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13 Phone: (415) 457-3773
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15 Attorneys for Plaintiff
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)
21 Plaintiff,) **DECLARATION OF TIMOTHY J.**
22 vs.) **WALTON IN SUPPORT OF**
23) **OPPOSITION TO MOTION FOR**
24 KENNEDY-WESTERN UNIVERSITY, et al.,) **SUMMARY JUDGMENT**
25)
Date: February 24, 2006
Time: 9:00 a.m.
Judge: Hon. Susan Illston

I, Timothy Walton, declare:

1. I am a member of the bar of the State of California with an office in the County of Santa Clara, State of California and am attorney of record for Plaintiff herein. My business address is 407 South California, Suite 8, Palo Alto, CA 94306.

1
2 2. I believe that this Declaration is timely filed pursuant to Northern District Local Rule
3 7-7(d).

4 3. Assertions by Defendant KENNEDY-WESTERN UNIVERSITY in its motion for
5 summary judgment are belied by the evidence it has produced.

6 4. Attached as Exhibit "A" is a true and correct copy of a contract with Boca
7 Networks.com, LLC showing that the Defendant did not require the vendor to use double opt-in,
8 demonstrating that Defendant agreed to pay for email advertising, and which includes a mutual
9 indemnity clause.

10 5. Attached as Exhibit "B" is a true and correct copy of email from Shea Parks sent prior
11 to the effective date of CAN-SPAM which shows knowledge of the false header prohibition.

12 6. Attached as Exhibit "C" is a true and correct copy of a June 17, 2004, email message
13 from Shea Park which demonstrates exactly those provisions of the law which concerned
14 Defendant Kennedy-Western University, and notably lacking any discussion of false or forged
15 headers.

16 7. Attached as Exhibit "D" is a true and correct copy of a June 3, 2004, email message
17 from Shea Park which admits that opt outs requests are not being honored.

18 8. Attached as Exhibit "E" is a true and correct copy of an October 28, 2004, email
19 message from Shea Park which shows that double opt-in is not a requirement of Defendant
20 Kennedy-Western University, and the Defendant is satisfied with the single opt-in information of
21 date, time and Internet protocol address.
22
23
24

1
2 9. Attached as Exhibit "F" is a true and correct copy of a June 7, 2004, email that shows
3 that email advertising approval did not require accurate header information.

4 10. Attached as Exhibit "G" is a true and correct copy of June 17, 2004, email message
5 from Shea Park that shows that Peak was responsible for the email ad sent to Andrew Meredith.

6 11. Attached as Exhibit "H" is a true and correct copy of a July 26, 2004, email message
7 to Shea Park which shows that NetBlue was using unsolicited commercial email.

8 12. Attached as Exhibit "I" is a true and correct copy of a December 3, 2003, email which
9 shows that Shea Park included YF Direct on the "do not approach" list."

10 13. Shea Park testified in her deposition in this action that NetBlue used to be YF Direct.
11 I am informed and believe that NetBlue did in fact used to go by the name of YF Direct.

12 14. Attached as Exhibit "J" is a true and correct copy of the Declaration of Steve Berns in
13 this action which shows that Contour Media Group sent email advertising to Plaintiff
14 Hypertouch, Inc.

15
16 I declare under penalty of perjury under the laws of the United States of America that the
17 foregoing is true and correct. Executed at Palo Alto, California on February 3, 2006.

18 /s/ Timothy J. Walton

19 TIMOTHY J. WALTON

Exhibit "A"



Date Issued: **2/26/04** Insertion #: **MN-022664-1** Revision #: **1.5** Autho #: **AP-01**
 Client/Product: **Kennedy Western University** Vendor: **Boca Networks**
 Campaign Dates: **2/26/04** Site/E-mail list: **Boca Networks - General**

Boca Networks.Com, LLC		
Billing/Relations Contacts:	Marcy Lane	Edward Lewis
Phone:	561.826.8000 X101	561.826.8050 X115
Fax:	561.826.8080	561.826.8050
E-mail:	mlane@bocanetworks.com	elewis@bocanetworks.com
Address:	3500 NW Boca Raton Blvd.	
City, State, Zip	Boca Raton, FL 33431	

Customer	
Sales Contact:	Rob Starnburg
Phone:	800-635-2900 X125
Fax:	885-379-1282
E-mail:	rstarnburg@kw.edu
Address:	
City, State, Zip	

Order Date	Customer	Media Type/ Placement	Client/Product	Net CPM	Quantity	Cost
2/26/04	Kennedy Western University	Email - 100K opens guarantee Career, Distance Edu, Business opt-ins (ages 30-60)	Online University		100k opens	\$2500.00
Totals:					Unlimited	\$ 2500.00

Campaign Schedule				
Drop Date	Campaign Code	Media Type / Placement	Cost	Payment Due Date
03/04/04	Selects-	Email - 100,000 Guaranteed Opens Career, Distance Edu, Business opt-ins (ages 30-60)	\$2500.00	Prepaid

Creative Specifications						
Customer	Placement Name	Campaign Code	Unit Type	Dimensions	Max. File Size	Comments
n/a	Creative A		JPG	800x600	200k	

This agreement constitutes a binding contract between Customer and Boca Networks.Com, LLC. By executing this agreement, Vendor hereby enters into this agreement with full understanding and acceptance of all terms and conditions as stated below.

PAYMENT INSTRUCTIONS
 All payments must be received prior to any campaign being sent out unless prior arrangements are made with our credit department. Any questions call Marcy at 561.826.8000 X101

ANTI-SPAM CLAUSE
 Boca Networks guarantees that all offers sent via email shall:
 1) Only be sent to those recipients who have agreed in advance to receive such transmissions from the host site (i.e. "opted-in").
 2) Ensure that each such recipient is provided with a valid "unsubscribe" mechanism within each email delivered in order to facilitate the opportunity to "opt-out" of future mailings.

ADDITIONAL TERMS

1. **Representations and Warranties of Advertiser.** Advertiser is solely responsible for the content of the Offer, the Test Run advertisement(s), any email messages, products, and/or services associated with the advertising campaigns, including the content and operation of any web pages associated with advertising campaigns (together, the "Advertising Content"). Advertiser is solely responsible for any and all liabilities, losses, costs, claims, and expenses arising out of or relating to the Advertising Content. Advertiser warrants and represents that (a) Advertiser owns and/or has the right and authority to permit the use, reproduction, distribution, and transmission of the Advertisements and the Advertising Content; (b) the Advertising Content (1) is factually accurate, (2) does not contain any fraudulent or deceptive materials, and (3) does not contain any material which misrepresents or defames any individual or group, nor any material which discriminates against persons on the basis of age, color, national origin, race, religion, sex, sexual orientation, handicap, or other prohibited basis; (c) the Advertising Content does not promote or make claims that are not easily provable, nor do they imply the Offer or message being communicated; and (d) the use, reproduction, distribution, or transmission of the Advertising Content does not violate any foreign or domestic, federal, state, or local law or regulation, or any rights of any third party, including but not limited to, any copyright, patent, trademark, trade secret, or other proprietary or property right, or constitute false advertising, unfair competition, defamation, invasion of privacy or rights of celebrity, or any other right of any person or entity.

2. **Indemnity.** Each party will defend, indemnify, and hold harmless the other party, and its respective officers, directors, employees, agents, and affiliated entities (the "Indemnified Parties") from and against any and all liabilities, losses, damages, claims, and expenses, including reasonable legal fees, that may be incurred or suffered by one or more Indemnified Parties arising out of or related to either parties conduct under this Agreement, or either parties breach of this Agreement, or the truth or any of the representations and warranties herein.

3. **Limitation of Liability.** Under no circumstances will Boca Networks.Com, LLC, be liable to Advertiser under any contract, strict liability, negligence or other legal or equitable theory, for any incidental, indirect, special or consequential damages or damages for lost profits, revenue or data in connection with the subject matter of this Agreement, even if either party has been advised of the possibility of such damages and even if such damages are foreseeable. The total aggregate liability for Boca Networks.Com, LLC, arising under this Agreement will not exceed the amounts paid by Advertiser to Boca Networks.Com, LLC, hereunder.

4. **Disclaimer of Warranties.** Boca Networks.Com, LLC, makes no representations, and hereby expressly disclaims all warranties, express or implied, regarding Boca Networks.Com, LLC's advertising program, including any implied warranties of merchantability or fitness for a particular purpose and including any implied warranties arising from course of dealing or course of performance. Without limiting the generality of the foregoing, Boca Networks.Com, LLC, specifically disclaims any warranty regarding (a) the number of persons who view the Offer, and (b) any benefit Advertiser might obtain from having the Offer advertised hereunder.

5. **Survival of Obligations.** The term of this Email Test Agreement (this "Agreement") shall begin on the date it is signed by Advertiser and shall expire upon completion of the Test Run, unless previously terminated by one of the parties. The terms of this Exhibit A shall survive any termination or expiration of this Agreement, and Advertiser's obligation to make payments to Boca Networks.Com, LLC, under the terms of this Agreement or any other Agreement between the parties for payment obligations arising before the date of termination or expiration shall survive any termination or expiration of this Agreement.

6. **Miscellaneous.** Boca Networks.Com, LLC, and Advertiser are independent contractors and neither party is an agent, representative, or partner of the other. Either party may terminate this Agreement at any time in the event of a material breach of this Agreement by the other party. This Agreement sets forth the entire agreement between the parties, and it supersedes any prior and contemporaneous agreements, communications, and understanding (whether written or oral) between the parties, with respect to its subject matter. This Agreement may only be modified, or any rights under it waived, by a written document executed by both parties. This Agreement shall be interpreted and enforced in all respects under the laws of the State of Florida without regard to its conflict of law principles. Any litigation arising out of this Agreement will be brought exclusively in the state or federal courts located in Boca Raton, Florida and the parties agree that the undersigned and venue provisions in such courts. Advertiser may not assign or delegate this Agreement, in whole or in part.

Edward Lewis 2/27/04
 Signature Boca Networks.com, LLC Date

Rob Starnburg 02/27/04
 Customer Date
 MARKETING SPECIALIST

Exhibit "B"

Bradley Brownstein

From: Shea L. Park, Ad-Spark.com [shea@ad-spark.com]
Sent: Wednesday, December 31, 2003 12:54 PM
To: Shea L. Park
Subject: Re: Can-Spam Act - Important information for Advertisers of Kennedy-Western University

Importance: High



article_880.pdf

Happy New Year!

Please be sure all partners and affiliates are in full compliance with the new Can-Spam Act when sending out email for Kennedy-Western University by Jan. 1, 2004.

Please SUMBIT a SAMPLE of the Kennedy-Western University email ad copy that will launch after Jan. 1, 2004.

Act Requirement

1. Prohibits falsifying transmission (header) information.

Email Provider Action Item. (No Advertiser Action Required)

1.A. Email Providers will require that all transmission information clearly and accurately identifies the sender of the email. We interpret this provision to go beyond the technical information that is contained in the header and to also include a FROM line that clearly identifies the company and/or list that is sending the email, as currently stated in our affiliate rules. This policy also prohibits placing the name of the advertiser, the subject of the advertisement or any false or misleading information in the FROM line. We will continue to diligently enforce this provision through spot checks, seeded email addresses, and anonymous compliance checks.

Act Requirement

2. Prohibits false or misleading SUBJECT lines for commercial email

Email Provider Action item (Advertiser Action Required)

2.A. All SUBJECT lines shall be pre-approved by the Advertiser on all email campaigns. Each provider will be given at least 5 subject lines that are reasonably and accurately related to the subject matter of the email advertisement. These SUBJECT lines will be REQUIRED of all publishers who wish to send email. Requests for changes will be sent to the advertiser for approval.

Act Requirement

3. Requires that commercial email include a clear and conspicuously displayed mechanism for recipients to object to receiving email AND requires senders to comply with objection requests within 10 days of the request.

Email Provider Action item (No Advertiser Action Required)

3.A. Email Provider will continue to require that all email contain a clearly displayed, functioning unsubscribe link. Building on this long-standing policy, Email Provider will also require that the unsubscribe is a universal unsubscribe from the company such that no further offers will be sent out to the unsubscribed email address, regardless of the fact that one company may have the name on multiple distinct lists.

Act Requirement

4. Clear identification that the email is a solicitation.

Email Provider Action item (No Advertiser Action Required)

4.A. Email Provider will require a statement in all email that identifies the email as a commercial solicitation. This may be done in one of several ways, for example: in the subject line, at the top of email, in the body of the email or at the end of the email.

Act Requirement

5. Requires that senders provide a valid postal address.

Email Provider Action item (No Advertiser Action Required)

5.A. Email Provider will require that all email contain a valid postal address of the sender. This postal address should be listed at the top or bottom of each email.

Act Requirement

6. The Act establishes liability for promotions involving commercial email sent with false or misleading transmission information, irrespective of whether the business itself is sending the email messages if the business should have known that email was being sent in violation of the Act and failed to take reasonable action to prevent or report such actions.

Email Provider (Advertiser Action Required)

6.A. Email Provider has established procedures to monitor and take reasonable actions to prevent violations of its procedures. An Email Provider's office will monitor compliance with the above requirements. Violators will be removed from the program and will not be able to conduct further email campaigns. Networks and advertisers should take appropriate actions to ensure that they monitor all marketing partners in a similar fashion.

Kennedy-Western University views the Can-Spam Act as a positive development for email marketing as it sets a national standard and overrides the often conflicting state laws. Practiced properly, email marketing will continue to be a powerful marketing tool for advertisers and website publishers.

Exhibit "C"

Bradley Brownstein

From: Shea L. Park, Ad-Spark.com [shea@ad-spark.com]
Sent: Thursday, June 17, 2004 11:48 AM
To: Bob Gordon
Subject: Fw: KWU ad campaign

Hi Bob,
Here are the items for KWU campaign.

From: Distance-Learning

Subject Line: See choices below

From: shea@ad-spark.com

Suppression File: Will be sent from KWU directly

Here are all creative deliverables for KWU campaign.

1) Directions to KWU's ad library is at bottom of this email . A few ads are attached, however you can review their ad library as well.

2) Attached is text version of email ad.

3) URL to embed in ad copy: <http://www.kw.edu/ref/default.asp?COID=GLRSC&cr=00010&token=> Please place your publishers ID number after the = sign in the above URL

4) Below are all the things needed so the mailing is compliant with the can spam act.

KWU's opt-out: [Click here to unsubscribe from receiving Kennedy-Western University emails.](#)

Link to: http://www.kw.edu/optout_contact.asp

Address for ad copy- Kennedy-Western University, 200 West 17th Street, Cheyenne, WY 82001-4412

5) Subject lines you can choose from:

Flexible degree programs for busy adults

Distance-learning, at your own pace

Work full-time while earning your degree

Advance Your Career

Want to get ahead in your career?

Self-paced degree programs for busy adults

Study online anywhere, anytime

Ad Library:

Please use ads numbered on the left hand that are 00020 and higher. Best email ads are # 00052, 00055, 00100, 00132, 00133. And the attached are also good.

> > <http://www.kw.edu/ref/PartnerCreatives/kwubanners.asp>

> >
> > log in with this info:
> >
> > UID: kwupartner
> > PW: q123w
> >
>

Thank you,
Shea

Shea L. Park
Founder, Ad-Spark.com
email: shea@ad-spark.com
AIM: sheaadsark
Office: 406-664-3131
Fax: 240-526-8278

New email_txt_YF

with a college degree, you can earn so much more -
as much as \$2.2 million over your career*.

Kennedy-Western University's convenient online degree
programs are designed for today's busy professionals.

Click here for a FREE catalog:

- > Earn a B.S., M.S., or PH.D. degree faster than at traditional universities
- > No classroom attendance required
- > Credit for work and education experience
- > Learn at your own pace
- > Same curriculum used in universities across the country
- > Offering industry recognized degree programs for over 18 years
- > Sallie Mae/SLM Financing as low as \$50 per month

Click here for a FREE catalog:

Kennedy-Western University
A leader in online-learning

* US Census Bureau

Exhibit "D"

Bradley Brownstein

From: Shea L. Park, Ad-Spark.com [shea@ad-spark.com]
Sent: Thursday, June 03, 2004 12:20 PM
To: Shea L. Park, Ad-Spark.com
Subject: Fw: CatalogRequestRef page problem

Please see the complaints below KWU is receiving.
Numerous complaints are saying that their unsubscribe links are not working.
Please check so that all ad copies have a functional opt-out link for KWU.

Click here to unsubscribe from receiving Kennedy-Western University emails.
or copy and paste the following link into your browser: http://www.kw.edu/optout_contact.asp

Thank you

Shea

----- Original Message -----

From: Chad Clark
To: Shea Park (E-mail) ; Rob Sternburg
Sent: Thursday, June 03, 2004 12:39 PM
Subject: FW: CatalogRequestRef page problem

and the saga continues...

-----Original Message-----

From: Murrell - Roaming Server [mailto:crabs4t@maglobe.net]
Sent: Thursday, June 03, 2004 5:14 AM
To: webmaster@kw.edu
Subject: CatalogRequestRef page problem

The nature of the problem or error message is:

I am trying to unsubscribe and I am getting a FORBIDDEN message.

Kindly do it now and confirm my unsubscription to ypur unsolicited e-mails.

-----Original Message-----

From: Tom and Mindy Gee [mailto:tom_mindygee@computerfactory.com]
Sent: Thursday, June 03, 2004 11:41 AM
To: webmaster@kw.edu
Subject: CatalogRequestRef page problem

The nature of the problem or error message is: I am unable to remove myself from your mailing list.

tom_mindygee@computerfactory.com

-----Original Message-----

From: April Simpson [mailto:asimpson@famlit.org]
Sent: Thursday, June 03, 2004 5:36 AM
To: webmaster@kw.edu
Subject: CatalogRequestRef page problem
Importance: High

Take me off of your list. When I go to the unsubscribe link it tells me I don't have permission. I will not waste money on a stamp or a phone call. Take me off now.

Exhibit "E"

Bradley Brownstein

From: Steve Berns [steve@peakadvertising.com]
Sent: Thursday, October 28, 2004 12:11 PM
To: 'Shea L Park'
Subject: FW: DO NOT EMAIL KWU ANYMORE
Importance: High

Hi Shea,

I found it! Here is the info you need.

Best regards,

Steve Berns
 President
 Peak Advertising, LLC
 tel 818.766.0171
 fax 818.766.0371
 AIM: StevePeakAdv

From: IT Department [mailto:it@contourmediagroup.com]
Sent: Thursday, June 17, 2004 2:37 PM
To: steve@peakadvertising.com
Cc: Jake@contourmediagroup.com
Subject: FW: DO NOT EMAIL KWU ANYMORE
Importance: High

Steve,

All mailing for KWU has been halted. I pulled the following information from our database. Please keep me posted on this complaint and let me know how many leads we have at this point. Also, please send an email indicating when you would like us to start mailing again.

-Tim

Fname	Lname	Email	Stamp	IP
Andrew	Meredith	andrew@anvil.org	8/6/2001 9:06	62.49.18.108

-----Original Message-----

From: Steve Berns [mailto:steve@peakadvertising.com]
Sent: Thursday, June 17, 2004 3:30 PM
To: 'Jake Adams'; 'IT Department'
Subject: DO NOT EMAIL KWU ANYMORE
Importance: High

I need to speak with you at once about this. I need time,date, IP, and optin source for the complainant I sent you. In the meantime, do not send any further KWU emails.

5/18/2005

Steve Berns
President
Peak Advertising, LLC
tel 818.766.0171
fax 818.766.0371
AIM: StevePeakAdv

From: Steve Berns [mailto:steve@peakadvertising.com]
Sent: Thursday, June 17, 2004 11:55 AM
To: 'Jake Adams'
Cc: 'IT Department'
Subject: URGENT
Importance: High

I need someone from your company to call me immediately about the email message below and the attached email.

Steve Berns
President
Peak Advertising, LLC
tel 818.766.0171
fax 818.766.0371
AIM: StevePeakAdv

-----Original Message-----

From: Andrew Meredith [mailto:andrew@anvil.org]
Sent: Thursday, June 17, 2004 2:22 AM
To: abuse@kw.edu ; Bob Patterson
Subject: [Fwd: Study online anywhere, anytime!]

Hi There,

Were you aware that someone is sending out Spam on your behalf?

If you were, are you aware that the vast majority of the (probably
several million) recipients will see this as being a last ditch

desperate measure and a signal that KW is *not the sort of place they

should consider using. It will in fact render any further marketing

attempts, of any kind, in their direction, completely useless. With

Spam, the usual ratio of hits to "completely turned off" is microscopic.

So each time you celebrate over a hit from this approach, do bear in

5/18/2005

Message

mind the thousands of "never in a million years" that each represents.

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If you were not aware of this, you might like to track down who did it

and stop them now before they cause any more damage!

ADM

--

Andrew Meredith BEng CEng CITP MBCS MIEE

The Anvil Organisation Ltd.

Director

Tel: +44 (0) 1249 444240 Email: andrew@anvil.org

Mob: +44 (0) 7802 389007 Web: <http://www.anvil.org/>

Need a Systems Administrator, just not a whole one?

Try our "As you need it" support and training services.

Steve Berns
President
Peak Advertising, LLC
tel 818.766.0171
fax 818.766.0371
AIM: StevePeakAdv

From: Jake Adams [<mailto:jake@contourmediagroup.com>]

Sent: Monday, June 07, 2004 6:21 PM

To: steve@peakadvertising.com

Subject: KWU invoice - May

Steve,

Here's May's invoice. please pay asap... feel free to use our Fed ex account #267983828. Thanks.

Jake Adams
Contour Media Group
jake@contourmediagroup.com
www.contourmediagroup.com
P: 954-783-3065 x 306
F: 954-783-3077



5/18/2005

This transmission may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or use of the information contained herein is STRICTLY PROHIBITED.

If you received this transmission in error, please contact the sender immediately by reply e-mail and destroy the material in its entirety, whether in electronic or hard copy format.

Thank you

-----Original Message-----

From: Steve Berns [mailto:steve@peakadvertising.com]

Sent: Monday, June 07, 2004 4:50 PM

To: 'Jake Adams'

Subject: RE: KWU invoicing?

Hi Jake,

Final Number for KWU May 202 leads. Please send me an invoice.

Best regards,

Steve Berns
President
Peak Advertising, LLC
tel 818.766.0171
fax 818.766.0371
AIM: StevePeakAdv

From: Jake Adams [mailto:jake@contourmediagroup.com]

Sent: Sunday, June 06, 2004 4:23 PM

To: steve@peakadvertising.com

Cc: IT Department

Subject: RE: KWU invoicing?

Hi Steve,

Let me know what the totals are and through what time frame so we can get you invoiced ASAP. Thanks.

Jake Adams
Contour Media Group
jake@contourmediagroup.com
www.contourmediagroup.com
P: 954-783-3065 x 306
F: 954-783-3077



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If you received this transmission in error, please contact the sender immediately by reply e-mail and destroy the material in its entirety, whether in electronic or hard copy format.

Thank you

From: Steve Berns [mailto:steve@peakadvertising.com]
Sent: Tuesday, June 01, 2004 1:51 PM
To: 'Jake Adams'
Subject: RE: KWU invoicing?

Hi Jake,

I'll need an invoice from you, but I don't have the final numbers from KWU yet. I should see them in a few days. Right now you're at about 215. I'll need an invoice from you.

You can resume sending mail for KWU if you'd like, also.

Thanks,

Steve Berns
President
Peak Advertising, LLC
tel 818.766.0171
fax 818.766.0371
AIM: StevePeakAdv

From: Jake Adams [mailto:jake@contourmediagroup.com]
Sent: Monday, May 31, 2004 5:35 AM
To: steve@peakadvertising.com
Cc: IT Department
Subject: KWU invoicing?

Steve,

Do we need to send an invoice or will you automatically cut us a check for KWU? If you need an invoice please send me the details so we can get the paperwork processed. Thanks.

Jake Adams
Contour Media Group
jake@contourmediagroup.com
www.contourmediagroup.com
P: 954-783-3065 x 306
F: 954-783-3077



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If you received this transmission in error, please contact the sender immediately by reply e-mail and destroy the material in its entirety, whether in electronic or hard copy format.

Thank you

Exhibit "F"

Bradley Brownstein

From: Shea L. Park, Ad-Spark.com [shea@ad-spark.com]
Sent: Monday, June 07, 2004 8:58 AM
To: Kristine Latronica
Subject: Fw: [SP] Work full-time while earning your degree

Thanks for seeing me.

If this was by any chance and approval request, it is approved.

Thanks

Shea

----- Original Message -----

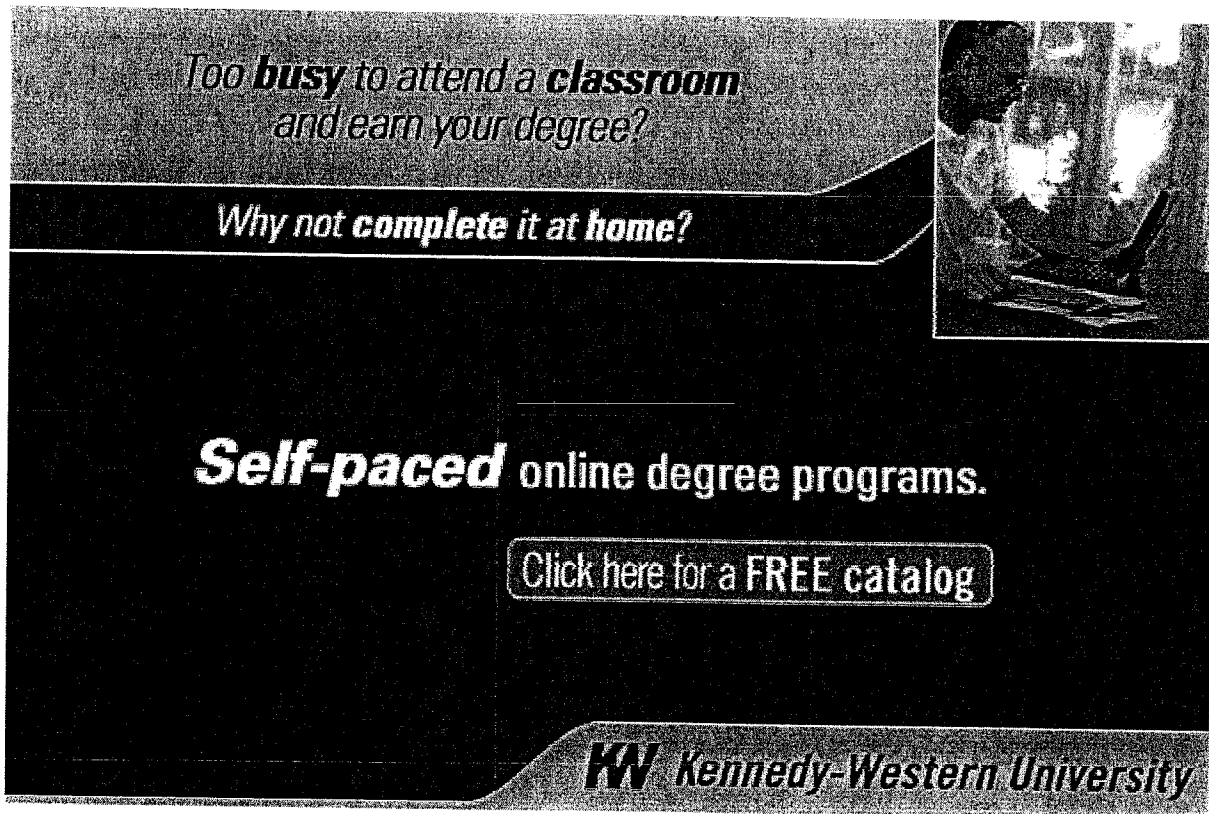
From: Online Education

To: shea@ad-spark.com

Sent: Monday, June 07, 2004 9:57 AM

Subject: [SP] Work full-time while earning your degree

You received this email because you joined CreditGift.com.



*Too busy to attend a classroom
and earn your degree?*

Why not complete it at home?

Self-paced online degree programs.

Click here for a **FREE** catalog

KW Kennedy-Western University

[Click here to unsubscribe](#) from receiving Kennedy-Western University emails.
or write to the following address:
Kennedy-Western University
200 West 17th Street
Cheyenne, WY 82001-4412

Take yourself off this list by sending a blank email [here](#). Or write to CustomerService, PO Box 390520, Mountain View, CA 94039-0520

This message was sent to the address shea@ad-spark.com

Exhibit "G"

Bradley Brownstein

From: Shea L. Park, Ad-Spark.com [shea@ad-spark.com]
Sent: Thursday, June 17, 2004 11:35 AM
To: Rob Sternburg
Subject: Re: [Fwd: Study online anywhere, anytime!]

Hi Rob,

This is one of Peak's publishers. I'll tell them to stop them immediately!
THEY are not even running approved copy.

Shea

----- Original Message -----

From: "Rob Sternburg" <Rob@kw.edu>
To: "Shea Park (E-mail)" <shea@ad-spark.com>
Sent: Thursday, June 17, 2004 12:31 PM
Subject: FW: [Fwd: Study online anywhere, anytime!]

Hi Shea,

Can you determine who this provider is?

Thanks

Rob Sternburg
Marketing Specialist
Kennedy-Western University
818-707-4318
rsternburg@kw.edu <mailto:rsternburg@kw.edu>

-----Original Message-----

From: Andrew Meredith [mailto:andrew@anvil.org]
Sent: Thursday, June 17, 2004 2:22 AM
To: abuse@kw.edu ; Bob Patterson
Subject: [Fwd: Study online anywhere, anytime!]

Hi There,

Were you aware that someone is sending out Spam on your behalf?

If you were, are you aware that the vast majority of the (probably several million) recipients will see this as being a last ditch desperate measure and a signal that KW is *not the sort of place they should consider using. It will in fact render any further marketing attempts, of any kind, in their direction, completely useless. With Spam, the usual ratio of hits to "completely turned off" is microscopic. So each time you celebrate over a hit from this approach, do bear in mind the thousands of "never in a million years" that each represents.

If you were not aware of this, you might like to track down who did it and stop them now before they cause any more damage!

ADM

--

Andrew Meredith BEng CEng CIP MBCS MIEE
The Anvil Organisation Ltd.
Director

Tel: +44 (0) 1249 444240 Email: andrew@anvil.org
Mob: +44 (0) 7802 389007 Web: <http://www.anvil.org/>
Need a Systems Administrator, just not a whole one?
Try our "As you need it" support and training services.

Exhibit "H"

Bradley Brownstein

From: Kristine Latronica [klatronica@netblue.com]
Sent: Monday, July 26, 2004 11:14 AM
To: Shea L. Park, Ad-Spark.com
Cc: klatronica@netblue.com
Subject: RE: UCE Complaint (Study online anywhere, anytime)

Hi Shea,

Email: kennwood@rochester.rr.com
Signup Site: www.YourGiftCards.com
Signup Date: 07/23/04 10:55:43
IP Address: 24.169.148.76
User has been opted out effective immediately July 26, 2004.

I am going to talk to my email group about the falling lead quality.

Regards,
Kristine

-----Original Message-----

From: Shea L. Park, Ad-Spark.com [mailto:shea@ad-spark.com]
Sent: Monday, July 26, 2004 10:57 AM
To: Kristine Latronica
Subject: Fw: UCE Complaint (Study online anywhere, anytime)

Hello Kristine,

We've had trouble with this database before through adteractive.

Please provide

- 1) This persons opt-in record (name, email, opt-in location, date, and IP address) KWU's COO keeps a file for future reference in case something does results in a legal battle.
- 2) Please opt this person out from receiving any more email from this list or KWU.

Also, Kim the analyst said were were slipping in quality of leads this month from May and June's efforts.
Can you expire working with this database for now and see if that helps pick conversions back up?

Shea

----- Original Message -----

From: "Bob Patterson" <Bob@kw.edu>
To: "Shea Park (E-mail)" <shea@ad-spark.com>
Cc: "Rob Sternburg" <rsternburg@kw.edu>
Sent: Friday, July 23, 2004 6:44 PM
Subject: FW: UCE Complaint (Study online anywhere, anytime)

-----Original Message-----

From: Ken Wood [mailto:kenwood@rochester.rr.com]
Sent: Friday, July 23, 2004 4:49 PM
To: Bob Patterson
Subject: UCE Complaint (Study online anywhere, anytime)

I have received the attached unsolicited e-mail from someone at your domain.

I do not wish to receive such messages in the future, so please take the appropriate measures to ensure that this unsolicited e-mail is not repeated.

Return-path: <bounce-kennwood#rochester.rr.com@85177221.ygcevent.com>
Received: from ms-mta-02 (ms-mta-02-smtp [10.10.4.6]) by ms-mss-01.nyroc.rr.com (iPlanet Messaging Server 5.2 HotFix 1.21 (built Sep 8 2003)) with ESMTMP id <011B008VSRYP11@ms-mss-01.nyroc.rr.com> for kennwood@rochester.rr.com; Fri, 23 Jul 2004 18:04:02 -0400 (EDT)
Received: from nymx04.mgw.rr.com (nymx04.mgw.rr.com [24.92.226.25]) by ms-mta-02.nyroc.rr.com (iPlanet Messaging Server 5.2 HotFix 1.21 (built Sep 8 2003)) with ESMTMP id <011B008RMRYPPH@ms-mta-02.nyroc.rr.com> for kennwood@rochester.rr.com (ORCPT kennwood@rochester.rr.com); Fri, 23 Jul 2004 18:04:01 -0400 (EDT)
Received: from mta02.ygcevent.com ([64.62.249.73]) by nymx04.mgw.rr.com (8.12.10/8.12.8) with ESMTMP id i6NM0Vk2017686 for <kennwood@rochester.rr.com>; Fri, 23 Jul 2004 18:00:34 -0400 (EDT)
Received: by mta02.ygcevent.com (PowerMTA(TM) v2.0r4) id h0658404r2gj; Fri, 23 Jul 2004 15:00:29 -0700
Date: Fri, 23 Jul 2004 18:00:33 -0400 (EDT)
From: Distance Learning
<bounce-kennwood#rochester.rr.com@85177221.ygcevent.com>
Subject: Study online anywhere, anytime
To: kennwood@rochester.rr.com
Message-id: <200407232200.i6NM0Vk2017686@nymx04.mgw.rr.com>
MIME-version: 1.0
Content-type: text/html; charset=iso-8859-1
Content-transfer-encoding: binary
X-Virus-Scanned: Symantec AntiVirus Scan Engine
Original-recipient: rfc822;kennwood@rochester.rr.com

<HTML>
<HEAD>

<META HTTP-EQUIV="Content-Type" CONTENT="text/html; charset=iso-8859-1">
</HEAD>

<BODY BGCOLOR=#FFFFFF LEFTMARGIN=0 TOPMARGIN=0 MARGINWIDTH=0 MARGINHEIGHT=0>

<center>

<IMG

SRC="http://ads.yourfreedvds.com/creatives/email/img/kw1.gif" WIDTH=600 HEIGHT=400 ALT="Click here for a free catalog" align="center"

border="0"><p>

Click here to unsubscribe

from receiving Kennedy-Western University emails.

or write to the following address:

Kennedy-Western University

200 West 17th Street

Cheyenne, WY 82001-4412

</center>

<div id="footer">

If you do not wish to receive special offers, discounts, and

coupons from Yourgiftcards.com, please do one of the following:

Use this link to unsubscribe

OR write us at Customer Service

PO Box 390520, Mountain View, CA 94039-0520

</div>

</BODY>

</HTML>

Exhibit "I"

Bradley Brownstein

From: Shea L. Park, Ad-Spark.com [shea@ad-spark.com]
Sent: Wednesday, December 03, 2003 12:27 PM
To: Shea L. Park, Ad-Spark.com
Subject: Re: please do not approach

ello please do not approach Jumpstart technologies for KWU's offer.
 nother partner owns that list relationship.
 so here is the updated partner list of partners not to approach for us.

Thank you,
 > > Our partners direct or through another network
 ullzimedia
 qualamail
 atamarketplace
 ailgravity
 lectronic Marketing Systems
 ptin-Real big's CPA Empire
 esult Driven Marketing
 ddrive.com;
 ddictive Marketing
 ekData
 fer web
 inetinternational.com;
 musica.com;
 elistgroup.com;
 rapass.com;
 rrentmail.com;
 acificmediaproject.com;
 arketvenue.com;
 imedia.com;
 argetinternet.com;
 pphermarketing.com;
 otimus.com;
 orldnets.com;
 arkedmail.com;
 oplusmedia.com;
 xxtaisle.com;
 ygoodoffers.com;
 optionsunlimited.com;
 jdirect.com
 pmail
 al offers.com
 onsumerbase
 LeadClick
 Vendare Group
 > Felton Media
 > RadixGroup
 > Marked Mail (pending contract)
 > Responsiveemail
 > Mightmedia
 > emailhello
 > imarket
 > nextoptin
 > memolink
 > offertime
 > Free.com
 > datastream group
 > directconnect media
 > hula media

12/23/2005

- > student list
- > network60
- > broadvision
- > ion entertainment
- > permission data
- > massive communications
- > total edata
- > passionup
- > greenmail
- > directqlick
- > coverclicks
- > restorationmedia
- > freeze.com
- > allrecipes
- > clickformail
- > accipiter
- > advise
- > jdrmedia
- > adsdirect
- > leadclick
- > mybeautycenter
- > theadmanager
- > wowoffers
- > aaavirtual
- dailywebdeals
- Equifax
- ntermark Media
- MyLeads
- ROI Network
- ustomoffers (only with long form)
- otcompromotions.net
- MyzerInc.com.
- /Fdirect
- lunomail
- etzero
- > > Headhunter/ careerbuilder.com
- > > WetFeet
- > > Net-Temps, Inc.
- > > DirectLeads (subscriberbase.com)
- > > Performics
- > > Datamark
- > > Quinstreet
- > > Webclients
- > > Targetemaildirect
- > > imozo
- > > VentureDirect
- > > Topica (career)
- > > ClickAgents (owns topica relations)
- > > Valueclick (onresponse, zmedia)
- > > ROINetwork
- > > bargaindog.com
- > > about.com
- > > List-universe
- > > Nationjobs.com
- > > Rhinoceros LLC
- > > Aptimus
- > > Innovatelt
- > > DaTran
- > > EDemographic
- > > Martin Worldwide
- > > Cross media
- > > Pal Talk-CPM
- > > FatTail
- > > affiliatefuel
- > > monster

- > > > monsterlearning
- > > > ClassesUSA
- > > > Colleges.com
- > > > Universities.com
- > > > flipdog
- > > > fastweb
- > > > computerjobs.com
- > > > directsynergy
- > > > SmartDM
- > > > eLearners.com Inc.
- > > > Salary.com and all affiliated sites
- > > > Atlas Education Group
- > > > Rising Results
- > > > Internet Wire

- > <http://www.showmethedeals.com/interests.aspx>.
- > > > NO freebie email lists
- > > > NO Gaming lists
- > > > NO Dating lists
- > > > NO Rewards lists
- > > > NO joke list
- > > > These we have not been fond of their opt-in processes or qualified %
- > > > SniperMail ???
- > > > buybidwin (not testest, bad reputation)
- > > > redmoss (not testest, bad reputation)
- > > > e-listmarketers (not testest, bad reputation)
- > > > emailmaestro (not testest, bad reputation)
- > > > e-direct naviant
- > > > Opinion Survey

ea

ea L. Park
 under, Ad-Spark.com
 mail: shea@ad-spark.com
 phone: 406-664-3131
 fax: 240-526-8278

Exhibit "J"

1 JEFFER, MANGELS, BUTLER & MARMARO LLP
JEFFREY K. RIFFER (Bar No. 87016)
2 1900 Avenue of the Stars
Seventh Floor
3 Los Angeles, CA 90067-4308
Telephone: (310) 203-8080
4 Facsimile: (310) 203-0567

5 Attorneys for Defendant
PEAK ADVERTISING, LLC
6
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 HYPERTOUCHE, INC.; a California corporation,)
12)
Plaintiff,)
13)
v.)
14)
KENNEDY-WESTERN UNIVERSITY, a)
15 Wyoming corporation, and DOES)
1 through 100, inclusive,)
16)
Defendants.)
17)
18
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28

CASE NO. C 04-5203 SI

DECLARATION OF STEVE BERNS

DECLARATION OF STEVE BERNS

I, Steve Berns, declare as follows:

1. I know the following facts of my own personal knowledge and if called to testify, could and would so testify.

2. Peak Advertising, LLC has been in business since March of 2004. I founded the company along with Mr. Phil Rosenthal. Mr. Rosenthal and I have collectively 8 years experience in the online advertising industry.

3. Our philosophy is, and has always been, to provide the best possible service to our advertiser clients while complying with the law. It is not in our best interest -- or our clients' -- to continue to use a provider that is receiving complaints.

4. In particular, we do business only with legitimate vendors that are compliant with CAN-SPAM and, before dealing with a vendor, take reasonable steps to determine that the vendor is compliant with such law.

5. Over the years, we have contracted for CAN-SPAM compliant emails with many different email providers. In the rare event of a complaint, as is evident in the email chains provided, we take immediate action to suspend the email provider (which we did here) and request the opt-in information for the

1 complainant.

2
3 6. Peak Advertising's work for Kennedy-Western
4 University ("KWU") consisted solely as a media buyer for KWU's
5 lead generation campaigns; Peak Advertising did not send any
6 emails to potential customers of KWU. A true and correct copy of
7 Peak Advertising's contract with KWU is attached hereto as
8 Exhibit A. Peak Advertising provided services to KWU for six
9 months; Mr. Rosenthal and I provided services to KWU for almost 4
10 years at our prior company.

11
12 7. Peak Advertising contracted Contour Media Group
13 ("CMG") as an email vendor for the KWU campaign based on the
14 following several reasons:

15
16 It had used CMG on several occasions for other
17 campaigns in the past (initially over a year ago) and did not
18 have any issues with their email lists and all of those prior
19 campaigns were CAN-SPAM compliant.

20
21 It talked with CMG prior to contracting them for
22 the KWU campaign and CMG confirmed that all of its email lists
23 were CAN-SPAM compliant.

24
25 Its investigation of CMG did not uncover any
26 negative information.

27
28 CMG was listed as an opt-in email provider on such

1 directories as EmailResults.com, a known industry resource for
2 finding opt-in email lists and is advertised to the entire
3 internet advertising community.

4
5 CMG's websites stated that their email lists are
6 opt-in, compliant with CAN-SPAM and they would never spam.

7
8 8. The Peak Advertising-CMG contract (called
9 Insertion Order) stated "If conducting email campaigns,
10 publisher [CMG] must be 100% compliant with all state and Federal
11 spam laws including, but not limited to, the CAN- SPAM Act of
12 2003." A true and correct of that contract is attached hereto as
13 Exhibit B.

14
15 9. The email message that Peak Advertising approved
16 for delivery from CMG for KWU was compliant with CAN-SPAM. The
17 email had a legitimate subject line (not misleading), legitimate
18 advertiser message, working opt-out links for both advertiser and
19 email list provider, physical addresses for advertiser and email
20 list provider.

21
22 10. Unfortunately, CMG sent a different email message.

23
24 11. Peak Advertising received Hypertouch's email
25 complaint from KWU. It then researched the email to determine
26 which vendor may have sent it. At first Peak Advertising did not
27 think the email was from its vendors because Peak Advertising had
28 not approved that email. It was also difficult to determine the

1 email's origin because Hypertouch did not send active links or an
2 email address that Peak Advertising could use to track down the
3 vendor.

4
5 12. Peak Advertising noticed that in the Bargain
6 Warrior email there was an identifier in the URL, the number,
7 10190. It then went back to all email vendors that it used in
8 the month in question. It discovered an approved CAN-SPAM
9 compliant email that had the same identifier in the URL. That
10 email was from CMG.

11
12 13. Upon further research into the Bargain Warrior
13 domain, Peak Advertising found that the domain (true-values.com)
14 in the URL used by CMG was owned by the same people that own
15 Bargain Warrior.

16
17 14. Peak Advertising immediately suspended the email
18 campaign with CMG. It emailed CMG, requested that the user be
19 removed from the list and we also requested the opt-in time,
20 date, and the IP address of the user in question.

21
22 15. CMG never responded.

23
24 16. Peak Advertising has never used CMG again.

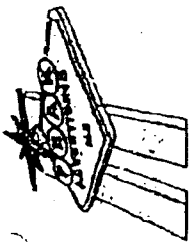
25
26 17. Peak Advertising never had an ownership or
27 economic interest in KWU or CMG.

28

1 18. Peak Advertising never: (a) had "actual knowledge"
2 that goods, products, property or services are promoted in a
3 commercial electronic mail message that violates section 5(a)(1);
4 and (b) received, or expected to receive, an economic benefit
5 from such promotion. (Peak Advertising was a vendor for KWU; KWU
6 received an economic benefit from the promotion.)
7

8 I declare under penalty of perjury under the laws of
9 the United States of America that the foregoing is true and
10 correct and that this declaration was executed on the __ day of
11 March, 2005, at Los Angeles, California.
12

13 
14 STEVE BERNS
15
16
17
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19
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Peak Advertising Insertion Order

Order #:	20040323KRWU	Date:	3/23/2004
Site/Company:	Peak Advertising	Reporting:	Daily
Representative:	Phil Rosenblatt	Payment Terms:	50% Prepayment, remainder Net 15
Client/Advertiser:	KRWU	Wire Transfer Info:	Peak Advertising
Address:	12740 Landers Street	Account number:	02479-20840
City, State, Zip:	Studio City, CA 91604	Routing number:	121000354
Phone:	818-768-0171	Bank of America	
Fax:	818-768-0371	1223 Ventura Boulevard	
Email:	philrosen@peakadvertising.com	Studio City, CA 91604	
		818.997.4877	

Dates	Advertising	Creative	Creative Specs	Monthly Number of Leads	Average Cost per Lead	Total Cost
Ongoing	Lead generation campaign	Various	TBD	2,000	15.00	\$30,000.00

Special Terms:

Leads will be:

*Age 23+

*Have 6+ years work experience

*US address, except in CA or OR leads

*Fields required are:

Full name, email address, physical address, 10 digit phone #, age, years of work exp., degree in listed n.

By signing below, Advertiser agrees to all Terms & Conditions found on sheet two of this agreement.

[Signature]
Authorized Signature:

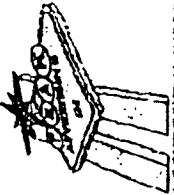
03/25/04
Date

[Signature]
ROB SPRENGER MARKETING SPECIALIST
Peak Advertising

3/25/04
Date

Peak Advertising

EXHIBIT A



Terms & Conditions

1. CONFIDENTIAL INFORMATION: Information that is of concern to the other party, and that is marked "confidential", or which under the circumstances ought reasonably to be treated as confidential information (including this Agreement), will be treated as confidential by the receiving party. The receiving party will not disclose to a third party such information, or use such information other than for the purposes for which it was provided, without the written consent of the other party; this limitation will apply for a period of one year after disclosure of such confidential information. The foregoing limitations do not apply to the extent such information: (a) is or subsequently becomes publicly available other than through a breach of these limitations; (b) is already known to the receiving party at the time of disclosure; (c) is developed by the receiving party independent of such information; or (d) is rightfully received from a third party without restrictions on disclosure or use.
2. RESPONSIBILITY FOR ADVERTISEMENTS: Advertiser represents and warrants to PEAK ADVERTISING, LLC that it is fully authorized to publish, and authorizes PEAK ADVERTISING, LLC to publish on its behalf, Content (including, without limitation, all text, graphics, URLs, and sites to which URLs are linked), and that all Content complies with all applicable laws and regulations. Advertiser will indemnify and hold Peak Advertising harmless from and against any and all loss, liability and expense (including reasonable attorneys' fees) suffered or incurred by reason of any claims, proceedings or suits based on or arising out of the Content, including without limitation claims for defamation, violation of rights of publicity, privacy, intellectual property, or a breach by Advertiser of any representation, warranty, condition, or obligation to be performed hereunder. Subject to inventory availability.
3. COMMITMENT; PAYMENT TERMS: Advertiser will pay PEAK ADVERTISING, LLC the fees as set forth in the IO based on the schedule set forth in the IO, over due amounts shall accrue interest at the rate of 1.5% compounded on a monthly basis until paid, or the legal maximum, whichever is less.
4. DISCLAIMERS; LIMITATIONS. EXCEPT AS EXPRESSLY PROVIDED HEREIN, PEAK ADVERTISING, LLC AND ANY MATERIALS OR OTHER SERVICES PROVIDED BY OR ON BEHALF OF PEAK ADVERTISING, LLC PURSUANT TO THIS AGREEMENT ARE PROVIDED "AS IS" AND WITH ALL DEFECTS, AND PEAK ADVERTISING, LLC HEREBY DISCLAIMS ALL REPRESENTATIONS, WARRANTIES, AND CONDITIONS, EXPRESS OR IMPLIED, EXCEPT FOR AMOUNTS OWING PURSUANT TO SECTION 4. NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR EXEMPLARY DAMAGES INCLUDING WITHOUT LIMITATION, DAMAGES FOR LOST PROFITS, BUSINESS INTERRUPTION, LOSS OF OR UNAUTHORIZED ACCESS TO INFORMATION.
5. Cancellation: Orders are binding on Advertiser and not subject to cancellation by Advertiser unless specified in the IO.
6. CAN SPAM: If conducting a small campaign, advertiser must be 100% compliant with all state and Federal spam laws including, but not limited, to the CAN SPAM Act of 2003.
7. Tracking: PEAK ADVERTISING, LLC or Publisher's tracking system will be used. Daily reporting available upon request.
8. Indemnification: Each party hereby agrees to defend, indemnify, and hold the other party and its officers, directors, shareholders, agents, employees, successors, and assigns harmless from and against any and all claims, demands, damages, director, shareholders, agents, employees, successors, and assigns for harmless from and against any and all claims, demands, damages, losses, damages, actions, judgments and expenses, including reasonable fees and expenses of attorneys, paralegals and other professionals (the "Claims"), arising out of, or related to any breach of either party's representations or warranties hereunder.
9. Governing Law: This Agreement shall be governed by, construed and interpreted according to the laws of the State of California. The parties agree that the appropriate, convenient and exclusive venue for any litigation arising out of this Agreement shall be the court of appropriate jurisdiction in Los Angeles County, California.
10. Agency: PEAK ADVERTISING, LLC is acting solely as an agency with regard to this media buy. Under no circumstances shall PEAK ADVERTISING, LLC be liable for indirect, incidental, consequential, special or exemplary damages (even if such damages are foreseeable), and whether or not PEAK ADVERTISING, LLC has been advised of the possibility of such damages) arising from any aspect of the advertising relationship provided for herein.

Handwritten initials "AP" and "SB" in circles.

