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7 IN THE SMALL CLAIMS COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF SAN MATEO
9

10 Hypertouch Inc.) Case No. SCS-111805
11)
12 Plaintiff)
13 v.) PLAINTIFF'S RESPONSE TO
14) DEFENDANT'S MOTION FOR
15 Data Exchange Corporation) CHANGE OF VENUE
16 BidVantage, Inc.)
17) Trial Date: SEPTEMBER 18, 2002
18 Defendants.)
19 _____)

20 FACTS

21 Starting on or around May 12, 2000, Defendants DEX/BidVantage sent unsolicited electronic mail
22 advertisements to the mail servers owned and operated by Plaintiff Hypertouch Inc., a corporation
23 located in Redwood City, San Mateo County, California. As is clearly indicated in Plaintiff's policy
24 and posted both on its web sites and in its mail servers' SMTP banners, and as is specified by
25 California Business and Professions Code, such activity is prohibited. Indeed, Plaintiff's mail
26 servers' logs recorded in detail the communications between Defendants' machines and Plaintiff's
27 servers located in San Mateo County. In each instance when Defendants' machines initiated
28 contact, an immediate industry standard 'NO UCE' notice was sent back to Defendants, and in each
instance Defendants' machines ignored this notice and sent the unsolicited message. These

1 electronic mail advertisements violated Plaintiff's posted email policy and a number of laws,
2 including most notably, California Business And Professions Code Section 17538.4 and 17538.45.
3 Plaintiff is an "Electronic mail service provider" as specified in each of those Sections. The
4 unsolicited messages were received, processed, stored, archived and dealt with by the email
5 infrastructure and personnel located in San Mateo County. Section 17538.45 provides for the
6 recovery of:

7 "liquidated damages of fifty dollars (\$50) for each electronic mail
8 message initiated or delivered in violation of this section."

9 This action is to recover those damages for the harm caused to Plaintiff by Defendants.

10 BACKGROUND

11 Unsolicited electronic mail advertisements, also known as Unsolicited Commercial Email
12 (UCE), junk email and/or most often simply "spam," places a tremendous burden upon email
13 service providers (ESP). The Hormel Foods Corporation has graciously conceded to the use of the
14 term "spam" for UCE, which is differentiated from "SPAM" Hormel's food product by the use of
15 all capital letters for its trademarked name. Indeed on their official SPAM website Hormel
16 provides a concise summary of why and from where the term spam arose:

17 Use of the term "SPAM" was adopted as a result of the Monty
18 Python skit in which a group of Vikings sang a chorus of "SPAM,
19 SPAM, SPAM . . ." in an increasing crescendo, drowning out other
20 conversation. Hence, the analogy applied because UCE was
21 drowning out normal discourse on the Internet.¹

22 Conservative estimates are that spam comprises currently at least 30-40% of the number of
23 email messages entering a typical service provider's email system, inflicting billions of dollars in
24 costs to companies yearly. The damage and costs spam causes ESPs are quite real. Plaintiff has had
25 to purchase additional computers, hard drives, and network bandwidth to handle the demands
26 placed on its email systems by spammers. A considerable amount of human time and effort must be
27 spent on a continuing basis due to the illegal activity such as that by Defendants. Plaintiff servers

28 ¹Hormel Food's Official Spam website (specifically: http://www.spam.com/ci/ci_in.htm)

1 have gone off line or been hung and network connectivity effectively interrupted during
2 particularly aggressive spam runs.

3 DISCUSSION

4 The Defendants refer to their spam as allegedly “offending email.” Indeed their case
5 citations are off-point. The cases they cite are for actions based on the "anguish, emotional distress"
6 cause by offending letters delivered via postal mail.

7 In motor vehicle accidents, as in other cases where physical injury
8 is directly caused by what has happened, the injury occurs at the
9 place where the happening occurs, and there is logic in having that
10 place a proper one for the trial. In an action such as plaintiff's,
11 however, the place where the injury occurs is not the locale of the
12 events which, ultimately, cause the injury. [The plaintiff] is injured
13 not at the site of the events, but, brooding over the wrongs done
14 her, at the place or places where worry and loss of sleep finally take
15 their toll.¹

16 This action is not, as Defendants quote in their motion, based on “severe humiliation, anguish,
17 emotional distress and trauma” from getting Defendants’ UCE. Unlike emotional damages which
18 may have no “no definite situs,” the locus of the effect of Defendants’ criminal conduct² as defined
19 by law is exclusively at Plaintiff’s location. The courts have dealt with venue issues for a
20 computer/Internet enabled offenses:

21 ¹ Cacciaguidi v. Superior Court (1990) 226 Cal.App.3d 181 , 276 Cal.Rptr. 465

22 ² Some of Defendants’ emails even included false and misleading legal disclaimers commonly used by spammers
23 to discourage or intimidate those who may wish to make complaints:

24 This is a responsible E-mail being sent by BidVantage. It complies
25 with Bill s.1618 Title 111 passed by the 105th U.S. Congress .

26 That bill was never passed by Congress. S. 1618, title III was passed in the Senate, but DIED in conference -- in
27 1998, a fact that Defendants have stated they “are fully aware.” The inclusion of the phrase "1618 title III" in an email
28 is used by many ISPs and end users in fact as a flag that a particular message is spam. In an observation lending insight
to the character of the spam (and perhaps of the Defendants), it should be noted that the messages that did include the
fake disclaimer nevertheless ironically do not even comply with the provisions of that failed 1998 bill.

1 "Venue lies in any district in which the offense was committed,"
2 and the Government is required to establish venue by a
3 preponderance of the evidence. *United States v. Beddow*, 957 F.2d
4 1330, 1335 (6th Cir. 1992) (quoting *United States v. Williams*, 788
5 F.2d 1213, 1215 (6th Cir. 1986)). This court examines the propriety
6 of venue by taking "into account a number of factors--the site of
7 the defendant's acts, the elements and nature of the crime, the locus
8 of the effect of the criminal conduct, and the suitability of each
9 district for accurate fact finding..."¹

10 The elements of 17538.45 were fulfilled at Plaintiff's location in San Mateo County. Plaintiff's
11 action is based on the unsolicited messages themselves, which were received, processed, stored,
12 archived and dealt with on the email infrastructure located in San Mateo County. The Defendants'
13 behavior has cost Hypertouch time, money and resources—in San Mateo County. Neither the
14 originating location of the spam Defendants sent to Plaintiff, the path it took to get to Plaintiff nor
15 the location of Defendants themselves is relevant to the situs of damages inflicted upon Plaintiff
16 nor the laws of California which protect Plaintiff. As had been said in noted elsewhere, (e.g.
17 *Verizon Online Services, Inc. , v. Alan Ralsky, Et Al.* ²) allowing Defendants to escape personal
18 jurisdiction in a forum they have exploited for pecuniary gain while causing a tort to a San Mateo
19 County resident would constitute a manifest unfairness to the rights of the Plaintiff.

20 A storeowner with graffiti on her store's wall would not be denied venue in the county
21 where her store is located simply because the cans of spray-paint came from elsewhere, nor
22 because the perpetrators drove up from Southern California to do their vandalism. It may be less
23 convenient for vandals, or spammers, to have to defend themselves in their victim's county but that
24 is the risk they assumed when they chose to break the law. The well reasoned decision denying all
25 the venue motions ³ by the spammer Ralsky in *Verizon v. Ralsky* is particularly relevant, raising
26 and dealing with a number of venue questions specific to spam:

27 _____
28 ¹ *United States v. Thomas*, 1996 FED App. 0032P (6th Cir.), 74 F.3d 701

² *VERIZON ONLINE SERVICES, INC., Plaintiff, v. ALAN RALSKY, ET AL., Defendants*. Civil Action No. 01-
432-A US DIST. COURT FOR THE EASTERN DIST. OF VA, June 7, 2002

³The defendant Ralsky's Motions to dismiss for Lack of Personal Jurisdiction and for Improper
Venue, and Motion to Transfer Venue were all denied.

1 Defendants knew or should have known that such trespass violated
2 Verizon's public anti-UBE [spam] policy and that the brunt of the
3 harm caused by their allegedly tortious conduct would fall on
4 Verizon's servers. Allowing Defendants to escape personal
5 jurisdiction in a forum they have exploited for pecuniary gain while
6 causing a tort to a Virginia resident would constitute a manifest
7 unfairness to the rights of Verizon...

8 The Defendants knew or should have known where they would be called to answer for their
9 actions:

10 Unlike a car manufacturer who places its product into the "stream
11 of commerce" ignorant of where it may wind up, Defendants knew
12 precisely where their spam was going - Verizon's e-mail servers
13 and its customers. And they knew, or reasonably should have
14 known, that such conduct violated Verizon's public anti-spam
15 policy and would result in litigation....

16 The California Code of Civil Procedure clearly supports Plaintiff's venue, as can be seen as quoted
17 in Defendant's own motion, Section 395, "the county where the injury occurs...shall be a proper
18 county for the trial of the action" as well as in Section 393:

19 393. (1) Subject to the power of the court to transfer actions and
20 proceedings as provided in this title, the county in which the cause,
21 or some part thereof, arose, is the proper county for the trial of the
22 following actions:

23 (a) For the recovery of a penalty or forfeiture imposed by
24 statute;

25 When Defendants' email was purposely and proactively sent to Plaintiff's email system, located in
26 San Mateo County, they became subject to actions brought in the Courts of San Mateo County.

CONCLUSION

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For all of the above reasons, it is respectfully submitted that Defendants' Motion to Change Venue be DENIED.

Date: September 3, 2002.

James Joseph Wagner
President, Hypertouch Inc.