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9 Enterprises, LLC, a.k.a.
10 Bargaindepot.net, David Linhardt and
11 Moniker Online Services, LLC

12
13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION, LOS ANGELES

16 WILLIAM SILVERSTEIN, an
17 individual,

18 Plaintiff,

19 vs.

20 E360INSIGHT, LLC, BARGAIN
21 DEPOT ENTERPRISES, LLC, AKA
22 BARGAINDEPOT.NET, DAVID
23 LINHARDT, an individual, MONIKER
24 ONLINE SERVICES, LLC, And DOES
25 1-50; inclusive,
26 Defendants

Case No.: cv07-2835 CAS (VBKx)

**NOTICE OF MOTION AND REPLY
IN SUPPORT OF MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

Date: October 1, 2007

Time: 10:00 a.m.

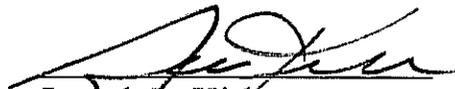
Courtroom: 5 on 2nd Floor

27 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

28 PLEASE TAKE NOTICE that Defendants have filed the attached Reply in Support
of their Motion to Dismiss the First Amended Complaint pursuant to Fed. R. Civ.
P. 12(b)(6). The motion will be heard on October 1, 2007 at 10:00 a.m. in

1 90012. The motion will be based on this Notice of Motion and Motion,
2 Memorandum of Points and Authorities, Reply in Support of the Motion, oral
3 argument, the pleadings in this action, and all other matters as may be properly
4 considered.
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8 Dated: September 24, 2007

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11 Joseph L. Kish
12 Attorney for Defendants
13 e360 Insight, LLC, Bargain Depot
14 Enterprises, LLC, a.k.a.
15 Bargaindepot.net, Moniker Online
16 Services, LLC and David Linhardt
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Introduction.**

3 Plaintiff’s Response to the Motion to Dismiss the First Amended Complaint
4
5 does nothing to salvage the First Amended Complaint from dismissal. Plaintiff’s
6 argument, that he pled Counts I and II (California Business and Professions Code
7 §17529.5 and the Controlling the Assault of Non-Solicited Pornography and
8 Marketing “CAN-SPAM”) with the requisite specificity, is objectively false given
9 that, at this late date and despite repeated requests, Plaintiff does not clearly
10 articulate the alleged falsities, has yet to produce a single e-mail allegedly sent by
11 any of the Defendants, and substitutes instead what is at best conclusory
12 obfuscation. Moreover, as a recipient of e-mail, Plaintiff does not even have
13 standing to bring an action under CAN-SPAM. Further, Plaintiff does not dispute
14 that Defendant Moniker did not “initiate” any of the allegedly offending e-mails.
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19 Plaintiff’s Response does nothing to alleviate the deficiencies contained in
20 Count III or counter the fact that under California law, the mere sending of an e-
21 mail message is not actionable under a claim of trespass to chattels.
22

23 Plaintiff’s allegation of a violation of California Penal Code § 502 (Count IV)
24 fails because Plaintiff has failed to plead that Defendants “accessed” Plaintiff’s
25 computer and that Plaintiff has failed to plead an “injury” for which he can recover
26 and Plaintiff’s Response provides no explanation for these deficiencies.
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28

1 Plaintiff concedes that Count V, alleging Negligence Per Se, fails if this Court
2 dismisses the other counts but futilely tries to resurrect this claim by arguing that it
3 might survive against Defendant Moniker, if Moniker violated 18 U.S.C. 1037(4),
4 which is not a basis for any of Plaintiff's claims in the First Amended Complaint.
5

6 Finally, Plaintiff's Response does not salvage the Libel claim alleged in Count
7 VI because Plaintiff does not allege in the First Amended Complaint that
8 e360Insight is liable for any of the statements of Linhardt. Additionally, Plaintiff
9 does not address the fact that nothing in Fed. R. Civ. P. 15 allows for an entirely
10 new cause of action to be attached to a pending lawsuit that bases its existence
11 from an entirely separate set of facts than those on which this lawsuit is premised.
12
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14 Counts I – V of Plaintiff's First Amended Complaint should be dismissed, with
15 prejudice. Count VI should be dismissed because Plaintiff has failed to allege that
16 subject matter exists and failed to allege a claim on which relief can be granted.
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18

19 **II. Argument.**

20 **A. Counts I And II Are As Equally Deficient As They Were In** 21 **The Original Complaint.**

22 **1. Plaintiff Has Failed To Plead Counts I And II With The** 23 **Requisite Specificity.**

24 Plaintiff has failed to comply with this Court's previous ruling requiring
25 Plaintiff to allege violations of § 17529.5 and CAN-SPAM with the specificity
26 required by Fed. R. Civ. P. 9. Instead, Plaintiff attaches a list of unknown origin
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1 that Plaintiff purports includes the “from” and “subject” lines of 99 allegedly
2 offending e-mails. Neither Plaintiff’s First Amended Complaint or Response to
3 the Motion to Dismiss, however, addresses the legal requirement that he “set forth
4 what is false or misleading about the [“from” or “subject” lines] and why [they are]
5 false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). Like
6 the original Complaint, Defendants and this Court are again left to guess what the
7 alleged falsities are. Plaintiff has failed to attach even a single allegedly offending
8 e-mail to the First Amended Complaint. Plaintiff could easily satisfy his burden of
9 specificity if he would produce the allegedly offending e-mails and his repeated
10 unwillingness to do so should be construed as a fatal deficiency that no further
11 amendments can correct.

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16 Plaintiff’s First Amended Complaint and his Response also concludes, with no
17 factual support, that the allegedly offending e-mails did not contain a valid return
18 address. (Plaintiff’s Resp. at p. 5 line 8). Plaintiff has to either produce the
19 allegedly offending e-mails to substantiate his otherwise baseless conclusions that
20 the e-mails failed to include a valid return address or state with particularity the
21 content of the emails so that it can be determined if return address information is,
22 indeed, missing. Plaintiff’s repeated refusal to produce any of the allegedly
23 offending e-mails or the substance of the information they contain raises an
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1 inference that he is unwilling to produce them (for whatever reason), an inference
2 that must be construed against Plaintiff.
3

4 **2. Plaintiff Does Not Have Standing To Bring An Action**
5 **Under CAN-SPAM.**

6 All of the allegations asserted by Plaintiff are in any event based on his personal
7 receipt of the allegedly offending e-mails. (See First Amended Complaint at ¶ 38).
8 Plaintiff's Response does not and cannot refute this fact. The harm alleged by
9 Plaintiff is that of an individual recipient, not an ISP. (See First Amended
10 Complaint at ¶ 85). Plaintiff is not suing in his capacity as the owner of an ISP but
11 rather as an individual. (See First Amended Complaint, caption, identifying
12 Plaintiff as an individual, not as an ISP). Plaintiff's allegations under CAN-SPAM
13 must be dismissed with prejudice because no private right of action is available
14 under CAN-SPAM. See 15 U.S.C. § 7706(g)(1).
15
16
17

18 **3. Moniker Is Not Liable Under Count I.**

19 Plaintiff's Response tacitly concedes that Moniker is not liable under § 17529.5
20 by failing to even address Defendants' argument that Moniker did not "initiate" the
21 allegedly offending e-mails, as that term is used in § 17529.5. Section 17529.5
22 requires a defendant to actually participate in the alleged violations, *i.e.*, actually
23 participate in sending the spam. For the reasons set forth in the Motion to Dismiss,
24 Count I should be dismissed, with prejudice, as against Moniker.
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1 **B. Plaintiff Cannot State A Claim For Trespass To Chattels.**

2 Plaintiff's Response fails to address Defendants' argument that under California
3
4 law Plaintiff was required to allege more than nominal damages in support of the
5 claim based on a trespass to chattels. *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1
6 Cal. Rptr. 3d 32 (Cal. 2003). Here, Plaintiff alleges only that the e-mails "caused
7 or threatened to cause harm." (First Amended Complaint ¶¶ 99-102, 105). Such
8 unidentified harm is certainly not sufficient to satisfy the standard contemplated by
9
10 *Hamidi* a case that Plaintiff does not refute. Plaintiff's conscience failure to
11 acknowledge this aspect of *Hamidi* warrants dismissal of Count III on this basis
12 alone.
13

14
15 Plaintiff misguidedly cites *Hamidi* for other reasons though, to no avail. In
16 *Hamidi*, the California Supreme Court held that "under California law [trespass to
17 chattels] does not encompass, and should not be extended to encompass, an
18 electronic communication that neither damages the recipient computer system nor
19 impairs its functioning. Such an electronic communication does not constitute an
20 actionable trespass to personal property, i.e., the computer system, because it does
21 not interfere with the possessor's use or possession of, or any other legally
22 protected interest in, the personal property itself." *Intel Corp. v. Hamidi*, 30 Cal.
23 4th 1342, 1347. Here, contrary to Plaintiff's conclusion, Plaintiff has alleged no
24 facts that Defendants' sending of the allegedly offending e-mails impaired the
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1 functioning of Plaintiff's computer in anyway whatsoever. "Under California law,
2 intangible intrusions on land, including electromagnetic transmissions, are not
3 actionable as trespasses (though they may be as nuisances) unless they cause
4 physical damage to the real property." *Id.* at 1361. Plaintiff's First Amended
5 Complaint does not, and cannot, allege any physical damage.
6
7

8 Count III should be dismissed with prejudice.

9
10 **C. Count IV Must Be Dismissed With Prejudice Because Plaintiff**
11 **Has Not Alleged The Requisite Access Or Injury Required By**
12 **Penal Code 502.**

13 In their Motion to Dismiss, Defendants clearly articulated the deficiencies
14 undermining Plaintiff's attempts to invoke Penal Code § 502, specifically that
15 Defendants did not "access" Plaintiff's computers as that term is used in the Penal
16 Code, nor was there an "injury" suffered by Plaintiff. Plaintiff failed to respond to
17 these arguments all together Plaintiff apparently concedes these points and Count
18 IV should be dismissed for these reasons alone.
19

20 Plaintiff addresses Defendants' third argument for dismissal of Count IV but to
21 no avail. Plaintiff argues that the duplicative nature of Penal Code § 502 and §
22 17529.5 should be ignored by this Court, for reasons that Plaintiff does not
23 articulate. It is axiomatic that the California legislature would not enact two
24 separate laws to address the same wrong. Equally as important, Plaintiff has not
25 and cannot cite to a single instance where a court applied Penal Code § 502 to the
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1 type of facts that exist in this case for none exist. Count IV should be dismissed
2 with prejudice.
3

4 **D. Plaintiff's Claim Based On Negligence Per Se Fails Because**
5 **The Counts That Give Rise To It Fail.**

6 Plaintiff's Response concedes (with a single caveat) that if all of the other
7 causes of action in the First Amended Complaint fail, his claim premised on
8 negligence per se also fails. (Plaintiff's Opposition to the Motion to Dismiss at p.
9 12 line 22-23). Plaintiff's caveat is premised on the contention that Count V
10 remains viable if Plaintiff can demonstrate that Defendants used false "Whois"
11 information in violation of 18 U.S.C. 1037(4). Plaintiff, however, has not brought
12 a Count for violation of 18 U.S.C. 1037(4) and does not cite to any case law
13 supporting his apparent position that negligence per se applies to any claim where
14 the statute that is alleged to have been violated is not part of an underlying cause of
15 action.
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20 To assert the doctrine of negligence per se, Plaintiff must allege and prove that
21 "the defendant violated a statute; the violation proximately caused the plaintiff's
22 injury; the injury resulted from the kind of occurrence the statute was designed to
23 prevent; and the plaintiff was one of the class of persons the statute was intended to
24 protect." *Friedman v. Manuel*, WL 1991165 (Cal.App. 4 Dist. 2007). As
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27 identified here and in the Motion to Dismiss, Defendants have not violated any of
28

1 the statutes or codes on which Plaintiff seeks to hold the Defendants liable.
2 Plaintiff's assertion of a violation of 18 U.S.C. 1037(4) does not save this count
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4 because Plaintiff does not allege the existence of any injury resulting from the
5 alleged violation of this statute. Plaintiff alleges only a violation of 18 U.S.C.
6 1037(4), not a corollary injury proximately caused by the alleged violation. (*See*
7 First Amended Complaint at ¶ 70). Plaintiff's claim based on negligence per se
8 fails and should be dismissed with prejudice.
9
10

11 **E. Plaintiff's Claim Premised On Libel Fails Against E360.**

12 Count VI of Plaintiff's First Amended Complaint alleges libel per se against
13 e360Insight and Linhardt. The First Amended Complaint, however, does not
14 assert facts that establish *respondeat superior* in an effort to convey liability to
15 e360Insight for the comments of Linhardt. Rather, the First Amended Complaint
16 alleges only that Linhardt made an allegedly libelous statement. (First Amended
17 Complaint at ¶¶ 133 and 138).
18
19

20 To state a cause of action based on *respondeat superior*, Plaintiff must allege
21 and prove a "causal nexus or reasonable relationship between the duties of
22 employment and the conduct causing injury." *Baptist v. Robinson*, 143 Cal. App.
23 4th 151, 162 (6th Dist. 2006). Moreover, "the plaintiff must show that the conduct
24 was either 'reasonably related to the kinds of tasks that the [employee/agent] was
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1 employed to perform' or was 'reasonably foreseeable in light of the employer's
2 business or the [agent's/employee's job] responsibilities.'" *Id.*

3
4 Plaintiff has not alleged that Linhardt was acting in his corporate capacity when
5 he allegedly posted the offending message. This Court has already ruled that it
6 does not have jurisdiction over Linhardt. Because of Plaintiff's failure to plead
7 *respondeat superior*, Count VI should be dismissed.

8
9 Count VI should also be dismissed because it does not relate back to the
10 original transactions or occurrences on which the Complaint was based, but rather
11 injects an entirely new claim based on an entirely separate set of occurrences, into
12 the First Amended Complaint. As noted in the Motion to Dismiss the First
13 Amended Complaint, Fed. R. Civ. P. 15 contemplates at a minimum that
14 amendments will be based on the same transactions and occurrences as the original
15 pleading. Here, there is simply no nexus between the occurrences giving rise to
16 the original complaint and those giving rise to Count VI.

17
18 Plaintiff's attempt to inject the libel claim against Linhardt or e360Insight here
19 based on entirely new occurrences results in real consequences for Defendants and
20 this Court. As noted in Defendants' opposition to Plaintiff's Motion for
21 Reconsideration, there are significant questions raised regarding whether the Court
22 has subject matter jurisdiction over the libel claim, as well as whether Plaintiff can
23 "transfer" what might be personal jurisdiction over Linhardt for the libel claim
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1 based on one set of occurrences, to the other claims Plaintiff has attempted to
2 assert in Count I – IV against Linhardt based on a second, wholly different, set of
3 occurrences.
4

5 Plaintiff's attempts to combine unrelated claims in one lawsuit serves no
6 purpose other than to allow Plaintiff an opportunity to bootstrap a second
7 jurisdictional argument against Linhardt that otherwise would not exist. Plaintiff
8 does not deny that the occurrences giving rise to the alleged libel arose *after* the
9 filing of this lawsuit and is based on a wholly separate set of occurrences. If
10 Plaintiff wants to bring a libel claim against Linhardt and/or e360Insight, he is free
11 to do so separately in a court of competent jurisdiction. Count VI has no place
12 here in this lawsuit based on the alleged sending of emails that do not comply with
13 various State and Federal statutes. Count VI should be dismissed.
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