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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)

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

Date: June 25, 2007
Time: 10:00 am
Location: Courtroom 5
Honorable Christina A. Snyder

15 Plaintiff William Silverstein, by and through his attorney of record, opposes to
16 Defendants' Motion To Dismiss as follows:

17 **I. Introduction**

18 This case involves a resident of California, William Silverstein, a software developer
19 who has been a regular user of the internet since 1995, Mr. Silverstein provides internet
20 access services to a group of customers. Mr. Silverstein now seeks to enforce his rights under
21 the State and Federal anti-spam statutes in an effort to slow the tide of what has become the
22 bane of internet users, and particularly of internet access/service providers, unsolicited
23 commercial electronic email, aka "spam".
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1 Defendants Linhardt and Moniker seeks to dismiss this complaint pursuant to FRCP
2 12(b)(2). All Defendants seek to dismiss the complaint pursuant to FRCP 12(b)(6), and to
3 strike the punitive damages provisions of the complaint pursuant to FCRP 12(f).
4

5 Defendants violated FCRP 5(d) when they fraudulently claimed to have served this
6 motion upon Plaintiffs counsel on May 7, 2007 prior to filing the instant motion. Even if the
7 Court ignored Defendants flagrant lack of conformance to LR 11-8 and Defendants failure
8 to properly serve the instant motion upon Plaintiff, the Court should find that the complaint
9 is sufficient on its face and find no merit to Defendants' motion.
10

11 **II. Relevant Factual Background**

12 Unsolicited commercial email messages sent over the Internet are known as "spam."
13 (Intel Corp. v. Hamidi, 30 Cal.4th 1342, 1348 (2003) (citing Ferguson v. Friendfinders, Inc.,
14 94 Cal.App.4th 1255, 1267 (2002))). Plaintiff is an individual that resides in Los Angeles, and
15 also is and an ISP with servers located in Los Angeles California. Plaintiff received spam
16 from Defendants advertising web sites located at domains that are owned by Defendant
17 Moniker.
18

19 **III. Relevant Procedural History**

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21 Defendants removed the instant case to this Court on April 30, 2007. Defendants filed
22 the instant motion on May 7, 2007, the last day to file a response pursuant to FCRP 81(c).
23 After filing of this motion, Defendants then improperly served Plaintiff a Court stamped
24 copy of this motion by mail on May 8, 2007, not May 7th, contrary to the declaration of
25 mailing.¹ On May 14, 2007 Defendants E360Insight ("E360") and Linhardt filed a libel
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1. Please see declaration of F. Bari Nejadpour, ¶¶ 1-4.

1 claim against Silverstein, and other individuals, for publically stating that E360 and Linhardt
2 sends unsolicited commercial e-mail ("spam") in the Cook County Law Court of Illinois.

3
4 Plaintiff recognizes that he did not provide much detail of the wrongful acts by
5 Defendant Moniker, Plaintiff is willing to amend the complaint to detail Moniker's wrongful
6 acts.

7 Even if the Court ignored Defendants' procedural errors, Defendants motion is
8 without merit and should be denied.

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11 **IV. ARGUMENT**

12 **A. There is Jurisdiction over Moniker and Linhardt**

13 The starting point for an analysis of personal jurisdiction is the forum state's long arm
14 statute. California Code of Civil Procedure § 410.10 sets forth this state's long arm statute
15 and provides that, "a court of this state may exercise jurisdiction on any basis not
16 inconsistent with the Constitution of this state or of the United States."California recognizes
17 two methods in which the minimum contacts requirement may be satisfied -- general and
18 specific.
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21 A nonresident defendant may be subject to the general jurisdiction of the forum if his
22 or her contacts in the forum state are "substantial ... continuous and systematic." In such a
23 case, "it is not necessary that the specific cause of action alleged be connected with the
24 defendant's business relationship to the forum." Such a defendant's contacts with the forum
25 are so wide-ranging that they take the place of physical presence in the forum as a basis for
26 jurisdiction.
27

28 A court may exercise specific jurisdiction over a nonresident defendant only if:

1 (1) "the defendant has purposefully availed himself or herself of forum benefits";
2 (2) "the 'controversy is related to or "arises out of" [the] defendant's contacts with
3 the forum"; and (3) "the assertion of personal jurisdiction would comport with
4 "fair play and substantial justice." Pavlovich v. Superior Court, 29 Cal.4th 262, 269
(2002).

5 When a district court acts on a defendant's motion to dismiss under Rule 12(b)(2)
6 without holding an evidentiary hearing, the Plaintiff need make only a prima facie showing of
7 jurisdictional facts to withstand the motion to dismiss. Ballard v. Savage et al, 65 F.3d 1495
8 (1995). "[T]he plaintiff need only demonstrate facts that if true would support jurisdiction
9 over the defendant." Id, citing Data Disc, Inc. v. Systems Technology Assos., 557 F.2d 1280,
10 1285 (9th Cir. 1977). The facts are viewed in the light most favorable to the Plaintiffs.
11 Compuserve Inc. v Patterson, 89 F.3d 1257, 1262, (6th Cir. 1996), citing Theunissen v.
12 Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991). "Furthermore, a `court disposing of a 12(b)(2)
13 motion does not weigh the controverting assertions of the party seeking dismissal,' ... because
14 we want `to prevent non-resident defendants from regularly avoiding personal jurisdiction
15 simply by filing an affidavit denying all jurisdictional facts.' Id at 1459 (emphasis added).
16 Dismissal in this procedural posture is proper only if all the specific facts which the plaintiff
17 alleges collectively fail to state a prima facie case for jurisdiction. Id. Unless directly
18 controverted, the plaintiff's version of the facts is taken as true. Doe v. Unocal, Corp., 248 F.
19 3d 915, 922 (9th Cir. 2001).

20 Conflicts in the evidence set forth in the parties' affidavits must be resolved in the
21 Plaintiff's favor. Id. Here, Plaintiff has clearly met his burden, and Defendant's Motion
22 should be denied.
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28 **1. There is both General and Specific Jurisdiction over Moniker**

1 Gator.com Corp. v. L.L. Bean, Inc., 341 F.3d 1072, 1079 (9th Cir. 2003) clearly
2 establishes general jurisdiction over Moniker in California when it said.

3
4 “[E]ven if the only contacts L.L. Bean had with California were through
5 its virtual store, a finding of general jurisdiction in the instant case would be
6 consistent with the ‘sliding scale’ test that both our own and other circuits have
7 applied to internet-based companies.”

8 Defendant Moniker owns the domain names that were advertised by the spam at issue
9 in this case. Moniker then leased these domains to the other Defendants.² Moniker does not
10 dispute that it “regularly and systematically solicit business from and conducts business with
11 California residents” and “operates highly interactive web sites that are specifically
12 programmed to conduct business with California residents.” Additionally, Moniker has sent
13 its sales people to California to solicit business from a booth at a trade show in San
14 Francisco.³

15
16 Moniker is also subject to specific jurisdiction in the instant case. Moniker does not
17 deny any allegation on the complaint. The harm complained of in this case is from the illegal
18 spam being sent to Plaintiff and through Plaintiff’s servers located in Los Angeles California
19 advertising Defendants’ web sites.⁴ The nature of Moniker’s private domain name
20 registration service causes the domain names owned by Moniker (also referred to as
21 registered domain name holder) , the same domain names that are being advertised in the
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25 2. Moniker’s privacy service operates by taking ownership of the domain name, and then
26 leasing the domain name to their customer for a fee, while keeping the identity of the actual and
27 current domain name lessor a secret.

28 3. See declaration of Joseph Wagner.

4. See Plaintiff’s complaint paragraphs 12, 29, and 50. The domain names are owned by
Defendant Moniker and operated by the other Defendants.

1 complained of spam. Even if the Court were to ignore the domain name owners, Moniker
2 has agreed to accept plain facts and publically available ("WHOIS") ownership records for
3 the specific domain names used in the spam e-mail messages at issue in this case, Moniker
4 has contractually agreed with ICANN (the International organization that licenses all
5 Internet domain name registrars, including Moniker) to accept liability for their illegal use of
6 Moniker's domain names in all instances where they (Moniker) fail to identify the current
7 lessor of the domain name .⁵
8

9
10 **2. There is both General and Specific Jurisdiction over Defendant**

11 **Linhardt**

12 Linhardt is subject to general jurisdiction in California. Despite his declaration to the
13 contrary, Linhardt maintains an office in Laguna Hills, has appointed an agent of service of
14 process at that office, and was served at that office – all in California. Additionally,
15 Defendant Linhardt, through his counsel, has filed a sworn declaration in a separate but
16 related federal case (06-CV-03958, now pending in Northern District of Illinois) to the effect
17 that he personally lost business and business opportunities in California due to actions of
18 Defendants in that separate case.
19

20
21 Linhardt's utilization of commercial mail receiving agency ("CMRA") in Laguna Hills as
22 his California office clearly implicates California Business and Professions Code Section
23 17538.5. That statute renders the Commercial Mail Receiving Agent ("CMRA") located at
24 Defendant Linhardt's California Busines address (23046 Avenida de la Carlota, Suite 600,
25

26
27 5. In its contract with ICANN, "A Registered Name Holder licensing use of a Registered
28 Name according to this provision shall accept liability for harm caused by wrongful use of the
Registered Name, unless it promptly discloses the identity of the licensee to a party providing the
Registered Name Holder reasonable evidence of actionable harm." Users of the internet are the
intended beneficiary of this contract.

1 Laguna Hills, CA 92653) Defendant Linhardt's agent for Service of Process within this state.
2 Furthermore, Defendant Linhardt's actions in contracting the aforementioned CMRA (Regus
3 Management Ltd.) as Linhardt's agent for Service of Process within the state must
4 necessarily, and by law, have been accompanied by Linhardt's knowing and willful
5 acceptance of California jurisdiction pursuant to 17538.5(f) which mandates that CMRAs
6 within the state obtain written acceptance of such jurisdiction from all of their customers.
7 Linhardt has been served at his Laguna hills address, thus is subject to jurisdiction in
8 California. *Burnham v. Superior Court of California*, 495 U.S. 604.⁶

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10
11 Furthermore, as noted above, Defendant Linhardt has admitted in a declaration to
12 another Federal Court, **that he personally** lost significant business and business
13 opportunities with with multiple California-domiciled corporations when Linhardt said,
14
15 “e360 and I also have had active and pending contracts cancelled as a result of
16 Spamhaus’ conduct. Contract that have been cancelled include SmartBargains,
17 Vendare Media, and OptinBig.” and “e360 and I also lost numerous opportunities
18 to obtained future work as a result of Spamhaus’ conduct.” and “ Lost business
opportunities include Net Blue, Cogent, Habeas, Yipes.”⁷

19 (Note that Vendare Media, Netblue, Habeas, and Yipes are all corporations whose principal
20 places of business are in California. See **Exhibits D, E.**)

21 Linhardt claims \$11,715,000.000 in losses to him and E360 involving seven corporate
22 entities, four of which based in California. Linhardt representations, to another federal court,
23 that he lost business and business opportunities with California residents makes abundantly
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27 6. Please see declarations of Lisa Coleston and the proofs of service. **Exhibit B.**

28 7. Please see Linhardt’s declaration, **Exhibit C**, ¶¶ 32, 33.

1 clear, in the Defendant Linhardt's own words, that he personally conducts business with, and
2 solicits business from California residents.

3
4 California Courts have specific jurisdiction personal over Defendant Linhardt. The
5 Complaint states that Linhardt was personally involved in the actions complained of.⁸ The
6 actions complained of are the transmission and/or procurement of illegal spam to Plaintiff,
7 and through Plaintiff's servers. As previously noted, both Plaintiff and his servers are located
8 in California, thus unambiguously conferring jurisdiction within this forum.

9
10 "Directors are jointly liable with the corporation and may be joined as defendants if
11 they personally directed or participated in the tortious conduct." *Seagate Technology v. A. J.*
12 *Kogyo Co.*, 219 Cal. App. 3d 696, 701-702 (Cal. Ct. App. 1990). The complaint alleges that
13 Defendant Linhardt is personally liable because he actively and personally participated in the
14 acts complained of, not that he, Linhardt, is merely vicariously liable for the acts of the
15 corporation. These specific and personal allegations, set forth within the complaint in the
16 instant case, renders Defendant Linhardt's reference to *Shearer v. Superior Court*, 70 Cal.
17 App. 3d 424 irrelevant.

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20 **B. The Complaint Sufficiently Pleads Both Causes of Action.**

21 Defendants Dismissal Of Actions Under Rule 12(b)(6) are disfavored - the Court
22 should consider only Plaintiff's allegations in a light most favorable to the non-moving party.
23 A complaint may be dismissed as a matter of law for only two reasons: (1) lack of a
24 cognizable legal theory or (2) insufficient facts under a cognizable legal theory. *Conley v.*
25 *Gibson*, 355 U.S. 41, 45-46 (1957); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530,
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8. See ¶¶ 5,8 of the verified complaint.

1 533 34 (9th Cir. 1984) (citing 2A J. MOORE, ET AL., MOORE'S FEDERAL PRACTICE
2 12.08 at 2271 (2d ed. 1982))) "A court may dismiss a complaint only if it is clear that no
3 relief could be granted under any set of facts that could be proved consistent with the
4 allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); see also *Argabright v.*
5 *United States*, 35 F.3d 472, 474 (9th Cir. 1994). Motions to dismiss generally are viewed with
6 disfavor under this liberal standard and are granted rarely. (*Gilligan v. Jamco Dev. Corp.*, 108
7 F.3d 246, 249 (9th Cir. 1997).) For purposes of a motion to dismiss, the Plaintiff's allegations
8 are taken as true, and the Court must construe the complaint in the light most favorable to
9 the Plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Argabright*, supra, 35 F.3d at
10 474. "[T]he central issue is whether, in the light most favorable to the plaintiff, the complaint
11 states a valid claim for relief." (*Hughes v. Tobacco Institute, Inc.*, 278 F.3d 417, 420-21 (5th
12 Cir.2001).). In fact, the complaint need not necessarily identify a particular legal theory at all.
13 *Williams v. Seniff*, 342 F. 3d 774, 792 (7th Cir. 2003); *Barrett v. Tallon*, 30 F. 3d 1296, 1299
14 (10th Cir. 1994). A claim will not generally be dismissed, even though the asserted legal
15 theories are not cognizable or the relief sought is unavailable, as long as other tenable legal
16 claims are evident on the face of the complaint, or the pleader is otherwise entitled to any
17 type of relief under another possible legal theory. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78
18 S.Ct. 99, 101-102, 2 L. Ed. 2d 80 (1957); See also *Barrett v. Talon*, supra. For purposes of a
19 motion under FRCP 12(b)(6), even the mere "possibility" of a cognizable claim is sufficient
20 to defeat dismissal. *Carparts Distrib. Ctr. v. Automotive Wholesaler's Ass'n. of Ne England,*
21 *Inc.*, 37 F. 3d 12, 17 (1st Cir. 1994).

22 Further, in considering a Rule 12(b)(6) motion, the court should be particularly hesitant
23 to dismiss at the pleading stage those claims asserting novel legal theories, where the claims
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1 could be better examined following the development of the facts through discovery. McGary
2 v. City of Portland, 386 F. 3d 1259, 1270 9th Cir. 2004); Baker v. Cuomo, 58 F.3d 814,
3 118-819 (2d. Cir. 1995).

4
5 Here, it is clear from a reading of Plaintiff's complaint that Plaintiff has easily satisfied
6 the requirements of pleading under FRCP 12(b)(6). Defendants complain that Plaintiffs
7 merely parroting the applicable statutory language in describing the statutory violations set
8 forth in the complaint. However, to the extent that is accurate, there is certainly nothing
9 wrong, or otherwise deficient in so doing. Plaintiff's claims are in fact statutorily based, and
10 the Statutes set forth the basic elements of a claim brought thereunder. Despite Defendants'
11 dissatisfaction with this style of complaint against them, it is patently appropriate to quote
12 from statutory language within the complaint. Furthermore, it is entirely disingenuous for
13 Defendant Linhardt to do so, given that Defendant Linhardt has himself filed, on multiple
14 occasions, vague boiler plate complaints accusing Plaintiff and others of slander in multiple
15 lawsuits in multiple courts.

18 **1. The Complaint Is Not for Fraud and Not Subject to the Pleading**
19 **Requirements under FCRP 9(b).**

20
21 The Heightened Pleading Requirements Of FRCP 9(b) does not apply to the Plaintiff's
22 claims under the statutes because the Plaintiffs' claims under the statutes are not
23 **"GROUNDED IN FRAUD."**

24 The Plaintiff's complaint does not allege fraud. Instead, the Plaintiff's complaint alleges
25 that the Defendant violated the provisions of California Business & Professions Code
26 17529.5 and certain provisions of the CAN-SPAM Act of 2003, 15 U.S.C. §7701 et seq.
27 (collectively referred to herein as the "Statutes"). FRCP 9(b) provides: "In all averments of
28

1 provides—”...“a valid physical postal address of the sender.”. 15 U.S.C.
2 §7704(a)(5)(A) and 15 U.S.C. §7704(a)(5)(A)(iii).

3 Accordingly, there is no requirement that the Plaintiff establish the elements of fraud to
4 prove a violation of the Anti-Spam Statutes, which do not require that anyone actually be
5 deceived, or defrauded by a particular offending e-mail. Where there is a right of action of
6 others besides the recipient, one the deceit is aimed at, there can be no requirement that
7 action being taken based on that deceit.
8

9 Neither § 17529.5 and CAN-SPAM have a requirement to for reliance on deception – a
10 requirement for a fraud claim. Senders utilizing using deceptive headers and subject lines are
11 doing so as to trick the recipient into opening the e-mail. Only an ISP or government agent
12 has a right of action under CAN-SPAM. § 17529.5 authorizes a recipient, an ISP, or a
13 government agent to bring an action. Where an ISP or government agent may bring an
14 action under these statutes, not the party that the deceit had been targeted at, there can be no
15 requirement of actual deception or reliance upon the deception – therefore the statutes
16 cannot be “grounded in fraud” and subject to FRCP 9(b) pleading requirements.
17

18 The Statutes do not require that the person sending an email that violates the Statute do
19 so with "the intent to deceive." The Statutes do not require that the recipient of an email
20 that violates the statute take any "action" in "reliance upon the [mis]representation." In
21 short, the Statutes require virtually none of the scienter, intent, damages, or interplay
22 between the actors, that are all required in an action for fraud.
23

24 Instead, the Statutes are proscriptive, and are directed to prohibit certain conduct on
25 the part of the senders/initiators of commercial Email, and those conspiring with and
26 assisting them. The Statutes effectively impose strict liability for violations. What
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1 Defendants refer to as allegations of "fraud" or "misrepresentation" are more appropriately
2 characterized as conditions or specifications, defined in detail in the Statutes. Neither intent
3 on the part of the sender, nor reliance or actual damages on the part of the recipient, are
4 required. All a successful complaint for a violation of the Statutes must allege is that a
5 commercial electronic mail message was sent that violated the technical requirements of the
6 Statutes. Applying the heightened pleading requirements of FRCP 9(b) would thus force the
7 Plaintiff to plead numerous facts that the Plaintiff will NOT be required to prove at trial to
8 establish that the Plaintiff is entitled to relief under the Statutes. Such a result is plainly not
9 warranted under FRCP 9(b).
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12 In setting forth Defendants' argument, lacking controlling authority, Defendants rely on
13 a recent Northern District Court of California decision Asis Internet Services v. Optin
14 Global, Inc., et al., No. C-05-5124 CW. However, Asis is readily distinguished from the
15 instant case, and, as a decision of the US District Court for the Northern District of
16 California is not binding precedent on this Court even if it were not. Nonetheless, the Court
17 in Asis actually found that most of that Plaintiff's claims did withstand the 12(b)(6) motion,
18 granted Plaintiff opportunity to amend its complaint, and focused its dismissal on a few very
19 limited allegations. For instance, with regard to the issue of initiation of the offending
20 Emails there, the Court found that:
21
22

23 ...”multiple Defendants may be held liable under the CAN-SPAM Act if they
24 "initiated" illegal emails, including either actually sending the message or paying or
25 inducing another to send the message while consciously avoiding knowledge that
26 the messages violated the law. Plaintiff's averments of fraud do not extend to the
27 initiation of the allegedly fraudulent commercial emails, but only to their content.
28 Therefore, the Court finds that Plaintiff need not plead with particularity the
circumstances surrounding the initiation of the alleged email; for instance, Plaintiff
need not plead particular facts showing a business relationship between the

1 Mortgage Defendants and the Spammer Defendants.” *Id at p. 5.*

2
3 To the knowledge of the undersigned, no United States Court of Appeals has decided
4 whether a complaint for a violation of either a State anti-spam statute, or the Federal Can-
5 Spam Act triggers the heightened pleading requirements of FRCP 9(b). However, the 9th
6 Circuit Court of Appeals did consider the application of FRCP 9(b) to a diversity class action
7 complaint against psychiatric associations and manufacturers of prescription pharmaceuticals
8 alleging that defendants increased sales of particular prescription drug in violation of
9 California Consumers Legal Remedies Act (CLRA) and California's unfair business practice
10 laws. In Vess v. Ciba-Geigy Corp., 317 F.3d 1097, (9TH Cir. 2003), 54 Fed.R.Serv.3d 1032, 3
11 Cal. Daily Op. Serv. 970, 2003 Daily Journal D.A.R. 1265 the Ninth Circuit established the
12 framework for analyzing the applicability of FRCP 9(b). In pertinent part, the Court states:
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14

15 “The text of Rule 9(b) requires only that in "all *averments of fraud* ..., the
16 circumstances constituting fraud ... shall be stated with particularity." Fed.R.Civ.P.
17 9(b) (emphasis added). The rule does not require that allegations supporting a
18 claim be stated with particularity when those allegations describe non-fraudulent
19 conduct.” *Id.* at 1104.

20 Plainly, the Statutes both impose liability for non-fraudulent conduct, and the only
21 claims the Plaintiff has set forth in his complaint are for violations of the Statutes.
22 Accordingly, the rule does not require that allegations supporting these claims be stated with
23 particularity. Finally, the Plaintiff would bring to the attention a recent decision by the
24 United States District Court for the Southern District of New York, In re: Initial Public
25 Offering Securities Litigation, 241 F.Supp.2d 281, Fed. Sec. L. Rep. P 92,282, which analyzed
26 the 9th Circuit’s opinion in Vess v. Ciba-Geigy Corp. while considering a case, such as the
27 one now before this Court, where a defendant sought to have the Court extend the pleading
28

1 requirements of FRCP 9(b) to cases which do not allege fraud. Beginning with a quote from
2 the United States Supreme Court, New York's Southern District Court observed:
3 "Whatever merits these and other policy arguments may have, it is not the province of [the
4 courts] to rewrite the statute [or Rules] to accommodate them." Artuz v. Bennett, 531 U.S. 4,
5 10, 121 S.Ct. 361, 148 L.Ed.2d 213 (2000). *See also* Badaracco v. Commissioner, 464 U.S. 386,
6 398, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984) ("Courts are not authorized to rewrite a statute
7 because they might deem its effects susceptible of improvement."). Indeed, in the last
8 decade the Supreme Court has *twice* admonished the lower courts for augmenting federal
9 pleading requirements: "A requirement of greater specificity for particular claims is a result
10 that *must* be obtained by the process of amending the Federal Rules, and *not* by judicial
11 interpretation." Swierkiewicz, 534 U.S. at 515, 122 S.Ct. 992 (quoting Leatherman, 507 U.S.
12 at 168, 113 S.Ct. 1160) (emphasis added). In fact, in Swierkiewicz, the Defendant tried to
13 persuade the Court on policy grounds by asserting that "allowing lawsuits based on
14 conclusory allegations of discrimination to go forward will burden the courts and encourage
15 disgruntled employees to bring unsubstantiated suits." *Id.* at 514, 122 S.Ct. 992. The Court
16 responded: "Whatever the practical merits of this argument, the Federal Rules do not contain
17 a heightened pleading standard for employment discrimination suits." *Id.* at 514-15, 122 S.Ct.
18 992.;B06766;B06766 *Id.* 340-341.

23 Just as the Southern District Court in New York analyzed our own 9th Circuit opinion
24 in Vess v. Ciba-Geigy Corp. to find that the Court should not allow the heightened pleading
25 standard for certain violations of securities law, so also should this Court decline to extend
26 the heightened pleading standard for violations of the anti-spam Statutes at issue here.

28 Arguendo, even if the FCRP 9(b) pleadings were required, Plaintiff has sufficiently

1 plead the complaint to meet that standard. Plaintiff alleged that Defendants used multiple
2 domain names as a method to deceive the recipient and bypass spam filters to trick people
3 into opening the e-mails. (See ¶¶ 31-34 of the verified complaint). Plaintiff also provided
4 examples of the deceptive from lines, some of which indicated that “Brighton Handbags”
5 actually sent the e-mail. (See ¶¶ 35, 36 of the verified complaint).

7 **2. Defendants Linhardt and Moniker have violated both California**
8 **Business & Professions § 17529.5 and CAN-SPAM.**

9 Defendants claim that it “is illogical as all the Defendants cannot all be “initiating” the
10 same e-mails” is both disingenuous and is asking the Court to ignore half the 15 U.S.C. §
11 77202(9) which states:

13 “INITIATE- The term 'initiate', when used with respect to a commercial
14 electronic mail message, means to originate or transmit such message or to
15 procure the origination or transmission of such message, but shall not include
16 actions that constitute routine conveyance of such message. **For purposes of**
17 **this paragraph, more than one person may be considered to have**
18 **initiated a message.**” [emphasis added].

19 The portion of the definition of “initiate” that Defendant cited is similar to the
20 definition used in § 17529.1(j). This definition is not helpful to Defendants where § 17529.5
21 provides liability to the advertiser which is defined as a person who advertises. “to give
22 information to the public about; announce publicly in a newspaper, on radio or television,
23 etc.” Dictionary.com Unabridged (v 1.1). Random House, Inc.
24 <http://dictionary.reference.com/browse/advertise>. This definition does not prohibit
25 multiple persons from advertising. – the owner of the product that is advertised and the
26 party that produces the thirty second video, and the person who buys the advertising spot
27 during the Super Bowl.
28

1 Both Linhardt and Moniker again revert to the ‘I said I didn’t do it, so I am not liable’
2 defense, providing no evidence – but instead only provide a self-serving declaration.

3 Linhardt again attempts to ask the Court to ignore that he is personally liable for his
4 actions involving initiation and procurement of the illegal spam. Linhardt claims, “I am not
5 personally involved” does neither state that he was not at all involved nor detail the extent of
6 his involvement – never stating that in his role as president he did instruct someone to send
7 the illegal spam.
8

9 Moniker is responsible since it was its property that was advertised, its domain
10 names.⁹ A domain name is an entity separate from the web site located at that domain, the
11 dispute over the domain name fuckgeneralmotors.com directing users to Ford Motor
12 Company’s web site exemplifies this. (See *Ford Motor Co. v. 2600 Enterprises*, 177
13 F.Supp.2d 661, E.D. Mich. 2001). Arguendo, if the domain name does not belong to
14 Moniker, then Moniker and another party have conspired to violate 18 U.S.C. 1087(a)(4).
15 Moniker. As stated before, Moniker has agreed to accept liability for illegal activities relating
16 to the use of its domain.
17
18

19 **3. California Business & Professions Code § 17529.5 is not pre-**
20 **empted by CAN-SPAM.**
21

22 Defendants ask that the Court ignore the plaintiff statutory language of the CAN-SPAM
23 Act and following a ruling by a Court in another Circuit ruling on Oklahoma law. At this
24 point in litigation the Court should only apply the strict language of the statute as other
25 Courts in this Circuit, on both § 17529.5 and the similar Washington Statute.
26

27 9. *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) provides an analysis of the
28 ownership of domain names. See **Exhibit F**, an example spam, and **Exhibit G**, historical whois
information indicating Moniker’s ownership of the advertised domain.

1 a. **Statutory language clearly leaves § 17529.5 intact.**

2 A simple reading of the plain statutory language § 17529.5 fits clearly into the
3 intentional exception of the CAN-SPAM Act. federal regulation. The applicable portion of
4 the CAN-SPAM Act is 15 USC 7707(b)(1), which states:

5
6 “This Act supersedes any statute, regulation, or rule of a State or political
7 subdivision of a State that expressly regulates the use of electronic mail to send
8 commercial messages, **except to the extent that any such statute,**
9 **regulation, or rule prohibits falsity or deception in any portion of a**
10 **commercial electronic mail message or information attached thereto.”**
[emphasis added].

11 The applicable portions of California Business & Professions Code § 17529.5 states:

12 (a) It is unlawful for any person or entity to advertise in a commercial e-mail
13 advertisement either sent from California or sent to a California electronic mail
14 address under any of the following circumstances:

15 (1) The e-mail advertisement contains or is accompanied by a
16 third-party's domain name without the permission of the third party.

17 (2) The e-mail advertisement contains or is accompanied by **falsified,**
18 **misrepresented, or forged header information.** This paragraph does not
19 apply to truthful information used by a third party who has been lawfully
20 authorized by the advertiser to use that information.

21 (3) The e-mail advertisement has a subject line that a person knows
22 would be **likely to mislead a recipient, acting reasonably under the**
23 **circumstances, about a material fact regarding the contents or subject**
24 **matter of the message.**

25 b. **The Court should ignore Omega World Travel decision.**

26 Every Court in this Circuit, at this stage in litigation, has ruled that § 17529.5 and its
27 equivalent is not pre-empted by CAN-SPAM. See *Gordon v. Impulse Marketing Group,*
28 *Inc.*, 375 F. Supp. 2d 1040, 1044--46 (E.D. Wash. 2005), *Infinite Monkeys & Co. LLC v.*
Global Resource Systems, et al. Santa Clara Superior Court 1-05-CV039918 at 2 (2005),

1 Timothy J. Walton v. Plasmanet, Inc et. al. Santa Clara Superior Court 1-04-CV033020, 2,3
2 (2006).

3 The ruling in Court in Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F.3d
4 348 (4th Cir. 2006) was made in response to a summary judgment motion and a different fact
5 pattern. Even if one remained blind to the differences and accepts the Omega Court's
6 holding that "Nor can the messages be actionable under Oklahoma's statutes, because
7 allowing a state to attach liability to bare immaterial error in commercial e-mails would be
8 inconsistent with the federal Act's preemption text and structure" that ruling does not apply
9 to § 17529.5 nor the facts in this case. Irregardless, Omega is bad law and should not be
10 followed at all, especially here.

13 Ignoring these factual distinctions, Plaintiff still argues that the Fourth Circuit's
14 holding in Omega failed to apply black letter law of statutory construction, misconstrued the
15 intent of Congress, and should not be followed by this or any other Court. Most troubling
16 of all, the Omega Court determined whether information in the header was "materially false
17 or materially misleading" by comparing it to information contained within the body of the
18 spam email itself. The effect of this rule is to require the recipient of a spam email from a
19 sender who has hidden their identity in the header to actually open that spam email to
20 determine whether it violates the Act. The rule has the dual effect of eviscerating the Act's
21 prohibition against false or misleading header information, and forcing spam email recipients
22 to expose their computers to viruses, trojan programs, web bugs, their children to
23 pornographic content, and to become cyber-detectives – thereby frustrating Congresses'
24 intent.

28 The Fourth Circuit failed to adhere to the black letter law of statutory construction by

1 erroneously interpreting 15 U.S.C. 7704(a)(6). Contrary to the Omega Court's holding, 15
2 U.S.C. 7704(a)(6) does NOT limit the possible meanings of the term "materially" to those
3 described in the section. As discussed above, a plain reading of 15 U.S.C. 7704(a)(6)
4 demonstrates that Congress intended that section to merely provide non-exclusive examples
5 of what constituted false and misleading header information. Accordingly, the Fourth
6 Circuit erred when it construed 15 U.S.C. 7704(a)(6) as providing a strictly limited definition
7 of the term "materially" in 15 U.S.C. 7704(a)(1).
8

9
10 The Omega Court simply ignored this language, and assumed that Congress intended
11 that the national standard created by the Act would apply in all areas governing commercial
12 email. However, it is clear that the Congress had no such intention. Rather, Congress
13 specifically preserved the authority for the States to promulgate statutes, regulations, and/or
14 rules prohibiting falsity or deception in any portion of a commercial electronic mail message
15 or information attached thereto. The legislative history is clear on this issue.
16

17 "Thus, a State law requiring some or all commercial e-mail to carry
18 specific types of labels, or to follow a certain format or contain specified
19 content, would be preempted. By contrast, a state law prohibiting fraudulent
20 or deceptive headers, subject lines, or content in commercial e-mail would not
21 be preempted...

22 "Given the inherently interstate nature of e-mail communications, the
23 Committee believes that this bill's creation of one national standard is a proper
24 exercise of the Congress's power to regulate interstate commerce that is
25 essential to resolving significant harms from spam faced by American
26 consumers, organizations, and businesses throughout the United States. This
27 is particularly true because, in contrast to telephone numbers, e-mail addresses
28 do not reveal the State where the holder is located. As a result, a sender of
e-mail as a no easy way to determine with which State law to comply. Statutes
that prohibit fraud and deception in the e-mail do not raise the same concern,
because they target behavior that a legitimate business trying to comply with
relevant laws would not be engaging in anyway." Sen. Rep. No. 108-102, at

1 21-22 (2003) (emphasis added).

2 In fact, since Omega, the U.S. District Court for the District of Maryland - part of the
3 Fourth Circuit - has already rejected a spammer's "Omega defense" that the court had no
4 jurisdiction in the matter because CAN-SPAM preempted Maryland's anti-spam law.
5 Beyond Systems v. Keynetics Inc., No. PJM 04-686 (D. Md. Mar. 26, 2007) (order denying
6 defendant's motion for other relief under FRCP 7.
7

8 **C. Defendants request to strike punitive damages should be denied.**

9 “Motions to strike are disfavored, and should not be granted unless it is clear that the
10 matter to be stricken can have no possible bearing upon the subject matter of the litigation.”
11 Freeman v. Alta Bates Summit Med. Ctr. Campus, 2004 U.S. Dist. LEXIS 21402 (D. Cal.
12 2004) citing Naton v. Bank of California, 72 F.R.D. 550 (N.D. Cal. 1976).
13

14 Defendants mistakenly reply upon Anuziato v. eMachines, Inc. where that Court
15 denied the motion to strike punitive damages.
16

17 Defendants mistakenly assert that the legislature did not provide for punitive damages
18 under § 17529.5 where in fact it did. By not prohibiting punitive damages, as permitted Civ.
19 Code § 3294, when drafting § 17529.5 the legislature tacitly approved punitive damages for §
20 17529.5.
21

22 Defendants' argument that punitive damages are not permitted because of a multiplier
23 under CAN-SPAM is also misplaced. The multiplier under 15 U.S.C. 15 U.S.C. §
24 7706(g)(3)(C) deter specific behavior and to aid in enforcement – but is not penal in nature.
25 In Kelly v. Yee, 213 Cal. App. 3d 336, 341-42, 261 Cal. Rptr. 568 (1989) the Court ruled that
26 punitive damages could award triple damages and punitive damages where the triple damages
27 were not punitive in nature but to aid in enforcement.
28

1 It does not follow that the limitations on one statute ought to, or need to, be read into
2 the other. *Anunziato v. eMachines, Inc.*, 402 F. Supp. 2d 1133, 1137 (D. Cal. 2005)

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5 **V. CONCLUSION**

6 For the reasons above Plaintiff respectfully request that the Court denies Defendants'
7 motion in its entirety.

8 If the Court does desire to grant Defendants' motion to dismiss, Plaintiff respectfully
9 requests that Plaintiff is provided discovery to determine the:

10
11 1. Domain names and internet addresses that are used by E360Insight, David Linhardt,
12 any company related to E360Insight, and any company controlled by David Linhardt.

13 2. Information as to the control and financing of each company related to E360Insight
14 so as to determine whether those companies are alter-egos of each other or of Linhardt.

15
16 3. Activity and control of activities of Linhardt and corporate Defendants to determine
17 what actions are personally directed or personally participated in by Linhardt.

18 After that discovery is permitted, can then amend the complaint to correct any deficiency
19 seen by the Court.

20
21
22 Dated: June 11, 2007

23 Respectfully submitted,

24
25
26 By: _____
27 F. Bari Nejadpour
28 Attorney for Plaintiff

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(213) 632-5297
4 *Attorney for: William Silverstein*

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

9 WILLIAM SILVERSTEIN, an individual,
Plaintiff,
10 vs.
11
12 E360INSIGHT, LLC, et al.,
13 Defendants.

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

**DECLARATION OF F. BARI
NEJADPOUR IN SUPPORT OF
PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

14
15 I, F. Bari Nejadpour, declares as follows:

16 1 I am the attorney for the Plaintiff in the above-captioned case. I am over eighteen years
17 of age and competent to testify. I have personal knowledge of the facts stated herein.

18 2 Exhibit A is a true and accurate copy of caption page of from Defendants' motion to
19 dismiss.
20

21 3 This caption page is from the only copy of the motion that I have received.

22 4 I received the aforementioned in my office on May 10, 2007.

23 5 The envelope that the aforementioned arrived in contained a Pitney Bowes postage
24 meter mark dated May 8, 2007 – indicating that the postage was not applied to the
25 envelope until May 8, 2007.
26

27 6 **Exhibit C** is a true and accurate true and accurate copy of declaration of David
28 Linhardt filed in case number 6-CV-3958 on August 30, 2006. This is a true and

1 accurate copy of the published by Defendant E360Insight on its web site at
2 http://www.e360insight.com/show_case_doc20-2.pdf and downloaded on May 29,
3 2007.

4
7 **Exhibit D** are true and accurate copies of the California Secretary of State's web pages
5 showing the corporate status for Habeas and Yipes.
6

7 **Exhibit E** is true and accurate copies of United States Patent and Trademark Website
8 showing the trademarks NetBlue and Vendare Media.
9

9 **Exhibit F** is a true and accurate copy, excepting the redaction of the recipient e-mail
10 address, of one of the complained of e-mails.
11

12 **Exhibit F** is a true and accurate copy of the historical whois information for the
13 domain name advertised in the aforementioned e-mail.
14

15 I declare under penalty of perjury under the laws of the United States of America that
16 the foregoing is true and correct.
17

18 Executed June 11, 2007, at Los Angeles, California.
19
20

21 _____
F. Bari Nejadpour
22
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1 F. Bari Nejadpour (SBN 216825)
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4 *Attorney for: William Silverstein*

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

9 WILLIAM SILVERSTEIN, an individual,
Plaintiff,
10 vs.
11 E360INSIGHT, LLC, et al.,
12 Defendants.

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

DECLARATION OF LISA COLESON

13 I, Lisa Coleson, declares as follows:

14 1. I am over eighteen years of age and competent to testify. I have personal knowledge of
15 the facts stated herein.

16 2. I was informed that David Linhardt had an agent of service of process at 23046
17 Avenida de la Carlota, Suite 600 in Laguna Hills, California. I was further informed that he
18 only uses the aforementioned address as a mailing address.

19 3. On May 23, 2007 at the aforementioned address, I confirmed with Kathy Hershberger
20 that she was authorized to accept service on behalf of David Linhardt. I also confirmed that
21 this was also his mailing address.

22 4. On May 23, 2007 at approximately 3:30 pm, I handed Kathy Hershberger the
23 summons, complaint, notice of case assignment, Plaintiff's preservation of rights to seek
24 punitive damages, and an ADR packet for Los Angeles Superior Court case number
25 BC368026.
26
27
28

1 5. During the aforementioned visit, I told Kathy Hershberger that these papers were for a
2 lawsuit.

3 I declare under penalty of perjury under the laws of the United States of America that
4 the foregoing is true and correct.
5

6
7 Executed June 9, 2007, at Los Angeles, California.
8

9
10 _____
Lisa Coleson

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4 *Attorney for: William Silverstein*

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

9 WILLIAM SILVERSTEIN, an individual,
Plaintiff,
10 vs.
11 E360INSIGHT, LLC, et al.,
12 Defendants.

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

DECLARATION OF LISA SAUCEDO

13 I, Lisa Saucedo, declares as follows:

- 14 1. I am over eighteen years of age and competent to testify. I have personal knowledge of
15 the facts stated herein.
- 16 2. I am the Operations Manager for HQ Global located in Suite number 600 of 23046
17 Avenida de la Carlota in Laguna Hills, California.
- 18 3. This location of HQ Global has been appointed as an agent for service of process for
19 David Linhardt.
- 20 4. This location of HQ Global is currently authorized to accept service of process for
21 David Linhardt.
- 22 5. HQ Global has complied with California Business & Professions Code § 17538.5.

23 I declare under penalty of perjury under the laws of the United States of America that
24 the foregoing is true and correct.

25
26 Executed June 8, 2007, at Laguna Hills, California.

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Lisa Saucedo

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4 *Attorney for: William Silverstein*

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

9 WILLIAM SILVERSTEIN, an individual,
Plaintiff,
10 vs.
11 E360INSIGHT, LLC, et al.,
12 Defendants.

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

DECLARATION OF JOSEPH WAGNER

13 I, Joseph Wagner, declares as follows:

- 14 1. I am over eighteen years of age and competent to testify. I have personal knowledge of
15 the facts stated herein.
- 16 2. On April 24, 2007 I attend the “ad:tech Interactive Media Conference” at the Moscone
17 Center located in San Francisco, California.
- 18 3. During my aforementioned attendance at ad:tech, I observed that Moniker Online
19 Services, LLC had an exhibitor booth within the Moscone Center.
- 20 4. At the aforementioned Moniker exhibitor booth, it appeared as though the people
21 operating that booth were soliciting business.
- 22 5.

23 I declare under penalty of perjury under the laws of the United States of America that
24 the foregoing is true and correct.

25 Executed June 9, 2007, at Palto Alto, California.

26
27 _____
Joseph Wagner