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8

9 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **FOR THE COUNTY OF LOS ANGELES**

11 WILLIAM SILVERSTEIN,  
12 Plaintiff,  
13  
14 v.  
15 T.J. WEB PRODUCTIONS, LLC,  
NINO ENTERPRISES, INC. and Does  
16 1-50,  
17 Defendants.

Case Number BC 352733

**OPPOSITION OF DEFENDANT,  
NINO ENTERPRISES, INC., TO  
PLAINTIFF'S DEMURRER TO  
ANSWER**

**Date: August 25, 2006**  
**Time: 8:30 A.M.**  
**Place: Dept. "42"**

Hon. Elihu Berle

18

19 DEFENDANT, NINO ENTERPRISES, INC. ("Nino"), hereby replies to the above-  
20 noted demurrer, as follows:

21

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23

**I.**

24

**INTRODUCTION AND SUMMARY OF ARGUMENT**

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Plaintiff's demurrer seems to be a "make-work" project that was motivated by the fact  
that another defendant, T.J. Web Productions, LLC, filed a motion to quash which is also set

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1 for hearing on August 25. Thus, having to appear in court anyhow, Plaintiff appears to be  
2 using the hearing date to present a demurrer to Nino's answer. However, as will be shown,  
3 Plaintiff's effort must fail.

4 The overarching concept that should guide the court as it considers plaintiff's  
5 demurrer is the function of answers. As one leading case suggests, the function of the answer  
6 is merely to outline the issues so that the parties may know what is involved in the litigation.  
7 Fibreboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 Cal.App.2d  
8 675, 708. Indeed, discovery can flesh out the facts underlying any defense. Thus, the answer  
9 itself is not designed to set forth all the facts supporting the defenses asserted therein; it  
10 merely provides a "road-map" as to the issues in the case.

## 11 II.

### 12 EACH AFFIRMATIVE DEFENSE ASSERTED 13 IN THE ANSWER IS PROPERLY PLED

#### 14 A. First Affirmative Defense: Failure to State a Cause of Action.

15 This is not a factual defense, it is a legal defense based upon Code of Civil Procedure  
16 Sec. 430.10(e). No facts beyond the pleadings need to be alleged in order to prevail on the  
17 defense, which may be asserted, "by demurrer or answer," Code of Civil Procedure Sec.  
18 430.10 (emphasis added).  
19

#### 20 B. Second Affirmative Defense: Eighth Amendment to U.S. Constitution.

21 Again, this is a legal defense. See, BMW of North America, Inc. v. Gore (1996) 517  
22 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809; TXO Production Corp. v. Alliance Resources  
23 Corp. (1993) 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366. Thus, there are no new facts  
24 to assert in support of this defense. The "road map" function of issue-outlining has been  
25 satisfied.  
26

1 **C. Third Affirmative Defense: Anti-Spamming Policy.**

2 The fact supporting this defense is the same as the defense itself: Nino maintains an  
3 anti-spamming policy. That is the supporting fact, which can (indeed, will) be fleshed out  
4 in discovery. Nino is not required to set forth every aspect of this defense in its answer.

5  
6 **D. Fourth Affirmative Defense: Failure to Exercise Reasonable Care by Third  
7 Parties.**

8 The same considerations applicable to the third affirmative defense apply to the fourth  
9 affirmative defense, Nino asserts that the actions of third parties caused any loss that the  
10 plaintiff complains of. Discovery will bear that out. Also, Nino is under no requirement to  
11 “implead” such third parties as plaintiff’s demurrer suggests. After identification of the third  
12 parties that caused any loss complained of by plaintiff, the plaintiff may, if he wishes, add  
13 them to the case.

14  
15 **E. Fifth Affirmative Defense: Failure to Mitigate Damages.**

16 It is well-settled that a plaintiff cannot “recover for avoidable loss . . . which could  
17 have been avoided by ‘exercising reasonable diligence and ordinary care.’” That is a defense  
18 that must be pleaded. Camrosa County Water District v. Southwest Welding & Mfg. Co.  
19 (1975) 49 Cal.App.3d 951. Nothing in that case or any other that Nino is aware of suggests  
20 that the defense must be pled to the exacting specificity that plaintiff demands.

21  
22 **F. Sixth Affirmative Defense: First, Fifth, and Fourteenth Amendments.**

23 Please refer to subsection (B), supra, regarding the second defense of the Eighth  
24 Amendment to the U.S. Constitution. Also, plaintiff has only mentioned “rights to free  
25 speech,” a First Amendment concern. Plaintiff has not mentioned anything regarding the  
26 application of the Fifth Amendment. (The Fourteenth Amendment is the “gateway” by  
27


1 which the first ten amendments of the U.S. Constitution are applicable to the states. See,  
2 TXO Production Corp., supra at n. 24.

3  
4 **III.**  
5 **CONCLUSION**

6 For all the foregoing reasons, Nino respectfully submits that the Court overrule  
7 plaintiff's demurrer, or, at the least, grant leave to amend as the demurrer states.

8  
9 Dated: August 14 2006

Respectfully Submitted,  
CLYDE DeWITT  
WESTON, GARROU, DEWITT & WALTERS

12  
13 By:   
Joseph P. Wohrle

14 Counsel for Defendant, Nino Enterprises, Inc.

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**PROOF OF SERVICE BY MAIL**

[Pursuant to Calif. Code of Civil Procedure § 1013a(3)  
and Fed.R.Civ.P. 5]

I am a resident of and/or employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within entitled action. I work at the law firm of Weston, Garrou, DeWitt & Walters, located at 12121 Wilshire Blvd., Suite 900, Los Angeles, California 90025.

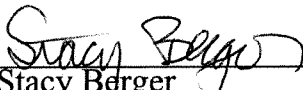
I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, any correspondence delivered to our firm's mail room employee(s) is routinely deposited with the United States Postal Service on the same day.

On the date shown below, I served the foregoing document on the interested parties in this action, by placing a true copy thereof enclosed in a sealed envelope, first class, with postage thereon fully prepaid, and either: (1) personally delivering it to our firm's mail room employee(s) for deposit with the United States Postal Service pursuant to our firm's ordinary business practice; or (2) personally depositing such correspondence directly in the United States mail, addressed as follows:

**F. Bari Nejadpour, Esq.**  
**3450 Wilshire Blvd., # 715**  
**Los Angeles, CA 90010**

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on August 14, 2006.

  
\_\_\_\_\_  
Stacy Berger