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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 HYPERTOUCHE, INC.,)	CASE NO. C 04 5203 SI
13 PLAINTIFF,)	
14 vs.)	JOINT SUPPLEMENTAL CASE
15 KENNEDY-WESTERN UNIVERSITY,)	MANAGEMENT STATEMENT
16 DEFENDANTS.)	AND PROPOSED ORDER
<hr/>		HEARING: 24 FEBRUARY 2006, 9 A.M.
		COURTROOM OF THE HON. SUSAN ILLSTON

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18 Pursuant to Civil L.R. 16-14(d), the parties to the above-entitled action certify that
19 they met and conferred at least 10 days prior to the subsequent case management
20 conference scheduled in this case and jointly submit this supplemental case management
21 statement and proposed order and request the Court adopt it as a supplemental case
22 management order in this case.

23 **DESCRIPTION OF SUBSEQUENT CASE DEVELOPMENTS**

24 Since the parties last discussed the case with the Court in September 2005,
25 discovery was exchanged, depositions were taken, expert designation occurred and the
26 parties attended an unsuccessful mediation with Magistrate Zimmerman. Defendant's
27 motion for summary judgment is pending.

1 Two issues have arisen that the parties request be addressed at the conference.

2 1. Late designations of experts.

3 **Defendant's Contentions:** This Court set the expert designation dates for 7
4 (plaintiff's), 18 (defendant's) and 30 November (rebuttal). Plaintiff never requested a
5 continuance of its deadline, but failed to make any designation by 7 November. Defendant
6 noted the omission and relied on it, confirming such reliance by facsimile to counsel on 10
7 November. Plaintiff responded on 11 November by designating Hypertouch's
8 owner/principal Joe Wagner (4 days late). Defendant then worked to get its designation
9 ready by the 18th, but because of the late designation could not do so until 21 November
10 after asking plaintiff's counsel for a 4-day extension (which was not refused). On 9
11 December plaintiff attempted to designate rebuttal expert William Cole (9 days late), but
12 failed to provide the required report. Defendant objected to the late designation on 14
13 December and served a notice of motion for exclusion of Mr. Cole if adequate disclosure
14 and the opportunity to depose Mr. Cole within discovery cutoff was not provided by 20
15 December, discovery cutoff. Plaintiff served Mr. Cole's report on 20 December and moved
16 to continue/reopen discovery, which motion was denied by this Court. Defendant thus did
17 not have the opportunity of deposing Mr. Cole. Defendant requests Mr. Cole's testimony be
18 excluded.

19 **Plaintiff's Contentions:** Defendant failed to timely designate its experts, so
20 it was natural that the designation of a rebuttal expert would be late. Moreover, Defendant's
21 counsel wrote a letter demanding the rebuttal expert's report and Plaintiff complied with the
22 demand in a timely manner. Defendant is incorrect that it lacked the opportunity to depose
23 the rebuttal expert, not least because it opposed the motion to re-open discovery and
24 rejected Plaintiff's offer to allow deposition of the expert notwithstanding the close of
25 discovery. If Defendant has been prejudiced at all (which Plaintiff disputes), then such
26 prejudice was the result of its own actions.

1 2. Right to jury trial.

2 **Defendant's contentions:** Although both parties' initial filings demanded a
3 jury trial, defendant has questioned any right to jury trial and hereby withdraws its request
4 for jury trial and has asked plaintiff to withdraw its request. Plaintiff has refused to withdraw
5 the request for jury trial.

6 The methodology to determine whether a statutory count provides a Seventh
7 Amendment right to jury trial in this circuit is found in Spinelli v. Gaughan, 12 F.3d 853, 855,
8 858 (9th Cir. 1993) (ERISA rights equitable and thus jury trial demand denied): First, one
9 looks at the nature of the right to determine whether it is analogous to common law rights.
10 There is no right to jury trial of a public right, which means a statutory right "closely
11 integrated with a federal regulatory scheme." In re Standard Insulations, Inc., 138 B.R. 947,
12 951 (W.D. Mo. 1992) (no jury trial for personal injury claims allowance in bankruptcy court).
13 Defendant argues the CAN-SPAM Act is part of a Congressional plan to regulate
14 commercial email (15 U.S.C. 7701(b)), with general standing for enforcement to be with the
15 FTC and not private parties (15 U.S.C. 7706(a)), which means the right being asserted by
16 a private party is of a public nature and no jury trial is allowed.

17 The second step is to examine the remedies provided to see whether they are legal
18 or equitable, which second step is more important than the first – determining whether the
19 cause of action is similar to a tort with actual and punitive damages, in which case the relief
20 is legal (jury trial allowed), or whether the remedies are more flexible and discretionary and
21 therefore equitable (no jury trial). Defendant cites to Joe Hand Promotions, Inc. v. Nekos,
22 18 F.Supp.2d 214 (N.D. N.Y. 1998), for an analogous situation denying a jury trial. In that
23 case, plaintiff sued under the federal Communications Act as a private party seeking
24 statutory damages. The request for jury trial was stricken. As with the CAN-SPAM Act, the
25 Communications Act allowed for statutory damages which could be increased or decreased
26 by the court. *Id.* at 216. The district court found three manners in which the remedy was
27 equitable in nature: restitutionary damages refer more to the defendant's tortious conduct

1 and to preventing it in the future than to compensating plaintiff's actual loss; the court's
2 discretion to adjust damages up or down meant the award was not compensating plaintiff
3 for actual damages; and statutory damages did not reflect plaintiff's actual damages. *Id.* at
4 217. Here, defendant argues, section 15 U.S.C. 7706(g)(3) allows for statutory damages
5 which "the court" may increase or reduce. Since the objective of damages is not to
6 compensate plaintiff for a tort but to give the court discretion to award what it deems
7 appropriate, the remedy appears equitable and no jury trial is available. [In addition here,
8 Hypertouch waived actual damages (see Order Re: Discovery filed 9/6/05 (Document 69)
9 at 1:16-17.]

10 **Plaintiff's contentions:** Defendant is relying on a district court opinion from
11 a court outside the Ninth Circuit, and misinterprets the nature of the statutory damages
12 under CAN-SPAM and the California law. Plaintiff has always contended that it suffered
13 actual damages. It elected to seek statutory damages as it is entitled to do, but that was not
14 a waiver of the claim that it has actual damages, it was merely an election to avoid the
15 necessity of proving the amount of such damages. Both CAN-SPAM and the California law
16 recognize that Internet service providers and recipients of unlawful email advertising suffer
17 damages. (See 15 U.S.C. § 7701(a)(3) (discussing "costs to recipients who cannot refuse
18 to accept such mail and who incur costs for the storage of such mail, or for the time spent
19 accessing, reviewing, and discarding such mail"); Cal. Bus. & Prof. Code § 17529(d) (spam
20 will cost United States organizations more than ten billion dollars (\$10,000,000,000) this
21 year, including lost productivity and the additional equipment, software, and manpower
22 needed to combat the problem. California is 12 percent of the United States population with
23 an emphasis on technology business, and it is therefore estimated that spam costs
24 California organizations well over 1.2 billion dollars (\$1,200,000,000).") Plaintiff is suing in
25 both law and equity. (The Complaint specifically prays for relief both in terms of actual
26 damages and for injunctive relief.) "Where equitable and legal claims are joined in the same
27 action, there is a right to jury trial on the legal claims which must not be infringed either by

