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11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

13 HYPERTOUCHE, INC.,  
14 PLAINTEIFF,  
15 VS.  
16 KENNEDY-WESTERN UNIVERSITY,  
17 DEFENDANT.

CASE NO. C 04 5203 SI  
REPLY MEMORANDUM RE:  
MOTION FOR SUMMARY JUDGMENT  
  
HEARING: 24 FEBRUARY 2006, 9 A.M.  
COURTROOM OF THE HON. SUSAN ILLSTON

18 The opposition does not establish there is a genuine issue as to any material fact  
19 entitling KWU to judgment as a matter of law. KWU demonstrated an absence of evidence  
20 to support Hypertouch’s two counts on numerous elements of its burden of proof, and  
21 undisputed evidence on its affirmative showings of safe harbors and entitlement to  
22 attorneys’ fees and costs. The burden thus shifted to Hypertouch to produce specific  
23 evidence showing a dispute exists as to each of the nine material issues. Chamberlan v.  
24 Ford Motor Co., 369 F.Supp.2d 1138, 1143 (N. D. Cal. 2005). If the adverse party does  
25 not so respond, with affidavits containing admissible evidence setting forth specific facts  
26 showing there is a genuine issue for trial, summary judgment “shall be entered against the  
27 adverse party.” Fed.R.Civ.Pro. 56(e). The opposition did not meet its burden of rescuing  
28 either count from summary judgment (the Cole declaration was not submitted timely per

1 the Court's Scheduling Order and both declarations are comprised of inadmissible material,  
2 see accompanying objections).

3 **1. KWU did not "initiate" any emails to Hypertouch.**

4 Since there is no dispute that KWU didn't send any of the accused emails itself, an  
5 element of Hypertouch's burden of proof on the first count (section 7704) is proof that KWU

6 a. intentionally paid someone else to initiate violative emails on its behalf

7 b. with actual knowledge, or by consciously avoiding knowing, whether such person  
8 would or did engage in a violative practice.

9 Nothing in the opposition papers shows that KWU paid anyone or that anyone sent  
10 any of the accused emails. The opposition does not even try to link what KWU assumed  
11 would be the two potential senders, Peak/Contour and Boca (who Hypertouch added as  
12 defendants (Docket document 6, filed 1/24/05)), to the sending of any message. The  
13 opposition does not mention these – or any other – potential senders, let alone trace any  
14 of the emails to them and show KWU paid them.

15 KWU's moving papers nevertheless detailed KWU's handling of those two marketers  
16 and how diligent KWU was to ensure neither of them sent violative emails. Hypertouch  
17 argues at page 3 lines 3-4 that KWU was aware that third parties used unlawful emails to  
18 increase KWU's exposure, but there is no citation to any evidence and that proposition  
19 contradicts Hypertouch's admissions to the contrary (J. Wagner Depo. 152:3-25, 153:1-23,  
20 156:9-14). Hypertouch cannot show that KWU had actual knowledge or avoided knowing  
21 the unnamed sender would violate the law. The undisputed evidence is that KWU complied  
22 with its responsibility, as per the Senate Report at page 25, to "inquire and confirm" that its  
23 marketers intended to comply with CAN-SPAM. Without any contrary evidence,  
24 Hypertouch at best is speculating that one or more renegades were at work – and  
25 renegade behavior is not actionable against the unknowing advertiser (Senate Report p.  
26 25).

1 The opposition argues that KWU must prove the emails were lawful and that its  
2 marketers' activities are imputed to KWU under agency law (pages 4 and 5). But this  
3 motion asks whether KWU can be found liable under federal or state law even if the emails  
4 are "spam." And agency law has no applicability here, where Hypertouch's counts allege  
5 KWU to be the initiator of the emails under each count and, in any event, Hypertouch fails  
6 to name any potential agent of KWU. The lengthy discussion of ratification at pages 5-6  
7 cites to no evidence that KWU ratified any sender's conduct.

8 Both showings of KWU payment to the actual sender and KWU's knowledge of the  
9 sender's wrongdoing are required to defeat summary judgment; the absence of either  
10 allows judgment for KWU to be entered on the first count pursuant to Fed.R.Civ.P. 56(e).

11 **2. Hypertouch is not an adversely affected ISP.**

12 To maintain the first count Hypertouch also must prove it is

- 13 a. an ISP  
14 b. adversely affected by the accused emails.

15 The opposition fails to establish either prong.

16 The legislative history and statutory references to the meaning of ISP in CAN-SPAM  
17 requires Hypertouch to establish itself as a bona fide provider of actual Internet access  
18 whose paying customers would be burdened by spam, such as AOL (Congressional  
19 Record, Appendix Exh. 3 pp. 35 and 36; Senate Report, Appendix Exh. 2 pp. 12 and 13).  
20 The opposition posits on page 2 lines 18-21 that it is a provider of Internet access with  
21 computers, email services and addresses and customers; on page 7 lines 11-14 that it is  
22 the sort of business the Legislature intended to have standing; and on pages 7-8 that it  
23 pays its bills and provides Internet access. But there is no citation to any evidence or any  
24 legislative history that creates a genuine issue of material fact on this point. Hypertouch  
25 does not evidence any provision of Internet access (it being provided and paid for by  
26 others), any paying customers, or any burden from the "well under 1%" of emails  
27 represented by KWU (J. Wagner Depo. 134:4-18 and Exhs. 1007, 1008 ad 1045, *attached*

1 *to the Supplemental Woollacott Decl.*). Mr. Wagner's declaration lacks foundation, proper  
2 opinions, and personal knowledge on this point (see accompanying objections).

3 Nor does the opposition offer any evidence or argument to create any dispute as to  
4 the lack of adverse effect to Hypertouch from the accused emails. Mr. Wagner's  
5 declaration merely tries to create an issue by contradicting his waiver in open court and his  
6 deposition and interrogatory testimony that there was no such damage (see J. Wagner  
7 Depo. 26:4-20, 93:95, 94:1, 94:7-8, 94:22-95:1 *attached to the Supplemental Woollacott*  
8 *Declaration*).

9 The opposition does not create an issue as to either required showing for standing.  
10 The first count must fail.

11 **3. KWU is entitled to a complete reduction of statutory damages.**

12 KWU has shown the right to summary judgment in its favor for the safe harbor  
13 reduction of damages affirmative defense. KWU only had to establish one of two  
14 undisputed facts:

- 15 a. it established and implemented commercially reasonable practices and  
16 procedures designed to prevent violations; or  
17 b. the violation occurred despite those commercially reasonable efforts to maintain  
18 compliance with the practices and procedures.

19 The declarations accompanying the moving papers establish KWU's practices and  
20 procedures not only were reasonable but were above market standards and strict about  
21 compliance.

22 The opposition does not create a genuine issue as to the reasonableness of KWU's  
23 11-point program or as to its implementation. The opposition's accusations that KWU did  
24 not control its marketers and somehow failed to investigate what they were doing (pages  
25 5 and 6) lack any evidentiary support. The undisputed evidence is that KWU thoroughly  
26 investigated complaints and terminated any marketer receiving a single complaint.

1 The opposition also argues that KWU cannot benefit from the safe harbor unless it  
2 demonstrates it honors “opt-outs” (page 10). Not only is this idea not supported by any  
3 evidence, it is contradicted by the several “opt-out” requirements detailed on page 4 of the  
4 moving memorandum; in particular, that Shea Park makes sure the emails comply with law  
5 (which requires opt-outs) and that KWU maintains a suppression list of people who have  
6 opted out which it sends to all marketers.

7 Nor does the opposition dispute that the accused emails occurred despite KWU’s  
8 efforts.

9 KWU is entitled to a finding that statutory damages are reduced to zero.

10 **4. KWU’s reasonable attorneys’ fees and costs should be assessed**  
11 **against Hypertouch.**

12 The opposition is silent as to KWU’s showing of entitlement to a judgment awarding  
13 it reasonable costs including attorneys’ fees against Hypertouch. KWU will present its  
14 evidence of amount in any format desired by the court.

15 **5. The second count is preempted by the CAN-SPAM Act.**

16 The opposition makes no mention of the issue of declining supplemental jurisdiction  
17 over the second count arising under state law if the first count fails; but KWU believes the  
18 second count should fail on the merits in any event.

19 First, the opposition disputes preemption of California *Business & Professions Code*  
20 17529.5 by the CAN-SPAM Act, citing to the third type of preemption (conflict preemption)  
21 as inapplicable under Gentry v. Ebay, Inc. (2002) 99 Cal.App.4th 816, 831 fn. 8, 121  
22 Cal.Rptr. 703.

23 But here there is express, or at least implied, preemption in section 7707 to  
24 exclusively regulate commercial email unless a state law makes fraudulent email a crime  
25 or intentional tort. (Section 7701(b)(1); Congressional Record, Appendix Exh. 2 pp. 31-32,  
26 36-37.) To the extent section 17529.5 does not require criminal or fraudulent scienter,  
27 therefore, it is preempted. If such a requirement exists, Hypertouch loses the second count  
28

1 for failure to establish a genuine issue as to KWU's actual knowledge of or participation in  
2 any wrongdoing.

3 **6. The second count is barred by the Dormant Commerce Clause.**

4 Section 17529.5 is unconstitutional because its terms apply to emails sent from or  
5 to other states, and to persons outside of California, and thus the California law's reach is  
6 too broad. The overbreadth is especially relevant here because Hypertouch has not  
7 created a genuine dispute that the sending and receiving equipment, domains and email  
8 addresses are owned by non-California persons (his brother's company).

9 **7. Hypertouch lacks state standing under Proposition 64.**

10 The opposition spends much time on the purpose of statutory damages where  
11 damages might be difficult to ascertain or the damages are meant to be a penalty, citing  
12 cases that do not arise under CAN-SPAM or the California unfair competition/false  
13 advertising statutes (pages 8-10).

14 The opposition fails, however, to address the fact that California voters decided in  
15 enacting Proposition 64 that statutory damages for false advertising were not available to  
16 persons who were not actually harmed. The opposition offers no contrary legislative history  
17 or evidence to support the proposition that section 17529.5 is somehow exempted from the  
18 application of Proposition 64 to all unfair competition laws (of which section 17529.5 is one)  
19 as the voters intended.

20 Hypertouch's admitted waiver of actual damages and its failure to present any  
21 evidence of actual harm require summary judgment on the second count under California  
22 Proposition 64's standing limitation.

23 **8. KWU did not initiate any emails to a Hypertouch California**  
24 **address.**

25 Were the accused emails sent from California or to California email addresses as  
26 required for section 17529.5 liability? Hypertouch cannot name any sender, so it cannot  
27 demonstrate sending from California.

1 Hypertouch does attempt to create an issue as to whether emails went to addresses  
2 in California, but it does so without any admissible evidence of specific facts. Joe Wagner's  
3 assertion that the emails went through domains hasit.com and reasonabledoubt.com lacks  
4 foundation and conflicts with his brother's testimony that all the emails were received by  
5 Beyond Systems in Maryland (P. Wagner Depo. 47:18-48:9, 101:14-17; and see other  
6 foundation issues raised in the accompanying objections.)

7 **9. KWU is entitled to a reduction of state statutory damages.**

8 The opposition does not dispute KWU's entitlement to the California safe harbor to  
9 reduce statutory damages to \$100 per email with a \$100,000 maximum total recovery. Nor  
10 does the opposition dispute KWU's evidence that Hypertouch's failure to mitigate any  
11 damages entitles KWU to judgment on the second count on this ground.

12 **10. Conclusion.**

13 There is no genuine issue of material fact to be considered by a trier of fact at trial.  
14 Summary judgment should be granted on both counts and KWU be allowed to recover its  
15 attorneys' fees and costs for this frivolous action.

16 DATED: January 27, 2006

WOOLLACOTT JANNOL LLP

17 By Cynthia Woollacott  
18 CYNTHIA WOOLLACOTT  
19 Attorneys for defendant Kennedy-Western  
20 University (signature on original)  
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