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Attorney for Plaintiff
HYPER TOUCH, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HYPER TOUCH, INC., a California
corporation,

Plaintiff,

vs.

KRAFT FOODS, INC., a Virginia
Corporation, VICT. TH. ENGWALL & CO.,
INC., a Delaware Corporation,

Defendants.

Case No. C05 01589 PJH

**FIRST AMENDED 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**

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 Kraft Foods, Inc., which has purposefully engaged in business activities in California and availed itself of the benefit of conducting commercially related activities within California.

1 4. This Court has personal jurisdiction over Defendant Vict. Th. Engwall & Co., Inc., which has
2 purposefully engaged in business activities in California and availed itself of the benefit of conducting
3 commercially related activities within California.

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

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

8 7. Plaintiff is informed and believes that Defendant Kraft Foods, Inc. is a corporation organized
9 under the laws of Virginia, with its principal place of business located in Three Lakes Drive, Illinois.

10 8. Plaintiff is informed and believes that Defendant Vict. Th. Engwall & Co., Inc. is a corporation
11 organized under the laws of Delaware with its principal place of business located in Northfield, Illinois.

12 9. Defendant Vict. Th. Engwall & Co., Inc. is the owner of the Gevalia brand name and uses the
13 domain names Gevalia.com and JoinGevalia.com for its online promotions.

14 10. The domain names Gevalia.com and JoinGevalia.com are registered to Kraft Foods, Inc.

15
16 **FIRST CAUSE OF ACTION**

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

18 (Against All Defendants)

19 11. Plaintiff refers to the allegations of the preceding paragraphs of this Complaint, and
20 incorporates the same herein by this reference as though set forth in full.

21 12. From January 1, 2004 forward, Plaintiff received electronic mail from Defendants and/or their
22 agents advertising Gevalia to its mail servers that violated the CAN-SPAM Act of 2003 as set forth below.
23 Attached as Exhibits 1 and 2, respectively, are a true and correct sample of the electronic mail
24 communications received by Plaintiff's mail servers and a list of all 8,518 currently identified messages.

25 13. Plaintiff also alleges that the Defendants and/or their agents sent the electronic mail in willful
26 and knowing violation of the CAN-SPAM Act of 2003.

27 14. Many of the relevant electronic mails sent by the Defendants and/or their agents from January
28 1, 2004 forward contained or were accompanied by or were transmitted with header information that was

1 materially false or materially misleading. For example, the identities, provided by the Defendants and/or
2 their agents, of the machines delivering mail to Plaintiff's mail servers do not match the IP addresses of the
3 contacting machine. In Exhibit 1, the sender used a machine at IP address 204.9.23.161 but that machine
4 identified itself as "breedingcoverage.com" which the spammer's own DNS server confirmed resided at a
5 completely different IP address: 66.63.174.191. In addition, the Defendants and/or their agents attempt to
6 mislead the recipients of their messages by using different fictitious people's names in the "From:" lines of
7 the message headers. For example, on March 26, 2005 the Defendants and/or their agents sent 761
8 electronic messages purporting to be from 761 different people, with each message's "From:" line
9 containing a unique full first and last name. Said conduct was in violation of 15 U.S.C. § 7704(a)(1).

10 15. Plaintiff further alleges that the Defendants and/or their agents sent electronic mail to the
11 Plaintiff that included domain names which were registered to false, non-existent entities, used false
12 addresses and/or used false telephone numbers. For example, the domain name "perfection.com" was
13 registered to "Perl Fiction" with a registration address of "12785 Stage Coach Dr., Orlando, FL 31223";
14 attached as Exhibit 3 is a true and correct copy of the domain registration of perlfiction.com. Plaintiff
15 alleges the name and address listed on Exhibit 3 is false. Said conduct was in violation of 15 U.S.C.
16 § 7704(a)(1).

17 16. Plaintiff further alleges that the Defendants and/or their agents sent electronic mail to the
18 Plaintiff that had no valid physical postal address of the sender. Said conduct was in violation of 15 U.S.C.
19 § 7704(a)(5)(iii).

20 17. Plaintiff further alleges that the Defendants and/or their agents sent electronic mail to the
21 Plaintiff to an address harvested from domain name contact registration information. Said conduct was in
22 violation of 15 U.S.C. § 7704(b)(1)(A)(i).

23 18. Plaintiff further alleges that the Defendants and/or their agents sent electronic mail to the
24 Plaintiff to addresses generated using automated means. Said conduct was in violation of 15 U.S.C.
25 § 7704(b)(1)(A)(ii).

26 19. Plaintiff further alleges that it received electronic mail from the Defendants and/or their agents
27 sent to a newly created email address that was submitted, as a test on November 8, 2004, to Gevalia's
28 mechanism for requesting not to receive future commercial electronic mail messages, i.e. to

1 “http://www.joingevalia.com/optout/spam_unsubscribe.aspx.” Said test email address had never before
2 nor has not since been provided to any entity, yet that address now regularly receives other unsolicited
3 electronic mail advertisements. Said conduct was in violation of 15 U.S.C. § 7704(a)(4)(A)(iv).

4 20. Plaintiff further alleges that the Defendants and/or their agents sent electronic mail to the
5 Plaintiff with a reply address that did not and could not have a functioning from or return electronic mail
6 address because the domain name was not valid. For example, on March 12, 2005, 677 messages were sent
7 with email addresses in the “From:” and “Reply-To:” header lines that used the expired domain name of
8 “figurespade.com.” Said conduct was in violation of 15 U.S.C. § 7704(a)(1) and 15 U.S.C.
9 § 7704(a)(3)(A).

10 21. As a proximate result of said unlawful conduct by said Defendants and/or their agents, Plaintiff
11 is entitled to damages for the actual monetary loss incurred or statutory damages in the amount of up to
12 \$100.00 in the case of violation of 15 U.S.C. § 7704(a)(1) or up to \$25.00 in the case of each violation of
13 the other subsections of 15 U.S.C. § 7704 in the form of statutory damages as set forth in 15 U.S.C.
14 § 7706(g)(1)(B)(ii) and 7706(g)(3)(A) and (C).

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

20 23. Plaintiff furthermore seeks its attorney fees and costs against the Defendants and/or their agents
21 pursuant to 15 U.S.C. § 7706(g)(4).

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

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SECOND CAUSE OF ACTION

(Violation of California Business & Professions Code § 17529.5)

(Against All Defendants)

25. Plaintiff refers to the allegations of the preceding paragraphs of this Complaint and incorporates the same herein by this reference as though set forth in full.

26. As set forth in the preceding paragraphs, Plaintiff alleges that the Defendants and/or their agents acting as its agents, sent electronic mail advertisements to the Plaintiff that contained falsified, misrepresented, or forged header information.

27. As a proximate result of said unlawful conduct by said Defendants and/or their agents, Plaintiff is entitled to damages for the actual monetary loss incurred and liquidated damages of \$1,000.00 per each unsolicited electronic mail advertisement, and attorney fees and costs, pursuant to California Business & Professions Code §17529.8.

WHEREFORE, Plaintiff prays judgment against the Defendants, and each of them, as follows:

1. For actual monetary damages according to proof, or in the alternative, statutory damages for up to \$100.00 for each violation of said Section 7704(a)(1) and up to \$25.00 in the case of any other violation of said Section 7704;

2. For aggravated damages under 15 U.S.C. § 7706(g)(3)(C)(i) and (ii) of up to three times the amount above for these violations committed by the Defendants and/or their agents willfully and knowingly, and for Defendants' and/or their agents' unlawful activity which includes aggravated violations of section 7004(b);

3. For actual monetary damages according to proof and liquidated damages of \$1,000.00 for each violation of Business & Professions Code §17529.5;

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1 4. For a preliminary and permanent injunction preventing the Defendants and all persons acting in
2 concert with them from the violation of the CAN-SPAM Act of 2003;

3 5. For an award of reasonable attorneys' fees and costs according to proof pursuant to 15 U.S.C.
4 7706(g)(4) and Business & Professions Code §17529.8(b)(2);

5 6. For costs of suit; and

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

7
8 DATED:

9 JOHN L. FALLAT
10 Attorney for Plaintiff
11 Hypertouch, Inc.

12 **DEMAND FOR JURY TRIAL**

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

15
16 DATED:

17 JOHN L. FALLAT
18 Attorney for Plaintiff
19 Hypertouch, Inc.