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28IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HYPER TOUCH, INC.,

No. C-08-4970 MMC

Plaintiff,

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS; DISMISSING
COMPLAINT WITH LEAVE TO AMEND;
CONTINUING CASE MANAGEMENT
CONFERENCE**

v.

AZOOGLE.COM, INC., et al.,

Defendants

Before the Court is Defendant Azoogole.com, Inc's ("Azoogole") "Motion to Dismiss, Motion for More Definite Statement, and Motion to Strike Pursuant to Fed. R. Civ. P. 12(b)(6), 12(e), and 12(f)," filed September 10, 2008 in the Central District of California. The motion was fully briefed during the period in which the above-titled action was pending in the Central District. Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.¹

1. Although, as plaintiff Hypertouch, Inc. ("Hypertouch") correctly notes, it has not pleaded an express claim for fraud, each of the three causes of action in the First Amended Complaint ("FAC"), as pleaded, sound in fraud. (See, e.g., FAC ¶ 104 (alleging defendants sent "fraudulent" emails), FAC ¶ 105 (alleging Hypertouch received "fraudulent" emails sent by defendants), FAC ¶ 107 (alleging defendants sent emails "to trick"

¹By order filed February 27, 2009, the Court took the matter under submission.

1 Hypertouch), FAC ¶ 110 (alleging Hypertouch received from defendants emails that
2 “intentionally misrepresented . . . a material fact . . . with the intention of depriving a person
3 of property or legal rights or otherwise causing injury”), FAC ¶ 111 (alleging defendants’
4 emails have “harmed and continue to harm Hypertouch”); see also FAC ¶¶ 117, 128, 134
5 (alleging, respectively, that First, Second, and Third Causes of Action are based on all prior
6 allegations in FAC.) As a consequence, Hypertouch’s claims must be pleaded in
7 conformity with Rule 9(b). See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04
8 (9th Cir. 2003) (holding where plaintiff bases any claim on allegation defendant “engaged in
9 fraudulent conduct,” plaintiff is required to comply with Rule 9(b)). Because the FAC does
10 not approach the level of particularity required by Rule 9(b), the FAC is subject to
11 dismissal.² (See, e.g., FAC ¶ 121 (alleging “e-mail advertisements for or received from
12 [d]efendants and/or their agents contained or were accompanied by the fraudulent and
13 false use of a third-party’s domain name,” but not alleging the person(s) who specifically
14 engaged in such conduct and how the use of a third-party domain name was “fraudulent
15 and false”).)³

16 Accordingly, each of the claims alleged in the FAC is subject to dismissal for failure
17 to comply with Rule 9(b).

18 2. Contrary to Hypertouch’s argument, the First Cause of Action, by which
19 Hypertouch alleges violations of § 17529.5(a) of the California Business & Professions
20 Code, is, in part, subject to dismissal as barred by the statute of limitations. In particular,
21 the First Cause of Action includes both a claim for “actual damages” under
22 § 17529.5(b)(1)(B)(i) and a claim for “liquidated damages” under § 17529.5(b)(1)(B)(ii).

23
24 ²To the extent Hypertouch argues it is sufficient, for Rule 9(b) purposes, to provide
25 examples of fraudulent statements and/or conduct, Hypertouch is incorrect. Even
26 assuming, arguendo, its allegations pertaining to eleven specific emails referenced in the
27 FAC would be sufficient to plead a claim sounding in fraud based on those eleven emails,
28 “all averments of fraud” must be pleaded in conformity with Rule 9(b). See Vess, 317 F.3d
at 1104.

³In light of the dismissal of the FAC, the Court has not addressed Azoogole’s
alternative requests for a more definite statement and for an order striking assertedly
immaterial allegations.

1 The claim for liquidated damages is not, contrary to Hypertouch’s argument, subject to the
2 four-year statute of limitations provided in § 17208. Section 17208 only applies to causes
3 of action set forth in Division 7, Part 2, Chapter 5, see Cal. Bus. & Prof. Code § 17208, and,
4 as Azoogole points out, § 17529.5 is set forth in a different chapter, specifically, Division 7,
5 Part 3, Chapter 1, see Cal. Bus. & Prof. Code § 17529.5. Consequently, the claim for
6 liquidated damages is subject to a one-year statute of limitations, because, if Hypertouch
7 establishes its claim, an award of liquidated damages is mandatory and, further, such
8 recovery would constitute a penalty because Hypertouch is entitled to recover both its
9 actual damages and an award of liquidated damages. See Cal. Code Civ. Proc.
10 § 340(a) (providing “action upon a statute for a penalty” is subject to one-year statute of
11 limitations); Cal. Bus. & Prof. Code § 17529.5(b)(1)(B) (providing where plaintiff
12 establishes violation of § 17529.5(a), plaintiff entitled to receive award of “liquidated
13 damages” of \$1000 and its actual damages); G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256,
14 277-79 (1983) (holding “statutes which provide for recovery of damages additional to actual
15 losses incurred” are “penal in nature”; stating that although claim for actual losses is subject
16 to § 338’s three-year statute of limitations, claim for recovery of damages in addition to
17 actual losses is subject to § 340(a)’s one-year statute of limitations).⁴

18 Accordingly, to the extent Hypertouch’s claim for liquidated damages is based on
19 Hypertouch’s having received emails before April 15, 2007⁵ (see FAC ¶¶ 39 (alleging
20 “[b]etween April 15, 2004 and continuing to the present, Hypertouch received over 380,000
21 e-mails attributable to [d]efendants”)), the claim for liquidated damages included in the First

22
23 ⁴Relevant case authority is contrary to Hypertouch’s argument that the penalty
24 provided under § 17529.5(b)(1)(B)(ii) is not “mandatory” because a court under some
25 circumstances must reduce the amount of liquidated damages awarded thereunder. See
26 TJX Cos. v. Superior Court, 163 Cal. App. 4th 80, 86 (2008) (holding claim for statutory
27 penalty subject to one-year statute of limitations where, upon establishment of liability,
28 penalty “must be imposed” even though “amount of the penalty is within the discretion of
the court”). Further, Hypertouch’s argument that a plaintiff has the option to chose whether
to allege a claim for liquidated damages misses the point; if, as here, the plaintiff does
allege such claim and, further, is able to establish a violation of § 17529.5(a), an award of
liquidated damages is mandatory.

⁵The initial complaint was filed April 15, 2008.

1 Cause of Action is subject to dismissal without leave to amend.

2 3. Contrary to Azoogole's argument, the Court cannot find, from the face of the FAC
3 and any judicially-noticeable documents, that Hypertouch's claims are barred, either in
4 whole or in part, by a judgment entered on a final decision issued by the Superior Court of
5 California against James Joseph Wagner ("Wagner") in an action Wagner filed against two
6 of the defendants named herein. (See Def.'s Req. for Judicial Notice, filed September 9,
7 2008, Exs. A, B.) Specifically, the Court has insufficient evidence to determine at the
8 pleading stage whether Hypertouch is the alter ego of or otherwise in privity with Wagner.
9 See, e.g., Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal.2d 601, 603-04 (1962)
10 (holding plaintiffs' claim barred by "collateral estoppel," where plaintiffs' "alter ego" had
11 previously litigated and lost same issue presented in plaintiffs' claim); Stafford v. Russell,
12 117 Cal. App. 2d 319, 320 (1953) (holding where plaintiff in second action "controlled"
13 conduct of party in first action, plaintiff was "bound" by judgment entered in first action).

14 4. Contrary to Azoogole's argument, the Court cannot find, from the face of the FAC
15 and any judicially-noticeable documents reflecting the dismissal with prejudice of two small
16 claims actions filed by Hypertouch against Azoogole, that Hypertouch's claims are barred,
17 either in whole or in part, by the doctrine of claim preclusion. (See Def.'s Req. for Judicial
18 Notice, filed September 9, 2008, Ex. F, unnumbered fifth and sixth pages.) Although,
19 contrary to Hypertouch's argument, the defense of claim preclusion can be based on a final
20 judgment issued by a small claims court, see Pitzen v. Superior Court, 120 Cal. App. 4th
21 1374, 1381 (2004), and a dismissal with prejudice constitutes a final judgment for purposes
22 of claim preclusion, see Roybal v. University Ford, 207 Cal. App. 3d 1080, 1085-86 (1989),
23 Azoogole has not offered the complaints filed by Hypertouch in small claims court or
24 otherwise established with "clarity and certainty" the nature of the claims that were asserted
25 by Hypertouch therein. See Clark v. Bear Stearns & Co., 966 F.2d 1318, 1321 (9th
26 Cir.1992) (holding "party asserting preclusion bears the burden of showing with clarity and
27 certainty what was determined by the prior judgment").

28 //

1 amend.

2 2. In all other respects, the causes of action alleged in the FAC are hereby
3 DISMISSED with leave to amend, specifically, to allege claims in conformity with Rule 9(b).

4 3. No later than April 10, 2009, Hypertouch may file a Second Amended Complaint.

5 4. The Case Management Conference is hereby CONTINUED from March 27, 2009
6 to May 29, 2009; a Joint Case Management Statement shall be filed no later than May 22,
7 2009.

8 **IT IS SO ORDERED.**

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10 Dated: March 19, 2009


MAXINE M. CHESNEY
United States District Judge

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