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

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

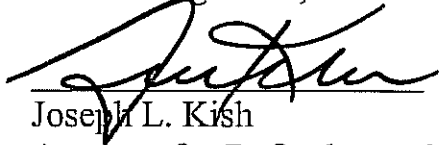
|    |                                  |   |                                |
|----|----------------------------------|---|--------------------------------|
| 13 | WILLIAM SILVERSTEIN, an          | ) | Case No.: cv07-2835 CAS (VBKx) |
| 14 | individual,                      | ) |                                |
| 15 | Plaintiff,                       | ) | <b>NOTICE OF MOTION AND</b>    |
| 16 | vs.                              | ) | <b>MOTION TO DISMISS FIRST</b> |
| 17 |                                  | ) | <b>AMENDED COMPLAINT</b>       |
| 18 | E360INSIGHT, LLC, BARGAIN        | ) |                                |
| 19 | DEPOT ENTERPRISES, LLC, AKA      | ) |                                |
| 20 | BARGAINDEPOT.NET, DAVID          | ) |                                |
| 21 | LINHARDT, an individual, MONIKER | ) |                                |
| 22 | ONLINE SERVICES, LLC, And DOES   | ) |                                |
| 23 | 1-50; inclusive,                 | ) | Date: October 1, 2007          |
| 24 | Defendants                       | ) | Time: 10:00 a.m.               |
| 25 |                                  | ) | Courtroom: 5 on 2nd Floor      |

26 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

27 PLEASE TAKE NOTICE that all Defendants move to dismiss the Claims in the  
28 Complaint pursuant to Fed. R. Civ. P. 12(b)(6). The motion will be heard on  
October 1, 2007 at 10:00 a.m. in Courtroom 5 on the 2nd floor, located at 312 N

1 Spring St., Los Angeles, CA 90012. The motion will be based on this Notice of  
2 Motion and Motion, Memorandum of Points and Authorities, oral argument, the  
3 pleadings in this action, and all other matters as may be properly considered.  
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7 Dated: August 24, 2007

8 

9 Joseph L. Kish  
10 Attorney for Defendants e360 Insight,  
11 Bargain Depot Enterprises, LLC, a.k.a.  
12 Bargaindepot.net, Moniker Online  
13 Services, LLC and David Linhardt  
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13 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ..... 3

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1 **A. Introduction.**<sup>1</sup>

2  
3 In response to this Court's prior dismissal of Plaintiff's original Complaint,  
4 Plaintiff filed a six (6) count First Amended Complaint ("FAC") against  
5 e360Insight, LLC ("e360"), Bargain Depot Enterprises, LLC, AKA  
6 Bargaindepot.net ("Bargain Depot"), David Linhardt ("Linhardt")<sup>2</sup> and Moniker  
7 Online Services, LLC ("Moniker"). In addition to attempting to resurrect its  
8 claims based on the California Business and Professions Code §17529.5 (Count I)  
9 and the Controlling the Assault of Non-Solicited Pornography and Marketing  
10 (CAN-SPAM) 15 U.S.C. §7701 *et seq.* (Count II), Plaintiff's FAC includes new  
11 claims based on purported trespass to chattels (Count III); violation of California  
12 Penal Code 502 (Count IV); negligence per se (Count V); and libel per se (Count  
13 VI). All of these Counts, old and new, should be dismissed with prejudice as to all  
14 Defendants  
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19 Counts I and II should be dismissed because Plaintiff has again failed to  
20 plead these counts with the particularity required by Fed. R. Civ. P (9)(b). Count II  
21 should also be dismissed because Plaintiff, as an e-mail recipient, lacks standing to  
22  
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24 <sup>1</sup> This motion is made following the attempt by counsel for Defendants to  
25 conference with counsel for Plaintiff pursuant to L.R. 7-3 which took place on  
26 August 22, 2007 after numerous prior attempts to resolve the deficiencies  
27 presented in the First Amended Complaint.

28 <sup>2</sup> On August 6, 2007, this Court dismissed Linhardt pursuant to Fed. R. Civ. P.  
12(b)(2) based on lack of personal jurisdiction.

1 the plaintiff, the Court is not required to accept legal conclusions. *Sprewell v.*  
2 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Clegg v. Cult*  
3 *Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

5 **C. Count I And II Should Be Dismissed With Prejudice.**

7 **1. Plaintiff Has Again Failed to Plead With the Requisite Particularity.**

8 This Court has already ruled that Plaintiff is required to plead Counts I and  
9 II with particularity. *See* Order entered June 25, 2007 (attached hereto as Exhibit  
10 A). Accordingly, Plaintiff's allegations "must be accompanied by 'the who, what,  
11 when, where, and how' of the misconduct charged..." and "must set forth what is  
12 false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy*  
13 *Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). This was made clear to Plaintiff  
14 in the Court's prior Order dismissing Counts I and II, apparently to no avail. Here,  
15 Plaintiff has not and indeed cannot plead violations of §17529.5 or CAN-SPAM  
16 with the specificity required by Rule 9. The FAC does not state who sent the e-  
17 mails, how *all* of the Defendants violated the statutes at the same time, and what,  
18 exactly, is the false nature of the header information. Plaintiff only alleges that the  
19 complained of e-mails "contained or [were] accompanied by falsified,  
20 misrepresented, or forged header information", (FAC at ¶ 84) and that the e-mails  
21 contained "materially false and materially misleading headers which  
22 misrepresented and hid the true identity of the sender of the complained of spam."  
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1 (FAC at ¶ 91). These allegations are of the same conclusory nature that prompted  
2 this Court to dismiss Counts I and II in the original Complaint and Plaintiff's FAC  
3 does nothing to correct those deficiencies. Plaintiff claims to have received some  
4 99 allegedly offending e-mails but like the original Complaint fails to attach a  
5 single e-mail to the FAC or identify how any of the e-mails specifically violate  
6 §17529.5 or CAN-SPAM. Plaintiff's allegations do not state with particularity the  
7 basis of the allegations of falsity and must therefore be dismissed.  
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11 Defendants previously pointed out to this Court why they need to see the  
12 allegedly offending emails to respond to Plaintiff's allegations because Defendants  
13 do not believe they are the originator of these e-mails. (See attached Declaration of  
14 David Linhardt ¶ 3-4). Defendants have requested that Plaintiff provide them with  
15 these e-mails repeatedly since the inception of this lawsuit, but Plaintiff is  
16 unwilling or unable to do so. As noted in the Linhardt Declaration, certain e-mails  
17 cited by Plaintiff could not have come from Defendants, (Linhardt Declaration at ¶  
18 4) while others probably did not originate from e360 or Bargain Depot; this cannot  
19 be determined without reviewing the specific header information and e-mails  
20 themselves. (Linhardt Declaration at ¶ 4). Defendants' request sought nothing  
21 more than what Plaintiff should have originally alleged in his Complaint - the  
22 requisite details of the purportedly offending e-mails - and certainly should have  
23 alleged in the FAC after this Court's prior dismissal of that Complaint.  
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1 Recognizing that Defendants' motion is based on Fed. R. Civ. P. 12(b)(6),  
2 the Linhardt Declaration is not being offered to contradict any evidence or  
3 allegation put forward by Plaintiff. This is so because Plaintiff has not put forth  
4 any allegations sufficient to support a claim under either §17529.5 or CAN-SPAM.  
5 The Linhardt Declaration is offered solely to demonstrate that Plaintiff cannot cure  
6 the deficiencies that existed in the original Complaint, and which remain in the  
7 FAC. Absent complete disclosure of the factual information pertaining to the  
8 purportedly offending e-mails, or the e-mails themselves (including the related  
9 header information), Defendants respectfully request that Counts I and II be  
10 dismissed with prejudice. Indeed, absent Plaintiff's disclosure of this information,  
11 Counts III, IV and V should also be dismissed with prejudice because these Counts  
12 necessarily rely on some showing that there are illegal e-mails that can be  
13 attributed to the Defendants.  
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20 **2. Plaintiff Cannot Bring An Action Under CAN-SPAM In His**  
21 **Individual Capacity.**

22 There is no private right of action for an *individual* under CAN-SPAM. The  
23 Act only permits *providers* of internet access to maintain a cause of action. 15  
24 U.S.C. § 7706(g)(1). In this case, while Plaintiff purports to be a provider of  
25 internet access, his allegations demonstrate otherwise. *All* of the allegedly  
26 offending e-mails contained in Exhibit A of the FAC were sent to Plaintiff's own  
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28



1 e-mail accounts. Plaintiff admits this when he alleges "Plaintiff's e-mail client  
2 program segregates all *his* incoming e-mails that have been determined to be spam  
3 from *his* inbox." FAC at par. 38. (emphasis added). Plaintiff's own allegations  
4 make clear that he is not alleging damages as an internet service provider but only  
5 as an individual. Clearly, Plaintiff's claim under CAN-SPAM fails because he is  
6 looking to remedy an individual harm, not a harm to those who use his services as  
7 an ISP to access the internet. Count II should therefore be dismissed as to all  
8 defendants.  
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12 **3. Moniker Has Not Violated The California Business And Professions**  
13 **Code §17529.5 Or CAN-SPAM.**

14 CAN-SPAM only applies to those who "initiate the transmission ... of ...  
15 commercial electronic mail message[s]." 15 U.S.C. § 7704(a)(1). "Initiate" is  
16 defined as "to originate or transmit" a commercial e-mail message or "to procure  
17 the origination or transmission of such message...." 15 U.S.C. § 7702(9).  
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20 The FAC does not allege that Moniker transmitted any e-mail messages.  
21 Rather the Complaint generally avers that *Defendants* sent the allegedly offending  
22 e-mails which is illogical as all of the Defendants cannot all be "initiating" the  
23 same e-mails. Moreover, the FAC is devoid of any allegations that Moniker  
24 "procured" any of the e-mails. Defendant Moniker can only be held liable for  
25 procuring the transmission of an e-mail message if it "intentionally" induced  
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1 another "to initiate such a message on [its] behalf." *See* 15 U.S.C. § 7702(12).

2 Here, the FAC contains no allegations that even remotely suggest Defendant  
3 Moniker is liable for procuring the allegedly offending e-mails. Counts I and II  
4 should be dismissed as to Moniker on this basis alone.  
5

6  
7 Similarly, Plaintiff fails to state a claim against Moniker for violations of  
8 Cal. Bus. & Prof. Code § 17529.5. Liability under § 17529.5 requires a defendant  
9 to actually participate in the alleged violations, *i.e.*, actually participate in sending  
10 the spam. Section 17529.5(a) states: "It is unlawful for any person or entity to  
11 advertise in a commercial e-mail advertisement [where:] (2) The e-mail  
12 advertisement contains or is accompanied by falsified, misrepresented, or forged  
13 header information [;or] (3) The e-mail advertisement has a subject line that a  
14 person knows would be likely to mislead a recipient . . . ." "Commercial e-mail  
15 advertisement" is defined by §17529.1(c) as "any electronic mail message *initiated*  
16 for the purpose of advertising or promoting ... services." (Emphasis added).  
17

18 "Initiate" is defined as "transmit or cause to be transmitted." §17529.1(i). Thus,  
19 according to the plain language of this statute, liability under §17529.5 requires  
20 that a defendant actually send the alleged spam or cause it to be sent. Here, the  
21 Declaration of Eric Harrington makes clear that Plaintiff's specious allegations  
22 cannot be inferred to mean that Defendant Moniker sent or caused to be sent the  
23 allegedly offending e-mails. Moreover, §17529.5 only applies to those who  
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1 “advertise” through e-mail. Here, there is no allegations whatsoever that  
2 Defendant Moniker advertised through the allegedly offending e-mails.  
3

4 **D. Plaintiff Cannot Allege A Claim Based On Trespass To Chattels.**

5 Count III should be dismissed because even assuming all of Plaintiff’s  
6 allegations are true, there is no viable claim for trespass to chattels. In *Intel Corp.*  
7 *v. Hamidi*, 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32, 71 P. 3d 296, 302 (Cal. 2003), the  
8 California Supreme Court determined that merely sending electronic  
9 communications that allegedly could cause injury only because of their content  
10 does not amount to an actionable trespass to a computer system through which the  
11 messages are transmitted. The California Supreme Court noted that decisions  
12 finding electronic conduct to be a trespass to a computer system involved some  
13 actual or threatened interference with the computers’ functionality. *Id.* 30 Cal. 4th  
14 at 1354, 1 Cal. Rptr. 3d at 42. As noted previously, Plaintiff here has not  
15 adequately alleged that he is an internet service provider, and the e-mails that  
16 purportedly give rise to this case establish quite the contrary – that Plaintiff  
17 received the e-mails as an individual recipient. Thus, there has been no actual or  
18 threatened interference with an ISP’s computer system functionality. Instead,  
19 Plaintiff only alleges that the purportedly offending e-mails passed through  
20 Plaintiff’s computer, which is insufficient to state a claim based on trespass to  
21 chattels under California law. *Id.* This conclusion is particularly appropriate  
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1 where, as here, it cannot even be determined whose e-mails contain the allegedly  
2 offending content. Trespass to chattels requires a far greater interference than the  
3 mere pass-through of a limited amount of e-mails, which is, at best, what Plaintiff  
4 alleges in Count III.  
5

6  
7 Moreover, Count III of the First Amended Complaint fails to allege any  
8 tangible damages suffered by Plaintiff. Rather, Plaintiff states in conclusory  
9 fashion that “Plaintiff suffered damages as the result of Defendants’ wrongful  
10 conduct.” FAC at par. 104. Absent a showing of more than nominal damages,  
11 Plaintiff is not entitled to recovery. *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1 Cal.  
12 Rptr. 3d 32, 71 P. 3d 296, 302 (Cal. 2003) (quoting Restatement (Second) of Torts  
13 § 218 (1965)) (rejected an action for nominal damages for harmless intermeddling  
14 with the chattel). Citing *Intel Corp.*, the Fourth Circuit has also rejected claims for  
15 nominal damages based on alleged trespass to chattel. *See Omega World Travel v.*  
16 *Mummargraphics, Inc.*, 469 F.3d 348; 2006 U.S. App. LEXIS 28517 (4th Cir.  
17 2006). (Because of Plaintiff’s failure to submit any evidence that the receipt of the  
18 e-mail messages placed a meaningful burden on its computer systems or even its  
19 other resources, summary judgment was appropriate). Here, at most, Plaintiff’s  
20 individual receipt of 99 e-mails, even assuming that they came from any of the  
21 Defendants, amount to nothing more than nominal damages to which Plaintiff is  
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1 not entitled to recover based on trespass to chattels. Count III of the Amended  
2 Complaint should be dismissed with prejudice.  
3

4 **E. Defendants Did Not Violate California Penal Code 502.**

5 Plaintiff alleges that all Defendants violated § 502 by knowingly and without  
6 permission used computer services and knowingly accessed and without  
7 permission added data. (FAC at ¶¶ 110 and 111). Even a cursory reading of §  
8 502 reveals that it is inapplicable to Plaintiff's claims against any of the  
9 Defendants. Section 502 was implemented to allow recourse for "tampering,  
10 interference, damage, and unauthorized access to lawfully created computer data  
11 and computer systems." Cal. Penal Code § 502 (a). The Code states that "access"  
12 means "to gain entry to, instruct, or communicate with the logical, arithmetical, or  
13 memory function resources of a computer, computer system, or computer  
14 network." *Id.* at § 502 (b)(1). No allegations of this kind of activity exist in the  
15 FAC. The term "injury" means "any alteration, deletion, damage, or destruction of  
16 a computer system, computer network, computer program or data caused by the  
17 access, or the denial of access to legitimate users of a computer system, network or  
18 program." *Id.* at § 502 (b)(8). Again, no allegations of this kind exist in the FAC.  
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25 Simply stated, a violation of Penal Code § 502 does not exist here.

26 Defendants did not "access" Plaintiff's computers as that term is defined by § 502.

27 There are no allegations that Defendants tampered, interfered with or damaged  
28

1 Plaintiff's computer data or computer system. At most, Plaintiff received e-mails  
2 he did not want, and nothing more. No court has concluded that § 502 applies to  
3 the conduct alleged in this case, which amounts to nothing more than Defendants  
4 sending a limited amount of e-mails to Plaintiff. This Court should not be the first.  
5

6  
7 Moreover, the California Legislature has already set in place statutory  
8 protections in appropriate circumstances by enacting Cal. Bus. & Prof. Code §  
9 17529.5 which specifically addresses the activities alleged in the FAC. In light of  
10 the existence of § 17529.5, the California Legislature could not have contemplated  
11 that Penal Code § 502 would apply to the very same conduct.  
12

13  
14 Finally, there are no allegations in the FAC that Moniker undertook any of  
15 the actions which would give rise to a violation of § 502. Moniker did not send,  
16 nor authorize the sending of any of the e-mail complained of in this case.  
17

18 Count IV should be dismissed as to all Defendants.

19  
20 **F. The Negligence Per Se Claim Fails Because Defendants Have Not  
21 Violated Any Underlying Statutes.**

22 To prevail on a claim of Negligence Per Se, Plaintiff must allege and prove  
23 that “the defendant violated a statute; the violation proximately caused the  
24 plaintiff’s injury; the injury resulted from the kind of occurrence the statute was  
25 designed to prevent; and the plaintiff was one of the class of persons the statute  
26 was intended to protect.” *Friedman v. Manuel*, 2007 WL 1991165 (Cal.App. 4  
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1 Dist. 2007). Plaintiff's claim of negligence per se fails because, as noted above,  
2 Defendants have not violated any of the statutes or codes on which Plaintiff seeks  
3 to hold Defendants liable. Count V should be dismissed.  
4

5 **G. E360Insight's Alleged Statements Do Not Constitute Libel.**

6 Count VI of Plaintiff's First Amended Complaint alleges libel per se against  
7 e360Insight and Linhardt. Notwithstanding the Caption of Count VI, a review of  
8 the FAC demonstrates that there is not a single allegation of libel against  
9 e360Insight. Rather, all the libel allegations are solely against Linhardt  
10 individually. Linhardt, however, has been dismissed from this case as a result of  
11 this Court's August 6, 2007 Order, granting Linhardt's Motion to Dismiss for lack  
12 of personal jurisdiction. Count VI should be dismissed with prejudice because it  
13 fails to state a cause of action.  
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18 Plaintiff's libel claim against E360 is a complete stranger to the lawsuit  
19 originally filed by Plaintiff on March 16, 2007. Plaintiff alleges in the FAC, some  
20 three months later, on June 28, 2007 that Linhardt published the statement  
21 "plaintiff is a criminal vigilante." (See FAC at ¶ 135.) But Plaintiff also alleges in  
22 ¶ 138 that "Linhardt's published false statements that implied that plaintiff illegally  
23 accessed e360 servers and used e360 servers to send pornographic e-mails to  
24 approximately 297, 000 clients of E360 clients." Presumably this alleged  
25 publication occurred at the same time.  
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1 Plaintiff cannot, however, allege wholly new allegations that had nothing to  
2 do with those on which the original lawsuit was based. There's nothing in Fed. R.  
3 Civ. P. 15 that would allow for wholly new claims to be attached to a pending  
4 lawsuit. The only nexus here is that the claims involve some of the same parties.  
5 Indeed, any amendment under Rule 15 contemplates that amendments will be  
6 based on the same transactions and occurrences, so far as to provide the relation  
7 back doctrine to new claims that do comply with the provisions of Rule 15. *See,*  
8 *e.g., Martell v. Trilogy, Ltd., 872 F.2d 322, 325 (9th Cir. 1989)* The relation back  
9 doctrine is premised on the notion that defendants should receive notice in the  
10 original pleading of the facts on which the pleaders claim for relief is based. If  
11 plaintiff fails to do so there is no room for an amended complaint relate back. See  
12 *Baldwin Co. Welcome Ctr. V. Brown, 466 US 147, 149-150, 104 S.Ct. 1723, 1725*  
13 (1984). Applying the same principles here, there is no basis on which plaintiff can  
14 inject a wholly new, and foreign, libel claim to a pending lawsuit that is based on a  
15 completely distinct set of facts and circumstances. To do so would inject brand-  
16 new issues pertaining to personal jurisdiction, subject matter jurisdiction, and  
17 proper venue.

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25 More troubling than the procedural infirmaries affecting Plaintiff's libel  
26 claim is the fact that Plaintiff has outright misrepresented the allegedly libelous  
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1 statement. The full statement ( including the full header information) on which the  
2 libel claim is apparently based reads as follows:  
3

4 *Path:*

5 *2news1.google.com!postnews.google.com!n2g2000hse.googlegroups.*  
6 *com!not-for-mail*

7 *From: e360Insight <e360insight@gmail.com>*

8 *Newsgroups: news.admin.net-abuse.email*

9 *Subject: E360 Wipes The Courtroom Floor With Silverstein*

10 *Date: Thu, 28 Jun 2007 19:27:29 -0000*

11 *Organization: http://groups.google.com*

12 *Lines: 53*

13 *Message-ID:*

14 *<1183058849.810634.131340@n2g2000hse.googlegroups.com>*

15 *NNTP-Posting-Host: 67.36.185.44*

16 *Mime-Version: 1.0*

17 *Content-Type: text/plain; charset="iso-8859-1"*

18 *X-Trace: posting.google.com 1183058850 23167 127.0.0.1 (28 Jun*  
19 *2007 19:27:30 GMT)*

20 *X-Complaints-To: groups-abuse@google.com*

21 *NNTP-Posting-Date: Thu, 28 Jun 2007 19:27:30 +0000 (UTC)*

22 *User-Agent: G2/1.0*

23 *X-HTTP-UserAgent: Mozilla/4.0 (compatible; MSIE 7.0; Windows NT*  
24 *5.1),gzip(gfe),gzip(gfe)*

25 *Complaints-To: groups-abuse@google.com*

26 *Injection-Info: n2g2000hse.googlegroups.com; posting-*  
27  
28

1 *host=67.36.185.44;*

2 *posting-account=SAFEMQ0AAABxNhwYoNEOT-5PNijQ0KIU*  
3 *Bill I-Want-To-Be-Mark-Mumma Silverstein had a tough day in court*  
4 *yesterday.*

5 *"The Court continues for 45 days defendants Moniker and Linhardt's*  
6 *motion to dismiss for lack of personal jurisdiction to enable parties*  
7 *to conduct limited jurisdictional discovery. The Court GRANTS*  
8 *defendants' motion to dismiss the Complaint for failure to plead with*  
9 *sufficient particularity, but GRANTS plaintiff leave to amend the*  
10 *Complaint. The Court GRANTS with leave to amend the defendants'*  
11 *motion to dismiss the Complaint against Moniker and Linhardt.*  
12 *Additionally, the Court GRANTS defendants' motion to strike*  
13 *plaintiff's request for punitive damages. Finally, the Court DENIES*  
14 *plaintiff's motion to strike defendants' Notice of Interested Parties*  
15 *and plaintiff's motion to remand the action to state court. IT IS SO*  
16 *ORDERED."*

17  
18 *Score In This Case:*

19 *Legitimate Marketer = 4*

20 *Criminal Vigilante = 1*

21 *Judge's Tentative Ruling*

22 *[http://www.e360insight.com/Judges\\_Tentative\\_Ruling\\_for\\_6\\_25\\_07\\_](http://www.e360insight.com/Judges_Tentative_Ruling_for_6_25_07_)*  
23 *hearing.pdf*

24 *Although the case is not over, we are looking to forward to opening*  
25 *up another can of whoop ass in 45 days should Mumma-Silverstein*  
26 *decide to amend his complaint.*

27 *Once the case is over, we will be filing to recover our legal fees and*  
28

1           *we will be seeking punitive damages against the parties responsible.*  
2           *In response to the ruling, Munma-Silverstein's attorney advised him*  
3           *to settle his divorce by offering 90% of everything he owns to his ex-*  
4           *wife.*

5           *To all legitimate system administrators who are trying to stop*  
6           *unwanted email - e360's stated policy is to not send any email*  
7           *messages to any one who does not want to receive them. If you have*  
8           *any concerns about email messages coming from our network, please*  
9           *feel free to contact me directly at dlinha...@gmail.com. All*  
10           *reasonably requests will be handled fairly and amicably.*

11           *To all criminal vigilantes who choose to make ridiculous claims in*  
12           *court - we will send you packing with a lien on your assets and your*  
13           *financial future, however dismal it may be. If you are interested in*  
14           *spam-fighting, you would be better served by directing your attention*  
15           *to someone who is actually doing something wrong.*

16           *Sincerely,*

17           *Dave Linhardt*

18           *President*

19           *e360Insight, LLC*

20           As a threshold matter, if in fact this is not the posting to which Plaintiff  
21           refers to in Count VI, he should be required to plead more particularly, if not  
22           verbatim, the allegedly libelous statements on which is libel claim is based. See  
23           *Vogel v. Felice*, 127 Cal. App. 4th 1006 26 Cal. Rptr. 3d 350; 2005 Cal. App.  
24  
25  
26  
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1 LEXIS 402 (Ca 6th Dist. 2005). If the above quoted language is the correct  
2 posting, the allegations contained in Count VI are a complete falsehood.<sup>3</sup>  
3

4 Nowhere in the passage referenced above does Mr. Linhardt refer to Plaintiff  
5 as a "criminal vigilante". Indeed, after referring to Plaintiff by name, including  
6 referring to him euphemistically as either "Bill I-Want-To-Be-Mark-Mumma  
7 Silverstein" or "Mumma Silverstein", Mr. Linhardt then refers to his audience at  
8 large, specifically a subcategory that Mr. Linhardt refers to as "criminal  
9 vigilantes". Given the context within which Mr. Linhardt's statements are made,  
10 the reference to criminal vigilante necessarily excludes Plaintiff. Simply stated,  
11 the statement alleged to be libelous in ¶135 of the FAC is not "of or concerning"  
12 Plaintiff, a requirement needed to state a libel claim under California law.  
13  
14 *Alexander v. Schwarzenegger*, 2007 WL 39291 (Cal. App. 3rd Dist. 2007).  
15  
16  
17

18 Moreover, the allegedly libelous statement contained in ¶138 of the FAC is  
19 nowhere to be found in the above referenced posting. The allegation contained in  
20 ¶135 of the FAC cannot, therefore, provide the basis for plaintiff's libel claim.  
21  
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23  
24 <sup>3</sup> Defendants recognize that at this point they have possibly treaded beyond Rule  
25 12 (b) (6) waters and into Rule 56 waters instead. Defendants believe, however,  
26 that they have a duty to clarify what is at issue in any motion brought before this  
27 Court. Defendants leave to the Courts discretion how to treat Defendant's  
28 arguments pertaining to Count VI.

1           Simply stated, Plaintiff's libel claim contained in Count VI is both  
2 procedurally and substantively deficient. It should be dismissed.  
3

4 **H. Plaintiff's Request For Punitive Damages Should Be Stricken.**

5           This Court previously struck his request for punitive damages based on  
6 Counts I and II. The FAC attempts to revive the claim for punitive damages, this  
7 time based on the remaining Counts. Because each of these counts fail the state a  
8 claim out which relief can be granted, there is no basis for a request for punitive  
9 damages.  
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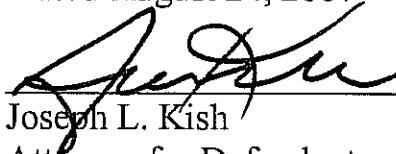
23 ///

24 ///

1 **I. Conclusion.**

2 Plaintiff's second attempt to state viable claims fares no better than his first.  
3  
4 Given this Court's prior dismissal Order and the guidance it provided to Plaintiff,  
5  
6 Plaintiff was well aware of what was necessary to correct his original pleading  
7  
8 deficiencies. He as failed to do so and has wandered further from stating claims on  
9  
10 which relief can be granted with his new found claims in Counts III – VI. Even at  
11  
12 this late date, Plaintiff cannot point to the allegedly offending e-mails or confirm  
13  
14 that any Defendant sent them. This case should be dismissed, with prejudice.

15 Dated August 24, 2007

16 

17 Joseph L. Kish  
18 Attorney for Defendants e360 Insight,  
19 Bargain Depot Enterprises, LLC, a.k.a.  
20 Bargaindepot.net, David Linhardt and  
21 Moniker Online Services, LLC  
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1                   DECLARATION OF DAVID LINHARDT

2  
3                   DAVID LINHARDT declares and states as follows:

- 4                   1. I am the President of e360Insight (“e360”), the President of Bargain Depot  
5                   Enterprises, LLC., and a Defendant in this action. I make this declaration in  
6                   support of Defendants’ Motion to Dismiss Plaintiff’s First Amended  
7                   Complaint. The facts set out below are known to me personally, and if  
8                   called on I could testify to those facts, under oath.
- 9  
10  
11                   2. I have reviewed the data available form Exhibit A of Plaintiff’s First  
12                   Amended Complaint.
- 13  
14                   3. The emails referenced in Set 2 of Exhibit A did not come from e360Insight  
15                   or Bargain Depot Enterprises, LLC.
- 16  
17                   4. I cannot confirm whether the e-mails referenced in Set 1 of Exhibit A for the  
18                   First Amended Complaint came from e360Insight or Bargain Depot  
19                   Enterprises, LLC. I need to see the complete and unaltered e-mail message  
20                   content, e-mail headers and the e-mail server logs from Plaintiff’s e-mail  
21                   server to make this determination.
- 22  
23  
24                   5. Attached to this Declaration is a true and accurate copy of the posting I  
25                   made that I believe is the alleged bases for Plaintiff’s allegation of libel in ¶  
26                   135 of the First Amended Complaint.
- 27  
28

1 I declare under penalty of perjury under the laws of the United States that  
2 the foregoing is true and correct and that this declaration was executed on August  
3 24, 2007.



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DAVID LINHARDT



1 Path:  
2 2news1.google.com!postnews.google.com!n2g2000hse.googlegroups.  
3 com!not-for-mail  
4 From: e360Insight <e360insight@gmail.com>  
5 Newsgroups: news.admin.net-abuse.email  
6 Subject: E360 Wipes The Courtroom Floor With Silverstein  
7 Date: Thu, 28 Jun 2007 19:27:29 -0000  
8 Organization: http://groups.google.com  
9 Lines: 53  
10 Message-ID:  
11 <1183058849.810634.131340@n2g2000hse.googlegroups.com>  
12 NNTP-Posting-Host: 67.36.185.44  
13 Mime-Version: 1.0  
14 Content-Type: text/plain; charset="iso-8859-1"  
15 X-Trace: posting.google.com 1183058850 23167 127.0.0.1 (28 Jun  
16 2007 19:27:30 GMT)  
17 X-Complaints-To: groups-abuse@google.com  
18 NNTP-Posting-Date: Thu, 28 Jun 2007 19:27:30 +0000 (UTC)  
19 User-Agent: G2/1.0  
20 X-HTTP-UserAgent: Mozilla/4.0 (compatible; MSIE 7.0; Windows  
21 NT 5.1),gzip(gfe),gzip(gfe)  
22 Complaints-To: groups-abuse@google.com  
23 Injection-Info: n2g2000hse.googlegroups.com; posting-  
24 host=67.36.185.44;

25 posting-account=SAFEMQ0AAABxNhwYoNEOT-5PNijQ0KIU  
26 Bill I-Want-To-Be-Mark-Mumma Silverstein had a tough day in court  
27 yesterday.

28 "The Court continues for 45 days defendants Moniker and Linhardt's  
motion to dismiss for lack of personal jurisdiction to enable parties  
to conduct limited jurisdictional discovery. The Court GRANTS  
defendants' motion to dismiss the Complaint for failure to plead with  
sufficient particularity, but GRANTS plaintiff leave to amend the  
Complaint. The Court GRANTS with leave to amend the defendants'  
motion to dismiss the Complaint against Moniker and Linhardt.  
Additionally, the Court GRANTS defendants' motion to strike  
plaintiff's request for punitive damages. Finally, the Court DENIES  
plaintiff's motion to strike defendants' Notice of Interested Parties  
and plaintiff's motion to remand the action to state court. IT IS SO  
ORDERED."

1 Score In This Case:

2 Legitimate Marketer = 4

3 Criminal Vigilante = 1

4 Judge's Tentative Ruling

5 [http://www.e360insight.com/Judges\\_Tentative\\_Ruling\\_for\\_6\\_25\\_07](http://www.e360insight.com/Judges_Tentative_Ruling_for_6_25_07_hearing.pdf)  
6 [hearing.pdf](http://www.e360insight.com/Judges_Tentative_Ruling_for_6_25_07_hearing.pdf)

7 Although the case is not over, we are looking to forward to opening  
8 up another can of whoop ass in 45 days should Mumma-Silverstein  
9 decide to amend his complaint.

10 Once the case is over, we will be filing to recover our legal fees and  
11 we will be seeking punitive damages against the parties responsible.  
12 In response to the ruling, Mumma-Silverstein's attorney advised him  
13 to settle his divorce by offering 90% of everything he owns to his ex-  
14 wife.

15 To all legitimate system administrators who are trying to stop  
16 unwanted email - e360's stated policy is to not send any email  
17 messages to any one who does not want to receive them. If you have  
18 any concerns about email messages coming from our network, please  
19 feel free to contact me directly at dlinha...@gmail.com. All  
20 reasonably requests will be handled fairly and amicably.

21 To all criminal vigilantes who choose to make ridiculous claims in  
22 court - we will send you packing with a lien on your assets and your  
23 financial future, however dismal it may be. If you are interested in  
24 spam-fighting, you would be better served by directing your attention  
25 to someone who is actually doing something wrong.

26 Sincerely,  
27 Dave Linhardt  
28 President  
e360Insight, LLC

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## DECLARATION OF ERIC HARRINGTON

ERIC HARRINGTON declares and states as follows:

1. I am the President of Domain Systems, Inc. (a Florida corp.), which is the managing member of Moniker Online Services, LLC, a Defendant in this action. I make this declaration on behalf of Moniker Online Services, LLC and in support of Defendants' Motion to Dismiss. The facts set out below are known to me personally, and if called on I could testify to those facts, under oath.
2. I am a resident of Broward, Florida.
3. Moniker is a Florida corporation with its principal place of business in Florida.
4. Moniker is properly incorporated.
5. Moniker does not own, use or possess any real property in California, does not pay any taxes in California, and does not maintain an account with a California bank.
6. Moniker is not registered to do business in California, and is not licensed or regulated by any government agency in California.
7. Moniker has never had any employees in California.
8. Moniker has no office, no mailing address, post office box or telephone directory listing in California.

1 9. Moniker has never made a general appearance in an action in any state or  
2 federal court in California.  
3

4 10. Moniker does not advertise in California.  
5

6 11. Moniker was not involved in the acts complained of in the Complaint.  
7

8 12. Moniker did not send, authorize or have knowledge of the e-mails  
9 complained of in the Complaint.  
10

11 13. The e-mails complained of in the Complaint were not sent on behalf of or  
12 authorized by Moniker.  
13

14 I declare under penalty of perjury under the laws of the United States that  
15 the foregoing is true and correct and that this declaration was executed on May 4,  
16 2007.  
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20 ERIC HARRINGTON  
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