

1 WOOLLACOTT JANNOL LLP
2 CYNTHIA WOOLLACOTT, ESQ. (#110119)
3 10350 SANTA MONICA BOULEVARD
4 SUITE 350
5 LOS ANGELES, CALIFORNIA 90025-5075

6 310.277.5504

7 Attorneys for Defendant Kennedy-Western
8 University

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11	HYPERTOUCHE,)	CASE NO. C 04 5203 SI
)	
12	PLAINTIFF,)	REPLY MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF MOTION
13	vs.)	FOR SANCTIONS (RE DOCUMENT
)	PRODUCTION MOTION).
14	KENNEDY-WESTERN UNIVERSITY,)	
)	
15	DEFENDANT.)	
)	

16
17 HEARING:

18 Date: 12 August 2005
19 Time: 9:00 a.m.
20 Courtroom 10.

21
22 The opposition cites a case for the proposition that sanctions may not be imposed on
23 counsel. (Opp., p. 3:1-3; *Maynard v. Nygren*, 332 F.2d 462 (7th Cir. 2003).) The case decided
24 whether sanctions could be imposed on lawyers under the “failure to disclose” provisions of
25 subdivision (c), Rule 37. (*Id.*, at 470.) It has nothing to do with defendant’s request for
26 sanctions against counsel under that rule’s subdivision (a)(4). The text of the rule invoked by
27 defendant makes it clear sanctions may run against counsel.

28 //

1 The three declarations submitted by plaintiff's counsel Mr. Fallat on the discovery
2 motions confirm that sanctions would be appropriate against plaintiff and its counsel, Mr.
3 Triplett, as requested in the moving papers.

4 The principal ground for opposition to the sanctions motions rests on the privacy
5 objection. Such respect as a privacy objection should be given must be reserved for situations
6 in which the objection receives the evidentiary support necessary for the court to consider
7 sustaining it. The law cited in the moving and opposing papers makes it clear that a decision
8 on the privacy objection, where properly raised, depends on the interrelationship of a number
9 of facts. (See e.g. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 35-39, 26
10 Cal.Rptr.2d 834; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 509, 120 Cal.Rptr.2d 197.)
11 These include whether the objecting party had an expectation of privacy as to the information,
12 whether such an expectation was reasonable under the circumstances, the gravity of the
13 threatened invasion, and the competing interests of the requesting party favoring disclosure.
14 (*Id.*)

15 Against these authorities, cited by both sides, such evidence as exists in support of the
16 privacy objection appears only in Mr. Fallat's declarations. They do not include any of the
17 information discussed in the case law. Mr. Fallat declared only that the plaintiff corporation is
18 "closely held" and that its shareholders "can . . . be direct victims of this invasion of privacy."
19 (See e.g. Fallat decl., interrogatories motion, ¶¶ 12, 13.) This goes to whether the plaintiff, as
20 a corporation, even has the right to raise the objection. Otherwise, Mr. Fallat limited himself
21 to the conclusion "I am aware" that discovery of the sort involved here "invade [sic] the privacy
22 of the plaintiff." (Fallat decl., documents motion, ¶14.) In effect this asks the court to take
23 counsel's word for the truth of the factual assertion made. No facts have been presented.

24 The other ground for opposition to the sanctions motion rests on plaintiff's arguments
25 that defendant served the discovery in question as a pretext for getting spammer lists, and not
26 for the purpose of gathering facts to challenge plaintiff's standing or the court's subject-matter
27 jurisdiction under the Act. Here too, Mr. Fallat's declarations require the court to accept the
28 fact asserted solely on the basis of belief. For example, the declaration submitted in opposition

1 to the two sanctions motions recites “Mr. Triplett and I believe” that the underlying motions
2 merely served as pretexts for illegitimate purposes including to “harass and intimidate the
3 plaintiff,” or “to use discovery . . . to identify and obtain additional spammer’s lists”. (Fallat
4 decl., ¶15.) He declares the same “belief” in the other two declarations. (Fallat decl., document
5 motion, ¶19; Fallat decl., interrogatories motion, ¶16.)

6 But the declarations and the other evidence submitted with the oppositions do not
7 include any evidence of substance for those beliefs. To be credible, and if true, Mr. Fallat as
8 a minimum should have explained how requests for information about demand letters, other
9 complaints, and revenue generated by plaintiff from spammers and from others could be used
10 to obtain “additional spammer’s lists.” He offers nothing of a tangible nature on the issue. At
11 best, the declaration regarding the interrogatories motion says only “I am aware that blanket
12 distribution of case information can result in defendant obtaining” such lists. (Fallat decl.,
13 interrogatories motion, ¶11.) Again, the court has been asked to take Mr. Fallat’s word in the
14 absence of evidence.

15 Another example appears in Mr. Fallat’s declaration to the effect defense counsel “has
16 never been able to explain how the discovery sought . . . would potentially disconfirm [sic]
17 plaintiff’s status as an Internet access service.” (See Fallat decl., documents motion, ¶19; *id.*,
18 interrogatories motion, ¶15; and *id.*, sanctions motion, ¶4.) The record shows just the
19 opposite. Both sides included the standing and jurisdiction issues in their case management
20 statement. (Woollacott decl., Exh. 1.) Both sides included in their discovery plan several
21 specific references to the subjects on which defendant propounded the discovery at issue in
22 the motions. (*Id.*, items (16), (23), (24), (30), (31), and (32).) Defense counsel underscored
23 these references and further explained the relevance in her letters dated 4/22/05 (Woollacott
24 decl., Exh. 2), 5/16/04 (Exh. 4), and 6/28/05 (Exh. 7). She also explained the issue in detail to
25 Mr. Triplett on 6/28/05 during their pre-motion conference. (*Id.*, ¶15.) Nothing in the record
26 indicates defense counsel ever spoke with Mr. Fallat about the issues. Mr. Triplett, with whom
27 defense counsel had such a conversation, did not submit any declaration.

28 //

1 The true pretext before the court consists of plaintiff's objections to defendant's
2 legitimate discovery. Plaintiff refused to withdraw any of its objections in the meet and confer
3 process preceding the motion. In opposition, plaintiff supported the objections by its counsel's
4 bare beliefs, by mis-citing authority, by arguments to the effect counsel could not define the
5 meaning of "quantify," or not at all. Plaintiff appears to understand that it cannot give up the
6 information without losing the case, and so refused to answer. Such misconduct on the core
7 issue of the case warrants the sanctions requested.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: 28 July 2005.

WOOLLACOTT JANNOL LLP
BY _____ *Cynthia Woollacott/s/* _____
CYNTHIA WOOLLACOTT
Attorneys for Kennedy-Western University

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10350 Santa Monica Boulevard, Suite 350, Los Angeles, California 90025-5057.

On 28 July 2005, I served the foregoing documents described as REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SANCTIONS (RE DOCUMENT PRODUCTION MOTION) on the interested parties by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Law Offices of John L. Fallat
John L. Fallat
Brian J. Triplet
523 Fourth Street, Suite 210
San Rafael, California 94901

I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business. The correspondence described above was placed for deposit in the United States Postal Service at 10350 Santa Monica Boulevard following ordinary business practices this date for collection and mailing on this date.

Executed on 28 July 2005 at Los Angeles, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Justin Thomas/s/
Justin Thomas