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

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

Plaintiff,

vs.

IMPULSE MARKETING
GROUP, INC.,
a Nevada Corporation

Defendant.

NO. CV-04-5125-FVS

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

JURY TRIAL DEMANDED

COMES NOW the plaintiff, James S. Gordon, Jr., and files this
response to the Defendant's Motion to Dismiss Plaintiff's Complaint.

1 **I. RES JUDICATA DOES NOT BAR MR. GORDON'S CLAIMS**

2
3 **PROCEDURAL BACKGROUND**

4 Mr. Gordon does not contest the bulk of the defendant's recitation of
5 the procedural history of Mr. Gordon's prior lawsuit against
6 Commonwealth Marketing Group, Inc., ("CMG"). Mr. Gordon filed an
7 action against CMG in Benton County Superior Court (the "CMG suit") on
8 December 15, 2003. The CMG suit was then removed to this Federal
9 Court and assigned to Senior Judge Alan McDonald. The CMG suit was
10 dismissed with prejudice on October 20, 2004. Notably, it was at Mr.
11 Gordon's request that the suit was dismissed.
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15 Mr. Gordon denies virtually all of the defendant's remaining
16 allegations concerning the relationship between the CMG suit and the now
17 pending claims against Impulse. Mr. Gordon contends that the doctrine of
18 res judicata is inapplicable to the facts before the Court, and Mr. Gordon
19 further contends that even if the Court applies the doctrine of res judicata,
20 the claims against Impulse cannot be barred because 1) they are not the
21 same claims as those asserted and dismissed in the CMG suit and 2) there
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1 is no privity between Impulse and CMG. Accordingly, the present claims
2 cannot be barred by the doctrine of res judicata as a matter of law.
3

4 **RES JUDICATA DOES NOT APPLY TO THE DISPUTE**

5 Washington's Commercial Electronic Email Statute, RCW 19.190 et
6 seq. (hereafter the "Act") generally prohibits falsity and deception in
7 commercial electronic mail messages. Overlapping prohibitions in the Act
8 simultaneously apply to those who "initiate the transmission" of false or
9 deceptive messages, to those who "conspire with another to initiate the
10 transmission" of false or deceptive messages, and to those who "assist [in]
11 the transmission" of false or deceptive messages. See RCW 19.190.020.
12

13 It is obvious from a plain reading of the Act that several persons may each
14 violate separate prohibitions in the Act in the transmission of a single
15 commercial electronic mail message, (eg. one individual may have liability
16 for "initiating" transmission, and another for "assisting" transmission of
17 the same message).
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22 In seeking to apply the principles of res judicata, Impulse is in effect
23 asking the court to ignore this structure in the Act, and to instead treat the
24 matter as a contract or tort dispute between Mr. Gordon, CMG and
25

1 Impulse. However, this is not the proper framework to analyze the action.
2 The court should instead view Mr. Gordon's action as enforcing
3 Washington law in a "private attorney general" capacity against Impulse.
4

5 The purpose of the Act is clearly punitive in nature. Before passing
6 the Act, the Washington State legislature heard copious testimony that the
7 specific conduct prohibited by the Act cost businesses in the state of
8 Washington thousands of hours in lost productivity and millions of dollars
9 in wasted costs.¹ The Washington legislature sought to discourage that
10 conduct by exposing persons sending, assisting in sending, and conspiring
11 to send false and deceptive commercial mail messages to significant
12 financial liability, often vastly exceeding actual damages. To enforce the
13 Act, the legislature designed the statute to allow Washington's Attorney
14 General to prosecute violations by defining violations of the Act as "per
15 se" violations of Washington's Consumer Protection Statute, RCW 19.86.
16

17 Both Washington's Consumer Protection Statute and Washington's
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23 ¹ No official transcripts were made of the testimony before the Washington State Legislature.

24 Instead, the testimony was recorded, and has been made available by the State at
25 <http://198.239.32.151/ramgen/Archives/199904/>

1 Commercial Electronic Email Statute further authorize citizens, such as
2 Mr. Gordon, to bring actions against persons violating the Act.
3

4 Thus, as prescribed by the Act and Washington’s Consumer
5 Protection statute, Mr. Gordon is seeking to impose a penalty for Impulse’s
6 ongoing violations of the Act. Impulse, and previously CMG, stand
7 accused as separate entities, each of whom are accountable for their own
8 violations of the Act. Just as the prior conviction of a criminal does not
9 operate to prevent the subsequent prosecution of a different criminal, the
10 doctrine of res judicata simply does not apply to separate entities each
11 accused of individually violating the Act.
12
13

14 Generally speaking, the pursuit of a claim against one individual will
15 not bar the pursuit of the same claim against another. *See* Restatement
16 (Second) of Judgments § 49 (1982) (“A judgment against one person liable
17 for a loss does not terminate a claim that the injured party may have
18 against another person who may be who may be liable therefore.”); *id.* §
19 49 cmt. a (“Accordingly, a judgment for or against one obligor does not
20 result in merger or bar of the claim that the injured party may have against
21 another obligor.”). Each defendant is liable for their own conduct
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25 regardless of the disposition of a separate prosecution against a different
26 Plaintiff’s Response to Defendant’s Motion to Dismiss Plaintiff’s
Complaint., Certificate of Service

1 party for their separate conduct, even if the various defendants' prohibited
2 acts were related. Res judicata is therefore simply inapplicable, and the
3 entire analysis need not even be conducted.
4

5 However, if the court does apply the principles of res judicata, it is
6 still clear that the requirements for dismissal as set forth by the 9th Circuit
7 are not met, and Mr. Gordon's suit against Impulse is not properly
8 dismissed.
9

10
11 **THE PRESENT CLAIMS DERIVE FROM A DIFFERENT SET**
12 **OF FACTS THAN THE CMG SUIT**

13 To dismiss an action as barred by res judicata, the Ninth Circuit
14 requires an 1) identity of claims, 2) a final judgment on the merits, and 3)
15 identity or privity between the parties. Owens v. Kaiser Foundation Health
16 Plan, Inc. 244 F.3d 708, 713 (9th Cir. 2001). If any of the three prongs are
17 not met, res judicata is inapplicable, and the action is not barred. City of
18 Martinez v. Texaco Trading and Transp. 353 F.3d 758 Ca. (9th Cir. 2003).
19

20 Addressing the first and second prongs, there is neither identity of claims
21 nor a final judgment on the merits, because the claims before this Court
22 include claims that could not be asserted, and were not asserted, in the
23
24
25 CMG suit.

1 **IMPULSE’S CLAIM THAT THE EMAILS ARE “THE SAME” IS**
2 **BOTH DISINGENUOUS AND FALSE**

3 Until the filing of this brief, Mr. Gordon had never revealed to
4 Impulse which commercial electronic mail messages formed the basis for
5 the claims now asserted against Impulse. See ¶ 2 of “Declaration of James
6 S. Gordon, Jr. in Support of Plaintiff’s Response to Defendant’s Motion to
7 Dismiss Plaintiff’s Complaint.” The sworn statement of the defendant’s
8 attorney David O. Klein is therefore puzzling. Mr. Klein states:
9

10 “The Related Action [the CMG suit] arose out of the receipt of the
11 same commercial e-mails as allegedly transmitted by Impulse to Mr.
12 Gordon in the instant litigation.”

13 See ¶ 8. of “Declaration of David O. Klein, Esq. in Support of Defendant’s
14 Motion to Dismiss Plaintiff’s Complaint”
15

16 Unless Mr. Klein is clairvoyant, he cannot possibly have known
17 which emails Mr. Gordon was referencing in his complaint. Even if one
18 assumes that Mr. Klein had detailed and specific knowledge of the
19 commercial e-mails that were at issue in the CMG suit, he still cannot
20 possibly have known that the commercial e-mails at issue in the present
21 suit were “the same.” In fact, since Impulse continued to send Mr. Gordon
22 commercial e-mail messages that violate RCW 19.190 et seq long *after* the
23 Plaintiff’s Response to Defendant’s
24 Motion to Dismiss Plaintiff’s
25 Complaint., Certificate of Service

1 date the CMG suit was dismissed, Mr. Klein and Impulse had good reason
2 to suspect that many of the commercial e-mails asserted in the present suit
3 were *not* the same as those asserted in the CMG suit.
4

5 Regardless of Mr. Klein’s misstatement of this material fact, the
6 present suit inarguably includes emails that were sent by Impulse that were
7 *not* a part of any claims asserted by Mr. Gordon in the CMG suit. See ¶¶
8 11 and 12 of “Declaration of James S. Gordon, Jr. in Support of Plaintiff’s
9 Response to Defendant’s Motion to Dismiss Plaintiff’s Complaint.”
10

11 Notably, these unrelated and distinct emails number over 300 to date, and
12 thus give rise to damages that are more than sufficient to satisfy the
13 requirements of diversity jurisdiction standing on their own.
14
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16 **THE PRESENT CLAIMS INCLUDE CLAIMS ARISING FROM**
17 **EMAILS THAT WERE NOT A PART OF THE CMG SUIT**

18 The claims against Impulse can be divided into three categories.
19

20 The first category comprises claims arising from commercial electronic
21 messages sent by Impulse that offered products from companies other than
22 CMG. Mr. Gordon obviously could not, and did not, assert claims against
23 CMG arising from these emails, as they were unrelated to CMG. Claims
24 against Impulse and derived from this first category of emails indisputably
25

1 fail to satisfy any of the requirements of Owens. These claims lack
2 identity of both claims and parties, and a final judgment on the merits,
3
4 because they were not asserted against CMG.

5 The second category comprises claims related to emails that were
6 sent *after* the CMG suit was dismissed. Claims arising from these emails
7
8 also cannot possibly meet the requirements of Owens as these claims are
9 derived from acts that had not yet occurred at the time the CMG suit was
10 dismissed. At a minimum, claims arising from emails sent by Impulse
11
12 after the conclusion of the CMG suit lack identity and a final judgment on
13 the merits, because were not asserted against CMG and were not
14 contemplated by the Court's dismissal.

15
16 The third category of emails related to Mr. Gordon's claims against
17 Impulse are emails that were part of the basis for Mr. Gordon's claims in
18 the CMG suit. Mr. Gordon's claims related to these emails are also not
19 properly barred under the doctrine of res judicata because the third prong
20 of the Owens test cannot be met, as there can be no privity between CMG
21 and Impulse.
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1 **CLAIMS ARISING FROM EMAILS THAT WERE AT ISSUE IN**
2 **THE CMG SUIT STILL INVOLVE DIFFERENT PARTIES WHO**
3 **WERE NOT IN PRIVACY; FTC V. GARVEY CONTROLS THE**
4 **PRIVACY ANALYSIS AND DICTATES THAT THE DEFENDANT’S**
5 **REQUEST FOR DISMISSAL BASED ON RES JUDICATA BE**
6 **DENIED**

7 In *FTC v. Garvey* 383 F.3d 891 C.A.9 (Cal.), 2004, (decided a mere
8 7 weeks before the CMG suit was dismissed at Mr. Gordon’s request), the
9 9th Circuit Court of Appeals examined a case virtually identical to the case
10 now before this Court. The FTC had brought two separate but virtually
11 identical actions, each seeking to enforce sections 5 and 12 of the FCTA,
12 15 U.S.C. § 45 and 52; (the federal counterpart to Washington’s Consumer
13 Protection statute).

14 The first action was brought against Enforma, who had been accused
15 of selling a dietary product by using false and misleading television
16 advertising. The second action was against the “Modern Interactive
17 Defendants,” who had produced the accused television advertising for
18 Enforma. The FTC had entered into a Stipulated Final Order with
19 Enforma, settling the Enforma suit, and the Modern Interactive Defendants
20 sought to have the FTC’s complaint against them dismissed as a result of
21 that settlement on the basis of res judicata. After the district court granted

1 the Modern Interactive Defendant's motion to dismiss, the 9th Circuit
2 reversed.

3
4 The 9th Circuit recognized that the two suits involved the exact same
5 television advertising, and further recognized the fact that Enforma had
6 agreed to indemnify the Modern Interactive Defendants. Nevertheless, the
7
8 9th Circuit found that the Enforma defendants were "not sufficiently
9 connected" with the Modern Interactive Defendants to create privity and
10 justify barring the FTC's claims under the doctrine of res judicata. The
11
12 rational for the 9th Circuit's September 1, 2004 opinion reads:

13 This conclusion is supported by evidence that Enforma knew that
14 the FTC was pursuing and intended to continue pursuing other
15 defendants around the time that the Stipulated Final Order was
16 entered. An FTC attorney submitted a declaration stating that he
17 gave Enforma's counsel notice that the FTC was pursuing additional
18 parties and that the settlement would not bar subsequent
19 enforcement actions against those parties.

20 Just as the FTC had informed Enforma that it intended on pursuing
21 the Modern Interactive Defendants prior to settling, Mr. Gordon had
22 repeatedly and specifically informed CMG that he viewed Impulse's
23 liability as independent and separate from CMG's, and that he fully
24 intended to bring a separate action against Impulse. See ¶ 9 of

25
26 "Declaration of James S. Gordon, Jr. in Support of Plaintiff's Response to
Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's
Complaint., Certificate of Service

1 Defendant's Motion to Dismiss Plaintiff's Complaint." The facts in the
2 case before this court are thus virtually identical to those before the 9th
3 Circuit in FTC v. Garvey, and where they differ, they do so in ways that
4 further argue against privity and res judicata.
5

6 The FTC's suits against Enforma and the Modern Interactive
7 Defendants arose from violations based on the exact same fraudulent
8 advertising. While there is some overlap, the fraudulent email advertising
9 in the present suit is at least partially distinct from that asserted in the
10 CMG suit. Just as Enforma was told the FTC intended to pursue claims
11 against the Modern Interactive Defendants, Mr. Gordon specifically
12 informed CMG that he intended to bring this action against Impulse.
13 Finally, Enforma indemnified the Modern Interactive Defendants.
14

15 However, in the present action, Impulse itself flatly states that it refused to
16 accept liability for Mr. Gordon's claims against CMG. In paragraph 10 of
17 the declaration of David O. Klein, Mr. Klein states:
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21 "After examining the terms of the Agreement, and understanding
22 between CMG and Impulse to defend and indemnify it in the
23 Related Action [the CMG suit] could not be reached. As such,
24 Impulse did not defend, indemnify and/or hold CMG harmless in the
25 Related Action [the CMG suit]."
26

1 See ¶ 10. of “Declaration of David O. Klein, Esq. in Support of
2 Defendant’s Motion to Dismiss Plaintiff’s Complaint”

3
4 Thus, by Impulse’s own admission, Impulse did not and does not agree that
5 it had any liability for claims asserted by Mr. Gordon in the CMG suit.

6 How then can Impulse plausibly claim that it is in “privity” with the prior
7 claims against CMG? Impulse simply asks the court to turn the doctrine of
8 privity on its head.
9

10
11 **IMPULSE’S ANALYSIS OF HEADWATERS INC. V. U.S.**
12 **FOREST SERVICE IS FLAWED**

13 Impulse asks this Court to contort the Ninth Circuit’s ruling in
14 Headwaters Inc. v. U.S. Forest Service 382 F.3d 1025 C.A.9 (Or.), 2004.²
15 to shoehorn Impulse into privity with CMG. However, the ruling in
16 Headwaters was rendered on facts that are the mirror image of the facts
17 presently before this Court.
18

19
20 In Headwaters, the 9th Circuit barred an environmental group from
21 bringing a subsequent suit on behalf of the public. The suit alleged the
22 same claims against the same defendant (the US Forest Service) as a
23

24 _____
25 ² The Defendant’s have incorrectly cited the case as Headwaters, Inc. v Forest Conservation
26 Counsel , 2004 U.S. App. LEXIS 18930 (9th Cir. 2004)

1 previous suit. The previous suit was brought by a “related” environmental
2 group and was also on behalf of the public. The court reasoned that
3 “privity” existed between the original plaintiff and the subsequent plaintiff
4 because the stated interests of the litigants were not simply “closely
5 aligned,” they were “the same,” and the relief sought was “identical.”
6
7

8 The present case presents the opposite circumstance. The present
9 case does not involve identical defendants. Impulse is not the same as
10 CMG. They are entirely separate and distinct entities. Even if successful,
11 Mr. Gordon’s claims do not seek any relief from CMG and there is no
12 chance whatsoever that the present litigation will result in a judgment
13 against CMG. Thus, if CMG has an interest in the outcome Mr. Gordon’s
14 claims against Impulse, it is based entirely on the possibility that Impulse
15 might bring suit against CMG. The interests of CMG and Impulse are not
16 “closely aligned” or “the same.” The interests of CMG and Impulse are
17 directly adversarial.
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22 **ADVERSARIAL PARTIES CANNOT BE IN PRIVITY**

23 In *Bianchi v. Walker*, 163 F.3d 564, (9th Cir. 1998), the 9th Circuit
24 considered a claim of privity between adverse parties. The Court held:
25

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2
3 Bianchi also maintains that this court's decision in *Bianchi v. Perry*,
4 140 F.3d 1294 (9th Cir. 1998) is res judicata on the question whether
5 the Bank is entitled to recover the amount owing on the VECP claim
6 pursuant to the assignment agreement. This contention lacks merit.
7 *Bianchi v. Perry* cannot serve as a bar to the Bank's claim because it
8 was not a party or privy to that action. Res judicata only applies to
9 persons who were parties or their privies in a prior action involving
10 the same claim. See *In Re Schimmels*, 127 F.3d 875, 881 (9th Cir.
11 1997). The Bank and the Government are not in privity, they are
12 adverse parties. Accordingly, neither Bank of America nor *Bianchi*
13 *v. Perry* bars the Bank's rights under the assignment agreement.

14
15 Accordingly, any claim of privity between Impulse and CMG is in
16 direct contradiction to Impulse's own conduct in refusing to indemnify
17 CMG, and the binding precedent of the 9th Circuit Court of Appeals. The
18 Defendant's request for dismissal under the doctrine of res judicata should
19 therefore be denied.

20
21
22 **II. WASHINGTON'S COMMERCIAL ELECTRONIC MAIL
23 STATUTE WAS NOT PREEMPTED BY THE FEDERAL CAN
24 SPAM LEGISLATION**

25
26 Impulse's arguments related to federal preemption are entirely
disingenuous. Here is the part of the federal Can Spam legislation Impulse
quotes in it's memorandum:

1 This Act supersedes any statute, regulation, or rule of a State or
2 political subdivision of a State that expressly regulates the use of
3 electronic mail to send commercial messages . . .

4 Here is the language of the legislation that follows immediately
5 thereafter, which Impulse saw fit to remove with the ellipse:

6 , except to the extent that any such statute, regulation, or rule
7 prohibits falsity or deception in any portion of a commercial
8 electronic mail message or information attached thereto. 15 USCA
9 § 7707 (West Supp. 2003).

10 The intent of Congress could not be more plain. Statutes such as
11 Washington's, which prohibit nothing but "falsity and deception," are
12 deliberately excepted from federal preemption.
13

14 Washington's Commercial Electronic Mail statute was among a
15 small handful of state statutes existed during the debate and passage of the
16 CAN SPAM Act. Congress specifically and deliberately crafted the
17 language of the CAN SPAM Act to allow the Washington statute to
18 continue in full force and effect. The Defendant's request for dismissal
19 under a claim of federal preemption is contradicted by the plain language
20 of the CAN SPAM Act, appears to be a deliberate effort to mislead the
21 Court, and should therefore be denied.
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1 **III. IMPULSE’S CLAIM THAT IT “COULD NOT HAVE**
2 **VIOLATED” THE ACT “AS A MATTER OF LAW” IS**
3 **SOPHISTRY.**

4 Impulse further seeks to have the claims dismissed claiming that
5 Impulse “could not have violated” the law because Impulse asserts that Mr.
6 Gordon “consented” to receiving Impulse’s fraudulent email. Mr. Gordon
7 contests this assertion, and further points out that even if Mr. Gordon did at
8 one point “opt in” to receive email at some of Mr. Gordon’s email
9 addresses, the records produced by Impulse show that Mr. Gordon
10 immediately “opted out.” See Exhibit “F” of Impulse’s motion to dismiss.
11

12 In either event, the question of whether Mr. Gordon “consented” to
13 receiving the emails is irrelevant. Nowhere does RCW 19.190 et seq.
14 distinguish between solicited and unsolicited email. The Act simply
15 requires that commercial email (whether solicited or not) 1) not use a third
16 party’s internet domain name without permission of the third party, 2) not
17 misrepresent or obscure any information in identifying the point of origin
18 or the transmission path of a commercial electronic mail message; and 3)
19 not contain false or misleading information in the subject line. Lack of
20 “consent” is simply not an element for a violation of the Act. A party’s
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1 “consent,” or lack thereof, cannot and does not excuse another party’s
2 violations of the Act.

3
4 Finally, Impulse argues that Impulse should not be required to check
5 the WAISP database to determine if Mr. Gordon is a Washington resident,
6 and for that reason should be excused from its violations of the Act.

7
8 Assuming, *arguendo*, that Impulse is not required to conduct this check,
9 Impulse has admitted that it had actual knowledge Mr. Gordon was a
10 Washington resident for over a year, and during that time Impulse has
11 continued to send emails that violate the Act to Mr. Gordon.³ Given that
12 Impulse continued to send fraudulent email to Mr. Gordon long after they
13 know him to be a Washington resident, Impulse’s complaints about “due
14 process” are clearly a ruse. Impulse couldn’t care less who is or isn’t a
15 Washington resident. Impulse simply wants this Court to hold that the Act
16 does not apply to them.
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20 Regardless of whether Impulse had a duty to check the WAISP
21 database, the Act further provides that “a person knows that the intended
22

23 ³ Impulse claims in its memorandum that it participated in the CMG suit by providing
24 documents and examining pleadings and discovery. As such, Impulse was plainly aware that Mr.
25 Gordon is and was a Washington resident.

1 recipient of a commercial electronic mail message is a Washington resident
2 if that information is available, upon request, from the registrant of the
3 internet domain name contained in the recipient's electronic mail address.”

4 See RCW 19.190.120(2) In his complaint, Mr. Gordon states that he is the
5 registrant of the “gordonworks.com” domain name, and that this
6 information was available on request from Mr. Gordon. Impulse was
7 therefore on notice that Mr. Gordon was a Washington resident.

8
9 Impulse relies on Cybersell, Inc. v. Cybersell Inc. 130 F.3d 414 (9th
10 Cir. 1997) to argue that application of the Act violates their “due process”
11 rights. However, the issue in the Cybersell case was personal jurisdiction.
12 Impulse has not contested personal jurisdiction, or the fact that they are
13 doing business in the state of Washington. Rather, Impulse simply argues
14 that Washington’s laws are sufficiently inconvenient that they should not
15 apply to them. The Court should dismiss this nonsense out of hand.

16 17 18 19 20 21 **IV. CONCLUSION**

22 None of Impulse’s bases for dismissal under FRCP 12(b)(6) are
23 sound. Res judicata is not applicable to the facts before the Court, and
24 even if it were, an analysis under 9th Circuit precedent still shows that Mr.

1 Gordon's claims should not be barred. Washington's Commercial
2 Electronic Mail statute was deliberately exempted from federal
3
4 preemption, and Impulse's arguments that Washington's Commercial
5 Electronic Mail statute doesn't apply to them or violates their due process
6
7 rights are entirely specious. Accordingly, the Court should deny their
8
9 motion to dismiss in its entirety, and grant such other and further relief as it
10
11 deems just and proper.

11 DATED this 3rd day of February, 2005

12
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17 Certificate of Service

18 I hereby certify that on February 3, 2005, I electronically filed the foregoing,
19 together with a Declaration of James S. Gordon, Jr., with the Clerk of the
20 Court using the CM/ECF System which will send notification of such filing
21 to the following: Floyd Ivey, and I hereby certify that I have mailed by
22 United States Postal Service the documents to the following non-CM/ECF
23 participants: Peter J. Glantz, Sean A. Moynihan.

22
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