

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. CV05-1285L

JOINT STATUS REPORT AND
DISCOVERY PLAN

1. NATURE AND COMPLEXITY OF THE CASE.

**A. The United States' Statement of the Factual and Legal Bases of the
Claims.**

Plaintiff filed this action seeking civil penalties, a permanent injunction and other equitable relief, alleging that the Defendant violated Section 5(a) and (d) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM"), 15 U.S.C. § 7704(a) and (d), and the Federal Trade Commission's ("FTC") Adult Labeling Rule (the "Adult Labeling Rule" or the "Rule"), 16 C.F.R. Part 316.4.

Since May 19, 2004, and continuing to the present, Defendant has owned and operated dozens of commercial web sites that sell access to a vast collection of sexually

1 oriented videos and pictures. Defendant promotes these sites through an affiliate program
2 that pays people who sign on as “affiliates” to steer consumers to Defendant’s sites.
3 Affiliates advertise Defendant’s web sites through a variety of means such as email, pop-up
4 advertisements, banner advertisements, and web pages.

5 Some people who participate in Defendant’s affiliate program advertise and
6 promote Defendant’s commercial web sites through widely distributed commercial email
7 messages containing sexually explicit pictures and stories that hyperlink to Defendant’s
8 web sites. Defendant can identify a particular affiliate as the entity deserving payment
9 when a potential customer clicks through an email to one of Defendant’s sites due to the
10 specific characteristics of the hyperlinks in the email employed by the individual affiliate.
11 Since May 19, 2004, numerous email messages that advertise and promote Defendant’s
12 commercial web sites have been sent to computers used in interstate or foreign commerce
13 and communication.

14 In connection with the marketing and promotion of Defendant’s commercial web
15 sites, Defendant, through its affiliate program, has induced others, by monetary payments
16 and other consideration, to transmit commercial email messages on Defendant’s behalf. In
17 doing so, Defendant has procured the transmission of such messages and thereby “initiates”
18 as the term is defined under CAN-SPAM, 15 U.S.C. § 7702(9), the email messages sent by
19 its affiliates that promote and market Defendant’s web sites. In addition, because
20 Defendant’s web sites are being advertised or promoted by such messages, Defendant is
21 also a “sender,” as that term is defined under CAN-SPAM, 15 U.S.C. § 7702(16), of the
22 email messages that its affiliates are transmitting on Defendant’s behalf.

23 CAN-SPAM and the Rule do not forbid sending sexually oriented material via
24 email. Rather, they provide the electronic equivalent of a brown paper wrapper. Email
25 advertising sites like those owned by the Defendant must caution the reader in the email
26 subject line concerning the sexual content of the email, and the initially viewable area of the

1 email cannot contain sexually oriented material. Such email must also have a workable
2 “opt-out” option, and state the physical address of the sender. Thus, firms like the
3 Defendant are free to peddle their wares via email, they must merely conform to some basic
4 rules of law when they do so.

5 Based on the facts outlined above and others as alleged in the Amended Complaint,
6 Plaintiff alleges three causes of action: (1) Defendant’s acts or practices violate Section 5(d)
7 of the CAN-SPAM Act, 15 U.S.C. § 7704(d), and the Adult Labeling Rule, 16 C.F.R. §
8 316.4(a); (2) Defendant’s acts or practices violate Section 5(a)(5)(A)(ii) and Section 5(a)(3)
9 of the CAN-SPAM Act, 15 U.S.C. §§ 7704(a)(5)(A)(ii) and 7704(a)(3); and (3)
10 Defendant’s acts or practices violate Section 5(a)(5)(A)(iii) of the CAN-SPAM Act, 15
11 U.S.C. § 7704(a)(5)(A)(iii).

12 **B. Defendants’ Statement of the Factual and Legal Bases of the Defenses.**

13 This is a case of first impression under the recently enacted CAN-SPAM Act, 15
14 U.S.C. § 7701, *et seq.*, and the even more recently enacted regulations promulgated
15 thereunder at 16 C.F.R. Part 316.4, regulating unsolicited commercial email of a sexually-
16 oriented nature. The essential issue in this case is one of vicarious liability. In a nutshell,
17 the Plaintiff contends that the Act leaves providers of goods and services liable for “spam”
18 advertising of their products by others who are not agents, employees, officers, directors,
19 partners or otherwise under the control of the providers, notwithstanding the fact that those
20 providers, such as the Defendant, had no knowledge of the spam or of its illegal nature prior
21 to it being sent.

22 Congress passed the CAN-SPAM Act in December of 2003, effective January 1,
23 2004, only after considering numerous spam-related bills over the years. The Act includes
24 enabling legislation allowing the Federal Trade Commission (“FTC”) to promulgate
25 regulations of various types.
26

1 Central to this case are those regulations promulgated by the FTC related to
2 sexually-oriented spam, 16 C.F.R. Part 316.4, the self-styled “Adult Labeling Rules,” which
3 became effective May 19, 2004.

4 It is noteworthy that in May of this year, the FTC solicited and received public
5 comments concerning the possibility of creating a set of “safe harbor” provisions for those
6 in precisely the same position as Defendant Impulse Media Group, i.e., those who sell
7 products of services that are promoted by others whose conduct the seller cannot control.
8 Ironically, in apparent recognition that vicarious liability may not be appropriate in
9 situations such as that faced by Defendant Impulse Media Group, the FTC queried, “Should
10 the Commission adopt a ‘safe harbor’ with respect to opt-out and other obligations for
11 companies whose products or services are advertised by affiliates or other third-parties? If
12 not, why not? If so, what would be the appropriate criteria for such a safe harbor?”
13 Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 70
14 Fed. Reg. 25426, 25450 (May 12, 2005). Nevertheless, without answers to those questions,
15 the FTC brings this action against the Defendant alleging violation of the very conduct
16 questioned by Plaintiff’s posit.

17 Contrary to Plaintiff’s intimations in its Amended Complaint, Defendant Impulse
18 Media Group does not “pre-pay” members of its affiliate program to refer potential
19 customers to Defendant’s Web sites. Also contrary to Plaintiff’s allegations, no affiliates
20 advertise and promote Defendant’s commercial Web sites through widely distributed
21 commercial email messages with Defendant’s knowledge or consent.

22 Defendant Impulse Media Group submits that the United States lacks standing to
23 claim relief for alleged violations of 15 U.S.C. § 7704(d) and 16 C.F.R. Part 316.4(a) on the
24 basis that 15 U.S.C. § 7704(d) and 16 C.F.R. Part 316.4(a) are unconstitutionally vague and
25 therefore void.
26

1 Defendant Impulse Media Group submits that the evidence will not show that it has
2 unlawfully initiated transmission, to protected computers, of commercial email messages in
3 violation of 15 U.S.C. §§ 7704(a)(5)(A)(ii) and 7704(a)(3). Defendant Impulse Media
4 Group further submits that the evidence will not show that it has unlawfully initiated
5 transmission, to protected computers, of commercial email messages in violation of 15
6 U.S.C. § 7704(a)(5)(A)(iii).

7 Defendant Impulse Media Group will show that it has, at all times, maintained and
8 enforced a “zero tolerance” policy against violators of CAN-SPAM and the Adult Labeling
9 Rule of whom it has become aware.

10 This is not a complex case.

11 **C. The United States’ Response to Defendant’s Statement.**

12 Defendant asserts that it is noteworthy that in May of this year, the FTC solicited
13 and received public comments concerning the possibility of creating a set of safe harbor
14 provisions. Definitions, Implementation, and Reporting Requirements Under the
15 CAN-SPAM Act, 70 Fed. Reg. 25426, 25450 (May 12, 2005). The issue of a safe harbor
16 provision was raised by some commentators seeking a ruling from the FTC on a safe
17 harbor, but the FTC declined to establish a safe harbor for the reasons set forth in its
18 comments.

19 As stated in the FTC comments in the proposed rulemaking cited by Defendant:
20 “Some commenters asked the Commission for a ruling that content providers are not
21 responsible for e-mail messages advertising their product or service if the messages are sent
22 by affiliates or other third parties over which they have no control. The Commission
23 declines to issue so broad a statement -- especially because, in other contexts, it has
24 specifically held sellers liable for the actions of third-party representatives if those sellers
25 have failed to adequately monitor the activities of such third parties and have neglected to
26 take corrective action when those parties fail to comply with the law. The Commission

1 believes it inappropriate to excuse content providers in advance from the obligation to
2 monitor the activities of third parties with whom they contract. However, the Commission
3 includes questions in Part VII on whether a 'safe harbor' provision should be added to the
4 Rule and, if so, what criteria such a safe harbor might include." 70 Fed. Reg. at 25431
5 (footnotes omitted).

6 **2. ALTERNATIVE DISPUTE RESOLUTION.**

7 The parties agree to submit these matters to mediation pursuant to Local Rule CR
8 39.1.

9 **3. TIMING OF ALTERNATIVE DISPUTE RESOLUTION.**

10 The parties agree to submit these matters to mediation by October 27, 2006.

11 **4. PROPOSED DEADLINE FOR JOINING ADDITIONAL PARTIES.**

12 The parties proposed deadline for joining additional parties is January 20, 2006.

13 **5. PROPOSED DISCOVERY PLAN.**

14 **A. Fed. R. Civ. P. 26(f) Conference.**

15 The Fed. R. Civ. P. 26(f) conference was held telephonically on October 14, 2005.
16 Plaintiff was represented by counsel. Defendant was represented by counsel. Pursuant to
17 the Court's order of September 23, 2005, Plaintiff's initial Fed. R. Civ. P. 26(a) disclosures
18 will be provided on or before October 28, 2005. By agreement of the parties, Defendant's
19 initial Fed. R. Civ. P. 26(a) disclosures will be provided within one week of Plaintiff's
20 disclosures. This Joint Status Report and Discovery Plan pursuant to Fed. R. Civ. P. 26(f)
21 will have been filed by November 4, 2005.

22 **B. Discovery to be conducted.**

23 Plaintiff intends to serve discovery requests regarding, but not necessarily limited
24 to: the initiation, development, utilization and operation of Defendant's affiliate program;
25 the Defendant's relationship with each affiliate; copies of commercial electronic mail
26 messages sent by Defendant or an affiliate of Defendant as part of Defendant's affiliate

1 program; documents relating to earnings, payments, commissions or other consideration
2 provided to any affiliate, prospective affiliates or terminated affiliate; documents relating to
3 questions, concerns, complaints, or disputes from any person relating to the receipt of a
4 commercial electronic mail message related to Defendant's website(s), products, or
5 services; and financial statements.

6 Defendant intends to serve discovery requests regarding, but not necessarily limited
7 to: Plaintiff's facilities, processes, and procedures for receiving, processing, authenticating,
8 and investigating complaints received by Plaintiff for alleged violations of CAN-SPAM and
9 the Adult Labeling Rule; Plaintiff's investigation of Defendant; all notes, memoranda,
10 letters, electronic mail messages, inter-departmental communications, intra-departmental
11 communications, and communications between Plaintiff and outside parties and entities
12 related to Plaintiff's investigation of and claims against Defendant; identities and actions of
13 Plaintiff's agents, employees, officers, and representatives involved in any manner
14 whatsoever in the investigation by Plaintiff of Defendant; identities and actions of outside
15 entities, including but not limited to Microsoft Corp., involved in any manner whatsoever
16 with Plaintiff's investigation of Defendant; and all notes, memoranda, letters, electronic
17 mail messages, inter-departmental communications, intra-departmental communications,
18 and communications related to the FTC's promulgation of regulations codified in 16 C.F.R.
19 Part 316.4(a).

20 **C. Limitations on discovery.**

21 The parties agree that no changes or additions should be made to the limitations to
22 discovery imposed under the Federal Rules of Civil Procedure and the Local Civil Rules.

23 **D. Management of discovery.**

24 The parties agree that the Federal Rules of Civil Procedure and the Local Civil
25 Rules shall be used to manage discovery so as to minimize expenses.

26 **E. Other orders to be entered by the Court.**

1 The parties agree that, at the time of the Joint Status Report, no other orders should
2 be entered by the Court pursuant to Fed. R. Civ. P. 26(c) or Local Rules CR 16(b) and (c).

3 **6. DATE OF COMPLETION OF DISCOVERY.**

4 The parties agree that all discovery matters in this case will be completed by June
5 30, 2006.

6 **7. CONSENT TO MAGISTRATE JUDGE TO CONDUCT ALL**
7 **PROCEEDINGS.**

8 Plaintiff consents to a Magistrate Judge for all pre-trial matters. Defendant Impulse
9 Media Group consents to a Magistrate judge for all pre-trial matters. Defendant Impulse
10 Media Group does not agree to a Magistrate judge for trial on the basis that Defendant
11 Impulse Media Group respectfully demands a jury trial.

12 **8. BIFURCATION.**

13 The parties agree that the liability issues and damages issues in this case should not
14 be bifurcated.

15 **9. PRETRIAL STATEMENTS AND PRETRIAL ORDERS.**

16 The parties agree that the pretrial statements and a pretrial order pursuant to Local
17 Rules CR 16(e), (h), (i), and (l), and 16.1 should be required in whole and not dispensed.

18 **10. SUGGESTIONS FOR SHORTENING OR SIMPLIFYING CASE.**

19 The parties do not have further suggestions for shortening or simplifying this case.

20 **11. DATE FOR TRIAL.**

21 The parties agree that this matter will be ready for trial the week of November 27,
22 2006.

23 **12. JURY OR NON-JURY TRIAL.**

24 Defendant Impulse Media Group has requested a jury trial.

25 Plaintiff contends that any jury trial should be limited to a jury's determination of
26 Defendant's liability for civil penalties, *see Tull v. U.S.*, 481 U.S. 412 (1987), and that the

1 amount of civil penalty, and determinations regarding liability for and the nature of
2 injunctive relief are reserved to the Court.

3 Defendant agrees that it is entitled to have a jury determine its liability for civil
4 penalties, but disputes Plaintiff's contention that determinations regarding liability for
5 injunctive relief are reserved to the Court. Rather, Defendant observes that the Supreme
6 Court's holding in *Tull* specifically observed that where a "legal claim is joined with an
7 equitable claim, the right to jury trial on the legal claim, including all issues common to
8 both claims, remains intact. The right cannot be abridged by characterizing the legal claim
9 as 'incidental' to the equitable relief sought." *Tull*, 481 U.S. at 425 (citing *Curtis v. Loether*,
10 415 U.S., at 196, n. 11).

11 Defendant agrees that the amount of civil penalties and the nature of injunctive
12 relief falls fully within the sound discretion of the Court.

13 **13. NUMBER OF DAYS FOR TRIAL.**

14 The parties believe that this matter should be able to be tried within five court days.

15 **14. NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF TRIAL**
16 **COUNSEL.**

17 Jeffrey I. Steger
18 Office of Consumer Litigation
19 U.S. Department of Justice
20 P.O. Box 386
21 Washington, D.C. 20044
22 202-307-0047 (voice)
23 202-514-8742 (fax)
24 Jeffrey.steger@usdoj.gov
25 Attorney for Plaintiff
26

Robert S. Apgood
CARPELAW PLLC
2400 NW 80th Street #130
Seattle, WA 98117
206-624-2379 (voice)
206-784-6305 (fax)
rob@carpelaw.com
Attorney for Defendant

Brian C. Kipnis
Assistant U.S. Attorney
Western District of Washington
700 Stewart Street
Seattle, WA 9810
206-553-7970 (voice)
206-553-0882 (fax)
Attorney for Plaintiff

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2
3 **15. SERVICE ON REMAINING DEFENDANTS.**

4 All defendants have been served.

5 **16. SCHEDULING CONFERENCE PRIOR TO SCHEDULING ORDER.**

6 The parties do not request a scheduling conference prior to scheduling.

7
8 **OF COUNSEL:**

9 Alan Hile
10 Acting Associate Director for Marketing
11 Practices
12 Federal Trade Commission

13 K. Michelle Grajales
14 Attorney
15 Federal Trade Commission
16 600 Pennsylvania Ave. N.W., Rm 238
17 Washington, D.C. 20580
18 Phone: 202-326-3172
19 Fax: 202-326-3395

FOR THE UNITED STATES OF AMERICA

Peter D. Keisler, Jr.
Assistant Attorney General
Civil Division
U.S. Department of Justice

John McKay
United States Attorney

Brian Kipnis
Assistant U.S. Attorney
Western District of Washington
700 Stewart Street
Seattle, WA
Phone: 206-553-7970
Fax: 206-553-0882

20 s/ Jeffrey I. Steger
21 Jeffrey I. Steger
22 Trial Attorney
23 Office of Consumer Litigation
24 U.S. Department of Justice
25 P.O. Box 386
26 Washington, D.C. 20044
Phone: 202-307-0047
Fax: 202-514-8742
Email: Jeffrey.steger@usdoj.gov

FOR DEFENDANT IMPULSE MEDIA
GROUP, INC.

CARPELAW PLLC

s/ Robert S. Apgood

Robert S. Apgood, WSBA #31023

CARPELAW PLLC

2400 NW 80th Street #130

Seattle, WA 98117-4449

Telephone: (206) 624-2379

Facsimile: (206) 784-6305

Email: rob@carpelaw.com

DECLARATION OF SERVICE

I, Jeffrey I. Steger, hereby make the following Declaration from personal knowledge that on October 26, 2005, I electronically filed the foregoing

Joint Status Report and Discovery Plan

with the Clerk of the Court using the CM/ECF system. In accordance with their ECF registration agreement, the Clerk of the Court will send e-mail notification of such filing to the following attorney:

Robert S. Apgood, WSBA #31023
CARPELAW PLLC
2400 NW 80th Street #130
Seattle, WA 98117-4449
Telephone: (206) 624-2379
Facsimile: (206) 784-6305
Email: rob@carpelaw.com

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of October 2005 in Washington, D.C.

s/ Jeffrey I. Steger
Jeffrey I. Steger
Trial Attorney
Office of Consumer Litigation
U.S. Department of Justice
P.O. Box 386
Washington, D.C. 20044
Phone: 202-307-0047
Fax: 202-514-8742
Email: Jeffrey.steger@usdoj.gov