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2007 MAY -7 PM 2: 50

CLERK U.S. DISTRICT COURT
 CENTRAL DIST. OF CALIF.
 LOS ANGELES



BY _____

8 Attorney for e360Insight, Bargain Depot
 9 Enterprises, LLC, a.k.a. Bargaindepot.net,
 10 David Linhardt and Moniker Online Services,
 11 LLC

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

File by Fax

15 WILLIAM SILVERSTEIN, an)
 16 individual,)
 17 Plaintiff,)
 18 vs.)
 19 E360INSIGHT, LLC, BARGAIN)
 20 DEPOT ENTERPRISES, LLC, AKA)
 21 BARGAINDEPOT.NET, DAVID)
 22 LINHARDT, an individual, MONIKER)
 23 ONLINE SERVICES, LLC, And DOES)
 24 1-50; inclusive,)
 25 Defendants)

Case No.: cv07-2835 CAS (VBKx)
**NOTICE OF MOTION AND
 MOTION TO DISMISS**

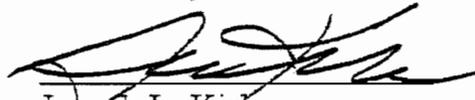
Date: June 25, 2007
 Time: 10:00 a.m.
 Courtroom: 5 on 2nd Floor

26 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

27 PLEASE TAKE NOTICE that Defendants David Linhardt and Moniker Online
 28 Services, LLC move to dismiss the Claims in the Complaint pursuant to Fed. R.
 Civ. P. 12(b)(2) and (6); Defendants e360Insight and Bargain Depot Enterprises,
 LLC, AKA Bargaindepot.net move to dismiss the Claims in the Complaint

1 pursuant to Fed. R. Civ. P. 12(b)(6); and all Defendants move to strike the prayer
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3 for punitive damages pursuant to Fed. R. Civ. P. 12(f). These motions will be
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5 heard on June 25, 2007 at 10:00 a.m. in Courtroom 5 on the 2nd floor, located at
6
7 312 N Spring St., Los Angeles, CA 90012. These motions will be based on this
8
9 Notice of Motion and Motion, Memorandum of Points and Authorities, the
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11 Declarations by David Linhardt and Eric Harrington, oral argument, the pleadings
12
13 in this action, and all other matters as may be properly considered.
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Dated May 4, 2007



Joseph L. Kish
Attorney for Defendants e360 Insight,
Bargain Depot Enterprises, LLC, a.k.a.
Bargaindepot.net, Moniker Online
Services, LLC and David Linhardt

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 A. Introduction

4 Plaintiff has filed a two (2) count Complaint against e360Insight, LLC
5 (“e360”), Bargain Depot Enterprises, LLC, AKA Bargaindepot.net (“Bargain
6 Depot”), David Linhardt (“Linhardt”) and Moniker Online Services, LLC
7 (“Moniker”) purporting to state violations of the California Business and
8 Professions Code §17529.5 (Count I) and the Controlling the Assault of Non-
9 Solicited Pornography and Marketing (CAN-SPAM) 15 U.S.C. §7701 *et seq.*
10 (Count II). Both counts are based on Plaintiff’s allegations that Defendants sent
11 unsolicited e-mails in violation of these laws.
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15 The Complaint should be dismissed for the following reasons. First,
16 Defendants Linhardt and Moniker are not to subject to the jurisdiction of this
17 Court. Second, the Complaint is devoid of any allegations that Defendants
18 Linhardt and Moniker sent any of the allegedly offending e-mails and advertised
19 through any of the allegedly offending e-mail. Third, the California Business and
20 Professions Code §17529.5 is preempted pursuant to 15 U.S.C. §7707(b)(1).
21 Fourth, Plaintiff has failed to plead allegations of false or materially misleading
22 header information and subject lines with the particularity required by Federal
23 Rules of Civil Procedure 9(b).
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1 This motion is made following the conference of counsel pursuant to L.R. 7-
2 3 which took place on April 30, 2007.

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4 **B. Legal Standard**

5 A complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) where
6 there is either a "lack of a cognizable legal theory" or the absence of sufficient
7 facts alleged to support a cognizable legal theory. *Balistreri v. Pacifica Police*
8 *Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). While the Court must take all material
9 allegations in a complaint as true and construe them in the light most favorable to
10 the plaintiff, the Court is not required to accept legal conclusions. *Sprewell v.*
11 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Clegg v. Cult*
12 *Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

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17 Where, as here, a complaint is grounded in fraud, it should be dismissed if
18 "its allegations fail to satisfy the heightened pleading requirements of Rule 9(b)."
19 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). Fed. R. Civ.
20 P. 9(b) extends to "the circumstances constituting fraud." *Slack v. Fair Isaac*
21 *Corp.*, 390 F. Supp. 2d 906, 911 (N.D. Cal. 2005). The Ninth Circuit interprets
22 "such circumstances" to include any claim that "sounds in fraud." *Id.*; *citing Vess*,
23 317 F.3d at 1103-04. Based on the allegations of falsity regarding the e-mail
24 headers, Count I, based on the Cal. Bus. & Prof. Code §17529.5, and Count II,
25 based on CAN-SPAM, must be plead with particularity. *Khoury v. Maly's of Cal.*,

1 *Inc.*, 14 Cal.App.4th 612, 619 (1993) and *Asis Internet Services v. Optin Global,*
2 *Inc.*, 2006 U.S. Dist. LEXIS 46309 at p. 15 (N.D. Cal. 2006). While a complaint
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4 may not purport to state a cause of action for fraud, if it is founded on allegations
5 of fraudulent conduct, the "claim is said to be 'grounded in fraud' or to 'sound in
6 fraud,' and the pleading of that claim as a whole must satisfy the particularity
7 requirement of Rule 9(b)." *Vess*, 317 F.3d at 1103-04; *see also U.S. v. Hempfling,*
8 2005 WL 2334713, at * 5 (E.D. Cal. Sept. 23, 2005). Allegations grounded in
9 fraud "must be accompanied by 'the who, what, when, where, and how' of the
10 misconduct charged..." and "must set forth what is false or misleading about a
11 statement, and why it is false." *Vess*, 317 F.3d at 1106
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15 **C. Defendants Linhardt and Moniker Are Not Subject To The Jurisdiction**
16 **Of This Court.**

17 Plaintiff bears the burden of proving by a preponderance of the evidence the
18 prima facie facts entitling the court to assume personal jurisdiction over a
19 defendant. *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1986).
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21 California's long arm statute provides that "a court of this state may exercise
22 jurisdiction on any basis not inconsistent with the Constitution of this state or of
23 the United States." Cal. Code of Civ. Pro. §410.10. General jurisdiction and
24 specific jurisdiction are the two methods by which a party may be subject to a
25 California court's jurisdiction. Neither exists here as to Linhardt and Moniker.
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1 General jurisdiction "exists where it is established that the defendant has
2 continuous and systematic contacts with the forum that the exercise of jurisdiction
3 does not offend traditional notions of fair play and substantial justice." *Phillips v.*
4 *Worldwide Internet Solutions*, 2006 U.S. Dist. LEXIS 44152 at p. 9 (N. D. Cal
5 2006) *see also: Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d
6 1122, 1129 (9th Cir. 2003).

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10 Specific jurisdiction requires that two components must be fulfilled. *Ziegler*
11 *v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). First, "the exercise of
12 personal jurisdiction must comport with the forum state's long arm statute." *Id.*
13 Second, "the exercise of personal jurisdiction must satisfy the constitutional
14 requirement of due process." *Id.* The Ninth Circuit has set forth a three-part
15 test to determine whether a district court's exercise of specific jurisdiction
16 comports with due process: "(1) the nonresident defendant must do some act or
17 consummate some transaction with the forum or perform some transaction with the
18 forum by which he purposely avails himself of the privilege of conducting
19 activities in the forum, thereby invoking the benefits and protections; (2) the claim
20 must be one which arises out of or results from the defendant's forum-related
21 activities; and(3) the exercise of jurisdiction must be reasonable." *Ballard v.*
22 *Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995).
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1 "The standard for establishing general jurisdiction is fairly high". *Bancroft*
2 & *Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). Here,
3 Defendants Linhardt and Moniker are not subject to this Court's jurisdiction under
4 either general or specific jurisdiction. General jurisdiction does not exist because
5 there is no allegation in the Complaint that these Defendants have had "continuous
6 and systematic contacts with the forum". In analyzing general jurisdiction, courts
7 consider whether the defendant makes sales, solicits or engaged in business in the
8 state, serves the state's markets, designates an agent for service of process, holds a
9 license, or is incorporated there. *Id.* Here, Linhardt is a resident and citizen of
10 Illinois and Moniker is a Florida based corporation. Both affirmatively state that
11 they (1) do not own, use or possess any real property in California, do not pay any
12 taxes in California, and do not maintain an account with a California bank, (2) are
13 not registered to do business in California, and are not licensed or regulated by any
14 government agency in California, (3) have never had any employees in California,
15 (4) have no offices, no mailing addresses, post office boxes or telephone directory
16 listings in California, (5) have never made a general appearance in an action in any
17 state or federal court in California, (6) do not advertise in California, and, (7) were
18 not involved in the acts complained of in the Complaint. (Declaration of Linhardt
19 at ¶1-9 and Eric Harrington at ¶ 1-12). Plaintiff has not, and cannot, meet the high
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1 burden of demonstrating general jurisdiction over Defendants Linhardt and
2 Moniker.
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4 Defendants Linhardt and Moniker are not subject to specific jurisdiction
5 either. As demonstrated by the Declarations of Messrs. Linhardt and Harrington,
6 Linhardt and Moniker have not committed some act or consummated some
7 transaction with the forum or performed some transaction with the forum by which
8 they purposely availed themselves of the privilege of conducting activities in the
9 forum, thereby invoking the benefits and protections. Moreover, Plaintiff's claim
10 is not one that arises out of or results from the Linhardt or Moniker's forum-related
11 activities. Finally, the exercise of jurisdiction is not reasonable because neither
12 Linhardt nor Moniker have had contact with this forum.
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17 Additionally, Linhardt is not subject to this Court's jurisdiction for his
18 actions as president of Bargain Depot. In the context of establishing jurisdiction,
19 the acts of officers and directors of an entity are considered the acts of the entity
20 exclusively and are not material for purposes of establishing minimum contacts as
21 to the officers and directors. *Shearer v. Superior Court*, 70 Cal.App.3d 424, 430,
22 138 Cal.Rptr. 824 (1977). Corporations are separate legal entities and cannot act
23 on their own and therefore act through their agents. *Mihlon v. Superior Court*, 169
24 Cal.App.3d 703, 713, 215 Cal.Rptr. 442 (1985). Acts performed by the corporate
25 agents, in their official capacity, cannot reasonably attributed to the agent creating
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1 personal jurisdiction. *Colt Studio, Inc. v. Badpuppy Enterprises*, 75 F.Supp.2d
2 1104, 1119 (C.D. Cal. 1999). Therefore, personal jurisdiction cannot attach to
3 Linhardt because of his actions as authorized agent of Bargain Depot and he must
4 be dismissed from this lawsuit for this reason alone.
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7 **D. Defendants Linhardt And Moniker Have Not Violated The California
8 Business And Professions Code §17529.5 Or CAN-SPAM.**

9 CAN-SPAM only applies to those who "initiate the transmission ... of ...
10 commercial electronic mail message[s]." 15 U.S.C. § 7704(a)(1). "Initiate" is
11 defined as "to originate or transmit" a commercial e-mail message or "to procure
12 the origination or transmission of such message...." 15 U.S.C. § 7702(9).
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14 The Complaint does not allege that Defendants Linhardt and Moniker
15 transmitted any e-mail messages. Rather the Complaint generally avers that
16 *Defendants* sent the allegedly offending e-mails which is illogical as all of the
17 Defendants cannot all be "initiating" the same e-mails, and the Complaint is devoid
18 of any allegations that Linhardt or Moniker "procured" any of the e-mails.
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20 Moreover, the evidence before this Court establishes quite the contrary, that
21 Defendants Linhardt and Moniker did not transmit any e-mail messages. *see*
22 Declaration of Linhardt at ¶ 9 and Eric Harrington at ¶ 11. Thus, Defendants
23 Linhardt and Moniker can only be held liable for procuring the transmission of an
24 e-mail message if they "intentionally" induced another "to initiate such a message
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1 on [their] behalf." *see* 15 U.S.C. § 7702(12). Here, the Complaint contains no
2 allegations that even remotely suggest Defendants Linhardt and Moniker are liable
3 for procuring the allegedly offending e-mails, nor could it in light of the
4 attestations provided in the Declarations of Messrs. Linhardt and Harrington.
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7 Similarly, Plaintiff fails to state a claim against Linhardt and Moniker for
8 violations of Cal. Bus. & Prof. Code § 17529.5. Liability under § 17529.5 requires
9 a defendant to actually participate in the alleged violations, *i.e.*, actually participate
10 in sending the spam. §17529.5(a) states: "It is unlawful for any person or entity to
11 advertise in a commercial e-mail advertisement [where:] (2) The e-mail
12 advertisement contains or is accompanied by falsified, misrepresented, or forged
13 header information [;or] (3) The e-mail advertisement has a subject line that a
14 person knows would be likely to mislead a recipient" "Commercial e-mail
15 advertisement" is defined by §17529.1(c) as "any electronic mail message *initiated*
16 for the purpose of advertising or promoting ... services." (Emphasis added).
17 "Initiate" is defined as "transmit or cause to be transmitted." §17529.1(i). Thus,
18 according to the plain language of the statute liability under §17529.5 requires that
19 a defendant actually send the alleged spam or cause it to be sent. Here, the only
20 evidence before the Court is that Defendants Linhardt and Moniker did not send,
21 nor did they cause to be sent, the allegedly offending e-mails.
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1 Moreover, §17529.5 only applies to those who “advertise” through e-mail.
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3 Here, there is no evidence Defendants Linhardt and Moniker advertised through
4 the allegedly offending e-mails.

5 **E. California Business And Professions Code §17529.5 Is Preempted By**
6 **CAN-SPAM.**

7 CAN-SPAM preempts Cal. Bus. & Prof. Code 17529.5. Specifically, 15
8
9 U.S.C. §7707(b)(1) states: “This Act supersedes any statute, regulation, or rule of
10 State or political subdivision of a State that expressly regulates the use of
11 electronic mail to send commercial messages, except to the extent that any such
12 statute, regulation, or rule prohibits falsity or deception in any portion of a
13 commercial electronic mail message or information attached thereto.”
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15
16 Plaintiff does not allege fraud in the content of the allegedly offending e-
17 mails. Rather, Plaintiff alleges only that the e-mails were “accompanied by
18 falsified, misrepresented, or forged header information”, and “header information
19 that is materially false or materially misleading” and “subject lines intended to, and
20 likely to, mislead recipients...” First Cause of Action at par. 43 and Second Cause
21 of Action at par. 52 and 53 respectively. CAN-SPAM prohibits the types of e-mail
22 prohibited under the California Statute. Specifically, Cal. Bus. & Prof. Code
23 §17529.5 prohibits the sending of e-mail that “contains or is accompanied by
24 falsified, misrepresented, or forged header information” and that “has a subject line
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1 that a person knows would likely mislead a recipient..." Likewise, CAN-SPAM
2 prohibits the sending of e-mail that contains "header information that is materially
3 false or materially misleading." §7704(a)(1) and prohibits "deceptive subject
4 headings". §7704(a)(2).
5

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7 In addition, the Fourth Circuit has already examined the issue of preemption
8 and ruled that CAN-SPAM preempts state laws. *Omega World Travel, Inc. v.*
9 *Mummagraphics, Inc.*, 469 F.3d 348, 356 (4th Cir. 2006). The court in *Omega*
10 recognized that senders of e-mail often don't know where the e-mail is being sent
11 and thus, if state laws were not preempted, senders of e-mail would have to adhere
12 to the strictest state's law and that law would become "a de facto national
13 standard". *Id.*
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17 Cal. Bus. & Prof. Code §17529.5 is clearly preempted by CAN-SPAM and
18 Count I should be dismissed with prejudice.
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20 **F. Count I And II Must Be Dismissed Because Plaintiff Has Failed to Plead
21 With the Requisite Particularity.**

22 Count I is based on an alleged violation of Cal. Bus. & Prof. Code §17529.5.
23 §17529.5 is a sub-part of Cal. Bus. & Prof. Code § 17500 *et seq.*, which prohibits
24 various forms of false advertising. A Plaintiff alleging a violation under Cal. Bus.
25 & Prof. Code §17500 *et seq* "must state with reasonable particularity the facts
26 supporting the statutory elements of the violation." *Khoury v. Maly's of Cal., Inc.*,
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1 14 Cal.App.4th 612, 619 (1993). The Complaint does not state who sent the e-
2 mails, how *all* of the Defendants violated the Code at the same time, and what,
3 exactly, is the false nature of the header information. Plaintiff only alleges that
4 “the complained of e-mails contained or was accompanied by false,
5 misrepresented, or forged header information.” Complaint par. 43. Plaintiff
6 claims to have received 87 allegedly offending e-mails but fails to attach a single
7 e-mail to the complaint or identify how any of the e-mails specifically violate
8 §17529.5. In the age of technically savvy individuals, Defendants need to see the
9 allegedly false header information and mail log files to determine the origin of the
10 e-mails. Plaintiff’s allegation does not state with particularity the basis of the
11 allegations of falsity and must therefore be dismissed.
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17 The Federal Rules of Civil Procedure require that “all averments of fraud or
18 mistake, the circumstances constituting fraud or mistake shall be stated with
19 particularity.” Fed. R. Civ. P. 9(b). In Count II, Plaintiff alleges that the e-mails
20 contained “header information that is materially false or materially misleading”
21 and that the subject lines “mislead recipients, acting reasonably under the
22 circumstances, about a material fact regarding the contents or subject matter of the
23 message.” Complaint par. 52-54. In a similar case, the District Court for the
24 Northern District of California ruled such allegations must be plead with
25 particularity. *Asis Internet Services v. Optin Global, Inc.*, 2006 U.S. Dist. LEXIS
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1 46309 at p. 15 (N.D. Cal. 2006). Specifically, in *Asis*, the court held that
2 allegations that the subject lines “were false and misleading” needed to be plead
3 with particularity. *Id.* Moreover, the court held that “ascribing to all defendants
4 the act of sending the allegedly fraudulent email also runs afoul of Rule 9(b).” *Id.*
5 Here, Plaintiff has not alleged with any particularity which person or entity sent the
6 allegedly offending e-mails.
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9 In this case, Plaintiff is required to plead with particularity the allegedly
10 false information regarding the headers and the subject lines. The Complaint
11 should be dismissed due to Plaintiff’s failure to do so.
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14 **G. Plaintiff’s Request For Punitive Damages Should Be Stricken.**

15 As identified above in Section F, §17529.5 is a sub-part of Cal. Bus. & Prof.
16 Code §17500 *et seq.* Punitive damages are not recoverable under §17500.
17 *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1137 (C.D. Cal. 2005). The
18 California legislature has not provided for the recovery of punitive damages under
19 §17500 *et seq.* and therefore, Plaintiff is not entitled to punitive damages.
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22 Additionally, where the legislature has specified a civil penalty, plaintiffs
23 can not recover punitive damages. *Freeman v. Alta Bates Summit Med. Ctr.*
24 *Campus*, 2004 U.S. Dist. LEXIS 21402, at p. 9 (N.D. Cal. 2004). Here, §17529.5
25 provides a civil penalty of \$1,000 per e-mail in addition to actual damages. Cal.
26 Bus. & Prof. Code §17529.5.
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1 Finally, “under California law, a plaintiff who relies solely on a statutory
2 violation is deemed to have waived entitlement to punitive damages.” *Id.*
3 Plaintiff is relying solely on a statutory violation, namely, §17529.5, and thus is not
4 entitled to punitive damages. As a result, based on the above-cited principles,
5 Plaintiff’s prayer for punitive damages must be stricken pursuant to Fed. R. Civ. P.
6 12(f).

7 Likewise, punitive damages are not recoverable under CAN-SPAM because
8 it allows for treble damages pursuant to 15 U.S.C. §7706(g)(3)(c). Where a statute
9 allows treble damages, a plaintiff may not recover punitive damages. *Doran v.*
10 *Embassy Suites Hotel*, 2002 U.S. Dist. LEXIS 16116, p. 4 (N.D. Cal. 2002).
11 Where the award of treble damages is meant to be punitive, a plaintiff cannot
12 recover separate punitive damages. *Id.* Here, the express language of
13 §7706(g)(3)(c) makes clear that it is designed to punish defendants for violating
14 the statute “willfully and knowingly”. Additional punitive damages in this case
15 would be duplicative and therefore not recoverable.

16 **H. Conclusion**

17 Plaintiff’s Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(2)
18 and (6). Defendants Linhardt and Moniker are not subject to this Court’s
19 jurisdiction and they did not do any act violating the Cal. Bus. & Prof. Code §
20 17529.5 or CAN-SPAM. Moreover, the Complaint should be dismissed because it
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1 is not plead with the necessary particularity. Count I should be dismissed because
2 Cal. Bus. & Prof. Code § 17529.5 is preempted by CAN-SPAM. Finally,
3
4 Plaintiff's prayer for punitive damages should be stricken pursuant to Fed. R. Civ.
5 P. 12(f) because punitive damages are not recoverable under the facts of this case.
6

7 Dated May 4, 2007

8 

9 Joseph L. Kish
10 Attorney for Defendants e360 Insight,
11 Bargain Depot Enterprises, LLC, a.k.a.
12 Bargaindepot.net, David Linhardt and
13 Moniker Online Services, LLC
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1 DECLARATION OF DAVID LINHARDT

2 DAVID LINHARDT declares and states as follows:
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- 4 1. I am the President of e360Insight ("e360") and a Defendant in this action. I
5 make this declaration in support of Defendants' Motion to Dismiss. The
6 facts set out below are known to me personally, and if called on I could
7 testify to those facts, under oath.
8
- 9 2. I am a resident of Lake County, Illinois. My only place of business is
10 located in Cook County, Illinois.
11
- 12 3. I do not own, use or possess any real property in California, do not pay any
13 taxes in California, and do not maintain an account with a California bank.
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- 15 4. I am not registered to do business in California, and am not licensed or
16 regulated by any government agency in California.
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- 18 5. I have and have never had any employees in California.
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- 20 6. I have no mailing address, post office box or telephone directory listing in
21 California.
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- 23 7. I have never made a general appearance in an action in any state or federal
24 court in California.
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- 26 8. I do not advertise in California.
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1 9. I have never personally conducted business in California, or, to the best of
2 my knowledge, with any California resident. I was not personally involved
3 in the acts complained of in the Complaint.
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5 10. e360 is an Illinois corporation with its principal place of business in Illinois.
6

7 11. e360 is properly incorporated and I have never used its financial accounts
8 for my personal purposes.
9

10 12. e360 does not own, use or possess any real property in California, does not
11 pay any taxes in California, and does not maintain an account with a
12 California bank.
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14 13. e360 is not registered to do business in California, and is not licensed or
15 regulated by any government agency in California.
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17 14. e360 has never had any employees in California.

18 15. e360 has no office, no mailing address, post office box or telephone
19 directory listing in California.
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21 16. e360 has never made a general appearance in an action in any state or
22 federal court in California.
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1 I declare under penalty of perjury under the laws of the United States that
2 the foregoing is true and correct and that this declaration was executed on May 4,
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4 2007.

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8 DAVID LINHARDT
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DECLARATION OF ERIC HARRINGTON

ERIC HARRINGTON declares and states as follows:

1. I am the President of Domain Systems, Inc. (a Florida corp.), which is the managing member of Moniker Online Services, LLC, a Defendant in this action. I make this declaration on behalf of Moniker Online Services, LLC and in support of Defendants' Motion to Dismiss. The facts set out below are known to me personally, and if called on I could testify to those facts, under oath.
2. I am a resident of Broward, Florida.
3. Moniker is a Florida corporation with its principal place of business in Florida.
4. Moniker is properly incorporated.
5. Moniker does not own, use or possess any real property in California, does not pay any taxes in California, and does not maintain an account with a California bank.
6. Moniker is not registered to do business in California, and is not licensed or regulated by any government agency in California.
7. Moniker has never had any employees in California.
8. Moniker has no office, no mailing address, post office box or telephone directory listing in California.

1 9. Moniker has never made a general appearance in an action in any state or
2 federal court in California.
3

4 10. Moniker does not advertise in California.

5 11. Moniker was not involved in the acts complained of in the Complaint.
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7 12. Moniker did not send, authorize or have knowledge of the e-mails
8 complained of in the Complaint.
9

10 13. The e-mails complained of in the Complaint were not sent on behalf of or
11 authorized by Moniker.

12 I declare under penalty of perjury under the laws of the United States that
13 the foregoing is true and correct and that this declaration was executed on May 4,
14 2007.
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19 ERIC HARRINGTON
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ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address) JOSEPH KISH SBN 136429 SYNERGY LAW GROUP, LLC 730 WEST RANDOLPH SUITE 600 CHICAGO IL 60661 ATTORNEY FOR Defendant	TELEPHONE NUMBER Ref. No. or File No. 2389.06.01	FOR COURT USE ONLY
Insert name of court and name of judicial district and branch if any. District Court Central District, Los Angeles 312 N Spring St #G-8 Los Angeles CA 90012		
SHORT TITLE OF CASE: William Silverstein v E360 Insight, LLC, et al		
INVOICE NO. 540822	DATE:	TIME:
	DEP./DIV.	CASE NUMBER: CV072835

PROOF OF SERVICE BY MAIL

I AM A CITIZEN OF THE UNITED STATES AND EMPLOYED IN THE COUNTY OF LOS ANGELES STATE OF CALIFORNIA. I AM AND WAS ON THE DATES HEREIN MENTIONED, OVER THE AGE OF EIGHTEEN YEARS AND NOT A PARTY TO THE ACTION.

ON 05/07/07, I SERVED THE WITHIN:

notice of motion and motion to dismiss
proof of service (mailing)

ON THE DEFENDANT, IN SAID ACTION BY PLACING A TRUE COPY THEREOF ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON PRE-PAID FOR FIRST CLASS IN THE UNITED STATES MAIL AT: MONTEREY PARK , CALIFORNIA, ADDRESSED AS FOLLOWS:

F. BARI NEJADPOUR

3540 WILSHIRE BLVD.
#715
LOS ANGELES CA 90010

DECLARANT: KANEISHA ROSE

RAPID LEGAL INC.
1199 MONTEREY PASS RD.
MONTEREY PARK, CA 91754
323-526-7300 FAX 323-526-7377

- d. Registered California process server
 (1) Employee or Independent Contractor
 (2) Registration No. 1277
 (3) County: SAN DIEGO
 (4) Expiration: 05/02/08

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATE: 05/07/07

>

SIGNATURE

