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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 SANCTIONS
RELATING TO (1) DOCUMENT
REQUEST AND (2)
INTERROGATORIES**

**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 two Motions for Sanctions with this single Response and Opposition. Both of defendant's motions are identical save that one relates to the controversy over the document request and the other relates to the controversy over interrogatory responses. In the interests of judicial economy, plaintiff responds to both in this single Response and Opposition. 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.

**MEMORANDUM OF POINTS AND AUTHORITIES
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MOTION FOR SANCTIONS RELATING TO
DOCUMENT REQUEST AND INTERROGATORIES**

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2 **1. Introduction**

3 Defendant begins its sanction motions by claiming the “threshold issue” of this case to be plaintiff’s
4 standing to sue and thus the jurisdiction of the Court. Defendant makes the same claim that it made in its
5 motion to compel document production and motion to compel interrogatories, to wit: the document request
6 and interrogatories probe “the facts underlying plaintiff’s standing and the court’s jurisdiction. As
7 demonstrated in plaintiff’s response to defendant’s two motions to compel, none of the discovery even
8 remotely relates to the issue of standing.

9 Additionally, previous responses to defendant’s first and second document requests have produced
10 documents that amply show that Hypertouch is a *legitimate* Internet access service as contemplated by this
11 Congress. Defendant only asks for “documents sufficient,” and plaintiff submits that these are sufficient
12 documents on the issues of standing.

13 Rule 37, F.R.Civ.P., calls for such sanctions “unless the court finds...that the opposing party’s
14 nondisclosure, response, or objection was substantially justified, or that other circumstance make an award
15 of expenses unjust.” By now the Court is well aware of plaintiff’s concern, in the midst of the pretextuality
16 of defendant’s discovery, that the documents and information sought might be, at best, aimed at harassing,
17 and at worst, misappropriated for commercial purposes. Indeed, the defendant admits the validity of
18 plaintiff’s concern by showing its own desire for a protective order. Plaintiff submits that this admission
19 alone demonstrates that the objections at issue were substantially justified.

20 As discussed in plaintiff’s responses and oppositions to defendant’s motions to compel (on
21 production requests and interrogatories), plaintiff has strong concerns for the privacy of the material sought,
22 and this is buttressed by the Constitution of the State of California, Article 1, § 1. A party is not entitled to
23 sanctions where discovery sought is possibly immune from disclosure. *Delozier v. First Nat. Bank of*
24 *Gatlinburg*, 109 F.R.D. 161 (E.D.Tenn. 1986). What the law looks for is the presence of willfulness, bad
25 faith or culpability. *Melendez v. Illinois Bell Telephone Co.*, 79 F.3d 661 (7th Cir. 2003); *Daval Steel*
26 *Products v. M/V Fakredine*, 951 F.2d 1357 (2d Cir. 1991). The Court must find such elements expressly
27 before imposing sanctions. *In re Anthracite Coal Antitrust Litigation*, 82 F.R.D. 364 (D.C.Pa. 1979). This

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1 is not even an issue here. In addition, sanctions may not be imposed on attorneys under the rule providing
2 for sanctions for failure to disclose, false or misleading disclosure or refusal to admit. *Maynard v. Nygren*,
3 332 F.3d 462 (7th Cir. 2003).

4 **2. Conclusion**

5 For the foregoing reasons, plaintiff respectfully requests that this Court deny defendant's
6 Motion for Sanctions with the following Order:

7 "Defendant's Motion for Sanctions is denied. Defendant has not shown that plaintiff or its
8 counsel has conducted itself in any that warrants the imposition of sanctions.

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11 DATED: July 22, 2005

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13 JOHN L. FALLAT
14 Attorney for Plaintiff

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27 **MEMORANDUM OF POINTS AND AUTHORITIES**
28 **IN SUPPORT OF RESPONSE AND OPPOSITION TO**
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