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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 ORDERS
OVERRULING OBJECTIONS TO
PRODUCTION OF DOCUMENTS**

**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 Orders Overruling Objections to Production of Documents. 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

Defendant's argument employs adjectives in such a way as to suggest they came out of some official Congressional glossary: "limited standing"; "exception to"; "general rule that enforcement powers under the Act belonged to the Federal Trade Commission and other responsible governmental bodies. Motion to Compel, page 6, lines 10-13. Nothing is further from the truth. Following this *opera bouffe* the defendant

1 lectures: “Congress did not intend the Act to be the basis for a class of bounty hunters to harass honest
2 businesses or entangle this court in trumped up disputes over trivial Internet problems.” *Id.*, lines 17-19. It
3 would be gratuitous to respond to this were it not that it seriously misleads the Court as to Congress’ aim in
4 passing this recent Act.

5 Putting aside defendant’s proprietary claim to know Congress’ mind, Congress did indeed recognize
6 a legitimate problem with commercial spammers like defendant, and consequently it wrote and passed this
7 Act. Congress did not view it as a “trivial Internet problem.” Based upon no less than twelve findings (15
8 U.S.C. § 7701(a)) it stated as a public policy, (1) that there is a substantial government interest in regulation
9 of commercial electronic mail on a nationwide basis; (2) that senders of commercial electronic mail should
10 not mislead recipients as to the source or content of such mail; and (3) recipients of commercial electronic
11 mail have a right to decline to receive additional commercial electronic mail from the same source. 15
12 U.S.C. § 7701(b). Finally, Congress did also intend for these kinds of actions to be brought in the district
13 courts of the United States: “A provider of Internet access service adversely affected by a violation...may
14 bring a civil action in any district court of the United States with jurisdiction over the defendant...” 15
15 U.S.C. § 7706(g)(1). Defendant’s words are an attempt to trivialize this law in an effort to avoid its very real
16 consequences.

17 **2. Requested Documents are Irrelevant and not likely to lead to the discovery of admissible**
18 **evidence**

19 Defendant seeks to compel production of documents that it purports would reveal plaintiff lacks
20 standing to bring this suit under the Controlling the Assault of Non-Solicited Pornography and Marketing
21 (CAN-SPAM) Act, 15 USC § 7701, *et seq.* (“the Act”), because, allegedly, Hypertouch is not a legitimate
22 Internet access service. It argues that the discovery in question probes “the facts underlying plaintiff’s
23 standing.” Defendant’s Motion to Compel Production of Documents (“Motion to Compel”), page 2, line 21.
24 Yet, the documents demanded by defendant would yield no “contradictory facts” and indeed, would have no
25 bearing on that issue at all.

26 Category no. 21 of defendant’s Production Request (other complaints filed against alleged
27 spammers) does not even remotely test plaintiff’s status as an Internet access service. Plaintiff might well

1 have filed other complaints and still be an Internet access service. Indeed, under the law none but
2 government authorities and Internet access services may bring such lawsuits, as defendant admits, so that
3 plaintiff's standing is presumptively established at the outset. It is illogical to assert that documents
4 produced under this category would say anything whatsoever about plaintiff's standing.

5 Similarly, categories nos. 22-23 (demand letters and responses), 24 (documents showing income
6 "per year" from spammers), 25 (documents showing names and addresses of spammers), 26 (settlement
7 agreements) and 27 (income per year other than from spammers) would yield nothing that would verify or
8 controvert plaintiff's status as an Internet access service. The Act expressly contemplates that Internet
9 access services would bring such suits, so what would be proved if there were documents attesting to the
10 fact that plaintiff acts like an Internet access service? The categories of documents requested would not be
11 germane to resolving that issue of this suit. Fed.R.Civ.P. 26(b)(2). If the defendant would have limited its
12 request to an interrogatory asking the identification of all **civil** cases filed on the issue of unsolicited e-mail
13 advertisements, the plaintiff would have complied.

14 Furthermore, all of the requests are vague, ambiguous and uncertain. For example, category number
15 24 and request "[d]ocuments sufficient to show your income *per year* from..." sources who are believed to
16 be spammers and sources other than spammers. This is vague, ambiguous and uncertain as to what year or
17 years are intended. Is the plaintiff to go back to its date of incorporation, and if so, how is that relevant to
18 the question of whether or not plaintiff is an Internet access service? Numbers 24, 25 and 27 of the
19 document request call for "documents sufficient" which is equally vague and uncertain. Perhaps what
20 plaintiff feels is "sufficient" does not comport with what defendant feels is "sufficient". This kind of
21 ambiguous discovery is calculated to breed litigation, and most assuredly if such a difference should arise,
22 the Court is subjected to a flood of motions to compel, together with accompanying motions for sanctions.
23 Clearly, the requests for production are inartfully drafted, or worse, and while plaintiff wishes to be as
24 forthcoming as possible in discovery, it is better to demonstrate through objection that the requests are
25 irrelevant and not likely to lead to the discovery of admissible evidence.

1 Finally, on the standing issue, previous responses to defendant's first and second document requests
2 have produced documents that amply show that Hypertouch is a *legitimate* Internet access service as
3 contemplated by this Congress. Thus, defendant's reasons for this discovery are pretextual.

4 **3. The Production Demand is Invasive of Plaintiff's Privacy**

5 In addition to the absence of relevance, the discovery in question is invasive of plaintiff's privacy
6 interest in that the categories seek financial information and other documents relating to extraneous matters.

7 As one court noted:

8 "Where a party establishes that disclosure of requested information could cause injury to it or
9 otherwise thwart desirable social policies, the discovering party will be required to demonstrate that
10 its need for the information, and the harm that it would suffer from the denial of such information,
11 outweigh the injury that disclosure would cause either to the other party or to the interests cited by
12 it."

13 *Apex Oil Co. v. DiMauro*, 110 F.R.D 490, 496 (S.D.N.Y 1985); see also, *Johnson v. Nyack Hospital*, 169
14 F.R.D. 550 (S.D.N.Y. 1996). As we have seen, none of the categories at issue in defendant's production
15 request logically connect to the reasons proffered by the defendant. None of them test plaintiff's status as
16 an Internet access service.

17 Privacy is one of those "desirable public policies" intended in *Apex Oil Co.* Defendant points to
18 Rule 501, F.R.Evid., claiming that "federal common law" shall determine the extent of the applicability of
19 "privacy." Motion to Compel, page 4, lines 18-21. But Rule 501 specifically states:

20 "However, in civil actions and proceedings, with respect to an element of a claim or defense as to
21 which State law supplies the rule of decision, the privilege of a witness, person, government, State,
22 or political subdivision thereof shall be determined in accordance with State law."

23 Rule 501, F.R.Evid. Article 1, § 1 of the Constitution of California defines as "inalienable rights":

24 "Among those are enjoying and defending life and liberty, acquiring, possessing, and protecting
25 property, and pursuing and obtaining safety, happiness, *and privacy.*"

26 Constitution of California, Article 1, § 1 (italics added). This right of privacy applies to private action as
27 well as governmental action. *Alfaro v. Terhune* (App. 2 Dist. 2002) 98 Cal.App.4th 492, 120 Cal.Rptr.2d

1 197. Generally, a party attempting to invade a privacy interest must establish that the interest of the party
2 taking the action (1) outweighs the infringement on constitutional privacy, and (2) cannot be achieved by
3 less intrusive means. *Department of Fair Employment and Housing v. Superior Court* (App. 5 Dist. 2002)
4 99 Cal.App.4th 896, 121 Cal.Rptr.2d 615. With respect to the first of these we have already seen that
5 defendant's argument is flawed—the documents requested would not logically show anything regarding
6 plaintiff's standing—and defendant utterly fails to address the second.

7 As we have seen, defendant's claim of relevance does not stand up to scrutiny. On the other hand,
8 documents such as complaints, demand letters and settlement agreements, if any, involve sensitive
9 negotiations that could be upset by indiscriminate circulation of them. Additionally, many settlement
10 agreements may have confidentiality provisions that would be violated by dissemination of them. Most
11 importantly, questions about plaintiff's income sources are highly intrusive and involve matters that are
12 totally personal. Hypertouch, while indeed a corporation, but unlike Gulf Oil Co., is closely held such that
13 revealing personal financial information about it is revealing personal financial information about its
14 shareholders.

15 Additionally, the very nature of this action draws into question defendant's motives in seeking this
16 information. Many of the categories identified might refer to documents, if any, having lists or keys to
17 revealing lists of Internet users in appendices and attachments. As everyone, including Congress, is aware,
18 lists are the life's blood of commercial spammers such as defendant. It would be harsh irony if defendant
19 could use each such lawsuit filed against it to procure more lists for use in its illicit endeavors.

20 Finally, should the Court be inclined to grant defendant's Motion to Compel it is respectfully request
21 the Court include in its Order an "attorney's eyes only" provision so that such sensitive material not be
22 indiscriminately circulated.

23 **4. Conclusion**

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

26 "Plaintiff Hypertouch's objections to defendant's production request categories Nos. 21-27
27 are sustained. Defendant has not shown them to be germane to the proffered issue of plaintiff's

1 standing and its requests are invasive of plaintiff's privacy rights under Article 1, § 1 of the
2 Constitution of California. Plaintiff's privacy outweighs defendant's need for the documents."

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5 DATED: July 22, 2005

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7 JOHN L. FALLAT
8 Attorney for Plaintiff
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