

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF WASHINGTON

3  
4  
5 JAMES S. GORDON, JR., an  
6 individual residing in Benton  
County, Washington,

7 Plaintiff,

8 v.

9  
10 IMPULSE MARKETING GROUP, INC., a  
Nevada Corporation,

11 Defendant.  
12

No. CV-04-5125-FVS

ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS

13  
14 **THIS MATTER** came before the Court pursuant to Defendant's motion  
15 to dismiss, Ct. Rec. 2. Plaintiff is represented by Douglas  
16 McKinley. Defendant is represented by Floyd Ivey, Sean Moynihan, and  
17 Peter Glantz.

18 **BACKGROUND**

19 Plaintiff, James Gordon, is a Washington resident and the  
20 registered user of the internet domain name "Gordonworks.com".  
21 Defendant, Impulse Marketing Group, Inc., a Nevada corporation, is an  
22 electronic marketing company that transacts business with Washington  
23 by sending commercial electronic mail messages (email) to Washington  
24 state residents. Plaintiff's Complaint alleges Defendant violated  
25 Washington's Commercial Electronic Mail Act, RCW § 19.190 et seq.,  
26 and Washington's Consumer Protection Act, RCW § 19.86 et seq., by

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1 initiating and/or conspiring with others to initiate unsolicited  
2 commercial emails to various addresses at Plaintiff's domain,  
3 "Gordonworks.com".

4 *Related Action*

5 In December 2001, Plaintiff filed a complaint against  
6 Commonwealth Marketing Group, Inc. ("CMG") in Benton County Superior  
7 Court. That action (the "Related Action") was subsequently removed  
8 to the United States District Court for the Eastern District of  
9 Washington and dismissed with prejudice on October 20, 2004. See CV-  
10 04-5003-AAD.

11 On or about December 10, 2001, Defendant and CMG entered into a  
12 Website Development and Marketing Services Agreement ("Agreement").  
13 Pursuant to the terms of that Agreement, Defendant contracted with  
14 CMG to market and advertise CMG's USA Gold Card program over the  
15 Internet ("the Program"). The Program allowed individuals to apply  
16 for a USA Gold Card online and use the Card to shop online. Pursuant  
17 to the terms of the Agreement, Defendant, under specific  
18 circumstances, agreed to indemnify and hold CMG harmless from and  
19 against any liability, claim, deficiency, loss, damage, penalty, or  
20 injury suffered or incurred by CMG under certain circumstances. When  
21 Plaintiff sued CMG in the Related Action, Defendant retained a lawyer  
22 to examine whether it had a duty to indemnify CMG in that action, but  
23 ultimately, Defendant did not defend, indemnify and/or hold CMG  
24 harmless in the Related Action.

25 **DISCUSSION**

26 Defendant moves to dismiss Plaintiff's Complaint under Federal

1 Rule of Civil Procedure 12(b)(6) on grounds that (1) Plaintiff's  
2 claims are preempted by the federal law; (2) Plaintiff's Complaint  
3 fails to plead a violation of the Washington statutes under which  
4 this action is brought; (3) Plaintiff's Complaint fails to plead  
5 allegations of fraud with particularity as required by Federal Rule  
6 of Civil Procedure Rule 9(b); and (4) Plaintiff's claims are barred  
7 by the doctrine of res judicata.

8 **I. Standard of Review**

9 A complaint should not be dismissed for failure to state a claim  
10 upon which relief may be granted under Federal Rule of Civil  
11 Procedure 12(b)(6) unless it "appears beyond doubt that the plaintiff  
12 can prove no set of facts in support of his claim which would entitle  
13 him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99,  
14 101-02, 2 L.Ed.2d 80 (1957); *Johnson v. Knowles*, 113 F.3d 1114, 1117  
15 (9th Cir. 1997). When the legal sufficiency of a complaint's  
16 allegations are tested with a motion under Rule 12(b)(6), "[r]eview  
17 is limited to the complaint." *Cervantes v. City of San Diego*, 5 F.3d  
18 1273, 1274 (9th Cir. 1993). All factual allegations set forth in the  
19 complaint are taken as true and construed in the light most favorable  
20 to the plaintiff. *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140  
21 (9th Cir. 1996). The Court must give the plaintiff the benefit of  
22 every inference that reasonably may be drawn from well-pleaded facts.  
23 *Tyler v. Cisneros*, 136 F.3d 603, 607 (9th Cir. 1998).

24 As a general rule, the Court "may not consider any material  
25 beyond the pleadings in ruling on a Rule 12(b)(6) motion. *Lee v.*  
26 *City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Rule

1 12(b) (6) expressly provides that "when matters outside the pleading  
2 are presented to and not excluded by the court, the motion *shall* be  
3 treated as one for summary judgment and disposed of as provided in  
4 Rule 56, and all parties shall be given reasonable opportunity to  
5 present all material made pertinent to such a motion by Rule 56."  
6 Fed.R.Civ.P. 12(b) (6) (emphasis added). There are, however, two  
7 exceptions to the requirement that consideration of extrinsic  
8 evidence converts a Rule 12(b) (6) motion to a motion for summary  
9 judgment. *Lee*, 250 F.3d at 688.

10 First, the Court "may consider material which is properly  
11 submitted as part of the complaint on a motion to dismiss without  
12 converting the motion to dismiss into a motion for summary judgment."  
13 *Id.* If the documents are not physically attached to the complaint,  
14 they may be considered if the documents' authenticity is not  
15 contested and the plaintiff's complaint necessarily relies on them.  
16 *Id.* at 689 (citations omitted).

17 Second, pursuant to Federal Rule of Evidence 201, the Court may  
18 take judicial notice of "matters of public record" without converting  
19 a motion to dismiss into a motion for summary judgment. *MGIC Indem.*  
20 *Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). However, the  
21 Court may not take judicial notice of a fact that is "subject to  
22 reasonable dispute." Fed.R.Evid. 201(b). Here, the Court takes  
23 judicial notice of the Related Action and will review the complaint  
24 and amended complaints in that action. These documents are found in  
25 Exhibits A - D attached to the Declaration of Phil Huston.

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1           **II. Preemptive Effect of CAN-SPAM**

2           Defendant contends Plaintiff's claims under Washington's  
3 Commercial Electronic Mail Statute, RCW § 19.190 et seq., and  
4 Washington's Consumer Protection Act, RCW § 1986 et seq., are  
5 preempted by the recently enacted federal law known as the  
6 Controlling the Assault of Non-Solicited Pornography and Marketing's  
7 Act of 2003 ("CAN-SPAM Act"), 15 U.S.C. § 7701 et seq. There are  
8 three circumstances in which state law is preempted by federal law:  
9 (1) express preemption, where Congress explicitly defines the extent  
10 to which its enactments preempt state law; (2) field preemption,  
11 where state law attempts to regulate conduct in a field that Congress  
12 intended the federal law exclusively to occupy; and (3) conflict  
13 preemption, where it is impossible to comply with both state and  
14 federal requirements, or where state law stands as an obstacle to the  
15 accomplishment and execution of the full purpose and objectives of  
16 Congress. *Indus. Truck Assoc., Inc. v. Henry*, 125 F.3d 1305, 1309  
17 (9th Cir. 1997) (citing *English v. General Elec. Co.*, 496 U.S. 72,  
18 78-80, 110 S.Ct. 2270, 2274-75, 110 L.Ed.2d 65 (1990)). Here,  
19 Defendant argues the CAN-SPAM Act expressly preempts any state effort  
20 to regulate commercial emails.

21           The CAN-SPAM Act imposes limitations and penalties on the  
22 transmission of unsolicited commercial email, commonly known as spam,  
23 via the internet. More specifically, it prohibits spammers from  
24 sending deceptive or misleading information and using deceptive  
25 subject headings, requires them to include return addresses in their  
26 email messages, and prohibits them from sending emails to a recipient

1 after that recipient has indicated he or she does not wish to receive  
2 email messages from the spammer. See 15 U.S.C. § 7704(a).

3 Similarly, Washington's Commercial Electronic Mail Act prohibits  
4 misrepresentation in the subject line or transmission path of any  
5 unsolicited commercial email message sent from a computer located in  
6 Washington, or sent to an email address that the sender knows or has  
7 reason to know is held by a Washington resident. RCW § 19.190.020.

8 Defendant contends the CAN-SPAM Act preempts the Washington  
9 Commercial Electronic Mail Act because that statute also regulates  
10 unsolicited commercial email. Defendant bases its argument on the  
11 text of the CAN-SPAM Act, which states, in relevant part, that it

12 *supersedes any statute, regulation, or rule of a*  
13 *State...that expressly regulates the use of electronic mail*  
14 *to send commercial messages, except to the extent that any*  
15 *such statute, regulation, or rule prohibits falsity or*  
*deception in any portion of a commercial electronic mail*  
*message or information attached thereto.*

16 15 U.S.C. § 7707(b) (1) (emphasis added).

17  
18 To some degree, the CAN-SPAM Act expressly preempts anti-spam  
19 legislation where a statute "expressly regulates the use of  
20 electronic mail to send commercial messages." However, the CAN-SPAM  
21 Act does *not* preempt state spam laws to the extent they "prohibit[]  
22 falsity or deception in any portion of a commercial electronic mail  
23 message or information attached thereto." 15 U.S.C. 7707(b) (1).

24 Washington's Commercial Electronic Mail Act provides in  
25 pertinent part:

26 (1) No person, corporation, partnership, or association may  
initiate the transmission of a commercial electronic mail

1 message from a computer located in Washington or to an  
2 electronic mail address that the sender knows, or has  
reason to know, is held by a Washington resident that:

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

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

9 (2) For purposes of this section, a person...knows that the  
intended recipient of a commercial electronic mail message  
is a Washington resident if that information is available,  
upon request, from the registrant of the internet domain  
name contained in the recipient's electronic mail address.

10 RCW § 19.190.020 (emphasis added).

11 The Court concludes that the plain language of the CAN-SPAM Act  
12 does not support Defendant's argument that Plaintiff's claims are  
13 preempted by the CAN-SPAM Act. Since subsection 1(a) prohibits  
14 misrepresentation in the transmission path or in identifying the  
15 point of origin, and subsection 1(b) prohibits false or misleading  
16 information in the subject line, the Court concludes that  
17 Washington's Commercial Electronic Mail Act is excepted from federal  
18 preemption because it prohibits "falsity and deception". Further,  
19 since it is a violation of Washington's CPA, RCW § 19.86, "to  
20 conspire with another person to initiate the transmission or to  
21 initiate the transmission of a commercial electronic mail message"  
22 that contains "false or misleading information in the subject line",  
23 RCW § 19.190.030(1), Plaintiff's claim that Defendant violated  
24 Washington's CPA is also excepted from federal preemption.

25 Accordingly, to the extent Defendant's motion to dismiss is based on  
26 the assertion that Plaintiff's claims are preempted by federal law,

1 the motion is denied.

2 **III. Failure to State a Claim under Washington Law**

3 Defendant argues Plaintiff's Complaint fails to assert a claim  
4 for a violation of Washington law. Specifically, Defendant asserts  
5 it "could not" have violated Washington's Commercial Electronic Mail  
6 Act because Plaintiff consented to receiving the emails at issue in  
7 this case and because Defendant did not know Plaintiff was a  
8 Washington resident.

9 **A. Consent**

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11 Defendant contends Plaintiff consented to receiving commercial  
12 emails from Defendant and that this consent precludes any cause of  
13 action against Defendant for a violation of Washington's Commercial  
14 Electronic Mail Act as a matter of law. Defendant contends Plaintiff  
15 consented to or opted-in to receiving commercial email from  
16 Defendant, or one or more of Defendant's marketing partners. As  
17 proof of this consent, Defendant submits Exhibit F, attached to the  
18 declaration of Phil Huston. Plaintiff contests this assertion and  
19 further contends he immediately opted-out, thereby negating any  
20 consent provided by originally opting in.

21 The Court determines that whether Plaintiff "consented" to  
22 receiving the emails at issue is a contested question of fact,  
23 which cannot support the dismissal of Plaintiff's Complaint under  
24 Rule 12(b)(6). Factual challenges to a plaintiff's complaint have no  
25 bearing on the legal sufficiency of the allegations under a Rule  
26 12(b)(6) motion. *Lee*, 250 F.3d at 688. Moreover, Defendant's



1 evidentiary support for its contention that Plaintiff consented to  
2 receiving the emails at issue may not be considered by the Court  
3 because it is found in materials outside the pleadings. *Id.* The  
4 Court does not consider Exhibit E to Phil Huston's Declaration  
5 because the Court cannot take judicial notice of the information  
6 contained within the exhibit and because Plaintiff's Complaint does  
7 not necessarily rely on this exhibit. Therefore, the exhibit does  
8 not fall within one of the two exceptions to the requirement that  
9 consideration of extrinsic evidence converts a Rule 12(b)(6) motion  
10 into a motion for summary judgment. *Lee*, 250 F.3d at 688.  
11 Accordingly, to the extent Defendant's motion to dismiss is based on  
12 the argument that Plaintiff "consented" to receiving the emails, the  
13 motion is denied.

14 *B. Knowledge*

15 Washington's Commercial Electronic Mail Act prohibits the  
16 initiation or transmission of a commercial email message "from a  
17 computer located in Washington or to an electronic mail address that  
18 the sender knows, or has reason to know, is held by a Washington  
19 resident". RCW § 19.190.020(1) (emphasis added). Defendant argues  
20 that it could not have violated Washington's Commercial Electronic  
21 Mail Act because the Washington Association of Internet Service  
22 Providers (WAISP) database is insufficient to establish that Impulse  
23 knew, or had reason to know, that Plaintiff's email address was  
24 located in it. Defendant's argument is based on the assumption that  
25 the only way Plaintiff can prove Defendant "knew or had reason to  
26 know" Plaintiff was a Washington resident is by proving his email

1 address was listed at the WAISP website, "where Washington residents  
2 who do not wish to receive spam can register their email addresses,  
3 and thus where responsible e-commerce businesses can find lists of  
4 Washington email addresses." *State v. Heckel*, 122 Wn.App. 60, 64, 93  
5 P.3d 189 (2004). However, this assumption is incorrect. Plaintiff  
6 does not appear to rely on the fact that his name was listed on the  
7 WAISP website to prove Defendant "knew or had reason to know"  
8 Plaintiff was a Washington resident.<sup>1</sup>

9 Plaintiff's Complaint appears to rely on RCW § 19.190.020(2) to  
10 prove Defendant "knew or had reason to know" Plaintiff was a  
11 Washington resident. To prove facts satisfying this section of  
12 Washington's Commercial Electronic Mail Act, Plaintiff has to present  
13 evidence to demonstrate the information regarding Plaintiff's  
14 Washington residency was available upon request from the registrant  
15 of the internet domain name of Plaintiff's email address.  
16 Plaintiff's Complaint states that he is the registrant of the  
17 internet domain name "Gordonworks.com" and that this information was  
18 available on request. Complaint, ¶ 3.2. Therefore, if the Court  
19 accepts the allegations in the Complaint as true and draws all  
20 reasonable inferences in Plaintiff's favor, the Court must assume,  
21 for purposes of Defendant's Rule 12(b)(6) motion to dismiss,  
22 Plaintiff can prove Defendant knew or had reason to know Plaintiff's  
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24  
25 <sup>1</sup> Therefore, the Court does not address Defendant's argument  
26 that requiring an out-of-state "email marketer" to check the  
WAISP registry before sending commercial emails violates its due  
process rights.

1 status as a Washington resident.

2 Although Plaintiff's Complaint does not assert "actual  
3 knowledge", Plaintiff now contends Defendant had actual knowledge  
4 Plaintiff was a Washington resident. Specifically, Plaintiff argues  
5 Defendant had actual knowledge of Plaintiff's status as a Washington  
6 resident because Defendant participated in Plaintiff's previous suit  
7 against CMG by providing documents and examining pleadings and  
8 discovery. The Court determines that whether Defendant knew or had  
9 reason to know Plaintiff was a Washington resident is a disputed  
10 question of fact. Therefore, the Court cannot resolve this question  
11 within the parameters established by Rule 12(b)(6). Accordingly, to  
12 the extent Defendant's motion to dismiss is based on Plaintiff's  
13 inability to prove Defendant "knew or had reason to know" Plaintiff  
14 was a Washington resident, the motion is denied.

15 ***III. Failure to Plead With Particularity***

16 Defendant contends the claims in Plaintiff's Complaint sound in  
17 fraud and thus, must meet the requirements of Federal Rule of Civil  
18 Procedure 9(b). Defendant moves to dismiss Plaintiff's Complaint on  
19 the basis that it does not meet the Rule 9(b) threshold. See *Vess v.*  
20 *Ciba-Geigy Corp.*, 317 F.3d 1097, 1107 (9th Cir. 2003) ("A motion to  
21 dismiss a complaint or claim 'grounded in fraud' under Rule 9(b) for  
22 failure to plead with particularity is the functional equivalent of a  
23 motion to dismiss under Rule 12(b)(6) for failure to state a  
24 claim.").

25 //

1 Federal Rule of Civil Procedure 9(b) states:

2 In all averments of fraud or mistake, the circumstances  
3 constituting fraud or mistake shall be stated with  
4 particularity. Malice, intent, knowledge, and other  
condition of mind of a person may be averred generally."

5 Fed.R.Civ.P. 9(b).

6 Even with regard to complaints that do not specifically plead  
7 fraud, the Ninth Circuit has consistently held that cases that are  
8 "grounded in fraud" or "sound in fraud" must satisfy the  
9 particularity requirement of Rule 9(b), regardless of whether the  
10 substantive law at issue is federal or state. *Vess*, 317 F.3d at  
11 1103-04. The parties disagree on whether a complaint for a violation  
12 of RCW § 19.190 "sounds in fraud" and triggers the heightened  
13 pleading requirements of Rule 9(b). Plaintiff contends the  
14 heightened pleading requirements of Rule 9(b) do not apply to his  
15 Complaint because RCW § 19.190 is a strict liability statute and a  
16 cause of action under the statute does not contain any element of  
17 fraud.

18 The elements of fraud consist of (1) a false representation (2)  
19 in reference to a material fact (3) made with knowledge of its  
20 falsity (4) and with the intent to deceive (5) with action taken in  
21 reliance on the misrepresentation. *Hart v. McLucas*, 535 F.2d 516,  
22 519 (9th Cir. 1976) (citing *Pence v. United States*, 316 U.S. 332,  
23 338, 62 S.Ct. 1080, 1083, 86 L.Ed. 1510 (1942)). A violation of RCW  
24 § 19.190.020 occurs when a person sends, or conspires with another to  
25 send, a commercial email to an electronic mail address that the  
26 sender knows, or has reason to know, is held by a Washington resident

1 that: (a) uses a third party's internet domain name without  
2 permission of the third party, or otherwise misrepresents or obscures  
3 any information in identifying the point of origin or the  
4 transmission of a commercial electronic mail message; or (b) contains  
5 false or misleading information in the subject line.<sup>2</sup>

6 Defendant argues that a claim under RCW § 19.190 "sounds in"  
7 fraud because the express language of the statute speaks to acts that  
8 "misrepresent", "mislead", contain "falsities", and/or "obscure"  
9 information. Although the Court concluded Plaintiff's claims under  
10 Washington's Commercial Electronic Mail Act were not preempted by the  
11 federal CAN-SPAM Act because the Washington Act prohibits falsity and  
12 deception, this does not require the Court also conclude that  
13 Plaintiff's Complaint "sounds in fraud". Rather, the Court  
14 determines that a comparison of the elements of RCW § 19.190.020 with  
15 the elements of fraud, illustrates that Plaintiff's Complaint does  
16 not sound in fraud. There is no requirement under RCW § 19.190.020  
17 that the sender "know" that the information in the subject line or  
18 transmission path of the email is "false or misleading". Also, RCW  
19 § 19.190.020 does not require the false or misleading information in  
20 the subject line or transmission path be "material". Further, RCW  
21 § 19.190.020 does not require the recipient of an email that violates  
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23 <sup>2</sup> Although Plaintiff's Complaint also alleges a claim under  
24 RCW § 19.190.030 and Washington's CPA, the only issue with  
25 respect to the application of Rule 9(b) is whether a claim for a  
26 violation of RCW § 19.190.020 triggers the heightened pleading  
requirements of Rule 9(b) because RCW § 19.190.030 merely states  
that a violation of RCW §19.190.020 is a violation of  
Washington's CPA.

1 the statute take any action "in reliance upon the representation" in  
2 the email. Neither intent on the part of the sender, nor detrimental  
3 reliance on the part of the recipient, is required to prove a  
4 violation of RCW § 19.190.020, like it is required to prove fraud.  
5 Therefore, the Court concludes that Plaintiff's claims under  
6 Washington's Commercial Electronic Mail Act do not trigger the  
7 heightened pleading requirements of Rule 9(b).

#### 8 **IV. Doctrine of Res Judicata**

9 Defendant moves to dismiss Plaintiff's Complaint on the basis  
10 that the claims are barred by the doctrine of res judicata. Res  
11 judicata, also known as claim preclusion, bars litigation in a  
12 subsequent action of any claims that were litigated or could have  
13 been asserted in a prior action. *Owens v. Kaiser Found. Health Plan,*  
14 *Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). Res judicata applies where  
15 there is (1) a final judgment on the merits, (2) an identity of  
16 claims, and (3) identity or privity between parties. *Id.* If any of  
17 these three factors are not met, res judicata is inapplicable. *City*  
18 *of Martinez v. Texaco Trading and Transp.*, 353 F.3d 758, 762 (9th  
19 Cir. 2003).

##### 20 A. Final Judgment

21  
22 The phrase "final judgment on the merits" is often used  
23 interchangeably with "dismissal with prejudice". *Stewart v. United*  
24 *States Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002); see also *Int'l*  
25 *Union of Operating Eng'rs-Employers Constr. Indus. Pension v. Karr*,  
26 994 F.2d 1426, 1429 (9th Cir. 1993) (noting that the dismissal of an

1 action with prejudice constitutes a final judgment on the merits and  
2 precludes a party from reasserting the same claims in a subsequent  
3 action). Here, the Related Action was dismissed with prejudice.  
4 Therefore, the first factor is met because there has been a final  
5 judgment on the merits.

6 *B. Same Claims*

7 The Ninth Circuit looks to the following criteria in determining  
8 whether the claims asserted in successive lawsuits are sufficiently  
9 identical: "(1) whether rights or interests established in the prior  
10 judgment would be destroyed or impaired by prosecution of the second  
11 action; (2) whether substantially the same evidence is presented in  
12 the two actions; (3) whether the two suits involve infringement of  
13 the same right; and (4) whether the two suits arise out of the same  
14 transactional nucleus of facts." *Costantini v. Trans World Airlines*,  
15 681 F.2d 1199, 1201 (9th Cir. 1982). These factors are considered  
16 "tools of analysis, not requirements." *Karr*, 994 F.2d at 1430.  
17 However, the last of these criteria is considered the most important.  
18 *Costantini*, 681 F.2d at 1202. Here, the parties acknowledge that  
19 both actions involve infringement of the same right. Plaintiff's  
20 Complaint in the present action and the complaint in the Related  
21 Action both allege violations of the same statutes. Further, it  
22 appears that much of the same evidence presented in the Related  
23 Action will be presented in this action. Therefore, the issue  
24 centers on the most important factor; whether the two suits arise out  
25 of the same transaction or nucleus of facts.

26 In determining whether two events are part of the same  
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1 transaction, the Court considers whether they are "related to the  
2 same set of facts and whether they could conveniently be tried  
3 together." *Karr*, 994 F.2d at 1429. Here, Defendant argues this  
4 action arises out of the same nucleus of facts as the Related Action  
5 because both actions involve the same emails. However, Plaintiff  
6 adamantly contests this assertion. Plaintiff contends the emails  
7 supporting his claims against Defendant comprise three categories:  
8 (1) emails sent by Defendant offering products from companies other  
9 than CMG; (2) emails sent by Defendant after the Related Action was  
10 dismissed; and (3) emails that were in fact part of the basis for  
11 Plaintiff's claims against CMG. Both parties' arguments are  
12 supported by declarations. These declarations constitute material  
13 beyond the pleadings, which the Court may not consider in ruling on a  
14 Rule 12(b)(6) motion. *Lee*, 250 F.3d at 688.

15 Because Plaintiff's Complaint does not identify the emails  
16 supporting his claims against Defendant, the Court cannot determine  
17 whether this action arises out of the same transaction or nucleus of  
18 facts as the Related Action. Therefore, the Court cannot determine  
19 whether Plaintiff's Complaint is barred by res judicata until  
20 Plaintiff identifies the specific emails supporting his claims  
21 against Defendant. Accordingly, to the extent that Defendant's  
22 motion to dismiss is based on the argument that Plaintiff's claims  
23 are barred by res judicata, the motion is denied. Accordingly,

24 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss, **Ct.**  
25 **Rec. 2**, is **DENIED**. **The Defendant shall file its Answer to**  
26 **Plaintiff's Complaint within 20 days of the entry of this Order.**



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2 **IT IS SO ORDERED.** The District Court Executive is hereby  
3 directed to enter this Order and furnish copies to counsel.

4 **DATED** this 11th day of July, 2005.

5  
6 s/ Fred Van Sickle  
7 Fred Van Sickle  
8 Chief United States District Judge

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