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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HYPERTOUCHE, INC., a California corporation,

Plaintiff,

vs.

KENNEDY-WESTERN UNIVERSITY,

Defendant.

Case No. C 045203 SI

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RESPONSE AND OPPOSITION TO
MOTION FOR PROTECTIVE ORDER**

**Date: August 12, 2005
Time: 9:00 a.m.
Dept. 10**

Plaintiff Hypertouch, Inc., by and through its undersigned attorneys, hereby responds and opposes defendant's Motion for Protective Order. This Response and Opposition is based upon the attached declarations, the accompanying Memorandum of Points and Authorities and the entire record in this matter to date.

1. Introduction

As defendant's recitation of facts shows, both plaintiff and defendant have an interest in instating a protective order in this matter. Also shown is plaintiff's active participation in negotiations to create a

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1 protective order that meets each party's needs. The dates of the exchanges in this negotiation show that as
2 late as June 28, 2005 the parties were actively pursuing negotiations for a protective order.

3 What plaintiff objects to is the implication that plaintiff has engaged in a bad faith refusal to
4 negotiate this matter, or is otherwise dragging its heels on the issue. The Court should note that defendant
5 fails to inform us as to how the last proposed draft was transmitted. More importantly, the Court should
6 note that the filing of this Motion was on July 5, 2005, a mere five (5) judicial days—six (6) mailing dates—
7 from the June 28th date. Only defendant's need for undue haste prompts this motion—which is, the Court
8 will note, otherwise needless.

9 **2. Plaintiff's Position Regarding a Protective Order**

10 Plaintiff's position is that automatic inclusion of *any* document produced by either party to the
11 limitations of the protective order is totally unacceptable. Equally unacceptable is a retroactive provision in
12 the application of the protective order. One can envision embroiled litigation over when, and whether the
13 protective order applied, and so, whether there was a breach of it, in the event that some document or other
14 appears outside of this litigation. The Court need only note defendant's energetic pursuit of sanctions in this
15 matter, to see the future. If the protective order is not well thought out, the Court could be opening itself up
16 to unending peripheral litigation over alleged transgressions, as well as loopholes to accommodate
17 spammers and marketers.

18 However, speaking for itself, and speaking prospectively, plaintiff would like to see the proprietary
19 information of Hypertouch's customers protected by an "Attorney's Eyes Only" provision, so that the
20 documents and data regarding customer information do not ultimately land in the hands of defendant's, or
21 any other spammers or marketers. This problem is pervasive, as Congress has noted:

22 "The convenience and efficiency of electronic mail are threatened by the extremely rapid growth in
23 the volume of unsolicited commercial electronic mail. Unsolicited electronic mail is currently
24 estimated to account for over half of all electronic mail traffic, up from an estimated 7 percent in
25 2001, and the volume continues to rise. Most of these messages are fraudulent or deceptive in one or
26 more respects."

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1 15 U.S.C. § 7701(a)(2). Plaintiff does not wish to see this litigation actually become a contributor to this
2 massive problem. In particular, plaintiff has a huge interest in seeing to it that its own customers are not
3 victimized in this regard.

4 **3. Defendant's Proposed Protective Order**

5 Defendant's proposed protective order is unacceptable to plaintiff for the following reasons:

- 6 • It fails to address non-retroactivity.
- 7 • It also fails to state a commencement date.
- 8 • It is automatic and absolute in its coverage. Protective Order [Proposed], page 2, lines 8-9.
- 9 • It is a veritable litigation breeder; for example, in Level two protection, it provides: "If the party to
10 whom 'Attorneys Only' material has been produced disagrees with the designation, they may move
11 for redesignation." Protective Order [Proposed], page 2, lines 24-25. Presumably that would be
12 accompanied by a motion for sanctions, as well.

13 However, insofar as both parties appear to be in favor of some sort of protective order, plaintiff asks the
14 Court to consider denying this motion in order to permit the parties time to complete negotiations.

15 Thereafter, if agreement is not reached both parties might brief their respective positions on a joint motion
16 for protective order.

17 **4. Conclusion**

18 For the foregoing reasons, plaintiff respectfully requests that this Court deny defendant's Motion to
19 Compel Answers to interrogatories with the following Order:

20 "Defendant's Motion for Protective Order is denied. The parties appear to have been
21 progressing on their own in negotiations over a protective order and defendant has not shown the
22 need for the Court's intervention at this point. In the future, should the parties be unable to reach
23 agreement on a protective order, the Court may entertain a joint motion for protective order in which
24 each party briefs its respective position on the matter."

25 DATED: July 22, 2005

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27 JOHN L. FALLAT
28 Attorney for Plaintiff

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