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16 HYPERTOUCHE, INC.

17 **UNITED STATES DISTRICT COURT**

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

19 HYPERTOUCHE, INC.,	)	Case No.: C 04-5203 SI
	)	
20 Plaintiff,	)	<b>PLAINTIFF'S OBJECTIONS TO</b>
21 vs.	)	<b>DECLARATIONS IN SUPPORT OF</b>
	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
22 KENNEDY-WESTERN UNIVERSITY, et al.,	)	Date: February 24, 2006
	)	Time: 9:00 a.m.
23 Defendants.	)	Judge: Hon. Susan Illston
	)	

24 Plaintiff HYPERTOUCHE, INC. objects to the declarations in support of Defendant's motion for  
25 summary judgment as follows:

DECLARATION OF JASON RINES

1. Paragraph 2: lacks foundation, irrelevant to the issues in the action.

2. Paragraph 3: exceeds scope of demonstrated expertise, lacks specificity, unclear whether the Declarant is testifying that Hypertouch altered emails that were initially lawful to make them appear unlawful, or something else.

DECLARATION OF SHEA PARK

1. Paragraph 2: claimed expertise in email law contradicts deposition testimony that declarant never finished college or attended any law school classes.
2. Paragraph 3: speculation as to why she was hired by Defendant.
3. Paragraph 4: contradicts deposition testimony in which she testified that Defendant agreed to work with NetBlue, previously YF Direct, despite acknowledged problems.
4. Paragraph 4: exceeds scope of expertise. Declarant is not qualified to testify as to what actions meet or exceed legal requirements as she is not an attorney. The statement that "the guidelines explicitly require KWU marketers to make sure their lists used (either directly or through affiliates) be 'in full compliance' with CAN-SPAM and state laws... exclusively use double opt-in lists... and send no more than one KWU email a month" is contradicted by the Exhibits themselves, which do not discuss state requirements or require full compliance with CAN-SPAM.
5. Paragraph 9: contradicts deposition testimony to the extent it suggests that EmChoice was available in 2001 when Declarant was initially hired by KWU.
6. Paragraph 12: contradicts deposition testimony in which she testified that Defendant agreed to work with NetBlue, previously YF Direct, despite acknowledged problems.

1 7. Paragraph 13: exceeds scope of expertise, lacks foundation, beyond the personal  
2 knowledge of Declarant.

3  
4 8. Paragraph 17: exceeds scope of expertise, lacks foundation, beyond the personal  
5 knowledge of Declarant.

6 9. Paragraph 18: statement that "Boca also was... problem free" contradicts statement in  
7 Paragraph 20 that Boca received at least one complaint in 2004.

8 10. Paragraph 19: exceeds scope of expertise. Declarant is not an attorney, nor even an expert  
9 in technical matters, and lacks the expertise necessary to determine whether an email  
10 violates the law.

11 11. Paragraph 20: exceeds scope of expertise. Declarant is not an attorney, nor even an expert  
12 in technical matters, and lacks the expertise necessary to determine whether the  
13 information provided by Boca was actual proof of opt-in.

14 12. Paragraph 21: lacks foundation, outside the personal knowledge of Declarant, exceeds  
15 scope of expertise, lacks specificity, unclear whether the Declarant is testifying that  
16 Hypertouch altered emails that were initially lawful to make them appear unlawful, or  
17 something else.  
18

19 DECLARATION OF DR. LAWRENCE MILLER

20 1. Paragraph 2: outside the scope of demonstrated expertise.

21 2. Paragraph 5: outside the scope of demonstrated expertise. Dr. Miller has not  
22 demonstrated any expertise within the field of electronic mail exchanges generally or  
23

1 electronic mail advertising specifically. A programmer may understand computers, but an  
2 expert on programming is not qualified to testify about Internet marketing.

3  
4 3. Paragraph 6: lacks foundation, outside the personal knowledge of Declarant.

5 4. Paragraph 7: lacks foundation, outside the personal knowledge of Declarant, exceeds  
6 scope of expertise, lacks specificity, unclear whether the Declarant is testifying that  
7 Hypertouch altered emails that were initially lawful to make them appear unlawful, or  
8 something else.

9 5. Paragraph 8: lacks foundation, outside the personal knowledge of Declarant, exceeds  
10 scope of expertise, lacks specificity, unclear whether the Declarant is testifying that  
11 Hypertouch altered emails that were initially to make them appear lawful, or something  
12 else.

13 DECLARATION OF ROBERT PATTERSON

14 1. Paragraph 8: outside the personal knowledge of Declarant, contradicts deposition  
15 testimony of Shea Parks in which she testified that Defendant agreed to work with  
16 NetBlue, previously YF Direct, despite acknowledged problems.

17  
18 2. Paragraph 9: beyond the scope of Declarant's expertise. Declarant is not an attorney or an  
19 email marketing expert and cannot provide opinion testimony about whether the  
20 "guidelines exceed both legal requirements and industry standards". Testimony  
21 contradicts exhibits which themselves demonstrate that Defendant did not in fact require  
22 compliance with CAN-SPAM or state laws. Testimony contradicts deposition testimony  
23

1 of Shea Park and documents produced by Defendant which demonstrate that Defendant  
2 repeatedly used marketers which did not use double opt-in.

- 3
- 4 3. Paragraph 15: outside the personal knowledge of Declarant, contradicts deposition  
5 testimony of Shea Parks in which she testified that Defendant agreed to work with  
6 NetBlue, previously YF Direct, despite acknowledged problems.
- 7 4. Paragraph 16: outside the personal knowledge of Declarant, contradicts deposition  
8 testimony of Shea Parks in which she testified that Defendant agreed to work with  
9 NetBlue, previously YF Direct, despite acknowledged problems.
- 10 5. Paragraph 18: outside the personal knowledge of Declarant, exceeds scope of expertise.  
11 Declarant is not an attorney or an email marketing expert and cannot provide opinion  
12 testimony about whether the "KWU's practices exceed industry standards and are  
13 considered to be the highest and strictest of email marketing standards for advertisers per  
14 people working in that industry and independent experts".
- 15 6. Paragraph 20: beyond the scope of Declarant's personal knowledge or admitted expertise.  
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17  
18  
19 DATED: February 3, 2006

WALTON & ROESS LLP

20 BY: /s/ Timothy J. Walton

21 TIMOTHY J. WALTON  
22 Attorneys for the Plaintiff  
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