

1 HON. ROBERT S. LASNIK
2
3
4
5
6
7

8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 SEATTLE DIVISION

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 IMPULSE MEDIA GROUP, INC., a
Washington corporation,

15 Defendant.

No. CV 05-1285L

16 DECLARATION OF ROBERT S. APGOOD
17 IN SUPPORT OF DEFENDANT'S
18 RESPONSE IN OPPOSITION TO
19 PLAINTIFF'S MOTION FOR SUMMARY
20 JUDGMENT

21 1. I am at least eighteen years of age and could and would be able to testify to the herein
22 stated matters from personal knowledge;

23 2. I am an attorney of record representing the Defendant, Impulse Media Group, Inc., in
24 the above-stated matter;

25 3. Attached hereto as Exhibit A, and by reference incorporated herein, is a true and correct
26 copy of pp. 6-8 of Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment
27 As To Liability in the case of *United States v. Cyberheat, Inc.*, Case No. 4:05-cv-0457, United States
District Court for the District of Arizona ("Cyberheat Case") wherein Plaintiff offers into evidence

28 a) the Declaration of David Vetter describing the Microsoft "Hotmail trap
29 accounts" and wherein the Plaintiff states that Mr. Vetter avers Microsoft has
30 never provided any consent to anyone to send e-mail messages to the Hotmail
31 trap account addresses;

32 DECLARATION OF ROBERT S. APGOOD IN
33 SUPPORT OF DEFENDANT'S RESPONSE IN
34 OPPOSITION TO PLAINTIFF'S MOTION FOR
35 SUMMARY JUDGMENT - 1

36 CARPELAW PLLC
37 2400 NW 80th Street #130
38 Seattle, Washington 98117
39 (206) 624-2379 - (206) 784-6305 (fax)

- b) the Declaration of Chad L. Bundy purporting to describe email in a database that Plaintiff alleges was created by Microsoft;
- c) the Declaration of Allyson Himelfarb detailing how, in Ms. Himelfarb's opinion, the emails violate CAN-SPAM and the Adult Labeling Rule; and
- d) the e-mail detailed in Ms. Himelfarb's Declaration at ¶ 37 is an e-mail sent to a Hotmail trap account;

4. Attached hereto as Exhibit B, and by reference incorporated herein, is a true and correct copy of page 23 of the Himelfarb Declaration submitted in the Cyberheat Case wherein Ms. Himelfarb describes “Exhibit N” to her declaration, wherein she describes that the email was sent by an affiliate to Cyberheat, Inc. identified as “Cyberheat Affiliate 26377,” and wherein she identifies as an exhibit the “source code” to that e-mail;

5. Attached hereto as Exhibit C, and by reference incorporated herein, is a true and correct copy of the “source code” identified in Ms. Himelfarb’s Declaration as her Exhibit “N,” as having been sent by Cyberheat Affiliate 26377, and showing that the e-mail message was addressed to “al1996@hotmail.com”;

6. Attached hereto as Exhibit D, and by reference incorporated herein, is a true and correct copy of page 17 of Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment as to Liability in the Cyberheat Case wherein, at ¶ 78, Plaintiff argues that "Cyberheat affiliate 26377 sent one unsolicited commercial email to Microsoft's trap accounts" citing as a factual basis "Cyberheat affiliate 26377 section" (produced as Exhibit B, hereto);

7. Attached hereto as Exhibit E, and by reference incorporated herein, is a true and correct copy of the Declaration of David Vetter described in ¶ 3(a), *supra*;

8. Attached hereto as Exhibit F, and by reference incorporated herein, is a true and correct copy of the Declaration of Chad Bundy wherein, at ¶ 5, Mr. Bundy describes how he obtained copies of the e-mails he describes in his declaration “through Microsoft’s vendor”;

9. Attached hereto as Exhibit G, and by reference incorporated herein, is a true and correct copy of pp. 16-17 of the Declaration of Allison Vivas in Support of Defendant Response in Opposition to Plaintiff's Motion for Summary Judgment wherein she avers that the individual using the e-mail

address “al1996@hotmail.com” (identified in ¶ 4-6, *supra*) gave prior affirmative consent to Cyberheat to receive commercial e-mail messages from Cyberheat;

10. Attached hereto as Exhibit H, and by reference incorporated herein, are true and correct copies of pp. 3-11 of Defendant Cyberheat’s Motion for Partial Summary Judgment wherein Defendant identifies (at 3:8-10) the e-mail messages offered in Plaintiff’s Motion for Summary Judgment (collectively, the “Cyberheat E-Mails”) as messages actually sent by Defendant Cyberheat. Of note, Defendant specifically identifies “Exhibit L” to the Declaration of Allison Vivas, which e-mail message is that very message described in ¶ 5, *supra*;

11. Attached hereto as Exhibit I, and by reference incorporated herein, is a true and correct copy of pages 8-10 of the Declaration of Allison Vivas wherein, at ¶39, she enumerates all the e-mail messages sent by Cyberheat to “al1996@hotmail.com” (a “Hotmail trap account”) as produced by Plaintiff to Defendant Cyberheat, and averring that the al1996@hotmail.com subscriber had provided prior affirmative consent to receive those e-mails:

12. Attached hereto as Exhibit J, and by reference incorporated herein, is a true and correct copy of page 10 of Plaintiff's Response in Opposition to Defendant's Motion for Partial Summary Judgment wherein Plaintiff observes that the Cyberheat E-Mails consist of e-mails originated or transmitted directly by Cyberheat itself, and the Government agrees that the Cyberheat E-Mails (which include the e-mails sent to al1996@hotmail.com -- the "Hotmail trap account") do not violate the law."

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

FURTHER YOUR DECLARANT SAYETH NAUGHT.

DATED this 25th day of September 2006.

ROBERT S. APGOOD



DECLARATION OF ROBERT S. APGOOD IN
SUPPORT OF DEFENDANT'S RESPONSE IN
OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT - 3

CARPELAW PLLC
2400 NW 80th Street #130
Seattle, Washington 98117
(509) 624-2379 - (206) 784-6305 (