

EXHIBIT J

1 **V. Argument**

2 Defendant's Motion for Partial Summary Judgment divides the emails it discusses
3 into two categories. The first category consists of emails originated or transmitted directly
4 by the Defendant itself. The second category consists of emails that were sent by
5 Defendant's affiliates. As discussed below, the Government agrees that first category of
6 email does not violate the law. However, because the Defendant procured the initiation of
7 the second group of email through the undisputed use of its affiliate program, the
8 Defendant must be held liable for those violative emails.

9 **A. The Emails Defendant Sent With Consent of the Recipient**

10 Pages 3-11 of Defendant's summary judgment memorandum discuss email that
11 Defendant itself sent using its own computers. That section of Defendant's memorandum
12 establishes primarily that the individuals who received these emails consented to do so,
13 making the emails lawful. The Government has never contended otherwise.

14
15 As a part of its Initial Disclosures, the United States provided hundreds of emails to
16 the Defendant including the emails in this first group. In attachments A, B, and C to the
17 United States' Response to the Defendant's First Set of Interrogatories Propounded to
18 Plaintiff, the Government identified emails produced as a part of the Government's
19 discovery to Defendant that were in violation of the Act and Rule. The Government did
20 not identify in Attachments A, B, or C any of the sixty-seven emails originated or
21 transmitted by the Defendant that are set forth in the Defendant's Motion for Partial
22 Summary Judgment. The Government also did not seek summary judgment as to liability
23 for these emails.

24 Because the Defendant produced evidence of consent with respect to these emails,
25 the Government has not, and does not, contend that this category of emails are violative.
26 These emails have not been at issue in the case. Summary judgment as to this category of
27 emails is unnecessary and inappropriate.