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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HYPERTOUCH, INC., a California corporation, Plaintiff, vs. KENNEDY-WESTERN UNIVERSITY, Defendant.	Case No. C 045203 SI **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONSE AND OPPOSITION TO MOTION FOR ORDERS OVERRULING OBJECTIONS TO INTERROGATORIES** **Date: August 12, 2005** **Time: 9:00 a.m.** **Dept. 10**

Plaintiff Hypertouch, Inc., by and through its undersigned attorneys, hereby responds and opposes defendant's Motion for Orders Overruling Objections to Interrogatories. This Response and Opposition is based upon the attached declarations, the accompanying Memorandum of Points and Authorities and the entire record in this matter to date.

1. Introduction

Defendant's argument employs adjectives in such a way as to suggest they came out of some official Congressional glossary: "*limited* standing"; "*exception* to"; "*general rule* that enforcement powers under the Act *belonged* to the Federal Trade Commission and other *responsible* governmental bodies. Motion to

Compel-Interrogatories, page 5-6, lines 26-28, 1-7. Nothing could be further from the truth. Following this *opera bouffe* the defendant lectures: "Congress did not intend the Act to be the basis for a class of bounty hunters to harass honest businesses or entangle this court in trumped up disputes over trivial Internet problems." *Id.,* lines 17-19. It would be gratuitous to respond to this were it not that it seriously misleads the Court as to Congress' aim in passing this recent Act.

Putting aside defendant's proprietary claim to know Congress' mind, Congress did indeed recognize a legitimate problem with commercial spammers like defendant, and consequently it wrote and passed this Act. Congress did not view it as a "trivial Internet problem." Based upon no less that twelve findings (15 U.S.C. § 7701(a)) it stated as a public policy, (1) that there is a substantial government interest in regulation of commercial electronic mail on a nationwide basis; (2) that senders of commercial electronic mail should not mislead recipients as to the source or content of such mail; and (3) recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source. 15 U.S.C. § 7701(b). Finally, Congress did also intend for these kinds of actions to be brought in the district courts of the United States: "A provider of Internet access service adversely affected by a violation…may bring a civil action in any district court of the United States with jurisdiction over the defendant…" 15 U.S.C. § 7706(g)(1). Defendant's words are an attempt to trivialize this law in an effort to avoid is very real consequences.

2. Interrogatories are Irrelevant and not likely to lead to the discovery of admissible evidence

Defendant seeks to compel answers to interrogatories that it purports would reveal plaintiff lacks standing to bring this suit under the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act, 15 USC § 7701, *et seq*., because, allegedly, it is not a legitimate Internet access service. It argues that the discovery in question probed "the facts underlying plaintiff's standing." Defendant's Motion to Compel Answers to Interrogatories ("Motion to Compel-Interrogatories"), page 2, line 20. Yet, the interrogatories propounded by defendant would yield no "contradictory facts" and indeed, would have no bearing on that issue at all.

Interrogatory No. 21 of defendant's Interrogatories (going to other complaints and documents relating to complaints filed against alleged spammers) does not even remotely test plaintiff's status as an Internet access service. Plaintiff might well have filed other complaints and still be an Internet access service. Indeed, under the law none but government authorities and Internet access services may bring such lawsuits, as defendant admits, so that plaintiff's standing is presumptively established at the outset. It is illogical to assert that interrogatory answers under this category would say anything whatsoever about plaintiff's standing.

Similarly, answers to interrogatories Nos. 22-23 (income from spammers and other than spammers) would yield nothing that would verify or controvert plaintiff's status as an Internet access service. The Act expressly contemplates that Internet access services would bring such suits, so what would be proved if there were documents attesting to the fact that plaintiff acts like an Internet access service? The categories of information requested would not be germane to resolving the issues of this suit. Fed.R.Civ.P. 26(b)(2). If the defendant would have limited its request to an interrogatory asking the identification of all **civil** cases filed on the issue of unsolicited e-mail advertisements, the plaintiff would have complied.

Interrogatory No. 25 is a reflex question going to witnesses regarding answers to Interrogatories Nos. 21, 22, and 23, so that the same arguments applicable to those interrogatories would be applicable to No. 25.

Furthermore, all of the interrogatories are vague, ambiguous and uncertain. For example, interrogatories nos. 22 and 23 ask for plaintiff to "quantify" its income. This is vague, ambiguous and uncertain as to what is intended by "quantify". Does this mean how many occasions per year one receives such income? Does this mean variations from one occasion to the next? Or, is defendant asking for simple gross amounts? Additionally, what years are intended when defendant asks for income "per year"? Over what span of years are we talking? Is plaintiff supposed to simply pick the years arbitrarily, and if so, how may it be assured that its selection will not evoke motions to compel accompanied by motions for sanctions? This kind of ambiguous discovery is calculated to breed litigation, and most assuredly if such a difference should arise, the Court would see a flood of motions to compel, together with accompanying motions for

sanctions. Clearly, the interrogatories are inartfully drafted, or worse, and while plaintiff wishes to be as forthcoming as possible in discovery, it is better to demonstrate through objection that the requests are irrelevant and not likely to lead to the discovery of admissible evidence.

Finally on the standing issue, previous responses to defendant's first and second document requests have produced documents that amply show that Hypertouch is a *legitimate* Internet access service as contemplated by this Congress (please see Exhibit A).

3. The Interrogatories are Invasive of Plaintiff's Privacy

In addition to the absence of relevance, the discovery in question is invasive of plaintiff's privacy interest in that the categories seek financial information and other documents relating to extraneous matters. As one court noted:

> "Where a party establishes that disclosure of requested information could cause injury to it or otherwise thwart desirable social policies, the discovering party will be required to demonstrate that its need for the information, and the harm that it would suffer from the denial of such information, outweigh the injury that disclosure would cause either to the other party or to the interests cited by it."

Apex Oil Co. v. DiMauro, 110 F.R.D 490, 496 (S.D.N.Y 1985); see also, *Johnson v. Nyack Hospital*, 169 F.R.D. 550 (S.D.N.Y. 1996). As we have seen, none of the categories at issue in defendant's production request logically connect to the reasons proffered by the defendant. None of them test plaintiff's status as an Internet access service.

Privacy is one of those "desirable public policies" intended in *Apex Oil Co.* Defendant points to Rule 501, F.R.Evid., claiming that "federal common law" shall determine the extent of the applicability of "privacy." Motion to Compel-Interrogatories, page 4, lines 12-15. But Rule 501 specifically states:

> "However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Rule 501, F.R.Evid. Article 1, § 1 of the Constitution of California defines as "inalienable rights":

> "Among those are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*."

Constitution of California, Article 1, § 1 (italics added). This right of privacy applies to private action as well as governmental action. *Alfaro v. Terhune* (App. 2 Dist. 2002) 98 Cal.App.4th 492, 120 Cal.Rptr.2d 197. Generally, a party attempting to invade a privacy interest must establish that the interest of the party taking the action (1) outweighs the infringement on constitutional privacy, and (2) that the interest cannot be achieved by less intrusive means. *Department of Fair Employment and Housing v. Superior Court* (App. 5 Dist. 2002) 99 Cal.App.4th 896, 121 Cal.Rptr.2d 615. With respect to the first of these we have already seen that defendant's argument is flawed—the interrogatory answers would not logically show anything regarding plaintiff's standing—and defendant utterly fails to even address the second.

As we have seen, defendant's claim of relevance does not stand up to scrutiny. On the other hand, interrogatories going to lawsuits other than this one may involve sensitive issue that could be upset by indiscriminate circulation of them. Confidentiality provisions in settlement agreements might be compromised. Most importantly, questions about plaintiff's income sources are highly intrusive and involve matters that are totally personal. Hypertouch, while indeed a corporation, but unlike Gulf Oil Co., is closely held such that revealing personal financial information about it is revealing personal financial information about its shareholders.

Additionally, the very nature of this action draws into question defendant's motives in seeking this information. Many of the interrogatories, if answered, might identify lists or keys to revealing lists of Internet users. As everyone, including Congress, is aware, lists are the life's blood of commercial spammers such as defendant. It would be harsh irony if defendant could use each such lawsuit filed against it to procure more lists for use in its illicit endeavors.

Finally, should the Court be inclined to grant defendant's Motion to Compel-Interrogatories it is respectfully request the Court include in its Order an "attorney's eyes only" provision so that such sensitive material not be indiscriminately circulated.

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4. Conclusion

For the foregoing reasons, plaintiff respectfully requests that this Court deny defendant's Motion to Compel Answers to interrogatories with the following Order:

> "Plaintiff Hypertouch's objections to defendant's interrogatories Nos. 21, 22, 23 and 25 are sustained. Defendant has not shown them to be germane to the proffered issue of plaintiff's standing and its interrogatories are invasive of plaintiff's privacy rights under Article 1, § 1 of the Constitution of California. Plaintiff's privacy outweighs defendant's need for responses.

DATED: July 21, 2005

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JOHN L. FALLAT
Attorney for Plaintiff

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