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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11
12 HYPERTOUCHE, INC., a California
13 corporation,

14 Plaintiff,

15 v.

16 KRAFT FOODS, INC., a Virginia corporation,
17 VICT. TH. ENGWALL & CO., a Delaware
corporation,

18 Defendants.
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CASE NO. C 05-01589 PJH

**VICT. TH. ENGWALL & CO.'S
ANSWER AND SEPARATE DEFENSES
TO FIRST AMENDED COMPLAINT**

20 Defendant Vict. Th. Engwall & Co. ("Vict. Th. Engwall") answers the First Amended
21 Complaint ("Complaint") of Plaintiff Hypertouch, Inc. ("Plaintiff" or "Hypertouch"), on personal
22 knowledge as to its own activities and on information and belief as to the activities of others, as
23 follows:

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JURISDICTION, VENUE, AND PARTIES

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2 1. Answering the allegations of Paragraph 1, Vict. Th. Engwall admits that this Court
3 has original jurisdiction, in that the Complaint avers to bring this action under the CAN-SPAM
4 Act of 2003 (15 U.S.C. §7701 et seq.), the Computer Fraud and Abuse Act. Except as thus
5 expressly admitted, Vict. Th. Engwall denies the allegations of Paragraph 1.

6 2. Answering the allegations of Paragraph 2, Vict. Th. Engwall admits that this Court
7 has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§1331 and supplemental
8 jurisdiction pursuant to 28 U.S.C. §1367, in that the Complaint avers to be an action for violation
9 of the CAN-SPAM Act of 2003 (15 U.S.C. §7701 et seq.) and California Business & Professions
10 Code §17529.5. Except as thus expressly admitted, Vict. Th. Engwall denies the allegations of
11 Paragraph 2.

12 3. Vict. Th. Engwall lacks knowledge or information sufficient to form a belief as to
13 the truth of the allegations of Paragraph 3, and on that basis denies those allegations.

14 4. Answering the allegations of Paragraph 4, Vict. Th. Engwall admits that this Court
15 has personal jurisdiction over it, in that the Complaint avers that Vict. Th. Engwall has conducted
16 business in California.

17 5. Answering the allegations of Paragraph 5, Vict. Th. Engwall admits that venue is
18 proper as to it, in this judicial district pursuant to 28 U.S.C. § 1391(b). For the remaining
19 allegations of Paragraph 5, Vict. Th. Engwall lacks knowledge or information sufficient to form a
20 belief as to the truth of those allegations, and on that basis denies them.

21 6. Vict. Th. Engwall lacks knowledge or information sufficient to form a belief as to
22 the truth of the allegations of Paragraph 6, and on that basis denies those allegations.

23 7. Vict. Th. Engwall lacks knowledge or information sufficient to form a belief as to
24 the truth of the allegations of Paragraph 7, and on that basis denies those allegations.

25 8. Vict. Th. Engwall admits that it is a corporation organized under the laws of
26 Delaware, but denies that its principal place of business is in Northfield, Illinois. Vict. Th.
27 Engwall denies any remaining allegations of Paragraph 8.
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1 sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

2 18. Vict. Th. Engwall denies that it sent any electronic mail to Plaintiff. As to the
3 remaining allegations of Paragraph 18, Vict. Th. Engwall lacks knowledge or information
4 sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

5 19. Vict. Th. Engwall denies that it sent any electronic mail to Plaintiff. As to the
6 remaining allegations of Paragraph 19, Vict. Th. Engwall lacks knowledge or information
7 sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

8 20. Vict. Th. Engwall denies that it sent any electronic mail to Plaintiff. As to the
9 remaining allegations of Paragraph 20, Vict. Th. Engwall lacks knowledge or information
10 sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

11 21. Vict. Th. Engwall denies that Plaintiff is entitled to any damages and denies any
12 remaining allegations of Paragraph 21.

13 22. Vict. Th. Engwall denies that Plaintiff is entitled to any injunctive relief and denies
14 any remaining allegations of Paragraph 22.

15 23. Vict. Th. Engwall denies that Plaintiff is entitled to any attorney fees and costs and
16 denies any remaining allegations of Paragraph 23.

17 24. Vict. Th. Engwall denies the allegations of Paragraph 24.

18 **SECOND CAUSE OF ACTION**

19 (Violation of California Business & Professions Code § 17529.5)

20 (Against All Defendants)

21 25. Answering the allegations of Paragraph 25, Vict. Th. Engwall incorporates its
22 responses to Paragraphs 1 through 24 as if fully set forth herein.

23 26. Vict. Th. Engwall denies that it sent any electronic mail to Plaintiff. As to the
24 remaining allegations of Paragraph 26, Vict. Th. Engwall lacks knowledge or information
25 sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

26 27. Vict. Th. Engwall denies that Plaintiff is entitled to any damages and denies any
27 remaining allegations of Paragraph 27.

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SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

28. Plaintiff's claims are barred for failure to state a claim on which relief can be granted, including but not limited to a failure to meet the requirements of the CAN-SPAM Act of 2003, 15 U.S.C. § 7704, and/or California Business & Professions Code § 17529.5.

SECOND SEPARATE DEFENSE

29. Plaintiff's claims are barred because to the extent that any alleged unlawful e-mails were sent, which Vict. Th. Engwall expressly denies, such e-mails were transmitted accidentally and/or after implementation of reasonable measures or procedures to avoid sending unlawful e-mails.

THIRD SEPARATE DEFENSE

30. Plaintiff's alleged injury is the result, in whole or in part, of its own or others' actions and comparative or contributory fault. In addition, if any damages have resulted, Plaintiff failed to mitigate.

FOURTH SEPARATE DEFENSE

31. Plaintiff's claims are barred, in whole or in part, by the doctrines of laches, waiver and estoppel.

FIFTH SEPARATE DEFENSE

32. Plaintiff's claims are barred by the doctrine of unclean hands.

DATED: June 2, 2005.

PERKINS COIE LLP

By: _____ /s/
Kenneth B. Wilson
Suchon Tuly
Attorneys for Defendant Vict. Th. Engwall & Co.

