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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11	HYPERTOUCHE, INC.,	)	CASE NO. C 04 5203 SI
12		)	
13	PLAINTIFF,	)	DEFENDANT'S NOTICE OF MOTION
14	vs.	)	AND MOTION FOR SUMMARY
15	KENNEDY-WESTERN UNIVERSITY,	)	JUDGMENT
16	DEFENDANTS.	)	DATE: 10 FEBRUARY 2006
		)	TIME: 9 A.M.
		)	COURTROOM OF THE HON. SUSAN ILLSTON

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18 To Plaintiff Hypertouch, Inc. and its attorney of record: Please take note that on 10  
19 February 2006 at 9 a.m. or as soon thereafter as counsel may be heard in the above-entitled  
20 courtroom of the on. Susan Illston, defendant Kennedy-Western University will and does  
21 move the court for summary judgment on the ground there is no genuine issue as to any  
22 material fact and that the moving party is entitled to judgment as a matter of law for the  
23 reasons that:

24 **As to Count 1** (15 U.S.C. §§ 7701 *et seq.* "Controlling the Assault of Non-Solicited  
25 Pornography and Marketing Act of 2003 ("CAN-SPAM Act")):

- 26 1. KWU did not "initiate" any emails to Hypertouch.
- 27 2. Hypertouch is not "a provider of Internet access service adversely affected by a

1 violation” of the CAN-SPAM Act.

2 3. KWU is entitled to a complete reduction of statutory damages.

3 4. KWU’s reasonable attorneys’ fees and costs should be assessed against  
4 Hypertouch.

5 **As to Count 2** (California Business & Professions Code 17529, “Restrictions on  
6 Unsolicited Commercial E-Mail Advertisers”):

7 1. The claim is pre-empted by the CAN-SPAM Act.

8 2. The claim violates the Dormant Commerce Clause.

9 3. Hypertouch, Inc. lacks standing under Proposition 64.

10 4. KWU did not initiate or advertise any unsolicited emails to a California email  
11 address of Hypertouch.

12 5. KWU is entitled to a reduction of liquidated damages.

13 This motion is based on this notice, the accompanying memorandum of points and  
14 authorities, the accompanying declarations, exhibits and appendix, the pleadings and papers  
15 on file in this action, and upon such matters as may be presented to the court at the time of  
16 the hearing.

17 Dated: 3 January 2006

WOOLLACOTT JANNOL LLP

18 By Cynthia Woollacott  
19 Cynthia Woollacott  
20 Attorneys for KWU (original signature with  
21 counsel)

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