a
23 separate occurrence in which information was exchanged, into a single request. This clearly violates
24 the requirement that, "Each matter of which an admission is requested shall be separately set forth".
25 FRCP 36(a).
26

27 ADMISSION NO. 79: Admit or deny that you are involved in managing the call centers that
28

1 entities under your control use to place solicitation calls.

2 Improper Request: Plaintiff improperly attempts to request an admission or denial based on
3 the management of multiple call centers which are under contract with multiple entity. The operations
4 of each call center and the individual dealings with each call center are separate occurrences, each of
5 which requires a separate request for admission as required by FRCP 36(a). This is not a properly
6 presented request.
7

8 ADMISSON NO. 146: Admit or deny that you do not dispute that entities under your
9 control sent the text messages as alleged in the Amended Complaint.

10 Improper Request: Plaintiff, who alleges in his Amended Complaint Dkt 83, to have received
11 thirteen text messages and six phone calls, two of which were missed and went unanswered and all of
12 which were separate occurrences, now attempts to combine both text messages and phone calls
13 (nineteen in total) into one request. According to plaintiff, these alleged communications took place
14 over five months. Plaintiff's request is not properly requested because it does not comply with the
15 requirement of FRCP 36(a), that "Each matter of which an admission is requested shall be separately
16 set forth".
17
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19 ADMISSON NO. 147: Admit or deny that you do not dispute that entities under your
20 control initiated the phone calls as alleged in the Amended Complaint.

21 Improper Request: As with many of Plaintiff's improper requests, Plaintiff seeks to combine
22 multiple occurrences alleged in the Amended Complaint, into a single request. Such practice is
23 prohibited by Federal Rules of Civil Procedure rule 36(a), which states, "Each matter of which an
24 admission is requested shall be separately set forth".
25

26 b. For Purposes of the Pending Action Only

27 Federal Rules of Civil Procedure rule 36(a), states, "A party may serve upon any other party a
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1 written request for the admission, for purposes of the pending action only”. On multiple occasions,
2 Plaintiff seems to lose focus on what the issue is in this case. These diversions from the issues in the
3 pending action are Plaintiff’s attempt to confuse and distract from his wrong doings. The following
4 requests for admission were not submitted for purposes of the pending action and in fact have nothing
5 to do with the pending action and cannot be stipulated too as fact.
6

7 Request for admission 130, 132, 133, 134, and 141, all seek information regarding a 2018
8 conviction of Defendant Joe Delfgaw. Plaintiff does not allege fraud in either his original Complaint
9 Dkt 1, nor his Amended Complaint Dkt 83. Furthermore, the conviction took place four years prior to
10 the communications which are at issue in this lawsuit. Plaintiff has attempted to use this prior
11 unrelated conviction to distract from the actual issues in this case before. Plaintiff filed a motion
12 asking the court to take judicial notice of defendant’s former conviction Dkt 70. The court, quickly
13 realizing the irrelevance and imprudence of Plaintiff’s motion denied it Dkt 98. Now Plaintiff hopes
14 to make an end run around the courts decision by having such irrelevant issues be stipulated too as
15 facts.
16

17 Federal Rules of Civil Procedure rule 36(a), states, “A party may serve upon any other party a
18 written request for the admission, for purposes of the pending action only”. An unrelated conviction,
19 which is related to an incident that took place in 2008, thirteen years prior to the events that triggered
20 this lawsuit, is not part of the pending action and were requested for improper reasons, those reasons
21 being to harass and distract and therefore are not proper request for admission under FRCP 36(a).
22

23 These improper requests are as follows:
24

25 **ADMISSION NO. 130:** Admit or deny that in 2018 you were convicted of Financial
26 Institution Fraud.

27 **ADMISSION NO. 132:** Admit or deny that in 2018 you admitted to knowingly executing a
28

1 blog article was written in October of 2021 and that Plaintiff alleges to have received the first
2 communication in April of 2021, six months prior. Therefore, any requests for admissions regarding
3 a software product that did not exist at the time of the allegations on which the present lawsuit is
4 based and played no part in the present lawsuit would not be for purposes of the pending action as it
5 would not have any relevance what-so-ever to the pending action.
6

7 Plaintiff make eleven improper request in which he quotes lengthy sections of the blog
8 articles related to the Validiform product; these requests are as follows:

9 ADMISSION NO. 160: Admit or deny Validiform.com makes the statement “What websites
10 need lead certification? Any website that collects personal information for use in electronic or
11 telecommunication is subject to certain regulations about being able to prove the user gave consent
12 for the website owner to do so. Validiform is designed to be a clearcut protection for fraudulent
13 claims of these violations.”
14

15 ADMISSION NO. 161: Admit or deny Validiform.com makes the statement “If you’re doing
16 any sort of automated outbound marketing by phone or text message, you’re subject to be compliant
17 with the Telephone Consumer Protection Act (TCPA). This essentially means that it’s your legal
18 responsibility to be sure that all of your contacts are up-to-date and that they have explicitly given
19 you permission to call or text them with your marketing efforts. It’s crucial that you have validated,
20 archived proof of consent to stay compliant with the TCPA, or they can slap you with a fine of up to
21 \$1,500 per call for violation. That’s a high price to pay for one ill-placed phone call.”
22

23 ADMISSION NO. 162: Admit or deny Validiform.com makes the statement “One of the
24 most important things to remember is that this consent must be written, and documented, and you
25 need to be able to find it if you need it. The TCPA doesn’t mince words– it states clearly that the
26 burden of proof rests solely on you, the advertiser. If you can’t provide proof of consent, you’re all
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1 but guaranteed to be hit with those hefty fines we talked about above. (Also note that people often opt
2 into things and forget, so you may even get complaints from people who you legitimately had the
3 right to contact.)”

4 ADMISSION NO. 163: Admit or deny Validiform.com makes the statement “It’s sad, but
5 there are people out there who are going to try use form spamming to rip you off as an affiliate
6 marketer. The way they do this is with bots that are programmed to find lead forms on web pages and
7 fill them out. This triggers a “conversion” for them as an affiliate, which technically means you owe
8 them revenue for it. The issue is the conversion isn’t legitimate, so if you pay out on this conversion,
9 you’re essentially just giving money away to a fraudster that cheated you. But it can get way worse–
10 and can be much more expensive. See, the form spammers are getting more sophisticated, and the
11 bots they’re using are advanced enough to fill in real names, real phone numbers, and real email
12 addresses. Since these form fills look legitimate, you’ll likely reach out to these people since (as far
13 as you know) they showed interest. The problem is, a bot filled out your form with their information,
14 and they have no earthly idea who you are. If you contact them with an offer without their
15 permission, you’re now in violation of TCPA regulations and can face up to \$1,500 in fines if the
16 person files a complaint. You need a way to protect your affiliate marketing efforts against form
17 spamming, or it could end up costing you a lot of money.”

18 ADMISSION NO. 164: Admit or deny Validiform.com makes the statement “It’s a sad fact,
19 but every form of digital marketing is susceptible to some type of fraud. Where it can be especially
20 dangerous and expensive is in the lead acquisition space.”

21 ADMISSION NO. 165: Admit or deny Validiform.com makes the statement “A spambot is a
22 malicious piece of software that is built to crawl your website and find specific code, and interact
23 with it, pretending to be human for fraudulent purposes. Spambots can do a number of things,
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1 including leaving fake comments, creating fake accounts, and executing fake email signups, among
2 many other things. Many Spambots are programmed exclusively to perform fake sign-ups. Since
3 these tasks often only require the user to fill out a few fields, the Spambots are programmed to do this
4 automatically. information. Some Spambots are so sophisticated that they model human behavior
5 before taking action so they're more difficult to detect. Spambots are never good, but if they're
6 loaded with stolen, real information to execute fake signups it can be especially bad. If you try to
7 send messages to these people, they'll have no idea who you are, and in almost every case, you'll be
8 breaking the law because you don't have true consent to contact them." Sometimes these Spambots
9 are coded to invent entirely new, fictional user information– but sometimes they're loaded with real
10 (often stolen).
11

12
13 ADMISSION NO. 166: Admit or deny Validiform.com makes the statement "It begins when
14 a bad actor signs up for your affiliate program. They often already have access to illicitly obtained
15 customer data at this point. This is stolen customer information they've typically purchased from a
16 prohibited source like the dark web or illegal information brokers. These bad actors then use
17 Spambots to automate the signup process and use the stolen information to execute a wave of fake
18 sign-ups en masse. Unless you catch these fake sign-ups quickly and accurately, you then pay out the
19 affiliate referral fee on false information. You think you've gotten a bunch of real sign-ups, but you
20 haven't. So while you're jumping up and down in excitement, a fraudster is taking your money and
21 disappearing. You'll not only lose money but to make it even worse, now your database is also
22 tainted with a wave of fake customer data."
23

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25 ADMISSION NO. 167: Admit or deny Validiform.com makes the statement, "How to
26 Protect Against Form Spam Good 'Ol CAPTCHA You've likely heard of CAPTCHA (or at the very
27 least, had to fill one out). They're essentially puzzles that are crafted so that only humans can solve
28

1 them. They work by requiring inputs that bots can't do easily or accurately. CAPTCHA is a type of
2 tool, not a single brand, so there are various kinds of CAPTCHA solutions available that all attempt
3 to vex and confound bots. There are some downsides to CAPTCHA. Firstly, sometimes people are
4 just plain annoyed by them because they're an extra step in completing online tasks. Secondly, bots
5 are getting smarter every day, and not all CAPTCHAs are unbeatable. Having a CAPTCHA in place
6 typically can't hurt anything, and can be a good "catch-all" for bot traffic protection."
7

8 ADMISSION NO. 168: Admit or deny Validiform.com makes the statement "The baseline
9 method for stopping fake signups is the use of the latest version of a CAPTCHA (or the more
10 advanced ReCAPTCHA). While these tools aren't perfect, they're a strong complement to some of
11 the more robust solutions we've recommended. A CAPTCHA or ReCAPTCHA forces a website's
12 user to interact with the site with specific clicks that can't be faked by Spambots easily. This can be
13 checking a check box, or even selecting a group of similar pictures. Every site should have a
14 CAPTCHA or ReCAPTCHA as its first line of defense against fake signups."
15

16 ADMISSION NO. 169: Admit or deny Validiform.com makes the statement "Don't Try to
17 Validate Leads Yourself Even if you can figure out the technical side of the equation (which is no
18 simple matter), and you can figure out a way to store the data in way you can find it, there is still one
19 major reason you'll want to avoid validating leads yourself... the legal implications. If someone does
20 file a lawsuit against you, it doesn't look great that your proof is coming from your own in-house
21 sources. Candidly, who's to say you didn't doctor the data before presenting it? If your proof comes
22 from an independent source, it's often considered a much stronger piece of evidence."
23
24

25 ADMISSION NO. 170: Admit or deny Validiform.com makes the statement "If a Spambot
26 uses someone's real information to sign up, and you contact them, your only course of action will be
27 to assume guilt and take the penalty or fine".
28

1 link in one of the resulting emails, it would create a new row of “opt in” data in the database
2 represented by Exhibit A.

3 e. Plaintiff Puts Forth Request with Intent to Harass

4 Plaintiff has meticulously laid out all nineteen of the communications he has alleged to have
5 received and has no need for the information he seeks beyond those nineteen communications.
6

7 Never-the -less, Plaintiff has put forth the following Request:

8 ADMISSIOIN NO. 71: Admit or deny that the Dialer data was deleted to deprive Barton of
9 the evidence.

10 As part of the previous discovery, Plaintiff received the screenshot attached to declaration of
11 Donna Gibson as Exhibit B stating that the dialer was updated on July 3, 2021. Plaintiff is aware of
12 this fact but seeks to harass Defendant and to push this court to create a new false fact. Plaintiff filed
13 his lawsuit on August 23, 2021, a full 51 days after the Defendants dialer was updated and previous
14 logs no longer made available; Plaintiff is aware of this. However, in order for this to be stipulated as
15 fact, Plaintiff must explain how Defendant deleted information to deprive Plaintiff of evidence, 51
16 days prior to Defendant even knowing that Plaintiff existed. Plaintiff is hoping the court will
17 disregard the actual fact and create a new false fact that will support Plaintiff’s case.
18
19

20 As stated, Plaintiff has meticulously laid out all nineteen of the communications he has
21 alleged to have received. Plaintiff seeks the unavailable dialer logs for the purpose of alleging
22 additional communication to one or more of the multiple phones owned by Plaintiff, however, FRCP
23 36(a) limits requests for admissions for purposes of the pending action only and Plaintiff has set forth
24 one phone and nineteen communications in the pending case. To allow this request and to stipulate to
25 a false fact would be to spit in the face of justice.
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II. Improper Request for Admissions
Docket Entry No. 301

a. Each Matter of Which an Admission is Requested Shall be Separately Set Forth

Federal Rules of Civil Procedure rule 36(a), states that, “Each matter of which an admission is requested shall be separately set forth”. As with Dkt 299, Plaintiff in each of the following requests for admission improperly attempts to combine multiple occurrences into each request. Had Plaintiff followed the requirements of FRCP 36(a), each occurrence would have been “separately set forth” allowing Defendant to respond to each individual occurrence based on the facts of each occurrence. Therefore, the following requests for admission were submitted in violation of FRCP 36(a) and cannot be stipulated to as fact.

ADMISSION NO. 17: Admit or deny that you sent solicitation text messages using the SMS short code 365365 on April 1, 2021, and April 8, 2021.

Improper Request: As stated above, Federal Rules of Civil Procedure rule 36(a), states that, “Each matter of which an admission is requested shall be separately set forth”. Plaintiff attempts to combine two separate occurrences into one request for admissions. Plaintiff’s request is not properly presented and therefore cannot be stipulated too as fact.

ADMISSION NO. 31: Admit or deny that during the times relevant to this Lawsuit, the first day you texted (360) 910-1019, you texted that phone number 7 times.

Improper Request: Federal Rules of Civil Procedure rule 36(a), states that, “Each matter of which an admission is requested shall be separately set forth”. Plaintiff is attempting to combine 7 separate occurrences into one request. Plaintiff’s request does not comply with Federal Rule of Civil Procedure rule 36(a), which states that, “Each matter of which an admission is requested shall be separately set forth”. This is not a properly presented request that can be stipulated too as fact.

ADMISSION NO. 136: Admit or deny that you do not dispute that the Amended Complaint

1 correctly identifies the entities whose offer was being solicited.

2 Improper Request: Plaintiff, who alleges in his Amended Complaint Dkt 83, to have received
3 nineteen alleged communications and/or attempted communications from at least seven different
4 sources, combines these communications into one request and asks defendant to admit or deny the
5 seven different sources as if they were the same. Per FRCP 36(a), Plaintiff's request must be set forth
6 as seven separate requests and because Plaintiff has failed to follow the rules, this is not a properly
7 presented request.
8

9 ADMISSIOIN NO. 165: Admit or deny that on the first day you allege Barton "opted in" and
10 caused you injury you sent each of the messages shown in the following image to phone number
11 (360) 910-1019.
12

13 Improper Request: Plaintiff again attempts to combine multiple admissions into this one
14 request stating, "each of the messages shown". Plaintiff's request is not properly requested and
15 presents defendant with an all or nothing response. This is not a properly presented request.
16

17 ADMISSIOIN NO. 166: Admit or deny that on the first day you allege Barton "opted in" and
18 caused you injury you sent each of the messages shown in the following image to phone number
19 (360) 910-1019.
20

21 Improper Request: Once again, Plaintiff again attempts to combine multiple admissions into
22 this one request stating, "each of the messages shown". Plaintiff's request is not properly requested
23 and presents defendant with an all or nothing response. This is not a properly presented request.
24

25 b. For Purposes of the Pending Action Only

26 Federal Rules of Civil Procedure rule 36(a), states, "A party may serve upon any other party a
27 written request for the admission, for purposes of the pending action only". Throughout Plaintiff's
28 Notice of Stipulated Facts Dkt 301, Plaintiff attempts to solicit responses regarding incidents that

1 may or may not have happened outside of the scope of this lawsuit. Plaintiff, alleges in his Amended
2 Complaint Dkt 83, to have received nineteen communications and/or attempted communications with
3 the first having been received on April 1, 2021, and the last alleged communication having been
4 received on August 4, 2021. Any properly requested admissions regarding the alleged
5 communication would need to be within the requirements of FRCP 36(a), however, Plaintiff attempts
6 to request admissions related to communications not alleged in Plaintiff's pleadings and therefore,
7 not, "for purposes of the pending action only". As stated, the last communication Plaintiff alleges to
8 have received from Defendants, in violation of the Telephone Communications Protection Act
9 (TCPA), was August 4, 2021. All nine of the following requests solicit admissions outside of the
10 parameters established by Plaintiff himself. Plaintiff does not allege receiving any communications in
11 November or December of 2021, and therefore, such request for admissions for such communications
12 would not be for purposes of the pending action only as required.
13
14

15 ADMISSION NO. 17: Admit that on 11/17/2021, Starter Home initiated three text messages
16 to phone number (360) 910 1019 from SMS short code 46758.

17 ADMISSION NO. 21: Admit or deny that you sent solicitation text messages using the SMS
18 short code 33959 on July 13, 2021
19

20 ADMISSION NO. 33: Admit or deny that on November 17, 2021, you sent a text message to
21 phone number (360) 910-1019 from SMS Short Code 33959.

22 ADMISSION NO. 34: Admit or deny that on November 23, 2021, you sent a text message to
23 phone number (360) 910-1019 from SMS Short Code 33959.
24

25 ADMISSION NO. 35: Admit or deny that on November 25, 2021, you sent two text
26 messages to phone number (360) 910-1019 from SMS Short Code 33959.

27 ADMISSION NO. 36: Admit or deny that on November 17, 2021, you sent three text
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1 messages to phone number (360) 910-1019 from SMS Short Code 46758.

2 ADMISSION NO. 37: Admit or deny that on November 25, 2021, you sent three text
3 messages to phone number (360) 910-1019 from SMS Short Code 46758.

4 ADMISSION NO. 62: Admit or deny that you texted (360) 910 1019 during the month of
5 November 2021.

6
7 ADMISSION NO. 63: Admit or deny that you texted (360) 910 1019 during the month of December
8 2021.

9 These nine requests solicit admissions unrelated to the allegations set forth in Plaintiff's
10 Amended Complaint Dkt 8, and therefore are improperly presented requests for admissions as such
11 communications would not be for purposes of the pending action only as required.

12
13 c. Hypothetical Scenario Created by Plaintiff

14 Once again, Plaintiff creates the same hypothetical scenarios set forth in Plaintiff's Notice of
15 Stipulated Facts Dkt, 299. Federal Rules of Civil Procedure rule 36(a), states in part, "A party may
16 serve upon any other party a written request for the admission, for purposes of the pending action
17 only, of the truth of any matters . . . that relate to statements or opinions of fact or of the application
18 of law to fact". The key word here is "fact". Plaintiff again puts forth the same hypothetical scenarios
19 in which he states, "if" a person opting in were to do something and then click on something else, this
20 result would happen, or "if" Defendant would have done this, this would have happened. Plaintiff
21 attempts to answer his own hypothetical scenario and request confirmation of his hypothetical
22 scenario from Defendant. This is not a properly presented request designed to determine the truth of
23 the request and is not a fact that can be stipulated too. The three requests set forth below are
24 improperly presented requests for admissions as such cannot be stipulated too as fact.
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27 ADMISSION NO. 142: Admit or deny that you could have verified that Barton was the
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1 of which an admission is requested shall be separately set forth”. Plaintiff in each of the following
2 requests for admission improperly attempts to combine multiple occurrences into each request. Had
3 Plaintiff followed the requirements of FRCP 36(a), each occurrence would have been “separately set
4 forth” allowing Defendant to respond to each individual occurrence based on the facts of each
5 occurrence. Therefore, the following requests for admission were submitted in violation of FRCP
6 36(a) and cannot be stipulated too as fact.

8 ADMISSION NO. 31: Admit or deny that during the times relevant to this Lawsuit, the first
9 day you texted (360) 910-1019, you texted that phone number 7 times.

10 Improper Request: Federal Rules of Civil Procedure rule 36(a), states that, “Each matter of
11 which an admission is requested shall be separately set forth”. Plaintiff is attempting to combine 7
12 separate occurrences into one request. Plaintiff’s request does not comply with Federal Rule of Civil
13 Procedure rule 36(a), which states that, “Each matter of which an admission is requested shall be
14 separately set forth”. This is not a properly presented request that can be stipulated too as fact.

15 ADMISSION NO. 125: Admit or deny that you do not dispute the date that Amended
16 Complaint lists each text message as having been received.

17 Improper Request: Again, Federal Rules of Civil Procedure rule 36(a), states that, “Each
18 matter of which an admission is requested shall be separately set forth”. Plaintiff, who alleges in his
19 Amended Complaint Dkt 83, to have received thirteen text messages and six phone calls, two of
20 which were missed and went unanswered, now attempts to combine the dates of each of the nineteen
21 alleged communication into one request. According to plaintiff, these alleged communications took
22 place over five months. Plaintiff’s request is not properly requested and as such presents Defendant
23 with an all or nothing response. This is not a properly presented request that can be stipulated too as
24 fact.
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1 ADMISSION NO. 126: Admit or deny that you do not dispute contents of each text message
2 listed in the Amended Complaint.

3 Improper Request: Again. Federal Rules of Civil Procedure require that, “Each matter of
4 which an admission is requested shall be separately set forth”. FRCP(36)(a). Plaintiff, again as in
5 improper request 125 above, combines all nineteen alleged communications and/or attempted
6 communications into one request. Nineteen alleged communications which took place over a period
7 of five months are nineteen different and distinct occurrences that must be addressed separately.
8 Plaintiff’s request is not properly requested that can be stipulated too as fact.
9

10 ADMISSION NO. 127: Admit or deny that you do not dispute that the Amended Complaint
11 correctly identifies the entities whose offer was being solicited.

12 Improper Request: Yet again, Plaintiff, who alleges in his Amended Complaint Dkt 83, to
13 have received nineteen alleged communications and/or attempted communications from at least seven
14 different sources, combines these communications into one request and asks defendant to admit or
15 deny the seven different sources as if they were the same. Plaintiff’s request is not properly requested
16 and presents defendant with an all or nothing response. This is not a properly presented request.
17
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19 ADMISSION NO. 132: Admit or deny that you do not dispute that the date the Amended
20 Complaint lists each text message as having been received is the date that the text message was sent.

21 Improper Request: as stated in many of these statements of improper requests, the Federal
22 Rules of Civil Procedure rule 36(a), states that, “Each matter of which an admission is requested shall
23 be separately set forth”. Plaintiff, who alleges in his Amended Complaint Dkt 83, to have received
24 nineteen alleged communications and/or attempted communications covering a span of 5 months,
25 combines these communications into one request and asks defendant to admit or deny the different
26 distinct dates as if they were the same. Plaintiff’s request is not properly requested and presents
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1 defendant with an all or nothing response. This is not a properly presented request.

2 b. Hypothetical Scenario Created by Plaintiff

3 As he did in both Dkt 299 and Dkt 301, Plaintiff creates the same hypothetical scenarios.

4 Federal Rules of Civil Procedure rule 36(a), states in part, “A party may serve upon any other party a
5 written request for the admission, for purposes of the pending action only, of the truth of any matters .
6 . . . that relate to statements or opinions of fact or of the application of law to fact”. The key word once
7 again is “fact”. Plaintiff yet again puts forth the same hypothetical scenarios in which he states, “if” a
8 person opting in were to do something and then click on something else, this result would happen, or
9 “if” Defendant would have done this, this would have happened. Again, Plaintiff attempts to answer
10 his own hypothetical scenario and request confirmation of such scenario from Defendant. This is not
11 a properly presented request designed to determine the truth of the request and is not a fact that can
12 be stipulated too. The three requests set forth below are improperly presented requests for admissions
13 as such cannot be stipulated too as fact.
14

15
16 ADMISSON NO. 133: Admit or deny that you could have verified that Barton was the
17 person ‘opting in’ on EducationSchoolMatching.com by texting a code to the phone that had to be
18 entered into the website to complete the ‘opt in’.
19

20 ADMISSON NO. 134: Admit or deny that you could have verified that Barton was the
21 person who ‘opted in’ on EducationSchoolMatching.com by having a real person call the phone
22 number and verify the accuracy of the ‘opt in’.
23

24 Both of the previously stated requests are improper. Once again, Plaintiff does not ask that
25 Defendant admit or deny a fact that can be stipulated too, but rather that defendant respond to a
26 hypothetical scenario created by Plaintiff. Plaintiff suggest that defendant might have added
27 additional steps to it process. Plaintiff’s suggestions are not facts, but rather personal opinions of how
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s/ Donna Gibson
Donna Gibson, WSBA #33583
Attorney for Defendants/Counterclaimants
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AND STARTER HOME INVESTING, INC
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Hon. David G. Estudillo

**UNITED STATES DISTRICT COURT
IN AND FOR THE WESTERN DISTRICT OF WASHINGTON**

NATHEN BARTON,

Plaintiff,

v.

JOE DELFGAUW, XANADU MARKETING,
INC, and STARTER HOME INVESTING, INC.,
ET AL

Defendants

NO. 3:21-cv-05610-DGE

DECLARATION OF DONNA GIBSON IN
SUPPORT OF RESPONSE TO SHOW CAUSE
ORDER re: STIPULATED
FACTS/ADMISSIONS

AND RELATED COUNTERCLAIMS

I, Donna Gibson, declare as follows:

1. I am and the attorney of record for the defendants/counterclaimants in this matter and make this declaration in that capacity and on their behalf.

2. I On January 29, 2024, a Show Cause Hearing was held, in which the court ordered that Defendants file a briefing discussing which of the 130 Requests for Admissions in Plaintiff’s Notice of Stipulated Facts (Dkt. Nos. 299, 301, 303) are improper.

3. I was informed by Defendant Joe Delfgauw that he and his various entities have defended against what he considers attempts to extort money by serial litigators such as Plaintiff, and felt that some kind of software product

1 needed to be developed to protect businesses from these predators. Validiform was the name chosen
2 for the product and six months after Plaintiff alleges to have received the first communication, a
3 blog was written to promote the product. See screen shot from website validiform.com, showing
4 links to blogs advertising the benefits of the Validiform product. Attached hereto as Exhibit A is a
5 true and correct copy of a screen shot showing such. Plaintiff received the screenshot attached to
6 declaration of Donna Gibson as Exhibit A stating that the dialer was updated on July 3, 2021.

7
8 4. As part of the previous discovery, Plaintiff received a copy of a screen shot of the
9 dialer information. Attached hereto as Exhibit B is a true and correct copy of such, which stating
10 that the dialer was updated on July 3, 202.

11
12 5. I have been advised by Defendant Joe Delfgauw that prior to this litigation, he had no
13 knowledge of anyone named Nathen Barton. Attached hereto as Exhibit C is a true and correct copy
14 of a Beenverified report I was provided by Mr. Delfgauw's in-house counsel, Edd Winkler.

15 I declare under penalty of perjury under the laws of the State of Washington that the
16 foregoing is true and correct based on the information that I have been provided. Dated this 14th day
17 of March, 2024, signed in Bellingham, Washington

18
19
20 s/Donna Gibson
21 Donna Gibson

EXHIBIT A

The screenshot displays the Validform website's 'News Blog' page. The page features a dark header with the Validform logo, contact information, and navigation links. The main content area is titled 'News Blog' and contains three article cards. A 'SEE ALL ARTICLES' button is located below the articles. The browser's address bar shows the URL 'https://validform.com/consent-based-marketing-made-cheaper/'.

VALIDFORM
 support@validform.com | (844) 844-4168 | Sign-up | Log-in
 HOME ABOUT US PRICING CONTACT US FAQ BLOG

News
Blog

CONSENT-BASED MARKETING, MADE CHEAPER!
 by Tim Kearney | Nov 12, 2021
 The face of marketing has changed forever in the...
[READ MORE](#)

THE BIGGEST TCPA LAWSUITS IN HISTORY
 by Tim Kearney | Nov 5, 2021
 If you do any form of telecommunications marketing...
[READ MORE](#)

WHAT IS TCPA? AND WHY DOES IT MATTER TO YOU?
 by Tim Kearney | Oct 22, 2021
 You need to know about the Telephone Consumer Protection...
[READ MORE](#)

[SEE ALL ARTICLES](#)

https://validform.com/consent-based-marketing-made-cheaper/

10:53 AM 2/2/2024

EXHIBIT B



Legal CSC 5069
543 JAMES

People groups messages
L.S.
Mast Now

Recent chats

Ryan Becker

Tuesday, November 2, 2021
9:11 AM

I understood that the Vid Dial was updated, and the records were not transferred over. Can you tell me when the update took place? Because of the update I would assume that there is not a way to find out if any of the phone numbers listed below made calls to (860) 910-1019 between April 1, 2021, and August 17, 2021. Is that correct?

- (860) 230-6955
- (860) 319-7867
- (860) 743-8004
- (877) 710-4419
- (877) 456-0937
- (877) 791-1559
- (877) 514-1445
- (877) 694-1533
- (860) 200-6775
- (888) 996-4593
- (888) 410-2734
- (888) 996-4451
- (720) 687-2323

Ryan, 10:51 AM
Vid was upgraded on July 31st, any detailed logging (which would include specifics about caller ID numbers) from before then are not available. Steve looked yesterday and saw that we made at least 3 calls to that number in April but nothing more recent that we can see. I may be able to get that information from the carrier logs. I'll look there and see if that info is still available

Thank you. It is alleged that calls were made to phone number (860) 910-1019 between April 1, 2021, and August 17, 2021.

Ryan, 10:55 AM
I'll see what I can find and let you know

Ryan, 11:18 AM
carrier logs are not available that far back either.

Type a message

Pop Out - Windows - DJ - Text File (860) 910-1019 - 2021-11-02 10:51 AM

83°F Sunny

10:48 AM 6/25/2022