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5 **UNITED STATES DISTRICT COURT**  
6 **WESTERN DISTRICT OF WASHINGTON**  
7 **AT SEATTLE**

8 **UNITED STATES OF AMERICA,**

9 Plaintiff,

10 v.

11 **IMPULSE MEDIA GROUP, INC.,**

12 a Washington corporation,

13 Defendant.

**No. CV05-1285L**

**United States' Reply  
in Support of Request  
Regarding Attendance at the  
Court Ordered Settlement  
Conference**

14 **NOTE ON MOTION CALENDAR:**  
15 **(October 22, 2007)**

16 The purpose of mediation is to facilitate settlement of a case. The Government has  
17 actively attempted to settle this case, and will continue to do so. The Government offered to  
18 settle this matter before it was filed, and subsequently offered to engage in settlement  
19 discussions on numerous occasions. The Government has provided the Defendant with proposed  
20 injunctive language that would serve as the basis for any settlement and an explanation of the  
21 calculation the Government would use to determine an acceptable civil penalty.

22 The Request to excuse a party with full settlement authority from the October 25, 2007,  
23 mediation in no way reflects an unwillingness on the part of the Government to engage in  
24 meaningful settlement negotiations. However, requiring all five Federal Trade Commission  
25 ("FTC") Commissioners to attend mediation, in person or by phone, would be unduly  
26 burdensome. The presence of the lead Department of Justice attorney who has litigated the case  
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28 UNITED STATES' REPLY IN SUPPORT  
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AT SETTLEMENT CONFERENCE  
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1 from its filing and a senior official from the FTC<sup>1</sup> will ensure that the purpose of mediation will  
2 be fulfilled.

3 **I. Defendant's Objection No. 1**

4 Because the relief sought was relief from a local rule, the Government considered the  
5 applicable rule on timing to be LR 7(d)(2)(A), not LR 7(d)(3) as asserted by Defendant.  
6 The Government filed its Request Regarding Attendance at the Court Ordered Settlement  
7 Conference on October 11, 2007, with a noting date no earlier than seven judicial days after  
8 filing pursuant to LR 7(d)(2)(A) which states: "(2) The following motions may be noted for  
9 consideration no earlier than seven judicial days after filing: (A) motions for relief from a  
10 deadline or limit imposed by an order, federal rule or local rule." Under LR 7(d)(2) the  
11 Defendant's reply was not due until the noting date of October 22, 2007. The Defendant was not  
12 prejudiced because it had seven judicial days, as set forth in the Local Rules, to respond to the  
13 Government's Motion.

14 **II. Defendant's Objection No. 2**

15 The Defendant objects to the Government's Motion for failure to comply with LR  
16 39.1(c)(4). The Government substantially complied with the requirements of LR 39.1(c)(4)  
17 through a series of telephone calls and email communications between counsel for the  
18 Government, counsel for IMG, and United States Magistrate Judge Donohue's deputy that dealt  
19 with scheduling the meditation. (Exhibits 1, 2, 3, 4, 5 and 6.) With respect to the Motion,  
20 counsel for the Government provided IMG's counsel with a draft of the Motion and conferred  
21 with him regarding filing it. Defendant acknowledges as much. (Def's Resp. at p. 4, lines 14-  
22 20.) The Government's intent was not to blindside the Defendant. Indeed, Defendant had notice  
23 of the Motion two days before it was filed, and the Government properly noted the Defendant's  
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27 <sup>1</sup> Charles Harwood, Federal Trade Commission Regional Director for the Northwest Region.

1 opposition to the requested relief.<sup>2</sup>

2 The Government filed the Motion in good faith. LR 39.1(c)(4)(E) states that even if a  
3 mediator excuses a party with full settlement authority from attending mediation, the party shall  
4 be on call by telephone during the conference. In its Motion, the Government seeks relief from  
5 both the requirement of LR 39.1(c)(4)(E) that a party with full settlement authority attend  
6 mediation, and the requirement that a party with full settlement authority be on call during the  
7 conference. The Government sought the relief requested through a Motion because it believed  
8 that the subject required a formal determination.

### 9 **III. Defendant's Objection No. 3**

10 Defendant asserts that he knows of no "Court Ordered Settlement Conference." (Def's  
11 Resp. at p. 5, lines 5-6.) On September 17, 2007, this Court appointed United States Magistrate  
12 Judge James P. Donohue as "Settlement Judge" and directed counsel to contact Judge Donohue's  
13 chambers to schedule a "settlement conference." (Docket Entry 42.) The September 28, 2007,  
14 letter from the Clerk of the Court to counsel in this matter confirmed a "settlement conference"  
15 has been scheduled before Judge Donohue. Whether the October 25, 2007, meeting is labeled a  
16 "settlement conference" or "mediation," the United States is prepared to engage in substantive  
17 and meaningful discussions in an effort to resolve this matter.

### 18 **IV. Discussion**

19 The issue is the United States' representative at this meeting. The Government requests  
20 that the Court enter an Order that the requirement of LR 39.1(c)(4)(E) will be fulfilled by the  
21 attendance of Charles Harwood, FTC Regional Director for the Northwest Region, at the  
22 October 25, 2007 mediation.

23 Such relief is not unusual. In a similar CAN-SPAM action in the District of Nevada, the  
24 Court ordered that because "no single individual has binding settlement authority . . . the  
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26 <sup>2</sup> If IMG's counsel believed the matter could have been handled through a telephonic conference,  
27 he could have suggested that during the exchange of emails.

government is in compliance with the Court's Settlement Conference Order by sending an official from the Commission who is familiar with Commission policies and can speak authoritatively regarding Commission practice and policy regarding settlement." United States v. TJ Web Production, No. 05-cv-00882 (D. Nev. June 22, 2006) (order regarding settlement discussions). (Exhibit 7.)<sup>3</sup> In the TJ Web case, the parties participated in the settlement conference, narrowed the issues, and ultimately reached an agreement. During the settlement conference, the Government was represented by the lead Department of Justice attorney who had litigated the case from its filing and a senior official from the FTC. The FTC Commissioners subsequently voted 5-0 to authorize the Department of Justice to file the proposed settlement in that case.<sup>4</sup>

The Government moves this Court to adopt the requested relief.

Dated: October 18, 2007

FOR PLAINTIFF UNITED STATES OF AMERICA

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<sup>3</sup> While the relief in TJ Web matter was from a Court Order rather than a local rule, the essence of the requested relief, and the relief itself, were the same as here. There, as here, the Government's request for relief noted that meetings of the FTC Commissioners are regulated by the Government in the Sunshine Act, 5 U.S.C. § 552b. That statute imposes a series of procedural requirements which govern both public and non-public meetings of the Commissioners.

<sup>4</sup> Press Release, Federal Trade Commission, Adult Entertainment Marketer Settles FTC Charges, Will Pay \$465,000 For Violating Spam Law (Jan. 30, 2007), <http://www.ftc.gov/opa/2007/01/tjweb.shtm> (last visited Oct. 17, 2007). (Exhibit 8.)

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 18, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such to the following CM/ECF registrant:

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