

1
2
3
4
5 **UNITED STATES DISTRICT COURT**
6 **WESTERN DISTRICT OF WASHINGTON**
7 **AT SEATTLE**

8 **UNITED STATES OF AMERICA,**

9 Plaintiff,

10 v.

11 **IMPULSE MEDIA GROUP, INC.,**

12 a Washington corporation,

13 Defendant.

No. CV05-1285L

**UNITED STATES' MOTION
and MEMORANDUM IN
SUPPORT OF SUMMARY
JUDGMENT**

**NOTE ON MOTION CALENDAR:
(September 29, 2006)**

14
15 **I. Introduction**

16 Plaintiff United States of America ("United States") moves for summary judgment as to
17 liability under the Controlling the Assault of Non-Solicited Pornography and Marketing Act of
18 2003 ("CAN-SPAM" or "the Act"), 15 U.S.C. § 7701 et seq., and the Federal Trade
19 Commission's Adult Labeling Rule (the "Adult Labeling Rule" or the "Rule"), 16 C.F.R. § 316,
20 against Defendant Impulse Media Group, Inc. ("IMG"). IMG violated the law by initiating the
21 transmission of hundreds of unsolicited commercial email messages ("spam") that contained
22 sexually explicit material and lacked the required warnings, disclosures, and opt-out
23 mechanisms. As a result, unsuspecting recipients around the country were bombarded with
24 sexually explicit images in their in-boxes. Congress explicitly forbade the transmission of the
25 email messages at issue in order to protect recipients of sexually explicit spam from viewing
26 material that they may find offensive and to provide recipients of commercial spam an

27
28 Plaintiff's Motion for
Summary Judgment
CV05-1285L

U.S. Department of Justice
P.O. Box 386
Washington, DC 20044
(202) 353-1991

1 opportunity to opt-out from receiving further messages from the sender.

2 There is no genuine dispute of the material facts that impose liability on IMG. IMG
3 caused its “affiliates” to send the spam that is the subject of this motion. As discussed in Section
4 VB, *infra*, IMG operated an affiliate program called “Soulcash.” IMG provided its affiliates
5 with marketing materials and support, paid affiliates for bringing subscribers to IMG as a part of
6 its affiliate program, and induced affiliates to send email as a part of the Soulcash affiliate
7 program. Further, the undisputed facts show that IMG affiliates promoted IMG’s websites
8 through unsolicited commercial email messages that contain sexually oriented material that
9 violate
10 CAN-SPAM and the Adult Labeling Rule.

11 Congress recognized that there was often a distinction between firms that induce sexually
12 explicit spam, like IMG, and entities that actually sent the spam, such as IMG’s affiliates. The
13 text, structure, and legislative history of the Act (*see* Sections IV and VI, *infra*) unequivocally
14 demonstrate how Congress, motivated in large part by a desire to prevent pornographic email
15 from being delivered to children, purposefully excluded a “knowledge” requirement from the
16 pertinent provision of CAN-SPAM to expressly impose liability for injunctive relief on both
17 those who induce the spam and the actual senders of spam. In doing so, Congress deliberately
18 extended the scope of the statute to reach firms like IMG that induce and provide consideration
19 to others to send sexually explicit email to non-consenting recipients. Thus, IMG is liable for
20 injunctive relief.

21 Even where Congress did impose a knowledge requirement as with civil penalties (*see*
22 Section VII, *infra*), the undisputed evidence in this case demonstrates that IMG had actual and
23 implied knowledge of its affiliates’ unlawful practices and of CAN-SPAM. Therefore, IMG is
24 liable not just for injunctive relief, but for civil penalties as well. The contours of any injunction
25 and the amount of any civil penalty will be decided in later proceedings.

26 Because there are no genuine issues of material fact in dispute as to whether IMG
27

1 violated CAN-SPAM and the Rule, summary judgment in favor of the United States should be
2 granted.

3 **II. Statement of Undisputed Facts**

4 **A. IMG**

5 1. Since January 1, 2004, and continuing to the present, Defendant IMG has owned and
6 operated dozens of commercial websites ("websites") that display a vast collection of sexually
7 oriented videos and pictures. (IMG's Answer to the Amended Complaint at ¶ 6, Incorporated
8 by Reference; Schermerhorn deposition, attached as Exhibit 9 at p. 8 lines 5-18 and p. 10 line 22
9 to p. 11 line 2).

10 2. Seth Schermerhorn is the President and sole owner of IMG. Seth Schermerhorn has
11 owned IMG since he started the company in 2001. (Schermerhorn deposition, attached as
12 Exhibit 9 at p. 9 line 9 to p. 10 line 9 and p. 10 line 22 to p. 11 line 2).

13 3. Seth Schermerhorn was identified by IMG as someone who designed the affiliate
14 program, negotiates and signs contracts, terminates and reinstates affiliates, deals with
15 complaints about affiliates, and monitors affiliates for compliance. (Response No. 1 to
16 Interrogatory Requests, attached as Exhibit 4 at pp. 6-7).

17 4. Adam Welch was employed by IMG from May 2003 to November 2005 as a project
18 manager. While employed at IMG, Adam Welch worked on the day-to-day operations of the
19 company and served as an affiliate representative, providing assistance to affiliates. (Welch
20 deposition, attached as Exhibit 7 at p. 8 line 17 to p. 10 line 12).

21 5. Adam Welch was identified by IMG as someone who dealt with complaints about
22 affiliates and monitored affiliates for compliance. (Response No. 1 to Interrogatory Requests,
23 attached as Exhibit 4 at pp. 6-7).

24 6. During his employment at IMG, Adam Welch had direct contact with IMG affiliates.
25 (Schermerhorn deposition, attached as Exhibit 9 at p. 11 lines 21-24).

26 7. Josh Mackey has been employed at IMG since 2002. He has held the positions of
27

1 photographer and graphic designer. Josh Mackey is responsible for creating and designing
2 IMG's websites. (Mackey deposition, attached as Exhibit 8 at p. 15 line 20 to p. 16 line 6 and p.
3 16 line 24 to p. 17 line 24).

4 8. While employed at IMG, Josh Mackey has had direct contact with IMG affiliates.
5 (Schermerhorn deposition, attached as Exhibit 9 at p. 11 lines 21-24).

6 **B. The IMG Affiliate Program**

7 9. To fully access IMG's websites, individuals must subscribe and pay membership fees.
8 (Schermerhorn deposition, attached as Exhibit 9 at p. 8 lines 13-18 and p. 26 lines 8-16).

9 10. To attract members/subscribers to its websites, IMG runs an affiliate program called
10 Soulcash. Affiliates of the Soulcash program advertise IMG's websites. Affiliates earn money
11 each time they refer a customer who subscribes to one of IMG's adult websites. (IMG's Answer
12 to the Amended Complaint at ¶ 6, Incorporated by Reference; Mackey deposition, attached as
13 Exhibit 8 at p. 30 lines 23-25; Schermerhorn deposition, attached as Exhibit 9 at p. 8 line 19 to p.
14 9 line 3 and p. 21 lines 14-17).

15 11. To become an affiliate of IMG, an applicant need only complete IMG's on-line
16 affiliate application and provide an email address. "There is no process employed [by IMG] to
17 evaluate a prospective affiliate. As long as the prospective affiliate agrees to the SOULCASH
18 PROGRAM AGREEMENT and validates his email, he is entitled to participate." (Response No.
19 2 to Interrogatory Requests, attached as Exhibit 4 at p. 8; Mackey deposition, attached as Exhibit
20 8 at p. 34 lines 5-18; Schermerhorn deposition, attached as Exhibit 9 at p. 14 line 23 to p. 15 line
21 9; Welch deposition, attached as Exhibit 7 at p. 32 line 11 to p. 33 line 25).

22 12. IMG does not interview affiliate applicants as a part of the affiliate sign-up process.
23 (Schermerhorn deposition, attached as Exhibit 9 at p. 15 lines 18-20).

24 13. IMG does not ask affiliate applicants for references as a part of the affiliate sign-up
25 process. (Schermerhorn deposition, attached as Exhibit 9 at p. 15 lines 21-23).

26 14. IMG approved an affiliate applicant who provided the following information during
27

1 the sign-up process: first name “hjghgj;” last name “not provided;” street address “ghghghj
2 ghghj;” city “ghghgj;” state “ghghgj;” country “ghghgj;” email address “ghghghj@Jhghghg.com.”
3 IMG also approved affiliate applicants who provided the names “ccc xzc” and “sdfsfd dsfsdfs.”
4 (Excerpts from Response No. 4 to Document Requests - Affiliate Database, attached as Sealed
5 Exhibit 13).

6 15. IMG assigns each affiliate a unique user identification (“user ID”) consisting of
7 characters chosen by the affiliate during the affiliate sign-up process. (IMG’s Answer to the
8 Amended Complaint at ¶ 7, Incorporated by Reference; Response No. 6 to Interrogatory
9 Requests, attached as Exhibit 4 at pp. 11-12; Mackey deposition, attached as Exhibit 8 at p. 43
10 lines 2-8; Schermerhorn deposition, attached as Exhibit 9 at p. 22 lines 11-14).

11 16. Some individuals have more than one affiliate account, with each account receiving
12 its own affiliate user ID. (Schermerhorn deposition, attached as Exhibit 9 at p. 22 lines 3-10).

13 17. IMG uses codes containing the affiliate’s user ID to track subscriber sales and clicks
14 referred by affiliates and to determine which affiliates to pay for subscribers and sales brought to
15 IMG’s websites. (IMG’s Answer to the Amended Complaint at ¶ 7, Incorporated by Reference;
16 Response No. 6 to Interrogatory Requests, attached as Exhibit 4 at pp. 11-12; Mackey
17 deposition, attached as Exhibit 8 at p. 42 line 17 to p. 43 line 1).

18 18. IMG provides its affiliates with marketing and promotional tools — including
19 content, pictures, and video — to advertise IMG’s websites. Many of these items contain
20 sexually explicit material. (Response No. 11 to Document Requests - Hosted Full Page Ads,
21 attached as Exhibit 16; Response No. 11 to Document Requests - Hosted Half Page Ads,
22 attached as Exhibit 17; Response No. 11 to Document Requests - Movies of the Day, attached as
23 Exhibit 18; Mackey deposition, attached as Exhibit 8 at p. 25 line 15 to p. 26 line 2 and p. 37
24 lines 15-24; Welch deposition, attached as Exhibit 7 at p. 34 line 19 to p. 36 line 15;
25 Schermerhorn deposition, attached as Exhibit 9 at p. 16 lines 4-12).

26 19. Specifically, IMG provides the following to affiliates for marketing purposes: hosted
27

1 galleries, downloadable galleries, banners, pictures of the day, movies of the day, and
2 interstitials. (Response No. 7 to Interrogatory Requests, attached as Exhibit 4 at p. 13).

3 20. IMG provides these marketing and promotional tools to affiliates to “give the
4 affiliate a means to drive new . . . prospective website members to our sites.” (Schermerhorn
5 deposition, attached as Exhibit 9 at p. 17 lines 17-24).

6 21. The marketing and promotional tools provided to affiliates generally have hyperlinks
7 embedded in the graphics to direct potential subscribers to IMG’s websites. (Mackey deposition,
8 attached as Exhibit 8 at p. 62 line 19 to p. 63 line 21).

9 22. It is technically feasible for affiliates to use in emails many of the promotional tools
10 containing content, pictures, and videos provided by IMG to promote IMG’s websites. (Mackey
11 deposition, attached as Exhibit 8 at p. 37 line 25 to p. 38 line 7; Schermerhorn deposition,
12 attached as Exhibit 9 at p. 17 line 17 to p. 18 line 13 and p. 53 line 21 to p. 55 line 13; Welch
13 deposition, attached as Exhibit 7 at p. 36 lines 16-23 and p. 61 line 18 to p. 68 line 2).

14 23. IMG provides detailed sales statistics to affiliates including number of sales, number
15 of clicks, referring URL information, and a list of the total dollar amount earned by the affiliate.
16 (IMG’s Answer to the Amended Complaint at ¶ 6, Incorporated by Reference; Response No. 6
17 to Interrogatory Requests, attached as Exhibit 4 at pp. 11-12; Mackey deposition, attached as
18 Exhibit 8 at p. 39 line 20 to p. 40 line 22; Schermerhorn deposition, attached as Exhibit 9 at p. 19
19 line 5 to p. 20 line 1).

20 24. IMG provides support to affiliates through a support system that allows affiliates to
21 send questions to IMG and receive responses, “via toll and toll free telephone numbers posted in
22 the footer of every page,” and through email communications and instant messenger. (Response
23 No. 4 to Interrogatory Requests, attached as Exhibit 4 at p. 10; Schermerhorn deposition,
24 attached as Exhibit 9 at p. 16 line 21 to p. 17 line 16; Welch deposition, attached as Exhibit 7 at
25 p. 10 line 15 to p. 12 line 6).

26 25. IMG sends a notification email to an affiliate each time the affiliate is credited with a
27

1 subscription to an IMG website. (Response No. 4 to Interrogatory Requests, attached as Exhibit
2 4 at p. 10; Sample Emails notifying affiliate of sale, attached as Exhibit 19).

3 **C. Affiliate Payment Programs**

4 26. IMG has two payment plans for affiliates: "per sign-up" and "50/50 rev share."
5 Affiliates on the per sign-up payment plan are paid more per sale the more sales they refer to
6 IMG's websites. Affiliates on the rev share program earn 50 percent of the payments made by a
7 subscriber. (Schermerhorn deposition, attached as Exhibit 9 at p. 13 line 7 to p. 14 line 12;
8 Welch deposition, attached as Exhibit 7 at p. 45 line 16 to p. 46 line 1).

9 27. IMG runs bonus payouts to encourage affiliates to bring subscribers to IMG's
10 websites. IMG ran a bonus whereby affiliates who brought in ten or more sales received a
11 bonus. IMG ran a bonus payout called Fat Fridays that paid affiliates \$50 per sign-up instead of
12 the normal \$25 or \$30. IMG also ran a gift certificate incentive program that gave affiliates who
13 sent in ten or more sign-ups over a period of time a choice of a gift certificate from a number of
14 stores. (Schermerhorn deposition, attached as Exhibit 9 at p. 23 line 1 to p. 24 line 2; Welch
15 deposition, attached as Exhibit 7 at p. 46 lines 8-14).

16 **D. IMG Dealings With Its Affiliates; Spam Policies and Practice**

17 28. IMG maintains a computer database of affiliate information. The affiliate database
18 contains the information provided by affiliates during the sign-up process as well as the status of
19 their account — active or terminated. (Schermerhorn deposition, attached as Exhibit 9 at p. 44
20 line 25 to p. 45 line 22).

21 29. IMG's response to Interrogatory Request No. 6 lists electronic mail and electronic
22 newsletter marketing as examples of a type of marketing IMG affiliates may choose to use.
23 (Response No. 6 to Interrogatory Requests, attached as Exhibit 4 at p. 12).

24 30. IMG's Program Agreement for Affiliates states that affiliates shall not use or employ
25 any form of mass unsolicited electronic mailings. In its Program Agreement for Affiliates, IMG
26 reserves the right to terminate an affiliate for sending mass unsolicited electronic mail
27

1 solicitations. (IMG's Program Agreement for Affiliates, attached as Exhibit 5 at ¶ 2.3).

2 31. IMG relies solely on the provision in its Program Agreement prohibiting spam by
3 affiliates to prevent affiliates from sending commercial email in violation of CAN-SPAM and
4 the Adult Labeling Rule. (IMG's Program Agreement for Affiliates, attached as Exhibit 5 at ¶
5 2.3; Schermerhorn deposition, attached as Exhibit 9 at p. 30 lines 13-19).

6 32. IMG received complaints from individuals who were the recipients of spam sent by
7 IMG affiliates. (Schermerhorn deposition, attached as Exhibit 9 at p. 32 lines 5-18).

8 33. IMG does not monitor or verify new affiliate sign-ups to determine if the applicant
9 has been previously terminated and ensure that a terminated affiliate does not sign-up again. An
10 affiliate who had been terminated for spamming can "easily" sign-up again to the Soulcash
11 affiliate program by submitting different information during the affiliate sign-up process.
12 (Schermerhorn deposition, attached as Exhibit 9 at p. 63 lines 14-17; Welch deposition, attached
13 as Exhibit 7 at p. 59 line 8 to p. 60 line 20).

14 34. In an effort to monitor its affiliates, it would have been feasible for IMG to:

15 a. ask subscribers to IMG's websites, as part of the membership sign-up process,
16 how they learned of IMG. (Mackey deposition, attached as Exhibit 8 at p. 47
17 line 15 to p. 48 line 2).

18 b. ask affiliates what promotional means they use to advertise IMG's websites.
19 (Schermerhorn deposition, attached as Exhibit 9 at p. 18 line 22 to p. 19 line 1
20 and p. 24 lines 10-24; Welch deposition, attached as Exhibit 7 at p. 37 lines 19-
21 24).

22 c. create a textlink on the first page of IMG's adult websites directing people who
23 arrived there unwillingly to a complaint form. (Schermerhorn deposition,
24 attached as Exhibit 9 at p. 28 lines 3-23).

25 35. IMG considered taking the following steps to monitor its affiliates:

26 a. asking subscribers to IMG's websites, as part of the membership sign-up
27

1 process, how they learned of IMG. (Schermerhorn deposition, attached as Exhibit
2 9 at p. 27 line 2 to p. 28 line 2).

3 b. creating a textlink on the first page of IMG's adult websites directing people
4 who arrived there unwillingly to a complaint form. (Schermerhorn deposition,
5 attached as Exhibit 9 at p. 28 lines 3-23).

6 36. IMG did not undertake any of the monitoring methods identified in Paragraph 34.

7 a. IMG did not ask subscribers to IMG's websites if they were directed to IMG's
8 websites through emails sent by affiliates. (Mackey deposition, attached as
9 Exhibit 8 at p. 47 lines 5-14; Schermerhorn deposition, attached as Exhibit 9 at p.
10 18 lines 16-21; Welch deposition, attached as Exhibit 7 at p. 52 lines 6-10).

11 b. IMG did not regularly ask affiliates what kinds of promotional tools they were
12 using to promote IMG's websites. (Welch deposition, attached as Exhibit 7 at p.
13 36 line 24 to p. 37 line 5).

14 c. IMG did not create a textlink on the first page of IMG's adult websites
15 directing people who arrived there unwillingly to a complaint form.
16 (Schermerhorn deposition, attached as Exhibit 9 at p. 28 lines 3-23).

17 37. Other than the provisions in its Program Agreement for Affiliates, IMG takes no
18 affirmative steps to monitor affiliates for compliance with the CAN-SPAM Act and Adult
19 Labeling Rule. Josh Mackey and Adam Welch were not aware of any steps IMG took to
20 monitor affiliates for compliance with the CAN-SPAM Act and Adult Labeling Rule. Seth
21 Schermerhorn testified that IMG does occasional manual reviews of affiliate payout information
22 looking for suspicious transactions that are evidence of fraud or abuse. No affiliate had ever
23 been terminated for violating CAN-SPAM or the Adult Labeling Rule as a result of one of these
24 reviews. (Mackey deposition, attached as Exhibit 8 at p. 51 lines 20-23; Schermerhorn
25 deposition, attached as Exhibit 9 at p. 28 line 24 to p. 30 line 12 and p. 78 lines 7-14; Welch
26 deposition, attached as Exhibit 7 at p. 21 line 15 to p. 22 line 7).

38. IMG did not have existing affiliates review the CAN-SPAM Act when the law went into effect. (Schermerhorn deposition, attached as Exhibit 9 at p. 30 lines 23-25; Welch deposition, attached as Exhibit 7 at p. 53 line 23 to p. 54 line 9).

39. IMG did not provide training on the CAN-SPAM Act to its employees. (Schermerhorn deposition, attached as Exhibit 9 at p. 12 lines 8-10).

40. IMG did not set up a designated email account to receive spam complaints. (Schermerhorn deposition, attached as Exhibit 9 at p. 34 lines 22-24).

E. Microsoft Trap Accounts

41. As part of its continuing efforts to combat spam, Microsoft Corporation (“Microsoft”) created and registered to itself a number of MSN Hotmail email accounts (“trap accounts”). The trap accounts are used to detect whether individuals or entities are sending spam to MSN Hotmail account users in violation of Microsoft’s Terms of Use and Anti-Spam Policy. Microsoft did not consent to the receipt of email messages at the trap account addresses. (Bundy Declaration, attached as Exhibit 3 at p. 1; Vetter Declaration, attached as Exhibit 2 at p. 2).

42. In response to requests from the Federal Trade Commission, in or about November 2004, February 2005, and April 2006, Microsoft provided the government with hundreds of email messages sent by IMG affiliates to Microsoft’s trap accounts. In addition to the original messages, Microsoft provided the government with copies of the messages created in Adobe PDF format. The Adobe PDF copies provide a snapshot of how the original email messages appeared and preserve the images in the event that the image sources in the original messages become inactive on the Internet. Microsoft also produced web captures created through HTTrack HTML. The web captures provide snapshots of where viewers would have been directed, e.g., what Internet websites they would have arrived at, had they clicked on the hyperlinked promotional material contained in the original messages. (Bundy Declaration, attached as Exhibit 3 at pp. 2-3; Vetter Declaration, attached as Exhibit 2 at p. 2).

F. Violative Email Procured by IMG and Sent by IMG Affiliates

43. IMG affiliate “zillium” sent twenty-two unsolicited commercial email messages to Microsoft’s trap accounts from September 8, 2004, to September 10, 2004. The email messages contain sexually explicit material and promote the IMG website gloryholestation.com. The messages bore hyperlinks that, when pressed, ultimately directed the viewer to a website owned by IMG. The email messages fail to contain the required label within the subject line or initially-viewable area of the messages; contain sexually-explicit material within the initially-viewable area of the messages; fail to include a valid physical postal address for IMG; and fail to include an opt-out mechanism. (Himelfarb Declaration at ¶¶ 9-12, attached as Exhibit 1).

44. IMG affiliate “zillium” sent five unsolicited commercial email messages to Microsoft’s trap accounts on November 17, 2004. The email messages contain sexually explicit material and promote the IMG website gloryholestation.com. The messages bore hyperlinks that, when pressed, ultimately directed the viewer to a website owned by IMG. The email messages fail to contain the required label within the subject line or initially-viewable area of the messages; contain sexually-explicit material within the initially-viewable area of the messages; fail to include a valid physical postal address for IMG; and fail to include an opt-out mechanism. (Himelfarb Declaration at ¶¶ 36-38, attached as Exhibit 1).

45. IMG included “zillium” as a terminated affiliate on the list of terminated affiliates provided by IMG in Response to Document Request No. 7. (Terminated Webmasters - Response No. 7 to Document Requests, attached as Sealed Exhibit 12 at p. 107).

46. The affiliate accounts “zillium” and “ortika” are operated by the same person. Both accounts are registered to Renaud Philappart and both directed that payments be made to Renaud Philappart. (Excerpts from Response No. 4 to Document Requests - Affiliate Information, attached as Sealed Exhibit 13).

47. The IMG affiliate “ortika” is an active IMG affiliate account. (Terminated Webmasters - Response No. 7 to Document Requests, attached as Sealed Exhibit 12).

48. IMG affiliate “b32day” sent twelve unsolicited commercial email messages to

1 Microsoft's trap accounts from July 6, 2004, to July 18, 2004. The email messages contain
2 sexually explicit material and promote the IMG websites blacksdownwhites.com,
3 gloryholestation.com, jizzlickers.com, and melodyhart.com. The messages bore hyperlinks that,
4 when pressed, ultimately directed the viewer to a website owned by IMG. The email messages
5 fail to contain the required label within the subject line or initially-viewable area of the
6 messages; contain sexually-explicit material within the initially-viewable area of the messages;
7 and fail to include a valid physical postal address for IMG. In addition, the messages contain an
8 opt-out mechanism that appears *after* the sexually-explicit material rather than within the
9 initially-viewable area. (Himelfarb Declaration at ¶¶ 13-19, attached as Exhibit 1).

10 49. IMG paid the affiliate "b32day" \$1,634.97 from January 2004 to December 2005.
11 (Excerpts from Webmaster Earnings Document - Response No. 14 to Document Requests,
12 attached as Sealed Exhibit 11).

13 50. The affiliate accounts "b32day" and "a313372" are operated by the same person.
14 These two accounts were registered under the same name, phone number, physical address, and
15 email address. Affiliate accounts "b32day" and "a313372" both directed that their payments be
16 made in the same name of 634099 BC Ltd. (Excerpts from Response No. 4 to Document
17 Requests - Affiliate Information, attached as Sealed Exhibit 13).

18 51. IMG paid the affiliate account "a313372" \$4,201.47 from January 2004 to December
19 2005. (Excerpts from Webmaster Earnings Document - Response No. 14 to Document Requests,
20 attached as Sealed Exhibit 11).

21 52. The IMG affiliate "b32day" is an active IMG affiliate account. (Terminated
22 Webmasters - Response No. 7 to Document Requests, attached as Sealed Exhibit 12).

23 53. IMG affiliate "scorpion" sent 355 unsolicited commercial email messages to
24 Microsoft's trap accounts from May 28, 2004, to August 2, 2004. The email messages contain
25 sexually explicit material and promote the IMG websites funtit.com, gloryholestation.com,
26 jizzlickers.com, and tastytranny.com. The messages bore hyperlinks that, when pressed,
27

1 ultimately directed the viewer to a website owned by IMG. The email messages fail to contain
2 the required label within the subject line or initially-viewable area of the messages; contain
3 sexually-explicit material within the initially-viewable area of the messages; and fail to include a
4 valid physical postal address for IMG. In addition, the messages contain an opt-out mechanism
5 that appears *after* the sexually-explicit material rather than within the initially-viewable area.
6 (Himelfarb Declaration at ¶¶ 20-32, attached as Exhibit 1).

7 54. IMG paid the affiliate “scorpion” \$2,057.00. (List of Affiliate Payment Information,
8 attached as Exhibit 10).

9 55. The affiliate accounts “scorpion,” “teddybear,” and “dacash” are operated by the
10 same entity or person. These three accounts were registered under the same name, phone
11 number, physical address, and email address. Affiliates “scorpion,” “teddybear,” and “dacash”
12 directed that their payments be made in the same name of Maps Holding, Inc. (Excerpts from
13 Response No. 4 to Document Requests - Affiliate Information, attached as Sealed Exhibit 13).

14 56. IMG paid “dacash” \$8,121.27. (List of Affiliate Payment Information, attached as
15 Exhibit 10).

16 57. IMG affiliate “teddybear” sent fourteen unsolicited commercial email messages to
17 Microsoft’s trap accounts on July 15, 2004. The email messages contain sexually explicit
18 material and promote the IMG website bootycakes.com. The messages bore hyperlinks that,
19 when pressed, ultimately directed the viewer to a website owned by IMG. The email messages
20 fail to contain the required label within the subject line or initially-viewable area of the
21 messages; contain sexually-explicit material within the initially-viewable area of the messages;
22 and fail to include a valid physical postal address for IMG. In addition, the messages contain an
23 opt-out mechanism that appears *after* the sexually-explicit material rather than within the
24 initially-viewable area. (Himelfarb Declaration at ¶¶ 33-35, attached as Exhibit 1).

25 58. IMG paid “teddybear” \$2,367.16. (List of Affiliate Payment Information, attached
26 as Exhibit 10).

1 59. IMG affiliate “imatrix” sent five unsolicited commercial email messages to
2 Microsoft’s trap accounts on August 7, 2004. The email messages contain sexually explicit
3 material and promote the IMG website jizzlickers.com. The messages bore hyperlinks that,
4 when pressed, ultimately directed the viewer to a website owned by IMG. The email messages
5 fail to contain the required label within the subject line or initially-viewable area of the
6 messages; contain sexually-explicit material within the initially-viewable area of the messages;
7 and fail to include a valid physical postal address for IMG. In addition, the messages contain an
8 opt-out mechanism that appears *after* the sexually-explicit material rather than within the
9 initially-viewable area. (Himelfarb Declaration at ¶¶ 39-41, attached as Exhibit 1).

10 60. The IMG affiliate “imatrix” is an active IMG affiliate account. (Terminated
11 Webmasters - Response No. 7 to Document Requests, attached as Sealed Exhibit 12).

12 61. The email messages described in Paragraphs 43 through 59 were
13 unsolicited. IMG produced one document in response to the United States’ First Request for
14 Production of Documents No. 16 for “documents that demonstrate affirmative consent by a
15 person to receive commercial electronic mail message containing sexually oriented material.”
16 The only document IMG produced in response to Document Request No. 16 was IMG’s Terms
17 and Conditions of Subscription, a document that outlines terms and conditions for IMG’s
18 subscribers and does not show any evidence of affirmative consent by any person. (Affiliate
19 Terms and Conditions of Subscription - Response No. 16 to Document Requests, attached as
20 Exhibit 20).

21 62. In addition, Microsoft never consented to the receipt of any email to its trap
22 accounts. (Vetter Declaration, attached as Exhibit 2 at p. 2).

23 63. The email messages described in Paragraphs 43 through 59 contain
24 sexually explicit material, as is evident from the face of the messages.

25 64. IMG affiliates zillium, b32day, scorpion, teddybear, and imatrix sent 413 sexually
26 explicit email messages promoting websites owned by IMG. (Himelfarb Declaration at ¶42,
27

attached as Exhibit 1).

III. Summary Judgment Standard

Summary judgment is warranted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1158 (9th Cir. 2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The moving party has the initial burden of establishing that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). This burden may be satisfied by any kind of admissible evidence. Id. at 324. Once the moving party demonstrates that there are no genuine issues of material fact warranting trial, the non-moving party is required to produce evidence in opposition to the motion. Id. at 324. The opposing party must come forward with "specific facts" showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). It is not enough for the non-movant to offer merely colorable evidence that a genuine issue of material fact exists for trial. FTC v. Gill, 265 F.3d 944, 954 (9th Cir. 2001).

Because there is no genuine issue of material fact as to whether Defendant IMG initiated hundreds of unsolicited commercial email messages that contain sexually oriented material and violated CAN-SPAM and the Rule, the Court should enter summary judgment against IMG as to liability for those violations. Determining appropriate relief, including the amount of civil penalty, is an issue to be determined by further proceedings.

IV. Background on CAN-SPAM and the Adult Labeling Rule

Congress enacted CAN-SPAM and directed the Federal Trade Commission ("FTC") to promulgate what became the Adult Labeling Rule in part to protect people from being exposed to sexually explicit material without taking some affirmative step to see the material. See

1 15 U.S.C. § 7701(a)(5); see also, Federal Trade Commission, *Statement of Basis and Purpose,*
 2 *Label for Email Messages Containing Sexually Oriented Material*, 16 C.F.R. Part 316 (April 19,
 3 2004) (Introduction). By dictating that certain warnings and opt-out mechanisms must appear in
 4 the initially viewable area of the message, and commanding that sexually oriented material¹
 5 cannot appear in the initially viewable area, the Act and Rule protect recipients from
 6 unintentionally viewing material that may be classified as vulgar or pornographic. See Federal
 7 Trade Commission, *Statement of Basis and Purpose, Label for Email Messages Containing*
 8 *Sexually Oriented Material*, 16 C.F.R. Part 316 (April 19, 2004) (Introduction).

9 The Act and Rule are intended to protect minor recipients from unwillingly viewing
 10 inappropriate material. Congressional intent in this regard could not be clearer. As Senator
 11 McCain stated: “There are other costs to our society besides monetary costs. All of us are deeply
 12 concerned about the risks to our children who use e-mail and may be victimized by the nearly
 13 20 percent of spam that contains pornographic material, including graphic sexual images.”
 14 149 Cong. Rec. S13012, 13020 (daily ed. Oct. 22, 2003). Congressman Upton was similarly
 15 concerned: “As the father of two young kids, I am particularly pleased that this bill requires
 16 warning labels on commercial e-mails which contain sexually oriented material, and it protects
 17 our kids from being unwittingly exposed to such garbage that might pop up in the family's
 18 inbox.” 149 Cong. Rec. H12186, 12194 (daily ed. Nov. 21, 2003). See also S. Rep. No.
 19 108-102, at 4 (2003) (noting that “[u]nsuspecting children who simply open e-mails with
 20 seemingly benign subject lines may be either affronted with pornographic images in the e-mail
 21 message itself, or automatically and instantly taken-without requiring any further action on their
 22 part (like clicking on a link)-to an adult web page exhibiting sexually explicit images”);

24 ¹ The Act and the Rule prohibit “sexually oriented material” from an email message’s initially
 25 viewable area. “Sexually oriented material” encompasses “actual or simulated – (i) sexual intercourse,
 26 including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or
 27 opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious
 28 exhibition of the genitals or pubic area of any person[.]” 15 U.S.C. § 7704(d)(4); 18 U.S.C.
 § 2256(2)(A).

1 149 Cong. Rec. H12186, 12194 (daily ed. Nov. 21, 2003) (statement of Congressman Dingell)
 2 (“I am particularly pleased that the bill permits law enforcement to go after those who disguise
 3 sexual messages and through such deception are able to send sexual material into our homes and
 4 into the hands of our children. This is a critical first step against those who profit by sending
 5 unwanted and offensive sexual commercial messages. It will stop much wrongdoing.”).

6 Under the Act and the Rule, any person who initiates the transmission to a “protected
 7 computer”² of any commercial email message³ that includes sexually oriented material must
 8 include the phrase “SEXUALLY-EXPLICIT: ” at the beginning of the subject line in the header
 9 of the message. 15 U.S.C. § 7704(d)(1)(A); 16 C.F.R. § 316.4(a)(1). CAN-SPAM and the Adult
 10 Labeling Rule also require that any commercial email message that includes sexually oriented
 11 material place only the following information within the content of the message that is initially
 12 viewable by the recipient, when the message is opened by the recipient and absent any further
 13 action by the recipient (“initially viewable content”):

14 (A) the phrase “SEXUALLY-EXPLICIT: ” in a clear and conspicuous manner,
 15 15 U.S.C. § 7704(d)(1)(B)(i); 16 C.F.R. § 316.4(a)(2)(i);

16 (B) clear and conspicuous identification that the message is an advertisement or
 17 solicitation, 15 U.S.C. § 7704(d)(1)(B)(ii); 16 C.F.R. § 316.4(a)(2)(ii);

18 (C) clear and conspicuous notice of the opportunity of a recipient to decline to receive
 19 further commercial email messages from the sender, 15 U.S.C. § 7704(d)(1)(B)(ii); 16 C.F.R.
 20 § 316.4(a)(2)(iii);

21 (D) a functioning return email address or other Internet-based mechanism, clearly and
 22

23 ² “Protected computer” includes all computers used in interstate commerce or communications.
 24 See 15 U.S.C. § 7702(13), referencing 18 U.S.C. § 1030(e)(2)(B). The definition is broad, encompassing
 25 almost all computers that utilize email or browse the web.

26 ³ “Commercial electronic email message” includes any message that primarily promotes a
 27 “commercial product or service (including content on an Internet website operated for a commercial
 purpose).” 15 U.S.C. § 7702(2)(A).

conspicuously displayed, that a recipient may use to submit a reply email message or other form of Internet-based communication requesting not to receive future commercial email messages from that sender at the email address where the message was received, and that remains capable of receiving such messages or communications for no less than 30 days after the transmission of the original message, 16 C.F.R. § 316.4(a)(2)(iv);

(E) clear and conspicuous display of a valid physical postal address of the sender,⁴ 15 U.S.C. § 7704(d)(1)(B)(ii); 16 C.F.R. § 316.4(a)(2)(v); and

(F) any needed instructions on how to access, or activate a mechanism to access, the sexually oriented material, 15 U.S.C. § 7704(d)(1)(B)(iii); 16 C.F.R. § 316.4(a)(2)(vi).

Under CAN-SPAM itself, it is also unlawful for any person to initiate commercial electronic mail to a protected computer unless the message provides clear and conspicuous notice of an opt-out provision and bears a valid physical postal address of the sender. 15 U.S.C. § 7704 (a)(3), (a)(5)(A)(ii)-(iii). These provisions apply whether or not the email contains sexual material.

IMG is liable for the hundreds of email messages that its affiliates sent that violate these provisions of the law.⁵ Liability under CAN-SPAM is assessed for “initiating” email messages

⁴ The term sender is defined as “a person who initiates such a message.” 15 U.S.C. § 7702(16). IMG is a sender, and thus IMG’s physical postal address is required, because IMG initiated the commercial electronic messages at issue.

⁵ The three counts of the Complaint reflect these CAN-SPAM and Rule requirements. Count I alleges that on numerous instances IMG initiated the transmission to protected computers of commercial email with sexually oriented material that did not include the required “SEXUALLY-EXPLICIT: ” label at the beginning of the subject line. Count I also alleges that these messages were unlawful in that sexually explicit material appeared in the initially viewable area, and the following required information was absent: another recitation of “SEXUALLY-EXPLICIT: ”; a notice of the right to opt-out of receiving further email; and a clear and conspicuous display of a valid physical postal address of the Defendant. These are alleged to violate 15 U.S.C. § 7704(d) and 16 C.F.R. § 316.4(a).

Counts II and III of the Complaint involve the same email messages, and allege violations of CAN-SPAM provisions that apply to all commercial electronic mail, whether or not it contains sexually oriented material. Count II alleges that the emails failed to include clear and conspicuous notice of the opportunity to decline to receive further commercial email messages, violating 15 U.S.C. § 7704(a)(5)(A)(ii) and (a)(3). Count III alleges that the emails failed to include Defendant's valid

1 that violate the statute. See 15 U.S.C. § 7704(a)(1) (“It is unlawful for any person to initiate the
 2 transmission, to a protected computer, of a commercial electronic message”); 15 U.S.C.
 3 § 7704(a)(5)(A) (same). Under CAN-SPAM:

4 The term “initiate” when used with respect to a commercial electronic mail
 5 message, means to originate or transmit such message or *to procure the*
 6 *origination or transmission of such message*, but shall not include actions that
 constitute routine conveyance of such message. For purposes of this paragraph,
more than one person may be considered to have initiated a message.

7 15 U.S.C. § 7702(9) (emphasis added).⁶ CAN-SPAM defines “procure” as follows:

8 The term “procure” when used with respect to the initiation of a commercial
 9 electronic mail message, means intentionally to pay or provide other
 consideration to, or induce, another person to initiate such a message on one’s
 behalf.

10 15 U.S.C. § 7702(12). “Initiate” means to originate or procure the origination of such message,
 11 and the definition of “initiate” specifically provides that “more than one person may be
 12 considered to have initiated a message.” 15 U.S.C. § 7702(9). In drafting this language,
 13 Congress envisioned that one person could push the button and others provide consideration or
 14 induce the “button pusher” to push the button — and all violate the law. A colloquy between
 15 Senators Burns and Wyden confirms that Congress intended that multiple parties (*e.g.*,
 16 merchants and spammers) may both be liable under CAN-SPAM for the same email. In
 17 response to Senator Burns’ question “Can’t the FTC, State A.G.s, and Internet Service Providers
 18 bring actions under Section 5⁷ against parties who aren’t themselves spamming, but rather hire
 19 spammers to promote their products and services,” Senator Wyden responds: “Absolutely. The
 20 bill’s definition of ‘initiate’ makes that clear, because it applies not only to the spammer that
 21

22 physical postal address, violating 15 U.S.C. § 7704(a)(5)(A)(iii).

23 ⁶ “Routine Conveyance” means the “transmission, routing, relaying, handling, or storing,
 24 through an automatic technical process, of an electronic mail message for which another person has
 25 identified the recipients or provided the recipient addresses.” 15 U.S.C. § 7702(15). The definition
 encompasses, e.g., the routers, and Internet Service Providers that handle email message traffic.

26 ⁷ The Government’s Complaint asserts claims under Section 5 of the CAN-SPAM Act.
 27 15 U.S.C. § 7704.

1 originates the actual email, but also to a party who has hired or otherwise induced the spammer
 2 to send the e-mail on its behalf. If the e-mail message violates the bill, both parties would be on
 3 the hook under Section 5, and enforcement would be possible against both or either parties.”
 4 149 Cong. Rec. S 15938, 15945. Thus, CAN-SPAM holds the button pusher liable, as well as
 5 those who procure or induce the illegal email messages. That is, CAN-SPAM imposes liability
 6 on all parties who initiate violative email messages. IMG meets the definition of a statutory
 7 initiator because IMG procured the transmission of the violative messages at issue. CAN-
 8 SPAM’s legislative history, discussed *infra* Section VI, demonstrates further that CAN-SPAM
 9 was designed to impose liability on entities like IMG in cases as this.

10 **V. IMG Violated CAN-SPAM and the Adult Labeling Rule**

11 The evidence demonstrates that IMG initiated the transmission of hundreds of unsolicited
 12 commercial email messages that violated CAN-SPAM and the Adult Labeling Rule. Therefore,
 13 IMG should be found liable for violating the law.⁸ IMG reached consumers through an affiliate
 14 program called “Soulcash.” As discussed below, IMG paid affiliates for bringing paying
 15 subscribers to IMG’s websites and virtually anyone could sign up as an IMG affiliate and
 16 advertise IMG’s websites. The affiliates were the spammers who sent the violative email, but
 17 IMG is responsible because it initiated the email.

18 IMG readily acknowledges that it operated the Soulcash affiliate program. The operation
 19 of Soulcash is detailed in the Statement of Facts. (SOF 10-17) There is similarly no dispute that
 20 email promoting IMG’s websites was delivered to various recipients. The Government received
 21 these emails from Microsoft.⁹ The messages were delivered to email accounts, called “trap

23 ⁸ The effective date of CAN-SPAM was January 1, 2004, and the effective date of the Adult
 24 Labeling Rule was May 19, 2004. The violative emails initiated by IMG after January 1, 2004, and
 25 before May 19, 2004, only violate the CAN-SPAM Act as the Rule was not effective when these emails
 were initiated. References in the Memorandum to email violating both the Act and the Rule refer to those
 email messages sent on or after May 19, 2004.

26 ⁹ Allyson Himelfarb, an Investigator with the FTC, reviewed the emails obtained through the
 27 Microsoft trap accounts. Her declaration, attached as Exhibit 1, details the facts as to how these emails

accounts,” maintained by Microsoft to monitor spam activity over the Internet. (SOF 41-42) Email that was delivered to the Microsoft trap accounts promoting IMG websites is associated with various Soulcash affiliates. (SOF 43-59) The Government does not anticipate that Defendant will seriously dispute any of this. Rather, the Government believes that IMG will dispute its legal liability for violative email associated with (or sent by) Soulcash affiliates.

A. The Email Messages Promoting IMG’s Websites Violate CAN-SPAM and the Rule

IMG affiliates promoted IMG’s websites through unsolicited commercial email messages that contained sexually oriented material. The hundreds of email messages at issue were clearly “unsolicited” because they were delivered to the Microsoft trap accounts, which were dummy accounts set up just to determine what spam would be delivered to them. These accounts received violative email simply because they existed. Microsoft never provided consent to anyone to send email to any of the trap accounts. (SOF 41, 62) The United States sought from IMG any evidence it had regarding affirmative consent to “receive commercial electronic mail message[s] containing sexually oriented material,” and IMG produced no responsive documents showing evidence of affirmative consent. (SOF 61)

The emails at issue are “commercial” because their purpose was to induce people to subscribe to IMG’s adult oriented pay-websites. As is evident from the face of the email messages, the messages also contain sexually oriented material as defined by 18 U.S.C. § 2256(2)(A). Examples of unsolicited commercial email messages sent by IMG affiliates that contain sexually explicit material are at Exhibit 14. The messages contain hyperlinks that when “pressed” direct the viewer to the underlying IMG websites being advertised.

violate CAN-SPAM and the Rule and explains how these emails are associated with specific IMG affiliates. Exhibit 15 contains the universe of email messages that the United States contends violate CAN-SPAM and the Adult Labeling Rule. Exhibit 14 contains the specific email messages discussed in Ms. Himelfarb’s declaration that are a representative sample of the universe of messages. Ms. Himelfarb’s declaration refers to the emails in Exhibit 14 as copies of printouts with specific attachment numbers. The specific email messages from Exhibit 14 discussed in Ms. Himelfarb’s declaration are also attached as hard copies to the courtesy copy of exhibits provided to chambers.

1 The unsolicited commercial email messages promoting IMG violated CAN-SPAM and
 2 the Rule. All of the hundreds of email messages at issue contain sexually explicit material in the
 3 initially viewable content of the messages, in violation of the Act, 15 U.S.C. § 7704(d), and the
 4 Adult Labeling Rule, 16 C.F.R. § 316. In addition, all of the messages fail to include the
 5 required label in the subject line of the message and initially-viewable area of the message; and
 6 fail to include an opt-out mechanism or valid physical postal address of the sender within the
 7 initially viewable area. 15 U.S.C. § 7704(a)(3), (a)(5)(A)(ii)-(iii); 15 U.S.C. § 7704(d);
 8 16 C.F.R. § 316. The sample email messages discussed in Ms. Himelfarb's declaration, which
 9 are exhibits to that declaration, illustrate these violations.

10 **B. IMG Induced Affiliates to Send Violative Messages**

11 While many of the affiliates who sent violative emails received payment for the sales
 12 they referred to IMG, the CAN-SPAM Act does not require an affiliate to be paid for sending
 13 violative emails in order for a violation to occur. A company could be liable as an initiator of
 14 violative emails without ever paying an affiliate for its services. This is because the Act imposes
 15 liability on a company that procures the initiation or transmission of a message, and a company
 16 can procure the initiation of a violative email by paying an affiliate or by inducing an affiliate to
 17 send violative email. Inducement is sufficient because it is the procuring of the initiation of the
 18 email that creates the forbidden result, i.e., the sending of the violative email. After-the-fact
 19 payment to the affiliate by a company is a telling – but not *necessary* component of liability.

20 IMG provided affiliates with marketing and promotional materials that could be used in
 21 emails to promote IMG's websites. (SOF 18-19) Specifically, IMG provides the following to
 22 affiliates for marketing purposes: hosted galleries, downloadable galleries, banners, pictures of
 23 the day, movies of the day, and interstitials. (SOF 19) IMG provides these marketing and
 24 promotional tools to affiliates to "give the affiliate a means to drive new . . . prospective website
 25 members to our sites." (SOF 20)

26 As part of the affiliate program, IMG provides assistance to affiliates through a support

1 system that allows affiliates to send questions to IMG and receive responses, “via toll and toll
 2 free telephone numbers posted in the footer of every page,” and through email communications
 3 and instant messenger. (SOF 24) IMG also provides detailed sales statistics to affiliates
 4 including number of sales, number of clicks, referring URL information, and a list of the total
 5 dollar amount earned by the affiliate. (SOF 23) IMG even sends a notification email to an
 6 affiliate each time the affiliate is credited with a subscription to an IMG website. (SOF 25)

7 IMG induced affiliates to send violative emails through promises of payment. Affiliates
 8 earn money each time they refer a customer who subscribes to one of IMG’s adult websites.
 9 (SOF 10) IMG has two payment plans for affiliates, “per sign-up” and “revenue share.”
 10 Affiliates on the per sign-up payment plan are paid more per sale, with payments increasing with
 11 the number of sales they refer to IMG’s websites. Affiliates on the revenue share program
 12 receive fifty percent of the gross receipts from the accounts they refer. (SOF 26)

13 To induce affiliates to bring subscribers to IMG’s websites, IMG ran bonus payouts.
 14 (SOF 27) IMG ran a bonus payout called Fat Fridays that paid affiliates \$50 per sign-up instead
 15 of the normal \$25 or \$30. (SOF 27) IMG ran a gift certificate incentive program that gave
 16 affiliates who sent in ten or more sign-ups over a period of time a choice of a gift certificate from
 17 a number of stores. (SOF 27)

18 Several of the affiliates who sent the violative emails at issue were paid for successfully
 19 recruiting subscribers to IMG’s adult websites. According to records produced by IMG, IMG
 20 paid affiliate “b32day” \$1,634.97 (SOF 49); affiliate “scorpion” \$2,057.00 (SOF 55); affiliate
 21 “teddybear” \$2,367.16 (SOF 58); affiliate “dacash” \$8,121.27 (SOF 56); and affiliate “a313372”
 22 \$4,201.47 (SOF 51).¹⁰

23
 24 ¹⁰ The government’s evidence does not include emails sent directly by the affiliates “dacash”
 25 and “a313372.” However, these two accounts, “dacash” and “a313372,” are operated by individuals that
 26 did send some of the violative emails. (Ex. 15) The affiliate accounts “b32day” and “a313372” were
 27 registered under the same name, phone number, physical address, and email address and both affiliates
 directed that their payments be made in the name of 634099 BC Ltd. (SOF 50) The affiliate accounts
 “scorpion,” “teddybear,” and “dacash” were registered under the same name, phone number, physical

1 IMG induced affiliates by promising to pay them for bringing sales to IMG's websites
 2 and providing all the tools and support necessary for the affiliates to make those sales happen.
 3 Thus, IMG procured the transmission of the violative emails, including the hundreds of emails
 4 that came to the government's attention. As such, IMG initiated the unlawful email messages
 5 and violated CAN-SPAM and the Rule.

6 **VI. CAN-SPAM's Legislative History Underscores IMG's Liability**

7 IMG is liable for the unlawful transmission of spam because it intentionally provided
 8 consideration to and induced others to initiate violative email messages on IMG's behalf. What
 9 is required under this standard is that IMG did not act accidentally in inducing violative email.
 10 The Act does not require any showing of specific intent or knowledge for liability to attach.
 11 Rather, IMG's procurement of violative email makes IMG liable for injunctive relief for
 12 violating the Act.

13 The legislative history of CAN-SPAM demonstrates that Congress intended for procurers
 14 of commercial email such as IMG to be held liable in FTC actions as this. That is, Congress
 15 targeted entities such as IMG for liability for injunctive relief premised on CAN-SPAM
 16 violations associated with those induced to send commercial email, whether or not the "inducer"
 17 (here, IMG) had knowledge of the violative email. Indeed, Congress intentionally rejected a
 18 knowledge standard in the definition of "procure" as it applies in FTC enforcement actions. In
 19 the July 16, 2003, Senate version of the bill (S. 877), the definition of "procure" was as follows:

20 The term "procure," when used with respect to the initiation of a commercial
 21 electronic mail message, means intentionally to pay or provide other
 22 consideration to, or induce, another person to initiate such a message on one's
 behalf, knowing, or consciously avoiding knowing, the extent to which that
 person intends to comply with the requirements of this Act.

23 S. 877 Sec. 3(13) (July 16, 2003). However, the version of the bill that became law does not
 24 include this knowledge requirement in the definition of "procure." See 15 U.S.C. § 7702(12).

25 _____
 26 address, and email address and these three affiliates directed that their payments be made in the name of
 27 Maps Holding Inc. (SOF 55)

1 Thus, Congress considered inserting a “knowledge” element in this violation, but decided not to
2 do so.

3 The legislative history further underscores Congressional intent by elaborating on the
4 very meaning of “knowledge” that was deleted from this definition. A Senate Report discusses
5 the definition of “procure” that included the knowledge requirement that was later jettisoned.
6 The Report discusses the possibility of renegade behavior by a third party hired by a company to
7 send spam. The Senate Committee report states:

8 The intent of this definition is to make a company responsible for e-mail
9 messages that it hires a third party to send, unless that third party engages in
10 renegade behavior that the hiring company did not know about. However, the
11 hiring company cannot avoid responsibility by purposefully remaining ignorant of
12 the third party's practices. The “consciously avoids knowing” portion of this
13 definition is meant to impose a responsibility on a company hiring an e-mail
14 marketer to inquire and confirm that the marketer intends to comply with the
15 requirements of this Act.

16 S. Rep. No. 108-102, at 15 (2003). When Congress struck the knowledge requirement from the
17 final law as it applies to FTC enforcement actions, all of this analysis was rejected. A company
18 that induces a third party to send commercial email is liable for that third party's violations
19 regardless of whether the company knows or has reason to know of any possible CAN-SPAM
20 violations. There is no exception for renegade behavior.

21 Thus, Congress enacted a legislative scheme which gave broad discretion to the FTC to
22 bring enforcement actions against those who caused CAN-SPAM violations to occur. Congress
23 deleted any “renegade affiliate” defense that IMG might proffer. Even in those parts of the
24 statute where Congress did impose a knowledge element for a violation,¹¹ Congress specifically
25 deleted these knowledge elements when the FTC was seeking cease-and-desist orders and
26 injunctive relief. 15 U.S.C. § 7706(e). Congressional intent to impose liability in FTC
27 enforcement actions against those who induce CAN-SPAM violations, regardless of their
28 “knowledge” of the violations, could hardly be clearer.

29 ¹¹ See § 7704(a)(1)(C), (a)(2), (a)(4)(A) clause (ii), (iii), and (iv); § 7704(b)(1)(A), (b)(3).

1 Congress further demonstrated its intent for a strict liability scheme for procurers of spam
 2 under Section 5 when it added the knowledge element into the provision authorizing private
 3 causes of action brought by Internet Service Providers (“ISPs”). The “special definition of
 4 ‘procure’,” applicable in cases brought by ISPs, includes the words, “with actual knowledge, or
 5 by consciously avoiding knowing, whether such person is engaging, or will engage, in a pattern
 6 or practice that violates this [Act].” 15 U.S.C. § 7706(g)(2). Congress did not include this
 7 language in the definition of procure for FTC enforcement actions under Section 5 and,
 8 therefore, Congress intended that such procurers would be liable regardless of any knowledge of
 9 their spammers’ conduct.

10 The stark contrast between the relevant criminal and civil provisions of the law further
 11 emphasize that the latter has no knowledge requirement. The criminal provision is 15 U.S.C.
 12 § 7704(d)(5). Section 7704(d)(1) creates the requirement to place warning labels on commercial
 13 electronic mail containing sexually oriented material such as the spam involved in this case.
 14 Section (d)(5) makes it a five-year felony to “knowingly” violate this provision. 15 U.S.C.
 15 § 7704(d)(5). If the civil violation of CAN-SPAM already included a knowledge element, then
 16 adding a “knowingly” requirement to the criminal provision would be mere surplusage and there
 17 would be no distinction between the mental elements of civil and felony violations, at least in
 18 circumstances involving “procuring” violative spam. Congress did not create such a nullity
 19 when it defined the criminal offense.

20 Reviewing the statutory scheme as a cohesive whole shows that whereas a criminal case
 21 requires actual knowledge and a suit brought by an ISP requires consciously avoiding
 22 knowledge, the present civil case requires something less to obtain injunctive relief. What is
 23 required, and what is undisputed in this case, is that IMG did not act accidentally in inducing the
 24 violative email. IMG’s Soulcash affiliate program was created quite deliberately.

25 **VII. IMG is Liable for Civil Penalties**

26 Pursuant to Section 7(a) of CAN-SPAM, the Act “shall be enforced by the [FTC] as if the
 27

violation of the Act were an unfair or deceptive act or practice proscribed under Section 18(a)(1)(B) of the [FTC Act] (15 U.S.C. § 57a(a)(1)(B)).” That provision makes violations of CAN-SPAM enforceable as though they were violations of an FTC Trade Regulation Rule. In order to recover civil penalties for violations of a Trade Regulation Rule, and thus for a CAN-SPAM violation, the Government has to prove that IMG acted “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited,” 15 U.S.C. § 45(m)(1)(A).

Whether a defendant has violated a rule with actual or implied knowledge is based on objective factors. A defendant is responsible where a reasonable person under the circumstances would have known of the existence of the provision and that the action charged violated that provision.

United States v. Nat’l Fin. Servs., Inc., 98 F.3d 131, 139 (4th Cir. 1996) (citing legislative history).

A. IMG’s Knowledge or Implied Knowledge of Violations

IMG is liable for civil penalties under this standard. IMG intended to pay and induce affiliates when it knew or should have known that affiliates were sending spam in violation of the law and IMG consciously avoided taking steps to determine how its affiliates were promoting IMG’s websites. IMG knew that some of its affiliates relied on unlawful spam as a means to advertise IMG’s websites because IMG received complaints regarding affiliates sending spam. Despite this knowledge IMG did little to stop its affiliates from violating the law on its behalf.

Further, IMG was aware that it was operating in an environment conducive to spamming because IMG operates in an on-line world and pays affiliates who successfully bring customers to its websites through online advertising. (SOF 11) IMG’s agreement with affiliates to provide advertising services foreseeably involved the affiliates’ use of on-line advertising including email. In the environment of spam on the Internet and Soulcash’s incentives and tools to affiliates, the presence of violative spam is virtually inevitable rather than surprising. IMG cannot avoid liability by putting empty rhetoric in its contracts and claiming that it did not intend

1 the obvious results of its actions.

2 **B. IMG Avoided Taking Steps to Determine How its Affiliates Were**
3 **Promoting IMG's Websites**

4 IMG took no affirmative steps to monitor its affiliates to ensure that they were not using
5 violative emails to promote IMG's websites. IMG did not regularly ask affiliates what kinds of
6 promotional tools they were using to promote IMG's websites (SOF 36(b)); IMG did not ask
7 subscribers if they were directed to IMG's websites through emails sent by affiliates (SOF
8 36(a)); and IMG did not create a textlink on the first page of IMG's adult websites directing
9 people who arrived there unwillingly to a complaint form (SOF 36(c)). It would have been
10 feasible for IMG to undertake any of these monitoring methods, but IMG chose not to inquire
11 into its affiliates' marketing practices. (SOF 34(a)-(c))

12 IMG exercised little caution during the affiliate sign-up process. IMG's affiliates are the
13 sales force of the company. They are, to the extent there is one, the "face" of IMG. Even though
14 affiliates are provided with the marketing and promotional tools to introduce IMG to the public,
15 IMG does not interview affiliate applicants, ask for references, or conduct any detailed review of
16 affiliates as a part of the affiliate sign-up process. (SOF 11-13) IMG approves applicants even
17 when the answers they provide on the affiliate sign-up questionnaire are senseless. For example,
18 affiliates who provided the names "hjghgj," "ccc xzc," and "sfdsgd dsfsgd" were approved,
19 provided a unique user ID, and granted access to IMG's promotional materials. (SOF 14) At
20 bottom, IMG does not know, or care, who is advertising on its behalf.

21 IMG does have a provision in its Program Agreement that on paper restricts affiliates
22 from sending commercial email in violation of CAN-SPAM and the Rule. (SOF 30) IMG's
23 Program Agreement for affiliates states that IMG does not tolerate spamming and that IMG
24 reserves the right to terminate an affiliate for spamming. IMG claims that it has terminated
25 twelve affiliates for spamming. However, when asked for the specifics regarding these
26 terminations, Seth Schermerhorn stated that he did not recall the specifics of any of these and
27 that

1 IMG did not make a record of the reasons for the termination anywhere.¹²

2 IMG's words of compliance are more show than substance. IMG took no concrete steps
3 to prevent affiliates from promoting IMG's websites through spam. IMG did not even have
4 existing affiliates review the CAN-SPAM Act when the law went into effect or provide training
5 on the CAN-SPAM Act to its own employees. As illustrated by these facts, IMG's actual policy,
6 shown through its actions, was to reward affiliates who sent illegal spam. In sum, IMG is liable
7 not only for injunctive relief but also for civil penalties on the basis of uncontested facts.

8 **VIII. Conclusion**

9 By intentionally paying and otherwise inducing affiliates, IMG initiated email messages
10 that violate CAN-SPAM and the Adult Labeling Rule. Sexually explicit email advertising
11 IMG's websites was sent through affiliates to in-boxes around the Internet. IMG did not monitor
12 its affiliates, did not know who they were, and had a toothless anti-spam policy. As a result,
13 hundreds of email messages were sent in violation of the law. Congress passed that law, and the
14 FTC a regulation, to prevent precisely this result. IMG violated the law and the regulation, and
15 should be held responsible.

16 For the reasons set forth above, summary judgment as to liability should be awarded to
17 the United States.

18
19
20 ¹² During the deposition of Seth Schermerhorn on August 10, 2006, Plaintiff attempted to
21 question Mr. Schermerhorn regarding Government Deposition Exhibit 1 ("Dep. Ex. 1") which was a list
22 of twelve affiliates produced by the Defendant allegedly terminated by IMG as a result of spam problems.
23 The Defendant objected to the Government's use of Dep. Ex. 1 because page two of Dep. Ex. 1 was a
24 truncated spreadsheet. Based on the fact that the Defendant produced Dep. Ex. 1 to the Plaintiff in the
25 incomplete form and Plaintiff had requested a complete version of the spreadsheet prior to the deposition,
26 the parties agreed that the Plaintiff would propound written questions regarding the complete Exhibit
27 when it was produced by the Defendant and that Mr. Schermerhorn would answer Plaintiff's questions
28 regarding the Exhibit. See Schermerhorn deposition, attached as Exhibit 9 at p. 79 lines 3-17. Plaintiff
received the complete Exhibit from the Defendant on August 14, 2006. Plaintiff sent the questions to the
Defendant on August 18, 2006. Plaintiff followed up with the Defendant on August 28th and 31st and still
has not received a response to the questions. Presumably if IMG's dealings with its affiliates in this
regard would be helpful to IMG in this litigation, the information would have been produced.

1 DATED: September 5, 2006

Respectfully submitted,

2 FOR PLAINTIFF UNITED STATES:
3 PETER D. KEISLER
4 Assistant Attorney General,
Civil Division
U.S. DEPARTMENT OF JUSTICE

5 JOHN McKAY
6 United States Attorney

7 BRIAN KIPNIS
8 Assistant U. S. Attorney for the
9 Western District of Washington
700 Stewart Street
PHONE: (206) 553-7970
FAX: (206) 553-0882

10 EUGENE M. THIROLF
11 Director
Office of Consumer Litigation

12 KENNETH L. JOST
13 Assistant Director
Office of Consumer Litigation

14 JEFFREY STEGER
15 Trial Attorney
Office of Consumer Litigation

16 By: /s/ Lauren E. Hash
17 LAUREN E. HASH
18 Trial Attorney
19 Office of Consumer Litigation
20 U.S. Department of Justice
21 P.O. Box 386
22 Washington, DC 20044
23 Telephone: (202) 353-1991
24 Facsimile: (202) 514-8742
25 Lauren.Hash@usdoj.gov

26
27
28 Plaintiff's Motion for
Summary Judgment
CV05-1285L

U.S. Department of Justice
P.O. Box 386
Washington, DC 20044
(202) 353-1991

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such to the following CM/ECF registrant:

Robert S. Apgood
CarpeLaw PLLC
2400 NW 80th Street #130
Seattle, WA 98117-4449

By: /s/ Lauren E. Hash
Lauren E. Hash
Trial Attorney
Office of Consumer Litigation
U.S. Department of Justice
P.O. Box 386
Washington, DC 20044
Telephone: (202) 353-1991
Facsimile: (202) 514-8742
Lauren.Hash@usdoj.gov

Plaintiff's Motion for
Summary Judgment
CV05-1285L

U.S. Department of Justice
P.O. Box 386
Washington, DC 20044
(202) 353-1991