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PEAK ADVERTISING, LLC
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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10

11 HYPERTOUCH, INC., a California) CASE NO. C 04- 5203 SI
corporation,)
12) ANSWER OF DEFENDANT PEAK
Plaintiff,) ADVERTISING, LLC TO COMPLAINT
13)
v.)
14)
KENNEDY-WESTERN UNIVERSITY, a)
15 Wyoming corporation, and DOES)
1 through 100, inclusive,)
16)
Defendants.)
17)
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23 Defendant Peak Advertising, LLC ("Peak") hereby answers
24 the plaintiff's complaint.
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1 1. Responding to Paragraph 1 of the Complaint, Peak
2 states that this paragraph states legal conclusions to which no
3 response is required.

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5 2. Responding to Paragraph 2 of the Complaint, Peak
6 states that this paragraph states legal conclusions to which no
7 response is required.

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9 3. Responding to Paragraph 3 of the Complaint, Peak
10 lacks sufficient information to admit or deny the allegations,
11 and on that basis denies the allegations.

12
13 4. Responding to Paragraph 4 of the Complaint, Peak
14 states that whether venue is proper is a legal conclusion to
15 which no response is required. As to the factual allegations of
16 this paragraph, Peak lacks sufficient information to admit or
17 deny the allegations, and on that basis denies the allegations.

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19 5. Responding to Paragraph 5 of the Complaint, Peak
20 lacks sufficient information to admit or deny the allegations,
21 and on that basis denies the allegations.

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23 6. Responding to Paragraph 6 of the Complaint, Peak
24 lacks sufficient information to admit or deny the allegations,
25 and on that basis denies the allegations.

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27 7. Responding to Paragraph 7 of the Complaint, Peak
28 objects that the Federal Rules of Civil Procedure do not

1 authorize the use of "DOE" defendants. To the extent that
2 Plaintiff alleges that Peak is "responsible in some manner for
3 the events and happenings hereinafter set forth," Peak denies
4 such allegations except as otherwise specially admitted in this
5 Answer. As to any of the other alleged "DOE" defendants, Peak
6 lacks sufficient information to admit or deny the allegations,
7 and on that basis denies the allegations.

8
9 8. Responding to Paragraph 8 of the Complaint, Peak
10 objects that the Federal Rules of Civil Procedure do not
11 authorize the use of "DOE" defendants. To the extent that
12 Plaintiff alleges that Peak "assisted Defendant Kennedy-
13 Western University in and about the wrongs complained of herein,"
14 Peak denies such allegations. To the extent that Plaintiff
15 alleges that Peak was "in a principal/agent relationship with
16 Defendant Kennedy-Western University," Peak admits that it
17 briefly provided media buying services to Kennedy-Western
18 University, but otherwise denies such allegations. As to any of
19 the other alleged "DOE" defendants, Peak lacks sufficient
20 information to admit or deny the allegations, and on that basis
21 denies the allegations.

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23 9. Responding to Paragraph 9 of the Complaint, Peak
24 incorporates its responses to paragraphs 1-8 as though set forth
25 in full.

26
27 10. Responding to Paragraph 10 of the Complaint, Peak
28 denies that it sent or authorized the sending of the alleged

1 emails attached as Exhibits 1 and 2 to the Complaint, or of any
2 emails advertising Kennedy-Western University that violated the
3 CAN-SPAM Act of 2003. Peak otherwise lacks sufficient
4 information to admit or deny the allegations, and on that basis
5 denies the allegations.

6
7 11. Responding to Paragraph 11 of the Complaint, Peak
8 denies that it, willfully or otherwise, sent or authorized the
9 sending of the alleged emails attached as Exhibits 1 and 2 to the
10 Complaint, or of any emails advertising Kennedy-Western
11 University that violated the CAN-SPAM Act of 2003.

12
13 12. Responding to Paragraph 12 of the Complaint, Peak
14 denies that it sent or authorized the sending of the alleged
15 emails attached as Exhibits 1 and 2 to the Complaint, or of any
16 emails containing materially false or materially misleading
17 header information. Peak otherwise lacks sufficient information
18 to admit or deny the allegations, and on that basis denies the
19 allegations.

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21 13. Responding to Paragraph 13 of the Complaint, Peak
22 denies that it sent or authorized the sending of electronic mail
23 to the Plaintiff "that included domain names which were
24 registered to false non-existent entities using false addresses."
25 Peak otherwise lacks sufficient information to admit or deny the
26 allegations, and on that basis denies the allegations.

27
28 14. Responding to Paragraph 14 of the Complaint, Peak

1 denies that it sent or authorized the sending of electronic mail
2 to the Plaintiff "that had no valid physical postal address of
3 the sender." Peak otherwise lacks sufficient information to
4 admit or deny the allegations, and on that basis denies the
5 allegations.

6
7 15. Responding to Paragraph 15 of the Complaint,
8 Peak denies that it sent or authorized the sending of electronic
9 mail to the Plaintiff "to an address harvested from domain name
10 contact registration information." Peak otherwise lacks
11 sufficient information to admit or deny the allegations, and on
12 that basis denies the allegations.

13
14 16. Responding to Paragraph 16 of the Complaint,
15 Peak denies that it sent or authorized the sending of electronic
16 mail to the Plaintiff "to addresses generated using automated
17 means." Peak otherwise lacks sufficient information to admit or
18 deny the allegations, and on that basis denies the allegations.

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20 17. Responding to Paragraph 17 of the Complaint,
21 Peak denies the allegations.

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23 18. Responding to Paragraph 18 of the Complaint,
24 Peak denies the allegations.

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26 19. Responding to Paragraph 19 of the Complaint,
27 Peak denies the allegations.

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1 U.S.C. § 7705(b) (1) .

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3 SECOND AFFIRMATIVE DEFENSE

4 (Commercially Reasonable Practices and Procedures --
5 15 U.S.C. § 7706(g) (3) (D))

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7 Peak asserts that Plaintiff is not entitled to any
8 statutory damages against Peak because Peak established and
9 implemented, with due care, commercially reasonable practices and
10 procedures designed to effectively prevent violations of the CAN-
11 SPAM Act of 2003, and/or because any violation of the CAN-SPAM
12 Act of 2003 occurred, if at all, despite commercially reasonable
13 efforts to maintain compliance with such practices and
14 procedures.

15
16 THIRD AFFIRMATIVE DEFENSE

17 (First Amendment)

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19 Peak asserts that it is immune from liability the
20 statutory provisions asserted by Plaintiff, if applied against
21 Peak, would violate the First Amendment of the United States
22 Constitution.

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24 FOURTH AFFIRMATIVE DEFENSE

25 (Eighth Amendment)

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27 Peak asserts that the statutory penalties sought by
28 Plaintiff, if applied against Peak, would constitute excessive

1 fines in violation of the Eight Amendment of the United States
2 Constitution.

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4 WHEREFORE, Peak prays as follows:

- 5
- 6 1. Plaintiff take nothing by way of its Complaint;
 - 7
 - 8 2. Plaintiff be awarded no attorneys fees and no
9 costs;
 - 10
 - 11 3. Peak be awarded its attorney fees and costs of
12 this action;
 - 13
 - 14 4. The Court should award such other and further
15 relief as may be just and proper.

16
17 DATED: February 22, 2005 JEFFER, MANGELS, BUTLER & MARMARO LLP
18 JEFFREY K. RIFFER

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20 By: /S/-JEFFREY K. RIFFER-
21 JEFFREY K. RIFFER
22 Attorneys for Defendant Peak
23 Advertising, LLC
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DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

DATED: February 22, 2005 JEFFER, MANGELS, BUTLER & MARMARO LLP
JEFFREY K. RIFFER

By: /S/-JEFFREY K. RIFFER-
JEFFREY K. RIFFER
Attorneys for Defendant Peak
Advertising, LLC