

1 proposed class Settlement is fair and reasonable. (See, e.g., *Rebney v. Wells Fargo Bank* (1990) 220
2 Cal. App.3d 1117, at 1138 – 1139, recognizing the trial court’s broad discretion to determine whether or
3 not a proposed class action settlement is fair.)

4 As such, the Fairness Hearing is an extension of the Settlement conferences (in this case the
5 Mediation sessions before Justice-Retired Robert Dossee), where the proposed class Settlement is
6 subjected to the Court’s independent determination as to whether or not that Settlement should be
7 approved. (See generally, *Federal Manual For Complex Litigation* (Third Edition 1995) § 23.14, at pgs
8 171 – 172.)

9 Clearly, in this Settlement approval / disapproval process, the Court is not adjudicating the facts
10 of the case. (See *4 Newberry on Class Actions* (Fourth Edition 2002) § 11:45, at pg 127, summarizing
11 the pertinent case law, as to what courts may consider at a Fairness Hearing, as follows: “There is no
12 precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the
13 contested questions of fact. It is clear that the court need not possess evidence to decide the merits of
14 the issue, because the compromise is proposed in order to avoid further litigation.” and at pg 128 later
15 adding: “...At minimum, the court must possess sufficient information to raise its decision above mere
16 conjecture.”)

17 Instead, the Court is called upon to take a careful equitable “look”, as it were, exercising a
18 healthy skeptical eye in doing so, at the fairness, good faith, and reasonableness of the proposed
19 Settlement. (See *In re Oracle Securities Litigation* (N.D. Calif. 1993) 829 F. Supp. 1176, at 1179.)

20 In this context, the rules of evidence should not be strictly applied. Instead, the Court may and
21 should consider any good faith offers of proof, or other reliable statements, documents, or information
22 that will reasonably inform the Court of all aspects, considerations, and ramifications relevant to the
23 proposed Settlement. (Notably, the *Federal Manual For Complex Litigation, supra.*, at pg 172,
24 encourages that the court “...should ask for whatever additional information is necessary for its
25 review.”)

26 That this is so, for example, is suggested by *Wershba v. Apple Computer, Inc.*, (2001) 91 Cal.
27 App.4th 224, at 236, where the trial court considered the objectors’ statement based on copies of a draft
28 complaint in another anticipated lawsuit and certain Apple Computer letters and advertising even though

1 no supporting affidavits and declarations were submitted. It is also suggested by the custom and
2 practice in non-class civil cases that, in approving settlements, the Settlement Conference Judge
3 typically relies on the parties' offers of proof and fact representations made in the course of the
4 settlement talks themselves – settlement talks which that Judge has conducted.

5 Indeed, if the Court were to require here that every submission should be in evidentiary form,
6 authenticated or verified, and meeting the strict requirements for admissible evidence, this would hold
7 class members, if they are lay people who are unschooled in the law and not separately represented by
8 counsel, to an unreasonable standard that would foreclose or impede their ability to object to the
9 proposed class settlement.

10 The settlement approval procedure in class actions is simply not intended to require Objectors to
11 come forward with a formal evidentiary submission, and to require such would discourage, rather than
12 encourage Objectors from coming forward to assert unfairness in the proposed settlement. The whole
13 process is designed to promote the broadest possible opportunity for class members to raise such
14 challenges and/or concerns of unfairness as they wish so that any faults in the Settlement can be put to
15 full judicial scrutiny.

16 17 **Rulings On Objections And Judicial Notice Requests.**

18 Having these above-stated considerations in mind, the Court now makes the following rulings:

19 (1) Defendant Perry Johnson, Inc.'s Request For Judicial Notice of the hearing transcript of
20 Jan. 27, 2006 in *Gold Liens & Adoff v. Perry Johnson, Inc.*, Circuit Court of Maryland (Montgomery
21 County), Case No. 255190, is Granted.

22 (2) Defendant Perry Johnson, Inc.'s Objection to Declaration of Stephen H. Ring and
23 Objection to Declaration of Kristine Kogok are Overruled.

24 (3) Defendant Perry Johnson, Inc.'s so-called Objection To Class Representative's Jan. 19,
25 2007 Ex Parte Communication To The Court, is Overruled.

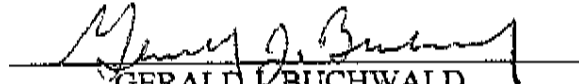
26 (4) Objector Kogok Corporation's Declaration of Stephen H. Ring includes what is, in effect,
27 a Request for Judicial Notice of (a) declarations, affidavits, transcripts, responses to discovery,
28 depositions, and deposition exhibits earlier filed in either this case or filed earlier in other specified cases

1 in State and Federal courts in Maryland and of (b) public records showing Perry Johnson, Inc.'s
2 corporate filings. That Request for Judicial Notice is Granted.

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IT IS SO ORDERED.

Dated: May 10th, 2007.


GERALD J. BUCHWALD
JUDGE OF THE SUPERIOR COURT

ENDORSED FILED
SAN MATEO COUNTY**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
IN AND FOR THE COUNTY OF SAN MATEO

MAY 11 2007

Clerk of the Superior Court
By C. FUJINO
DEPUTY CLERK**AFFIDAVIT OF MAILING****CASE NO. CIV 418600****CASE NAME: HYPERTOUCHE, INC. VS JOHNSON, INC.****DOCUMENT: ORDER RE: EVIDENTIARY ISSUES RAISED AT FAIRNESS HEARING**

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at South San Francisco, CA a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

JOHN L. FALLAT, ESQ.
LAW OFFICES OF JOHN L. FALLAT
523 FOURTH STREET, SUITE 210
SAN RAFAEL, CA 94901

JOHN C. BROWN, ESQ.
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STEPHEN H. RING, ESQ.
STEPHEN H. RING, P.C.
20300 SENECA MEADOWS PKWY., SUITE
200
GERMANTOWN, MD 20876

Executed on **MAY 11 2007**, at South San Francisco, CA

JOHN C. FITTON
CLERK OF THE SUPERIOR COURT

By CARRIE FUJINO, Deputy Clerk

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ENDORSED FILED
SAN MATEO COUNTY

MAY 11 2007

Clerk of the Superior Court
By C. FUJINO
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

HYPERTOUCHE, INC., and on behalf of
all others similarly situated,

Plaintiffs,

v.

PERRY JOHNSON, INC., et. al.,

Defendants.

CASE NO. Civ. 418600

CLASS ACTION

ORDER OVERRULING OBJECTOR
KOGOK CORPORATION'S
OBJECTIONS TO
CLASS ACTION SETTLEMENT

Regarding this pending Class Action Settlement, this Court held a Fairness and Good Faith Determination Hearing on January 19, 2007. The named class Plaintiff Hypertouch, Inc. and the Defendants Perry Johnson, Inc., et. al., were represented by their respective counsel of record. There was only one Objector who appeared, Kogok Corporation which was represented by its specially admitted counsel Stephen H. Ring, Esq. and local counsel John C. Brown, Esq.

At that time, Kogok Corporation presented its Statement of Objector, and the Court heard extended argument on Kogok's objections to the proposed Settlement. Having now fully considered the matter, and for the reasons stated below, the Court rejects Objector Kogok Corporation's objections to the Settlement.

1 The issues raised at said hearing, as supplemented by subsequent additional memoranda,
2 declarations, and exhibits, are: Objections to (1) Kogok Corporation's standing to object to the
3 preliminarily approved Settlement (on the basis that Kogok has not adequately shown that it is truly a
4 class member) and, if Kogok is properly before the Court, then Kogok Corporation's objections to (2)
5 what Kogok claims to be the proposed Settlement's failure to take full advantage of available liability
6 insurance coverage, (3) the adequacy of Notice of proposed Settlement to the class members, and (4) the
7 overall reasonableness and fairness of the proposed Settlement.

8 On these issues, the Court now rules as follows:

9
10 (1) **Kogok's Standing:** The Court finds that Kogok has adequately demonstrated its standing
11 to appear here as an Objector.

12 In that regard, Kogok has submitted evidence that it received at least nine faxes of advertisements
13 from Perry Johnson, Inc. in late 2002 and early 2003 (Decl. K. Kogok, dated 1/29/07, at pg. 3, lines 18 -
14 26), that it did not solicit such faxed advertising (Id., at pg. 3, line 27 - pg. 4, line 2), and that its lack of
15 consent to those unsolicited faxes was consistent with its long-standing corporate operating procedures
16 to decline such unwanted faxed advertising (Id., at pg. 2, line 25 - pg.3, line 17). This evidence,
17 standing alone, is *prima facie* evidence that shows that Kogok Corporation has Objector standing.

18 In addition, under seal (i.e., sealed in order to protect Perry Johnson, Inc.'s trade secrets and the
19 identity of Perry Johnson, Inc. customers who arguably did consent to receive Perry Johnson, Inc.'s
20 faxed advertising), Kogok has submitted copies of so-called "Info Sheets". These "Info Sheets" reflect
21 calls or other contacts by Perry Johnson, Inc. customers where it was noted, among other things, "Client
22 has given permission to fax..." (Exhibits 5 and 14, to Decl. S. Ring, dated 1/29/07) It is undisputed that
23 these records were produced by Perry Johnson, Inc. in other prior litigation. (See Decl. D. Cohen
24 [counsel for Perry Johnson, Inc. in Michigan], dated 2/5/07, pg. 1, line 25 - pg. 2 lines 2 - 3 and lines
25 25 - 26 ; Id., at pg. 3 lines 19 - 23).

26 The Court has reviewed these records of Perry Johnson, Inc.'s *in camera*, and notes that none
27 show any consent to faxed advertising being given by Kogok Corporation. Nor has Perry Johnson, Inc.
28 submitted any other "Info Sheets", or other business records, to show that it had Kogok Corporation's

1 permission to fax advertising to Kogok. If such a consent was given, Perry Johnson, Inc., as the party
2 raising the issue of the Objector's standing here, had the burden of proof to so establish such permission
3 and thereby rebut the *prima facie* showing made by Objector Kogok.

4 Under the circumstances, Kojok Corporation is properly before the Court with standing to have
5 Objector status here. (See, e.g., *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App.4th 224, 235 – 236,
6 holding that objectors had established their standing to challenge fairness of class action settlement even
7 though they filed no supporting declarations or affidavits. There, the filed statement of objections
8 included certain Apple-issued documents proving that the objectors had been promised continuing free
9 technical support and, thus, that they were in the settlement class of consumers who had bought Apple
10 products during certain time periods and who had been promised free technical support for the product
11 that they purchased.)

12 Accordingly, this Court overrules the Objections to Kogok Corporation's standing to appear as
13 Objector, and to challenge the fairness, good faith, and reasonableness of the proposed Settlement.

14
15 **(2) Available Insurance:** Turning to Kogok Corporation's specific objections to the
16 Settlement, Kogok suggests that the Court should not give final approval because, in Kogok's view, a
17 much more valuable monetary settlement can likely be achieved by the further pursuit of arguably
18 applicable liability insurance of Perry Johnson, Inc.'s. In this regard, Kogok asserts that "The filings do
19 not demonstrate that insurance coverage has been vigorously and thoroughly pursued." (Statement of
20 Objector Kogok Corporation, filed Nov. 1, 2006, at page 10.)

21 In considering this objection, the Court has reviewed a copy of the policy wording of the
22 applicable general liability and umbrella policies under which Perry Johnson, Inc. is the insured as to
23 this claim. (Exhibit 1 to Def. Perry Johnson, Inc.'s Insurance Policy Submission, filed Jan. 31, 2007.)
24 This copy of the policies was lodged with the Court, at the Court's direction, following the recent
25 Fairness Hearing.

26 The Court also notes here, and has drawn upon, its approximately 33 years of private civil law
27 practice, prior to coming onto the bench, in which the undersigned handled many insurance coverage
28 matters, including those arising under commercial business package policies, general liability policies,

1 and director & officer liability policies. In that prior law practice, the Court was also many times a
2 claims counsel for liability insurers, in the USA and in the London insurance market, including
3 Underwriters at Lloyd's, London. The undersigned was also, at many times, counsel for insureds such
4 as local and national corporations, non-profit organizations, and homeowner associations, or their
5 directors & officers, who were seeking to confirm coverage, or to compel the insurer's participation in a
6 defense or in settlement talks when the insurance carrier was questioning or denying its coverage
7 obligations.

8 In this Court's opinion, the likelihood is extremely remote that any substantial settlement monies
9 could be obtained by either the Plaintiff class or Perry Johnson, Inc.'s further pursuit of insurance
10 coverage here. Even the most promising avenue for coverage here is the invocation of the advertising
11 injury coverage for violations of privacy by the sending of the unwanted faxed advertisements.
12 However, as to that coverage, the policy wording includes pertinent exclusions that clearly apply to
13 negate coverage for the claims made by the Plaintiff class.

14 For example, the policy wording excludes coverage for advertising injury claims against an
15 insured in "the business [of]... telemarketing". (Id., at Bates-numbered pg. PJI149.) Undefined in the
16 policy itself, the term "telemarketing" is defined under the law to include faxed advertising. (See 47
17 Code Fed. Regs 64.1200, subsections (a)(3) and (f), which define the term "telemarketing" to mean the
18 advertisement of available property, goods, or services by "...the initiation of a telephone call or
19 message..."; see also the discussion of the legislative history of the Telephone Consumer Protection Act
20 in *Kaufman v. ACS Systems, Inc.* (2003) 110 Cal. App.4th 886, at 890 – 894.) Accordingly, the
21 "telemarketing" exclusion reasonably applies here to exclude coverage.

22 Other pertinent exclusions, as well, are the policy exclusions of coverage for claims arising out
23 of intentional acts and intentional violation of penal statutes and ordinances (e.g., Id., at Bates-numbered
24 pg. PJI 150). Those exclusions, likewise, apply here because the relief afforded by the Telephone
25 Consumer Protection Act (47 U.S.C. § 227) includes a minimum statutory recovery of \$500 for each
26 violation. (47 U.S.C. § 227 (f) (1) and § 227 (b) (3) (A) – (C).) As such, the TCPA qualifies as a penal
27 statute. (See *Anderson v. Burnes* (1898) 122 Cal. 272.)
28

1 Furthermore, the few recent cases which are directly on point all support the insurer's denial of
2 coverage for the claim made here. (See *ACS Systems v. St. Paul Fire & Marine Ins. Co.* (2007) 147 Cal.
3 App.4th 137, holding that advertising injury coverage did not apply to claims for TCPA violations or for
4 invasion of privacy from unsolicited faxes. See also, *Resource Bankshares Corp. v. St. Paul Mercury*
5 *Ins. Co.* (4th Cir. 2005) 407 F.3d 631, at 640; *American States Ins. Co. v. Capital Associates of Jackson*
6 *County* (7th Cir. 2004) 392 F.3d 939, at 943.)

7 Accordingly, in view of the fact that the availability of liability insurance is so speculative, the
8 objection that approval or not of this class Settlement should await the further pursuit of insurance
9 coverage, as that avenue has allegedly not been reasonably exhausted, is without merit and is rejected.

10
11 **(3) Adequate Notice To The Class:** Objector Kogok also challenges the proposed method of
12 Notice to the class as being inadequate.

13 The Notice method adopted in the proposed Settlement consists of (1) mailing of a postcard
14 Notice to a list of class members derived from those who are on what remains of the Defendants' Do-
15 Not-Call database, (2) mailing of a postcard Notice to attorneys of record known to have filed other
16 litigation against Defendants, (3) a press release giving Notice, issued simultaneously with the postcard
17 mailings, and (4) posting of Notice for a two-month period on a computer website
18 "JunkFaxLawsuit.com". (Joint Stipulation of Settlement, filed Aug. 25, 2006, at pages 10-11.)

19 Kogok Corporation contends that this proposed Notice method, i.e. sending notice to those
20 individuals and entities which telephoned Perry Johnson, Inc.'s Do-Not-Fax line coupled with a web-site
21 posting, is too restrictive and is not likely to afford notice to all of the class members. Instead of Notice
22 to the group of fax recipients who telephoned Perry Johnson, Inc.'s Do-Not-Fax line and asked to not
23 receive any more faxes, and to be removed from the fax database, Kogok Corporation proposes that
24 faxed Notice go out to all fax recipients listed in Perry Johnson, Inc.'s entire fax database.

25 This proposed modification of the Notice method, counsel for Perry Johnson, Inc. points out,
26 would result in sending settlement Notice that would include Perry Johnson, Inc. customers who had no
27 objection to the unsolicited faxes or customers who called in and affirmatively agreed to receipt of such
28

1 faxes. It would also result in a substantially higher cost of sending Notice, thereby changing the
2 dynamics of the Settlement.

3 In this Court's view, Objector Kogok has not presented any compelling reason to modify the
4 method of Notice of the Settlement to the class members.

5 The agreed method of Notice was, and remains, a material term of the Settlement that was
6 specifically negotiated in the series of extensive Mediation conferences with Justice-Retired Robert
7 Dossee, who is locally well known to be, and highly regarded, as a very excellent settlement judge. This
8 Court is satisfied that both sides here fully investigated and fully explored various alternatives of giving
9 Notice, and in doing so fully considered and evaluated the relative feasibility, effectiveness and, costs of
10 those alternatives. That effort included consultation with professional, experienced class action
11 administrators who recommended the Notice method arrived at.

12 Also, in the settlement talks, a consideration taken into account was the financial condition of
13 Perry Johnson, Inc., and the interplay of (a) the overall anticipated expense which would be incurred in
14 settling by use of coupons together with (b) the estimated expenses of Notice and claims administration.
15 The estimated amount of recovery being afforded by the Settlement was based upon, at least in part, the
16 agreed method of Notice among other factors – i.e., what total Settlement expense was feasible that
17 Perry Johnson, Inc. could reasonably afford? Again, this was a material Settlement term absent which a
18 Settlement may not have been reached.

19 Furthermore, the concept that Notice should be to those fax recipients who called the Do-Not-
20 Call number, and thus were people who clearly received unsolicited faxes, makes common sense and is
21 consistent with the guidelines for Notice voiced by the First District Court of Appeal earlier in this case.
22 (*Hypertouch, Inc. v. Superior Court* (2005) 128 Cal.App.4th 1527.)

23 Although the Court of Appeal was not considering the issue in a settlement context, that court
24 clearly approved of using the Do-Not-Call database as the basis for Notice to the Plaintiff class
25 members. (*Id.*, at 1554 – 1555.) And, to the extent that such Notice was not feasible, either for trade
26 secret or cost-effectiveness reasons, the Court of Appeal gave the following guidelines and direction to
27 this Court to apply in deciding what form and method of class Notice should be used: "If the court
28 concludes it would be unfair or infeasible to order defendant to notify the class, and personal notification

1 cannot otherwise be provided, the court will then need to devise some other means of notice reasonably
2 calculated to apprise the class members of the pendency of the action, such as that proposed by
3 plaintiff." (Id., at 1555.) At the time, Plaintiffs were proposing Notice to be given by a combination of
4 mailing, publication in *USA Today*, and a website. (Id., at 1535.)

5 Having the foregoing in mind, it is this Court's view that Notice by mailings to those fax
6 recipients on the Do-Not-Call database, coupled with the published and web-site Notice that is provided
7 for in the Settlement, meets the Court of Appeal's criteria and provides more than adequate Notice of the
8 Settlement to the class members in this case.

9
10 **(4) Overall Reasonableness / Fairness of Settlement:** Although it did not raise the point in its
11 Statement of Objector, and supporting papers, at the recent Fairness Hearing Objector Kogok also
12 questioned the overall reasonableness and fairness of the Settlement. Briefly stated here, this challenge
13 was made on the grounds, generally, that the coupon-type settlement which has been reached does not
14 provide any meaningful recovery to the Plaintiff class who should have a cash settlement.

15 Objector Kogok's position ignores the value of the additional year of injunctive relief which is
16 also built into the Settlement, and also ignores the practicalities that (a) funding a settlement from Perry
17 Johnson, Inc.'s insurance coverage, even after a litigated coverage action if one were mounted, is
18 extremely remote for the reasons above-stated and that (b) without such insurance proceeds, Perry
19 Johnson, Inc. itself is quite limited in what it can reasonably afford to do here short of going into an
20 insolvency.

21 As this Court expressed at the time of the preliminary approval of the Settlement, the good faith
22 and fairness of this Settlement is manifest from the way in which it was reached, through extended
23 Mediation conducted by a Mediator of the highest integrity and experience. The discussions were
24 clearly at arms-length, and there is not even any hint of possible collusion.

25 As this Court also expressed at the time of preliminary approval, the overall Settlement is fair
26 and reasonable given the value of the injunctive relief obtained and the ostensible value of the coupons
27 being used to settle the case. In that regard, the injunction will remain in effect for another year. Also,
28

1 those class members who file claims for coupons for Perry Johnson, Inc.'s training courses will be taken
2 at their word without having to provide any documentation or corroborating verification of their claim.

3 This Court's view is that the average value of each voucher, i.e. \$386.25, is reasonable as
4 compared to the \$500 per fax statutory recovery specified in the Telephone Consumer Protection Act
5 (27 U.S.C. § 227 (f) (1) and § 227 (b) (3) (A) - (C)). This is especially so in the context of the
6 Settlement terms whereby the trade-off for having no claim documentation burdens is Plaintiffs'
7 agreement that Settlement will be based on one fax per settling Plaintiff.

8 Additionally, based on the estimated size of the class, i.e. 142,000 class members¹, a \$500
9 statutory amount per class member would be a \$71 Million statutory recovery, if this case were
10 successfully taken to trial, as compared to a \$54.8 Million settlement generated by \$386.25 per claimant
11 in coupons. So viewed, the Settlement arrived at here amounts to a settlement value of around 75% of
12 the arguable aggregate value of the Plaintiff class members' claims.

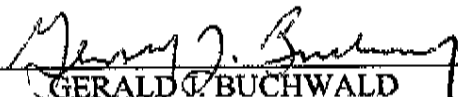
13 In short, the basic monetary value of this Settlement is at a very high percentage of estimated full
14 claim value as most settlements go. (Compare *Rebney v. Wells Fargo Bank* (1990) 22 Cal. App.3d 117,
15 at 1138 - 1140, where the primary relief afforded by the class action settlement was a series of
16 injunctions consisting of various check processing fee reforms and was found to be fair and reasonable:
17 "Admittedly, the monetary relief provided by the settlements was relatively paltry. But the primary
18 focus was on prospective relief, and the terms of the settlements appear to have the salutary effect of
19 reducing the overall number of future NSF checks and related fees." *Id.*, at 1139.)

20
21 **ORDER**

22 For the foregoing reasons, Kogok Corporation's objections to this Settlement should be and are
23 Overruled and an Order giving final approval to this Settlement should issue.

24 IT IS SO ORDERED.

25 Dated: May 10th, 2007.

26 
27 _____
28 GERALD BUCHWALD
JUDGE OF THE SUPERIOR COURT

1 In the earlier appeal herein, the Court of Appeal accepted the parties' estimate of an ascertainable class of 142,049 class members. (128 Cal. App.4th 1527, at 1535).

ENDORSED FILED
SAN MATEO COUNTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

MAY 11 2007

Clerk of the Superior Court
By C. FUJINO
DEPUTY CLERK

AFFIDAVIT OF MAILING

CASE NO. CIV 418600
CASE NAME: HYPERTOUCHE, INC. VS JOHNSON, INC.
DOCUMENT: ORDER OVERRULING OBJECTOR KOGOK CORPORATION'S
OBJECTIONS TO CLASS ACTION SETTLEMENT

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at South San Francisco, CA a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

JOHN L. FALLAT, ESQ.
LAW OFFICES OF JOHN L. FALLAT
523 FOURTH STREET, SUITE 210
SAN RAFAEL, CA 94901

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Executed on **MAY 11 2007**, at South San Francisco, CA

JOHN C. FITTON
CLERK OF THE SUPERIOR COURT

By CARRIE FUJINO, Deputy Clerk

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ENDORSED FILED
SAN MATEO COUNTY

MAY 11 2007

Clerk of the Superior Court
By C. FUJINO
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN MATEO
UNLIMITED JURISDICTION

HYPERTOUCHE, INC., and on behalf of all
others similarly situated,

Plaintiffs,

v.

PERRY JOHNSON, INC., et al.,

Defendants.

CASE NO. 418600

CLASS ACTION

**ORDER CONFIRMING SETTLEMENT
FOR FAIRNESS AND GOOD FAITH**
~~PROPOSED~~ *Agg B 5/10/07*

Hearing Date: January 19, 2007
Time: 10:00 a.m.
Dept: Honorable Gerald Buchwald
Action Filed: October 9, 2001

On January 19, 2007, a hearing to determine the fairness and good faith of the proposed Settlement was held before the Honorable Gerald Buchwald. John L. Fallat appeared on behalf of the Plaintiff Class and Joseph Wagner, the Class Representative also appeared. Leslie J. Mann of Epstein Becker & Green, P.C. and Dan Cohen of Pilchak, Cohen & Tice appeared on behalf of defendant Perry Johnson, Inc. John Brown of Redenbacher & Brown LLP and Stephen Ring appeared on behalf of objector Kogok Corporation. After hearing the arguments of counsel, considering the Memorandum of Points and Authorities in support of Joint Motion for Preliminary Approval of Class Action Settlement, Declarations of the Class Administrator and

1 Bruce Lewis, and Statement of Objector Kogok Corporation in Class Action, and the other
2 papers on file in this action, the court finds as follows:

3 In determining whether a class settlement is fair, adequate and reasonable, the Court
4 considered each of the following factors.

5 **I. The Strength Of Plaintiffs' Case**

6 The Plaintiff contends Defendant sent tens of thousands of unsolicited facsimile
7 advertisements. Plaintiff contends the evidence of over 100,000 calls to the 800 Do-Not-Fax
8 toll-free line of the Defendant during a space of approximately twenty-eight (28) months
9 indicates that a large number of individuals or entities had not granted the Defendant prior
10 express invitation or permission to send the facsimiles.

11 Defendant, however, contends that it will prevail in its defense of having the express
12 prior permission from the facsimile recipient to send each facsimile. Defendant contends that
13 Plaintiff bears the burden on this issue and that Plaintiff cannot prove that each of the facsimiles
14 was not sent with prior permission. Defendant has presented undisputed declarations supporting
15 its defense and if the case proceeds to trial Plaintiff will have to address this significant defense.

16 **II. The Risk, Expense, Complexity And Likely Duration Of Further Litigation**

17 This case has been pending for five (5) years and includes five (5) writs to the First
18 District Court of Appeal with one (1) published decision. The cost of proceeding to a protracted
19 jury trial with expert witnesses, and otherwise completing this case would be quite complex and
20 result in substantial expenses to all concerned. Plaintiff's estimate of class membership is in the
21 tens of thousands. Class members' expense to attend trial to prove their receipt of a facsimile is
22 a very significant consideration. Their incentive to attend trial with the possible recovery of
23 \$500 or possibly \$1500 is at best highly questionable. Plaintiff has suggested an alternative
24 method of proof through expert testimony. Defendant challenged the legal propriety of this
25 method of proof. Even if approved, proof by expert testimony would result in significant
26 expense to plaintiff. Either way the case would be a complex presentation of the transmission
27 and receipt of potentially tens of thousands of facsimiles. With the potential presentation of this
28 number of facsimiles, the duration of trial could extend for a significant period taxing the jury,

1 the court and the parties. Thus, taking this case to trial would result in trial time of several
2 months with a very significant expenditure money with the attendant risk potential of no
3 recovery to the class.

4 **III. The Risk Of Maintaining Class Action Status Through Trial**

5 Although Plaintiff contends that the class includes tens of thousands of members,
6 Defendant filed a motion for class decertification based upon plaintiff's inability to identify class
7 members. Indeed only 116 claims have been received after notice having been given. Defendant
8 withdrew that motion but represented that it planned to refile the motion if the case had not
9 settled. Without commenting on the merits of that motion, that motion if meritorious could
10 result in the decertification of the class.

11 **IV. The Amount Offered In Settlement**

12 Plaintiff obtained the injunctive relief which it initially sought. The settlement provides
13 for defendant to be enjoined from sending any marketing facsimiles for one year from the date of
14 entry of final judgment.

15 The coupon program is similar to the one approved in *Wershba v. Apple Computer*
16 (2001) 91 Cal. App. 4th 224, 246-47. Here, the coupons are transferable, applicable to any PJI
17 item, and with a potential value of \$424.75. Kogok challenged the use of coupons arguing the
18 class member has no interest in PJI's product. Class members will be able to transfer their
19 coupon to PJI customers to whom the coupons have significant value. With the face value of
20 \$424.75, the coupon approaches a successful TCPA plaintiff's full recovery of \$500. Therefore
21 a class member may be able to recover a significant proportion of the full value of their TCPA
22 claim through this settlement.

23 Given the relatively minor inconvenience suffered by class members and the high
24 potential recovery by class members from the settlement, the Court finds that the elements of the
25 settlement represent a reasonable compromise in light of all of the facts including the expense of,
26 and probabilities of success at trial.

27 **V. The Extent Of Discovery Completed And The Stage Of The Proceedings**

28 During the five years that this case has been at issue, plaintiff conducted wide-ranging

1 discovery, including nine sets of requests for production of documents, over two hundred
2 specially drafted interrogatories, three sets of requests for admissions and several depositions.
3 Plaintiff engaged in protracted discovery motion practice to ensure that defendant's production
4 of all properly discoverable information. The parties engaged in this discovery both before and
5 during the settlement negotiations.

6 The settlement was the product of extensive and hard-fought adversarial negotiations
7 between the parties. A well-respected retired Court of Appeal Justice, Robert Dossee served as
8 the neutral mediator during three separate mediation sessions and other critical stages of the
9 negotiations.

10 **VI. The Experience And Views Of Counsel**

11 Declarations submitted demonstrate that plaintiffs' counsel is experienced in handling
12 class action litigation. Counsel for the parties are experienced litigators, each with over twenty
13 years litigation experience. All counsel agreed that the settlement was a fair resolution of the
14 matter between the parties.

15 There was no challenge to the amount of attorneys fees allocated to Class Counsel in the
16 settlement agreement. The allocated amount was fair and reasonable given the experience and
17 efforts expended by Class Counsel in prosecuting this litigation.

18 **VII. The Reaction Of The Class Members To The Proposed Settlement**

19 Settlement class members strongly favored the settlement. Out of over 40,600 settlement
20 notices sent to class members, a nationwide Press Release and a settlement website up for 2
21 months, only 1 class member objected to the settlement.

22 **VIII. The Provided Notice Sufficiently Apprised Class Members of the Proposed** 23 **Settlement**

24 Evidence was presented that class notice was provided as follows:

25 1. Notice of the proposed settlement and the opt-out procedure was provided by
26 postcard sent by first class mail to the following entities and individuals:

- 27 (a) those individuals and/or entities who called PJI's "Do Not Fax" line;
28 (b) all individuals and/or businesses who already opted into the class after the

1 first published Notice;

2 (c) each attorney who has a pending action against PJI for alleged violations
3 of the TCPA; and

4 (d) other "probable class members" identified by the Class Representative.

5 The Class Administrator declared that notice was sent by this postcard method to 40,618
6 individuals and/or entities.

7 2. The website "JunkFaxLawsuit.com" was maintained for a two month period
8 which provided the full Notice of Settlement and a Claim Form.

9 3. James Joseph Wagner, President of Plaintiff Hypertouch, announced the proposed
10 settlement and the right to opt-out on the junkfax "bulletin board." Said notice was calculated to
11 give notice to the many attorneys and laypeople that are interested in combating junkfaxes. Mr.
12 Wagner also provided notice on the website TCPAlaw.com which is used by many attorneys and
13 laypeople to combat junkfaxes.

14 4. A press release was published to hundreds of publications nationwide advising of
15 this settlement.

16 The described notice cost of over \$25,000 was borne by the Defendant. Given the
17 circumstances of this litigation, this notice was reasonable and appropriate. There was extensive
18 briefing and argument on the issue of proper notice. This procedure provided notice to each
19 individual or entity which received a PJI fax and called defendant's toll-free telephone number
20 requesting that no additional facsimiles be sent to their telephone number.

21 Objector Kogok challenged the notice procedure arguing the notice should have been
22 provided to hundreds of thousands of individuals and entities which received defendant's
23 facsimile transmission from 1997 through 2003. This notice procedure was previously rejected
24 as vastly overbroad and unnecessary. The procedure argued by the Objector suggests notice of
25 settlement to be provided to individuals and entities which are PJI's customers and clients.
26 Undisputed evidence was presented by defendant that it had permission to fax from each
27 individual and entity to which it faxed. Undisputed evidence was presented that there are many
28 reasons a facsimile could have been sent to a facsimile number where the individual or entity

1 later claimed not to have provided permission. Those reasons include the facsimile was sent to a
 2 PJI customer but the particular employee who received the fax did not want the information. A
 3 facsimile was sent to an employee who gave permission for personal or business reasons which
 4 the recipient did not understand. The facsimile was sent after the authorizing employee had left
 5 the employment. The recipient's corporate headquarters, home office or principal place of
 6 business gave permission to send the facsimile, but the recipient at the local or branch office did
 7 not want or need the information. The facsimile was sent to an "old telephone number" for an
 8 individual or entity which had provided permission but who had since moved or changed phone
 9 number.

10 The cost of the notice suggested by Objector Kogok is also prohibitively expensive. The
 11 cost of direct mailing to 40,000 individuals and entities was over \$25,000. To provide direct
 12 mailing to the 7.8 million facsimile recipients (Kogok's estimated number of facsimile recipients
 13 during the class period) would be approximately \$4,875,000 for mailing alone without
 14 considering the cost of administration thereafter. Kogok recommended that the notice be
 15 provided by facsimile which is somewhat surprising because Kogok's premise is unsolicited
 16 faxes should never be sent. Nevertheless, Class representative and Class Counsel rejected
 17 providing notice of any kind by fax on the basis of legal authority prohibiting the sending of
 18 facsimiles to hospitals, nursing homes, cell phones and other similar locations.

19 Objector Kogok also suggested that the PJI's client database be used as the source of
 20 class members. This issue was also previously argued and rejected as inappropriate. Plaintiff
 21 twice moved to compel PJI's electronic client list database. Twice this Court and the Court of
 22 Appeal denied that motion based upon a factual finding that the PJI database is a trade secret and
 23 absolutely privileged from disclosure. Cal. Civ. Code § 3426.1. Moreover, PJI's client database
 24 is not a list of potential class members. Undisputed evidence was presented that whenever a
 25 caller requested to not receive any additional facsimiles, their fax number was removed from the
 26 PJI database. Therefore the database should only include individuals and entities which wanted
 27 to receive PJI faxes. Furthermore, PJI has a legitimate interest in protecting its relations with its
 28

1 clients and not unnecessarily interrupting their businesses with the proposed facsimile notice or
2 advising them of possible statutory violations.

3 The notice procedure utilized combined different elements providing notice to a broad
4 spectrum of individuals and entities. The mass Press Release reached many hundreds of
5 publications. The website was especially geared to the junk fax community. The notice to PJI's
6 do not fax telephone number callers reached exactly the individuals and entities which did not
7 want to receive PJI's faxes. This combined notice has "a reasonable chance of reaching a
8 substantial percentage of class members." *Wershba, supra*.

9 **IX. The Issue Of Possible Insurance Is Speculation.**

10 Objector Kogok also raises the issue of "possible insurance" to fund the settlement. The
11 court has "scrutinized the settlement agreement" and concludes that it is "not the product of
12 fraud or overreaching by or collusion between, the negotiating parties, and that the settlement,
13 taken as a whole, is fair, reasonable and adequate to all concerned." *Wershba, supra*, 91 Cal.
14 App. 4th at 245. The parties have fully investigated the issue of insurance. There is no evidence
15 before the court that any available insurance was disregarded.

16 **X. Conclusion**

17 A "presumption of fairness exists where: (1) the settlement is reached through arm's-
18 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to
19 act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
20 objectors is small." *Wershba, supra*, 91 Cal.App.4th at 245. The record reflects all of these
21 elements were present here. The court finds that the parties have met their burden of showing
22 that the settlement is fair and reasonable.

23 IT IS HEREBY ORDERED that the settlement is approved. The parties are directed to
24 prepare a judgment.

25
26 Date: 10 May 2007

27 
The Honorable Gerald Buchwald

28

**ENDORSED FILED
SAN MATEO COUNTY**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO**

MAY 11 2007

Clerk of the Superior Court
By C. FUJINO
DEPUTY CLERK

AFFIDAVIT OF MAILING

**CASE NO. CIV 418600
CASE NAME: HYPERTOUCHE, INC. VS JOHNSON, INC.
DOCUMENT: ORDER CONFIRMING SETTLEMENT FOR FAIRNESS AND GOOD
FAITH**

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at South San Francisco, CA a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

JOHN L. FALLAT, ESQ.
LAW OFFICES OF JOHN L. FALLAT
523 FOURTH STREET, SUITE 210
SAN RAFAEL, CA 94901

JOHN C. BROWN, ESQ.
REDENBACHER & BROWN, LLP
580 CALIFORNIA STREET, SUITE 1600
SAN FRANCISCO, CA 94104

JOSEPH D. MILLER, ESQ.
LESLIE J. MANN, ESQ.
EPSTEIN, BECKER, & GREEN, P.C.
ONE CALIFORNIA STREET, SUITE 2600
SAN FRANCISCO, CA 94111

STEPHEN H. RING, ESQ.
STEPHEN H. RING, P.C.
20300 SENECA MEADOWS PKWY., SUITE
200
GERMANTOWN, MD 20876

MAY 11 2007

Executed on _____, at South San Francisco, CA

JOHN C. FITTON
CLERK OF THE SUPERIOR COURT

By CARRIE FUJINO, Deputy Clerk

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**ENDORSED FILED
SAN MATEO COUNTY**

MAY 11 2007

Clerk of the Superior Court
By C. FUJINO
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

HYPERTOUCH, INC., and on behalf of
all others similarly situated,

CASE NO. Civ. 418600

CLASS ACTION

Plaintiffs,

ORDER REQUIRING
FINAL ACCOUNTING IN
CLASS ACTION SETTLEMENT

v.

PERRY JOHNSON, INC., et. al.,

Defendants.

By separate written Orders, this Court has overruled Objector Kogok Corporation's objections to the Class Action Settlement herein and has given Final Approval to that Settlement. In connection therewith, the Court has also vacated the trial date herein and has set a Status Conference Re: Closure of Settlement on Friday, May 30, 2008, at 2:00 p.m. in Dept. 10. Regarding said Status Conference Re: Closure of Settlement,

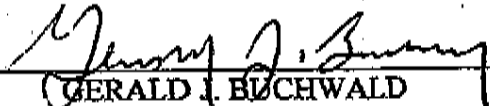
IT IS FURTHER ORDERED THAT:

At the May 30, 2008 Status Conference Re: Closure of Settlement, the parties shall jointly file a verified Final Accounting showing (1) the actual itemized cash payments paid out under the Settlement, which provides for up to \$386,000 in such cash payments (including Administrative Fees and Costs,

1 Court Costs, and Attorneys Fees), (2) an itemization of the coupons issued pursuant to the Settlement,
2 including their aggregate total retail value, and (3) a certification that there have been no known
3 violations of the Court's continuing Injunction.

4 In addition, the parties shall jointly submit a proposed Form of Order for this Court's acceptance
5 and approval of the Final Accounting and for the Injunction to be dissolved upon the expiration of the
6 additional year of injunctive relief that is provided for in the Settlement.

7
8 Dated: May 11th, 2007


GERALD J. BUCHWALD
JUDGE OF THE SUPERIOR COURT

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ENDORSED FILED
SAN MATEO COUNTY**SUPERIOR COURT OF THE STATE OF CALIFORNIA**
IN AND FOR THE COUNTY OF SAN MATEO

MAY 11 2007

Clerk of the Superior Court
By C. FUJINO
DEPUTY CLERK**AFFIDAVIT OF MAILING****CASE NO. CIV 418600****CASE NAME: HYPERTOUCH, INC. VS JOHNSON, INC.****DOCUMENT: ORDER REQUIRING FINAL ACCOUNTING IN CLASS ACTION
SETTLEMENT**

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at South San Francisco, CA a true copy of the foregoing document, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to the following:

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GERMANTOWN, MD 20876

Executed on **MAY 11 2007**, at South San Francisco, CA

JOHN C. FITTON
CLERK OF THE SUPERIOR COURT

By CARRIE FUJINO, Deputy Clerk



IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO
NORTHERN BRANCH
1050 Old Mission Road
South San Francisco, CA 94080

ENDORSED FILED
SAN MATEO COUNTY

MAY 11 2007

Clerk of the Superior Court
By C. FLWINO
DEPUTY CLERK

HYPER TOUCH, INC., and on behalf of all
others similarly situated.

Case No.: Civ 418600

Plaintiff,

vs.

PERRY JOHNSON, INC., et al

**ORDER VACATING TRIAL DATE
AND SETTING DATE FOR STATUS
CONFERENCE RE: CLOSURE OF
SETTLEMENT**

Defendant

The Court having overruled Objector Kogok Corporation's objections to Settlement and having now issued its Order Confirming Settlement For Fairness and Good Faith, thereby giving Final Approval to the Settlement herein,

IT IS ORDERED THAT (1) the previously set trial date of Monday, May 21, 2007 at 9:00 a.m. is VACATED and (2) a Status Conference Re: Closure of Settlement is set for Friday, May 30, 2008, at 2:00 p.m. in Dept. 10.

Dated: 5/11/07

Gerald J. Buchwald
GERALD J. BUCHWALD
JUDGE OF THE SUPERIOR COURT

**ENDORSED FILED
SAN MATEO COUNTY**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO**

MAY 11 2007

Clerk of the Superior Court
By C. FUJINO
DEPUTY CLERK

AFFIDAVIT OF MAILING

CASE NO. CIV 418600

CASE NAME: HYPERTOUCHE, INC. VS JOHNSON, INC.

**DOCUMENT: ORDER VACATING TRIAL DATE AND SETTING DATE FOR STATUS
CONFERENCE RE: CLOSURE OF SETTLEMENT**

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Executed on **MAY 11 2007**, at South San Francisco, CA

JOHN C. FITTON
CLERK OF THE SUPERIOR COURT

By CARRIE FUJINO, Deputy Clerk