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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 DOCU-
)	MENT REQUEST AND COMPELLING
14	KENNEDY-WESTERN UNIVERSITY,)	PLAINTIFF TO PRODUCE DOCUMENTS
)	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 category #21 from the others, and argues the information it
26 requests about demand letters and other complaints against spammers would not show
27 whether plaintiff qualifies as an Internet access service. (Opp., pp. 2:26 to 3:4.) The law does
28 not require that defendant stake its entire argument on standing and jurisdiction on production
of one category of documents. Documents culled from several categories, well as other
evidence, may be evaluated to show plaintiff lacks the standing it alleges. For example,
documents produced under category 21 might show that plaintiff sent numerous demand
letters and filed many complaints against alleged spammers. The article referenced above

1 suggests that to be true. (Woollacott decl., at Exh. 12.) Documents produced under other
2 categories, such as #27 at issue here, might show plaintiff received little or no money other
3 than from the demand letters and complaints. Taken together, these documents would negate
4 plaintiff's claim to be a provider of Internet access service, negate the further requirement that
5 plaintiff have been adversely affected by violations of the Act, or negate both. Information from
6 one category, viewed in isolation, 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.
9 (Fallat decl. ¶18.) The counsel who gave the declaration never asked. As indicated in the
10 moving papers, defense counsel spoke with Mr. Triplett, not the declarant. (Woollacott decl.
11 ¶15.) Mr. Triplett could have given a declaration; he did not. Regardless, the relevance appears
12 manifest in the case management conference order and the discovery plan. The subject-matter
13 of the categories at issue comes straight from items (16), (23), (30), (31) and (32) under the
14 heading "Discovery will be needed on the following subjects" in the court-approved discovery
15 plan. (Copy for reference attached to Woollacott decl., Exh. 1, at pp. 2:1 and 4:6-8.) Relevance
16 has also been made clear in the communications between defense counsel and Mr. Triplett.

17 Half-measures also infect plaintiff's argument on vagueness. The opposition claims "all
18 of the requests are vague, ambiguous, and uncertain." (Opp., p. 3:14.) Yet it only makes an
19 argument concerning the language of categories 24, 25, and 27. The opposition says nothing
20 about plaintiff's objections to categories 21, 22, 23, and 26, even though it may be supposed
21 from the plaintiff's form of order that plaintiff wants these objections sustained to these
22 categories as well. These four categories make up roughly one half of those at issue here. And
23 as to numbers 24, 25, and 27, plaintiff complains only that it might not know what documents
24 would be "sufficient" to disclose income and names. A party intending in good faith to comply
25 with its discovery obligations would have provided documents without worrying about such
26 hair-splitting, let alone objecting and refusing to provide any documents. The same applies to
27 plaintiff's quibble about the date range as to category 24, especially since plaintiff has only been
28 in existence since 1999.

1 Plaintiff's opposition also fails to support the privacy objection. This issue might be
2 considered in thirds rather than halves. The first third is plaintiff's burden to show a right of
3 privacy may be considered at all in relation to this discovery. The opposition's citation to Rule
4 501's use of State law privileges applies only "with respect to an element of a claim or defense
5 as to which State law supplies the rule of decision." (Opp., p. 4:23-25.) Here, the issues of
6 standing and jurisdiction arise under federal law, and so the quoted language from Rule 501
7 does not apply. Instead, Rule 501 requires use of federal common law, as indicated in the
8 moving papers. (Moving papers, p. 4:8-13.) Plaintiff cites nothing about federal common law.

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

24 The final "third" on the privacy argument assumes plaintiff meets its burden of proof on
25 the first two parts. If so, the court must balance the privacy interest against defendant's need
26 for the information. Plaintiff cries "harassment" and suggests a parade of horrors will occur
27 if the court grants the motion. But no evidence supports either point. For example, counsel
28 declares "indiscriminate disclosure of case information such as demand letters can be

1 detrimental to such cases.” (Fallat decl., ¶10.) He never says how, and the proposition
2 asserted cannot be taken at face value unless the “detriment” refers to dismissal of the case for
3 lack of standing and subject-matter jurisdiction. Counsel also declares such disclosure “can
4 result in defendant obtaining the kinds of lists that assist it in breaking the very law that is at
5 issue here.” (*Id.*, ¶11.) Again, he never says how. Defendant asked for demand letters, cases,
6 and income information, not lists.

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

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Dated: 28 July 2005.

WOOLLACOTT JANNOL LLP
BY _____ *Cynthia Woollacott/s/* _____
CYNTHIA WOOLLACOTT
Attorneys for Kennedy-Western University

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 DOCUMENT REQUEST AND COMPELLING PLAINTIFF TO PRODUCE DOCUMENTS 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