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HYPERTOUC H, INC.

11 **UNITED STATES DISTRICT COURT**

12 **NORTHERN DISTRICT OF CALIFORNIA (SAN FRANCISCO DIVISION)**

13 HYPERTOUC H, INC.,)

14 Plaintiff,)

15 vs.)

16 KENNEDY-WESTERN UNIVERSITY, et al.,)

17 Defendants.)

Case No.: C 04-5203 SI

**DECLARATION OF
JAMES JOSEPH WAGNER IN
SUPPORT OF PLAINTIFF'S
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

Date: February 10, 2006

Time: 9:00 a.m.

Judge: Hon. Susan Illston

21 I, James Joseph Wagner, declare:

- 22 1. I am over eighteen years of age and am a resident of Menlo Park, California.
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24

1 2. I am President of Hypertouch, a California corporation that is located in Menlo Park. I
2 make this Declaration on my own personal knowledge, and if called upon to testify thereto,
3 could and would so testify truthfully.

4 3. Hypertouch is developing next generation haptic peripherals. Hypertouch also provides
5 Internet services and consulting. None of Hypertouch's peripherals that are in development have
6 been released to market and so are currently protected trade secrets.

7 4. Hypertouch is a registered federal trademark (#2328650 and #2367595) for computer
8 services, first used in commerce in 1998.

9 5. Hypertouch owns and operates mail servers, web servers, and Domain Name Service
10 (DNS) servers that are connected to and accessed over the Internet. Opposing counsel has
11 inspected in person and photographed these servers. Opposing counsel has even inspected and
12 photographed the ethernet cord providing Hypertouch's upstream connectivity.

13 6. Each of Hypertouch's servers provides a service that enables users to access content over
14 the Internet. Hypertouch's clients could not access their email without Hypertouch's services. No
15 user anywhere on the Internet can send email to Hypertouch's clients nor view the web pages of
16 Hypertouch's clients without accessing the servers provided by Hypertouch and using the
17 services those servers provide.

18 7. All email messages relevant to this litigation were sent to email addresses ordinarily
19 accessed from two servers located in California; their main domain names are mail.hasit.com and
20 mail.reasonabledoubt.com. These two mail servers are owned and operated by Hypertouch, run
21 on computers located in California and are connected to the rest of the Internet via a high-speed
22 DSL line paid for by Hypertouch.
23
24

25

1 8. These two mail servers provide support for over two dozen domains and host over 120
2 email accounts.

3 9. Hypertouch owns and operates a number of DNS and web servers. For increased
4 efficiency, Hypertouch has DNS servers located on multiple separate networks, e.g. Megapath
5 and Speakeasy, rather than all being located on one subnet. This is an industry standard practice.
6 In fact, the defendant's own domain name, kw.edu, makes use of DNS servers that are located on
7 at least four different networks.

8 10. Hypertouch has provided in discovery a large amount of documentation showing that it is
9 a provider of Internet access, including:

10 A. Over 2,000 email messages that each clearly indicate their arrival and processing
11 on Hypertouch's mail servers;

12 B. The mail servers' logs showing the arrival of those messages, with a clear notice
13 that the servers are located in California and that Hypertouch has a "NO UCE" policy.;

14 C. Screen captures of the configuration screens of Hypertouch mail servers;

15 D. Screen captures of the screens of Hypertouch DNS and web servers;

16 E. The domain name registrations of at least two of its client's domains, clearly
17 showing their use of Hypertouch's services;

18 F. The signed declarations of three of Hypertouch's customers confirming their use of
19 Hypertouch's services; and

20 G. Financial records of payments: in money, stock options, and traded services, for
21 providing Internet services.

22 11. As is true for the suppliers of two thirds of the world's email addresses (e.g., Yahoo,
23 Hotmail and Google), most of Hypertouch's clients received these services without charge.

1 12. Hypertouch has clients throughout the U.S., as well as Vietnam and Germany.

2 Hypertouch provides email services for individuals, businesses, non-profits, start-ups, scientific
3 organizations and conferences.

4 13. Some of Hypertouch's clients are my relatives, some are (or have become) friends, and
5 some are people and/or organizations that I have only met once and of course some that I have
6 never met personally at all.

7 14. I am one of the users of Hypertouch's mail servers and a resident of California. I have
8 personally received email that advertised and promoted the defendants.

9 15. Other users of Hypertouch services have informed me that they have received email
10 advertising and promoting the defendants.

11 16. I have personally verified that the emails relevant to this litigation contain fraudulent
12 headers including false "HELO statements" from the senders' computers and false and
13 misleading "From: lines."

14 17. I have personally verified that many of the spams were sent via a wide variety of
15 residential line IP addresses. This fact indicates that the defendant or its agents were using
16 compromised "zombie" machines to relay the defendant's advertisements while obscuring the
17 true origin of the email.

18 18. Spam is by far Hypertouch's biggest customer service issue. Hypertouch has suffered
19 injury and lost money from high spam loads that includes the defendant's spam. This harm and
20 cost includes:
21

- 22 a. Decreased mail server and DNS server responsiveness;
23
24 b. Mail server and DNS server crashes;

1 c. Mail server hardware and software replacements and upgrades to handle the
2 increased email load;

3 d. Increased network bandwidth utilization; and

4 e. Prohibitively expensive server side virus scanning software with its pricing that is
5 set by the maximum number of messages scanned per hour.

6 19. Hypertouch is a self-funded startup that has yet to pay any salary, dividends or other
7 consideration to myself or any of the other people who are assisting in its development activities.

8 20. Since California's new spam laws were passed, Hypertouch has raised more than \$70,000
9 dollars for charities through donated judgments, settlements or by "directed" donations.

10 However, the majority of the funds received from dispute settlements has been used for legal
11 expenses spent in the fight against spam. Hypertouch has not applied settlement funds to its own
12 bottom line for distribution to shareholders. Indeed, there have been no distributions to
13 shareholders since Hypertouch was incorporated in 1999. My understanding is that as long as the
14 corporation is paying the bills that come due, it need not actually show a profit to be a
15 "legitimate" for-profit business.
16

17 21. I am aware that Hypertouch's attorneys have provided documents to defendants' counsel
18 that show Hypertouch has declined large settlement offers by companies who use illegal spam
19 but later accepted much more modest settlements that included corrective behavior of the
20 defendant—and a donation to charity of money many times the amount given to Hypertouch.

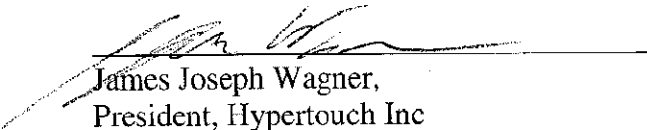
21 22. All four of Kennedy-Western's declarations contain the allegation that Hypertouch is
22 attempting to perpetrate fraud upon the court by altering the original emails messages [Miller
23 Decl. 7; Park Decl. 17; Rines Decl. 3; Patterson Decl 20).
24

1 23. Hypertouch has not altered any of the original emails sent to its servers nor is it
2 attempting to perpetrate a fraud upon the court.

3 24. Ms. Shea Park claims on page 120 of her deposition, that the evidence of Hypertouch's
4 fraud is the term "***SPAM**" in the 'subject' line. She states "Nor would it get through
5 anybody's recipient server. So, this copy itself has been changed." This claim is simply
6 ridiculous. Subject line tagging i.e. adding the label "***SPAM**" to incoming messages
7 suspected of being spam is perhaps the most common feature in spam filtering software, e.g.,
8 SpamAssassin, Brightmail, Barracuda, SpamPal, etc. Indeed in the email Ms. Park was referring
9 to during her deposition, SpamPal's label is clearly visible. With the testaments of depth of
10 expertise in email marketing that are made in these declarations, their accusations of fraud are
11 disingenuous and libelous.
12

13 25. Furthermore, as Kennedy-Western is aware, there are many public and private reports
14 and complaints by other people who have received emails nearly identical to those emails
15 received by Hypertouch's servers. There is a great deal of additional and independent testimony
16 available for trial to substantiate the accuracy of Hypertouch's email records.

17 I declare under penalty of perjury under the laws of the State of California that the
18 foregoing is true and correct, and that this declaration was executed on January 20, 2006,
19 at Menlo Park, California.
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21 
22 James Joseph Wagner,
23 President, Hypertouch Inc
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