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

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9 UNITED STATES OF AMERICA,)
10 Plaintiff,) No. C05-1285RSL
11 v.) ORDER DENYING DEFENDANT’S
12 IMPULSE MEDIA GROUP, INC.,) MOTION FOR ATTORNEY’S
13 Defendant.) FEES AND COSTS

14 This matter comes before the Court on “Defendant’s Motion for Attorneys’ Fees
15 and Costs Pursuant to the Equal Access to Justice Act (28 U.S.C. § 2412).” Dkt. # 95. Having
16 reviewed the memoranda, declarations, and exhibits submitted by the parties and having
17 presided over the trial of this matter, the Court finds as follows:

18 (1) Defendant prevailed at trial and timely filed its motion for attorney’s fees and costs
19 under the Equal Access to Justice Act (“EAJA”).

20 (2) Pursuant to the EAJA, the Court “shall award to a prevailing party other than the
21 United States fees and other expenses . . . incurred by that party in any civil action . . . brought
22 by or against the United States . . . unless the court finds that the position of the United States
23 was substantially justified or that special circumstances make an award unjust.” 28 U.S.C.
24 § 2412(d)(1)(A). The government bears the burden of establishing that its litigation position was
25 substantially justified. Kali v. Bowen, 854 F.2d 329, 332 (9th Cir. 1987). The fact that the
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1 government did not prevail does not resolve the issue. Edwards v. McMahon, 834 F.2d 796, 802
2 (9th Cir. 1987). The test for whether the government's position was substantially justified turns
3 on its reasonableness: was there a dispute over which reasonable minds could differ? Gonzales
4 v. Free Speech Coalition, 408 F.3d 613, 618 (9th Cir. 2005).

5 Defendant acknowledges that this litigation raised novel issues of law and fact.
6 Motion at 4-5. The government's argument that defendant could be liable for injunctive relief
7 under the CAN-SPAM Act, 15 U.S.C. § 7701 *et seq.*, regardless of whether defendant knew its
8 affiliates were utilizing e-mail to promote its products was a matter of first impression and was
9 based on supportable interpretations of the statute and its legislative history. See Gonzales, 408
10 F.3d at 619. Although the Court did not adopt the government's position in its entirety, it also
11 did not adopt defendant's position. The Court determined that the government merely had to
12 prove that defendant paid its affiliates to send commercial e-mail in order to obtain injunctive
13 relief: it did not have to prove that defendant was aware that its affiliates were violating the
14 CAN-SPAM Act.

15 Following the Court's summary judgment ruling, the focus of the litigation moved
16 from an analysis of the governing law to an intractable dispute regarding defendant's intent. A
17 genuine issue of fact existed regarding whether defendant had intentionally paid its affiliates to
18 drive traffic to defendant's websites with the understanding that the affiliates would use e-mails
19 to generate interest. The government's decision to seek a resolution of that factual issue at trial
20 was both reasonable and substantially justified. Although the jury ultimately concluded that
21 plaintiff had failed to meet its burden of proof, the Court was left with the distinct impression
22 that plaintiff lost not because there was no evidence that defendant procured the transmission of
23 the e-mails, but because plaintiff had failed to marshal the proof in a way that would convince
24 the tech-savvy jury chosen by the parties.

25 In its reply, defendant points out that the United States sought a permanent
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1 injunction after the jury had determined that defendant had done nothing wrong. To the extent
2 defendant seeks an award of fees based on the filing of this motion, the argument was not raised
3 in a timely fashion. The Court will not, therefore, determine whether a single unjustified motion
4 could destroy the safe haven provided in § 2412(d)(1)(A). See Al-Harbi v. Immigration and
5 Naturalization Serv., 284 F.3d 1080, 1084-85 (9th Cir. 2002) (court should evaluate case as a
6 whole, not “atomized line-items”).

7 (3) The Court is sympathetic to defendant’s plight. It spent years and a significant
8 amount of money defending itself from the government’s allegations. By the time it was finally
9 exonerated, it had spent over \$100,000 in attorney’s fees. Fee shifting is not appropriate,
10 however, if the government’s case was substantially justified. In this case, the government’s
11 legal theories were adequately supported and the decision to seek a jury determination regarding
12 defendant’s intent was reasonable. If it is any consolation, defendant should know that the fees
13 paid to defend this litigation were well-spent: counsel’s first-rate lawyering proved to be its
14 biggest asset.

15 (4) Neither the EAJA nor 28 U.S.C. § 1920 authorizes the recovery of shipping
16 expenses.

17 For all of the foregoing reasons, defendant’s motion for an award of fees and costs
18 is DENIED.

19 Dated this 10th day of October, 2008.

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22 Robert S. Lasnik
23 United States District Judge
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