Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

BEYOND SYSTEMS, INC., : Civil Action No.

Plaintiff, : PJM 08-0409

v. :

KRAFT FOODS, INC. et al., : Greenbelt, Maryland

Defendant. : Monday, October 19, 2009
_____/ 12:05 P.M.

TRANSCRIPT OF MOTION PROCEEDINGS
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

FOR THE PLAINTIFF BEYOND SYSTEMS AND HYPERTOUCH, INC.

THOMAS M. BARBA, ESQUIRE
ANTHONY ADRIAN ONORATO, ESQUIRE
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
202-429-3000

MICHAEL STEPHEN ROTHMAN, ESQUIRE
Law Office of Michael S. Rothman
401 E. Jefferson Street, Suite 201
Rockville, Maryland 20850
301-251-9660

STEPHEN HOWARD RING, ESQUIRE
Stephen H. Ring, PC
506 Main Street, Suite 215
Gaithersburg, Maryland 20878
301-563-9249

OFFICIAL COURT REPORTER: LINDA C. MARSHALL,(301) 344-3229

COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES

APPEARANCES CONTINUED:

FOR THE DEFENDANTS CONNEXUS CORP. AND HYDRA, LLC:	J. DOUGLAS BALDRIDGE, ESQUIRE ARI NICHOLAS ROTHMAN, ESQUIRE LISA JOSE FALES, ESQUIRE ROBERT FRIEDMAN, ESQUIRE Venable, LLP 575 Seventh Street, NW Washington, D.C. 20004 202-344-4000
FOR THE DEFENDANT KRAFT FOODS, INC.:	JOHN K. ROCHE, ESQUIRE Perkins, Coie, LLP 607 14th Street, NW Suite 800 Washington, D.C. 20005 202-434-1627

P-R-O-C-E-E-D-I-N-G-S

THE DEPUTY CLERK: Civil Action Number PJM 2008-0409, Beyond Systems, Inc. versus Kraft Foods, Inc., et al. The matter is before the Court for motions hearing.

THE COURT: All right. Let's go down, have ourselves identified starting, I think, we're in reverse here. I think we're plaintiffs on this side.

MR. BARBA: Morning, Your Honor. Thomas Barba for Beyond Systems and for Hypertouch, Inc.

MR. ONORATO: Good morning, Your Honor. Anthony Onorato for plaintiff, Beyond Systems, Inc.

MR. BALDRIDGE: Good morning. Doug Baldridge from the Venable Law Firm on behalf of the Defendants Connexus and Hydra.

MR. ROTHMAN: Good morning, Your Honor. Ari Rothman from Venable representing Connexus and Hydra.

MR. ROCHE: Good morning, Your Honor. John Roche on from Perkins, Coie on behalf of the Kraft defendants.

THE COURT: For?

MR. ROCHE: The Kraft defendants.

THE COURT: Kraft, okay.

Anyone else being identified?

MS. FALES: Good morning, Your Honor. Lisa Fales from Venable on behalf of Connexus and Hydra.

THE COURT: Gentleman, are you in the case? Are you in the case, sir?

MR. FRIEDMAN: Robert Friedman from Venable on behalf of Connexus and Hydra.

THE COURT: You're with Connexus and Hydra?

MR. FRIEDMAN: Defendants, Your Honor.

THE COURT: Okay. Mr. Ring, are you in this case?

MR. RING: Your Honor, also for the plaintiffs, Stephen Ring.

MR. ROTHMAN: And Mike Rothman.

MR. RING: And Paul Wagner, the president of Beyond Systems, Inc. is also present.

THE COURT: Now, I need to tell you folks, we're really late getting started. I have a 1:00 o'clock meeting I must make, so we may have to push this partly into this afternoon depending on the timing, because we were supposed to get started -- I was ready about 11:35 so we're pushed today.

Let me try and shortcut a few things. The arguments that papers not being received at this point, both denied. Papers are received.

Beyond Systems, I want to tell you, I'm a little surprised to get anything filed by you with that kind of request given the accommodation that the Court has made for Beyond Systems in other cases. Let's keep that in mind. Beyond Systems has been in this court many times and has been accommodated with I don't know how many extensions.

I'm talking to you, Mr. Ring.

So the idea that a paper is filed saying that somebody else should not be able to file something late came with a little bit of surprise to the Court. In any event, those motions are denied flat out, papers are received or however it was, to strike them, I believe.

The motions were actually request to file, leave to file the motion, the papers, supplemental papers and there were oppositions filed with that; is that correct? Am I wrong?

MR. BALDRIDGE: You're correct, but I think you mean, Your Honor, to say they're granted.

THE COURT: Well, they're granted in that there was leave -- that's fine. There was an opposition. The papers are granted in terms of being late received. No problem with that.

Now, I don't know how you want to go about this at this point. Some of these things sort of meld into one another. Is there some logical progression here?

Go ahead, Mr. Barba.

MR. BARBA: Your Honor, I guess I would suggest that we argue the Hypertouch motion first, the third party, the Motion to Dismiss the Third Party Complaint since that was docketed just slightly first. And so Hypertouch would speak first, I think, since it's the moving party.

MR. BALDRIDGE: I would see that we would only do that if we want to get the cart in front of the horse. We've got a Summary Judgment Motion pending on the damages that we did

indeed file a few weeks after their motion, but it seems to me that that naturally would be the first motion the Court wants to hear about.

MR. BARBA: Either way, Your Honor.

THE COURT: Well, let's go for Summary Judgment Motion first.

Go ahead.

MR. BALDRIDGE: Sir, I believe the briefs pretty much, make this a clear issue for the Court. It is a clean summary judgment issue unlike many times when parties are quibbling over what the facts are. And it obviously involves this Court's decision on what Statute of Limitations applies to the two claims; one under the Maryland statute and one under the California statute.

By way of very brief background, Connexus and Hydra, my clients are commercial bulk e-mailers. Beyond Systems, it sounds like the Court is familiar with them.

THE COURT: They've been here a lot.

MR. BALDRIDGE: They essentially have no function other than to file lawsuits. In this case, they have self-inflicted damages where Joe Wagner, Mr. Wagner's brother sent e-mails on from California and now they're claiming damages.

And interestingly, because we are going to talk about what a penalty is, I thought the Court might want to know that

they claim $31,000 in actual cost associated with all spam from anybody, including my clients. Yet, they're asking the Court eventually or a jury to give them $107 million in damages.

So, there's no doubt that there's very little actual damages here, and there's a windfall trying to be realized out of the statutory schemes of both California and Maryland. In any event, we have claims under the California Professional Business Code 17529.5 and the Maryland Commercial Electronic Mail Act 14-3001, et seq.

The parties' positions are very clear. We contend as has the Northern District of California and other courts concluded under the California statute that the One-Year Statute of Limitations applies. We also contend that the One-Year Statute of Limitations applies under the Maryland statute.

In both instances, Beyond Systems believes that the Three-Year Statute of Limitations applies. The impact of what the Court will do here today on summary judgment is if it rules as we believe it should that the one-year period applies, all e-mails received by Beyond Systems through this scheme prior to February 14, 2007, will be out of the case.

That cuts about -- and it changes daily because we're getting different e-mails daily, 49,839 e-mails out of the case based on the Statute of Limitations, and makes its case obviously more manageable.

Let's look at the California statute first, because I

think that's the easiest one. The only cases to look at 7529.5 in the context of Statute of Limitations is a Northern District of California, *Hypertouch/Azoogle*; the *Balsam/Subscriber* case, *Subscriberbase* case, excuse me. Indirectly, the *Netblue* case on similar issues, and every single one of them has concluded that one-year Statute of Limitations applies.

In reaching that conclusion under 17529.5, these courts cited California law. The law they cited was this GHII decision, which is an intermediate appellate court; and *Menefee*, which is another California case. And what they said is that the law in California is that if you're seeking damages additional to what are actual damages for purposes of Statute of Limitations, that's penal under California law, and the one-year Statute of Limitations applies. It is crystal clear that that's what they did in citing GHII and *Amenafee* in the Azoogle decision and in the *Balsam* decision.

So, if you do as BSI urges, look at what you believe the California Supreme Court would do in this context, you don't need to look any further than *Azoogle* and *Balsam*, because they cite the California Intermediate Appellate Courts, which have already concluded what the test is under California law. And that is, are they seeking damages in addition to actual damages?

There's no question here they have quantified their actual damages at 31,000. Yet, they're seeking another what, $106,670,000 divided by two, because you're in California, in

statutory damages which they have no basis whatsoever to concede or to argue are actual in nature. So under California, they have to be penal and the one-year Statute of Limitations applies.

Now, what do they do to try to distinguish these cases that are dead on and dead against them? Well, basically, they ask the Court to ignore *Hypertouch* and *Balsam*, and then they cite a bunch of inapposite Ninth Circuit cases evaluating penalties and forfeiture statutes that are unrelated to this internet statute.

In all of those cases, incidentally, Your Honor, involve labor employment or ERISA, and are just rich with jurisprudence out of the Supreme Court and otherwise establishes what overtime wages and employment rights are, and why those are actual damages in a context where an employee of disparate bargaining power with difficulty in proving damages gets the benefit of calling those actual damages.

These cases aren't anywhere near this internet context where there is an actual claim to dis-quantify and a non-actual claim that is purely statutory.

THE COURT: What about the relevance of Maryland Statute of Limitations? This is a case decided --

MR. BALDRIDGE: Okay, so we'll be going to Maryland --

THE COURT: Well, but I need to understand distinction between the two. Suppose Maryland doesn't follow California,

what result?

MR. BALDRIDGE: Suppose Maryland does not follow --

THE COURT: The case law of California, is that going to be dispositive of your argument regardless of what Maryland might say about the Statute of Limitations?

MR. BALDRIDGE: As to which one applies, Your Honor?

THE COURT: Yeah.

MR. BALDRIDGE: Well, I don't know, Your Honor. That was not briefed.

THE COURT: Am I to understand that your argument is that Maryland should apply the California Statute of Limitations?

MR. BALDRIDGE: That is indeed our argument.

THE COURT: But Maryland doesn't have anything on that particularly? Is Maryland obliged to follow it or are you saying it should follow it?

MR. BALDRIDGE: I tell you right now, I don't know the answer to that question. I did not even know it was an issue in the case until ten minutes before you walked through the door, I was handed some cases by BSI. I saw them out in the hall. Been out there 45 minutes. Could have given them to me then, and now they're trying to argue, I believe, that Maryland Statute of Limitations applies.

THE COURT: Well, as I looked at your papers, I'm wondering why are we talking about California law. Why aren't

we talking about Maryland law here? California may well be what you say, accepting that for argument purposes, but am I constrained to apply that? Does it have any relevance to Maryland? Why would that be?

MR. BALDRIDGE: Because the issue was never raised or briefed until ten minutes ago, I simply don't know.

THE COURT: Why do you think California law is dispositive?

MR. BALDRIDGE: Your Honor, I think the reason is is it's going to boil down to whether Statute of Limitations in this case is procedural or substantive. That's generally what the cases look at. I haven't evaluated the issue completely. I do know that I'm not seeing cases where the California Statute 7529.5 is applied with the Statute of Limitations of any state other than California. That doesn't answer your question.

THE COURT: Well, is the essence, though, of the claim by the plaintiff that it's, the violations have occurred with regard to all of these, these alleged spams, that they are violative of both California and Maryland law?

MR. BALDRIDGE: That's exactly what --

THE COURT: All right. So, suppose they just went with Maryland law, what would be the outcome there?

MR. BALDRIDGE: Well, I think if they said it was only a violation of Maryland law, would not have a California statute at issue, I don't know what the analysis would lead to, but I

believe that would probably be that Maryland Statute of Limitations applies.

THE COURT: Well --

MR. BALDRIDGE: I can't keep up with the shell game that's moving this issue around on this. I don't know what the answer is as I stand here.

THE COURT: Okay.

MR. BALDRIDGE: It has not been briefed. It was never raised. If it's raised at all, I can only tell by the cases handed to me a few minutes ago whether they're going to raise it, and I don't the answer. And if that is important to the Court, I'd ask for the opportunity to brief it.

THE COURT: Well, I expect that's where plaintiff wants to go on this case. I'm guessing.

Mr. Barba, just tell me where are you on this matter.

MR. BARBA: Well, Your Honor, it was thoroughly briefed in terms of the *Williams versus Standard Federal Savings and Loan* decision in the Maryland Special Appeals Court 1988. And that is in the briefs in this case, and we say that Maryland has explicitly considered the issue of whether the Statute of Limitations in cases similar to this should be three year or one year, and has gone in the three year direction.

And they clearly articulate in that case, which is briefed in here and is addressed by both parties, that a, that a penalty is when the state is seeking the damages for its, for

its own coffers and that plaintiffs when they are suing on their own behalf have a three-year Statute of Limitations.

The only case that we handed this morning was one we just became aware on which is *Master Financial* where the Maryland highest court has now explicitly adopted the *Williams* statute which we argued in our briefs.

So the news, the only new thing is that the highest Court of Maryland has now --

THE COURT: Before you go any further, I guess that the short question I would like an answer to is, suppose California law is as Mr. Baldridge says, what does that do to your case?

MR. BARBA: Well, Your Honor, there are claims under the California statute in this Court, and the BSI case, and there are claims under the Maryland anti-spam statute. We assert that the Maryland statute should govern both, or the Maryland Statute of Limitations should govern both California and the Maryland claims, but it's within Your Honor's discretion to decide whether the California statute should apply for the California claims and the Maryland statute should apply for the Maryland claims.

We think it's worth considering that a court in Maryland, courts in Maryland apply the procedural law of Maryland when deciding what the Statute of Limitations should be and you know that path, I'm sure, Your Honor.

THE COURT: All right. Go ahead.

MR. BALDRIDGE: Your Honor, just so we're clear and then I'll address your question directly. I think, number one, they have not briefed the issue. They briefed the issue over whether the Maryland Statute of Limitations applies to Maryland claims. You will not find in their briefs the argument that the Maryland Statute of Limitations applies to the California claims.

You can look at their briefs. I've looked at them, and maybe one case is new, but I got three cases this morning and I can't look at them on ten minutes notice truthfully. But moving to the Maryland statute, and we can argue that applicable to both California and Maryland. They rely completely on the intermediate appellate decision in *Williams*.

And as Mr. Barba has just said, their distinction in when the one year versus the three year applies, is that the one year applies only when the state's the plaintiff seeking damages that will be recoverable and will go to the coffers of the state. That's the line they draw in saying that the one year Statute of Limitations applies only that instance.

If you look at their briefs, they don't even mention the Fourth Circuit cases in *In Re: Brown* and *Early Learning*, don't even mention the cases by name, which both involved private plaintiffs recovering civil penalties under similar statutes that did not go to the coffers of the state and in both

instances, the Fourth Circuit applied the one-year Statute of Limitations.

They just simply mention it in the sentence and say, they're un-reported and they're not persuasive because they didn't mention *Williams*. That's all they said.

The Fourth Circuit has said that the distinguishing feature is not whether or not the recovery goes to the coffers of the states in *In Re: Brown* and *Early Learning*, and they have done nothing, nothing to distinguish those cases.

THE COURT: What were the states involved in those opinions?

MR. BALDRIDGE: The states?

THE COURT: The states. Were they state decisions?

MR. BALDRIDGE: No, these were Federal Fourth Circuit --

THE COURT: No, I mean, they are federal decisions, but --

MR. BALDRIDGE: Under the Maryland Secondary Mortgage Law *In Re: Brown* and under the Maryland Retail Installment Sales Act in *Early Learning*.

THE COURT: All right. So they were basically -- well, I have to read those. They were trumping Maryland law or were they interpreting Maryland law for the first time.

MR. BALDRIDGE: They were interpreting Maryland law.

THE COURT: For the first time?

MR. BALDRIDGE: I don't know whether it was the first time or not.

THE COURT: Well, here's the issue really. I mean, in the end, on any kind of substantive Maryland law, the federal courts are bound by those, obviously, those decisions. If it's a federal court interpreting what it thinks Maryland law would probably be, just as a matter of practice, a later Maryland Court of -- even Special Appeals opinion would trump that. So I need to sort of see in sequence where these opinions lie. I can't answer that on the fly because I haven't read your cases either.

MR. BALDRIDGE: Interestingly enough, they are all 1988 decisions, so I don't know which one came later. But the bottom line is in both the Fourth Circuit decisions, they are looking at Maryland law in deciding which Maryland Statute of Limitations --

THE COURT: Okay, but the point is it's the Federal Court interpreting Maryland law. There's no federal constitution here that says, this is what must be done. It's the federal court reading its view of the Maryland law. When the Maryland courts finally talk about it, this Court is obliged to follow what the Maryland courts say, not what the Fourth Circuit said, if they were interpreting Maryland law earlier. That's the progression.

So you may be citing '88 cases that really don't

really apply, but I'll have to look at them. I can't decide that, obviously, as you argue it now.

MR. BALDRIDGE: And regardless of your obligation to follow, none of these cases actually are looking at the MCMA.

THE COURT: Later legislation, I understand that.

MR. BALDRIDGE: It's all helpful, obviously, but it's not necessarily binding on this Court.

Now, also in citing *Williams* they ignore that in the *Williams* case, the plaintiff had waived the right to the punitive element or the penal element; that's treble damages. So the Court was not facing on the facts of that case in *Williams* the same situation that it faces here where there is both an actual damages claim and a statutory damages claim.

If you'll note in BSI's interrogatory response, they do concede that the Maryland statute relieves them of showing actual damages, so there is an admission in our view that we don't have actual damages at issue here. We have something else and the Court needs to decide what that something else is, and if that something else is, in fact, penal, we are in the one-year Statute of Limitations.

And then I think if you look at the *Natural Design versus Rouse* case, which is Maryland Supreme Court. That case holds that --

THE COURT: Court of Appeals.

MR. BALDRIDGE: Yeah, Court of Appeals. That case

holds that an award of treble damages under the Maryland Anti-Trust Statute is penal, even when the plaintiff is a private party.

So, I think that's probably your best guidance from the Maryland Court of Appeals as to what Maryland would do in this context, although again it doesn't involve the statute before the Court.

Finally, and I think we're well-briefed and I encourage you to look at everything, make a decision based on that. But the last thing is *Williams* says that the meaning of the terms "penalty and forfeiture" are far from inflexible and depend on the context in which they are used.

Now, I think you got to look at the context of this case. We don't have a situation in this case where the plaintiff does not know its actual damages. They're $31,000. The context within which we're dealing is a situation where there is absolutely no dispute that 106 million of what they're seeking here is just windfall. It's pure windfall. Doesn't come anywhere near damages. This is a company that hasn't made a million dollars in five years, and they're claiming 106 million in damages.

So the context within, which we're in, that has to be something penal, punitive, fine, forfeiture; you call it what it is within the context of this case.

THE COURT: All right. Mr. Barba, are you going to

argue?

MR. BARBA: Thank you, Your Honor.

The first thing I'll say is that the *Master Financial versus Crowder* decision of the Maryland Court of Appeals, I think, trumps the Maryland issue. The highest court has spoken. It has adopted the *Williams* case as the law of Maryland, and the deficiency that Mr. Baldridge mentioned with respect to the *Williams* case, with the waiver of punitive damages did not exist in *Master Financial*, so that issue no longer exist as an impediment, if it was.

The Maryland Special Court of Appeals concluded over 20 years ago that Section 5107 applies only to suits brought on behalf of the state to enforce the states penal laws for its financial benefit. And I think that's the key question for the Court to consider under Maryland and under the new case.

The *Williams* Court went to a great deal of trouble to track the issue historically back in Maryland for hundreds of years and has said that, you know, Maryland policy is that if the proceeds go to the, to the state, that it's penal; if the proceeds go to the individual litigants, then they are not.

So, when you read the Maryland Anti-Spam Statute, it's clear that it says either/or liquidated, or actual damages are available to the plaintiff. Liquidated damages are a form of remedial damage and actual damage says each of them are remedial in nature and neither of them is punitive, and that's how we

read the statute and think under *Williams* the Court should read the statute also.

The California law is much more difficult, I think. And as Mr. Baldridge indicated, the, the courts are all over the place in California in the intermediate courts. The California Supreme Court has not spoken with respect to whether a three-year or one-year Statute of Limitation should apply to the California Anti-Spam law. But in fact, we urge Your Honor to look at the California Ninth Circuit Court of Appeals decisions that have over a very long period of time tried to answer the question of penal versus remedial in the California context, and examining various cases.

And so, set forth in our, in our brief, you'll see references to the *Culver, Rivera* and *Stone* decisions, each of them following the U.S. Supreme Court's decision *in Huntington* from 1892, which is actually the same foundational statute, or foundational Supreme Court case that the Maryland Courts have always looked to to talk about whether a particular statute is penal or remedial.

And when you look at the Ninth Circuit's perch going from 1892 to 1944 in *Culver*, to 1984 in *Rivera*, and then the California Supreme Court's recent case in *Kenneth Cole*, all of these briefed to Your Honor --

THE COURT: But now you are conceding that the California based claims are, would be regulated by the

California analysis on that issue, or now are you saying that maybe Maryland law would apply?

MR. BARBA: I'm not conceding that, Your Honor. My primary position is that this Court should apply Maryland law to the California claims because it's entitled to do so. There are courts in the state of Maryland and in this District Court who have done the same thing, to look at the Maryland Statute of Limitations as a procedural issue and apply Maryland law in deciding what the Statute of Limitations should be under claims of a foreign state.

It becomes trickier when the states -- I think what you see in the decisions is it becomes much trickier when each of the two states' Statutes of Limitations disagree with each other. So if the result would be a different Statute of Limitations, say there was a four-year Statute of Limitations in California but a three-year in Maryland, that makes the job of the Court harder when it's judging the procedural issue.

But luckily in this case, the California has the same issue. They have the three-year Statute of Limitations for remedial, one year for penal; and Maryland has three-year Statute of Limitations for remedial and one year for penal.

So in applying Maryland law, there's no prejudice to the parties in changing the applicable Statute of Limitations. It's just the principle of which one to select. And since the test emanates from the same Supreme Court case that has been

followed by various courts in California and in the Ninth Circuit, and here in Maryland with the highest court of Maryland, we think that the Court would be less burdened and it would be within its rights to apply the Maryland statute.

THE COURT: All right. Anything more on that issue, Mr. Baldridge? You want to respond?

MR. BALDRIDGE: I just have a couple words. I just note that the *Master Financial* case, which Mr. Barba says resolves issues dated June 9th, 2009, this is the case handed to me right before the hearing. Don't know why it was held from me while I was out in the hall. Maybe I could respond more thoroughly if I had received it timely with some degree of courtesy.

The second issue I would say is that, again, look at the briefs. There's been no argument that the Maryland Statute of Limitations applies to California claims. It's never been contended. Everything has been briefed otherwise. This is a brand new argument. I don't know when it was developed, but it was dropped upon us right before the hearing.

I do note, though, that Master Financial, although if the Court finds it to be an important decision, I would like the opportunity to brief it, but I will --

THE COURT: I'll give you two weeks to do that, because I'm going to have to take this issue under advisement anyway. I can't decide it today anyway. So you can file it

within two weeks, 14 days, a supplemental response. And you can reply within ten days after.

MR. BARBA: Thank you, Your Honor.

THE COURT: All right. Nothing more on that issue. Let's go to the motions relative to the third-party complaint, and we have a Motion to Dismiss that I believe.

MR. BARBA: Yes, Your Honor. Thomas Barba appearing for Hypertouch, Inc. With respect to Hypertouch's Motion to Dismiss the Amended Third-Party Complaint for Indemnification brought by primarily responsible defendants Connexus and Hydra Media. Hypertouch moves to dismiss because it asserts that it's immune under the Communications Decency Act, and furthermore that it's not a proper target of an indemnification claim under Maryland law.

Your Honor, I think you're familiar from prior decisions with the *Zeran* standard, which is the Fourth Circuit test for whether the Communications Decency Act applies with respect to a particular set of facts.

In this situation, Hypertouch, Inc. is a California company. It's an internet service provider and it has a business arrangement with Beyond Systems, Inc. whereby it routes the internet mail messages from Hypertouch's facilities in Menlo Park, California to Beyond Systems' facilities in Maryland. That is a business arrangement between the two parties and Beyond Systems is -- Hypertouch in this case is no different

than, in our view, than any other internet service provider who is routing mail messages through a corporate arrangement.

The, the *Zeran versus AOL* has a three-prong test. First, the defendant must be a provider or user of interactive computer services. A holding that the provider will be liable to make service providers liable for information originating from a third party has to be applicable. And then the information in question must be provided by, under their information content provider.

Boiling this down, Your Honor, the Communications Decency Act is intended to protect internet service providers for gaining liability for doing their job of passing electronic mail and other information as a pipeline provider. That's what Hypertouch is doing in this case. It does not add content, amend content, change the electronic mail messages, exercise editorial authority. It has an agreement to move the e-mail that comes for BSI's purposes in California and to send that e-mail to Maryland, and it does that.

So under the Communications Decency Act, it is --

THE COURT: Do they go out looking for potential spam and send it to BSI?

MR. BARBA: No, Hypertouch's only obligation is to, in essence, raise the BSI flag on the internet. So when e-mail is directed to internet service provider like Beyond Systems, it has to ask to have its mail delivered somewhere. So it sets up

its account so that all its mail flows into a central point, just like AOL does, just like anybody else does who is an ISP.

So, the way Beyond Systems operates is that it asks Hypertouch who has the facilities to do it to be the receipt point for its mail, and then it routes that mail ISP to ISP here to Maryland.

THE COURT: Is it your contention that all the alleged spam in this case was really directed toward BSI independently of Hypertouch? It just happened to fall into their lap?

MR. BARBA: Well, it is directed to BSI, Your Honor, because BSI is the owner of the domain Hypertouch.com. So any e-mail which is directed to Hypertouch.com is directed to a BSI-owned facility. So Hypertouch is -- and the names can be confusing here. So Hypertouch, Inc. owned by Mr. Wagner's brother in California, is its own company. It's called Hypertouch, Inc., but the Hypertouch.com domain is owned by BSI in Maryland.

THE COURT: How do they come to get 50,000 plus spam messages? That's a big number.

MR. BARBA: Well, it's actually millions per day. It's just 50,000 plus pertain to these particular defendants, and spam -- you know, it's well understood that spam comprises over 95 percent of all e-mail sent. So, it's not a surprise that there'd be this much spam coming addressed to Hypertouch.com, just like there's spam addressed the U.S. Courts

or to Steptoe and Johnson, or to Venable.

THE COURT: Does Hypertouch do anything besides work with BSI?

MR. BARBA: Sure, Your Honor. Hypertouch is a company in California that works in the area of haptic peripherals. It's owner is a graduate doctoral degree candidate from Stanford and he works in the area of creating artificial intelligence and artificial limbs with sensory perception.

He is an internet advocate, internet -- has his own internet service provider operation, has its own customers and services those customers. So he is an ISP in his own right, and his brother here in Maryland is an ISP --

THE COURT: You're asking for judgment as a matter of law in effect on that proposition?

MR. BARBA: Well, I think you don't have to reach those points other than looking at the, at the third-party complaint. The Amended Third-Party Complaint in of itself alleges all these facts. And so you take those facts as true.

I shouldn't say all these facts, because I was answering your question, Your Honor, but there are sufficient facts in the Amended Third-Party Complaint to make all the points necessary under the Communications Decency Act rule in Hypertouch's favor.

THE COURT: Well, is there some question about whether these defendants really are bona fide internet service provider,

and whether they aren't in effect in league with BSI to kind of manufacture lawsuits? I mean, that's one of the allegations. And I must tell you in candor, BSI has litigated a lot in this court, and I don't know what else BSI does besides file these suits, but it did raise a flag with me to see them back here yet again with other claims, and I'm wondering what else they do besides file lawsuits.

MR. BARBA: Well, they are an internet service provider and they have customers, and they service those customers, Your Honor. They meet the standards for an ISP under the Communications Decency Act, and under the anti-spam statutes both. That is, that they have facilities --

THE COURT: Well, let me put the question to you this way: Suppose they do meet technically some definitions, but in fact it could be established in the course of discovery that they really had an understanding with BSI to try and call all these potential spam messages and feed them to BSI so that BSI could file lawsuits based on them, which is what they're saying. Suppose they could put that out there in the record before a trier of fact. Don't you think that that might affect the finding of the bona fides of your client?

MR. BARBA: It's certainly an issue which has been brought up by our opponents in the lawsuit, Your Honor, but in fact both companies have subscribers and both --

THE COURT: Yeah, but you're here for Motion for

Summary Judgment. That's where we are now. I'm not saying you don't prevail on that point. At some point you're asking me as a matter of law now to dismiss the complaint. And I'm really raising with you is there maybe some issue here that really in fairness needs to be discovered and litigated.

MR. BARBA: Well, Your Honor, I think there's enough for you to grant the motion. I think the facts won't change after discovery. I know it's going to be, likely be hotly disputed, but the definition is simple under the CDA. "Any information service system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet." And --

THE COURT: Slow down a little bit for the reporter to stay with you.

MR. BARBA: I'm sorry. I do that.

Should I read again?

"Any information service system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet." And so what I'm saying, Your Honor, is that Hypertouch clearly meets that standard. It has been found by other courts to meet that standard. So, I think under the CDA analysis, you're within your rights if you decided to do so.

THE COURT: Have's they been so found on, after -- on the basis of a Motion for Summary Judgment or after discovery, or what?

MR. BARBA: Well, there's a decision, *Hypertouch versus Kennedy-Western*, which we've cited in our briefs, Your Honor, where in a contested proceeding they were found --

THE COURT: In a contested proceeding?

MR. BARBA: Yes, Your Honor.

THE COURT: Not on summary judgment.

MR. BARBA: I think that's correct.

THE COURT: Well, all right. We'll see.

MR. BARBA: I'm not positive, Your Honor.

THE COURT: All right. That's the key issue right now, whether there's going to be a contested proceeding or whether it goes out on, as a matter of law.

MR. BARBA: It wasn't default judgment. It was on a motion, Your Honor, I'm pretty sure.

THE COURT: All right. You want to hear response on this or --

MR. BARBA: Sure, Your Honor.

THE COURT: All right. Mr. Rothman.

MR. ROTHMAN: Yes, thank you, Your Honor. I want to preface what I'm about to say by the fact that I'm mindful that we're on a Motion to Dismiss, and that we're not really supposed to go outside the record. But in response to plaintiff or

Hypertouch's counsel, I sort of have to do that to put things into perspective and to let you know where this is going.

The first thing as regarding the CDA is that the facts in this case, and we'll be able to show this in discovery and we've actually put some of it before the Court, is that Hypertouch is not acting as an intermediary like AOL was in *Zeran*. What happened here is that Hypertouch asked plaintiff, will you archive for Hypertouch.com.

Included in that request or maybe it morphed into something else. The record is a little bit unclear about that. But what that eventually morphed into was an agreement whereby Hypertouch would route to plaintiff e-mails addressed to other domain names owned by Hypertouch. And so in that sense, there is no credible argument that any of those e-mails were intended for the plaintiff.

So, again, this is an agreement that they reached where --

THE COURT: They, now, let's be clear. The plaintiff BSI?

MR. ROTHMAN: Yes.

THE COURT: And Hypertouch, all right. Go ahead.

MR. BALDRIDGE: Right, Hypertouch asked plaintiff, will you archive the mail and Beyond Systems said, yes. And in fact, and we put this in, I think it's Exhibit Three, which is Joe Wagner's deposition transcript at Pages 301 and 302,

Hypertouch admits that Beyond Systems is the one doing the service for Hypertouch and not AOL doing service for the customer. They don't have the exact line -- it's not lined up right as is necessary for the CDA to apply.

And the CDA, the Communications Decency Act was intended to insulate the true intermediary from liability. Those just aren't the facts here. So, that's one point I wanted make, and it's also a factual issue which we don't believe can be addressed on a Motion to Dismiss.

The other issue that was raised, excuse me, is Hypertouch doesn't change the content. We actually don't know that. That's another hotly contested issue in this case. We've had several days of deposition. Our expert has put forth a thousand pages of expert reports on this. Plaintiff has admitted, or Beyond Systems has admitted there are certain alterations that are going on in these e-mails as they come in to Hypertouch and end up with Beyond Systems, and the full extent of those alterations is unknown.

We don't know it sitting here today. We're getting all kinds of different stories. What's undisputed is that there are alterations, and we do not know the full extent of those alterations or even get the tip of the iceberg back when we filed the third-party complaint in March, but we certainly have enough of a basis to allege that now through an amended pleading.

Now, you also asked, does Hypertouch do anything to attract this spam? The answer is, yes. There's two things that we know of, one of which we just discovered last week through plaintiff expert, Resnick. And what they did, what Hypertouch did some years ago is published on its internet website, I don't know if it's dozens or hundreds, but it's a lot of e-mail addresses that belong or are somehow associated with Beyond Systems.

And what that does is is that broadcasts to the e-mailers of the world, these are existing e-mail addresses and there's these automated things, for lack of a better word, they're called web crawlers, that go around and pick up these addresses. There's no question that that is a spam trap. Plaintiff's expert admitted, that is a spam trap, and that is something that Hypertouch did. So, there are indications, at least with respect to that, that show that Hypertouch is attracting these e-mail.

The other thing that Hypertouch and plaintiff does, for that matter, is they configure their mail servers to receive anything that comes before the "at" signal in the domain name. So you could lean on your keyboard and it would end up in one of their e-mail boxes and then they save it indefinitely. And these are saved in e-mail archives. Plaintiff refers to them as gold in a deposition exhibit, and then he goes and calls these e-mails from those archives.

THE COURT: He being who?

MR. ROTHMAN: Paul Wagner, the plaintiff.

So, there are things that discovery will show and has shown that Hypertouch and plaintiff are doing things to attract these e-mails.

Now, the other issue, and I think it's clear from our briefs, is that Connexus and Hydra aren't seeking to hold Hypertouch liable for the content of these e-mails. In other words, we're not saying that they created the ad copy and are responsible for some false claim that appears in that e-mail or what have you.

In fact, the contents aren't really even at issue in this lawsuit, because plaintiff didn't download them. In other words, plaintiff has these e-mails, but he never downloaded the images associated with those e-mails. He instead requested that we provide them in discovery. So the content really isn't the issue. What the issue is, is the e-mails are caused to be sent by Hypertouch. It's the causation element.

It's not expressed in the statute, but it's a statutory tort. There has to be a causation element there. And we are contending that Hypertouch is the one that is causing these e-mails to be sent to plaintiff. Plaintiff itself is causing these e-mails to be sent to plaintiff. They had this agreement where they knew that they would get these e-mails and it would be at least, 99 -- I think at various years it was 95.

I think as the years progressed, it went up somewhere between 99 and a hundred percent. They knew they were going to get them.

So this isn't a situation where there's a defamatory statement in an e-mail and somebody is trying to hold somebody liable for the actions of the defamatory statement. That's not what's going on here.

You also don't have the intermediary sending that defamatory statement to the party. In this case, Hypertouch is not acting -- act as intermediary. Beyond Systems is doing Hypertouch the service.

And then, of course, as Your Honor correctly pointed out, we don't believe that Hypertouch is within the class of entities that the CDA designed to protect. The CDA was designed to protect intermediaries, so that intermediaries would not get hit for, you know, claims like defamation, tortious interference with contract, those sorts of things.

If Hypertouch is immune from liability, then that is akin to saying, if you run a mail server, no matter what you do with it, you can do anything you want with it without repercussions. That can't be what Congress intended. And we've cited cases, *Doe versus New York*, I believe is one of them, *Doe versus New York*, because if that were the result, then according to *Doe versus New York*, doing so would exempt virtually all internet use from liability expanding the statute's reached beyond that which Congress intended. And that's exactly what

they're asking you to do.

We also filed with respect to this Motion the *Gordon versus Virtumondo* case, Ninth Circuit case which basically said, there isn't a black and white test for this. You really have to delve into the facts. And are the facts such that the plaintiff is within the class of entities that the statutes were designed to protect.

Farron versus Echostar, another case we cite in our brief. Same issue. They want the black and white test. We say the black white test isn't appropriate, and it requires a factual inquiry into what's really going on here.

So, for all these reasons and as you can tell, I raised a lot of factual issues, we think that this motion should at least be deferred and additional discovery undertaken so that we have a full factual record before making a decision on this issue.

THE COURT: All right. Mr. Barba.

MR. BARBA: Your Honor, I know you have to leave. I'll be very fast, if I might.

THE COURT: Go ahead. Sure.

MR. BARBA: Thank you.

I failed to address in my opening argument the part of the briefs regarding whether or not indemnification claim can lie in the state of Maryland in this circumstance.

THE COURT: Let me short-cut you on that, because I

don't know that I need to reach that issue now. I want to see whether your basic presence in the case continues or not, or whether their claim in effect goes forward. Damages we can talk about if, as and when. So don't spend a lot of time on that really right now.

MR. BARBA: That's fine, Your Honor. Then I would just say that the *Pyramid Condo* case is the one that I would encourage you to look at.

The arrangement that we're talking about, that Mr. Rothman is talking about, and that we've been talking about between Hypertouch and BSI long predated any of the anti-spam statutes. This is clearly not contrived to find spam to sue on. It's a pre-existing business relationship.

The idea that Hypertouch publishes internet mail addresses on its website was from a 2005 screen shot of its website. And at the time, they were required to do that by then existent California law if they wanted to be able to pursue remedies for those.

So they put boldly for all to see those internet e-mail addresses that they were declaring to be off limits merely in compliance with law, and was in their legal compliance portion of the website.

That's all I have, Your Honor.

THE COURT: All right. You don't need to reply, Mr. Rothman, on this.

MR. ROTHMAN: Thank you, Your Honor.

THE COURT: All right. I can give you this decision from the bench. The Court considers the Motion to Dismiss or in the alternative, Partial Motion to Dismiss by Wagner and Hypertouch, Inc.

Just by way of background, the Court hasn't recited this previously, but this is a case in which Beyond Systems, Inc., plaintiff, a server that receives and delivers e-mails to its original business subscribers has brought suit again Kraft, Engwall, and certain John Does, alleging that the defendants violated both Maryland and California Anti-Spam Statutes by conspiring to transmit thousands of unsolicited spam e-mails advertising Gevalia, G-E-V-A-L-I-A.

Kraft owns Gevalia, the brand name, and Engwall, a subsidiary of Kraft. Kraft owns the domain names Gevalia.com, and Join Gevalia.com which Engwall uses for online promotions.

In the Second Amended Complaint, the plaintiff alleges that Connexus Corporation and Hydra Media Group assisted the defendants in sending Gevalia e-mails from California to Maryland.

There are further allegations about how the violations occurred, but there are some 50,000 plus e-mails that are allegedly in play.

According to discovery that's taken place so far, in excess of 90 percent of the e-mails were sourced to Joe Wagner

and Hypertouch, Inc. Connexus and Hydra have filed a third-party complaint against Paul Wagner and Hypertouch, Hypertouch seeking indemnification contribution.

The allegation is that Paul Wagner is the brother of Joe Wagner, who is the owner of Hypertouch, and the Third-party Complaint essentially alleges that Wagner asked BSI to receive and store e-mails that were to be received by Wagner/Hypertouch, and a high percentage of the e-mails that BSI agreed to receive in excess of 90 percent allegedly were spam.

Connexus and Hydra have contended in the litigation that BSI received these e-mails because of wrongful conduct of Wagner/Hypertouch. And again, the suggestion is that the Wagner brothers are in the business of manufacturing lawsuits and that Hypertouch is merely a facade, or an arrangement whereby Joe Wagner can operate. And it has been apparently established in discovery that Joe Wagner has filed multiple lawsuits relating to spam.

The essential claim, as I said, is that this Motion to Dismiss should be granted, because they're preempted by the Communications Decency Act, and barred by Maryland and California statutes. There's an elaborate discussion about how the Communications Decency Act immunizes someone such as Hypertouch from liability, because of their status as a provider or user of interactive computer service, and this would make service providers liable for information originating with a

third-party user of the service. Citing the *Zeran versus America Online* case at 129 F.3d 327 at 330 in particular, a Fourth Circuit case from 1997.

Again, this is a Motion to Dismiss or Partial Motion to Dismiss, but the allegations are that Joe Wagner, Hypertouch sent BSI virtually all the e-mails to go forward with this lawsuit and that Joe Wagner has admitted on deposition filing at least 16 lawsuits in his personal capacity, and 25 in Hypertouch's name; that according to the third-party plaintiffs, the Communication Decency Act does not preempt claims against such as Hypertouch in this third-party complaint.

And again, that is -- essentially it's something of an answer that the plaintiff itself has manufactured this litigation, perhaps even invited this, this spam to be sent to it so that it could file litigation.

And the ultimate issue, in fact, is whether Hypertouch is an interactive computer service provider under the CDA. And there's arguments that Hypertouch have added to the original content of the e-mails.

In short, the suggestion is by the third-party plaintiff that all the arguments raised by the third-party defendants are factual issues that cannot be resolved on a Motion to Dismiss, and the Court agrees that the Motion to Dismiss in whole or part is denied, and that discovery should go forward on that point as appropriate, and we'll see where we are

as to that.

Now, Mr. Rothman, something more you want to say on that?

MR. ROTHMAN: I'm sorry?

THE COURT: You were sort of leaning forward with anticipation like you wanted to say something.

MR. ROTHMAN: No, thank you, Your Honor.

THE COURT: Okay. Well, I'll deny the motion, enter an order today. The other motion that we heard, I'll give, as I said, two weeks to the defendants to respond to the case that, the *Master Financial* case that was filed the last minute, ten days to reply by the plaintiff.

Now, is there anything else we have before us this morning?

MR. BALDRIDGE: No, Your Honor.

MR. ONORATO: No, Your Honor.

THE COURT: All right. So we made it at 1:01 or 1:02.

All right. Thank you, counsel.

(Recess at 1:01 p.m.)