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

10 WILLIAM SILVERSTEIN, an individual,
11 Plaintiff,

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

12 vs.

ANSWER AND AFFIRMATIVE
DEFENSES OF WILLIAM SILVERSTEIN
TO DEFENDANTS' COUNTERCLAIM

13 E360INSIGHT, LLC, BARGAIN DEPOT
14 ENTERPRISES, LLC AKA
15 BARGAINDEPOT.NET,
16 DAVID LINHARDT,
17 MONIKER ONLINE SERVICES, LLC,
18 and DOES 1-50;
19 Defendants.

20 E360INSIGHT, LLC and BARGAIN
21 DEPOT ENTERPRISES, LLC,
22 Counter-Plaintiffs,

23 vs.

24 WILLIAM SILVERSTEIN,
25 Counter-Defendant.

26 Counter-Defendant, William Silverstein, answers e360Insight's (Counter-Plaintiff)

27 counterclaim as follows:¹

28 1. Silverstein admits that this is Defendants' counterclaim. Further responding,
Counter-Defendant denies that e360Insight is a legitimate internet marketing companies,

1. Silverstein will refer only to Counter-Plaintiff e360Insight in this answer, as the abuse of process claim has been stricken by the Court. The only party that brought the remaining claim is e360Insight.

ANSWER AND AFFIRMATIVE DEFENDANTS'
TO COUNTERCLAIM

1 where Counter-Defendant is aware that Counter-Plaintiff and its officers regularly
2 engage in criminal activity in connection with its criminal spamming enterprise. Counter-
3 Defendant otherwise deny the remaining allegations of this paragraph.
4

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6 **JURISDICTION AND VENUE**

7 2. Admit.

8
9 3. Counter-Defendant admits that venue is proper in this Court, but denies the
10 remaining allegations.

11 4. Counter-Defendant admits that Counter-Plaintiff is an e-mail based marketing
12 company. Counter-Defendant denies that Counter-Plaintiff has ever obeyed any
13 marketing related law. Counter-Defendant otherwise deny the remaining allegations of
14 this paragraph.
15

16 5. Counter-Defendant denies that their marketing is only directed to persons “opting
17 in.” Counter-Defendants is without knowledge or information sufficient to form a belief
18 as to the remaining allegations of this paragraph, therefore he denies them.
19

20 6. Counter-Plaintiff is known by many people, including district Court judges, to
21 send unsolicited commercial e-mail aka spam. Counter-Defendant otherwise deny the
22 remaining allegations of this paragraph.
23

24 7. Admit.
25
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COUNT I - DEFAMATION

1
2 8. Counter-Defendant hereby incorporates by reference the responses contained
3
4 within paragraphs 1 through 7, inclusive, as if the same were fully set forth herein.

5 9. Counter-Defendant admits that at some time in the past that statement existed on
6 Counsel's web site. Counter-Defendant further admits that he does not like liars or
7
8 bullies. Counter-Defendant otherwise deny the remaining allegations of this paragraph.

9 10. Counter-Defendant denies that quote is attributable to him. Counter-Defendant
10 denies that this statement was made regarding Counter-Plaintiff. Counter-Defendant
11 denies that the statement is false as David Linhardt has made intentional
12
13 misrepresentations to both this Court and the Spamhaus Court. Counter-Defendant
14 otherwise deny the remaining allegations of this paragraph.

15 11. Denied.

16 12. Plaintiff admits that he made a statement to and about David Linhardt, and that
17
18 an accurate copy of that statement is contained within Exhibit B of the counter-Claim.
19 Counter-Defendant otherwise deny the remaining allegations of this paragraph.

20 13. Plaintiff admits that Exhibit B of the counter-claim is an accurate copy of the
21
22 statement made to and about David Linhardt. Counter-Defendant otherwise deny the
23 remaining allegations of this paragraph.

24 14. Counter-Defendant admits spam can be illegal. Counter-Defendant otherwise
25
26 deny the remaining allegations of this paragraph.

1 15. Counter-Defendant admits that Exhibit C to the counter-claim is an is an
2 accurate copy of the statement made to David Linhardt. Counter-Defendant otherwise
3 deny the remaining allegations of this paragraph.
4

5 16. Denied.

6 17. Denied.

7 18. Counter-Defendant admits that Exhibit D to the counter-claim is an is an
8 accurate copy of the statement made to and about David Linhardt. Counter-Defendant
9 otherwise deny the remaining allegations of this paragraph.
10

11 19. Denied.

12 20. Denied.

13 21. Denied.

14 22. Denied.

15 23. Denied.
16
17

18 **COUNT II - ABUSE OF PROCESS**

19 24. Per the ruling of this Court, this cause of action is stricken. Therefore, Counter-
20 Defendant is not required to respond to paragraphs 24 though 37 (misnumbered as
21 paragraphs 21-34, starting on page 6, line 18).
22
23

24 **FIRST AFFIRMATIVE DEFENSE**

25 25. Counter-Plaintiffs' counterclaim fails to state a claim upon which relief may be
26 granted.
27

28 **SECOND AFFIRMATIVE DEFENSE**

1
2 26. Counter-Defendants activities are protected by the First, Fifth, and Fourteenth
3 Amendments to the United States Constitution, guaranteeing the right to freedom of
4 speech, press, and expression.

5
6 27. Counter-Plaintiffs has repeatedly filed and dismissed this type of lawsuit against
7 individuals who expose its practice of both legal and illegal spamming.

8 28. In fact, Counter-Plaintiff filed, and later dismissed the same type of lawsuit
9 against Counter-Defendant, in 2007.

10
11 **THIRD AFFIRMATIVE DEFENSE**

12 29. Counter-Plaintiff solely filed this counterclaim for improper purposes.

13 30. Counter-Plaintiff attempted to use this counterclaim to extort a dismissal of the
14 libel claim against Counter-Plaintiff.

15
16 31. Counter-Plaintiff is using this counterclaim to discover of the operations of
17 Spamhaus. Counter-Plaintiff requested discovery of communications between Counter-
18 Defendant and Spamhaus for a time period prior to the existence of Counter-Plaintiff.

19
20 32. Counter-Defendant believes that parties unknown are funding Counter-Plaintiffs
21 in this litigation, and other litigation against people who oppose spam in an effort to
22 silence people who oppose spam.

23
24 33. Counter-plaintiffs have filed this counterclaim in retaliation for William
25 Silverstein having exercised his rights of free speech to intimidate him and other spam
26 victims from exercising their rights, and thus constitutes abuse of process.

27 **FOURTH AFFIRMATIVE DEFENSE**

1 34. Counter-Defendant was mistaken due to wrongful acts of others.

2 35. Counter-Defendant was mistaken, as any ordinary prudent person would be, due
3 to the “spoofing” of e-mails.
4

5 36. Spoofing is the forging of information contained within, or the entire, e-mail to
6 make it look like it was sent from a party that did not send it.

7 37. Counter-Plaintiff stated that it has been spoofed in the past.

8 38. Counter-Plaintiff stated that the complained of e-mails were spoofed to make it
9 appear to have been sent from it.
10

11 39. This spoofing caused Counter-Defendant to reasonably believe that he received
12 spam from Counter-Plaintiff.
13

14 40. Where Counter-Defendant reasonably believe that he received spam from
15 Counter-Plaintiff, and then was told by an officer of Counter-Plaintiff that they never sent
16 him e-mail, Counter-Defendant reasonably believed that Counter-Plaintiff lied to him.
17

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19 **FIFTH AFFIRMATIVE DEFENSE**

20 41. Counter-Defendant was mistaken, as any ordinary prudent person would be, due
21 to the unclean hands of Counter-Plaintiff.
22

23 42. Counter-Plaintiff used anonymous domain name registrations in commercial
24 ventures, a behavior commonly associated.

25 43. Counter-Plaintiff intermingles its multiple shell companies to conduct business, a
26 behavior associated with spammers.
27
28

1 44. Counter-Plaintiff employs David Linhardt, a known liar and perjurer, as its
2 president.

3
4 45. Counter-Plaintiff intermingles its identify with the identify of a known liar and
5 perjurer, David Linhardt.

6 46. Counter-Plaintiff, or one of its shell companies, used the Atriks, a service
7 specifically designed to bypass spam filters by hiding the true sender IP address of an e-
8 mail.
9

10 **SIXTH AFFIRMATIVE DEFENSE**

11 47. All the complained of statements are not made about Counter-Plaintiffs, but were
12 made to and about David Linhardt – not a party to this action.
13

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15 **SEVENTH AFFIRMATIVE DEFENSE**

16 48. The complained of statements on Counter-Defendant’s counsel’s web site were
17 not published by Counter-Defendant.
18

19 49. Insomuch as the aforementioned complained of statements were spoken to
20 Counter-Defendant’s counsel, those discussion are privileged under California Civil
21 Code § 47 as these alleged communications between Counter-Defendant and his counsel
22 were made in good faith anticipation of litigation.
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1 **EIGHTH AFFIRMATIVE DEFENSE**

2 50. All statements made about Counter-Plaintiffs are true, including but not limited
3 to:

- 4
- 5 a. statements that Counter-Plaintiff is a liar;
 - 6 b. statements that Counter-Plaintiff is a spammer;
 - 7 c. statements that imply that Counter-Plantiff violate the law, as Counter-
8 Plaintiffs are in fact criminals;
 - 9
 - 10 d. Counter-Plaintiff regularly and knowing violates criminal statute, 18
11 U.S.1037(a)(4), by sending commercial e-mails in conjunction with domain
12 names with falsified registration information.
 - 13
 - 14 e. and, statements that Counter-Plaintiffs are being sued for illegal spamming.
 - 15

16 **NINTH AFFIRMATIVE DEFENSE**

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18 51. The statements complained of by Counter-Plaintiffs, the statements were
19 opinions based on disclosed facts.

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21 **TENTH AFFIRMATIVE DEFENSE**

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23 52. Prior to any statement by Counter-Defendant, Counter-Plaintiff had a reputation
24 of being a spammer therefore, Counter-Defendants statements could not have caused any
25 harm to Counter-Plaintiff.

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1 **ELEVENTH AFFIRMATIVE DEFENSE**

2 53. Counter-Plaintiff suffered no damage to its reputation as a result of statements of
3 made by Counter-Defendants as that any harm to Counter-Plaintiff's reputation is caused
4 by others who are not a party to this action.
5

6 54. In fact, Counter-Plaintiff has stated, under oath, that Spamhaus case, has caused
7 over \$30,000,000.00 in damages to it referring to it as a spammer.
8

9 55. Counter-Plaintiff has alleged that it suffered damages by other individuals who
10 referred to it as a spammer.

11 56. Counter-Plaintiff has alleged that Comcast Corporation causes it over
12 \$13,500,000.00 per year in damages as a result of Comcast blocking e-mails from
13 Counter-Plaintiff.
14

15 57. Therefore, any damages to Counter-Plaintiffs are caused by other persons, not by
16 Counter-Defendant.
17

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19 **TWELFTH AFFIRMATIVE DEFENSE**

20 58. Counter-Defendant are informed and believe and thereupon allege that if it
21 should be found that he is in any manner legally responsible for injury or damages,
22 allegedly, sustained by Counter-Plaintiff, which allegation is not admitted but merely
23 stated for the purpose of this defense, that any such damages or injuries found to have
24 been incurred or suffered by Counter-Plaintiff in this action were proximately contributed
25 to by other persons or entities not parties to this action. It is necessary that the
26 proportionate degree of negligence or fault of each of said other persons or entities,
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1 whether parties to this action or not, be determined and apportioned; and that any
2 judgment that might be rendered against Counter-Defendant reduced not only by that
3 degree of comparative negligence and/or assumption of the risk found to exist as to
4 Counter-Plaintiff, but also as to the total degree of negligence and/or fault found to exist
5 as to said other persons or entities. If these answering defendants are required to pay any
6 amount in excess of these answering defendants' proportionate degree of comparative
7 fault, if any, then these answering defendants are entitled to recover from the other
8 defendants, and each of them, the amount of said excess paid.
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13 **THIRTEENTH AFFIRMATIVE DEFENSE**

14 59. Defendants failed to mitigate damages.

15 60. Counter-Plaintiffs failed to terminate the employment of David Linhardt who is
16 known to regularly perjure himself in litigation. Linhardt is known to regularly lie both in
17 doing business and in litigation. Counter-Plaintiff terminating an employee who is known
18 to regularly lie and to commit perjury would indicate to the public that the Counter-
19 Plaintiff does not tolerate such activity thus eliminating, or reducing, alleged harm caused
20 by Counter-Defendants statements that Counter-Plaintiff lies.
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23 61. Counter-Plaintiff continues using activities that are commonly associated with
24 spammers, that have no legitimate business purpose, ie. using anonymous domain name
25 registrations.
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1 **FOURTEENTH AFFIRMATIVE DEFENSE**

2 62. The statements made by Counter-Defendant is based on documents filed with the
3 Court in the course of litigation. Counter-Defendant has no less right to discuss and
4 comment on those documents and the underlying controversy without being sued for
5 defamation than has any other individual or entity.
6

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8 **FIFTEENTH AFFIRMATIVE DEFENSE**

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10 63. That the Counter-Plaintiff's own conduct, lack of reasonable care, and
11 comparative fault in and about the matters alleged in Counter-Plaintiff's complaint was
12 the sole and proximate cause of the happening of the incident and the loss and damages
13 complained of, if any there were, and said conduct, lack of reasonable care, and
14 comparative fault on the part of the plaintiff bars plaintiff's recovery. In the alternative,
15 plaintiff's conduct, lack of reasonable care, and comparative fault in and about the matters
16 alleged in the complaint proximately contributed to the happening of the incidents and to
17 the loss and damages complained of, if any there were, and said conduct, lack of
18 reasonable care, and comparative fault on the part of the plaintiff requires that any
19 damages awarded plaintiff shall be diminished, as required under the laws of the State of
20 California, in proportion to the amount of fault attributed to said plaintiffs.
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24 64. Counter-Plaintiff brought this harm on themselves by engaging in activities that aa
25 spammer would engage in.
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27 65. Counter-Plaintiff registered domain names in a manner that hides the true user of
28 the domain names, a common behavior of spammer.

1 66. Counter-Plaintiff use large numbers of domain names, a common behavior of a
2 spammer.

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4 67. Counter-Plaintiff use several different companies to hide the use of its IP space,
5 a common behavior of an illegal spammer.

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7 **SIXTEENTH AFFIRMATIVE DEFENSE**

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9 68. Counter-Plaintiff is not entitled to special damages where Counter-Plaintiff
10 never requested a retraction.

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12 **SEVENTEENTH AFFIRMATIVE DEFENSE**

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14 69. Counter-Plaintiff's claims are barred by the doctrines of waiver and estoppel.

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16 **EIGHTEENTH AFFIRMATIVE DEFENSE**

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18 70. Counter-Defendant's statements contained within Exhibit D of the counterclaim
19 is privileged under the litigation privilege as this was a request for a retraction from the
20 Defendant of a libel claim .
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PRAYER FOR RELIEF ON THE COUNTER-CLAIM

WHEREFORE, Silverstein prays for judgment with respect to counterclaim as follows:

71. Judgment be entered in favor of Silverstein on the Counter-Claim.

72. Counter-Defendant be awarded its attorneys' fees and costs.

73. The Court declare that Counter-Plaintiff has unclean hands because (i) that e360Insight sends spam, (ii) that e360Insight sends illegal spam, (iii) that e360Insight brings lawsuits for the purpose of silencing critics, and (iv) and made made fraudulent statements about its services to Silverstein and in its pleadings in this case.

74. Silverstein be awarded such other and further relief as may be just or equitable.

Dated: May 16, 2008

Respectfully submitted

By /s/ F. Bari Nejadpour
F. Bari Nejadpour
Attorney for William Silverstein