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18 BVWEBTIES, LLC

19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA

22 Hypertouch, Inc.,
23 Plaintiff,
24 v.
25 BVWebTies, LLC and BlueStream Media,
26 Defendants.

CASE NO. C-04-0880MMC

**JOINT CASE MANAGEMENT STATEMENT
AND [PROPOSED] ORDER**

1 The parties to the above-entitled action jointly submit this Case Management
2 Statement and Proposed Order and request the Court to adopt it as its Case Management Order in
3 this case.

4 **DESCRIPTION OF THE CASE**

5 **1. A brief description of the event underlying the action:**

6 This is an action under the CAN-SPAM Act of 2003. Plaintiff Hypertouch, Inc.
7 claims that it provides an Internet access service within the meaning of 15 U.S.C. § 7703(1).
8 Plaintiff claims that defendants BVWebTies and Bluestream Media violated various provisions of
9 the CAN-SPAM Act by sending certain email transmissions to plaintiff between January 1, 2004
10 and March 3, 2004. Defendants deny that they have violated the CAN-SPAM Act, but are
11 unable at this point to more specifically respond to such claims as plaintiff has not disclosed the
12 date, time, content and other relevant details of the alleged transmissions.

13 **2. What are the factual and legal basis for plaintiff's claims and defendants'**
14 **defenses? Defendant's counter-claims and plaintiff's defenses to the counterclaims?**

15 Plaintiff contends that the following factual issues are in dispute and establish
16 violations of the CAN-SPAM Act:

- 17 1. Whether the header information that accompanied 41 marketing
18 solicitations contained information that was materially false or materially
19 misleading;
- 20 2. Whether the IP address of the contacting machine matched the identities
21 provided by the defendants of the machines delivering mail to Hypertouch;
- 22 3. Whether the principal host names provided by the defendants on 41
23 marketing emails matched the identifiers on the mail;
- 24 4. Whether the defendants gave the names of other machines rather than their
25 own when sending email to plaintiff's servers;
- 26 5. Whether defendants sent at least 14 separate items of electronic mail to the
27 plaintiff that had no valid physical postal address to the sender;
- 28 6. Whether defendants sent 57 separate items of electronic mail to plaintiff's

1 addresses generated using automated means and

- 2 7. Whether 41 pieces of electronic mail sent to plaintiff included a domain
3 name (“trackingclicks.com”) which was registered to a false or non-
4 existent California corporation.

5 Defendants dispute that plaintiff provides an Internet access service. Defendants
6 deny that they violated the CAN-SPAM Act, but are unable at this time to respond to the specific
7 alleged violations referenced above as plaintiff has not disclosed any details regarding those
8 violations. Even if such violations could be shown, defendants deny a pattern or practice as
9 required for certain alleged violations. And even if such violations could be shown, each
10 defendant denies that it had actual knowledge or consciously avoided knowing, whether the other
11 defendant was engaging or would engage in a pattern or practice that violated the Act. 15 U.S.C.
12 §7706(g)(2).

13 **3. What are the principal factual and legal issues in dispute?**

14 Plaintiff contends that the following violations of the CAN-SPAM ACT occurred:

- 15 1. 41 transmissions from defendants to plaintiff violated the CAN-SPAM Act
16 of 2003 (15 U.S.C. §7705, et seq.);
17 2. 57 automated electronic items of mail from defendants to plaintiff violated
18 U.S.C. §7705(b)(1)(A)(ii);
19 3. 14 items of electronic mail from defendants sent to plaintiff had no valid
20 physical postal address violated 15 U.S.C. §7705(a)(5)(iii);
21 4. Three separate transmissions from defendants to plaintiff generated after a
22 request to mechanisms requesting not to receive future commercial
23 electronic mail messages violated 15 U.S.C. §7705(a)(4);
24 5. 41 pieces of electronic mail from defendants to plaintiff exhibited a domain
25 name that related to a false or non-existent California corporation is
26 conduct in violation of 15 U.S.C. §7705(a)(1);
27 6. 41 pieces of electronic mail claiming to be “mail.bluestreammedia.com”
28 which resolved to a different IP address violated 15 U.S.C. §7705(a)(1).

1 Defendants deny that they have violated the CAN-SPAM Act. As plaintiff has not
2 yet disclosed sufficient details regarding those alleged transmissions, defendants are unable to
3 respond specifically to those allegations at this time.

4 **4. The other factual issues (e.g., service of process, personal jurisdiction, subject**
5 **matter jurisdiction or venue) which remain unresolved for the reason stated below and how**
6 **the parties propose to resolve those issues:**

7 Defendant BVWebTies contests personal jurisdiction. Defendants contest that
8 plaintiff has standing to bring the claims. Defendants are unable to determine the other factual
9 issues at this time as plaintiff has not disclosed the date, time, content and other relevant details of
10 the alleged transmissions.

11 **5. What are the issues that can be narrowed by agreement or by motion? Are there**
12 **dispositive or partially dispositive issues appropriate for decision on motion?**

13 The parties may be able to stipulate to certain factual issues after initial
14 disclosures. Defendants intend to bring motions for summary judgment upon completion of
15 discovery.

16 **6. What are the motions anticipated by the parties?**

17 Defendants intend to bring motions for summary judgment upon completion of
18 discovery.

19 **7. What relief does plaintiff seek? What is amount of damages sought by plaintiff's**
20 **claims? What is the amount of damages sought by defendant's counterclaims? How are**
21 **damages computed?**

22 Plaintiff claims statutory damages of \$44,700.00 and unknown fines, plus
23 attorneys' fees. Plaintiff claims the fines are to be determined by a trier of fact after
24 determination if defendants committing offence received anything of value aggregating \$5000 or
25 more during any one year period under 15 USC §7701 and §7702.

26 15USC §7705(b)(1)(A)(ii) Statutory fines:

27 57x\$250 = \$14,250

28 15USC §7705(a)(5)(iii) Statutory fines:

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12 x \$250 = \$3500.

15USC §7705(a)(1) Statutory fines:

41 x \$250 = \$10,250.

15USC §7705(a)(1) Statutory fines:

41 x \$250 = \$10,250.

15USC §7705(a)(1) Statutory fines:

3 x \$250 = \$750

15USC §7703(1)(B)(ii) Statutory fines:

57 x \$100 = \$5700.

Total \$44,700 + Attorneys fees

The defendants dispute that plaintiff is entitled to any statutory damages, fines or attorneys’ fees or other relief. If damages are awarded, defendants are entitled to a reduction of damages under 15 U.S.C. §7706(g)(3)(d) on grounds that they established and implemented with due care, commercially reasonable practices and procedures designed to effectively prevent such violation or the violation, if any, occurred despite commercially reasonable efforts to maintain compliance with such practices and procedures. No counterclaims have yet been filed.

8. The parties which have not been and the reasons:

All parties have been served.

9. The additional parties which the below-specified parties intend to join and the intended time to frame for such joinder:

There are no other parties that intend to join the lawsuit.

10. The following parties consent to assignment of this case to a United States Magistrate Judge for [court or jury] trial:

None.

1 Defendants each intend to serve requests for production, interrogatories and
2 requests for admissions on plaintiff. In addition, defendants intend to notice the deposition of
3 plaintiff under Rule 30(b)(6) of the Federal Rules of Civil Procedure. Defendants may seek
4 follow-up discovery based on plaintiff's disclosures and responses to discovery.

5 The parties propose a discovery cut-off date of January 31, 2005.

6 **TRIAL SCHEDULE**

7 **15. The parties request a trial date as follows:**

8 The parties request a trial date in March 2005.

9 **16. The parties expect that the trial will last for the following number of days:**

10 The parties expect that trial will last for 1-3 days.

11 **OTHER ISSUES**

12 **17. Are there related cases pending before other Judges of this Court?**

13 None.

14 **18. What are the prospects for settlement? Does any party wish to have a**
15 **settlement conference with another Judge or Magistrate Judge? How can settlement efforts**
16 **be assisted?**

17 It is unclear at this point whether this case can be settled. However, the parties
18 have agreed to submit to Court-ordered mediation.

19 **19. Such other matters as any party considers conducive to the just, speedy and**
20 **inexpensive determination of this action.**

21 None at this time.

22 Dated: _____

/s/

JOHN L. FALLAT

Attorney for Plaintiff Hypertouch, Inc.

24
25 Dated: _____

/s/

JAMES G. SNELL

Attorney for Defendant BVWebTies, LLC

1 Dated: _____

/s/
SCOTT W. PINK
Attorneys for Defendant BlueStream Media

5 **CASE MANAGEMENT ORDER**

6 The Case Management Statement and Proposed Order is hereby adopted by the
7 Court as the Case Management Order for the case and the parties are ordered to comply with this
8 Order. In addition, the Court orders:

9 [The Court may wish to make additional orders, such as:

- 10 a. Referral of the parties to Court or private ADR process;
- 11 b. Schedule a further case management conference;
- 12 c. Schedule and time and content of supplemental disclosures;
- 13 d. Specially set motions;
- 14 e. Impose limitations on disclosure or discovery;
- 15 f. Set time for disclosure of identity, background and opinions of experts;
- 16 g. Set deadlines for completing fact and expert discovery;
- 17 h. Set time for parties to meet and confer regarding pretrial submissions;
- 18 i. Set deadline for hearing motions directed to the merits of the case;
- 19 j. Set deadline for submissions of pretrial material;
- 20 k. Set date and time for pretrial conference;
- 21 l. Set a date a time for trial.]

22 Dated: _____

UNITED STATES DISTRICT/MAGISTRATE
JUDGE