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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11	HYPERTOUCHE,)	CASE NO. C 04 5203 SI
)	
12	PLAINTIFF,)	REPLY MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF MOTION
13	vs.)	OVERRULING OBJECTIONS TO INTER-
)	ROGATORIES AND COMPELLING
14	KENNEDY-WESTERN UNIVERSITY,)	PLAINTIFF TO ANSWER WITHIN TEN DAYS
)	
15	DEFENDANT.)	
)	

16
17 HEARING:
18 Date: 12 August 2005
19 Time: 9:00 a.m.
20 Courtroom 10.

21
22 Plaintiff's opposition relies on the proposition that a half-truth when repeated several
23 times becomes the whole truth. Not so.

24 Argument in the opposition about the core issue of standing and jurisdiction illustrates
25 the problem. According to plaintiff, defendant pursued the discovery in question to "reveal
26 plaintiff lacks standing to bring this suit [under the Act] because, allegedly, it is not a legitimate
27 Internet access service." (Opp., p. 2:19-21.) That's only half right. The standing requirement,
28 and therefore this court's jurisdiction, requires plaintiff to prove it qualifies as a provider of

1 Internet access service, *and* that it has been “adversely affected by” violations of the Act. (15
2 U.S.C.A., § 7706, subd. (g).) Just being an Internet access service meets only half the
3 requirement. Senator McCain’s comments in support of the Act illustrate what Congress had
4 in mind as to the other half:

5 “Internet service provider [sic] are the businesses caught in the middle, forced
6 every day to draw distinctions between what they perceive as legitimate e-mail
7 and what is spam. In this environment, the risk of ISPs blocking legitimate mail
8 that consumers depend on, such as purchase receipts or healthcare communica-
9 tions, is as much a concern as the prospect of failing to block as much spam as
10 possible in the face of consumer demand. Often, the filters used by ISPs fail to
11 meet their subscribers’ expectations on both accounts, failing to block spam and
12 sometimes blocking legitimate e-mail from coming through, leaving consumers,
13 legitimate business and the ISPs themselves frustrated.” (Remarks of the Hon.
14 John McCain, 149 Cong. Rec. S13012-01, p. 29 of 106.)

15 To be sure, defendant disputes plaintiff’s ability to prove *either* half of the standing
16 equation. With plaintiff described by its own counsel as a “Stanford student with a laptop”
17 (Woollacott decl. ¶14a) and suspected in published media reports of being “little more than a
18 front for anti-spam litigation” (*id.*, at Exh. 12), defendant has every reason to propound
19 discovery on whether plaintiff provides Internet access service. (15 U.S.C. § 7702, subd. (11),
20 and 47 U.S.C. § 231(e)(4).) The discovery goes to this issue. But the discovery also goes to the
21 additional and more difficult half of the standing requirement – that the Internet access service
22 prove it was adversely effected by the violation of the Act about which it complains. (*Id.*, §
23 7706, subd. (g).)

24 Plaintiff’s reliance on halves instead of wholes also appears in its argument directed to
25 relevance. The opposition picks interrogatory #21 from the others, and argues the information
26 it requests about demand letters and other complaints against spammers would not show
27 whether plaintiff qualifies as an Internet access service. (Opp., p. 3:1-7.) The law does not
28 require that defendant stake its entire argument on standing and jurisdiction on the answer to
one interrogatory. An answer to that question must be assessed along with answers to others,
as well as to other evidence, bearing on the same issue. For example, the answer to number
21 might show that plaintiff sent numerous demand letters and filed many complaints against
alleged spammers. The article referenced above suggests that to be true. (Woollacott decl.,

1 at Exh. 12.) The answers to interrogatories 22 and 23 (also at issue here) might show plaintiff
2 received lots of money as a result of the demands and complaints, but little or no money from
3 users of Internet access services. Taken together, these answers would negate plaintiff's claim
4 to be a provider of Internet access service, negate the further requirement that plaintiff have
5 been adversely affected by violations of the Act, or negate both. Information from one
6 interrogatory would provide only half of the story.

7 The opposition's declaration offering the conclusion that defense counsel "has never
8 been able to explain" the relevance of the discovery does not advance plaintiff's argument on
9 the issue. (Fallat decl. ¶15.) The person who gave the declaration never asked. As indicated
10 in the moving papers, defense counsel spoke with Mr. Triplett, not the declarant. (Woollacott
11 decl. ¶5.) Mr. Triplett could have given a declaration; he did not. Regardless, the relevance
12 appears manifest in the case management conference order and the discovery plan.
13 Interrogatories 21, 22, and 23 started life as items (30), (31) and (32) under the heading
14 "Discovery will be needed on the following subjects" in the court-approved discovery plan.
15 (Copy for reference attached to Woollacott decl., Exh. 1, at pp. 2:1 and 4:6-8.) Relevance has
16 also been made clear in the communications (written and oral) between defense counsel and
17 Mr. Triplett.

18 Half-truths also infect plaintiff's argument on vagueness and ambiguity. The opposition
19 wonders what defendant meant in interrogatories 22 and 23 by asking plaintiff to "quantify"
20 its income. (Opp., p. 3:20.) Six rhetorical questions follow as plaintiff ruminates on the single
21 word, which most lawyers would understand means "how much". (*Id.*, p. 3:20-26.) But by
22 extracting the word "quantify" from the interrogatories, defendant ignores the other halves of
23 the questions. There, defendant told plaintiff exactly what it wanted plaintiff to "quantify:"

24 INTERROGATORY NO. 22: *Quantify* your income per year from persons who
25 you believed to be spammers *by date of income, amount and name and address*
26 *of payor.* [¶] INTERROGATORY NO. 23: *Quantify* your income per year from
27 sources other than payments from alleged spammers *by date of income, amount*
28 *and name and address of payor.* (Emphasis added.)

1 Neither did the opposition respond to defendant's argument in the moving papers
2 pointing out that the wording of all three interrogatories came straight out of the Joint Case
3 Management Statement and Order signed by counsel for both sides. Defendant and the court
4 may assume plaintiff's counsel knew what these items meant when he signed the case
5 management statement and the proposed discovery plan. The questions phrased in
6 substantially the same language add nothing new.

7 Plaintiff's opposition also fails to support the privacy objection. This issue might be dealt
8 with in thirds instead of halves. The first third is plaintiff's burden to show a right of privacy
9 may be considered at all in relation to this discovery. The opposition's citation to Rule 501's
10 use of State law privileges applies only "with respect to an element of a claim or defense as to
11 which State law supplies the rule of decision." (Opp., p. 4:23-25.) Here, the issues of standing
12 and jurisdiction arise under federal law, and so the quoted language from Rule 501 does not
13 apply. Instead, Rule 501 requires use of federal common law, as indicated in the moving
14 papers. (Moving papers, p. 4:8-13.) Plaintiff offers no legal discussion of federal common law.

15 The second of the "thirds" assumes for the sake of argument that the applicable law lies
16 in California's right to privacy. If so, plaintiff as the party asserting the "privilege" must first
17 convince the court that it has a privacy interest warranting protection in the context of the
18 discovery. Protection exists only if the party asserting the privilege has a legitimate expectation
19 of privacy that is reasonable under the circumstances. (See e.g. *Hill v. National Collegiate*
20 *Athletic Assn.* (1994) 7 Cal.4th 1, 35, 26 Cal.Rptr.2d 834, cited in the moving papers but not
21 discussed in the opposition.) There can be no such expectation where, as here, plaintiff
22 tendered the issues on which defendant seeks discovery. Granting protection also requires the
23 court to assess the gravity of the alleged invasion of privacy. (*Hill, supra.*) The opposition
24 argues only that the plaintiff corporation "is closely held such that revealing personal financial
25 information about it is revealing personal financial information about its shareholders." (Opp.,
26 p. 5:16-17.) No authority has been offered in support of plaintiff's assertion that the interests
27 of the shareholders may be considered in assessing a corporation's claim of financial privacy.
28 No evidence indicates the extent of the intrusion, or whether such an intrusion has any

1 “gravity” at all in this context.

2 The final “third” on the privacy issue assumes plaintiff meets its burden under the first
3 two parts. If so, the court must balance the privacy interest against defendant’s need for the
4 information. Plaintiff cries “harassment” and suggests a parade of horrors will occur if the
5 court grants the motion. But no evidence supports either point. For example, counsel declares
6 “indiscriminate disclosure of case information such as demand letters can be detrimental to
7 such cases.” (Fallat decl., ¶10.) He never says how, and the proposition asserted cannot be
8 taken at face value unless the “detriment” refers to dismissal of the case for lack of standing and
9 subject-matter jurisdiction. Counsel also declares such disclosure “can result in defendant
10 obtaining the kinds of lists that assist it in breaking the very law that is at issue here.” (*Id.*, ¶11.)
11 Again, he never says how. Defendant asked for demand letters, cases, and income information,
12 not lists.

13 Plaintiff must offer evidence at trial or in response to a dispositive motion showing both
14 that it provides Internet access service and that it has sustained an adverse effect as the result
15 of the violation of the Act about which it now complains. Both issues necessarily open the door
16 onto plaintiff’s business and business operations. Defendant must be allowed discovery to
17 bring forward its own evidence even if this requires disclosures about the plaintiff’s business
18 and its operations that plaintiff would prefer to keep from defendant and the court. Such
19 discovery falls squarely within the case management order and the discovery plan, and cannot
20 be considered unreasonable or harassing in any sense.

21
22 Dated: 28 July 2005.

WOOLLACOTT JANNOL LLP

23 BY Cynthia Woollacott/s/

24 CYNTHIA WOOLLACOTT
25 Attorneys for Kennedy-Western University
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10350 Santa Monica Boulevard, Suite 350, Los Angeles, California 90025-5057.

On 28 July 2005, I served the foregoing documents described as REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ORDERS OVERRULING OBJECTIONS TO INTERROGATORIES AND COMPELLING ANSWERS WITHIN TEN (10) DAYS on the interested parties by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Law Offices of John L. Fallat
John L. Fallat
Brian J. Triplet
523 Fourth Street, Suite 210
San Rafael, California 94901

I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business. The correspondence described above was placed for deposit in the United States Postal Service at 10350 Santa Monica Boulevard following ordinary business practices this date for collection and mailing on this date.

Executed on 28 July 2005 at Los Angeles, California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Justin Thomas/s/
Justin Thomas