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16 HYPERTOUCHE, INC.

17 **UNITED STATES DISTRICT COURT**

18 **NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO DIVISION)**

19 HYPERTOUCHE, INC.,)	Case No.: C 04-5203 SI
)	
20 Plaintiff,)	PLAINTIFF'S OPPOSITION TO
21 vs.)	MOTION FOR SUMMARY JUDGMENT
)	
22 KENNEDY-WESTERN UNIVERSITY, et al.,)	Date: February 10, 2006
)	Time: 9:00 a.m.
23 Defendants.)	Judge: Hon. Susan Illston
)	

24 **I. INTRODUCTION**

25 Defendant KENNEDY-WESTERN UNIVERSITY ("KWU") has filed a motion for summary judgment that misunderstands the law and mis-states the facts. It has taken deposition testimony out of context and ignored material facts that do not square with its attempt to paint Plaintiff as the bad guy. This Court should deny Defendant's motion for summary judgment.

1
2 **II. FACTS AND ISSUES**

3 A. Statement of Relevant Facts

4 "According to Ferris Research Inc., a San Francisco consulting group, spam will cost
5 United States organizations more than ten billion dollars (\$10,000,000,000) this year, including
6 lost productivity and the additional equipment, software, and manpower needed to combat the
7 problem. California is 12 percent of the United States population with an emphasis on
8 technology business, and it is therefore estimated that *spam costs California organizations well*
9 *over 1.2 billion dollars (\$1,200,000,000)"* ¹

10 "Like junk faxes, *spam imposes a cost on users*, using up valuable storage space in e-mail
11 inboxes, as well as costly computer band width, and on networks and the computer servers that
12 power them, and discourages people from using e-mail" ² "The 'cost shifting' from deceptive
13 spammers to Internet business and e-mail users has been likened to sending junk mail with
14 postage due or making telemarketing calls to someone's pay-per-minute cellular phone" ³

15 "The true beneficiaries of spam are the advertisers who benefit from the marketing
16 derived from the advertisements." ⁴

17
18 Plaintiff HYPERTOUCHE, INC. ("HYPERTOUCHE") is a provider of Internet access with
19 computers in California. HYPERTOUCHE provides email service to numerous individuals and
20 businesses, and each of the email addresses used by HYPERTOUCHE customers is hosted by
21 Plaintiff's California computers.

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23 _____
¹ Cal. Bus. & Prof. §17529 (d) (emphasis added).

24 ² Cal. Bus. & Prof. §17529 (e) (emphasis added).

25 ³ Cal. Bus. & Prof. §17529 (h).

⁴ Cal. Bus. & Prof. §17529 (k).

1 Defendant KWU is a company offering diplomas online. KWU relies on third parties to
2 promote its business of selling its unaccredited education services. KWU is aware that these third
3 parties use unlawful email advertising as a means of increasing the exposure of KWU and the
4 products it sells.
5

6 HYPERTOUCHE has received up to 608 advertising messages in a single day which
7 promote KWU and the degrees it offers for sale.

8 B. Statement of Issues

9 The instant lawsuit concerns Defendant's use of unlawful email advertising. The issues
10 before this Court on Defendant's Motion for Summary Judgment are whether Defendant's use of
11 email advertising was lawful and whether Plaintiff has standing to insist that Defendant comply
12 with the law.

13 **III. DISCUSSION OF LEGAL ISSUES**

14 A. Defendant KWU Has Not Met Its Burden On Summary Judgment

15 Federal Rule of Civil Procedure 56 allows summary judgment only in those cases where
16 there is no genuine issue of material fact.¹ Because summary judgment is a drastic remedy which
17 deprives a party of the right to try an action before a jury, strict standards apply. The purpose of
18 summary judgment is to avoid useless trials in cases where "the law points unerringly to the
19 conclusion that one of the parties is entitled to judgment as a matter of law [citations omitted]." ²
20 The party moving for summary judgment bears the burden of showing that there is no genuine
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23 ¹ Federal Rule of Civil Procedure 56(c).

24 ² *Utility Control Corp. v. Prince William Constr.*, 558 F.2d 716, 719 (4th Cir. 1977).

1 issue of material fact.³ In assessing facts, this Court must draw all inferences in the light most
2 favorable to the non-moving party.⁴

3 B. Defendant KWU Has Not Provided Evidence That Its Email Advertising Was Lawful

4 In stark contrast to the evidence Plaintiff has provided to Defendant KWU showing that
5 Defendant KWU has benefited from unlawful email advertising, the Defendant's motion for
6 summary judgment contains very little that would suggest that it is entitled to summary judgment
7 in its favor. Indeed, the main thrust of its motion is not to argue that its advertising has been
8 lawful, but that it has terminated those agents which transmitted advertising, after it has
9 determined that it was being unlawfully advertised.
10

11 The termination of an agency relationship is closing the barn door after the horse has left,
12 and it does not eliminate the liability for those actions of the agent which are properly imputed to
13 the principal.

14 C. The Email Advertising At Issue In This Case Was Unlawful Under State And Federal Law

15 Plaintiff can provide expert testimony showing that Defendant's email advertising was in
16 violation of federal and state law.⁵ Defendant has not shown that the emails at issue in the case
17 actually comply with *either* state or federal law.

18 1. CAN-SPAM Does Not Preempt California Business & Professions Code § 17529.5

19 Conflict preemption exists when it is impossible to comply with both state and federal
20 requirements or when state law stands as an obstacle to the accomplishment and execution of the
21

22
23 ³ *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978) (citing *Mutual Fund Investors v. Putnam Management Co.*,
553 F.2d 620, 624 (9th Cir. 1977); *Doff v. Brunswick Corp.*, 372 F.2d 801, 805 (9th Cir. 1965), *cert. denied*, 389 U.S. 820, 88 S.Ct.
39, 19 L.Ed.2d 71 (1967); 6 MOORE *Federal Practice*, ¶ 56.15[3], at 56-463).

24 ⁴ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

25 ⁵ *See, e.g.*, Declarations of William Coles and James Joseph Wagner in support of opposition to motion.

1 full purposes and objectives underlying the federal law.⁶

2
3 Defendant claims that the remedial provisions of California Business & Professions Code
4 are no longer in effect since they conflict with the Federal "CAN-SPAM Act" (15 U.S.C. §§
5 7701-7713), which prohibits the use of false headers and other deceptive email practices. 15
6 U.S.C. § 7707 provides that the CAN-SPAM act,

7 [S]upersedes any statute, regulation, or rule of a State or political
8 subdivision of a State that expressly regulates the use of electronic
9 mail to send commercial messages, except to the extent that any
10 such statute, regulation or rule prohibits falsity or deception in any
11 portion of a commercial electronic mail message or information
12 attached thereto.

13 CAN-SPAM's intent was to allow states to continue to regulate commercial email
14 messages prohibiting falsity or deception in any portion therein. Under §17529.5, "an electronic
15 mail service provider" may bring action against a person or entity that violates any provision
16 listed therein. Persons expressly authorized under that state law to bring action will still be
17 allowed to bring action for falsity or deception despite the preemption by Federal law of separate
18 sections of the Business and Professions Code (namely, Section 17529.2).

19 2. KWU Ratified The Conduct Of Its Agents

20 KWU has done nothing to control the use of its name in email advertising. Its own
21 discovery responses have shown that it did not adequately control the multiple advertisers using
22 its name in advertising. KWU ratified the unlawful conduct by accepting the economic benefits
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25 ⁶ *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 831, n. 8.

1 such advertising bestowed. "A principal cannot split an agency transaction and accept the
2 benefits thereof without the burdens." ⁶

3
4 "Ratification ... may be established by any circumstantial or direct evidence
5 demonstrating adoption or approval of the employee's actions by the corporate agent. Such
6 ratification may be inferred from the fact that the employer, after being informed of the
7 employee's actions, does not fully investigate and fails to repudiate the employee's conduct by
8 redressing the harm done and punishing or discharging the employee." ⁷ The principal is not
9 excused by willful ignorance. ⁸ Mere failure to discharge an agent can result in liability. ⁹

10 "[W]here ignorance of the facts arises from the principal's own failure to investigate and
11 the circumstances are such as to put a reasonable man upon inquiry, he may be held to have
12 ratified despite lack of full knowledge." ¹⁰ "[T]he mere fact that the agent's act is a crime does
13 not prevent ratification by the principal if the act is done for his benefit." ¹¹

14
15 Compliance with the law is a non-delegable duty for any advertised entity. KWU cannot
16 argue that its refusal to investigate complaints is anything other than ratification.

17 D. Plaintiff HYPER TOUCH, INC. Has Standing

18 1. HYPER TOUCH, INC. Provides Internet Service

19 The operative definitions of an Internet service provider ("ISP") under the relevant
20 statutes are actually within those statutes. CAN-SPAM defines an "Internet access service" as

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⁶ *Reusche v. California Pac. Title Ins. Co.* (1965) 31 Cal.App.2d 731, 737 (citing *Price v. McConnell*, 184 Cal.App.2d 660).

22 ⁷ *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793, 801 (quoting *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 621).

23 ⁸ *Gallagher v. California Pacific T. & T. Co.* (1936) Cal.App.2d 482, 493.

24 ⁹ *Holland v. Nelson* (1970) 5 Cal.App.3d 308, 314 (citing *Sandoval v. Southern Cal. Enterprises, Inc.* (1950) 98 Cal.App.2d 240; and *McChristian v. Popkin* (1946) 75 Cal.App.2d 249).

25 ¹⁰ *Volandri v. Hlobil* (1959) 170 Cal.App.2d 656 (citing *Hutchinson Co. v. Gould*, 180 Cal. 356).

¹¹ *Id.* (citing *Sullivan v. People's Ice Corp.*, 92 Cal.App. 740).

1 having the same meaning given that term in section 231(e)(4) of the Communications Act of
2 1934 (47 U.S.C. 231(e)(4)), which defines it as "a service that enables users to access content,
3 information, electronic mail, or other services offered over the Internet, and may also include
4 access to proprietary content, information, and other services as part of a package of services
5 offered to consumers."
6

7 California state law defines an "Electronic mail service provider" as "any person,
8 including an Internet service provider, that is an intermediary in sending or receiving electronic
9 mail or that provides to end users of the electronic mail service the ability to send or receive
10 electronic mail."¹²

11 Under either definition, Plaintiff has established that it is the sort of business that
12 provides Internet access for users of email which lawmakers sought to provide with authority to
13 enforce the laws surrounding use of such services.

14 Defendant's twisted interpretation of the definitions would limit enforcement of the law
15 to only some select corporations, in defiance of the will of state and federal legislators. Plaintiff
16 Hypertouch is an ISP and has standing to enforce the law as it relates to the
17

18 2. Plaintiff Owns Servers And Hosts All Of The Domain Names

19 Defendant KWU takes deposition testimony out of context to argue that Hypertouch is
20 not the actual owner and provider of its bandwidth and servers, and to suggest that it does not
21 host the email addresses where the relevant email messages were received. In fact, the
22 deposition testimony demonstrates that Hypertouch pays its own bills. Hypertouch has provided
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25 ¹² Cal.Bus.&Prof. § 17529.1(h).

1 additional evidence that it provides Internet access to its users, and Defendant has offered no
2 evidence to the contrary.

3
4 3. Proposition 64 Does Not Prevent Plaintiff From Asserting Rights Under California Law

5 Defendant also claims that Proposition 64 eliminates Plaintiff's standing to enforce the
6 law. Proposition 64 was intended to reduce the caseload of the Court so that scarce judicial
7 resources could be directed at only those actions where some persons suffered harm. It was
8 intended to prevent attorneys from generating fees by threatening or bringing legal actions when
9 there are *no clients* who have been injured, used the defendant's product or service, viewed the
10 defendant's advertising, or had any other business dealing with the defendant.

11 Prop 64 does *not* try to eliminate *all* lawsuits under California Business & Professions
12 Code §§ 17200 and 17500. The underlying basis of Plaintiff's lawsuit is *not* a general § 17200
13 claim of unfair competition. In fact, Prop 64 specifically "protects the right of individuals to
14 retain an attorney and file an action for relief..." The point is, *as long as someone has been*
15 *harmed* – someone like the recipient of misleading email advertising – that person may sue for
16 the equitable relief of a court order requiring a defendant to obey the law.

17
18 The California Legislature, in passing the bill resulting in Business and Professions Code
19 § 17529.5, found that bulk email advertising *shifts costs to recipients*, just like junk-faxes do, and
20 so Plaintiff *has* been injured by Defendant's email advertisements. To the extent Defendant has
21 argued that Plaintiff waived actual damages, Plaintiff disputes the assertion and contends that it
22 was electing a remedy and not waiving standing.

23 Plaintiff brings this action under a very specific subsection, §17529.5, that prohibits
24 commercial email with falsified headers and authorizes a private right of action. It is admittedly
25

1 difficult to quantify the injury to Plaintiff (or to any recipient of misleading advertising), which is
2 precisely why §17529.5 sets liquidated damages at \$1,000 per violation. The California
3 Legislature found that recipients of misleading email advertising suffer actual damage, but
4 specified liquidated damages so that plaintiffs would not have to prove over and over that they
5 suffered damages.
6

7 Moreover, "penalties are designed to deter as well as compensate. A penalty statute
8 presupposes that its violation produces damage beyond that which is compensable." ¹⁵ "The
9 reason civil penalties are provided is that some deterrent beyond that of being subject to an
10 injunction and being required to return such ill-gotten gains is deemed necessary to deter
11 fraudulent business practices." ¹⁶ Another factor to consider is "the extent to which the amount
12 of penalty relates to the amount of profit" the defendants realize. ¹⁷
13

14 In the instant case, Plaintiff asserts that Defendant KWU has been successful in its
15 unlawful email marketing campaigns. Even if Plaintiff has only suffered small harm relative to
16 other recipients of Defendants' misleading advertising, it *is* still actual harm. This Court should
17 consider whether an efficient pickpocket stealing nickels from passersby would be subject to
18 mere restitution of 5¢ if just one particular passerby files suit, even though the pickpocket makes
19 thousands of dollars as he passes tens of thousands of California residents in the street every day.
20 Suppose, additionally, that the California Legislature actually passes a law designed to stop such
21 insidious pick-pocketing, and specifies liquidated damages in an effort to encourage enforcement
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24 ¹⁵ *California v. City & Cty. of San Francisco* (1979) 94 Cal.App.3d 522.

¹⁶ *People v. Bestline Products, Inc.* (1976) 61 Cal.App.3d 879.

¹⁷ *People Ex Rel. State Air Res. Bd v. Wilmsburst* (1999) 68 Cal.App.4th 1332

1 of the law (among other reasons). Proposition 64 would surely not limit the ability of a directly
2 affected Plaintiff to enforce a law passed by the California Legislature in such a situation.

3
4 Proposition 64 amended various sections within the Unfair Business Practices Act and
5 the Unfair Advertising Practices Act, but *not* Section 17529.5. By *not* changing §17529.5 even
6 as other sections were changed, Proposition 64 does not eliminate or weaken California's law
7 prohibiting the use of misleading headers in email advertising.

8 E. Defendant Is Not Entitled To A Reduction Of Damages

9 Defendant's contention that it has offered a reasonable mechanism for opting out of
10 receiving its email necessarily relies on the implied assumption that recipients could reasonably
11 expect it to honor opt out requests. Defendant has in fact not shown that it honors opt out
12 requests, and the Plaintiff's showing that its agents sent email with fraudulent headers strongly
13 suggests that the substance of the email body (where such an opt out mechanism would
14 presumably be displayed) was not to be trusted either.

15
16 **V. CONCLUSION**

17 Defendant KENNEDY-WESTERN UNIVERSITY asks this Court to grant its Motion for
18 Summary Judgment, but it has failed to show that it is entitled to summary judgment as a matter
19 of law. The evidence demonstrates that Defendant's agents sent email advertising which
20 contained fraudulent headers in violation of law. This Court should deny Defendant's Motion for
21 Summary Judgment and allow the litigants to proceed to trial.

22 DATED: January 20, 2006

WALTON & ROESS LLP

23 BY: /s/ Timothy J. Walton

24 TIMOTHY J. WALTON
Attorneys for the Plaintiff