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13 IN THE UNITED STATES DISTRICT COURT
 14 DISTRICT OF ARIZONA
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|----|-----------------------------|---|---------------------------|
| 17 | United States of America, |) | No. CIV 05-457-TUC-DCB |
| 18 | |) | |
| 19 | Plaintiff, |) | |
| 20 | |) | |
| 21 | vs. |) | UNITED STATES' SUBMISSION |
| 22 | |) | REGARDING PROPOSED ORDER |
| 23 | Cyberheat, Inc., an Arizona |) | FOR PERMANENT INJUNCTION |
| 24 | corporation, |) | |
| 25 | |) | |
| 26 | Defendant. |) | |
| 27 | _____ |) | |

28 The United States submits this memorandum to explain the proposed order for permanent
 29 injunction. The proposed order focuses on specific actions Defendant must take to comply with
 30 the law and to prevent continuing violations. The affirmative steps Defendant would be required
 31 to take are reasonable ones given that Defendant has violated a law that Congress designed to
 32 protect the public welfare, with emphasis on the welfare of children.

33 The proposed order includes findings and definitions, followed by specific injunctive
 34 relief. Many of the terms defined in the proposed order mirror the definitions set forth in the

1 CAN-SPAM Act, such as “affirmative consent,” “commercial electronic mail message,”
2 “initiate,” “procure,” “recipient” and “sender.” “Defendant” is defined as Cyberheat, Inc., and its
3 successors and assigns. “Defendant’s Representatives” is defined as “defendant’s officers,
4 agents, servants, employees, and attorneys, and those persons in active concert or participation
5 with them or defendant who receive actual notice of this Order by person service or otherwise.”
6 This latter definition mirrors the language of Federal Rule of Civil Procedure 65(d).

7 Paragraphs I and II prohibit Defendant and Defendant’s Representatives from violating
8 the CAN-SPAM Act and the Adult Labeling Rule, respectively. Such a command comports with
9 Ninth Circuit teaching:

10 The sole ground on which Miller contends the injunction is too vague is that it
11 repeats language contained in the Interstate Commerce Act, s 222(b). This, he
12 contends, makes it a general “obey the law” injunction. But the mere fact that the
13 injunction is framed in language almost identical to the statutory mandate does not
14 make the language vague. In this situation the statutory terms adequately describe
15 the impermissible conduct.

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17 United States v. Miller, 588 F.2d 1256, 1261 (9th Cir. 1978).

18 In addition to these general prohibitions, Paragraphs I and II enjoin the Defendant from
19 engaging in the specific type of conduct Defendant previously used when it initiated commercial
20 email in violation of the law. For example, the proposed order requires that all commercial email
21 initiated by Defendant contain the “SEXUALLY EXPLICIT” label in the subject line and the
22 initially viewable area.

23 Paragraph III requires Defendant to implement safeguards to verify and monitor its
24 affiliates. Specifically, Defendant is required to verify the name, physical address, and a working
25 telephone number of participants in its affiliate program. This is a step Defendant currently does

1 not take. However, this requirement would ensure that Defendant actually knows and can
2 monitor affiliates marketing on Defendant's behalf. In addition, Defendant is required to provide
3 a copy of the permanent injunction to its affiliates, and obtain from them an express written
4 agreement to comply with the law and the order. If an affiliate decides to engage in an email
5 campaign to promote Defendant's web sites, the proposed order requires Defendant to review the
6 email campaign for compliance with the law.

7 Paragraph III also requires Defendant to ask each consumer who registers or enrolls in
8 Defendant's web sites to identify the manner in which the consumer was directed to Defendant's
9 web site. If a consumer indicates that he or she was referred to Defendant's web sites through a
10 commercial email, Defendant is required to monitor the affiliate to ensure compliance with the
11 law. Not only is it technically feasible to ask consumers to identify the manner in which they
12 were directed to Defendant's web sites, it is a reasonable step for Defendant to take in monitoring
13 its affiliates' compliance with the law. Defendant will also be required to immediately terminate
14 any affiliate who violates the law or the order, and may not reinstate such affiliate. This
15 provision is designed to ensure that Defendant implements a true "zero tolerance" policy for
16 affiliates who violate the law.

17 Paragraph IV provides that Defendant shall pay a civil penalty in an amount to be
18 determined by further proceedings of this Court. As detailed in the government's submissions on
19 the motions for summary judgment, Defendant's liability for civil penalties follows from its
20 actual and implied knowledge of its affiliates' activities and of CAN-SPAM. Paragraph V would
21 permit standard methods of investigating potential order violations.

22 Paragraph VI provides, *inter alia*, that the Defendant provide a written report to the

1 Commission setting forth the manner in which it has complied and is complying with the order.
2 Paragraph VII requires that the Defendant create and maintain records in connection with the
3 marketing and promotion of Defendant's web sites. Paragraph VIII requires that Defendant
4 provide a copy of the order to all of Defendant's Representatives and obtain a signed statement
5 acknowledging receipt of the order. These Paragraphs are necessary to ensure Defendant's
6 ongoing compliance with this Court's order.

7 All of these provisions are designed to prevent Defendant from engaging in illegal
8 practices in the future. As the Supreme Court has observed with respect to FTC orders,

9 Orders of the Federal Trade Commission are . . . to prevent illegal practices in the
10 future. . . . If the Commission is to attain the objectives Congress envisioned, it
11 cannot be required to confine its road block to the narrow lane the transgressor has
12 traveled; it must be allowed effectively to close all roads to the prohibited goal, so
13 that its order may not be by-passed with impunity.

14 F.T.C. v. Ruberoid Co., 343 U.S. 470, 473 (1952). Accordingly, the Ninth Circuit recognizes that
15 FTC orders should “‘fence in’ known violators of the Act” and that “Fencing-in provisions serve
16 to ‘close all roads to the prohibited goal, so that [the FTC’s] order may not be by-passed with
17 impunity.’” Sterling Drug, Inc. v. F.T.C., 741 F.2d 1146, 1154 (9th Cir. 1984) (citing F.T.C. v.
18 National Lead Co., 352 U.S. 419, 429 (1957) (quoting F.T.C. v. Ruberoid Co., 343 U.S. 470, 473,
19 (1952)). Similarly, federal courts have power not only to enjoin specific violations, but to fashion
20 orders to prevent the same unlawful ends. See, e.g., Zenith Radio Corp. v. Hazeltine Research,
21 Inc., 395 U.S. 100, 132-33 (1969), and cases cited; see also United States v. Midwest
22 Pharmaceuticals, Inc., 890 F.2d 1004, 1007 (8th Cir. 1989) (upholding an injunction against
23 violation of the Federal Food, Drug and Cosmetic Act that barred the marketing of legal drugs
24 through otherwise permissible marketing techniques, and required certain customer
25 certifications).

1 The affirmative steps Defendant is required to take under the proposed order are designed
2 to prevent future violations of the law and the order. As the Supreme Court stated in deciding
3 criminal liability under a provision of the Federal Food, Drug and Cosmetic Act:

4 Thus, Dotterweich and the cases which have followed reveal that in providing
5 sanctions which reach and touch the individuals who execute the corporate mission
6 – and this is by no means necessarily confined to a single corporate agent or
7 employee – the Act imposes not only a positive duty to seek out and remedy
8 violations when they occur but also, and primarily, a duty to implement measures
9 that will insure that violations will not occur.

10 United States v. Park, 421 U.S. 658, 672 (1975) (referencing United States v. Dotterweich, 320
11 U.S. 277 (1943)). The Court’s opinion in Park is instructive. Where Congress seeks to protect
12 the public welfare and the legal standard for imposing liability is modest, the law requires entities
13 to implement measures that insure the law will not be violated. See Morissette v. United States,
14 342 U.S. 246, 256 (1952) (referring to “public welfare offenses,” the Court observed: “The
15 accused, if he does not will the violation, usually is in a position to prevent it with no more care
16 than society might reasonably expect and no more exertion than it might reasonably exact from
17 one who assumed his responsibilities.”).

18 Defendant made the business decision to promote its pornographic web sites through an
19 affiliate program. Defendant is in a position to prevent violations of the law with no more care
20 than society might reasonably expect and no more exertion than society might reasonably exact
21 from a Defendant seeking to benefit from the marketing and promotional efforts of its affiliates in
22 an area that Congress has determined is being abused. The public interest must weigh heavily in
23 the Court’s exercise of equitable discretion in fashioning relief for Defendant’s violations. See
24 United States v. Laerdal Mfg. Corp., 73 F.3d 852, 857 (9th Cir. 1995); F.T.C. v. World Wide
25 Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989).

1 The steps required in the proposed order are necessary to prevent Defendant from future
2 violations of the law, and are reasonable, especially in the context of a law designed to protect the
3 public, particularly children, from being exposed to unsolicited commercial email containing
4 vulgar and pornographic images.

5 DATED: December 27, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2006, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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