

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

Plaintiff,

v.

IMPULSE MARKETING GROUP, INC., a
Nevada Corporation,

Defendant.

No. CV-04-5125-FVS

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

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

BACKGROUND

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

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.

26 //

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

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**

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

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.¹

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
23

24 ¹ Therefore, the Court does not address Defendant's argument
25 that requiring an out-of-state "email marketer" to check the
26 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