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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

11	HYPERTOUCHE, INC.,	)	CASE NO. C 04 5203 SI
12	PLAINTIFF,	)	
13	vs.	)	DEFENDANT'S PRETRIAL FILINGS
14	KENNEDY-WESTERN UNIVERSITY,	)	
15	DEFENDANT.	)	PTC: 14 MARCH 2006, 3:30 P.M. COURTROOM OF THE HON. SUSAN ILLSTON

16  
17 Pursuant to Civil L.R. 16 and this Court's Pretrial Instructions, defense counsel has  
18 attempted (by facsimile, email and telephone) to meet and confer with plaintiff's counsel to  
19 submit a joint statement but has been unable to obtain any response. Defendant's motion  
20 for summary judgment was tentatively granted on 24 February 2006 but the Court's Order  
21 has not yet issued. Defendant therefore files its portions of the Pre-Trial Filings due today,  
22 on the assumption the tentative ruling is the ruling of the Court.

23 **(1) The Action**

24 **(A) Substance of the action.**

25 This is one of 30 cases brought by Joe Wagner's company Hypertouch, Inc.  
26 ("Hypertouch"), and duplicative of one of 21 brought by brother Paul Wagner's corporation  
27

1 Beyond Systems, Inc., designed to profit from recent consumer legislation regulating email  
2 by characterizing their personal computers as “Internet Service Providers” capable of suing  
3 for statutory damages against deep pockets (colloquially known as “shakedown suits”).  
4 Kennedy-Western University (“KWU”) is a successful online university targeted by the  
5 Wagners in these cases.

6 The complaint alleged two counts: Violation of 15 U.S.C. §§ 7701 *et seq.* Controlling  
7 the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”),  
8 and violation of California Business & Professions Code § 17529, Restrictions on Unsolicited  
9 Commercial E-Mail Advertisers.

10 It is defendant’s understanding based on the summary judgment tentative ruling that  
11 summary judgment is granted on Count 1 and Count 2 is dismissed for declination to  
12 exercise supplemental jurisdiction.

13 (B) **Relief prayed.**

14 \_\_\_\_\_The sole remaining issue after the summary judgment ruling should be the amount  
15 of costs including attorneys’ fees to be assessed against Hypertouch pursuant to 15 U.S.C.  
16 7706(g)(4). If the Court wishes this prove-up to occur by trial rather than motion, KWU is  
17 prepared to do so on 27 March.

18 (2) **The Factual Basis of the Action.**

19 KWU contends there was no factual basis for Hypertouch to sue KWU based on  
20 alleged receipt of approximately 2000 emails accurately advertising KWU’s educational  
21 program for all the reasons set forth in the summary judgment memorandum.

22 As to the remaining issue of costs including attorneys’ fees, KWU incurred and paid  
23 counsel on an hourly basis and litigation costs on a reimbursement basis.

24 (3) **Legal Issues.**

25 Pursuant to 15 U.S.C. 7706(g)(4) KWU’s counsel will testify as to the reasonableness  
26 of the costs including attorneys’ fees and KWU’s officer will testify that the costs were  
27 incurred, reasonable and paid.

1 KWU believes this issue will be tried to the Court and not a jury by the express  
 2 language of subsection 7706(g)(4) and requests Hypertouch's jury demand be stricken  
 3 under Federal Rule of Civil Procedure 39(a) on this ground as well as the Seventh  
 4 Amendment as applied to the CAN-SPAM Act.<sup>1</sup>

5 **(4) Trial Preparation.**

6 If the Court prefers trial of the costs' issue to a motion, the trial will be brief and limited  
 7 to the Court's "assessment" under section 7706(g)(4) of "reasonable costs, including  
 8

9 <sup>1</sup>

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

22 The second step is to examine the remedies provided to see whether they  
 23 are legal or equitable, which second step is more important than the first –  
 24 determining whether the cause of action is similar to a tort with actual and punitive  
 25 damages, in which case the relief is legal (jury trial allowed), or whether the  
 26 remedies are more flexible and discretionary and therefore equitable (no jury trial).  
 27 Joe Hand Promotions, Inc. v. Nekos, 18 F.Supp.2d 214 (N.D. N.Y. 1998),  
 presented an analogous situation in which jury trial was denied. In that case,  
 plaintiff sued under the federal Communications Act as a private party seeking  
 statutory damages. The request for jury trial was stricken. As with the CAN-SPAM  
 Act, the Communications Act allowed for statutory damages which could be  
 increased or decreased by the court. *Id.* at 216. The district court found three  
 manners in which the remedy was equitable in nature: restitutionary damages refer  
 more to the defendant's tortious conduct and to preventing it in the future than to  
 compensating plaintiff's actual loss; the court's discretion to adjust damages up or  
 down meant the award was not compensating plaintiff for actual damages; and  
 statutory damages did not reflect plaintiff's actual damages. *Id.* at 217. Here,  
 section 15 U.S.C. 7706(g)(3) allows for statutory damages which "the court" may  
 increase or reduce. Since the objective of damages is not to compensate plaintiff  
 for a tort but to give the court discretion to award what it deems appropriate, the  
 remedy appears equitable and no jury trial is available.

1 reasonable attorneys' fees."

2 (A) **Witnesses to be Called.**

3 \_\_\_\_\_ Assuming the sole issue of costs, Robert Patterson and Cynthia Woollacott. The  
4 former will testify to the hourly retention of counsel, that KWU incurred and paid all fees and  
5 costs billed in this matter, and the reasonableness of the costs; the latter will establish the  
6 reasonableness of the fees and costs.

7 If other issues are involved, KWU plans to call Steven Berns, Bradley Brownstein,  
8 Shea Park, Robert Patterson, Andrew Paul (by deposition), Robert Sternberg, Joseph  
9 Wagner (adverse party), Paul Wagner (by deposition) and experts Dr. Lawrence Miller and  
10 Jason Rines.

11 Written narrative statements of the relevant live witnesses and statements  
12 designating excerpts from depositions will be provided before trial.

13 (B) **Exhibits, Schedules and Summaries.**

14 Assuming the sole issue is costs, the exhibits will consist of the following:

15 <u>Exh. #</u>	<u>Substance or purpose</u>	<u>Sponsoring witness</u>
16 1003	Hypertouch's disks of accused emails	Woollacott
17 1004	Hypertouch demand for \$600,000	Woollacott
18 1005	Complaint	[judicial admission]
19 1022	Paul Wagner disk of accused emails	Woollacott
20 1033	Sue-a-spammer guide	Patterson
21 1040	Hypertouch list of spam cases	Patterson
22 1046	Hypertouch Rule 26 disclosure showing	
23	Hypertouch claiming \$82 million damages	[judicial admission]
24 1047	Legislative Histories of CAN-SPAM Act	[judicial notice]
25 1048	Legislative historical documents re California	
26	laws	[judicial notice]
27 1049	Proposition 64 history	[judicial notice]

- 1 1050 Law firm invoices to KWU (redacted) Woollacott
- 2 1051 Cost invoices to law firm Woollacott
- 3 1052 Payments by KWU to law firm Patterson

4 KWU also may present some or all of the transcripts and deposition exhibits,  
5 numbered 130-134 and 1000-1045, plus additional exhibits described as follows:

- 6 1053 reverse DNS lookups for Hypertouch's alleged servers
- 7 1054 Merriwest subpoena production of Hypertouch checks
- 8 1055 Peak Advertising descriptions of services
- 9 1056 Contour Media Group tests and description of services
- 10 1057 Boca Networks descriptions of services
- 11 1058 Hypertouch notice of deposition of Contour Media Group
- 12 1059 Webopedia definition of ASP
- 13 1060 Park/KWU do not use list
- 14 1061 FTC spam complaint forms
- 15 1062 KWU guidelines
- 16 1063 EmChoice description of services
- 17 1064 Cyveillance description of services
- 18 1065 Beyond Systems MD complaint against KWU

19 **Stipulations re Admissibility** (Trial Instruction 5.b.)

20 Plaintiff has chosen not to participate.

21 ©) **Trial.**

22 \_\_\_\_\_KWU believes plaintiff's jury demand should be stricken under Federal Rule of Civil  
23 Procedure 39(a).

24 (D) **Estimate of Trial Time.**

25 \_\_\_\_\_Two hours.

26 (E) **Use of Discovery Responses.**

27 \_\_\_\_\_None necessary for the costs' issue. If other issues are involved, KWU plans to

1 submit excerpts from Hypertouch discovery responses and will provide a statement of such  
2 excerpts before trial.

3 **(F) Further Discovery or Motions.**

4 \_\_\_\_\_ If the Court does not choose to strike the jury demand on its own initiative under  
5 Federal Rule of Civil Procedure 39, KWU would move to strike the demand.

6 If the issue is not limited to costs, KWU would move to exclude Joe Wagner and  
7 William Cole as experts based on lack of relevant and appropriate qualifications; and would  
8 move to exclude any reference to KWU as a “diploma mill” based on hearsay, lack of  
9 foundation and unfair prejudice/waste of time. Federal Rules of Evidence 102, 401, 402,  
10 403, 602, 701, 702, 801 and 802.

11 **Objections to Other Evidence** (Trial Instruction 5.c.)

12 KWU objects to any evidence submitted by Hypertouch for failure to disclose by  
13 today.

14 \_\_\_\_\_ **(5) Trial Alternatives and Options**

15 The parties have engaged in two alternative dispute mechanisms without success.  
16 KWU would consider having a magistrate judge hear the costs’ motion or trial of that issue.

17 Dated: 7 March 2006

WOOLLACOTT JANNOL LLP

18 By Cynthia Woollacott  
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20 Attorneys for defendant Kennedy-Western  
21 University  
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