

Tab 4

Declaration of James R. Gerberich

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

VALENCIA M MCCLATCHEY,)	
)	
)	
Plaintiff,)	
)	Civil Action No. 05-145J
v.)	
)	
THE ASSOCIATED PRESS,)	
)	
)	
Defendant.)	

DECLARATION OF JAMES R. GERBERICH

JAMES R. GERBERICH, pursuant to 28 U.S.C. § 1746, states:

1. I am employed as the Director of Operations and Content for The Associated Press (“AP”), defendant in the above-captioned case. I make this declaration upon my own personal knowledge and/or records maintained by AP in the ordinary course of its business. I would be competent to testify to the facts set forth in this Declaration.

2. When photographs are published by AP as part of AP’s PhotoStream service, those photographs automatically are entered into AP’s digital photo archive, known as the “PhotoArchive”

3. On September 12, 2002, AP published a news report entitled “Woman who captured searing Flight 93 image struggles a year later,” which news report included a copy of a photograph taken by Val McClatchey. Upon AP’s distribution of the copy of Ms. McClatchey’s photograph through the PhotoStream service, the copy became available in the PhotoArchive.

4. On November 4, 2003, following AP having been made aware that Ms McClatchey had objected to a use of her photograph made by AOL, AP removed the photograph from its PhotoArchive. Once removed from the PhotoArchive, members and subscribers of AP, and anyone else who may have had access to the PhotoArchive, had no further access to the photograph.

5. Attached as Exhibit A hereto is a true and correct copy of a report, dated August 29, 2005, that lists every instance in which the copy of Ms. McClatchey's photograph that was present in AP's PhotoArchive had been downloaded. I personally created the report shown in Exhibit A.

6. Other than the downloads identified on Exhibit A, no downloads were made of AP's copy of Ms. McClatchey's photograph during the entire time it was available in the PhotoArchive.

7. As is shown in Exhibit A, the only downloads of Ms. McClatchey's photograph from AP's PhotoArchive were made by Canadian Press, America Online and the Huntsville Times.

8. When a publisher downloads a photograph from the PhotoArchive, it does not mean that any further use of the photograph necessarily will be made. It is a common practice of publishers to download and review many photographs from multiple sources in connection with their consideration of which ones to publish.

9. AP does not know, and does not keep track of, whether anyone who has access to the PhotoArchive actually publishes or otherwise makes use of any of the photographs downloaded from the PhotoArchive.

10. AP members and subscribers who have access to the PhotoArchive do not pay fees based on the nature or content of the photographs therein, or on whether the photograph ultimately is published by the person who downloaded it. Rather, members and subscribers who download photographs incur a nominal charge of \$25 or \$35 for use of the system.

11. AP made no sales whatsoever either of copies of Ms. McClatchey's photograph or of any rights to publish or otherwise make use of that photograph.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: New York, New York
May 12, 2006


James R. Gerberich

Exhibit A

Photo Archive System

List of users who downloaded the Image : APA6430495

Login Id	User Name	Download Date	Bill Flag	AP Unit Id	Qty.	Amt.
canpress1	CANADIAN PRESS - NO CHARGE	30-JUN-03	Y	CP	0	
aol	AMERICA ONLINE	07-AUG-03	Y	IS	25	
alhut1	MICHAEL MERCIER	08-AUG-03	Y	NP	35	
aol	AMERICA ONLINE	08-AUG-03	Y	IS	25	
aol	AMERICA ONLINE	09-SEP-03	Y	IS	25	
aol	AMERICA ONLINE	09-SEP-03	N	IS	25	
aol	AMERICA ONLINE	30-OCT-03	Y	IS	25	