

HON. ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

IMPULSE MEDIA GROUP, INC., a
Washington corporation,

Defendant.

No. CV 05-1285L

DECLARATION OF SETH
SCHERMERHORN IN SUPPORT OF
DEFENDANT’S RESPONSE IN
OPPOSITION TO PLAINTIFF’S MOTION
FOR SUMMARY JUDGMENT

- 1. I am at least eighteen years of age and could and would be able to testify to the herein stated matters;
- 2. I am managing agent and sole shareholder of the Defendant, Impulse Media Group, Inc. (“IMG”) in the above-styled case and have personal knowledge of the matters herein;
- 3. I hold the title of “President” of the company;
- 4. I am an officer of the corporation;
- 5. I have read the United States’ Motion For Summary Judgment (“MSJ”) and know the contents therein;
- 6. Plaintiff alleges that IMG is liable for the hundreds of email messages that its affiliates sent in violation of the law. MSJ at 24:3-4. IMG had no knowledge of and did not give approval to its affiliates to promote IMG offerings through e-mail;
- 7. IMG pays commissions to affiliates who refer potential customers to IMG’s Web sites if, and only if, the potential customer subscribes to a IMG Web site;

DECLARATION OF SETH SCHERMERHORN - 1

CARPELAW PLLC
2400 NW 80th Street #130
Seattle, Washington 98117
(206) 624-2379 - (206) 784-6305 (fax)

1 8. IMG does not pay, encourage, condone, or otherwise procure or induce affiliates of
2 IMG's SoulCash program to send e-mail that violates CAN-SPAM or the Adult Labeling Rule to
3 promote IMG's websites;

4 9. Plaintiff has alleged that IMG provided affiliates with marketing and promotional
5 materials that could be used in e-mails to promote IMG Web sites. MSJ at 22:20-25. IMG has never
6 provided affiliates with marketing and promotional materials with the intent that they be used in e-
7 mails. Promotional materials were designed for use by SoulCash affiliates on Web sites only. The use
8 of promotional materials in e-mails was neither intended, encouraged, nor condoned by IMG.
9 Affiliates who utilize promotional materials in e-mail are in violation of the Affiliate Terms of Service,
10 Paragraph 3.6, and are subject to summary termination as an affiliate;

11 10. Plaintiff has alleged that IMG provides technical support to SoulCash affiliates via
12 telephone, e-mail communications, and instant messenger. MSJ at 22:26 – 23:6. Technical support is
13 not provided by IMG to SoulCash affiliates to induce affiliates to send e-mail on IMG's behalf. IMG
14 never provided technical support to affiliates to instruct affiliates in the use of e-mail as a promotional
15 device;

16 11. Plaintiff has alleged that IMG provides sales statistics to SoulCash affiliates to allow
17 the affiliates to monitor the results of their promotional efforts, including number of sales, number of
18 clicks, referring URL information, and a list of the total dollar amount earned by the affiliate. MSJ at
19 23:3-5. Statistical data is not provided by IMG to SoulCash affiliates to induce affiliates to send
20 e-mail on IMG's behalf. IMG has never provided statistical data to affiliates to allow affiliates to
21 monitor the use of e-mail as a promotional device. Referring URL information provided to SoulCash
22 affiliates relates solely to Internet Web sites, and not to the identification of e-mails;

23 12. Plaintiff alleges that IMG induced affiliates to bring subscribers to IMG's Web sites by
24 running bonus payouts called "Fat Fridays" and by giving affiliates gift certificates. MSJ at 23:13-17.
25 IMG did run bonus payouts and gift certificate programs to induce affiliates to bring subscribers to
26 IMG's Web sites. IMG did not run these programs to induce affiliates to send e-mail or to violate
27 CAN-SPAM or the Adult Labeling Rule.

1 13. Plaintiff alleges that IMG paid affiliates for sending violative e-mail messages and
2 induced them to send violative e-mails through promises of payment and extensive affiliate support.
3 MSJ at 24:1-5. IMG has never paid affiliates for sending violative e-mail messages. IMG has never
4 induced affiliates to send violative e-mails through promises of payment and extensive affiliate
5 support;

6 14. Plaintiff alleges that IMG is liable for the unlawful transmission of spam because it
7 intentionally paid and induced others to initiate violative e-mail messages on IMG's behalf. MSJ at
8 24:7-8. IMG has never intentionally paid and induced others to initiate violative e-mail messages on
9 IMG's behalf;

10 15. Plaintiff alleges that IMG knew that some of its affiliates relied on unlawful spam as a
11 means to advertise IMG's Web sites. MSJ at 27:13-16. IMG did not know that some of its affiliates
12 relied on unlawful spam as a means to advertise IMG's Web sites. In fact, IMG has and maintains a
13 strict policy prohibiting the sending of spam, lawful or otherwise. Affiliates of SoulCash who utilize
14 e-mail that violates CAN-SPAM or the Adult Labeling Rule to promote IMG's Web sites are in
15 violation of the SoulCash Affiliate Terms of Service, Paragraph 2.3, and are subject to summary
16 termination as an affiliate;

17 16. Plaintiff alleges that IMG does not deny that its affiliates operated in an environment
18 that was conducive to spamming. MSJ at 27:20-22. IMG denies that it maintains or supports an
19 environment that has been or is conducive to spamming;

20 17. Plaintiff alleges that IMG did little to stop its affiliates from violating the law on its
21 behalf. MSJ at 27:18-19. IMG has not ever granted agency to any affiliate that would allow the
22 affiliate to perform any act on IMG's behalf;

23 18. Plaintiff alleges that IMG claims that IMG has not provided specifics regarding the
24 identities of affiliates terminated for spamming. MSJ at 28:23 – 29:1. IMG has terminated 12
25 affiliates for spamming, and has recorded the reasons for those terminations in a document provided
26 to the FTC prior to the institution of the lawsuit;

27 19. Plaintiff alleges that IMG's termination policies were more show than substance. MSJ
28 at 29:2-7. IMG has rigorously enforced its termination policies against affiliates who violate IMG's

1 Terms of Service for affiliates. In addition to terminating 12 SoulCash affiliates for sending e-mail in
 2 violation of the SoulCash Affiliate Terms of Service, IMG has terminated many affiliates for attempts
 3 to cheat IMG in phony subscriptions to IMG's Web sites, for attempting to commit and committing
 4 fraud against IMG, and for violations of IMG's policy against the display of certain, enumerated types
 5 of content;

6 20. Plaintiff alleges that IMG cannot avoid liability by putting empty rhetoric in its
 7 contracts and then initiating violative e-mail. MSJ at 27:25 – 28:1. IMG rigorously enforces the terms
 8 of its contracts, both with affiliates and with subscribers to its Web sites;

9 21. IMG has never initiated violative e-mail, nor induced others to initiate violative e-mail.

10 I declare under penalty of perjury of the laws of the United States of America that to the best of
 11 my knowledge, the foregoing is true and accurate.

12 FURTHER YOUR DECLARANT SAYETH NAUGHT.

13 DATED this 28th day of August 2006.

14 SETH SCHERMERHORN

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