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14 **BLUESTREAM MEDIA**

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 HYPERTOUCHE, INC.,

15 Plaintiff,

16 v.

17 BVWEBTIES, LLC, BLUESTREAM
18 MEDIA,

19 Defendants.

Civ No. C-04-0880-MMC

**ANSWER TO COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF-VIOLATION OF
CAN-SPAM ACT OF 2003**

Jury Trial Demanded

20
21 Defendant Bluestream Media (“Bluestream”) answers the complaint filed by Plaintiff
22 Hypertouch, Inc. (“Hypertouch”) as follows:

23 **JURISDICTION, VENUE AND PARTIES**

24 1. Bluestream admits that plaintiff purports to bring this action under the Court’s
25 original jurisdiction under the CAN-SPAM Act of 2003, 15 U.S.C. § 7701, et seq. Bluestream
26 denies the remaining allegations in Paragraph 1 of the Complaint.

27 2. Bluestream denies that it has committed any unlawful acts in the judicial district of
28 this Court or in the State of California. Bluestream lacks sufficient information or knowledge to

1 admit or deny the remaining allegations of Paragraph 2 of the Complaint and on that basis, denies
2 each and every allegation thereof.

3
4 3. Bluestream lacks sufficient information or knowledge to admit or deny the
5 allegations of Paragraph 3 of the Complaint and on that basis, denies each and every allegation
6 thereof.

7 4. Bluestream lacks sufficient information or knowledge to admit or deny the
8 allegations of Paragraph 4 of the Complaint and on that basis, denies each and every allegation
9 thereof.

10 5. Bluestream admits that it is currently a partnership located in Sacramento
11 California. Bluestream denies the remaining allegations in Paragraph 5 of the Complaint.

12 **FIRST CAUSE OF ACTION**

13 6. Bluestream incorporates by reference its responses to the allegations in paragraphs
14 1 through 5 as if set forth here in full.

15 7. Bluestream lacks sufficient information or knowledge to admit or deny the
16 allegations of Paragraph 7 of the Complaint and on that basis, denies each and every allegation
17 thereof.

18 8. Bluestream admits that Exhibit 1 to the Complaint purports to contain a portion of
19 an email communication from Bluestream. Bluestream denies the remaining allegations of
20 Paragraph 8 of the Complaint.

21 9. To the extent the allegations contained in Paragraph 9 of the Complaint contain
22 legal conclusions no answer is required. Bluestream lacks sufficient information or knowledge to
23 admit or deny the allegations of Paragraph 9 of the Complaint and on that basis, denies each and
24 every allegation thereof.

25 10. To the extent the allegations contained in Paragraph 10 of the Complaint contain
26 legal conclusions no answer is required. Bluestream admits that Exhibit 3 purports to be a print-
27 out of a WhoIs database for the domain name registration for the domain name
28

1 TRACKINGCLICKS.com. Bluestream denies the remaining allegations of Paragraph 10 of the
2 Complaint.

3 11. To the extent the allegations contained in Paragraph 11 of the Complaint contain
4 legal conclusions no answer is required. Bluestream denies the allegations of Paragraph 11 to the
5 extent they relate to Exhibit 4. Bluestream lacks sufficient information or knowledge to admit or
6 deny the remaining allegations of Paragraph 11 of the Complaint and on that basis, denies each
7 and every allegation thereof.

8 12. To the extent the allegations contained in Paragraph 12 of the Complaint contain
9 legal conclusions no answer is required. Bluestream denies the allegations of Paragraph 12 of the
10 Complaint as they relate to Bluestream. Bluestream lacks sufficient information or belief to
11 admit or deny the remaining allegations of Paragraph 12 of the Complaint and on that basis,
12 denies each and every allegation thereof.

13 13. To the extent the allegations contained in Paragraph 13 of the Complaint contain
14 legal conclusions no answer is required. Bluestream lacks sufficient information or belief to
15 admit or deny the allegations of Paragraph 13 of the Complaint and on that basis, denies each and
16 every allegation thereof.

17 14. To the extent the allegations contained in Paragraph 14 of the Complaint contain
18 legal conclusions no answer is required. Bluestream denies the allegations of Paragraph 14 of the
19 Complaint as they relate to Bluestream. Bluestream lacks sufficient information or belief to
20 admit or deny the remaining allegations of Paragraph 14 of the Complaint and on that basis,
21 denies each and every allegation thereof.

22 15. To the extent the allegations contained in Paragraph 15 of the Complaint contain
23 legal conclusions no answer is required. Bluestream denies the allegations of Paragraph 15 of the
24 Complaint as they relate to Bluestream. Bluestream lacks sufficient information or belief to
25 admit or deny the remaining allegations of Paragraph 15 of the Complaint and on that basis,
26 denies each and every allegation thereof.

27 16. To the extent the allegations contained in Paragraph 16 of the Complaint contain
28 legal conclusions no answer is required. Bluestream denies the allegations of Paragraph 16 of the

1 Complaint as they relate to Bluestream. Bluestream lacks sufficient information or belief to
2 admit or deny the remaining allegations of Paragraph 16 of the Complaint and on that basis,
3 denies each and every allegation thereof.

4 17. To the extent the allegations contained in Paragraph 17 of the Complaint contain
5 legal conclusions no answer is required. Bluestream denies the allegations of Paragraph 17 of the
6 Complaint as they relate to Bluestream. Bluestream lacks sufficient information or belief to
7 admit or deny the remaining allegations of Paragraph 17 of the Complaint and on that basis,
8 denies each and every allegation thereof.

9
10 **AFFIRMATIVE DEFENSES**

11 Bluestream further asserts the following defenses to the claims for relief pleaded in the
12 Complaint:

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14 **First Affirmative Defense**

15 The Complaint, and each purported claim alleged therein, fail to state facts upon which
16 relief can be granted against Bluestream.

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18 **Second Affirmative Defense**

19 The Complaint, and each purported claim alleged therein, are vague, ambiguous and
20 uncertain.

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22 **Third Affirmative Defense**

23 Bluestream is informed and believes, and thereon alleges, that Plaintiff lacks standing to
24 bring a claim under the CAN-SPAM Act of 2003.

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26 **Fourth Affirmative Defense**

27 Bluestream denies that it is liable for any violations of the Can-Spam Act of 2003.
28 However, if such liability exists, Bluestream is entitled to a reduction of damages under 15 U.S.C.
7706(g)(3)(D) on grounds that Bluestream has established and implemented, with due care,

1 commercially reasonable practices designed to effectively prevent any violations of the Can-
2 Spam Act of 2003, or any violations that may have occurred, which Bluestream denies, occurred
3 despite such commercially reasonable efforts.

4
5 **Fourth Affirmative Defense**

6 Bluestream has substantially complied with the requirements of the law as they pertain to
7 this lawsuit and such substantial compliance bars plaintiff's claims.

8 **Fifth Affirmative Defense**

9 No threat of immediate or irreparable harm exists sufficient to support a grant of
10 injunctive relief.

11 **Sixth Affirmative Defense**

12 The Complaint fails to state a sufficient basis for injunctive relief, in that any such
13 injunctive relief would be inconsistent with the requirements of, or orders issued by, federal, state
14 and/or local agencies.

15 **Seventh Affirmative Defense**

16 Plaintiff acknowledged, ratified, consented to, and acquiesced in the alleged acts or
17 omissions, if any, of defendants, thus barring plaintiff from any relief prayed for herein.

18 **Eighth Affirmative Defense**

19 The Complaint is barred, in whole or in part, in that plaintiff has waived any claims it may
20 have against Bluestream.

21 **Ninth Affirmative Defense**

22 The Complaint is barred, in whole or in part, by the equitable doctrine of estoppel.

23 **Tenth Affirmative Defense**

24 The Complaint is barred, in whole or in part, by the doctrine of unclean hands.
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PRAYER

WHEREFORE, Bluestream prays that:

1. Plaintiff take nothing by its Complaint;
 2. That judgment be entered in favor of Bluestream herein;
 3. That Bluestream be awarded its reasonable attorneys' fees and costs in this action;
- and
4. For such other and further relief as the Court deems just and proper.

Dated: April 19, 2004

GRAY CARY WARE & FREIDENRICH LLP

By Scott W. Pink
SCOTT W. PINK
Attorneys for Defendant
BLUESTREAM MEDIA

PROOF OF SERVICE BY MAIL

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within cause. My business address is Gray Cary Ware & Freidenrich, 400 Capitol Mall, Suite 2400, Sacramento, California 95814-4428.

I served the below listed document(s) described as: ANSWER TO COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF-VIOLATION OF CAN-SPAM ACT OF 2003 on April 19, 2004 on the following parties to this cause by mailing a copy of the above document(s) as follows:

**Attorneys for Plaintiff
HYPER TOUCH, INC.**

John L. Fallat, Esq.
Law Offices of John L. Fallat
907 Sir Francis Drake Blvd., Suite 100
Kentfield, CA 94904-1502

**Attorneys for Defendant
BVWEBTIES, LLC**

Bingham McCutchen LLP
James G. Snell, Esq.
1900 University Avenue
East Palo Alto, CA 94303

I am familiar with the office practice of Gray Cary Ware & Freidenrich for collecting and processing documents for mailing with the United States Postal Service, which practice is that when documents are deposited with the Gray Cary Ware & Freidenrich personnel responsible for depositing documents with the United States Postal Service, such documents are delivered to the United States Postal Service that same day in the ordinary course of business with postage thereon fully prepaid. I placed a sealed envelope containing the document(s) in Gray Cary Ware & Freidenrich's Sacramento interoffice mail, addressed to the above parties.

I declare that I am employed in the office of a member of the Bar of or permitted to practice before this Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 19, 2004, at Sacramento, California.



Paula Borgens