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

10 WILLIAM SILVERSTEIN, an
11 individual,

12 Plaintiff,

13 vs.

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

22 E360INSIGHT, LLC and
23 BARGAIN DEPOT ENTERPRISES,
24 LLC,
25 Counter-Plaintiffs,
26 vs.
27 WILLIAM SILVERSTEIN,
28 Counter-Defendant.

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

**COUNTER-DEFENDANT'S REPLY TO
DEFENDANTS'S OPPOSITION OF
PLAINTIFF'S SPECIAL MOTION TO
STRIKE COUNTERCLAIM PURSUANT TO
CALIFORNIA RULES OF CIVIL
PROCEDURE § 425.16 ANTI-SLAPP
STATUTE**

Date: April 7, 2008
Time: 10:00 am
Location: Courtroom 5

Honorable Christina A. Snyder

I. INTRODUCTION

A. Factual Summary.

On January 28, 2008, this Court granted the motion to add the instant counterclaim. At oral arguments, counsel for Silverstein stated that he would not be representing Silverstein in the Counterclaim. Outside the courtroom, both attorneys and Silverstein discussed the counterclaim, and indicated that Plaintiff will be in pro per, for the purpose of the Counterclaim.¹ Silverstein engaged in a telephonic LR 7-3 conference for this anti-SLAPP with counsel for Counter-Plaintiffs.² Silverstein, with assistance of Attorney Timothy Walton, drafted an anti-SLAPP motion, and submitted it to this Court on February 19, 2008. On February 28, 2008, the Court rejected Silverstein's attempts to file the anti-SLAPP motion in pro per. On February 28, 2008, both Counsel discussed the anti-SLAPP motion. Counter-Plaintiffs, took the position that the prior LR 7-3 conference with Silverstein was insufficient. Counter-Defendant took the position that it was sufficient, as one should not be required to repeat a LR 7-3 if new counsel was substituted in, prior to the motion being filed. Regardless, counsel for counter-Plaintiffs had a copy of the proposed motion in his possession since mid February. Despite this, Counter-Plaintiff provided no substantive argument against the proposed, almost identical motion.

B. Summary of argument.

1. Until February 28, 2008, all parties, and Counsel were operating under the assumption that Mr. Silverstein would be litigating the counterclaim in pro-per. Plaintiff does not insinuate that Kish's LR 7-3 discussions on February 6th, 7th of this year with Silverstein was improper.

2. While Silverstein took the position that Kish didn't understand e-mail, and that the redacted field was not relevant to the litigation. Silverstein offered to provide un-redacted copies, subject to a stipulated protective order, Kish never signed the proffered stipulation.

1 Silverstein LR 7-3 conference with Kish and providing him with the proposed anti-
 2 SLAPP motion more than three weeks before the motion was filed is sufficient meet and
 3 confer under LR 7-3. Even so, the 5 day requirement waiting period requirement of LR 7-3,
 4 applies where the anti-SLAPP motion is subject to two time limits, both the 60 day limit of
 5 California Code of Civ. Proc. § 425.16(f), and the time to respond to the pleading.
 6

7 Counter-Plaintiffs have not established their likelihood of success where Counter-
 8 Defendant has submitted sufficient un rebutted evidence establishing both the truth of
 9 Counter-Defendant's, the fact that e360Insight is A Limited Purpose Public Figure, and had
 10 already earned reputation of being a spammer prior to any statement by Silverstein.
 11

12 **II. Argument**

13 **A. Counter-Defendant's meet and confer was proper.**

14 Counter-Plaintiff is attempting to promote form over substance, while using twisted
 15 logic to claim that the meet and confer was insufficient. Here, both the rule and the spirit
 16 were complied with.³
 17

18 **1. Silverstein's discussion with Kish was sufficient.**

19 For over two hours of telephone conference Silverstein not only discussed technical
 20 issues with Kish, counsel for Counter-Plaintiffs', but discussed the legal issues involved.⁴
 21 There was no objection to the four exhibits attached to Silverstein's anti-SLAPP motion,
 22 which was submitted with the instant motion. Arguendo, even if Silverstein didn't
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26 3. Unlike Defendants' motion for summary judgment in which the meet and confer was
 27 essentially, "I'm going to file a summary judgment motion." See Nejadpour decl. *Exhibit A*.

28 4. Mr. Kish's evaluation of Silverstein's understanding of the issues in this case is incorrect. In
 my opinion, Silverstein has a clear grasp of the all issues involved.. See Nejadpour decl. ¶ 7.

1 understand the rules of evidence, that would not impact the issue of litigation privilege as it
2 applied to the abuse of process claim. Later, Kish was provided with a anti-SLAPP motion
3 written by Silverstein.
4

5 **2. Counsel's continuation of the meet and confer was superfluous.**

6 Counsel for counter-Plaintiffs rehashed the same issues that had already been
7 discussed with Silverstein, with counsel for counter-Defendant. While Counter-Defendant
8 took time to provide Counter-Plaintiffs with a "technical explanation" for liability, it is not
9 required. Counter-Plaintiffs, pursuant to FCRP 11, was required to examine their case
10 before filing their counterclaim, including consulting with an expert on the e-mails
11 provided to counter-Plaintiff in August 2007. Counter-Defendant's expert examined the e-
12 mails attached to this motion, and to Mr. Kish's declaration attached to the summary
13 judgment motion and determined the spam to be authentic and the redacted portions to be
14 irrelevant to the instant case.⁵ One would expect that counter-Plaintiff would retain their
15 own expert to analyze the e-mails and confirm any technical explanation that Silverstein
16 provides. Counter-Plantiff had a copy of the proposed motion and samples of the
17 complained of e-mails since mid February, but failed to provide any substantive argument
18 against the proposed anti-SLAPP motion.⁶
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25 5. Dr. Levine literally wrote the book on Counter-Defendant's mail server. He not only opined
26 that there is no indication of forgery, but he stated that the redacted information was solely for
27 internal routing and would not interfere with Counter-Plaintiff's ability to analyze the e-mails.

28 6. See Kish's declaration submitted with the opposition to the instant motion ¶¶ 20, 21
complaining that the brief Kish was provided with in mid February is almost identical to the instant
motion.

1 Counter-Plaintiff only offered to drop the cause of action for abuse of process the day
2 of filing their opposition.

3 **3. The anti-SLAPP motion is subject to the 5 day meet and confer**
4 **requirement.**

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6 The purpose of the five day rule is to prevent the expiration time limits while waiting
7 for such conference be complete. While the anti-SLAPP motion is not specifically
8 described FCRP, there are time limits on bringing this motion.⁷ Counter-Plaintiff does not
9 present authority that addresses the question of time limited state law motions under the
10 FCRP.
11

12 **B. Counter-Plaintiffs Concede That The Counterclaim Arise From Protected**
13 **Activities and In A Public Forum, Therefore Meeting the Threshold**
14 **Requirement Under California Code of Civil Procure § 425.16**

15 Since Counter-Plaintiff do not dispute this, they therefore, concede these points.
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19 **C. e360Insight Cannot Prevail on its Defamation Claim.**

20 e360Insight is a limited purpose public figure, in regards to the issue of spam. E360
21 placed itself into the public controversy by talking to the press, making public postings in a
22 public forum (a UUNET newsgroup), and posting press releases onto its own web site.
23

24 E360 presents no evidence that disputes the evidence of Counter-Defendant which
25 establishes that: (1) e360's president has lied; (2) counter-Defendant received spam that he
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28 7. Not only the limit is contained within the statute itself, as a first response to a complaint, the time limits for filing an answer or rule 12 motion applies. Counter-Plaintiff specifically referred to this limit, as had not filed a request to default Counter-Defendant.

1 believed to be from Counter-Plaintiff; (3) that Counter-Plaintiff is being sued for sending
2 illegal spam; (4) that Counter-Defendant ever stated that e360, as opposed to Linhardt, is a
3 liar, and then if it was said, it was said to noone other than his attorney; (5) that e360 has
4 not thrust itself into the controversy of spam. The only evidence in rebuttal that e360
5 provides are self serving declarations.
6

7 Where Counter-Plaintiffs are public figures, to prevail on the defamation claim, they
8 have to show that not only are the statements factually false, that Silverstein knew or
9 should have known that the statements are false. Even if counter-Plaintiffs are not public
10 figures, they have to establish that Silverstein was negligent in determining that they are
11 spammers.
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14 **1. e360Insight is a limited purpose public figure.**

15 e360Insight, through their president, pushed their way into the forefront of the
16 spamming issue. Counter-Plaintiffs falsely claim that they are not public figures because
17 their public exposure was solely because they were dragged into the public forum to
18 respond to accusations. Counter-Plaintiffs ignore their own web site postings, multiple
19 intentional contacts with the news media, and non-responsive postings to news groups.
20

21 David Linhardt, president of e360Insight, on multiple occasions, actively sought the
22 spotlight on the issue of spam and his default judgment against Spamhaus.⁸ Their own
23 newsgroup postings, their own web site postings on the spam issues, and interviews with
24 news publications make them a limited purpose public figure. Rudnick v. McMillan (1994)
25 25 Cal.App.4th 1183, 1189–1191 [31 Cal. Rptr. 2d 193] [individual who sought publication
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8. Please see Exhibits A-D of Plaintiff's request for supplemental judicial notice.

1 of two articles himself a limited purpose public figure]; Denney v. Lawrence (1994) 22
2 Cal.App.4th 927, 933–936 [27 Cal. Rptr. 2d 556][individual giving press interviews about a
3 controversy was a limited purpose public figure]. Counter-Plaintiffs’ action of posting their
4 new release on the e360Insight web site is sufficient to make them a limited purpose public
5 figure. Ampex Corp. v. Cargle, 128 Cal. App. 4th 1569, 1578 (Cal. Ct. App. 2005).
6

7 Both of Counter-Plaintiff’s contention that it was only responding to posts in the
8 newsgroup, and that the only channel of communications with Silverstein was posting in
9 the newsgroup are, or one could say are lies. Linhardt’s newsgroup posting of June 28, 2007,
10 giving rise to Silverstein’s libel claim, was not a response, but a boasting of this Court’s
11 granting e360's motion to dismiss.⁹ Silverstein’s e-mail address was available to Linhardt,
12 as it was to any reader of Silverstein’s newsgroup postings.¹⁰ Linhardt’s Janury 26, 2007
13 e-mail to Silverstein establishes that falsity of that contention.¹¹
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16 **2. E360 is a liar, there is no evidence that Silverstein referred to**
17 **e360Insight as a liar, and Silverstein’s publication of that statement**
18 **was privileged.**
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25 9. A copy of this posting was attached to Defendants Motion to Dismiss the First Amended
26 Complaint.

27 10. When a newsgroup posting is made, the posters e-mail address is included as part post. See
28 Silverstein decl. ¶ 3.

11. See Exhibit B of Silverstein’s declaration submitted with the motion. (ECF document
54-2, page 10)

1 Counter-Plaintiffs provide no evidence that Silverstein published a statement that
2 e360Insight is a liar. Arguendo, even if Silverstein made such statement to his attorney, that
3 statement would be covered by the litigation privilege.¹²
4

5 Counter-Plaintiff puts forth no evidence that it never lied.¹³ Counter-Plaintiff puts
6 forth no evidence that Silverstein referred to e360 as a liar, except possibly to his attorney.

7 Counter-Plaintiffs' reliance on Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 is
8 misplaced in that the Court said
9

10 "The clear impact in some nine sentences and a caption is that [Milkovich] 'lied
11 at the hearing after . . . having given his solemn oath to tell the truth.'" Scott, 25
12 Ohio St. 3d at 251, 496 N.E.2d at 707. This is not the sort of loose, figurative, or
13 hyperbolic language which would negate the impression that the writer was
14 seriously maintaining that petitioner committed the crime of perjury." Ibid.

15 In Milkovich, there is no spectrum of untruths as in Underwager v. Channel 9 Austl., 69
16 F.3d 361, 367 (9th Cir. 1995).
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23 12. Counter-Defendant's attorney is a clearly participant in this litigation, thus privileged under
24 section 47. Rothman v. Jackson, 49 Cal. App. 4th 1134 (Cal. App. 2nd 1996).

25 13. There is no basis that Silverstein said that e360Insight lied in this litigation, but even if he
26 had, that statement is true. Linhardt stated under oath, "that Mr. Silverstein refused to provide his e-
27 mail address and the only way e360 could communicate with Plaintiff was through postings on the
28 message board." Where Linhardt claimed that it didn't have Silverstein's e-mail address, but did e-
mail Silverstein litigation See ¶ 18 of Linhardt's declaration in support of e360's opposition to this
motion. (ECF document 57-3, page 5). Also see, Exhibit B of Silverstein's declaration submitted
with the motion. (ECF document 54-2, page 10)

1 **3. Counter-Plaintiffs put forth no credible evidence that they are not a**
2 **spammer.**

3 Silverstein produced un rebutted evidence that he received spam sent on behalf of or
4 by counter-Plaintiffs. Silverstein's un rebutted expert clearly establishes that e360/BDE
5 engage in practices common to spammer.
6

7 Not only are the two spam samples provided in support of this motion un rebutted, but
8 a highly qualified expert, Dr. Levine, has stated that these e-mails are from a normally
9 functioning Qmail server with no indications of tampering.¹⁴ By identifying methods to
10 hide the sender IP address, one of which has been used by them, Dr. Levine also debunks
11 the Counter-Plaintiffs/Defendants' unsupported claim that the IP addresses are not there,
12 and the spam could not have been sent by them. This is especially true where there is
13 evidence that Counter-Plaintiff's used the Atriks service, one of the identified methods to
14 hide the sender IP address.¹⁵
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17 Counter-Plaintiffs admit engaging in business practices that are associated with
18 sending spam, as opposed to solicited e-mails. Counter-Plaintiff admits, in their summary
19 judgment motion, they register domain names with hidden information, using Moniker's
20 privacy service. Counter-Plaintiffs admit to using large number of domain names in e-
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26 14. Dr. Levine explicitly states that the redacted portion of the e-mail is irrelevant to this action
27 and does not interfere with e360's Counter-Plaintiff/Defendants' ability to track the e-mails. Clearly
28 rebukes Counter-Plaintiff/Defendants' cries that they need unredacted e-mails.

15. See Levine decl. ¶¶ 20, 21, and Silverstein Exhibit E, submitted with this reply.

1 mailing.¹⁶ Defendants admits that they have sent spam, as they found it was difficult to
2 convert to the to a double opt-in process.¹⁷

3 There are many people who receive spam from Counter-Plaintiffs.¹⁸ Counter-
4 Defendant is not the only person who complained of spam from counter-Plaintiffs.
5

6
7 **4. Counter-Plaintiffs put forth no credible evidence that their**
8 **reputation has been harmed.**
9

10 E360 admits that it is known as a liar, independent of any statement by Silverstein.
11 (See Linhardt decl. ¶ 7). Prior to any statement by Counter-Defendant, Counter-Plaintiffs
12 already earned their reputation as spammers.¹⁹
13

14 Counter-Plaintiffs put forth no evidence that people interchangeably associate spam
15 with illegal activity. However, is it undisputed that people despise spam - regardless of its
16 legality. (See Levine decl. ¶¶ 17-19).
17

18
19 **D. Abuse of Process Claim should be Stricken.**

20 Counter-Plaintiffs do not dispute the impropriety of their abuse of process claim. They
21 only argue that is should not be stricken, as they were going to dismiss anyway in order to
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24 16. See Levine decl. ¶ 19, Set1 of Exhibit A, of the FAC. Also see Cahn decl in support of
25 summary judgment ¶ 8, and Linhardt decl in support of summary judgment ¶¶ 38-40. (ECF
documents 56-3 and 56-2 respectfully).

26 17. See Exhibit E of Silverstein's declaration submitted in reply to Counter-Plaintiffs' opposition
27 to dismiss.

28 18. See Levine decl. ¶ 25, Ferguson decl., and Ferron decl..

19. See Levine decl. ¶ 26, Ferguson decl., and Ferron decl.

1 bring it later. Counter-Plaintiffs should not be allowed to play brinkmanship as they have
2 done in the past with individuals. (See Plaintiff's request for judicial notice, **Exhibits A, B,**
3 **and D**).

4
5 **III. CONCLUSION**

6 Counter-Defendant has met his burden to prevail on this motion, Counter-Plaintiffs
7 have not. It is undisputed that this is a public issue and the discussion occurred within a
8 public forum. To prevail, counter-Plaintiffs are required to establish that Silverstein knew,
9 or should have known, that, counter-Plaintiffs are not spammers. Counter-Plaintiffs' self
10 serving declaration claiming they do not spam has been thoroughly debunked by competent
11 evidence. This competent evidence shows that Counter-Plaintiff do in fact send spam.
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13
14 Counter-Plaintiff's provides no substantive opposition to striking the abuse of process
15 claim.

16 Attorney fees and costs associate with a successful anti-SLAPP motion is mandatory
17 under CCP § 425.16(b), even if the counter-Plaintiffs voluntarily dismisses. Therefore,
18 counter-Defendant is entitled to fees. Coltrain v. Shewalter, 66 Cal. App. 4th 94. Counter-
19 Plaintiffs' arguments regarding the fees are without merit.
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22
23 Dated: March 31, 2008

24 Respectfully submitted,

25 By: /s/ F. Bari Nejadpour
26 F. Bari Nejadpour, Attorney for
27 William Silverstein
28