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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, 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.

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

**COUNTER-DEFENDANT'S NOTICE
OF MOTION AND SPECIAL MOTION
TO STRIKE COUNTERCLAIM
PURSUANT TO CALIFORNIA RULES
OF CIVIL PROCEDURE § 425.16 ANTI-
SLAPP STATUTE AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

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

Honorable Christina A. Snyder

26 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

27 PLEASE TAKE NOTICE that on Monday April 7, 2008, or as soon thereafter as

28 parties can be heard, in the Courtroom of Christina A. Snyder, Courtroom 5, at 10:00 am

1 in the United States Courthouse, 312 N. Spring St., Los Angeles, CA 90012. Counter-
2 Defendant, William Silverstein, will move the Court pursuant to California Code of Civil
3 Procedure Section 425.16 to strike the complaint of Counter-Plaintiffs in this action on
4 the grounds that the allegations of the complaint arise out of Counter-Defendant's
5 exercise of his right to free speech under the State and Federal Constitutions in a public
6 forum, in connection with an issue of public interest, and is not probable that Plaintiff will
7 prevail on the claim. The motion will be based upon this Notice, the attached
8 Memorandum of Points and Authorities and Declarations, and the records and files in this
9 action.
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1 MOTION¹

2 William Silverstein, the Counter-Defendant herein, hereby respectfully moves this
3 Court to for an order of this Court directing:
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5 (1) That Counter-Plaintiffs' Counterclaim is stricken;

6 (2) Pursuant to California Code of Civil Procedure § 425.16(c), that Counter-
7 Plaintiffs pay Counter-Defendant's costs and attorneys' fees as related to both this motion
8 and Counter-Plaintiff's motion to add this counterclaim to this case, within 10 days of the
9 ruling on this motion;
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13 Dated: March 19, 2008

14 Respectfully submitted,

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17 /s/ F. Bari Nejadpour
18 F. Bari Nejadpour,
19 Attorney for William Silverstein
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27 1. This motion is made following the conference of Counter-Defendant and counsel for
28 Counter-Plaintiffs, Joseph Kish, pursuant to L.R. 7-3 which took place via e-mail on January 31,
2008, February 7, 2008, and by telephone on February 6, 2008, and February 7, 2008. Additionally
there were e-mails between counsel on this issue between February 28 and March 3rd.

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1 Memorandum of Points and Authorities

2 **I. SUMMARY**

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4 Counter-Plaintiffs are claiming that Counter-Defendant, William Silverstein,
5 defamed them by telling his attorney, F. Bari Nejadpour, that David Linhardt, the
6 individual, is a bully and liar; stating in a public forum that he received “spam” from
7 Counter-Plaintiffs; and as part of a demand for retraction, that Counter-Plaintiffs are
8 being sued for “illegal spamming.” Counter-Plaintiffs, in the second count of their
9 counterclaim charge Silverstein with a claim of abuse of process, claiming that Counter-
10 Defendant filed a lawsuit with no basis, falsely stating that Counter-Defendant failed to
11 provide any of the complained of e-mails to Counter-Plaintiffs, as an attempt to get
12 confidential business information from Counter-Plaintiffs, a list of their domain names –
13 falsely implying that the domain names of Counter-Plaintiffs are confidential information.
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17 The truth is Counter-Plaintiffs play fast and lose with the truth and with the justice
18 system to silence people who expose their illegal spamming operations. E360Insight
19 (“e360”) has filed lawsuits against individuals, and dismissed them, only to refile, and
20 dismiss them again, then to refile a third time. E360 and Linhardt received a default
21 judgment against Spamhaus for calling them spammers, though in this Court, David
22 Linhardt, the individual, claimed (in order to avoid personal jurisdiction in this case) that
23 he did not personally suffer damages in the Spamhaus, though as a plaintiff in that case he
24 submitted a declaration asking for damages for himself **and** Linhardt²
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2. See Request for judicial notice, Exhibit E, for the copy of the declaration.

1 **II. Facts and Procedural History**

2 The receipt of unsolicited commercial electronic mail may result in costs to
3 recipients who cannot refuse to accept such mail and who incur costs for the storage of
4 such mail, or for the time spent accessing, reviewing, and discarding such mail, or for
5 both. (15 U.S.C. § 7701(a)(3).) Unsolicited commercial electronic mail is commonly
6 referred to as “spam” and the senders of spam are called “spammers.” (See, e.g., Cal. Bus.
7 & Prof. § 17529(a).) Spam results in costs to recipients, even if the spam is lawful under
8 federal and state law.
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11 On June 21, 2006, e360Insight and David Linhardt, the individual, requested a
12 default judgment against an organization known as “Spamhaus”, claiming over \$30
13 million in damages, for referring to e360 and Linhardt as spammers (“the Spamhaus
14 Case”).
15

16 On March 7, 2007, e360 and Linhardt filed and then later dismissed a lawsuit in
17 Illinois against certain individuals, for defamation and intentional interference, because
18 these Defendants referred to e360 and Linhardt as spammers in a small public forum – a
19 discussion group composed of people who fight spam. (“Ferguson I”).³ After being made
20 aware of Ferguson I, Counter-Defendant inspected a small portion of e-mails received by
21 him, discovering that he received illegal spam from e360. Counter-Defendant then
22 discussed the issues in bringing of the instant lawsuit with his attorney F. Bari Nejadpour.
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27 3. E360insight, LLC, and David Linhardt v. Mark James Ferguson, Susan Wilson A.K.A. Susan
28 Gunn, Kelly Chien, Unknown Person A.K.A. Fudo, A.k.a. Morel Y Dotes, and Tim Skirvin. United
States District Court for the Northern District of Illinois Case number 1:07-CV-01305. See Request
for judicial notice, Exhibit A.

1 In May of 2007, after the filing of the instant lawsuit, e360 and David Linhardt filed
2 essentially the same lawsuit as in Ferguson I, but now including Silverstein as a
3 Defendant, in Illinois State Court for defamation, and intentional interference (“Ferguson
4 II”).⁴

6 On August 24, 2007, Counter-Defendant filed a motion for reconsideration, in the
7 instant case, on the Court’s granting the dismissal of David Linhardt for lack of personal
8 jurisdiction basing his argument on judicial estoppel – Linhardt opposed the dismissal for
9 lack of jurisdiction of Ferguson II, as Silverstein opposed the dismissal of Linhardt from
10 the instant case. On August 30, 2007, during oral argument, e360 and Linhardt voluntarily
11 dismissed the case.

14 On December 26, 2007, more than two months after their answer, e360 and Bargain
15 Depot Enterprises LLC (“bde”) filed this motion to add the instant counterclaim to the
16 instant case.

18 On January 15, 2008, e360 filed a lawsuit against Comcast, claiming over \$9 million
19 in damages for blocking e360's spam from being transmitted through Comcast’s servers.
20 (See request for judicial notice, “Exhibit C”). On January 18, 2008, e360 filed suit against
21 several individuals, essentially the same ones as in Ferguson I and Ferguson II, claiming
22 damages in excess of \$75,000, again for publically referring to e360 and Linhardt as
23 spammers – essentially the same case as Ferguson I and Ferguson II (“Ferguson III”).

27 4. E360insight, LLC and David Linhardt v. Mark James Ferguson, Susan Wilson A.K.A. Susan
28 Gunn, Rob Saecker A.K.A. Fudo, Rich Tietjens A.k.a. Morely Dotes, William Silverstein, and Tim
Skirvin A.K.A. Screwtape III, case number 2007-L-004983in the Circuit Court of Cook County,
Illinois County Department, Law Division. See request for judicial notice, Exhibit B.

1 (See request for judicial notice, "Exhibit D"). On January 29, 2008, the instant
2 counterclaim was filed.
3

4 III. ARGUMENT

5 A. The Alleged Conduct of Counter-Defendant Falls Squarely Within the
6 Anti-SLAPP Statute's Protections and Counter-Plaintiffs' Counterclaim
7 Chills Counter-Defendant's Exercise of Free Speech and Right to Redress of
8 Grievances Must Be Stricken as a Matter of Law.

9 A SLAPP suit - a strategic lawsuit against public participation - seeks to chill or
10 punish a party's exercise of constitutional rights to free speech and to petition the
11 government for redress of grievances. (*Briggs v. Eden Council for Hope & Opportunity*,
12 19 Cal.4th 1106, 1109, fn.1 (1999).) The California legislature enacted California Code
13 of Civil Procedure § 425.16 (known as the "anti-SLAPP statute") to provide a procedural
14 remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional
15 rights. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal. App,4th 855, 865
16 (1995).) (*See* Cal. C.C.P. § 425.16(b)(1), *supra*.) "The anti-SLAPP statute was enacted to
17 allow for early dismissal of meritless first amendment cases aimed at chilling expression
18 through costly, time-consuming litigation." (*Metabolife Int'l, Inc. v. Wornick*, 264 F.3d
19 832, 839 (9th Cir.2001).)

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22 In evaluating an anti-SLAPP motion, the trial court first determines whether the
23 defendant has made a threshold showing that the challenged cause of action arises from
24 protected activity. (*Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal, 4th 53, 67
25 (2002).) Under Code of Civil Procedure § 425.16 "[a] cause of action against a person
26 arising from any act of that person in furtherance of the person's right of petition or free
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1 speech... shall be subject to a special motion to strike..." (Code Civ. Proc. § 425.16,
2 subd. (b)(1).) "A cause of action 'arising from' defendant's litigation activity may
3 appropriately be the subject of a section 425.16 motion to strike." (*Church of Scientology*
4 *v. Wollersheim*, 42 Cal.App.4th 628,648 (1996) (disapproving on other grounds in
5 *Equilon, supra*, 20 Cal.4th at 68, fn. 5.) "Any act" includes communicative conduct such
6 as filing, funding, and prosecution of a civil action. (*Ludwig v. Superior Court*, 37 Cal.
7 App. 4th 8, 17-19 (1995).)

10 If the Court finds the defendant has made the threshold showing, it determines then
11 whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Equilon,*
12 *supra*, 20 Cal.4th at 67.) "In order to establish a probability of prevailing on the claim
13 (Code Civ. Proc., §425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion
14 must "state [] and substantiate [] a legally sufficient claim." (*Wilson v. Parker, Covert &*
15 *Chidester*, 28 Cal.4th 811, 821 (2002) (citing *Briggs, supra*, 10 Cal. 4th at 1123 (1999)).)
16 Put another way, the plaintiff "must demonstrate that the complaint is both legally
17 sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable
18 judgment if the evidence submitted by the plaintiff is credited." (*Matson v. Dvorak*, 40
19 Cal.App.4th 539, 548 (1995); *accord, Rosenaur v. Scherer*, 88 Cal.App.4th 260, 274
20 (2001), *as cited in Wilson v. Parker, Covert & Chidester, supra*, at 821.)

21 To prevail on an anti-SLAPP motion, movant must first make a threshold showing
22 that the challenged cause of action arises from protected activity. (*Equilon, supra*, 29 Cal.
23 4th at 67.) To meet this burden, the moving party need not prove that all the acts alleged
24 in a cause of action fall within the protection of the anti-SLAPP statute. (*Mann. v. Quality*

1 *Old Time Service, Inc.*, 1220 Cal. App.4th 90, 103 (2004).) Where a cause of action is
2 based upon allegations that include protected and nonprotected activities, the cause of
3 action is vulnerable to a special motion to strike under the anti-SLAPP statute if the
4 protected conduct forms a substantial part of the factual basis for the claim. (*Id.* at 104.)

5
6 The counterclaim here alleges two causes of action. One is defamation based on
7 statements made by Counter-Defendant's attorney, and for statements by Counter-
8 Defendant regarding a public issue made in a public forum. The second cause of action,
9 for abuse of process, for conduct within the instant lawsuit.

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13 **1. Both Counts of the Counterclaim Arise From Protected Activities,**
14 **Therefore Meeting the Threshold Requirement Under California**
15 **Code of Civil Procure § 425.16 .**

16 a. The Defamation Claim.

17 The defamation claim arises from two separate activities. The first are the alleged
18 statements made by Counter-Defendant's attorney, F. Bari Najadpour. Cross-Plaintiffs
19 nowhere allege that Cross-Defendant uttered the words - only that there exists a writing,
20 not authored by Cross-Defendant, attributing the words to Cross-Defendant.
21 (Counterclaim of E360Insight, LLC and Bargain Depot Enterprises ("Counterclaim") at
22 4:6-12.) Even if Cross-Plaintiffs amended the allegations to include a claim that Cross-
23 Defendant spoke the words to his attorney in preparation to bring the original claim in this
24 case, the alleged statement would be privileged. (*Aronson v. Kinsella*, 58 Cal. App. 4th
25 254, 262 (1997) ("In California, the courts have held prelitigation statement is protected
26 by the litigation privilege of section 47, subdivision (b) when the statement is made in
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1 connection with a proposed litigation that is "contemplated in good faith and under
2 serious consideration.".) The second set of claims regarding allegedly defamatory
3 writings are newsgroup postings directed to Cross-Plaintiff Linhardt and saying, in
4 essence, "I received spam from you, therefore you must be a spammer" and "you are
5 being sued for sending illegal spam." (Counterclaim at 4:21-24, 5:4-7, and 5:14-17 and
6 Exhibits B, C, and D.)

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8
9 Spam, both lawful or unlawful, is a public issue. The Federal Trade Commission has
10 held multiple spam summits to discuss issues regarding spam.⁵ California and the United
11 States passed laws regulating spam, and made amendments to them.⁶ There can be no
12 dispute that spam is an issue of public interest. (*See, e.g.*, Cal.Bus.&Prof. § 17529(d)
13 (finding that costs in 2004 were estimated to be more than ten billion dollars in the United
14 States alone); *see also Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 479
15 (stating that "public interest" within the meaning of the anti-SLAPP statute, includes
16 "private conduct that impacts a broad segment of society").)

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19 It cannot be disputed that the complained of statements (excepting statements
20 Silverstein may have made to his attorney) were made in a public forum, the
21 News.Admin.Net-Abuse.Email Usenet Newsgroup ("NANAE") – a public forum, mainly
22 populated by anti-spammers, discussing abuses of e-mail, including unwanted and
23 unsolicited e-mail. These statements are public forums covered by the anti-SLAPP statute
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26 5. The FTC press release for its 2007 spam summit is located at
27 <http://www.ftc.gov/opa/2007/04/spamsummit.shtm>.

28 6. California Business and Professions Code §§ 17529.5 and 17538.45 have been amended at
least once.

1 (Cal.Civ.Proc. § 425.16(e)(3)) and the First Amendment to the United States Constitution.
2 (*Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 (Cal. 2006) ("The Court of Appeal properly
3 rejected plaintiffs' claim. Web sites accessible to the public, like the "newsgroups" where
4 Rosenthal posted Bolen's statement, are "public forums" for purposes of the anti-SLAPP
5 statute.".)
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9 **b. The Abuse of Process Claim**

10 California Code of Civil Procedure Sections 425.16 (e)(1) and (e)(2) are coextensive
11 with the litigation privilege of Civil Code Section 47(b) (*Ruiz v. Harbor View Community*
12 *Ass'n*, 135 Cal. Ap 4th 1456, 1467, fn. 3 (2005)) and protects all statements or writings
13 made before, or in connection with issues under consideration by, official bodies and
14 proceedings. (*Briggs, supra*, 19 Cal 4th at 1119.) The purpose of the litigation privilege
15 is to afford litigants and witnesses "the utmost freedom of access to the courts without
16 fear of being harassed subsequently by derivative tort actions." (*Silberg v. Anderson*, 50
17 Cal. 3d 205, 213 (Cal. 1990).) "In other words, the litigation privilege is intended to
18 encourage parties to feel free to exercise their fundamental right of resort to the courts for
19 assistance in the resolution of their disputes, without being chilled from exercising this
20 right by the fear that they may subsequently be sued in a derivative tort action arising out
21 of something said or done in the context of the litigation." (*Edwards v. Centex Real Estate*
22 *Corp.*, 53 Cal. App. 4th 15, 29 (1997)("Edwards").) Despite its explicit wording, the
23 privilege described by section 47(b) has been given expansive application by California
24 courts. The *Edwards* court further said that the litigation privilege extends to all torts
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1 other than malicious prosecution; therefore the tort of abuse of process is covered by the
2 litigation privilege.

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5 **B. Counter-Plaintiffs Cannot Show a “Probability Of Success” Given the**
6 **Litigation Privilege and That Counter-Plaintiffs Will Be Unable To**
7 **Establish That Counter-Defendant's Statements Were False And**
8 **Malicious.**

9 To establish a likelihood of prevailing on its claims, “the appropriate inquiry is
10 whether the plaintiff has stated and substantiated a legally sufficient claim.” (*Mann,*
11 *supra*, 120 Cal.App.4th at 105.) In making this determination, the court may not weigh
12 the credibility of comparative strength of the evidence, but must consider whether
13 plaintiff has made a prima facie showing of the facts based upon competent admissible
14 evidence that would, if proved, support a judgment in the plaintiff's favor. (*Id.*) The court
15 should measure the plaintiff's showing against a standard similar to that used in deciding
16 a motion for nonsuit, directed verdict, or summary judgment. (*Computer Xpress, Inc. v.*
17 *Jackson*, 93 Cal. App. 4th 993, 1010 (2001).) Just as a plaintiff cannot defeat a summary
18 judgment motion based upon a theory of recovery not yet pled, a plaintiff cannot defeat an
19 anti-SLAPP motion based on evidence showing a theory of recovery different from that
20 alleged in the claim.
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24 Additionally, any mistaken attribution of e-mails to Counter-Plaintiffs are a direct
25 result of Counter-Plaintiffs’ affirmative acts to hide their identity in the sending of e-mail,
26 including the use of Moniker’s Privacy Service.
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1 **1. The Abuse of Process Claim**

2 Counter-Plaintiffs' abuse of process claim consists solely of communicative acts that
3
4 are related to the litigation – the filing of the lawsuit and engaging in the discovery
5 process - combined with assumptions about Cross-Defendant's intent.

6 Counter-Plaintiffs’ abuse of process claim is for bringing the original lawsuit
7
8 without basis supposedly so as to obtain “confidential business information.”
9 (Counterclaim at 6:22-26 (incorrectly numbered as paragraph 22).) To support this,
10 Counterclaim Plaintiffs point to Silverstein’s refusal to provide the “allegedly offending
11 e-mails that purportedly form the basis for this case.” (Counterclaim at 9:19-25.) Counter-
12 Plaintiffs seek to mislead this Court, as Silverstein provided e-mail messages to Counter-
13 Plaintiffs on August 27, 2007. (*See* Nejadpour Declaration, Exhibit A.) Counter-Plaintiffs
14 further attempt to deceive this Court by implying that domain name ownership is
15 “confidential business information” but, in fact, not only is domain name ownership
16 information public information, but federal law makes it a crime to use more than one
17 domain name without truthful registration information when sending otherwise lawful
18 spam. (18 U.S.C. § 1037(a)(4).) (Please see expert declaration of Jay Westerdal).

19 Each item complained of in the abuse of process are acts that are part of the
20
21 litigation of the instant case, and therefore are privileged. “To effectuate its vital
22 purposes, the litigation privilege is held to be absolute in nature.” (*Silberg, supra*, 50 Cal.
23 3d at 215 (internal citations omitted).)

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27 *Albertson*, Justice Traynor, speaking for the court, reasoned that the policy of
28 encouraging free access to the courts was so important as to require application
of the privilege to torts other than defamation. (*Albertson v. Raboff, supra*, 46

1 Cal.2d at p. 381; see *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss*
2 *& Karma, Inc.*, supra, 42 Cal. 3d at p. 1164.) Accordingly, in the years since
3 *Albertson*, section 47(2) has been held to immunize defendants from tort
4 liability based on theories of abuse of process (*Drasin v. Jacoby & Myers*
5 (1984) 150 Cal. App. 3d 481 [197 Cal. Rptr. 768]; *Rosenthal v. Irell &*
6 *Manella*, supra, 135 Cal. App. 3d 121; *Asia Investment v. Borowski* (1982) 133
7 Cal. App. 3d 832 [184 Cal. Rptr. 317, 30 A.L.R.4th 561]; *Umansky v.*
8 *Urquhart* (1978) 84 Cal. App. 3d 368 [148 Cal. Rptr. 547]; *Twyford v. Twyford*
9 (1976) 63 Cal. App. 3d 916 [134 Cal. Rptr. 145]; *Younger v. Solomon* (1974)
10 38 Cal. App. 3d 289 [113 Cal. Rptr. 113]; *Thorton v. Rhoden*, supra, 245 Cal.
11 App.2d 80, 99; but see *Oren Royal Oaks Venture v. Greenberg, Bernhard,*
12 *Weiss & Karma, Inc.*, supra, 42 Cal. 3d at p. 1165.) (*Silberg v. Anderson*, 50
13 Cal. 3d 205, 215 (Cal. 1990).)

14 Counter-Plaintiff's assertions that there are no such e-mails forming the basis of the
15 complaint is simply false.⁷ In fact, Silverstein provided copies of some the complained of
16 e-mails to Counter-Plaintiffs' counsel on multiple occasions, along with lessons on how
17 e-mail works.⁸

18 Counter-Plaintiffs' abuse of process claim essentially amounts to a discovery
19 dispute, which are settled through a motion to compel in accordance with Federal Rule of
20 Civil Procedure 37 – not a derivative action. If there were no such e-mails, as the
21 Counter-Plaintiffs claim, then Counter-Defendant would be subject to perjury charges.
22 “We observe, however, that in a good many cases of injurious communications, other
23 remedies aside from a derivative suit for compensation will exist and may help deter
24 injurious publications during litigation. Examples of these remedies include criminal

25
26 7. Counter-Plaintiff's counsel declaration, in support of the motion to add the counterclaim,
27 claiming that the e-mails were never provided to him is contradicted by his own e-mail to Plaintiff's
28 counsel. (See Nejadpour decl. Exhibit A)

8. Please see Silverstein's declaration ¶¶ 4-7.

1 prosecution for perjury (Pen. Code, § 118 et seq.).” (*Silberg, supra*, 50 Cal. 3d at
2 218-219.)

3
4 Counter-Defendants request for the list of the domain names are directly related to
5 this litigation. Counter-Defendant needs Counter-Plaintiffs’ domain names so that he can
6 properly and definitely identify **ALL** e-mails, on all of his computers, associated with
7 **ALL** Defendants in the claim in chief.⁹ Counter-Plaintiffs do not dispute the need for this
8 information.
9

10 Silverstein’s filing of this lawsuit is covered by the litigation privilege. Silverstein
11 requests for discovery and refusal to provide discovery, without a protective order, is
12 covered by the litigation privilege, are to be resolved pursuant to F.C.R.P. 37 and L.R. 37-
13 1 through L.R. 37-4. Therefore the abuse of process claim must be dismissed.
14
15

16
17 **2. The Defamation claim**

18 The defamation claim amounts to claims that Counter-Defendant:

- 19 a. Allegedly stated to his attorney that David Linhardt is a bully
20 and liar;
21
22 b. Stated in a public forum to David Linhardt, that Cross-
23 Defendant received spam from him, therefore he must be a
24 spammer;
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9. See Silverstein decl. ¶ 9.

1 c. Stated in a public forum that David Linhardt is being sued for
2 illegal spam.
3

4 David Linhardt, e360, and bde are limited purpose public figures. Spam, both legal
5 and illegal, and issues regarding spam are issues of public interest. Counter-Plaintiff
6 e360, through its president, placed itself directly into the spam controversy, not only by
7 posting statements in NANAE, but by actively seeking news coverage. Where Counter-
8 Plaintiffs are limited purpose public figures, they must show not only that the complained
9 of statements to be false, but made with knowledge of their falsehood or with reckless
10 disregard to the truth. (*New York Times v. Sullivan*, 376 U.S. 254, 279-80, 11 L. Ed. 2d
11 686, 84 S. Ct. 710 (1964).) Cross-Plaintiffs cannot meet this standard as the statements
12 were and are true.
13
14

15 A limited purpose public figure is one who (a) voluntarily participates in a
16 discussion about a public controversy, and (b) has access to the media to make his or her
17 own view known. (*See Barry v. Time Inc.*, 584 F. Supp. 1110, 1113-22 (N.D. Cal. 1984);
18 *Reader's Digest Ass'n v. Superior Court*, 37 Cal. 3d 244, 254 (1984), *cert. denied*, 478
19 U.S. 1009 (1986); *Copp v. Paxton*, 45 Cal.App.4th 829, 845-846 (1996).) David Linhardt
20 and e360 meet this standard, since they (a) voluntarily entered the newsgroup's debate on
21 the topic at issue, and (b) had access to the same audience to provide a rebuttal simply by
22 posting a response.¹⁰ Counter-Plaintiffs, actively participated in the same newsgroup,
23 actively sought news coverage and even posted their own news releases on e360's web
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28 10. There is no allegation that Cross-Defendant referred to either Counter-Plaintiff in the public forum, nor that bde suffered damages.

1 site. This is counter to the situation in *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (U.S.
2 1976), where Firestone did not choose to publicize the issues related to her marriage.
3

4 Counter-Plaintiffs cannot show any damages by Counter-Defendant's statements.
5 Even if Counter-Plaintiff e360 could show damages, it never took any steps to mitigate
6 those damages. e360 already stated, under oath, that it suffered at least \$30,215,000.00 in
7 damages from Spamhaus referring to e360 as a spammer.¹¹ E360 claims, in its case
8 against Comcast, that it suffered \$21,590,124.00 in damages.¹² In the Ferguson I,
9 Ferguson II, and Ferguson III litigation, e360 claims harm relating to being called a
10 spammer. However, Silverstein's voice was drowned out by the cacophony of voices
11 referring to e360 and Linhardt as spammers, so it is impossible for Counter-Plaintiffs to
12 attribute any damages specifically to Silverstein's statements.
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17 **a. Cross-Defendants' Dislike Of Being Called Liars Is Not**
18 **Actionable.**

19 The statement that Cross-Plaintiffs are liars, whether made by Cross-Defendant or
20 not, happens to be true, but it is also opinion, and privileged under the circumstances
21 implied by allegations in the Counterclaim. If the statement is specific to David Linhardt,
22 then the other Cross-Plaintiffs lack standing to bring any claim based on that statement.
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26 11. See ¶¶ 32-36 of Linhardt's declaration in support of Default Judgment. Request for judicial
27 notice, exhibit E.

28 12. See ¶¶ 35(a), 46(a), 53(a), 62(a) of the Comcast Complaint, attached as Exhibit C, of the
request for judicial notice.

1 Even if the statement were false, there is no possibility of damage from the alleged
2 statement made to Silverstein’s counsel.

3
4 Moreover, the term “lying” applies to a spectrum of untruths including “white
5 lies,” “partial truths,” “misinterpretation,” and “deception.” As a result, the
6 statement is no more than nonactionable “rhetorical hyperbole, a vigorous
7 epithet used by those who considered [the appellant's] position extremely
8 unreasonable.” *Milkovich*, 497 U.S. at 17 (quoting *Greenbelt Cooperative*
9 *Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 13-14, 26 L. Ed. 2d 6, 90 S. Ct.
10 1537 (1970) (holding that the word “blackmail” used in that specific context
11 was no more than rhetorical hyperbole).) (*Underwager v. Channel 9 Austl.*, 69
12 F.3d 361, 367 (9th Cir. 1995).)

13
14 David Linhardt sent a private e-mail to Silverstein, in response to Silverstein
15 publically stating that he received spam from e360, saying that he checked and found one
16 e-mail address belonging to Silverstein, but never sent e-mail to that e-mail address. (*See*
17 *Silverstein Declaration*, Exhibit B.) Counter-Defendant never signed up to receive e-mail
18 from Counter-Plaintiffs or anyone who identified Counter-Plaintiffs as a partner. (*See*
19 *Silverstein decl.* ¶¶ 17-18). In fact, he had never heard of e360 or Bargain Depot prior to
20 2006, therefore any e-mail from e360 or related company was unsolicited. (*See Silverstein*
21 *decl.* ¶¶ 14-18). Counter-Defendant not only received e-mails from e360, but provided a
22 summarization of them in the Verified First Amended Complaint, even provided copies to
23 Counter-Plaintiffs. To this date, despite being provided with e-mails, Counter-Plaintiffs
24 never denied the veracity of the e-mails provided to them – though there is sufficient
25 information provided to them to make a determination in this regard. Counter-Defendant
26 identified e-mails being from Counter-Plaintiffs: two are attached to Silverstein’s
27 declaration, as Exhibits C and Exhibit D (identified in the Set1 attached to the FAC on
28

1 line numbers 23 and 45 respectively) copies of which were included in the samples
2 provided to Counter-Plaintiffs on August 27, 2007.
3

4 Silverstein never signed up with Counter-Plaintiffs for any e-mails; Silverstein
5 identified spam from Counter-Plaintiffs; Silverstein received an e-mail from Linhardt,
6 saying he never sent e-mails to Silverstein; leading to the conclusion that Linhardt, the
7 president of both e360 and bde, made statements contrary to the truth – that he lied.
8

9 Even if referring to Linhardt as a liar was a false statement, it is not actionable for
10 several reasons. Linhardt, the individual, is not a party to this action, and e360 has no
11 standing to bring an action on his behalf. The statement was not made with malice, as
12 Silverstein had spam he believed was sent by one of Linhardt's companies to an e-mail
13 address at the sorehands.com domain, despite Linhardt's statement that they NEVER sent
14 any e-mail to the only address within their database at the sorehands.com domain. e360
15 hiding the ownership of its domain names directly contributes to any mistake in
16 attributing spam to e360. Arguendo, if the alleged statement were made with malice, the
17 counterclaim does not allege that the statement was published by Silverstein, except
18 possibly to his attorney, F. Bari Nejadpour. But even if Cross-Defendant actually made a
19 malicious and false statement to his attorney, that alleged statement is covered by the
20 litigation privilege. Even ignoring the litigation privilege, Counter-Plaintiffs will not be
21 able to establish any damage resulting from Silverstein allegedly publishing this statement
22 to his attorney.
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b. David Linhardt Is Not A Cross-Plaintiff.

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2 The actual published statement implying that David Linhardt is a spammer, was
3 posted as a reply to Linhardt's statement that Counter-Defendant is a "criminal vigilante".
4 Cross-Defendant stated in a public forum, "I received spam from you, therefore you must
5 be a spammer." Counter-Plaintiffs contention, in ¶ 13 of the counterclaim, that calling a
6 person a spammer implies illegal activity is inexplicable in light of their own third
7 affirmative defense to the FAC, that if you obey the law, that spamming is not illegal.
8 This is not only a true statement, but was directed at David Linhardt, not a Cross-Plaintiff
9 in this action. For the statement to be true, Counter-Defendant need only identify one
10 spam that he received from Linhardt or the companies he controls. For Counter-Plaintiffs
11 to prevail on this portion of the defamation, Counter-Plaintiffs need to establish that
12 either, Silverstein knew he never received any commercial e-mails attributable to
13 Counter-Plaintiffs, or that Silverstein received commercial e-mails from Counter-
14 Plaintiffs, but knowingly and specifically asked for commercial e-mails from Counter-
15 Plaintiffs. Given the facts of this case and the fact that Counter-Plaintiffs have not
16 disputed the veracity of the e-mail messages provided to them last August, Counter-
17 Plaintiffs cannot establish a likelihood of prevailing on this portion of the defamation
18 claim.
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24 As stated above: Silverstein had never heard of Counter-Plaintiffs, prior to 2006;
25 Silverstein never affirmatively signed up with Counter-Plaintiffs to receives ANY e-mail
26 from them, ever; In 2007, Silverstein identified e-mail advertising that was sent by, or on
27 behalf of Counter-Plaintiffs. Spam, as commonly used refers to unsolicited commercial e-
28

1 mail, and people who send spam are known as spammers.¹³ Where Counter-Defendant
2 received spam from Counter-Plaintiffs, or believed he received emails from Linhardt or
3
4 one of his companies, it is reasonable for Counter-Defendant to refer to Linhardt as a
5 spammer.

6 **c. Cross-Plaintiffs Inexplicably Claim That The Statement**
7 **“You Are Being Sued For Sending Illegal Spam” Was A**
8 **False Statement.**

9 One only has to look at the caption page of the original complaint or amended
10 complaint to determine whether this complained of statement was truthful.

11 The first two counts of the complaints in the instant case are “Violations of Business
12 and Professions Code § 17529.5” and “Violations of the CAN-SPAM ACT (15 U.S.C. §
13 7703 et seq).” Both statutes regulate spam and commercial-email. Spam sent in violation
14 of either statute is unlawful and therefore illegal. There is no likelihood that Counter-
15 Plaintiffs can show that they are not being sued for “illegal spamming.”
16
17

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19 **IV. Request for Attorneys' Fees**

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21 Cross-Defendant should recover attorneys' fees. A prevailing defendant is entitled to
22 a mandatory award of his attorneys' fees and costs against the plaintiff. (Cal.Civ.Proc. §
23 425.16(c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.) Cross-Defendant hereby
24 requests an award of attorneys fees and costs incurred both the this motion and his
25 opposition of the motion to add counterclaim.
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13. Please see paragraphs 28, 29 of the First Amended Complaint.

1 **V. Conclusion**

2 This counterclaim is a typical SLAPP suit. Counter-Plaintiffs brought multiple
3 defamation suits against individuals speaking out against their tactics, including
4 Silverstein, only to repeatedly dismiss the claim when challenged. Now Counter-Plaintiffs
5 seek to hold Counter-Defendant liable for public statements about a public issue and for
6 acts while in litigation – both are subject to dismissal upon anti-SLAPP motion.
7

8 Counter-Plaintiffs cannot possibly establish that the alleged statements were false or
9 known to be false by Counter-Defendant, when made. Even if Counter-Plaintiffs could
10 establish that the statements were actually defamatory, they could not establish any
11 damages since they have claimed that many people have already referred to them as
12 spammers, and claimed millions of dollars in damages from those people.
13

14 The abuse of process claim relates to acts that occurred as part of litigation and
15 therefore privileged. Where the acts are privileged, Counter-Plaintiffs cannot establish a
16 likelihood of recovery.
17

18 For the reasons stated above, Counter-Defendant respectfully requests that this Court
19 grants this anti-SLAPP motion Counter-Plaintiffs be required to pay his attorneys' fees
20 and costs associated with this counterclaim and this motion.
21

22 Dated: March 19, 2008
23

24 Respectfully submitted,
25

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