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6 Attorneys for Defendant
KRAFT FOODS INC.

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

HYPERTOUCHE, INC., a California
corporation,

Plaintiff,

v.

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

Defendants.

CASE NO. C 05-01589 PJH

**KRAFT FOODS INC.'S ANSWER AND
SEPARATE DEFENSES TO FIRST
AMENDED COMPLAINT**

Defendant Kraft Foods Inc. ("Kraft"), improperly sued as Kraft Foods, Inc., answers the First Amended Complaint ("Complaint") of Plaintiff Hypertouch, Inc. ("Plaintiff" or "Hypertouch"), on personal knowledge as to its own activities and on information and belief as to the activities of others, as follows:

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JURISDICTION, VENUE, AND PARTIES

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1. Answering the allegations of Paragraph 1, Kraft admits that this Court has original jurisdiction, in that the Complaint avers to bring this action under the CAN-SPAM Act of 2003 (15 U.S.C. §7701 et seq.), the Computer Fraud and Abuse Act. Except as thus expressly admitted, Kraft denies the allegations of Paragraph 1.

2. Answering the allegations of Paragraph 2, Kraft admits that this Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§1331 and supplemental jurisdiction pursuant to 28 U.S.C. §1367, in that the Complaint avers to be an action for violation of the CAN-SPAM Act of 2003 (15 U.S.C. §7701 et seq.) and California Business & Professions Code §17529.5. Except as thus expressly admitted, Kraft denies the allegations of Paragraph 2.

3. Answering the allegations of Paragraph 3, Kraft denies that this Court has personal jurisdiction over Kraft.

4. Kraft is informed and believes that the allegations of Paragraph 4 are correct, in that the Complaint avers that Vict. Th. Engwall has conducted business in California.

5. Answering the allegations of Paragraph 5, Kraft denies that venue is proper as to it, in this judicial district pursuant to 28 U.S.C. § 1391(b). For the remaining allegations of Paragraph 5, Kraft lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

6. Kraft lacks knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6, and on that basis denies those allegations.

7. Kraft admits the allegations of Paragraph 7.

8. Kraft is informed and believes that the allegations of Paragraph 8 are correct, in that the Complaint avers that Vict. Th. Engwall is a Delaware corporation.

9. Answering the allegations of Paragraph 9, Kraft denies that Vict. Th. Engwall is the owner of the Gevalia brand-name. Kraft is informed and believes that Vict. Th. Engwall uses the domain names Gevalia.com and JoinGevalia.com for its online promotions.

10. Kraft admits the allegations of Paragraph 10.

FIRST CAUSE OF ACTION

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

(Against All Defendants)

11. Answering the allegations of Paragraph 11, Kraft incorporates its responses to Paragraphs 1 through 10 as if fully set forth herein.

12. Kraft denies that it sent any electronic mail to Plaintiff. As to the remaining allegations of Paragraph 12, Kraft lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

13. Kraft denies that it sent any electronic mail to Plaintiff. As to the remaining allegations of Paragraph 13, Kraft lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

14. Kraft denies that it sent any electronic mail to Plaintiff. As to the remaining allegations of Paragraph 14, Kraft lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

15. Kraft denies that it sent any electronic mail to Plaintiff. As to the remaining allegations of Paragraph 15, Kraft lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

16. Kraft denies that it sent any electronic mail to Plaintiff. As to the remaining allegations of Paragraph 16, Kraft lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

17. Kraft denies that it sent any electronic mail to Plaintiff. As to the remaining allegations of Paragraph 17, Kraft lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

18. Kraft denies that it sent any electronic mail to Plaintiff. As to the remaining allegations of Paragraph 18, Kraft lacks knowledge or information sufficient to form a belief as to the truth of those allegations, and on that basis denies them.

1 2003, 15 U.S.C. § 7704, and/or California Business & Professions Code § 17529.5.

2 **SECOND SEPARATE DEFENSE**

3 29. Plaintiff's claims are barred because to the extent that any alleged unlawful e-mails
4 were sent, which Kraft expressly denies, such e-mails were transmitted accidentally and/or after
5 implementation of reasonable measures or procedures to avoid sending unlawful e-mails.

6 **THIRD SEPARATE DEFENSE**

7 30. Plaintiff's alleged injury is the result, in whole or in part, of its own or others'
8 actions and comparative or contributory fault. In addition, if any damages have resulted, Plaintiff
9 failed to mitigate.

10 **FOURTH SEPARATE DEFENSE**

11 31. Plaintiff's claims are barred, in whole or in part, by the doctrines of laches, waiver
12 and estoppel.

13 **FIFTH SEPARATE DEFENSE**

14 32. Plaintiff's claims are barred by the doctrine of unclean hands.
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16 DATED: June 2, 2005.

PERKINS COIE LLP

17 By _____ /s/
18 Kenneth B. Wilson
19 Suchon Tuly
20 Attorneys for Defendant Kraft Foods Inc.
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PROOF OF SERVICE

I, Susan Daniels, declare:

I am a citizen of the United States and am employed in the County of San Francisco, State of California. I am over the age of 18 years and am not a party to the within action. My business address is Perkins Coie LLP, 180 Townsend Street, 3rd Floor, San Francisco, California 94107-1909. I am personally familiar with the business practice of Perkins Coie LLP. On June 2, 2005, I served the following document(s):

KRAFT FOODS INC.'S ANSWER AND SEPARATE DEFENSES TO FIRST AMENDED COMPLAINT

by placing a true copy thereof enclosed in a sealed envelope addressed to the following parties:

Counsel for Plaintiff
Brian Triplett, Esquire
Law Offices of John L. Fallatt
523 Fourth Street, Suite 210
San Rafael, CA 94901

_____ (By Overnight Courier) I caused each envelope, with postage fully prepaid, to be sent by _____.

XXX (By Mail) I caused each envelope with postage fully prepaid to be placed for collection and mailing following the ordinary business practices of Perkins Coie LLP.

_____ (By Hand) I caused each envelope to be delivered by hand to the offices listed above.

_____ (By Facsimile/Telecopy) I caused each document to be sent by Automatic Facsimile/Telecopier to the number(s) indicated above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed at San Francisco, California.

DATED: June 2, 2005. _____
Susan Daniels