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

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

14	WILLIAM SILVERSTEIN, an individual,)	Case No.: cv07-2835 CAS (VBKx)
15	Plaintiff,)	E360INSIGHT, LLC AND
16	vs.)	BARGAIN DEPOT ENTERPRISES
17	E360INSIGHT, LLC, BARGAIN DEPOT ENTERPRISES, LLC, AKA BARGAINDEPOT.NET, DAVID LINHARDT, an individual, MONIKER ONLINE SERVICES, LLC, And DOES 1-50; inclusive,)	REPLY SUPPORTING
18	Defendants)	MOTION FOR LEAVE TO FILE COUNTERCLAIM
19)	Date: January 28, 2008
20)	Time: 10:00 a.m.
21)	Courtroom: 5

22 **INTRODUCTION**

23 Plaintiff's Opposition offers little analysis in support of points that would in
24 any event be insufficient to preclude this Court from exercising its discretion to
25 allow Defendants' Counterclaim. The most that Plaintiff can offer is that the
26 ultimate resolution of his case will be delayed briefly, which is an ironic assertion
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1 in light of the recent revelation that Plaintiff brought his original claims without
2 any probable cause to do so. The 30-day delay on which Plaintiff relies is
3 insufficient to bar the Counterclaim, while the prejudice to Defendants and the
4 judicial inefficiencies that such a bar will cause is significant. Defendants
5 respectfully request that its Motion be granted.
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8 **ARGUMENT**

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10 **A. Plaintiff Cannot Be Prejudiced By Disqualification Of His Attorney**

11 It is entirely unclear to Defendants why Plaintiff's counsel will be
12 disqualified merely because of the Counterclaim. It is true that one of a number of
13 the statements alleged in the Counterclaim to be defamatory appeared on Mr.
14 Nejadpour's law firm's website, but the statement appearing there is attributed to
15 Plaintiff. Plaintiff's Opposition states only that this fact alone would warrant
16 disqualification. It remains a mystery to Defendants why. Plaintiff provides no
17 factual background or legal support or any explanation for this proposition.
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21 Plaintiff does not acknowledge that, in addition to the one defamatory
22 statement on the Nejadpour law firm's website, there are other libelous statements
23 that give rise to the defamation Count, as well as separate Count for abuse of
24 process arising from the Plaintiff's lack of probable cause to bring Counts I-V in
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1 his Amended Complaint.¹ Plaintiff does not explain why Defendants should have
2 to shoulder the burden of the ill-defined basis for his attorney's disqualification.
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4 Plaintiff cites no authority, and indeed none exists, for the proposition that under
5 the circumstances of this case Defendants should be denied the ability to bring
6 viable defamation and abuse of process claims in this case, in the most efficient
7 manner possible. Defendants' motion should be granted.
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10 **B. Plaintiff Is Not Prejudiced By Undue Delay**

11 Plaintiff claims that there will be undue delay solely premised on the notion
12 that he will file a motion to strike Defendants' Counterclaim pursuant to California
13 Code of Civil Procedure § 426.16, and that discovery will be stayed as a result.
14 Plaintiff treats both the filing of this motion and its success as a *fait accompli*, both
15 of which are far from certain, but neither of which this Court needs to consider
16 now. Even if such a motion is filed, discovery will be stayed for only 30 days,
17 affecting none of the current scheduling cut-off dates previously agreed to and
18 adopted by this Court.
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22 Moreover, it is not necessarily the case that discovery pertaining to the claims
23 asserted in Plaintiff's should be stayed. Arguably, only discovery pertaining
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27 ¹ Plaintiff's concern over disqualification involves only the single statement
28 attributed by Plaintiff on Mr. Nejadapour's website, not with any of the other
statements Defendants allege are defamatory or with the fact that Defendants have
also alleged a Count for abuse of process.

1 to the Counterclaim should be stayed. Defendants acknowledge that Code of
2 Civil Procedure § 426.16 calls for a stay of the “action” upon filing of the motion
3 to strike, but whether “action” encompasses both a complaint and counterclaim is
4 an unanswered question to date.
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7 Finally, it is respectfully submitted that Plaintiff’s concern here is at best
8 minimal given the brief delay that a purported motion to strike might cause, and
9 wholly prejudicial to Defendants where, as here, there is a viable abuse of process
10 claim challenging the legitimacy of the very filing of this action, which will not be
11 defeated by Plaintiff’s motion to strike pursuant to Code of Civil Procedure §
12 426.16.
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15 **C. Allowing Defendants’ Counterclaim Is Not Futile**
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17 Plaintiff argues that Defendant’s attempt to state any claims against him
18 would be “futile” because they are subject to Code of Civil Procedure § 426.16.
19 Plaintiff cannot seriously threaten that he will file a motion to strike Defendants’
20 defamation claim pursuant to California Code of Civil Procedure § 426.16 when
21 Plaintiff’s own claim for defamation would also be subject to the same motion.²
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25 ² Defendants have, until now, attempted to litigate this matter as little as possible
26 in the hopes of reaching an early settlement because Plaintiff repeatedly
27 represented he had emails that gave rise to the claims contained in Counts I-V.
28 Plaintiff’s Initial Disclosure makes clear that he does not. Defendants will file a
motion for summary judgment, without the need for any additional discovery, on
these Counts. Defendants will also be motivated to bring it’s own section 426.16

1 Plaintiff's analysis of the individual statements giving rise to the defamation
2 claim also misses the mark. Paragraph 9 encompasses a message thread whose
3 subject line clearly indicates that it refers to e360. The fact that Plaintiff thinks the
4 statement is true is factual issue Plaintiff needs to prove, not merely assert. Finally,
5 Calling e360 a "liar" s a statement of fact that is provable true or false, and is
6 clearly not a statement of opinion.
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9 Similarly, Paragraph 14 of the complaint is directed to e360 and accuses it of
10 specific illegal conduct. This fact is made even clearer by reading it in conjunction
11 with Paragraph 20 of the proposed Counterclaim as well as the message thread as a
12 whole. In this context, Plaintiff is not stating that e360 is engaging in "legal
13 spamming" as Plaintiff argues. Even if he is, this would only render Defendants
14 libel claims as sounding in defamation per quod, instead of defamation per se. It
15 would not render these claims futile. Plaintiff's defense is also premised on the
16 existence of the offending emails that Plaintiff's Initial Disclosure makes clear do
17 not exist. The fact that Plaintiff has generated what appears to be spreadsheets of
18 names and subject lines, both of which are inadmissible and in the case of Exhibit
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28 motion to bring an end to Plaintiff's case in its entirety, which this Court can allow
notwithstanding the 60 day rule contained in Code of Civil Procedure § 426.16.

1 A-2 to the Amended Complaint, untrue, cannot suffice to render Defendants' claim
2 futile.³
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4 Paragraph 20, "you are being sued for sending illegal spam" is hardly
5 indisputably true. Defendants are prepared to prove that they are being sued
6 because of the successful prosecution of the *e360 v. Spamhaus* case that resulted in
7 a default judgment against The Spamhaus Project, with whom Plaintiff at least
8 sympathizes and with whom Plaintiff might have a more active role. In addition,
9 the very statement that "you are being sued for sending illegal spam" connotes the
10 underlying message that Defendants are engaged in illegal activity, irrespective of
11 why Plaintiff sued them. The viability of Plaintiff's "truth defense" is questionable
12 at this point, and certainly does not render Defendants claim futile
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17 Moreover, irrespective of what might become of Defendants' (and
18 Plaintiff's) defamation claims, Plaintiff will not successfully defeat Defendants
19 proposed claim for abuse of process with a section 426.16 motion. Defendants'
20 abuse of process claim is rooted in the fact that Plaintiff filed his lawsuit without
21 any colorable factual or legal basis for doing so but with an ulterior motive to
22 obtain information to which Plaintiff is not entitled and to harass Defendants
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26 ³ In support of the motion for summary judgment referred to above, Mr. David
27 Linhardt will submit a declaration, similar to the declaration he previously
28 submitted in support of Defendants Motion to Dismiss, stating that the purported
emails listed on Exhibit A-2 to Plaintiff's Amended Complaint were not sent by
e360 or BDE.

1 through the discovery process attendant to this case. These allegations do not in
2 any way seek to impede on the rights that California Code of Civil Procedure §
3 426.16 were intended to protect.⁴

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5 **D. Defendants Counterclaim Is Being Brought In Good Faith**

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7 Plaintiff's opposition makes much of the fact that Defendants previously
8 filed, and then voluntarily dismissed, a defamation claim in Illinois state court
9 similar to the one contained in the proposed Counterclaim. This point is irrelevant
10 for purposes of what Defendants seek here. Indeed, Plaintiff cites to no prohibition
11 to Defendants' filing a defamation claim against him here.

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14 As noted previously, Defendants prior motivations for dealing with
15 Plaintiff's claims have changed, and Defendants are free to re-allege the
16 defamation claims it previously asserted against Plaintiff. Since the defamation
17 claim in Defendants' proposed Counterclaim involves the same string of message
18 board postings contained in Plaintiff's Amended Complaint, judicial economy and
19 common sense dictate that these claims be tried together. The alternative is that
20 Defendants reinstate their defamation claims against Plaintiff in Illinois, which is
21 hardly desirable.

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26 ⁴ Plaintiff argues that the abuse of process claim is defeated by the litigation
27 privilege contained in California Code of Civil Procedure § 47. Defendants have
28 been unable to find any support for this proposition under the circumstances of this
case. The litigation privilege cannot be understood to allow claims to be brought
without probable cause.

1 Defendants should also be allowed to prove their abuse of process claim in
2 the same forum that will consider Plaintiff's claims. The issues in and evidence
3 supporting the abuse of process claim in the proposed Counterclaim will be the
4 same as Counts I-V in Plaintiff's Amended Complaint. Simply stated, it makes no
5 sense to adjudicate Defendants claims separately from Plaintiff's. Defendants'
6 motion should be granted.
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9 Plaintiff implies that there was something untoward regarding the timing of
10 Defendants proposed Counterclaim. The need for the proposed Counterclaim was
11 borne out of the fact that Defendant's purportedly offending emails did not exist or
12 were not Defendants, which was not fully ascertained until Plaintiff's Initial
13 Disclosure. (See Declaration of Joseph L. Kish (Kish Declaration) at ¶ 4.) Then,
14 Defendants' sought Plaintiff's stipulation to file the proposed Counterclaim, which
15 Plaintiff would not stipulate to requiring this motion following the counsel
16 conference pursuant to L.R. 7-3 and the requisite waiting period. (See Kish
17 Declaration at ¶ 5-6.) While Plaintiff may have sent his discovery on December 19,
18 2007 Defendants did not receive this discovery, until after it filed this Motion. At
19 the time Defendants filed this Motion, it was not in receipt of any discovery
20 requests from Plaintiff. (See Kish Declaration at ¶ 7.) Plaintiff's discovery,
21 attached to the accompanying Kish Declaration for the Court's reference,
22 perpetuates his abuse alleged in the Counterclaim by seeking information wholly
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1 irrelevant to any of the issues presented in this case. (See Kish Declaration at ¶ 8.)

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3 Stated simply, Defendants timing of its Counterclaim does not demonstrate bad
4 faith warranting denial of this motion.

5 **E. Allowing The Counterclaim Is Proper And Appropriate**

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7 Federal Rule of Civil Procedure 13(f) provides that a court may grant leave
8 to amend when the moving party "fails to set up a counterclaim through ... (3)
9 excusable neglect, or (4) when justice requires." When "presented with motions
10 for leave to amend a pleading to add an omitted counterclaim generally [courts]
11 'adhere to the liberal amendment policy of Rule 15' in deciding whether to grant
12 the requested leave." *Hip Hop Beverage Corp. et. al. v. RIC et. al.*, 220 F.R.D.
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14 614, 620; 2003 U.S. Dist. LEXIS 25429 *21 (C.D. CAL 2003).

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17 Defendants pointed out to the rule in this District that, "the general rule is
18 that amendment of pleadings is to be permitted unless the opposing party makes a
19 showing of undue delay, bad faith, undue prejudice, or futility of amendment on
20 the part of the moving party." *Hip Hop Beverage Corp. et. al. v. RIC*, at 620, *21
21 (C.D. CAL 2003). As demonstrated above, Plaintiff has clearly fallen short of
22 making a requisite showing on any of the points.

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25 Moreover, Plaintiff fails completely to address another point raised in
26 Defendants' Motion. The court in *Hip Hop Beverage Corp.* acknowledged that in
27 order to prevent a plea of waiver or res judicata, leave to add a compulsory
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1 counterclaim is normally freely granted. *Hip Hop Beverage Corp. et. al. v. RIC*, at
2 620, *22. Defendants' Motion states that only the Count for defamation is
3 compulsory, but arguably, both it and the abuse of process claim are compulsory
4 since both arose "out of the transaction or occurrence that is the subject matter of
5 the opposing party's claim" See Fed. R. Civ. P 13(a). Certainly the defamation
6 claim contained in Count I is compulsory, but so too is the abuse of process claim
7 contained n Count II because it derives from the absence of any evidence and thus
8 probable cause supporting Plaintiff's filing his lawsuit.
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12 CONCLUSION

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14 In the final analysis, Plaintiff offers no sufficient reason why Defendants'
15 motion should be denied. Defendants Motion should instead be granted, and
16 Defendants Counterclaim be deemed filed as of January 28, 2008.
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18 Dated: January 21, 2008

19 /s/ Joseph L. Kish

20 Joseph L. Kish

21 Attorney for Defendants e360 Insight,
22 and Bargain Depot Enterprises, LLC,
23 a.k.a. Bargaindepot.net, Moniker Online
24 Services, LLC, and David Linhardt
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **E360insight, LLC and Bargain Depot Enterprises Reply Supporting Motion for Leave to File Counterclaim** was served upon the attorneys listed below electronically through CM/ECF on January 21, 2008.

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By: /s/ Joseph L. Kish

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