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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**

9
10 HYPERTOUCH, INC., a California
Corporation,

11 Plaintiff(s),

12 vs.
13 KENNEDY-WESTERN UNIVERSITY, a
14 Wyoming Corporation, and DOES 1-100,
inclusive,

15 Defendant(s).

CASE NO. C04 5203 SI

**DEFENDANT BOCA
NETWORKS.COM'S NOTICE
OF MOTION AND MOTION
TO DISMISS;
MEMORANDUM OF POINTS
AND AUTHORITIES;
DECLARATION OF PAUL;**

**[[PROPOSED] ORDER filed
concurrently herewith]**

**FRCP 12(b)(2), 12(b)(4); and
12(b)(6)**

Date: April 15, 2005
Time: 9:00 a.m.
Judge: Honorable Susan Illston

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1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that Defendant BOCA NETWORKS.COM, LLC will
3 move this Court on April 15, 2005, at 9:00 a.m., pursuant to Federal Rules of Civil
4 Procedure 12(b)(2), 12(b)(4), and 12(b)(6).

5 Plaintiff's complaint seeks relief under the federal Controlling the Assault of Non-
6 Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") (15 U.S.C.
7 §§7701 to 7713) and the California anti-spam law ("California Law") (Calif. B&P Code,
8 §§17529 to 17529.9). The complaint should be dismissed because (1) service of process
9 was defective (F.R.C.P. Rule 12(b)(5); (2) there is no personal jurisdiction over the
10 defendant Boca Networks.com (F.R.C.P. Rule 12(b)(2); and (3) the complaint lacks the
11 fundamental allegations necessary to state any claim for relief (F.R.C.P. Rule 12(b)(6).

12 This motion will be based on this Notice of Motion, the accompanying
13 Memorandum of Points and such other evidence and argument which may be presented
14 at the time of the hearing on this motion.

15
16 Respectfully submitted,

17
18 DATED: March __, 2005

GREENBERG TRAURIG, LLP

19
20 By: 

21 Frank E. Merideth
22 Alan R. Maler
23 Wendy M. Mantell
24 Attorneys for Defendant
25 BOCA NETWORKS.COM, LLC
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 Plaintiff's complaint seeks relief under the federal Controlling the Assault of Non-
5 Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") (15 U.S.C.
6 §§7701 to 7713) and the California anti-spam law ("California Law") (Calif. B&P Code,
7 §§17529 to 17529.9).¹ The complaint should be dismissed because (1) there is no
8 personal jurisdiction over the defendant Boca Networks.com (F.R.C.P. Rule 12(b)(2); (2)
9 service of process was defective (F.R.C.P. Rule 12(b)(5); and (3) the complaint lacks the
10 fundamental allegations necessary to state any claim for relief (F.R.C.P. Rule 12(b)(6).

11 Under well-established personal jurisdiction principles, a court does not have
12 jurisdiction over a non-resident defendant unless that defendant has "minimum contacts"
13 with the state such that it can reasonably anticipate being haled into court there.
14 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *see also World-Wide*
15 *Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The touchstone of personal
16 jurisdiction is "purposeful availment," of the privilege of conducting activities in the
17 forum state. *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985). These principles do
18 not change because they are now being applied in the Internet context. Because Moving
19 Defendant has no continuous contacts with California, and because it has not
20 purposefully availed itself of the privilege of doing business in California, Moving
21 Defendant is not subject to jurisdiction in this state, and the Complaint must be dismissed
22 on that basis.

23 Additionally, while the Federal Rules of Civil Procedure establish very broad
24 guidelines for effective pleading of claims in a complaint, even these generous rules have
25 their limits. A complaint exists fundamentally to advise the Defendants of the existence
26 and nature of a legal dispute. *See Bodine Produce, Inc. v. United Farm Workers*

27 ¹ All future statutory references are to the CAN-SPAM Act or California Law unless
28 otherwise indicated.

1 *Organizing Committee*, 494 F.2d 541, 556 (9th Cir. 1974) (“It is clear that the intent of
2 Rule 8(a)(2) is to require that the pleader’s ‘short plain statement’ give to the ‘defendant
3 fair notice of what the plaintiff’s claim is and the grounds upon which it rests”)(internal
4 citations omitted). The Complaint filed by Plaintiff Hypertouch, Inc. (“Hypertouch” or
5 “Plaintiff”) fails to meet even the most basic standards for effective pleading.

6 Nowhere in the entire Complaint is there a single clear statement of what conduct
7 Boca Networks.com (the “Moving Defendant”) is charged with actually committing.
8 Even under the liberal pleading standards of the federal court, there is a lack of
9 allegations setting forth culpable conduct on the part of the Moving Defendant.
10 Moreover, the Moving Defendant is not named in the Summons or the Complaint.
11 Rather, the only pleading stating Moving Defendant’s identity is an amendment
12 purporting to replace all mentions of “Doe” in the complaint with Moving Defendant and
13 another Defendant’s names.

14 The Moving Defendant, therefore, brings this motion to dismiss to address the
15 vague and wholly insufficient allegations pled in Plaintiff’s Complaint. The Moving
16 Defendants’ motion is based on the following arguments:

- 17 • **There is no personal jurisdiction over the Moving Defendant.** The complaint
18 must be dismissed as to the Moving Defendant as it’s contacts with the State of
19 California do not constitute a basis for the assertion of personal jurisdiction over
20 the Moving Defendant.
- 21 • **Plaintiff has failed to allege any conduct specifically engaged in by the Moving**
22 **Parties:** The Moving Defendant must be dismissed from this action because the
23 Complaint does not specifically allege any wrongful acts committed by the
24 Moving Defendant. While Plaintiffs are not responsible for spelling out in exact
25 detail each and every act they ascribe to the Moving Defendant, they do have an
26 obligation to allege some foundational acts – and Plaintiff’s failure to do so means
27 that they have not stated any claims upon which relief may be granted.

- 1 • **Plaintiff fails to properly plead the elements of every cause of action in the**
2 **complaint:** While the rules governing pleading are liberal, Plaintiff's failure to
3 adequately plead the elements of the causes of action alleged in the Complaint
4 means that these claims are facially deficient. The Moving Defendant cannot be
5 expected to answer and defend against claims that have not been properly pled.
- 6 • **The Summons is defective on its face:** The Summons does not name the Moving
7 Defendant and "Doe" allegations are general and therefore impermissible.

8 In short, Plaintiff has not and can not, consistent with Rule 11, plead any viable
9 causes of action against the Moving Defendants. Plaintiff's Complaint is absolutely
10 unredeemable, and, as such, must be dismissed for failure to state a claim upon which
11 relief may be granted.

12 If the action under the federal CAN-SPAM Act is dismissed or transferred, the
13 Court should exercise its discretion and dismiss the second claim for relief under the
14 California Law as the basis for pendant jurisdiction will have been eliminated. *See*
15 *Carnegie Mellon University v. Cohill*, 484 U.S. 343, 350 (1988).

16 II.

17 STATEMENT OF FACTS

18 A motion brought pursuant to Rule 12 is limited to the facts as alleged in the
19 operative pleadings. Additionally, in the context of a motion to dismiss, each of the
20 factual allegations in the complaint is deemed to be true for the limited purpose of testing
21 the sufficiency of the plaintiff's claims. *See Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d
22 336, 337-338 (9th Cir. 1996). While this presumably results in favorable treatment to the
23 Plaintiff, the facts alleged in the Complaint in this matter actually support the Moving
24 Defendant's contention that they have been improperly embroiled in this dispute.

25 Moving Defendant is not a named party defendant but has been ostensibly served
26 with an "amended" complaint as a substituted Doe defendant. In fact there is no
27 "amended" complaint but only a purported "amendment" ostensibly substituting Moving
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1 Defendant for a Doe defendant. The operative allegations are as to the named defendant
2 Kennedy-Western University only. The summons served upon Boca Networks.com does
3 not identify Boca Networks.com as a defendant in the action; in fact, there is no mention
4 of Boca Networks.com anywhere on the Summons. Moving Defendant was served with
5 a copy of the summons and complaint, and the Amendment to the Complaint, on
6 February 9, 2005 by personal service. Declaration of Andrew Paul (“Paul Decl.”) ¶ 8.
7 There is no mention of Boca Networks.com anywhere on the Summons served on Boca
8 Networks.com. Paul Decl., Exh. A.

9 Plaintiff Hypertouch alleges that it is an “internet access service” within the
10 meaning of Section 7702(11) and is entitled to bring an action within the meaning of
11 Section 7706(g). (Complaint, ¶5). Plaintiff alleges that the named defendant is
12 Kennedy-Western University, organized under the laws of Wyoming, but having its
13 principal place of business in Agoura Hills, California. Plaintiff claims that Kennedy
14 Western University provides education and degrees over the internet but is “not permitted
15 to offer degrees to California residents.” (Complaint, ¶6).

16 There are no allegations as to the status, domicile, presence or residence of Boca
17 Networks.com. Boca Networks.com is a Florida Corporation with its principal place of
18 business in Florida, and has no corporate employees in California. Paul Decl. ¶¶ 2, 3.
19 Boca Networks.Com does not have an agent for process designated in California, nor
20 does it hold a license to do business there. Paul Decl. ¶ 4. Boca Networks.com has no
21 record that an electronic message was ever initiated to Plaintiff. Paul Decl. ¶ 7.

22 Plaintiff alleges that certain defendants names are not available to him and alleges
23 Doe defendants who “assisted” the named defendant “by providing financial support,
24 advice, resources, or other assistance” without specifying further the nature of the
25 relationship between the named defendants and the Does, or the factual basis of why
26 Plaintiff is unable to name additional defendants. He also alleges that the Does were “in
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1 a principal/agent” relationship with the named defendant without specifying which was
2 the principal and which the agent. (Complaint, ¶¶7 & 8).

3 Plaintiff alleges that it “received electronic mail” from the named defendant
4 “and/or” Doe defendants “to its mail servers” and that the named defendant “and/or the
5 Doe Defendants” sent the electronic mail “in willful and knowing violation” of the law.
6 (Complaint, ¶¶10 and 11).

7 Plaintiff alleges that the “header” information was “materially false or materially
8 misleading.” As an example he refers to Exhibits 3 and 4 of its complaint thereby
9 apparently alleging that an entity Light Speed Vision was the “domain registration for
10 05100.com and 06100.com.” Plaintiff goes on to allege that Light Speed Vision is not a
11 legitimate entity because it cannot be found in un-described California records. There is
12 no allegation of any connection between Light Speed Vision and Moving Defendant
13 Boca Networks.com. (Complaint, ¶12). Plaintiff also alleges that the e-mail included
14 false “domain names” registered to “bargain.warrior.com,” but there is no allegation
15 linking Moving Defendant Boca Networks.com to this registration. (Complaint, ¶13).
16 There is no allegation of facts to support the mere conclusion that the header was
17 “materially” false or misleading.

18 Plaintiff alleges that there was “no valid physical postal address of the sender.”
19 However, there is no allegation of who the “sender” was. If “sender” is somehow
20 assumed to be the named defendant, the allegation is contradicted by plaintiff’s own
21 exhibit which shows an address for the named defendant. The address of Moving
22 Defendant in Florida also appears in the email. There is no allegation that the addresses
23 shown in the Exhibit were not accurate and true. (Complaint, ¶14).

24 Plaintiff alleges that the named defendant “and/or DOE defendants” sent e-mail to
25 it “to an address “harvested” in violation of 7704(b)(1)(A)(i). There is no allegation of
26 facts linking Moving Party to the alleged “harvesting.” (Complaint, ¶15). Plaintiff
27 alleges that the named defendant “and/or DOE defendants” sent email to addresses
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1 generated “using automated means” in violation of 7704(b)(1)(A)(ii). There is no
2 allegation of facts linking Moving Party to the alleged generation “using automated
3 means.” Moreover there is no allegation that Moving Party had “actual knowledge, or
4 knowledge fairly implied on the basis of objective circumstances” of the conduct alleged
5 as required by 7704(b)(1)(A). (Complaint, ¶¶15 & 16).

6 Plaintiff alleges that he is entitled to statutory damages, but there is no allegation
7 for the basis of the damages. (Complaint, ¶17). Plaintiff alleges that he is entitled to
8 injunctive relief, but there is no allegation of facts supporting a claim of continuing
9 conduct. (Complaint, ¶18) The allegations of paragraphs 20 and 21 appear to be
10 duplicates of paragraphs 18 and 19.

11 In the second claim for relief, based upon California Business & Profession Code,
12 section 17529.8, plaintiff merely incorporates the earlier allegations and, ostensibly based
13 upon the same facts, or lack there of, alleges that the named defendant “and/or DOE
14 defendants” acting as the named defendant’s agents, sent e-mail to Plaintiff that
15 “contained falsified, misrepresented, or forged header information.”

16 III.

17 LEGAL ARGUMENT

18 A. Relevant Legal Principles.

19 “Pursuant to Rule 8(a), a complaint will be deemed inadequate only if it fails to (1)
20 provide notice of circumstances which give rise to the claim, or (2) set forth sufficient
21 information to outline the elements of the claim or permit inferences to be drawn that
22 these elements exist. *See General Star Indemnity, Co. v. Vesta Fire Ins., Corp.*, 173
23 F.3d 946, 950. (5th Cir. 1999). “[A] complaint, which contains a “bare bones” allegation
24 that a wrong occurred and which does not plead any of the facts giving rise to the injury,
25 does not provide adequate notice. *Walker v. South Cent. Bell Tel. Co.*, 904 F.2d, 275,
26 277 (5th Cir.1990); *see also Beanal v. Freeport*, 197 F.3d 161,164 (5th Cir. 1999).
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1 "A complaint should not be dismissed under Rule 12(b)(6) 'unless it appears
2 beyond doubt that the plaintiff can prove no set of facts in support of his claim which
3 would entitle him to relief.' Dismissal can be based on the lack of a cognizable legal
4 theory or the absence of sufficient facts alleged under a cognizable legal theory."
5 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). The Moving
6 Defendant seeks to be dismissed from this lawsuit on the grounds that Plaintiff has failed
7 to allege any facts showing that Plaintiff has any meritorious claims against the Moving
8 Defendant.

9 Additionally, Federal Rule of Civil Procedure 4(a) requires the summons to
10 contain the identity of the party served. The Federal Rules of Civil Procedure do not
11 make allowance for the use of "Doe" defendants except in very limited circumstances.
12 No such circumstances are present here because there is a total lack of operative
13 allegations against the Moving Defendant.

14
15 **B. Plaintiffs' Complaint Must Be Dismissed Because It Fails To Allege Any**
16 **Culpable Conduct Attributable To The Moving Defendants.**

17 Viewed in the light most favorable to Plaintiffs, the Complaint absolutely fails to
18 allege any culpable conduct on behalf of the Moving Defendant. It is axiomatic that
19 there can be no liability without culpable conduct and, furthermore, that there can be no
20 finding of culpable conduct if the Plaintiff does not even allege let alone prove such
21 conduct. Because this is entirely insufficient to state a claim against the Moving
22 Defendant, Plaintiff's Complaint must be dismissed as to the Moving Defendant. *See*
23 *Brazil v. U.S. Dept. of the Navy*, 66 F.3d 193, 199 (9th Cir. 1995) ("Although a pro se
24 litigant ... may be entitled to great leeway when the court construes his pleadings, those
25 pleadings nonetheless must meet some minimum threshold in providing a defendant with
26 notice of what it is that it allegedly did wrong").

1 **C. Plaintiff's Complaint Must Be Dismissed Because It Fails To Allege The**
2 **Essential Elements Of Each And Every Cause Of Action.**

3 Dismissal of Plaintiff's Complaint is also warranted, because they have failed to
4 state facts or allegations which meet the elements of the causes of action pled. Plaintiff
5 has repeated this error throughout its Complaint and, coupled with the fact that they have
6 not articulated any specific acts of culpable conduct engaged in by the Moving
7 Defendant, such failure warrants dismissal of the entire Complaint as to the Moving
8 Defendant to any of the claims for relief contained therein. *See Jones v. Community*
9 *Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) ("a pleading must "give[] fair
10 notice and state [] the elements of the claim plainly and succinctly")(internal citations
11 omitted).

12 **1. False Header Claims Under 7704(a)(1) and 17529.5.**

13 In order to state a claim for relief for "false header" claims under 7704(a)(1), the
14 Plaintiff must allege: (1) it an internet access service, (2) it has been adversely affected
15 by the alleged violation, (3) the defendant initiated the transmission of electronic mail,
16 (4) the transmission was either a commercial message or a transactional or relationship
17 message, and (5) that the header information is materially false or misleading. The Act
18 goes on to elucidate what is false, misleading and material. Section 7704(a)(1) provides,
19 in part:

20 **(A)** header information that is technically accurate but includes an originating
21 electronic mail address, domain name, or Internet Protocol address the access to
22 which for purposes of initiating the message was obtained by means of false or
23 fraudulent pretenses or representations shall be considered materially misleading;

24 **(B)** a "from" line (the line identifying or purporting to identify a person initiating
25 the message) that accurately identifies any person who initiated the message shall
26 not be considered materially false or materially misleading; and

27 **(C)** header information shall be considered materially misleading if it fails to
28 identify accurately a protected computer used to initiate the message because the
person initiating the message knowingly uses another protected computer to relay
or retransmit the message for purposes of disguising its origin.

1 And Section 7704(a)(6) provides:

2 (6) Materially

3 For purposes of paragraph (1), the term "materially", when used with respect to
4 false or misleading header information, includes the alteration or concealment of
5 header information in a manner that would impair the ability of an Internet access
6 service processing the message on behalf of a recipient, a person alleging a
7 violation of this section, or a law enforcement agency to identify, locate, or
8 respond to a person who initiated the electronic mail message or to investigate the
9 alleged violation, or the ability of a recipient of the message to respond to a person
10 who initiated the electronic message.

11 There are insufficient facts alleged relative to subpart (A) above for at least the
12 reason that there is no allegation that the "originating electronic mail address, domain
13 name, or Internet Protocol address the access to which for purposes of initiating the
14 message *was obtained by means of false or fraudulent pretenses or representations.*"
15 (Emphasis added.) There are no facts alleged relative to subpart (B) above regarding the
16 "from" line whatsoever. There are insufficient facts alleged relative to subpart (C) above
17 for at least the reason that there is no allegation that "the person initiating the message
18 *knowingly uses another protected computer to relay or retransmit the message for
19 purposes of disguising its origin.*" (Emphasis added.)

20 Any other allegations regarding materiality found in Paragraph 12 are woefully
21 inadequate in that they merely parrot the statutory language and provide no factual basis
22 for materiality. More particularly, there is no allegation linking Boca Networks.com to
23 Light Speed Vision in a manner which would constitute a violation of the statute.
24 Moreover, the allegation that Light Speed Vision is not a legitimate business because
25 there are no records in California only suggests that it might be found in any one of 49
26 other jurisdictions in the United States alone. Finally, the portion of Exhibit 1 showing
27 the e-mail as it appeared to the recipient clearly shows addresses and links which would
28 allow a response at any time; at the very least, the perceived inconsistency would have to
be clarified in the pleadings.

2. "Pattern or Practice" claims under 7704(a)(5)(A)(iii).

1 In order to state a claim for relief for “false header” claims under
2 7704(a)(5)(A)(iii), the Plaintiff must allege, and then prove: (1) it an internet access
3 service, (2) it has been adversely affected by a violation of the Can-Spam Act, (3) the
4 defendant engaged in a pattern or practice of violating 7704(a)(5), namely, (a) the
5 transmission included an “identifier, opt-out, and physical address in commercial
6 electronic mail” and (b) a “valid physical postal address of the sender.” Exhibit 1 to the
7 Complaint clearly shows the existence of these requirements which are at odds with the
8 allegations which merely parrot the statute. Moreover, there is are no facts alleged
9 suggesting, let alone supporting, a “pattern and practice” as required by the CAN-SPAM
10 Act.

11 **3. Unlawfully Obtained Address Claims Under 7704(b)(1)(A)(i).**

12 In order to state a claim for relief for “false header” claims under 7704(b)(1)(A)(i),
13 the Plaintiff must allege, and then prove: (1) it an internet access service, (2) it has been
14 adversely affected by a violation of the Can-Spam Act, (3) the defendant violated the
15 provisions of 7704(b)(1)(A)(i), namely, (i) the defendant initiated the transmission that is
16 unlawful under subsection (a) or assisted in the origination of such message through the
17 provision or selection of addresses to which the message will be transmitted, or (ii) the
18 defendant “had actual knowledge or knowledge fairly implied on the basis of objective
19 circumstances,” that “the electronic mail was obtained through automated means *from an*
20 *Internet website or proprietary online service* operated by another person, *and such*
21 *website or online service included, at the time the address was obtained, a notice* stating
22 *that the operator of such website or online service will not give, sell, or otherwise*
23 *transfer addresses maintained by such website or online service to any other party for the*
24 *purposes of initiating, or enabling others to initiate, electronic mail messages.”*
25 (Emphasis added.) Once again, Plaintiff’s allegations merely recite the statute (albeit
26 incompletely) and allege no facts suggesting or supporting that the addresses were
27 obtained “*from an Internet website or proprietary online service,*” which included “*at*

1 *the time the address was obtained*” the notice stating that the addresses could not be sold
2 or otherwise transferred “*for the purposes of initiating, or enabling others to initiate,*
3 *electronic mail messages.*” Devoid of these facts, the allegations fail to support the
4 alleged violation of 7704(b)(1)(A)(i).

5
6 **D. The Complaint should be Dismissed Pursuant to Federal Rule of Civil**
7 **Procedure 12(b)(2) Because the Court Lacks Personal Jurisdiction Over Boca**
8 **Networks.Com.**

9 **1. Personal Jurisdiction Principles**

10 A United States district court may exercise personal jurisdiction over a non-
11 resident defendant if jurisdiction is proper under the applicable state’s long-arm statute
12 and if that exercise of jurisdiction accords with federal constitutional due process
13 principles. *See Fireman’s Fund Ins. Co. v. National Bank of Cooperatives*, 103 F.3d 888,
14 893 (9th Cir. 1996). California’s long-arm statute provides that jurisdiction may be
15 exercised “on any basis not inconsistent with the Constitution of this state or of the
16 United States.” Cal. Code Civ. Pro. § 410.10. Thus, personal jurisdiction in California is
17 “coextensive with the outer limits of due process under the state and federal constitutions,
18 as those limits have been defined by the United States Supreme Court.” *Data Disc, Inc.*
19 *v. Systems Tech. Assocs.*, 557 F.2d 1280, 1286 (9th Cir. 1977) (citations omitted).

20 Due process under the U.S. Constitution requires that a nonresident defendant have
21 “minimum contacts” with the forum state such that maintaining the suit against the
22 defendant does not offend “traditional notions of fair play and substantial justice.”
23 *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Stated another way, the
24 issue is whether the “defendant’s conduct and connection with the forum State are such
25 that he should reasonably anticipate being haled into court there.” *World-Wide*
26 *Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

1 There are two types of personal jurisdiction: general and specific. *Helicopteros*
2 *Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8-9 (1984). General personal
3 jurisdiction “enables a court to hear cases unrelated to the defendant’s forum
4 activities....” *Fields v. Sedgewick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir.
5 1986). A court may exercise general jurisdiction only where the nonresident defendant’s
6 activities are “substantial or continuous and systematic.” *Sher v. Johnson*, 911 F.2d
7 1357, 1361 (9th Cir. 1990) (internal quotation marks omitted). Specific personal
8 jurisdiction allows the court to exercise jurisdiction over a defendant whose forum-
9 related acts gave rise to the action before the court. *See Bancroft & Masters, Inc. v.*
10 *Augusta Nat’l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

11 “It is the plaintiff’s burden to establish the court’s personal jurisdiction over a
12 defendant.” *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). “The court may
13 consider evidence presented in affidavits to assist it in its determination and may order
14 discovery on the jurisdictional issues.” *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir.
15 2001).

16 **2. There is No General Personal Jurisdiction Because Boca Networks.com**
17 **Has No Substantial and Continuous Contacts with The Forum**

18 General jurisdiction should approximate “physical presence within the state’s
19 borders. *Bancroft & Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1086 (9th Cir.
20 2000). “The standard for establishing general jurisdiction is fairly high.” *Id.* “Factors to
21 be taken into consideration are whether the defendant makes sales, solicits or engages in
22 business in the state, serves the state's markets, designates an agent for service of process,
23 holds a license, or is incorporated there.” *Id.* (citing *Hirsch v. Blue Cross, Blue Shield of*
24 *Kansas City*, 800 F.2d 1474, 1478 (9th Cir. 1986)).

25 Boca Networks.com has no physical presence in California and has no corporate
26 employees in California. Paul Decl. ¶ 3. It is a Florida Company with its principal place
27 of business in Florida. Paul Decl. ¶ 2. Boca Networks.Com does not have an agent for
28

1 process designated in California, nor does it hold a license to do business there. Paul
2 Decl. ¶ 4. Boca Networks.com has no record that an electronic message was ever
3 initiated to Plaintiff. Paul Decl. ¶ 7.

4 While its presence on the Internet allows Boca Networks.Com to serve all states'
5 markets, it does not specifically target California residents. Moreover, its website is
6 mostly passive, with very few interactive elements. *Compare Gator.com v. L.L. Bean,*
7 *Inc.*, 341 F.3d 1072, 1078 (9th cir. 2003) (finding general jurisdiction to be a “close
8 question” where defendant had extensive marketing and sales in California to California
9 residents and operated a highly interactive website that acted as a virtual retail store).
10 While there is an option to purchase web hosting on Moving Defendant’s website, no
11 California residents have exercised that option to date. Web hosting is the only thing that
12 Boca Networks.com sells over the Internet. The total number of sales of web hosting is
13 less than three over the past year, again none of which were in California. Boca
14 Networks.com undertakes no active marketing of this activity. Paul Decl ¶ 6.

15 The only allegation in the complaint purporting to be a contact with the forum is
16 the allegation that the named defendant “and/or DOE defendants” sent e-mail to the
17 Plaintiff in California. Setting aside that there is no allegation that Boca Networks.com
18 has any contacts with California which would submit it to jurisdiction in this state, and
19 Plaintiff has not submitted any evidence that the email came from Moving Defendant,
20 assuming for the purposes of this motion that an email from Boca Networks.com ended
21 up in California, such a fact would not rise to the “continuous and systematic,” contacts
22 necessary for general jurisdiction. *Sher*, 911 F.2d at 1361 (9th Cir. 1990); *see also Naxos*
23 *Resources, Ltd. v. Southam, Inc.*, 1996 WL 662451 at *4 (C.D. Cal. 1996) (dismissing
24 complaint for lack of personal jurisdiction because mere transmission of data over the
25 Internet is not sufficient to establish jurisdiction).

26 **3. There is No Specific Personal Jurisdiction Because Boca Networks.com**
27 **Did Not Purposefully Avail Itself of the Forum Even if It Unwittingly**

1 **Sent an Email to Plaintiff.**

2 Even where, as here, there is no general jurisdiction, if “the cause of action arises
3 directly from a defendant’s contacts with the forum,” there may be specific jurisdiction.
4 *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 910 (D. Or.
5 1999). The Ninth Circuit uses a three-part test to determine whether a district court can
6 exercise specific jurisdiction over a non resident defendant:

- 7 (1) The nonresident defendant must do some act or
8 consummate some transaction with the forum or perform some
9 act by which he purposefully avails himself of the privilege of
10 conducting activities in the forum, thereby invoking the
11 benefits and protections; (2) the claim must be one which arises
12 out of or results from the defendant’s forum-related activities;
13 and (3) exercise of jurisdiction must be reasonable.

14 *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 416 (9th Cir. 1997). The first
15 requirement is the most critical. *Id.*

16 The only forum-related activity from which Plaintiff’s claim arises is the act of
17 sending email over the Internet into the forum state. Where the forum-related activity is
18 over the Internet, the Ninth Circuit looks at the “level of interactivity and commercial
19 nature of the exchange of information that occurs on the web site. . . .” *Id.* at 418
20 (adopting test spelled out in *Zippo Mfg. Co. v. Zippo Dot Com Inc.*, 952 F. Supp. 1119
21 (W.D.Pa. 1997), and finding no jurisdiction where defendant maintained a passive
22 website and did not target plaintiff or know of its existence). To find jurisdiction, the
23 defendant has to have “intentionally directed its [] activities at the forum state.”
24 *Millennium*, 33 F. Supp. 2d at 916 (citing cases). Nothing here suggests that Moving
25 Defendants “directed its website [or emails] at residents of the forum any more than
26 anyplace else in the nation.” *Id.* at 917.

1 Assuming for purposes of this motion that the email attached to the complaint as
2 Exhibit 1 came from Moving Defendant's email server, that does not rise to the level of
3 purposeful targeting of the forum necessary to confer jurisdiction over the defendant.
4 *Millennium*, 33 F. Supp. 2d 907 (finding no jurisdiction where only one sale was made to
5 a resident of the forum over a somewhat interactive website); *see also Spacey v. Bugar*,
6 207 F. Supp. 2d 1037, 1045-46 (C.D. Cal. 2001) (finding no jurisdiction where website
7 activities were not aimed at the forum state). The contact with the forum must be more
8 than just a random or fortuitous contact. *Burger King*, 471 U.S. at 472-73. Moreover,
9 other courts in similar contexts have decided that jurisdiction cannot lie where defendant
10 did not intentionally direct emails to the plaintiffs. *See Marycle LLC v. First Choice*
11 *Internet, Inc.*, 2004 WL 8295955 (Md. 2004). Such is the case here.

12 Because there was no purposeful targeting at the forum state and because sending
13 one email to the plaintiff does not invoke the privilege or benefit of doing business in
14 California, jurisdiction over Moving Defendant is not proper and this motion should be
15 granted under Fed. R. Civ. Pro. 12(b)(2).

16 **E. The Court Should Dismiss the Complaint Pursuant to Federal Rule of Civil**
17 **Procedure 12(b)(4) for Insufficient Process Because the Summons is Defective.**

18 Federal Rule of Civil Procedure 4(a) requires that the Summons shall "identify . . .
19 the parties." Boca Networks.Com, LLC does not appear anywhere on the face of the
20 summons. Boca Networks.Com was sued as a "Doe" defendant in this action. There is
21 no authority for asserting claims against "Doe Defendants" in the Federal Rules of Civil
22 Procedure. Rather, only some courts have allowed cases to proceed against unknown
23 defendants in federal question cases in limited circumstances where the allegations
24 against real, but unknown, defendants. *See e.g., Merritt v. County of Los Angeles*, 875
25 F.2d 765, 766 (9th Cir. 1989) (allowing Doe allegations in a 42 U.S.C. § 1983 action
26 where specific allegations were made against the Doe defendants and it was alleged that
27 certain of the Does were employed as sheriffs by the county).

1 Here, Plaintiff asserts general allegations that the Doe Defendants assisted “in and
2 about the wrongs complained of herein by providing financial support, advice, resources,
3 or other assistance,” and that the Doe Defendants “were in a principal/agent relationship”
4 with the named defendant without specifying who was the principal and who was the
5 agent. Complaint ¶ 8. Plaintiff asserts no allegations specific to Boca Networks.Com and
6 there is no authority for Plaintiff to assert allegations against Boca Networks.Com as a
7 Doe Defendant without such specific allegations.

8 The lack of Moving Defendant’s name on the summons and throughout the
9 complaint is not merely a technical defect. It highlights the lack of specific allegations
10 towards Moving Defendant and hence, prejudices Moving Defendant by forcing it to
11 reply to unsubstantiated allegations that may or may not apply to it.

12 Because Boca Networks.Com is not named on the Summons or in the Complaint,
13 except as a Doe Defendant, and use of the Doe Defendant in this manner is not
14 authorized by the Federal Rules of Civil Procedure or this Court, the Complaint should
15 be dismissed for insufficient process.

16 **IV.**
17 **CONCLUSION**

18 For the foregoing reasons, the Moving Defendants submit that their motion must
19 be granted and that Plaintiffs Complaint be dismissed.

20
21 DATED: March 4, 2005

GREENBERG TRAURIG, LLP

22
23 By: Frank E. Merideth
24 Frank E. Merideth
25 Alan R. Maler
26 Wendy M. Mantell
27 Attorneys for Defendants
28 BOCA NETWORKS.COM, LLC

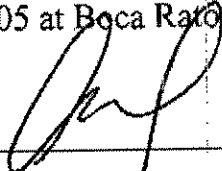
1 **DECLARATION OF ANDREW PAUL**

2 I, ANDREW PAUL, do hereby declare the following:

- 3 1. I am the Managing Director of Boca Networks.com. I make this declaration based
4 upon my own personal knowledge and if called upon as a witness, could and
5 would testify to the truth of the matters set forth herein.
- 6 2. Boca Networks.com is a Florida Limited Liability Company with its principal
7 place of business at 3500 NW Boca Raton Blvd., Suite 706, Boca Raton, FL 33431
8 Florida.
- 9 3. Boca Networks.com has no physical presence in California and has no employees
10 in California.
- 11 4. Boca Networks.Com does not have an agent for process designated in California,
12 nor does it hold a license to do business in California.
- 13 5. Boca Networks.Com, LLC is an experienced strategy, design, hosting and
14 development company that specializes in integrated web technologies, marketing,
15 advertising, and lead generation. Boca Networks.Com LLC maintains a website at
16 www.bocanetworks.com.
- 17 6. There is an option to purchase web hosting on Boca Networks.com's website. No
18 California residents have exercised that option to date. Web hosting is the only
19 thing that Boca Networks.com sells over the Internet. The total number of sales of
20 web hosting is less than three over the past year, again none of which were in
21 California. Boca Networks.com undertakes no active marketing of this activity.
- 22 7. Boca Networks.com has no record that an electronic message was ever initiated to
23 Plaintiff.
- 24 8. On February 9, 2005, I was personally served with a copy of the summons and
25 complaint in this action, and the Amendment to the Complaint. A true and correct
26 copy of the summons and pleadings served upon me on behalf of Boca
27 Networks.com LLC is attached as Exhibit A.

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I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed this 14th day of March, 2005 at Boca Raton, Florida.



Andrew Paul

84210.01010 F 12/6/04

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-filing

02/09/2005
JF #887 CR5
10:20 am

HYPERTOUCHE, INC., a California corporation,

SUMMONS IN A CIVIL CASE

CASE NUMBER:

v.
KENNEDY-WESTERN UNIVERSITY, a Wyoming
corporation, and DOES 1 through 100, inclusive,

C 04 5203
SI

TO:

KENNEDY-WESTERN UNIVERSITY

COPY

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY

John L. Fallat (SBN 114842)
LAW OFFICES OF JOHN L. FALLAT
907 Sir Francis Drake Blvd., Suite 100
Kentfield, California 94904-1502
Tel: (415) 457-3773
Fax: (415) 457-2667

an answer to the complaint which is herewith served upon you, within ²⁰ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

RICHARD W. WIEKING

DEC 8 2004

CLERK

DATE

MARY ANN BUCKLEY

(BY) DEPUTY CLERK

CALL 3/1/05

RETURN OF SERVICE

DATE

Service of the Summons and Complaint was made by me ¹

Name of SERVER (PRINT)

TITLE

Check one box below to indicate appropriate method of service

- Served Personally upon the Defendant. Place where served:

- Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left

- Returned unexecuted:

- Other (specify):

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL
--------	----------	-------

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____
Date

Signature of Server

Address of Server

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

FILED
04 DEC -3 PM 3:17
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-filing

LAW OFFICES OF JOHN L. FALLAT
JOHN L. FALLAT (State Bar No. 114842)
907 Sir Francis Drake Blvd., Suite 100
Kentfield, CA 94904-1502
Telephone: (415) 457-3773
Facsimile: (415) 457-2667

Attorney for Plaintiff
HYPER TOUCH, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HYPER TOUCH, INC., a California
corporation,

Plaintiff,

vs.

KENNEDY-WESTERN UNIVERSITY, a
Wyoming corporation, and DOES 1 through
100, inclusive,

Defendants.

Cas No. 04 - 5203

COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF - VIOLATION
OF CAN-SPAM ACT OF 2003
[15 U.S.C. §7701, *et seq.*] and California
Business & Professions Code §17529.5

SI

DEMAND FOR JURY TRIAL

Plaintiff Hypertouch, Inc. alleges as follows:

JURISDICTION, VENUE, AND PARTIES

1. This Court has original jurisdiction of the causes of action herein which are brought under the CAN-SPAM Act of 2003 (15 U.S.C. §7701 et seq.), the Computer Fraud and Abuse Act.
2. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, which gives federal District Courts original jurisdiction over claims brought under the laws of the United States. This Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.
3. This Court has personal jurisdiction over Defendant Kennedy-Western University who has purposefully engaged in business activities in California and availed themselves of the benefit of conducting commercially-related activities within California.

21

1 4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) because a substantial
2 part of the events or omissions giving rise to the claims pled herein occurred in this judicial district.

3 5. Plaintiff Hypertouch, Inc. is a California corporation located in Foster City, California, and
4 provides Internet access service within the meaning of 15 U.S.C. § 7702(11) and 7706(g).

5 6. Plaintiff is informed and believes that Defendant Kennedy-Western University is a corporation
6 organized under the laws of Wyoming with its principal place of business located in Agoura Hills,
7 California, and is the owner of the kennedy-western.com and kw.edu domain names. Kennedy-Western
8 University advertises a "convenient and flexible method for earning Bachelor's, Master's and Doctorate
9 level degree" via the Internet. A number of private and governmental entities have described Kennedy-
10 Western University as a "Diploma Mill". Though located in California, they are not permitted to offer
11 degrees to California residents.

12 7. Plaintiff is informed and believes and thereon alleges that Defendants DOES 1 through 100,
13 inclusive, are sued herein under such fictitious names, and that their true names and capacities, whether
14 individual, partnership, corporate or otherwise, are unknown to Plaintiff, and when such information is
15 obtained, Plaintiff will seek leave of the Court to amend its Complaint accordingly. Plaintiff is informed
16 and believes and thereon alleges that each of the Defendants sued under fictitious names are responsible in
17 some manner for the events and happenings hereinafter set forth.

18 8. Said DOE Defendants, at all times mentioned herein, assisted Defendant Kennedy-Western
19 University in and about the wrongs complained of herein by providing financial support, advice, resources
20 or other assistance. Said DOE Defendants were in a principal/agent relationship with Defendant Kennedy-
21 Western University. Plaintiff will seek to amend this Complaint to allege the true names and capacities of
22 these DOE Defendants when they are ascertained.

23
24 **FIRST CAUSE OF ACTION**

25 (Violation of CAN-SPAM Act of 2003 – 15 U.S.C. § 7704(a)(1))

26 (Against All Defendants)

27 9. Plaintiff refers to the allegations of the preceding paragraphs of this Complaint, and incorporate
28 the same herein by this reference as though set forth in full.

1 10. From January 1, 2004 forward, Plaintiff received electronic mail from Defendant Kennedy-
2 Western University and/or the DOE Defendants advertising Kennedy-Western University to its mail servers
3 that violated the CAN-SPAM Act of 2003 as set forth below. Attached as Exhibits 1 and 2, respectively,
4 are true and correct samples of the electronic mail communications received by Plaintiff.

5 11. Plaintiff also alleges that the Defendant and/or the DOE Defendants sent the electronic mail in
6 willful and knowing violation of the CAN-SPAM Act of 2003.

7 12. Many of the relevant electronic mails sent by the Defendant and/or the DOE Defendants from
8 January 1, 2004 forward contained or were accompanied by or were transmitted with header information
9 that was materially false or materially misleading. For example, the identities provided by the Defendant
10 and/or the DOE Defendants of the machines delivering mail to Plaintiff's mail server on Exhibit 1 do not
11 match the IP addresses of the contacting machine. Please see attached Exhibits 3 and 4 which identify
12 Light Speed Vision as the domain registration for 05100.com and 06100.com. Plaintiff alleges Light Speed
13 Vision is not a legitimate business organization as it is not a registered corporation or limited liability
14 company in California, not registered as a fictitious business name in Los Angeles County, the street
15 address and zip code do not exist, and the telephone number is disconnected.

16 13. Plaintiff further alleges that the Defendant and/or the DOE Defendants sent electronic mail to
17 the Plaintiff that included domain names which were registered to false non-existent entities using false
18 addresses, e.g. "bargain-warrior.com" with a registration address of "7429 Nort C St, St. Paul, MI 20932"
19 (please see Exhibit 2). Attached as Exhibit 5 is a true and correct copy of the domain registration of
20 bargain-warrior.com. Plaintiff alleges the address listed on Exhibit 5 is false. Said conduct was in
21 violation of 15 U.S.C. § 7704(a)(1).

22 14. Plaintiff further alleges that the Defendant and/or the DOE Defendants sent electronic mail to
23 the Plaintiff that had no valid physical postal address of the sender. Said conduct was in violation of 15
24 U.S.C. § 7704(a)(5)(iii).

25 15. Plaintiff furthers allege that the Defendant and/or the DOE Defendants sent electronic mail to
26 the Plaintiff to an address harvested from domain name contact registration information. Said conduct was
27 in violation of 15 U.S.C. § 7704(b)(1)(A)(i).

1 16. Plaintiff further alleges that the Defendant and/or the DOE Defendants sent electronic mail to
2 the Plaintiff to addresses generated using automated means. Said conduct was in violation of 15 U.S.C.
3 § 7704(b)(1)(A)(ii).

4 17. As a proximate result of said unlawful conduct by said Defendant and/or the DOE Defendants,
5 Plaintiff is entitled to damages for the actual monetary loss incurred or statutory damages in the amount of
6 up to \$100.00 in the case of violation of Section 5(a)(1) or up to \$25.00 in the case of each violation of the
7 other subsections of Section 5 in the form of statutory damages as set forth in 15 U.S.C. § 7706(g)(1)(B)(ii)
8 and 7706(g)(3)(A) and (C).

9 18. Plaintiff furthermore seeks a preliminary and permanent injunction against the Defendant and/or
10 the DOE Defendants for its current and future violations of the CAN-SPAM Act of 2003 as it and members
11 of the general public will continue to incur damages as a result of the unlawful conduct of said Defendant
12 and/or the DOE Defendants. The seeking of injunctive relief by the Plaintiff is specifically authorized by
13 15 U.S.C. § 7706(g)(1)(A).

14 19. Plaintiff furthermore seeks its attorney fees and costs against the Defendant and/or the DOE
15 Defendants pursuant to 15 U.S.C. § 7706(g)(4).

16 20. Plaintiff furthermore seeks a preliminary and permanent injunction against the Defendant and/or
17 the DOE Defendants for its current and future violations of the CAN-SPAM Act of 2003 as it and members
18 of the general public will continue to incur damages as a result of the unlawful conduct of said Defendant
19 and/or the DOE Defendants. The seeking of injunctive relief by the Plaintiff is specifically authorized by
20 15 U.S.C. § 7706(g)(1)(A).

21 21. Plaintiff furthermore seeks its attorney fees and costs against the Defendant and/or the DOE
22 Defendants pursuant to 15 U.S.C. § 7706(g)(4).

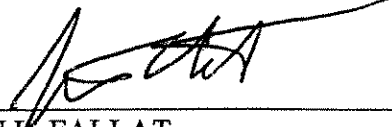
23 22. Defendants' actions detailed above violated 15 U.S.C. § 7704 and entitle Plaintiff to injunctive
24 relief, statutory damages and aggravated damages because of Defendants' willful and knowing violation of
25 the CAN-SPAM Act.

26 ///

27 ///

1 7. For such other and further relief as this Court deems just and proper.

2
3 DATED: 12/8/04

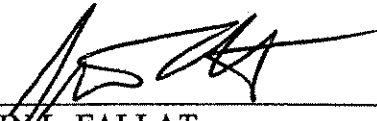


JOHN L. FALLAT
Attorney for Plaintiff
Hypertouch, Inc.

4
5
6
7 **DEMAND FOR JURY TRIAL**

8 Plaintiff Hypertouch, Inc., by and through its attorney hereby demand a jury trial in the above-
9 entitled matter.

10
11 DATED: 12/8/04



JOHN L. FALLAT
Attorney for Plaintiff
Hypertouch, Inc.

Exhibit 1: First Sample Spam

Spammer domains used in this email (06100.com, 05100.com, and visionfan.net) have fake domain registration information: "Light Speed Vision" isn't registered as a DBA in LA County and isn't know to the CA Sec. of State as a Corp or LLC. The USPS (and Mapquest) says the address doesn't exist. And the zip code doesn't even exist according to the USPS website. Call the phone number and you get "This number has been disconnected."

The email also includes fraud in the header, as is noted in mail server's log during the arrival of the message:

```
11:53:45 4 SMTP-015() Got connection from [65.249.78.47:54280]
11:53:45 4 SMTP-015([65.249.78.47]) Sending 220-mail.hasit.com Stalker Internet
Mail Server V.1.8b9d14 is ready.\r\n220 ESMTP is spoken here. NO UCE Sending
unsolicited email ads uses equipment of Hypertouch located in CA and violates
its policies\r
11:53:45 4 SMTP-015([65.249.78.47]) Input Line: HELO 06100.com\r
11:53:45 4 SMTP-015(06100.com) Looking for 06100.com
11:53:45 4 SMTP-015(06100.com) Sending 250 mail.hasit.com this is fraud your
name is not 06100.com\r\n
11:53:45 4 SMTP-015([65.249.78.47]) Input Line: MAIL FROM:<bounce-
768F784D24@05100.com>\r
11:53:45 4 SMTP-015([65.249.78.47]) Sending 250 <bounce-768F784D24@05100.com>
sender accepted\r\n
11:53:45 4 SMTP-015([65.249.78.47]) Input Line: RCPT TO:<****@hypertouch.com
[***Private email address deleted for public court exhibit**]>\r
11:53:45 4 SMTP-015([65.249.78.47]) Sending 250 <****@hypertouch.com
[***Private email address deleted for public court exhibit**> recipient
accepted\r\n
11:53:46 4 SMTP-015([65.249.78.47]) Input Line: DATA\r
11:53:46 4 SMTP-015([65.249.78.47]) Sending 354 Enter mail, end with "." on a
line by itself\r\n
11:53:46 2 SMTP-015([65.249.78.47]) {S.0007688911} received, 2456 bytes
11:53:46 4 SMTP-015([65.249.78.47]) Sending 250 S.0007688911 message accepted
for delivery\r\n
11:53:46 4 SMTP-015([65.249.78.47]) Input Line: QUIT\r
11:53:46 4 SMTP-015([65.249.78.47]) Sending 221 mail.hasit.com closing
connection\r\n
11:53:46 4 SMTP-015([65.249.78.47]) Closing
11:53:46 4 SMTP-015([65.249.78.47]) Nothing read - stream closed
11:53:46 4 SMTP-015([65.249.78.47]) Input Stream ended
11:53:46 3 SMTP-015([65.249.78.47]) Abort Received, reason=6011768
```


-- Kennedy-Western spam as would be viewed in web-enabled email client--

From: Career Advancement <noreply@05100.com>

Subject: ****SPAM**** Want to get ahead in your career?

To: [**Private email address deleted for public court exhibit**]

Date: Tue, 03 Aug 2004 11:53:46 -0700



KW Kennedy-Western University

Earn your degree at your own pace. Online. Anytime.

Since 1984, Kennedy-Western University has been offering mid-career professionals an opportunity to complete their degree without classroom attendance, at their own pace, and in less time than traditionally required.

- Earn a B.S., M.S., or Ph.D. degree faster than at traditional universities
- No classroom attendance required
- Credit for work and education experience
- Learn at your own pace
- Same curriculum used in universities across the country
- Offering industry recognized degree programs for over 18 years

**Click here for a
FREE catalog**

[Click here to unsubscribe from receiving Kennedy-Western University emails.](#)

Kennedy-Western University
200 West 17th Street
Cheyenne, WY 82001-4412

If you wish to be removed from this email list, [click here](#). You can also send a request via postal mail to: Newsletter Dept., PO BOX 812274, Boca Raton, Florida 33481-2274. Be sure to include your email address. Please allow a week for processing.

<http://join.msn.com>

EXHIBIT |

-- Full non-redacted (except for recipient's address) source of Kennedy-Western spam --

Return-Path: bounce-768F784D24@05100.com
Received: from [65.249.78.47] (HELO 06100.com)
by mail.hasit.com (Stalker SMTP Server 1.8b9d14)
with SMTP id S.0007688911 for <****@hypertouch.com [****Private email address
deleted for public court exhibit****]>; Tue, 03 Aug 2004 11:53:46 -0700
Received: (qmail 9598 invoked by uid 0); 3 Aug 2004 16:32:04 -0000
From: Career Advancement <noreply@05100.com>
Subject: **SPAM** Want to get ahead in your career?
To: ****@hypertouch.com [****Private email address deleted for public court
exhibit****]
MIME-Version: 1.0
Content-Type: MULTIPART/alternative; BOUNDARY="0-1804289383-
1091550710=:7839"
X-bounce-to: bounce-768F784D24-[****]=hypertouch.com@05100.com
Date: Tue, 03 Aug 2004 11:53:46 -0700
X-SpamPal: SPAM SBL+XBL 65.249.78.47

<x-html>
<html>

<head>
<meta http-equiv="Content-Type" content="text/html; charset=windows-1252">
</head>

<body>
<center>
<p>
<a
href="http://t1.05100.com/track.php/768F784D24/fast/1?email=[****]%40hypertouch.c
om">
</p>
</center>
<p align="center"><u>

<a title="http://www.kw.edu/optout_contact.asp"
href="http://t1.05100.com/track.php/768F784D24/fast/3?email=[****]%40hypertouch.c
om">
Click here<font face="Arial"
size="2"><span style="font-weight:
bold; color: black; font-family: Arial"><a title="http://www.kw.edu/optout_contact.asp"
href="http://t1.05100.com/track.php/768F784D24/fast/2?email=[****]%40hypertouch.c
om">

EXHIBIT |

29

to unsubscribe from receiving Kennedy-Western University
emails.</u></p>
<p align="center">Kennedy-Western University

200 West 17th Street

Cheyenne, WY 82001-4412</p>

<p align="center"><a
href="http://t1.05100.com/ unsub.php?email=[****]%40hypertouch.com&cid=768F784D
24">
</p>
<p align="center">

http://join.msn.com</p></body>

</html>
</x-html>

Second Sample Spam

Spammer domain used in this email (Bargain-warrior.com) has fake domain registration information. The zip code doesn't even exist according to the USPS website. Spam sent to an illegally harvested domain registration contact address (dnsbill@hypertouch.com); Email includes fraud in the header.

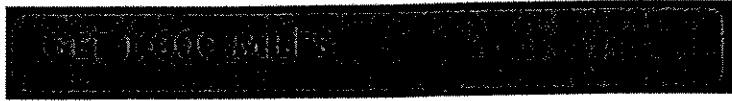
--Full non-redacted email source of Kennedy-Western spam --

Received: from [65.33.102.111] (HELO mail.bargain-warrior.com)
by mail.hasit.com (Stalker SMTP Server 1.8b9d14)
with SMTP id S.0003783787 for <dnsbill@hypertouch.com>; Fri, 11 Jun 2004
19:48:39 -0700
Date: Sat, 12 Jun 2004 00:00:14 +0000
From: Time 2 Learn <guyhem@bargain-warrior.com>
Subject: Distance-learning, at your own pace
To: Dnsbill <dnsbill@hypertouch.com>
References: <24B460DI210A1A8F@hypertouch.com>
In-Reply-To: <24B460DI210A1A8F@hypertouch.com>
Message-ID: <31C41KHDH65J0B50@bargain-warrior.com>
MIME-Version: 1.0
Content-Type: text/html
Content-Transfer-Encoding: 8bit

```
<x-html>
<!DOCTYPE HTML PUBLIC "-//W3C//DTD HTML 4.0 Transitional//EN">
<HTML><HEAD><TITLE>Kennedy Western</TITLE>
<META http-equiv=Content-Type content="text/html; charset=iso-8859-1">
<META content="MSHTML 6.00.2800.1400" name=GENERATOR></HEAD>
<BODY text=#000000 bgColor=#ffffff leftMargin=0 topMargin=0 marginheight="0"
marginwidth="0"><center>
<a href="http://www.bargain-warrior.com/10190/kwu.php"></a><br>
<table width="599" border="0">
<tr>
<td width="334" height="76" valign="top"><font color="#9AB0B3" size="1"
face="verdana"><a href="http://www.bargain-warrior.com/10190/kwu-o.php">Click
here</a> to unsubscribe from receiving Kennedy-Western University
emails.</font></td>
<td width="305" align="right"><font size="1" face="verdana">
<div align="right"><font color="#567C80">Kennedy-Western University <br>
<font size="1" face="verdana">200 West 17th Street</font><br>
<font size="1" face="verdana">Cheyenne, WY 82001-4412</font></div>
```

```
<p> <br>
  </p></td>
</tr>
</table></center>
<div align="center">
  <a href="http://www.bargain-warrior.com/10190/o.php"></a>
<br>P.O. Box 7897 G.P.O. Shah Alam - 40732 Shah Alam - Selangor D.E. Malaysia.
</div>
</BODY></HTML>
```

```
</x-html>
```



WHOIS SEARCH RESULTS

05100.com



[Certified Offer Service](#) - Make an offer on this domain
[Backorder](#) - Get this name when it becomes available
[Private Registration](#) - Make personal information for this domain private
[Similar Names](#) - See suggested alternatives for this domain

Registrant:
 Light Speed Vision (380626830)
 1555 N. Robertson Blvd
 Los Angeles, CA 90204
 US
 Phone: 3125999900

[Make this info private](#)

Domain Name: 05100.COM

Administrative Contact:
 Kennedy, Jacky
 (38062684P)
 jackykennedy2000@yahoo.com
 1555 N. Robertson Blvd
 Los Angeles, CA 90204
 US
 Phone: 3125999900

Technical Contact:
 Network Solutions, LLC. (HOST-ORG)
 customerservice@networksolutions.com
 13200 Woodland Park Drive
 Herndon, VA 20171-3025
 US
 Phone: 1-888-642-9675
 Fax: 571-434-4620

Record expires on 24-Jun-2005
Record created on 24-Jun-2004
Database last updated on 13-Jul-2004

Domain servers in listed order:

NS95.WORLDDNIC.COM	216.168.225.235
NS96.WORLDDNIC.COM	216.168.225.236

[Show underlying registry data for this record](#)

Current Registrar:	NETWORK SOLUTIONS, LLC.
IP Address:	1.1.1.1 (ARIN & RIPE IP search)
IP Location:	(-)
Record Type:	Domain Name
Server Type:	Apache 2
Lock Status:	REGISTRAR-LOCK
Web Site Status:	Active
DMOZ:	no listings
YI Directory:	see listings
Secure:	No
E-commerce:	No
Traffic Ranking:	Not available
Data as of:	08-Jun-2004

.net
 .org
 .info
 .biz
 .tv
 .us
 .bz
 .vg
 .gs
 .tc
 .ms
 .name

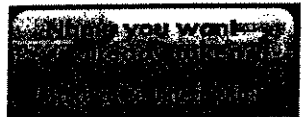
[CONTINUE](#)

Enter a search term:

 e.g. networksolutions.com

Search by:
 [Domain Name](#)
 [NIC Handle](#)
 [IP Address](#)

[SEARCH](#)



When you register a domain name, current policies require that the contact information for your domain name registration be included in a public database known as WHOIS. To learn about actions you can take to protect your WHOIS information visit www.internetprivacyadvocate.org.

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NetworkSolutions

WHOIS VIEW ORDER CUSTOMER SERVICE

ACCOUNT MANAGER LOGIN

HOME REGISTER A DOMAIN CREATE A WEB SITE BUY E-MAIL PURCHASE HOSTING PROMOTE YOUR SITE GROW YOUR BUSINESS TRANSFER YOUR DOMAINS RENEW SERVICES



WHOIS SEARCH RESULTS

06100.com



Certified Offer Service - Make an offer on this domain
Backorder - Get this name when it becomes available
Private Registration - Make personal information for this domain private
Similar Names - See suggested alternatives for this domain

Registrant:
Light Speed Vision (38062683Q)
1555 N. Robertson Blvd
Los Angeles, CA 90204
US
Phone: 3125999900

[Make this info private](#)

Domain Name: 06100.COM

Administrative Contact:
Kennedy, Jacky
(38062684P)
jackykennedy2000@yahoo.com
1555 N. Robertson Blvd
Los Angeles, CA 90204
US
Phone: 3125999900

Technical Contact:
Network Solutions, LLC. (HOST-ORG)
customerservice@networksolutions.com
13200 Woodland Park Drive
Herndon, VA 20171-3025
US
Phone: 1-888-642-9675
Fax: 571-434-4620

Record expires on 24-Jun-2005
Record created on 24-Jun-2004
Database last updated on 13-Jul-2004

Domain servers in listed order: [Manage DNS](#)
[NS5.WORLDDNIC.COM](#) 216.168.225.135
[NS6.WORLDDNIC.COM](#) 216.168.225.136

[Show underlying registry data for this record](#)

Current Registrar: NETWORK SOLUTIONS, LLC.
IP Address: 65.249.78.2 (ARIN & RIPE IP search)
IP Location: US(UNITED STATES)
Record Type: Domain Name
Server Type: Apache 2
Lock Status: REGISTRAR-LOCK
Web Site Status: Active
DMOZ: no listings
Y! Directory: see listings
Secure: No
E-commerce: No
Traffic Ranking: Not available
Data as of: 08-Jun-2004



- 06100 .net
- 06100 .org
- 06100 .info
- 06100 .biz
- 06100 .tv
- 06100 .ws
- 06100 .bz
- 06100 .vg
- 06100 .gs
- 06100 .tc
- 06100 .ms
- 06100 .name

CONTINUE



Enter a search term:
e.g. networksolutions.com

- Search by:
- Domain Name
 - NIC Handle
 - IP Address

SEARCH



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Trusted for Online Success

MY ACCOUNT DOMAIN NAMES PRODUCTS PROGRAMS HELP CORPORATE

Home » Whois » Domain Owner Check

Whois

Domain Owner Check

To view current registration and ownership details please enter the domain name in the inspection box, select the correct extension and click on the WhoIs button.

Domain name	Extension	Encoding
bargain-warrior	.com	

Whois

Whois Result For bargain-warrior.com @ whois.melbourneit.com

Domain Name	bargain-warrior.com
Creation Date	2004-03-11
Registration Date	2004-03-11
Expiry Date	2005-03-11
Organisation Name	Collin J Priskovskino
Organisation Address	7429 Nort C St, St. Paul, MI 20932 Paul 845144 waiguo CHINA
Admin Name	Collin J Priskovskoi
Admin Address	7429 Nort C St, St. Paul, MI 20932 Paul 845144 waiguo CHINA
Admin Email	rall1972@hotmail.com
Admin Phone	+1.0465425435
Admin Fax	+1.0465425435
Tech Name	Collin J Priskovskoi
Tech Address	7429 Nort C St, St. Paul, MI 20932 Paul 845144 waiguo CHINA
Tech Email	rall1972@hotmail.com
Tech Phone	+1.0465425435
Tech Fax	+1.0465425435
Name Server	ns1.ultra-savings.com ns2.ultra-savings.com

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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the aforesaid county, State of California; I am over the age of 18
4 years and not a party to the within action; my business address is **2450 Colorado**
5 **Avenue, Suite 400E, Santa Monica, California 90404.**

6 On March 4, 2005, I served the **DEFENDANT BOCA NETWORKS.COM'S NOTICE OF**
7 **MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES;**
8 **DECLARATION OF ANDREW PAUL** on the interested parties in this action by placing the true
9 copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

10 **SEE ATTACHED SERVICE LIST**

11 **(BY ELECTRONIC MAIL)**

12 I sent via electronic mail the above-captioned document to the above-referenced parties and
13 received no system administrator undeliverable message.

14 I am readily familiar with the business practice of my place of employment in respect to the
15 collection and processing of correspondence, pleadings and notices for mailing with United
16 States Postal Service. The foregoing sealed envelope was placed for collection and mailing
17 this date consistent with the ordinary business practice of my place of employment, so that it
18 will be picked up this date with postage thereon fully prepaid at Santa Monica, California, in
19 the ordinary course of such business.

20 **(BY FEDERAL EXPRESS)**

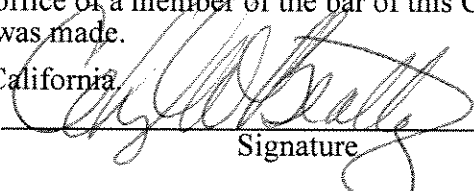
21 I am readily familiar with the business practice of my place of employment in respect to the
22 collection and processing of correspondence, pleadings and notices for delivery by Federal
23 Express. Under the practice it would be deposited with Federal Express on that same day with
24 postage thereon fully prepared at Santa Monica, California in the ordinary course of business. I
25 am aware that on motion of the party served, service is presumed invalid if delivery by Federal
26 Express is more than one day after date of deposit with Federal Express.

27 **(BY FACSIMILE)**

28 On March 4, 2005, I transmitted the foregoing document(s) by facsimile sending number.
Pursuant to rule 2009(i)(4), I caused the machine to print a transmission record of the
transmission, a true and correct copy of which is attached to this declaration.

(FEDERAL) I declare under penalty of perjury that the foregoing is true and correct,
and that I am employed at the office of a member of the bar of this Court
at whose direction the service was made.

Executed on March 4, 2005, at Santa Monica, California


Signature

CHERYL BEATTY

Print Name

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SERVICE LIST
Case No. 3:04-cv-05203-SI
HYPER TOUCH, INC., v. KENNEDY-WESTERN UNIVERSITY

<p>John L. Fallat, Esq. Law Offices of John L. Fallat 907 Sir Francis Drake Boulevard, Suite 100 Kentfield, CA 94904-1502 Tel: 415-457-3773-- Fax: 415-457-2667 jfallat@fallat.com</p>	<p>Cynthia Woollacott 10350 Santa Monica Boulevard, Suite 350 Los Angeles, CA 90025 Tel: 310-277-5504 cw@wjllp.com</p>
<p>Jeffrey K. Riffer, Esq. Jeffer, Mangles, Butler & Marmaro 1900 Avenue of the Stars, Seventh Floor Los Angeles, CA 90067-4308 Tel: 310-203-8080—310-203-0567 jkr@jmbm.com</p>	