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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
TUCSON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CYBERHEAT, INC., an Arizona corporation Defendant.	**No. CIV 05-0457-TUC-DCB** DEFENDANT'S MEMORANDUM IN RESPONSE TO PLAINTIFF'S PROPOSED INJUNCTIVE RELIEF

COMES NOW the defendant, Cyberheat, Inc., and pursuant to the Order of this Honorable Court on December 15, 2006, by and through its counsel, submits its Opposition to Plaintiff's proposed injunctive relief.

I. ARGUMENT

A. Cyberheat Cannot Be Held Vicariously Strictly Liable For The Unknown And Unforeseeable Acts Of Non-Agent, Independent Contractors.

In the parties cross-motions for summary judgment, Defendant Cyberheat argues that the CAN-SPAM Act contains a *mens rea* element. In order to be held liable as an "initiator" of violative emails sent by third-parties, Cyberheat must have necessarily paid some form of consideration to or persuaded or prevailed upon those parties specifically to

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1 send emails on Cyberheat's behalf. The Plaintiff argues that CAN-SPAM is a strict-
2 liability statute and that Cyberheat must be held vicariously liable for the acts of its
3 affiliates, regardless of whether Cyberheat knew of the sending of emails by the third
4 parties. Plaintiff candidly admits that none of the emails upon which it makes its claims
5 were sent by Defendant Cyberheat, but instead were sent by third-party affiliates of
6 Cyberheat. Assuming, *arguendo*, that Plaintiff's interpretation of the law is correct, this
7 Honorable Court must necessarily find an accepted rule of law that will allow it to
8 impose this strict liability upon Defendant Cyberheat.

9 The Third Circuit Court of Appeals provides a concise discussion on the reach of
10 liability to principals for wrongful acts by third parties in *AT&T v. Winback, et al.*
11 wherein it held:

12 An agency relationship is created when one party consents to have another
13 act on its behalf, with the principal controlling and directing the acts of the
14 agent. Depending upon the right of control capable of being exercised by the principal over the agent, agents are characterized either as servants or independent contractors.

15

16 Servants generally are employees of the principal, and are subject to
17 physical control by the principal. An agent is a person who represents another in contractual negotiations or transactions akin thereto. A servant
18 is a person who is employed to perform personal services for another in his affairs, and who, in respect to his physical movements in the performance
19 of the service, is subject to the other's control or right of control. Persons who render service but retain control over the manner of doing it are not
20 servants. Thus, if the employer assumes the right to control the time,
21 manner, and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract, a
22 master-servant agency relationship has been created.

23

24 If, however, the agent is not subject to that degree of physical control, but is only subject to the general control and direction by the principal, the agent
25 is termed an independent contractor. Thus, all agents who are not servants are "independent contractors." Moreover, all non-agents who contract to
26 do work for another are also termed "independent contractors". For example, a person who contracts to build a swimming pool for another is

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> the latter's independent contractor. There are, then, agent independent contractors and non-agent independent contractors.
>
> Such distinctions matter because the scope of the employer's liability for the torts of its representatives depends almost exclusively on how the relationship is characterized. If the principal is the master of an agent who is his *servant,* the fault of the agent, if acting within the scope of his employment, will be imputed to the principal by reason of *respondeat superior*. On the other hand, the principal [generally] is not vicariously liable for the torts of the *independent contractor* if the principal did not direct or participate in them.
>
> [W]here the agent is not a servant, the principal is not liable for the agent's negligent conduct unless the act was done in the manner authorized or directed by the principal, or the result was one authorized or intended by the principal. The general rule ... is that an owner, employer, or contractee will not be held liable for the torts of an independent contractor or of the latter's employees committed in the performance of the contracted work.
>
> As the New Jersey Supreme Court has explained, the independent contractor is "characterized by the attributes of self-employment and self-determination in the economic and professional sense." Since the employer "has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the employer is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it."

42 F.3d 1421, 1435 (1994) (citations and footnotes omitted).

Applying this sound reasoning to the facts of this case, it is abundantly clear that no master-servant relationship exists between Defendant Cyberheat and its affiliates. Cyberheat does not, and indeed cannot, subject any of its affiliates to physical control. Neither is any affiliate employed to perform personal services for Cyberheat in its affairs, nor, in respect to his physical movements in the performance of the services anticipated by the contractual relationship between Cyberheat and the affiliate, be subject to Cyberheat's control or right of control. As such, Cyberheat cannot be held liable for the acts of its affiliates under a theory of *respondeat superior*.

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1 The relationship between Cyberheat and its affiliates is a relationship of
2 contractor-independent contractor. This undisputed fact is unambiguously evidenced by
3 the Topbucks' Affiliate Terms and Conditions (Exhibit I to Declaration Of Allison Vivas
4 In Support Of Defendant's First Motion For Partial Summary Judgment). In order to
5 determine whether liability for the acts of these independent contractors extends to
6 Cyberheat, the nature of the relationship between Cyberheat and the independent
7 contractors must be examined to determine whether the affiliates are "agent independent
8 contractors," or "non-agent independent contractors."
9 Defendant Cyberheat cannot control the acts of its affiliates, nor compel them to
10 promote Cyberheat's goods and services at all. These independent contractors are not
11 authorized to negotiate contracts for or enter into transactions with others on behalf of
12 Cyberheat. As the evidence shows, they may not, on behalf of Cyberheat, even enter into
13 Web site subscription agreements with potential customers. Rather, the only acts that the
14 affiliates are authorized to conduct in interaction with potential subscribers is to refer
15 them to Cyberheat's Web sites, at which time the potential subscriber deals directly with
16 Cyberheat. Moreover, the contractual Affiliate Terms of Service between Cyberheat and
17 its affiliates *specifically disclaims* an agency relationship between the parties.[1] Those
18 same Terms and Conditions specifically instruct affiliates that they "shall not use or
19 employ any form of mass unsolicited electronic mailings, newsgroup postings, IRC
20 postings, adware, spyware, malware marketing or any other form of 'spamming' as a
21 means of promoting Affiliate Web sites or for the purpose of directing or referring users
22 to any web sites owned, operated or controlled by CHI."[2] Further, the affiliates were
23
24

25 [1] Paragraph 10.1 reads, "Nothing contained in this Agreement shall create or be deemed to create a partnership, joint venture or other business combination or venture of any kind between Affiliate and CHI, its subsidiaries, affiliated
26 entities, successors or assigns; nor shall any term contained in this Agreement constitute or create any agency or employment relationship between Affiliate and CHI, its subsidiaries, affiliated entities, successors or assigns."
27 [2] Terms and Conditions at ¶ 6.1.

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1 authorized by Cyberheat to use its advertising banners, links, and other promotional
2 materials only on their Web sites.[3]
3
4 "A principal is subject to liability for loss caused to another by the other's reliance
5 upon a tortious representation of a servant *or other agent,* if the representation is:
6 (a) authorized;
7 (b) apparently authorized; or
8 (c) within the power of the agent to make for the principal."
9 Restatement (Second) of Agency § 257 at 558 (cited in Prosser and Keeton, § 70, n. 70).
10 Since Cyberheat did not authorize its affiliates to use its promotional materials in
11 emails, and since Cyberheat did not authorize its affiliates to send emails on Cyberheat's
12 behalf, and since nothing in the contractual relationship provided the affiliates the power
13 to do either on behalf of Cyberheat, the only remaining possibility for extending liability
14 to Cyberheat for the acts of the affiliates is if the affiliates had the "apparent authority" to
15 send the emails on Cyberheats behalf.
16 "Apparent authority arises in those situations where the principal causes persons
17 with whom the agent deals to reasonably believe that the agent has authority" despite the
18 absence of an actual agency relationship. *AT&T v. Winback,* 42 F.3d at 1439 (citing
19 *Barticheck v. Fidelity Union Bank/First Nat'l State,* 680 F.Supp. 144, 148-49
20 (D.N.J.1988) (applying New Jersey law)). If the principal is responsible for the third
21 person believing that the person with whom she deals is an agent, or if the principal
22 should realize that his conduct is likely to induce such belief, then there is an agency
23 created by apparent authority and the principal will be held responsible for the torts of his
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25
26 [3] Paragraph 6.1 reads, "Affiliate shall only use and promote on Affiliate Web sites CHI approved advertising banners, links, and other promotional materials."
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1 agent. *Roberts v. Montgomery Ward and Co., Inc.,* 729 F.2d 1462 at *3 (6th Cir.1984).
2 In this case, no evidence whatsoever indicates that Cyberheat said or did anything
3 that would reasonably cause the recipients of the emails to believe that the affiliates were
4 authorized to send emails on Cyberheat's behalf or to otherwise believe that the senders
5 of the emails would or could transact on behalf of Cyberheat..
6 The evidence in this case is clear that the relationship of Cyberheat affiliates to
7 Cyberheat is as non-agent, independent contractors. As such, the Plaintiff's theory that
8 Cyberheat is liable for the wrongful acts of those affiliates is not supported by well-
9 established laws of agency.
10 **B. Plaintiff's Proposed Definitions Overreach The Grasp Of The Law.**
11 Defendant Cyberheat OBJECTS to Plaintiff's Definitions to the extent that, as
12 shall be discussed more fully *infra*, they seek to expand the reach of the injunctive relief
13 sought by Plaintiff beyond the scope of existing law and to impose duties on entities not
14 parties to this lawsuit. Generally, Cyberheat OBJECTS to Plaintiff's restatement of the
15 law *as it exists today*, without reference to the statutory codification of that law and
16 without provision for amendment to those definitions as the underlying statutory law may
17 be amended from time-to-time. Without any such amendment provision, Defendant
18 Cyberheat could well be required to abide by an injunctive provision that has been
19 subsequently ruled unconstitutional and would be left to a Hobson's choice of either
20 abiding by the law and thereby be held in contempt for violation of an injunction, or
21 conversely, abiding by the language of the injunction, and thereby be forced to violate a
22 third-party's constitutional rights pursuant to court order.
23 Cyberheat's specific objections address Plaintiff's definitions by alphabetical
24 designation and phrase:
25 A. "Affiliate Program" – Plaintiff's use of the phrase "or any other Internet-
26 based mechanism," as used in Plaintiff's Injunctive Provisions overly broadens the scope
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of Plaintiff's proposed Monitoring For Compliance injunctions, and as more fully discussed *infra*, thereby violates Cyberheat's affiliates of their fundamental right to privacy and procedural and substantive due process rights.

E. "Defendant's Representatives" – Plaintiff's use of this definition in its Prohibition Against Violating the CAN-SPAM Act, Prohibition Against Violating the Adult Labeling Rule, and Record Keeping Provisions injunctions imposes injunctions on entities who are not parties to this lawsuit, and as more fully discussed *infra*, thereby violates those parties' of their fundamental rights to privacy and procedural and substantive due process rights.

F. "Document" – Plaintiff improperly attempts to redefine the plain-language of Fed. R. Civ. P. 34(a) by adding the undefined and therefore ambiguous term "other data compilations" to the list of inclusions and/or by misstating the language of the rule.

I. "Email Campaign" – Plaintiff's definition is overly broad and thereby vague for voidness. Because Plaintiff has not defined the term "commercial email message," the plain meaning of the word "commercial" in that term must be applied in conjunction with Plaintiff's definition of the term "email message."[4] Consequently, Plaintiff's definition would unnecessarily include commercial correspondence in the normal course of business between any "natural person or a corporation, partnership, proprietorship, limited liability company, or other organization or legal entity, including and association, cooperative, or agency, or other group or combination acting as an entity" who may coincidentally "participate[] in Defendant's affiliate program to promote Defendant's products, services, or Internet web *[sic]* sites" regardless of the method used by that "natural person or a corporation, partnership, proprietorship, limited liability

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[4] Defendant Cyberheat notes that Plaintiff's Definition "H" specifically describes "Electronic mail message" and its synonymous term "email message," but makes no similar synonymous designation for Definition "C" describing "Commercial electronic mail message." Consequently, Defendant Cyberheat reasonably concludes that "commercial email message" is not synonymous to "Commercial electronic mail message" and is purposefully not made so by Plaintiff.

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company, or other organization or legal entity, including and association, cooperative, or agency, or other group or combination acting as an entity" to perform the promotion. As more fully described *infra*, Plaintiff's use of this definition in its Monitoring For Compliance injunctions imposes injunctions on entities who are not parties to this lawsuit, and as more fully discussed *infra*, thereby violating those parties' of their fundamental rights to privacy and procedural and substantive due process rights.

J. "Initiate" - Plaintiff's definition is overly broad and thereby vague for voidness. Because Plaintiff has not defined the term "commercial email message," the plain meaning of the word "commercial" in that term must be applied in conjunction with Plaintiff's definition of the term "email message." Consequently, Plaintiff's definition would unnecessarily include commercial correspondence in the normal course of business between any "natural person or a corporation, partnership, proprietorship, limited liability company, or other organization or legal entity, including and association, cooperative, or agency, or other group or combination acting as an entity" who may coincidentally "participate[] in Defendant's affiliate program to promote Defendant's products, services, or Internet web *[sic]* sites" regardless of the method used by that "natural person or a corporation, partnership, proprietorship, limited liability company, or other organization or legal entity, including and association, cooperative, or agency, or other group or combination acting as an entity" to perform the promotion. As more fully described *infra*, Plaintiff's use of this definition in its Monitoring For Compliance injunctions imposes injunctions on entities who are not parties to this lawsuit, thereby violating those parties' of their fundamental rights to privacy and procedural and substantive due process rights. Moreover, Plaintiff's definition is merely a *partial* restatement of portions of 15 U.S.C. § 7702(9), but fails to include Congress' well-reasoned exclusions stated in 15 U.S.C. § 7702(9) and enumerated in 15 U.S.C. § 7702(17), and the Federal Trade Commission's ("FTC") rule for such exclusions

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1 codified in 16 CFR 316.3(b)-(c). As such, Cyberheat restates its general objection to the
2 inclusion of definitions already defined by statute.
3 K. "Person" - Plaintiff's use of this definition in other Definitions, Monitoring
4 For Compliance, Compliance Monitoring, and Compliance Reporting By Defendant
5 injunctions imposes injunctions on entities who are not parties to this lawsuit and, as
6 more fully discussed *infra*, thereby violates those parties' of their fundamental rights to
7 privacy and procedural and substantive due process rights.
8 L. "Procure" - Plaintiff's definition is overly broad and thereby vague for
9 voidness. Because Plaintiff has not defined the term "commercial email message," the
10 plain meaning of the word "commercial" in that term must be applied in conjunction with
11 Plaintiff's definition of the term "email message." Consequently, Plaintiff's definition
12 would unnecessarily include commercial correspondence in the normal course of
13 business between any "natural person or a corporation, partnership, proprietorship,
14 limited liability company, or other organization or legal entity, including and association,
15 cooperative, or agency, or other group or combination acting as an entity" who may
16 coincidentally "participate[] in Defendant's affiliate program to promote Defendant's
17 products, services, or Internet web *[sic]* sites" regardless of the method used by that
18 "natural person or a corporation, partnership, proprietorship, limited liability company, or
19 other organization or legal entity, including and association, cooperative, or agency, or
20 other group or combination acting as an entity" to perform the promotion. As more fully
21 described *infra*, Plaintiff's use of this definition in its Monitoring For Compliance
22 injunctions imposes injunctions on entities who are not parties to this lawsuit, thereby
23 violating those parties' of their fundamental rights to privacy and procedural and
24 substantive due process rights. Moreover, Plaintiff's definition is merely a *partial*
25 restatement of portions of 15 U.S.C. § 7702(12), and Cyberheat restates its general
26 objection to the inclusion of terms already defined by statute.
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1 M. "Recipient" - Plaintiff's definition is overly broad and thereby vague for
2 voidness. Because Plaintiff has not defined the term "commercial email message," the
3 plain meaning of the word "commercial" in that term must be applied in conjunction with
4 Plaintiff's definition of the term "email message." To the extent that Plaintiff's definition
5 is merely a restatement of portions of 15 U.S.C. § 7702(14), Cyberheat restates its
6 general objection to the inclusion of terms already defined by statute.
7 N. "Sender" - Plaintiff's definition is overly broad and thereby vague for
8 voidness. Because Plaintiff has not defined the term "commercial email message," the
9 plain meaning of the word "commercial" in that term must be applied in conjunction with
10 Plaintiff's definition of the term "email message." To the extent that Plaintiff's definition
11 is merely a restatement of portions of 15 U.S.C. § 7702(16), Cyberheat restates its
12 general objection to the inclusion of terms already defined by statute.
13 O. "Sexually Explicit Conduct" – Plaintiff's definition is an apparent
14 restatement of the definition of that term as it is *currently* codified in 28 U.S.C. § 2256 as
15 provided in 15 U.S.C. 7704(d)(4). To the extent that Plaintiff's definition is merely a
16 restatement of portions of 18 U.S.C. § 2256, Cyberheat restates its general objection to
17 the inclusion of terms already defined by statute.
18 P. "Sexually Oriented Material" - Plaintiff's definition is an apparent
19 restatement of the definition of that term as it is *currently* codified in 15 U.S.C.
20 § 7704(d)(4). To the extent that Plaintiff's definition is merely a restatement of portions
21 of 15 U.S.C. § 7704(d)(4), Cyberheat restates its general objection to the inclusion of
22 terms already defined by statute.
23 Q. "Valid Physical Postal Address" - Plaintiff's definition is a modification of
24 15 U.S.C. § 7704(a)(5)(A)(iii) and Plaintiff asks this Honorable Court to "legislate from
25 the bench" by imposing a limitation not authorized by Congress, to wit: limiting
26 Cyberheat's ability to contract with affiliates who serendipitously do not have a "street
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1 address" (but may have a "valid physical postal address") and who are not situated in the
2 United States or one of its territories . To the extent that Plaintiff's definition is merely a
3 restatement of portions of 15 U.S.C. § 7704(a)(5)(A)(iii), Cyberheat restates its general
4 objection to the inclusion of terms already defined by statute. Cyberheat further
5 OBJECTS to the limitation imposed by Plaintiff's definition on the basis that it violates
6 Cyberheat's substantive due process rights and imposes injunctions on entities who are
7 not parties to this lawsuit and, as more fully discussed *infra*, thereby violates those
8 parties' of their fundamental rights to privacy and procedural and substantive due process
9 rights.

10 **C. <u>The Balancing Of Equities And Costs</u>.**

11 Defendant Cyberheat has approximately 50,000 webmaster/affiliates that belong
12 to its affiliate program. Deposition of Allison Vivas at 13:11-12 (Relevant pages
13 attached hereto as Exhibit "A" and by this reference thereby made a part hereof). On any
14 given month, approximately 10,000 of those webmasters refer potential subscribers to
15 Cyberheat Web sites. *Id.* at 13:20 – 14:1. However, in all of the 280 electronic mail
16 messages produced by Plaintiff in discovery, the revenue identification numbers in those
17 messages revealed that they contained only fourteen (14) unique "revid" codes,[5] two of
18 which were internal codes used exclusively by Defendant Cyberheat. Consequently, all
19 of the other messages resulted from transmissions by ***only twelve (12)*** of Defendant
20 Cyberheat's webmasters. As such, the relevant percentage of Cyberheat's webmasters
21 who were promoting Cyberheat Web sites by use of electronic mail messages was an
22 ***infinitesimal 2/100 of one-percent*** of the registered affiliates (12/50000 = .0002).

23 Nevertheless, Plaintiff asks this Honorable Court to compel "each and every
24 person who participates in Defendant's affiliate program to provide information to
25 Defendant" as enumerated in Plaintiff's proposed injunctions in section III, *regardless of*
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27 [5] A "revid" code is a unique number assigned to a Cyberheat webmaster when he registers as a Cyberheat affiliate.

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whether those affiliates' activities implicate the CAN-SPAM Act or the Adult Labeling Rule.

Injunctive relief is available to a party who demonstrates "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay, Inc. v. MercExchange, LLC*., 126 U.S. 1837, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006).

In the case at bar, although Plaintiff *may* have demonstrated that it has suffered an irreparable injury, it has *not* demonstrated that the irreparable injury was caused by Defendant Cyberheat. In fact, as observed *supra*, Plaintiff has candidly admitted that none of the electronic mail messages sent by Defendant Cyberheat violated the CAN-SPAM Act or the Adult Labeling Rule.

Even if assuming *arguendo* that Cyberheat *had* sent the violative messages, an adequate remedy at law exists to Plaintiff, to wit: monetary damages of no insignificant amount as provided by the Federal Trade Commission Act. 15 U.S.C. § 45(m).

As discussed more fully *infra* in section E, the burden and cost to Cyberheat to comply with the proposed injunctions is onerous. The proposed injunctions would require Cyberheat to significantly change its business model in order to conduct detailed monitoring of the webmasters' activities, gather and record detailed personal information on those webmasters and their internal business conduct and structure, gather and record detailed information from its consumers, perform the investigatory functions otherwise relegated by Congress to the Federal Trade Commission, create detailed records and supply detailed reports on each and every business transaction between Cyberheat and each of its webmasters to the Federal Trade Commission.

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1 Defendant Cyberheat can ascertain no purpose (and Plaintiff offers no justification
2 for) these costly and burdensome activities that furthers the stated goal of the CAN-
3 SPAM Act to ease the burden of e-mail servers. Rather, the only benefit to Plaintiff that
4 Defendant Cyberheat can envision is that these costly and burdensome impositions on
5 Defendant Cyberheat will facilitate Plaintiff's efforts in legal pursuit of Cyberheat's
6 webmasters should Plaintiff determine that a webmaster has violated CAN-SPAM or the
7 Adult Labeling Rule at some future time. Here, the hardships fall strongly on Defendant
8 Cyberheat and the little to no benefit afforded Plaintiff by the injunctions does not in any
9 fashion support the imposition of the proposed injunctions.
10 Moreover, the public interest will be significantly disserved by the burden that
11 Plaintiff's proposed injunctions impose on the fully protected free speech afforded by the
12 First Amendment to the U.S. Constitution. The true public interest is in the continuation
13 of relatively unfettered freedom of speech and expression. Plaintiff offers no argument
14 of, and Defendant Cyberheat can envision no for, a compelling government interest that
15 would be served by the imposition of Plaintiff's proposed injunctions. As is more fully
16 discussed *infra*, Plaintiff's requested injunctive relief inordinately burdens free speech
17 and expression by inhibiting the lawful expression of that speech.
18 "Permanent injunctive relief is warranted where . . . defendant's past and present
19 misconduct indicates a strong likelihood of future violations." *Orantes-Hernandez v.*
20 *Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990) (citations omitted). "In seeking a
21 permanent injunction, the moving party must convince the court that relief is needed:
22 'The necessary determination is that there exists some cognizable danger of recurrent
23 violation, something more than the mere possibility which serves to keep the case alive.'"
24 *Cummings v. Connell*, 316 F.3d 886, 898 (9th Cir. 2003) (quoting *United States v. W.T.*
25 *Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 97 L. Ed. 1303 (1953)). In making this
26 determination, the court may consider "the degree of scienter involved; the isolated or
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1 recurrent nature of the infraction; the defendant's recognition of the wrongful nature of
2 his conduct; the extent to which the defendant's professional and personal characteristics
3 might enable or tempt him to commit future violations; and the sincerity of any
4 assurances against future violations." *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852,
5 854-855 (9th Cir. 1995).

6 Plaintiff's tortured readings of the terms "procure" and "initiate" as defined in the
7 CAN-SPAM Act are the only vehicles that lead it down its circuitous path in its attempt
8 to hold Defendant Cyberheat liable for the unknown and unauthorized acts of non-agent
9 independent contractors. Plaintiff enthusiastically admits that Cyberheat's "past and
10 present" direct conduct do not violate the CAN-SPAM Act or the Adult Labeling Rule.
11 Neither does Plaintiff offer anything other than a supposition of the "mere possibility"
12 that Cyberheat *may* commit some offense in the future. Rather, Cyberheat's *actual*
13 conduct in the past shows that it *did* terminate affiliates who violated the CAN-SPAM
14 Act. Moreover, as evidenced by Cyberheat's express Terms and Conditions *forbidding*
15 violation of the CAN-SPAM Act and the Adult Labeling Rule by its affiliates, and by
16 Cyberheat's own termination of sending even the *lawful and conforming* electronic mail
17 messages it did send, Defendant Cyberheat shows that, not only was it *not* tempted in the
18 past to commit a violation of the Act or the Rule, but further that it will not somehow
19 decide to do so in the future.

20 Consequently, it is abundantly clear that permanent injunctive relief is not
21 warranted in this case.

22 **D. The Nature Of Plaintiff's Injunctions.**

23 Plaintiff's proposed injunctions are of two types: "prohibitory"; and "mandatory."
24 Whereas a "prohibitory" injunction simply proscribes an act by the enjoined party, a
25 "mandatory" injunction compels the enjoined party to affirmative perform the act.
26 Although both mandatory and prohibitory injunctions are governed by the same criteria,
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courts are generally more cautious about issuing mandatory injunctions that would *alter the status quo* by commanding some positive act. Such relief is "subject to heightened scrutiny and should not be issued unless the facts and law *clearly favor the moving party*." *Dahl v. HEM Pharmaceuticals Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (emphasis added).

Plaintiff's proposed "injunction" for a Civil Penalty is a legal remedy, and Plaintiff's proposed "injunctions" for Severability and Retention of Jurisdiction are not equitable remedies.

Plaintiff's proposed prohibitory injunctions (Prohibition Against Violating the CAN-SPAM Act and Prohibition Against Violating the Adult Labeling Rule) are nothing more that restatements of statutory proscriptions. Further, Plaintiff's proposed mandatory injunctions (Monitoring For Compliance, Compliance Monitoring, Compliance Reporting by Defendant, Record Keeping Provisions[6], Distribution of Order By Defendant, and Acknowledgement of Receipt of Order by Defendant) do not work to preserve a state *in statu quo*, nor restore conditions to a state *in statu quo ante*. Rather, the seek to compel Defendant Cyberheat to conduct onerous tasks and to take complex affirmative steps to create an entirely new state of conditions and conduct that are not, in most part, provided by the CAN-SPAM Act nor the Adult Labeling Rule.

In actuality, the net effect of Plaintiff's proposed injunctions results in another type of injunction known as a "structural" injunction. Generally, a structural injunction attempts to remodel an existing social or political institution to bring it into conformity with constitutional demands. Structural injunctions differ from traditional injunctions, which focus on the rights of two parties vis-à-vis each other, and tend to involve wider interests of society, not only in the sense that the court may consider those interests in

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[6] While seemingly offered as prohibitory injunctions, Plaintiff's "Monitoring For Compliance" and "Record Keeping Provisions" are phrased in the double-negative and are, in fact, mandatory injunctions.

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1 fashioning remedies, but also in the sense that the interests of third parties will be
2 affected in substantial ways by affirmative injunctive relief.

3 While traditional litigation attempts to provide a remedy that correlates to the right
4 asserted and enforce that right, structural injunctions go beyond this kind of right-remedy
5 correlation. Indeed, remedial orders of a structural nature typically provide a remedy that
6 goes beyond the right in question. Consequently, restructuring injunctions are typically
7 complex and invasive. They are likely to involve the court in tasks less traditionally
8 considered to be non-judicial, e.g., less about rights and duties and more about
9 management For this reason, structural injunctions should be limited in application as
10 they are now, to wit: only as public law remedies for serious and pervasive rights
11 violations. *See generally,* Chayes, *The Role of the Judge in Public Law Litigation*, 89
12 Harv.L.Rev. 1281 (1976). Where the discrepancy between the scope of the right and the
13 scope of the wrong is relatively small, so too must the intrusion upon the defendant be
14 small for a court to consider the imposition of structural injunctive relief. Consequently,
15 when the remedy is so different that it does not address the wrong done by the defendant,
16 but rather reaches to the point where the remedy reaches a wrong that was not done by
17 the defendant at all, the injunctive relief sought becomes unacceptable, party because it is
18 too intrusive [*Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976)], partly
19 because it opens up too much discretion [Schoenbrod, *The Measure of the Injunction: A*
20 *Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 Minn.L.Rev.
21 627 (1988); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial*
22 *Legitimacy*, 91 Yale L.J. 635, 679-83 (1982)], and partly because it is unacceptable in
23 principle to force a defendant to do more than rectify his wrong [*Swann v. Charlotte-*
24 *Mecklenberg Bd. Of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554, 566
25 (1971)]. Moreover, by asking for issuance of structural injunctive relief, Plaintiff ignores
26 the separation of powers doctrine and asks this Honorable Court to inject itself too much
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1 into political or policy decisions that should be left to the legislative branch. *See*,
2 Mishkin, *Federal Courts as State Reformers*, 23 Wash. & L.L.Rev. 949, 966 (1978).
3 The Plaintiff candidly admits that *none* of the electronic mail messages that
4 originated or were transmitted by Defendant Cyberheat violated the CAN-SPAM Act or
5 the Adult Labeling Rule. United States Response to Defendant's Motion For Partial
6 Summary Judgment (Dkt. #39), ¶ V at 10:1-6. Nevertheless, Plaintiff doggedly pursues a
7 course of litigation that improperly attempts not only to hold the Defendant liable for the
8 wrongful and unauthorized acts of non-agent independent contractors, but additionally
9 seeks to compel Defendant Cyberheat to, in essence, police the actions of those parties at
10 the significant burden of time and expense to Cyberheat, and all without authority or
11 compulsion of statutory law or regulation. Moreover, even if Cyberheat *had* committed
12 *past* wrongs, Plaintiff must nevertheless show that there is a real and immediate threat
13 that Cyberheat will commit *future* wrongs. *City of Los Angeles v. Lyons*, 461 U.S. 95,
14 102, 103 S.Ct. 1660, 1665 (1983)("Past exposure to illegal conduct does not in itself
15 show a present case or controversy regarding injunctive relief"). Some irreparable injury
16 must be threatened; otherwise, injunctive relief must be denied. *Local Union No. 884 v.*
17 *Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1355 (8th Cir. 1995).
18 **E. <u>The Proposed Injunctions Violate The U.S. Constitution And The First</u>**
19 **<u>And Fifth Amendments Thereto</u>.**
20 **1. Procedural Due Process**
21 The Due Process Clause of the Fifth Amendment of the United States Constitution
22 requires that parties in interest be given an opportunity to be heard after due notice before
23 they may be bound by a court order. *Snow v. Great Western Bank*, 201 B.R. 968, 971-72,
24 29 Bankr.Ct.Dec. 1174 (1996), citing *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 97 S.Ct.
25 1983, 32 L.Ed.2d 556 (1972). For more than a century, the central meaning of procedural
26 due process has been clear: parties whose rights are to be affected are entitled to be heard;
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1 and in order that they may enjoy that right they must first be notified. *Fuentes* at 80,
2 citing *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531; *Winsdor v. McVeigh*, 93 U.S.
3 274, 23 L.Ed. 914; *Hovey v. Elliot*, 167 U.S. 4098, 17 S.Ct. 841, 42 L.Ed. 215; *Grannis v.*
4 *Oredeam*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363.

5 Adequate notice, the heart of due process, must be reasonably calculated to apprise
6 the parties of a pending action and afford them an opportunity to present their objections.
7 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed.
8 865 (1950). Specific notice requirements of due process may vary with the
9 circumstances and entail the weighing of competing interests, including the private
10 interest affected, the risk of erroneous deprivation through current practices, and the
11 government's interests. *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S.Ct. 893, 47
12 L.Ed.2d 18 (1976).

13 In the case at hand, the Court does not need to analyze any competing interests in
14 determining that the government's proposed injunctions violate the Due Process Clause
15 of the United States Constitution. The government's proposed injunctions necessarily
16 enjoin persons and entities that are not parties to this lawsuit (primarily
17 webmasters/affiliates) and have not been provided any notice of being subject to a court
18 order.

19 **2. Substantive Due Process**

20 The substantive component of the Due Process Clause of the United States
21 Constitution protects individual liberty against certain government actions regardless of
22 the fairness of the procedures used to implement them, providing heightened protection
23 against government interference with fundamental rights and liberty interests. *See Troxel*
24 *v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); and *Collins v.*
25 *Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992).
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1 If governmental action burdens a person's exercise of a fundamental right, the
2 government's justification for the action is subject to a "strict scrutiny" review, requiring
3 governmental action to be narrowly tailored to the achievement of a compelling
4 government interest. *See Williams v. King*, 420 F. Supp.2d 1224, 1232 (N.D. Ala 2006),
5 *citing Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).
6 In determining whether the right implicated by the government action is
7 fundamental, the Court performs an analysis requiring careful description of the asserted
8 fundamental right and determines whether the right as described is among those
9 fundamental interests which are objectively deeply rooted in the "Nation's history and
10 tradition, and implicit in the concept of ordered liberty, such that neither liberty nor
11 justice would exist if they were sacrificed." *Washington v. Gluckaberg*, 521 U.S. 702,
12 720-21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). If the initial inquiry is answered
13 affirmatively, the government action is subjected to strict scrutiny, requiring (1) the
14 action to promote a compelling and legitimate governmental interest or purpose and (2)
15 the action to be narrowly tailored to the achievement of that interest. *Id.*
16 Squarely at issue in the case at hand is the long protected First Amendment right
17 to free speech. The injunctions proposed by the United States unequivocally infringe
18 Cyberheat's First Amendment right to free speech. The proposed injunctions' main
19 effect is to create and maintain a severe burden on Cyberheat's ability to present First
20 Amendment protected material to adults throughout the country and the world. This
21 limitation is not imposed by law on Cyberheat's competitors.
22 Virtually all persons that observe and read Cyberheat's constitutionally protected
23 material do so at the urging of Cyberheat's webmasters/affiliates. These webmasters
24 direct Internet traffic to Cyberheat's Web sites by disseminating, with legal license,
25 Cyberheat's material in the form of banner ads, pop-ups, pop-unders, hyperlinks, and in
26 the very rare historical occasion, e-mails. As the proposed injunctions impose upon *all*
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1 affiliates, regardless of the manner in which the affiliate directs Internet traffic to
2 Cyberheat, the injunctions serve to regulate and burden the dissemination of Cyberheat's
3 materials regardless of the time, place, and manner of the dissemination of the
4 constitutionally protected material.
5 The enormous and burdensome identification data collection of Cyberheat's
6 affiliates likely will result in the severe reduction, if not complete cessation, of the
7 dissemination of Cyberheat's materials over the Internet. Affiliates would cease to
8 contract with Cyberheat should they be required to provide the identification
9 documentation and business structure and operations infromation to Cyberheat, while
10 Cyberheat's competitors do not require the same.
11 Sexual expression, such as that which is disseminated by Cyberheat, which is
12 indecent, but not obscene, is protected by the First Amendment. *Reno v. American Civil*
13 *Liberties Union,* 521 U.S. 844, 874-75, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), *citing*
14 *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106
15 L.Ed.2d 93 (1989). Even in the context of commercial speech, the government may only
16 regulate that which is false, deceptive, or misleading, or is related to illegal behavior. *See*
17 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S.
18 748, 771-72, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Pittsburgh Press Co. v. Human*
19 *Relations Comm'n*, 413 U.S. 376, 388, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973); *and Carey*
20 *v. Population Services International*, 431 U.S. 678, 700-01, 97 S.Ct. 2010, 52 L.Ed.2d
21 675 (1977).
22 When the government requests action that presents limitations on the speech of
23 one particular party or group, as in the context of injunctions, the Court, in deciding
24 whether strict scrutiny of the action is required, must necessarily determine whether the
25 requested action is content neutral. *Madsen v. Women's Health Center, Inc.*, 512 U.S.
26 753, 762-63, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). The principle inquiry in
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determining content neutrality is whether the government has regulated speech without reference to its content. *Id.*, *citing Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989). In determining whether to examine requested injunctive relief under the strictest standard of scrutiny, the Court must look to the government's purpose as the threshold consideration. *Madsen* at 763.

Government action is "content neutral" only if the regulation is justified without reference to the content of the regulated speech and serves a purpose unrelated the expression's content. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293-95, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). The government may not regulate speech based on hostility or favoritism towards the underlying message expressed. *R.A.V. v. St. Paul*, 505 U.S. 377, 386, 112 S.Ct. 2538, 120 L.Ed.2d 881 (1989).

Injunctions are remedies imposed when there are violations, or threatened violations, of a legislative or judicial decree and carry greater risks of censorship and discriminatory application than do general ordinances. As a result, even more stringent application of First Amendment principles should be applied in review of such injunctions. *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 765, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

The purpose of the government's requested injunctions is unequivocally to limit the expression of sexually oriented materials. This purpose is evident in the claims asserted by the government, alleging violations of the Controlling the Assault of Non-Solicited Pornography and Marketing Act and the Adult Labeling Rule. This purpose is further evidenced in the government's proposed injunctions, defining "sexually oriented material" and enjoining the transmissions of certain messages containing sexually oriented material.[7]

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[7] Cyberheat agrees with the assertion that commercial electronic mail sent in violation of the CAN-SPAM Act of 2003 should be regulated. Cyberheat disagrees with the assertion that liability exists in this case, thereby justifying

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1 The injunctions proposed by the government are not content-neutral, but rather
2 serve to directly regulate and limit the dissemination of protected speech. As the
3 injunctions proposed by the government seek to enjoin and limit Cyberheat's protected
4 right of free speech, that being sexual expression, the injunctions must be reviewed with
5 the strictest of scrutiny, determining whether the regulation is necessary to serve a
6 compelling government interest and that the regulation is narrowly drawn to achieve that
7 end. *See Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).
8 Should the proposed injunctions be deemed content-neutral, close attention must
9 still be paid to the fit between the objectives of an injunction and the restrictions it
10 imposes on speech. The governing standard is whether the challenged provisions burden
11 no more speech than necessary to serve a significant government interest. *Madsen* at
12 765-66, *citing Calfano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2558, 61 L.Ed.2d 176
13 (1979).
14 The stated government interest in the CAN-SPAM Act is the reduction of costs
15 and burdens spam imposes on the e-mail system. 15 U.S.C. § 7701(a). The "Adult
16 Labeling Rule" is a federal regulation instituted by the F.C.C. in Part 316, Title 16 Code
17 of Federal Regulations, Rule Implementing the CAN-SPAM Act of 2003. *See* 16 C.F.R.
18 316.3. Therefore, the purpose of the Adult Labeling Rule must the same of the CAN-
19 SPAM Act.
20 Assuming *arguendo* that the statutory purpose of the CAN-SPAM Act furthers a
21 *compelling* government interest,[8] the proposed injunctions are hardly tailored to the
22 purpose of the Act to "reduce the costs and burdens of spam on the e-mail system."
23
24 the imposition of any injunctions, and disagrees that the proposed injunctions are narrowly tailored to the purpose of the CAN-SPAM Act.
25 [8] 15 U.S.C. §7701(b)(1) actually states:
(b) Congressional Determination of Public Policy. On the basis of the findings in subsection (a), Congress
26 determines that –
(1) there is a *substantial* government interest in regulation of commercial electronic mail on a nationwide
27 basis. (Emphasis added.)

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1 Cyberheat has 50,000 webmaster/affiliates, with approximately 10,000 active in
2 any given month. Of these 50,000 affiliates, the government has discovered evidence of
3 ***only twelve (12)*** that have sent e-mails allegedly in violation of the CAN-SPAM Act. In
4 fact, e-mail is no longer permitted as a medium by Cyberheat's affiliates to disseminate
5 material or information in order to direct Internet users to Cyberheat's Web sites.
6 The injunctive terms proposed by the government are not specific to the
7 transmission of e-mails, or to contractual relationships with those few affiliates that may
8 utilize e-mails. Rather, the proposed injunctions govern Cyberheat and all 50,000
9 Cyberheat affiliates regardless of whether e-mails are utilized. The only purpose of such
10 expansive injunctive terms is to burden the *material* that is disseminated by Cyberheat's
11 affiliates.
12 The gap between the actions by non-agent independent contractors of Cyberheat
13 and the expansive breadth of the proposed injunctions is so wide that any attempt to
14 bridge the gap with a "narrowly tailored" view of the injunctive terms is, at best,
15 intellectually dishonest.
16 The government cannot justify the proposed injunctions by asserting, much less
17 believing, that they are actually tailored to promote the true purpose of the CAN-SPAM
18 Act. Rather, the government is using the CAN-SPAM Act to change or alter the
19 dissemination of certain and specific constitutionally protected speech over the Internet.
20 The government is attempting to do so absent the checks and balances of legislation and
21 in the hope of "flying under the radar" of constitutional challenge, forcing most parties to
22 cave under the costs of litigation and stipulating to such outrageous and unconstitutional
23 injunctive terms. To date, many defendants have been economically forced to fall into
24 line.
25 Additionally, the cost and burden imposed upon Cyberheat are not justified by the
26 stated purpose of the injunctions and the requirement that such injunctions be narrowly
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1 tailored to such purpose. Such burden and costs include: (1) serving all 50,000 affiliates
2 with a copy of the order; (2) requesting information from all 50,000 affiliates; (3)
3 recording information from all 50,000 affiliates; (4) tracking information from all 50,000
4 affiliates; (5) tracking entity formation information of all 50,000 affiliates; and (6) the
5 loss of affiliate business as a direct result of requiring such information. Such
6 requirements are quite expensive and burdensome, especially balanced against the 12
7 affiliates the government has identified as sending allegedly violative e-mails.

8 **II. CONCLUSION**

9 The senders of the emails that the Plaintiff claims violate the CAN-SPAM Act and
10 the Adult Labeling Rule are non-agent independent contractors. Assuming *arguendo* that
11 the emails in fact violate the CAN-SPAM Act and/or the Adult Labeling Rule, by virtue
12 of the fact that those messages were sent without the knowledge or consent of Cyberheat,
13 the well-established laws of agency prohibit Cyberheat from being held liable under any
14 theory. Consequently, this Honorable Court may dispense with any consideration of
15 whether to impose the injunctive relief sought by the Plaintiff.

16 If, however, this Honorable Court does conclude that Cyberheat may be held liable
17 for the acts of its non-agent independent contractors, Plaintiff offers no explanation of
18 (and Defendant Cyberheat cannot divine) how the injunctive terms proposed by the
19 Plaintiff right a past wrong or assure that no possible future wrong will be committed by
20 Cyberheat. Rather, the only reasonable conclusion that can be had in considering the
21 proposed terms is that the mandatory injunctions for Monitoring For Compliance,
22 Compliance Monitoring, Compliance Reporting by Defendant, and Record Keeping
23 Provisions are intended to compel Cyberheat to conduct the investigation and policing of
24 third parties solely for the benefit of the Plaintiff should the Plaintiff desire to pursue
25 those third parties for any wrong doing they may commit in the future.
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1 Since only twelve out of 50,000 of Cyberheat's affiliates were responsible for the
2 initiation and sending of the emails that the Plaintiff alleges violate the CAN-SPAM Act
3 and the Adult Labeling Rule,[9] there exists no reasonable rationale how the onerous
4 monitoring and reporting of webmasters who do not utilize email to promote Cyberheat's
5 Web sites furthers the legislative goal of Congress to reduce the costs burden of spam on
6 e-mail servers. Moreover, Plaintiff's proposed injunctions for reporting also do not
7 further Congress' goal. Rather, they serve only to allow the Plaintiff to pry into the
8 minutia of the private business affairs of Defendant Cyberheat and its affiliates.
9 As previously observed, the minimal benefit that the Plaintiff may derive from
10 obtaining the detailed information it seeks from Cyberheat and its representatives and
11 affiliates is immensely outweighed by the cost and burden that the injunctions would
12 place on Cyberheat. In particular, the mandatory injunctions Plaintiff seeks, while doing
13 little-to-nothing to further Congress' goal, are extensive in their reach. As such, the
14 benefit-burden analysis slams the scales down in favor of Cyberheat.
15 As more fully described *supra*, Plaintiff's attempts to impose the injunctive terms
16 upon Cyberheat's webmasters by requiring Cyberheat to serve a copy of the Order on
17 those affiliates violates those third parties' procedural due process rights. This is
18 particularly apparent where the proposed injunctions impose extensive reporting by those
19 affiliates on their business structures and identities and activities of their principals,
20 employees, sub-affiliates and agents.
21 Plaintiff's proposed injunctions wreak havoc on Cyberheat and its affiliates
22 substantive due process rights. Plaintiff apparently has little regard for the constitutional
23 rights and protections to which Cyberheat and its affiliates are entitled. Plaintiff's
24 proposed mandatory injunctions are clearly not aimed at "reduc[ing] the costs and
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[9] Cyberheat disputes this allegation and is prepared to rebut at trial with evidence that most, if not all, of the messages were sent to recipients who had provided prior affirmative consent to the senders to receive them

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1 burdens of spam on the e-mail system," but inarguably *are* aimed at significantly
2 burdening the lawful dissemination of specific, fully protected speech. The proposed
3 injunctions are *not* content-neutral and *must* be subjected to the strictest scrutiny. In
4 doing so, no reasonable conclusion can be had determining that the terms are narrowly
5 tailored to achieve a compelling governmental purpose.

6 For all these reasons, Plaintiff's pursuit of Cyberheat must cease and Plaintiff's
7 proposed injunctive relief must be denied.

8 DATED this 11th day of January 2007.

9 Respectfully submitted,

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11 *s/ Robert S. Apgood*
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1 **CERTIFICATE OF SERVICE**

2

3 I, Robert S. Apgood, do hereby certify that on the 11th day of January 2007, I
4 caused true and correct copies of the following:

5 1. Defendant's Memorandum in Response to Plaintiff's Proposed Injunctive
6 Relief; and

7 2. this Certificate of Service

8 to be served on:

9 Lauren Hash, Esq.
10 Department of Justice
Office of Consumer Litigation
11 P.O. Box 386
Washington, D.C. 20044
12

13 Jeffrey E. Steger, Esq.
Department of Justice
14 Office of Consumer Litigation
P.O. Box 386
15 Washington, D.C. 20044
16

17 by filing a copy of same with the Clerk of the Court. In accordance with the Local Rule
18 and the attorneys' agreements, the above named attorneys will receive notification of
19 filing and copies of same using the court's CM-ECF system.

20 I declare under penalty of perjury under the laws of the United States of America
21 that the foregoing is true and correct. Executed at Seattle, Washington,

22 DATED this 11th day of January 2007.

23 *s/ Robert S. Apgood*
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