

1 F. Bari Nejadpour (SBN 216825)
2 Law Nejadpour & Associates P.L.C.
3 3540 Wilshire Blvd. #715
4 Los Angeles, CA 90010
5 (213) 632-5297
6 (213) 632-5299 (FAX)
7 *Attorney for: William Silverstein*

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 WILLIAM SILVERSTEIN, an individual,
11 Plaintiff,

12 vs.

13 E360INSIGHT, LLC, et al,
14 Defendants.

Case No.: CV07-02835-CAS (VBKx)

15 **PLAINTIFF'S OPPOSITION TO**
16 **DEFENDANTS MOTION TO DISMISS**
17 **PLAINTIFF'S FIRST AMENDED**
18 **COMPLAINT; DECLARATION OF F.**
19 **BARI NEJADPOUR**

20 Date: October 1, 2007
21 Time: 10:00 am
22 Courtroom: 5

1 Defendants in the instant motion confuse issues of proof and evidence with
2 sufficiency of pleading. Plaintiff objects to Defendants' self-serving declarations being
3 improperly included with this motion, as this is a motion to dismiss, not a motion for
4 summary judgment. Defendants again submit self-serving declarations essentially saying
5 "I didn't do it."¹ Defendants' sole purpose for this motion is to avoid providing Plaintiff
6 an opportunity to conduct discovery and request evidence from Defendants, and to
7 prevent Plaintiff from submitting evidence, some of which will show Defendants' history
8 of manufacturing false evidence as a basis for a claim.² Once Defendants provide truthful
9 discovery responses, these responses will reveal Defendants to the Court as the
10 lawbreakers that they are.

14 Plaintiff's first amended complaint ("FAC") is sufficient on its face and therefore
15 should not be dismissed. The FAC provides sufficient detail regarding the complained of
16 e-mails, and that Defendants deny sending the e-mails.

18 Furthermore Defendants motion should be denied for their failure to meet and
19 confer, as required under Local Rule 7-3.³ Plaintiff objects to Defendants' attempt to turn

22 1. During my time in the San Bernadino prosecutor's office, every criminal that I have
23 prosecuted denied committing the crime of which he/she were charged with. Never the less, these
24 same 'innocent criminals, apologized to the Court and victims when they made pleas for leniency
at sentencing.

25 2. In e360Insight, et al. v. Ferguson et al. One of the Defendants submitted uncontroverted
26 evidence that Linhardt, which he used as a basis for the claim, manufactured false signup
27 information. At the hearing on the motion to dismiss, Linhardt dismissed the claim, instead of
having the judge rule on the evidence submitted.

28 3. See declaration of F. Bari Nejadpour.

1 this motion to dismiss into a summary judgment motion without Plaintiff having full
2 opportunity to conduct discovery.⁴
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4

5 **I. Moniker’s liability.**

6 Moniker is liable under one or two theories:

7
8 **A. Moniker is the owner of the domain names advertised in the spam.**

9 The domain names in question are/were registered to Moniker. (FAC §§ 58, 59).

10 The registrant of a domain name is the owner (FAC §§ 75, 76). The allegation is that the
11 domain names registered/owned by Moniker are being advertised by illegal spam,
12 therefore Defendants are liable for this illegal advertising in accordance with § 17529.5.
13
14

15 **B. Alternatively, Moniker is liable if Moniker is not the true registrant of**
16 **the domain names advertised.**
17

18 At the request of the other Defendants, Moniker inserted its name into the Whois
19 information as the registrant of some of the complained of domains. (FAC §§ 68, 69). In
20 an attempt to avoid liability, Moniker now claim that it is not the registrant of these
21 domain names. If Moniker’s claim is true, that it is not the true registrant of the domain
22 names in questions, then Moniker has admitted to violating 18 U.S.C. 1037(4), as more
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25

26 4. “material outside the pleadings cannot be considered in ruling on a motion to dismiss.”
27 Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach (In re American Continental
28 Corporation/Lincoln S&L Secs. Litig.), 102 F.3d 1524, 1537 (9th Cir. 1996)

1 than two of these domain names are being used in conjunction with spam. (FAC §§ 53,
2 54). Therefore all Defendants, **including Moniker**, are guilty of 18 U.S.C. 1037(4).
3

4 Either theory provides liability for Moniker. Therefore Moniker should not be
5 dismissed.
6

7
8 **II. Counts I and II should Not Be Dismissed.**

9 **A. Both Counts I and II are Sufficiently Pled.**

10 Plaintiff in the first amended complaint, has set forth the who, what, when, where,
11 and how:
12

13 • **Who:** Paragraphs 45 and 46 of the First amended verified complaint (“FAC”)
14 identifies the Defendants. Paragraphs ¶¶ 79, 80, 81 identify Defendants’ domains as
15 being advertised by the complained of spam. Paragraphs 87 and 88 identify the
16 Defendants as the Sender and initiators of the e-mails.
17

18 • **What:** Paragraphs 45 and 46 of the FAC identifies the e-mails, and have a
19 summary of them attached to the complaint. The FAC states that the “From:” field is
20 supposed to identify the sender (FAC ¶ 42), and that the “From:” field does not actually
21 identify the sender (FAC ¶ 60 and *Exhibit A*) . The deceptive “From:” fields are part of
22 the header (see FAC ¶ 28). Paragraphs 61, 62 of the FAC provide 17 different examples
23 of deceptive subject lines.
24

25
26 • **When:** is provided in paragraphs 45 (“between May 11, 2005 and March 31,
27 2006”) and paragraph 46 (“between July 7, 2007 and July 11, 2007”). Attachment A to
28

1 the FAC actually provides the time received by Plaintiff’s server of each of the
2 complained of e-mails.

3
4 • **Where:** is provided by paragraph 19 of the FAC (“were relayed through
5 servers located in Los Angeles”)

6 Defendants ignore that one part of the CAN-SPAM is not “*sounding in fraud*” – 15
7 U.S.C. § 7704(a)(5)(iii). This is the requirement that Defendants to include a physical
8 postal address of the sender. The FAC ¶ 94 alleges that “Plaintiff is informed and believes
9 and therefore alleges that Defendants engaged in a pattern and practice of sending spam
10 that failed to contain the sender's physical postal address.”
11
12

13 The Asis Court recognized the reality of the spamming business when it ruled that
14 the rule 9(b) pleadings did not apply to the initiation of e-mail.⁵ Plaintiff complained in
15 FAC ¶ 60, “do not accurately identify the sender.” It is nonsensical to allow a party to
16 escape liability for its deceit because that party perfects the deceit that the law is designed
17 to punish.
18

19 Providing ninety-nine examples of deceptive headers is sufficient level of pleading
20 for this case. *Exhibit A* of the FAC provides ninety-nine examples of the deceptive
21
22
23

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25 5. “Plaintiff’s averments of fraud do not extend to the initiation of the allegedly fraudulent
26 commercial emails, but only to their content. Therefore, the Court finds that Plaintiff need not
27 plead with particularity the circumstances surrounding the initiation of the alleged email; for
28 instance, Plaintiff need not plead particular facts showing a business relationship between the
Mortgage Defendants and the Spammer Defendants.” Asis Internet Servs. v. Optin Global, Inc.,
2006 U.S. Dist. LEXIS 46309 (D. Cal. 2006)

1 “From:” field of the header.⁶ Paragraph 42 of the FAC states that the “From:” field
2 should identify the sender of the e-mail and ¶ 60 of the FAC states that the “From:” field
3 of the header does not identify the sender. Paragraphs 52 through 56 of the FAC identify
4 the misleading and or false information in the mailbox specifier of the “From:” field of
5 the header.
6

7
8 Plaintiff has sufficiently pled the deceptive subject lines in the FAC. Paragraphs 61
9 and 62 of the FAC go into great detail on how the subject lines are deceptive, referring to
10 18 specific examples contained within *Exhibit A* of the FAC. In its first ruling, the Asis
11 Court complained that there was no example of the deceptive subject lines when it said,
12 “but does not provide an example or otherwise specify the manner in which the subject
13 lines were false and misleading” Asis Internet Servs. v. Optin Global, Inc., 2006 U.S.
14 Dist. LEXIS 46309 (D. Cal. 2006). On the second motion to dismiss, the Asis Court ruled
15 that providing some examples, and not 10,000 copies of the e-mail with 10,000
16 explanations was sufficient when it said
17
18

19 *“In its FAC, Plaintiff includes examples and states that the subject lines “were*
20 *clearly intended to get someone to open the email by telling them that their*
21 *loan was pre-approved (‘Pre-approved rate # uzthxvml’) or that a loan was*
22 *approved (‘Notice: Loww Mortgage Ratee Approved’).” Asis Internet Servs. v.*

23
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26 6. The “From:” field is defined as part of the e-mail header’s originator fields. The
27 originator fields are defined within RFC 2822, paragraph 3.6.2.. RFC 2822 specification of e-
28 mail header. See FAC ¶ 39.

1 Plaintiff detailed 17 examples of deceptive subject lines (FAC ¶¶ 62,63). Defendants
2 do not dispute that they sell counterfeit goods nor that the examples given are not
3 deceptive.
4

5 Plaintiff has sufficiently pled both Counts I and II. Defendants' request to dismiss
6 Counts III, IV, and V is not only premature, but disingenuous in light of Defendants'
7 refusal to disclose needed information.⁷
8

9 Defendants sole complaint is that copies of the e-mails were not attached to the
10 complaint.
11

12 **B. Plaintiff has standing to bring an action under CAN-SPAM.**

13 Defendants mistakenly claims that an ISP who uses his own service is unable to
14 bring a claim under CAN-SPAM. Plaintiff is an ISP (FAC ¶¶ 1-3, 90) that Defendants
15 relayed their spam through. Defendants argue that spam received by Plaintiff using his
16 own services should be treated differently than spam received by Plaintiff's clients. Will
17 Defendants argue that spam complaints forwarded to Plaintiff should be exempt from
18 CAN-SPAM complaints because it was received by Plaintiff? Will spam to Google
19 employees or gmail trap addresses be exempt from CAN-SPAM complaints because they
20 were received by Google employees?⁸ Defendants try obscure the real questions: 1. Did
21
22
23

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25 7. Plaintiff is unable to identify all of the Defendants' spam until Defendants provide ALL
26 the domain names used by them. Plaintiff has repeatedly requested this to no avail.

27 8. A trap address is an e-mail address that has not been used or registered to receive e-mail,
28 but does exist for the detection of spam. This is commonly spam detection technique used by
Spamhaus, Microsoft, and Federal Trade Commission.

1 spam advertising Defendants domain names and web sites violate the law? 2. Did these
2 spam travel access Plaintiff's servers and networking equipment.⁹
3
4

5 **II. Defendant is liable to Plaintiff's for Trespass to Chattel.**

6 In an attempt to dismiss this case and avoid discovery, Defendants attempt to
7 mislead this court on Plaintiff's allegations of trespass to chattel claim, the requirements
8 of that claim, and even the law.
9

10 Plaintiff does not allege a content basis for this claim, as Defendants imply on page
11 8, line 11 of their motion, but rather alleges a claim based on lack of permission. (See
12 FAC ¶ 102). Defendants had no permission to use **Plaintiff's** servers for the purpose of
13 sending or relaying spam. (See FAC ¶¶ 32, 33, 90, 98, 102). Defendants' unauthorized
14 use of Plaintiff's system caused or threatened to cause harm. (See FAC ¶¶ 99-102, 105).
15
16

17 Defendants misstate the law on trespass to chattel. While Defendants are correct to
18 refer to Intel v. Hamidi, 30 Cal. 4th 1342 (Cal 2003), Defendants clearly misrepresent the
19 Intel Court's ruling.
20

21 *"The dispositive issue in this case, therefore, is whether the undisputed facts*
22 *demonstrate Hamidi's actions caused or threatened to cause damage to Intel's*
23 *computer system, or injury to its rights in that personal property, such as to*
24 *entitle Intel to judgment as a matter of law. To review, the undisputed evidence*
25 *revealed no actual or threatened damage to Intel's computer hardware or*
software and no interference with its ordinary and intended operation. Intel
was not dispossessed of its computers, nor did Hamidi's messages prevent Intel

26 9. If Plaintiff did not detail how his e-mail client (as do many others) segregate spam,
27 Defendants would then argue that their illegal spam are not material and that the complaint must
28 be dismissed.

1 from using its computers for any measurable length of time. **Intel presented no**
2 **evidence its system was slowed or otherwise impaired** by the burden of
3 delivering Hamidi's electronic messages. Nor was there any evidence
4 transmission of the messages imposed any marginal cost on the operation of
5 Intel's computers. In sum, **no evidence suggested** that in sending messages
6 through Intel's Internet connections and internal computer system Hamidi used
7 the system in any manner in which it was not intended to function or **impaired**
8 **the system in any way**. Nor does the evidence show the request of any
9 employee to be removed from FACE-Intel's mailing list was not honored. The
10 evidence did show, however, that some employees who found the messages
11 unwelcome asked management to stop them and that Intel technical staff spent
12 time and effort attempting to block the messages. A statement on the
13 FACE-Intel Web site, moreover, could be taken as an admission that the
14 messages had caused "[e]xcited and nervous managers" to discuss the matter
15 with Intel's human resources department." Intel Corp. v. Hamidi, 30 Cal. 4th
16 1342, 1352-1353 (Cal. 2003) [emphasis added]

17
18 *"Intel has not presented undisputed facts demonstrating an injury to its
19 personal property, or to its legal interest in that property, that support, under
20 California tort law, an action for trespass to chattels."* Ibid. at 1360.

21 The Intel Court ruled that Plaintiff's claim was for the e-mails causing loss of
22 employee productivity and interference with Intel's employees, not interference with
23 Intel's equipment. Employees are not chattel.

24 There is nothing in Intel that requires a victim of trespass to chattel to be an ISP. In
25 fact, Sotelo v. DirectRevenue, LLC, 384 F. Supp. 2d 1219 (D. Ill. 2005) permitted a
26 trespass to chattel claim to go forward against a spyware company for interference with
27 an individual's computer – not an ISP's server. Additionally Sotelo also recognized that
28 the Intel Court was an appeal on a summary judgment motion, **after** discovery has
occurred.

1 Plaintiff has sufficiently pled trespass to chattel, that there was interference to
2 Plaintiff's equipment, that this interference was without authorization, and this
3 interference was caused by Defendants.
4

5
6 **III. Defendants Are Guilty of Violating California Penal Code § 502.**

7
8 *(c) Except as provided in subdivision (h), any person who commits any of
the following acts is guilty of a public offense:*

9 [...]

10 *(3) Knowingly and without permission uses or causes to be used computer
services.*

11 *(4) Knowingly accesses and without permission adds, alters, damages, deletes,
12 or destroys any data, computer software, or computer programs which reside
13 or exist internal or external to a computer, computer system, or computer
network.*

14 California Penal Code § 502.

15 Defendants ignore that the fact that sending e-mail is actually a process of sending
16 instructions which causes an e-mail to be received.¹⁰ Defendants, without authorization,
17 communicated with Plaintiff's computer systems, instructed Plaintiff's server to create a
18 copy of their spam and deposit it into a mailbox for the user to retrieve it.
19

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23 10. As a simplified example of how e-mail actually works when sending an e-mail
24 from the Court to the Plaintiff. The Court would create an e-mail using Microsoft
25 Outlook) which then sends instructions to the Court's mail server (ie.
26 icmecfres1.gtwy.uscourts.gov) which creates a copy of the e-mail on the Court's mail
27 server. The Court's mail server, would then in turn send instructions to Plaintiff's mail
28 server, creating a copy of that e-mail onto Plaintiff's mail server, and will then remain on
Plaintiff's server until the Plaintiff's email client (PostRoadMailer for OS/2) connect to
Plaintiff's POP server and retrieve a copy of the that e-mail.

1 Defendants fail to cite any authority that prohibits the application of Penal Code §
2 502 to a claim that using a computer without authorization to send or relay e-mail.

3
4 Defendants sole support for this fiction is that both laws can be used to prohibit the same
5 conduct and the legislature would not pass laws that overlap. Nonsense.

6 There are many examples of overlapping laws. The CAN-SPAM law prohibits the
7 unauthorized use of computers to relay unsolicited commercial e-mail (15 U.S.C.
8 7704(b)(3)) while the Computer Fraud and Trespass Act (18 U.S.C. 1030) have been used
9 to prohibit the unauthorized use of computers. Business & Professions Code § 17529.2
10 prohibits spam, while § 17529.5 prohibits the use of deceptive headers and subject lines
11 in commercial e-mail, which overlaps when the complained of spam contain deceptive
12 subject lines or deceptive headers. This Court already ruled that the § 17529.5 is not
13 preempted by CAN-SPAM, even though there is an overlap. The CAN-SPAM Act
14 prohibits use of deceptive subject lines and headers in spam, while § 17529.5 prohibits
15 the same behaviors in any kind of commercial e-mail. No Court has ever ruled that
16 overlapping laws, providing multiple theories of recovery for the same acts, invalidate the
17 use of those laws. This Court should not be the first.

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23 **IV. The Negligence per se claim can even survive if all the other claims fail.**

24 Defendants attempt to put the cart before the horse. Defendants do no argue that the
25 pleading is deficient, but only, again, contend that they didn't do it. At this point, the
26

1 Court cannot determine if Defendants didn't do it, but only if Plaintiff has sufficiently
2 pled his complaint.

3
4 Arguendo, if this Court were to dismiss each of the prior causes of action, for the
5 reasons argued by Defendants, the negligence per se claim survives. If the Defendants
6 violated 18 U.S.C. 1037(4), a criminal statute which Plaintiff does not have a right of
7 action under, Plaintiff still may prevail on negligence per se. If the Court accepts
8 Defendants' contention that one may not recover under both § 17529.5 and Penal Code §
9 502, Defendants may still be liable under negligence per se.

10
11 Though the CAN-SPAM Act does not provide a right of action to the recipient, it is
12 intended to protect recipient. The requirements for non-deceptive headers and subject
13 lines are clearly there for the recipient. Providing the recipient an OPT-OUT mechanism
14 is not for the ISP, but for the recipient. Plaintiff discussed the disjoint on the right of
15 action and the protection of recipient in relation to the issue of fraud pleadings in his
16 opposition to the original motion to dismiss this on pages 11 and 12. Therefore both
17 CAN-SPAM and California statutes are designed to protect Silverstein, and others like
18 him.

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22 Plaintiff's pleading on this cause of action is sufficient. Plaintiff concedes that if the
23 Court dismisses all other causes of action, and find that the Defendants did not engage in
24 using false Whois information, then the Court may be justified in dismissing this Cause of
25 action.
26
27
28

1 **V. E360Insight’s statements are libelous on their face.**

2 Linhardt again blurs the difference between Linhardt, President of e360, and
3
4 Linhardt individual – to get what he wants from the Courts. Defendants then spin their
5 own statements, when called to task. Defendants improperly attaches the full statement to
6 the complaint, in an attempt to spin the statement.¹¹ Defendants attempts to claim that
7
8 libel is subject to 9(b) pleading standards.

9 Now that Linhardt, the individual, is not in the case, Defendant e360 points the
10 liability finger at Linhardt, the individual, not Linhardt the corporate representative of
11 e360. E360 ignores that the libelous statement is signed, “David Linhardt, President” not
12 David Linhardt, individual.
13

14 Linhardt’s, the individual, 12(b)(2) motion was predicated on the fact that Linhardt,
15 the individual, had no contact in California, but his corporate alter-ego has contacts.
16 When presented with evidence of a mailing address in California Linhardt attributed this
17 address to corporate ego making note that the application was signed, David Linhardt,
18 president. When confronted with Linhardt’s own statements in the Spamhaus declaration,
19 Linhardt, the individual, successfully argued that those losses were on Linhardt, the
20 president of e360. Even though the statements were made by Linhardt, the individual,
21 those statements were ratified and endorsed by Linhardt, corporate representative and
22 president of e360. The endorsement and ratification of the libelous statements by the
23 president of e360 confers liability upon e360.
24
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28 11. Plaintiff will stipulate that this is accurate and the source for quote in FAC § 135.

1 While Defendants argument that the libel claim being a complete stranger to the
2 lawsuit is creative, it is without merit. Defendant argues that since the claim cannot be
3 related back, therefore the claim is not valid. If there was an issue regarding a statute of
4 limitation, there would be merit. Defendants not alleging any issue of statute of limitation
5 makes their argument irrelevant.
6

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9 Plaintiff's cause of action for libel is sufficient as the claim both stated the exact
10 quote of the statement, that the statement was directed at the Plaintiff. Defendants'
11 implication that Plaintiff includes the entire document as his complaint is absurd, and
12 Plaintiff did include the complained of statement – "criminal vigilante." It is pled that the
13 complained of statement referenced plaintiff.¹²
14

15 Where Defendants improperly include the posting, Plaintiff will address it.¹³
16 Plaintiff was specifically referred to in this posting. The posting about **this Court's** ruling
17 of June 25, 2007, Defendant Linhardt posted:
18

19 "Score In **This Case**:

20 Legitimate Marketer = 4

21 Criminal Vigilante = 1"

22 Defendants' motion to dismiss page 15, lines 18-20. [emphasis added]
23
24

25 12. Defendants reference to the unpublished case of Alexander v. Schwarzenegger 2007 WL
26 39291 (Cal.App. 3 Dist.) is improper as it is an unpublished case.

27 13. Plaintiff does not waive his objection to Defendants' inclusion of the posting and does
28 not consent to turning this motion into a motion for summary judgment.

1 While Plaintiff contends that Linhardt has never been a legitimate marketer, but an illegal
2 spammer, it is clear on its face who Defendant referred to. Using the language “In This
3 Case:” specifically referred to the parties in the instant case – not a class of persons.
4

5 Unless Linhardt was admitting that e360Insight, Bargain Depot, Moniker, and
6 himself are criminal vigilantes, then the libelous statements were specifically about
7 Silverstein.
8

9 **VI. Plaintiff’s Request For Punitive Damages is Valid.**

10 The FAC properly revives the claim for punitive damages. Again Defendants ask the
11 Court to put the cart before the horse. Plaintiff concedes that if the Court dismisses then
12 the it would be appropriate to strike the punitive damages from the dismissed complaint.
13

14
15 **VII. Conclusion**

16 Defendants arguments are valid for a summary judgment motion, after discovery is
17 complete. However, Defendants motion to dismiss fails as the FAC is sufficiently pled.
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19
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21 Dated: September 7, 2007
22

23 Respectfully submitted,
24

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26 _____
27 F. Bari Nejadpour
28 Attorney for Plaintiff, William Silverstein