

HON. ROBERT S. LASNIK

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 ROBERT S. APGOOD  
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 from personal knowledge;

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

3. Attached hereto as Exhibit A, and by reference incorporated herein, is a true and correct copy of pp. 6-8 of Plaintiff's Memorandum of Law in Support of its Motion for Summary Judgment 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

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

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SUMMARY JUDGMENT - 1

**CARPELAW** PLLC  
2400 NW 80<sup>th</sup> Street #130  
Seattle, Washington 98117  
(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

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

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

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

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

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

21 FURTHER YOUR DECLARANT SAYETH NAUGHT.

22 DATED this 25<sup>th</sup> day of September 2006.

23 ROBERT S. APGOOD

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