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6

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

9 WILLIAM SILVERSTEIN, an individual,  
10 Plaintiff,

11 vs.

12 E360INSIGHT, LLC, BARGAIN DEPOT  
13 ENTERPRISES, LLC AKA  
14 BARGAINDEPOT.NET,  
15 DAVID LINHARDT,  
16 MONIKER ONLINE SERVICES, LLC,  
and DOES 1-50;  
Defendants.

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

FIRST AMENDED VERIFIED  
COMPLAINT FOR DAMAGES AND  
INJUNCTIVE RELIEF

1. Violations of California Business and  
Professions Code § 17529.5
2. Violations of the CAN-SPAM ACT
3. Trespass to Chattels
4. Penal Code 502
5. Negligence Per Se.
6. Libel Per Se.

18

19 Pursuant to this Court's Order of June 25, 2007, Plaintiff amends his complaint to  
20 read as follows:

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27 PLAINTIFF'S FIRST AMENDED  
28 VERIFIED COMPLAINT

## Parties

1. Plaintiff WILLIAM SILVERSTEIN is an individual operating as a sole proprietor under the laws of the State of California and qualified and doing business as "WILLIAM SILVERSTEIN" with a principal place of business in Los Angeles, California.

2. Plaintiff provides registered users the ability to send or receive electronic mail through equipment located in the State of California, and operates equipment that acts as an intermediary in sending and receiving electronic mail.

3. Plaintiff owns and maintains computers and other equipment that process electronic mail messages and allow for exchange of electronic mail messages by registered users with others. Electronic mail sent to and from Plaintiff's registered users is processed though and stored on equipment located within the State of California.

4. Plaintiff is a software professional with more than twenty-five years of professional software development experience. Plaintiff's professional experience includes developing electronic mail ("e-mail") client and server programs, navigation systems used by several military organizations, operating system components, and digital cinema software that was used to produce and show Star Wars, Episode II.

5. Plaintiff has operated web sites and Internet accessible bulletin boards for more than ten years.

6. Plaintiff has programmed web sites in multiple programming languages, including PHP, Java, C, and html.

1           7. Plaintiff is informed and believes and thereon alleges that at all times relevant  
2 herein David Linhardt ("Linhardt") is an individual that resides at 500 Sumac Road,  
3 Highland Park, Illinois. Plaintiff further alleges that Linhardt personally and actively  
4 controlled, managed, and approved of all activities complained of herein.

5           8. Plaintiff is informed and believes and thereon alleges that at all times relevant  
6 herein E360insight, LLC ("E360"), is a limited liability corporation duly organized and  
7 recognized under the laws of the State of Illinois with its principle office located at 600  
8 Northgate Parkway, Suite A, Wheeling, Illinois.

9           9. Plaintiff is informed and believes and thereon alleges that at all times relevant  
10 herein Bargain Depot Enterprises, LLC ("Bargain Depot"), is a limited liability  
11 corporation duly organized and recognized under the laws of the State of Illinois with its  
12 principle office located at 600 Northgate Parkway, Suite A, Wheeling, Illinois. Plaintiff  
13 further alleges that Bargain Depot also operated under the name BargainDepot.net which  
14 is also the domain name that Bargain Depot operates a web site at.

15           10. Plaintiff is informed and believes and thereon alleges that at all times  
16 relevant herein Moniker Online Services, LLC ("Moniker"), is a limited liability  
17 corporation duly organized and recognized under the laws of the State of Florida with a  
18 principle office located at 20 S.W. 27TH Avenue, Suite 201 in Pompano Beach, Florida.

19           11. All the corporate entities, except Moniker, are all personally controlled by  
20 David Linhardt.

21           12. Plaintiff further alleges and is informed and believes that E360, Bargain  
22 Depot, and their sister companies are all alter-egos for David Linhardt and of eachother.

1       13. Plaintiff is ignorant of the true names and capacity of Defendants sued  
2 herein as DOES 1-50, inclusive, and therefore sues those Defendants by such fictitious  
3 names. Plaintiff will amend this complaint to allege their true names and capacities when  
4 ascertained.

5       14. Plaintiff is informed and believes and thereon alleges that each of the  
6 fictitiously named Defendants are responsible in some manner for the occurrences herein.  
7 Plaintiff is informed and believes and thereon alleges that these occurrences are the  
8 proximate cause of damages to Plaintiff.

9       15. Plaintiff is informed and believes and thereon alleges that at all times  
10 relevant herein DOE Defendants were the agents, servants, employees, and the  
11 co-conspirators of the named Defendants and all Defendants are doing the things  
12 hereinafter mentioned were acting within the course and scope of their authority as such  
13 agents, servants, and employees with the permission, consent, and encouragement of their  
14 co-Defendants.

15       16. Plaintiff is informed and believes and thereon alleges that Defendants have  
16 a high degree of control over any agents that have been contracted and paid to send  
17 advertising through email.

## **JURISDICTION AND VENUE**

17. Plaintiff brings this action pursuant to 15 U.S.C. § 7701 et seq.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 1338(a). This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1337.

18. The Court has personal jurisdiction over the Defendants, who have engaged in business activities in and directed to California, have committed tortious acts within the forum and have purposefully availed themselves of the opportunity to conduct commercial activities in the forum.

19. The harm occurred within the jurisdiction of this Court as the email messages complained of herein were relayed through servers located in Los Angeles, California.

20. Plaintiff is informed and believes and thereon alleges that all Defendants regularly and systematically solicit business from and conduct business with California residents.

21. Defendants Bargain Depot and Moniker operate highly interactive web sites that are specifically programmed to conduct business with California residents.

22. Plaintiff inspected the programming code of Moniker's web site and saw that Moniker's web site contained programming code that is specifically designed to accept orders from California residents.

23. Plaintiff examined the code on Moniker's web site and saw that

24. Defendant Linhardt maintains a mailing address in Laguna Hills, California.

25. Defendant Linhardt has appointed an agent for service of process in Laguna Hills, California.

26. Plaintiff is informed and believes and thereon alleges that Defendant Linhardt uses Gmail and Google Groups. Plaintiff further alleges that these services are provided by Google, Inc. in accordance with a terms of service which requires the user to consent to California jurisdiction and venue.

27. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because substantial amounts of the events giving rise to the claims pled herein occurred in the Central District of California.

## **FACTS COMMON TO ALL CAUSES**

28. "Spam" is a term commonly used to refer to unsolicited commercial e-mail, which is a method of Internet advertising that involuntarily shifts the cost onto the ISP, the email service provider, and the recipient.

29. The practice of sending spam, also known as spamming, is so reviled on the Internet that the people sending spam ("spammers") go to great lengths to conceal their identities to avoid complaints made by recipients, Internet service providers, and government agencies.

30. A botnet is a group of zombies. A zombie is a hijacked computer that has been infected with a virus or trojan which is remote controlled. This allows a person to silently remotely control the infected computer as a means to attack other computers, run

1 illegal web sites, or to send unsolicited commercial e-mail -- unbeknownst to the owner of  
2 the computer.  
3

4 31. Many spammers use botnets to transmit their spam both as a method of  
5 hiding their identities and to bypass spam filters.  
6

7 32. Plaintiff prohibits the use of his servers for the purpose of transmitting or  
8 relaying of spam.  
9

10 33. Plaintiff's server gives automatic notice to every person sending e-mail to  
11 his servers of the aforementioned policy.  
12

13 34. Opening spam e-mails can be dangerous, as some spam contain programs  
14 (ie. keyloggers, zombie attack robots, etc.) that can infect a user's computer upon opening  
15 an e-mail. Many spam e-mails contain "web bugs" which report back to a spammer that  
16 the e-mail has been opened indicating that the e-mail address is valid.  
17

18 35. A spam filter is software that analyzes e-mail and makes a determination  
19 that a particular e-mail is spam.  
20

21 36. Plaintiff, as many internet service providers ("ISPs") use spam filters to  
22 identify spam.  
23

24 37. Many e-mail recipients use spam filters to identify spam. Many of these  
25 recipients will only open e-mails that are determined not to be spam.  
26

27 38. Plaintiff's e-mail client program segregates all his incoming e-mails that  
28 have been determined to be spam from his inbox. that have been determined to be spam,  
by the spam filters that are installed on Plaintiff's mail server.  
29

1       39. The specification of e-mail headers are contained within a document known  
2       as RFC 2822.  
3

4       40. Many spam filters, including the Plaintiff's, use the domain name of the  
5       "From:" e-mail address as part of their heuristics to determine if a particular e-mail is  
6       spam.  
7

8       41. Most e-mail recipients, including Plaintiff, use the e-mail's "*From:*" field  
9       and "*Subject:*" fields to determine if they are to open an e-mail.  
10

11       42. The "From:" field indicates the sender of the e-mail and is composed of a  
12       "display name" and mailbox specifier.  
13

14       43. Prior to the user opening an e-mail, most e-mail client programs will only  
15       display the "display name" portion of the "From:" field, if a display name was provided.  
16       The display name what a typical user sees when viewing their inbox.  
17

18       44. The "From Field:" is one of the key factors, if not the key factor, that e-  
19       mail recipients use to determine if they are to open the e-mail.  
20

21       45. Plaintiff has identified at least 45 e-mails sent by, or on behalf of,  
22       Defendants between May 11, 2005 and March 31, 2006. Plaintiff expects to find many  
23       more as investigation is ongoing. These e-mails are summarized in Exhibit A, labeled as  
24       Set-1 ("Set-1").  
25

26       46. Plaintiff has identified at least 44 e-mails that he believes has been sent by,  
27       or on behalf of, Defendants between July 7, 2007 and July 11, 2007. These e-mails are  
28       summarized in Exhibit A, Set-2 ("Set-2").  
29

1       47.   Spam filters use all the information contained within the e-mail header as  
2 part of their heuristic analysis determining whether an e-mail is spam.  
3

4       48.   Using multiple domain names is a method to hide identity, bypassing spam  
5 filters, and tricking the user into opening an e-mail that they do not desire to open. In the  
6 context of this complaint, domain name does not include any sub-domain specifier, i.e.  
7 affiliate1 is the sub-domain specifier, and bargaindepot.net is the domain name in the  
8 URL <http://affiliate1.bargaindepot.net>.  
9

10      49.   Many of the complained of spam contain different domain names contained  
11 within mailbox specifier portion of the "From:" field of the e-mail header.  
12

13      50.   There is no valid reason for Defendants to use multiple domain names in the  
14 "From:" fields of their spam. The only purpose for the multiple domain names is to  
15 deceive the spam filters and trick recipient into opening and reading the e-mail.  
16

17      51.   There is no valid reason for Defendants to use multiple domain names in the  
18 hyperlinks advertised by Defendants spam. The only purpose for the multiple domain  
19 names is to deceive the spam filters in an attempt to trick the recipient into opening and  
20 reading the e-mail.  
21

22      52.   Each of the 45 Set-1 e-mails in contained a different mailbox specification  
23 within the "From:" field.  
24

25      53.   43 of the 44 Set-2 e-mails contained a different mailbox specification  
26 within the "From:" field.  
27

28      54.   There are 43 unique domain names contained the "From:" field of the 45  
Set-1 emails.  
29

1       55. There are 21 unique domain names contained the "From:" field of the 44  
2 Set-2 emails.  
3

4       56. Plaintiff is informed and believes and thereupon alleges that each of the  
5 mailbox specifications referred to in the prior paragraph is materially false and misleading  
6 as it does not identify the sender, but in fact indicates that 98 of the 99 e-mails were sent  
7 by different parties.  
8

9       57. Defendants' use of multiple domain names prevented Plaintiff from user a  
10 simple "drop list" method of detecting spam.  
11

12       58. Many of, if not all of domain names advertised in the complained of e-mails  
13 are or were registered to Moniker.  
14

15       59. All of the Set-2 domain names were registered to Moniker on July 4, 2007.  
16

17       60. Plaintiff alleges that each of the "From:" field in the complained of spam do  
18 not do not accurately identify the sender. Some examples are the complained of "From:"  
19 field are: "Brighton Handbags," "Prada & Fendi," "6for48 Shades," "Louis Vuitton,"  
20 "Cheaper Oakleys," "Compare to Oakley," "Designer Eyewear." A summary of these e-  
21 mails are "Exhibit A" and incorporated herein.  
22

23       61. Plaintiff alleges the subject lines of the e-mails, identified in rows 2 through  
24 and including 18 of Exhibit A are deceptive as each of these subject lines indicate that  
25 Defendants are selling brand name items at a deep discount. Plaintiff is is informed and  
26 believes and thereupon further alleges that Defendants do not sell these brand name items,  
27 but sell counterfeits of these brand names.  
28

62. Plaintiff alleges the subject line of the e-mail identified in row 32 of Exhibit A is deceptive as it indicated that Plaintiff received an award. Plaintiff did not receive any award during the existence of Defendants' corporations.

## **THE NATURE OF MONIKER'S BUSINESS**

63. ICANN is a non-governmental organization that oversees and creates the policy for the registration and management of internet domain names.

64. ICANN is an acronym for Internet Corporation for Assigned Names and Numbers.

65. Plaintiff is informed and believes and thereupon alleges that Moniker is an ICANN approved domain name registrar.

66. Plaintiff is informed and believes and thereupon alleges that to become an ICANN approved registrar that Moniker agreed to be bound to jurisdiction within Los Angeles County, California.

67. Plaintiff is informed and believes and thereupon alleges that to become an ICANN approved registrar that Moniker agreed:

- a. to require that each registrant of each domain, that is registered through Moniker, to provide accurate information regarding the registrant of each domain name; and
- b. to make publically available the name and postal address of the registered name holder for each domain name registered with them;

1       68. Plaintiff is informed and believes and thereupon alleges that for a fee  
2       Moniker will tell the public that Moniker is the owner of the domain name.  
3

4       69. Plaintiff is informed and believes and thereupon alleges that Moniker refers  
5       to this service as "Moniker Privacy Services."

6       70. Plaintiff is informed and believes and thereupon alleges Moniker in  
7       providing this services to persons who send unsolicited commercial e-mail is a violation  
8       of 18 U.S.C. 1037(4).

9       71. Plaintiff is informed and believes and thereupon alleges that the use of this  
10      service makes it much more difficult, if not impossible, to identify the true sender of  
11      spam.

12      72. Plaintiff is informed and believes and thereupon alleges that the use of this  
13      service for more than one domain name in conjunction with the sending of spam makes it  
14      virtually impossible for recipients and ISPs to determine the extent of the spamming  
15      operation by the user until after discovery has occurred in litigation.

16      73. Plaintiff is informed and believes and thereupon alleges that Moniker has  
17      the ability to control, suspend, terminate, or cancel any domain names that is either  
18      registered to or registered through Moniker.

## **FIRST CAUSE OF ACTION**

(VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17529.5)  
(Against All Defendants)

74. Plaintiff hereby incorporates by reference paragraphs 1 through 73, inclusive, as if the same were fully set forth herein.

75. The registrant of a domain name is the owner of the domain name. See Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003).

76. A domain name is a property that is separate from a web site. See Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003) and See Ford Motor Co. v. 2600 Enterprises, 177 F.Supp.2d 661, at 665 (E.D. Mich. 2001).

77. The value of a domain name is partly based on the amount of traffic to that domain name.

78. The owner of a domain name may direct the domain name to any web site on the internet. See *Ford Motor Co. v. 2600 Enterprises*, 177 F.Supp.2d 661, at 665 (E.D. Mich. 2001).

79. Plaintiff is informed and believes, and therefore alleges that domain names that are owned by Moniker are advertised in some or all of the complained of spams.

80. Plaintiff is informed and believes, and therefore alleges that web sites owned or operated by all Defendants, except Moniker, are advertised in the complained of spams.

81. Defendants are "advertisers" pursuant to Cal. Bus. & Prof. Code § 17529.1(a) because they are persons or entities that advertise through the use of commercial e-mail advertisements.

82. Plaintiff's email addresses are "California email addresses" pursuant to Cal. Bus. & Prof. Code § 17529.1(b).

83. Pursuant to Cal. Bus. & Prof. Code § 17529.1(m), Plaintiff is a "recipient" of unsolicited commercial email advertisements initiated by Defendants.

84. Plaintiff is informed and believes and therefore alleges that the complained of spam contained or was accompanied by falsified, misrepresented, or forged header information. Plaintiff further alleges that the headers misrepresented and hid the true identity of the sender of the complained of spam. See **Exhibit A**.

85. Plaintiff suffered damages as a result of Defendants' wrongful conduct.

WHEREFORE, Plaintiff prays for judgment against all Defendants herein for damages as set forth in the Prayer for relief.

**SECOND CAUSE OF ACTION**  
(VIOLATION OF THE CAN-SPAM ACT)  
(Against All Defendants, Except Moniker)

86. Plaintiff hereby incorporates by reference paragraphs 1 through 85, inclusive, as if the same were fully set forth herein.

87. Defendants are each a "Sender" of commercial electronic mail messages because each is "a person who initiates such a message and whose product, service, or Internet Web site is advertised or promoted by the message." 15 U.S.C. § 7702(16)(B).

88. Plaintiff is informed and believes and therefore alleges that Defendants "initiated" the emails complained of herein as that term is defined by 15 U.S.C. § 7702(9).

1       89. Plaintiff's servers and personal computers are "protected computers" as that  
2 term is defined in section 18 U.S.C. 1030(e)(2)(B).  
3

4       90. Defendants used Plaintiff's servers to relay spam without authorization.  
5

6       91. Plaintiff is informed and believes and therefore alleges that Defendants sent  
7 spam to Plaintiff containing materially false and materially misleading headers which  
8 misrepresented and hid the true identity of the sender of the complained of spam. See  
9

**Exhibit A.**

10       92. Plaintiff is informed and believes and therefore alleges that Defendants  
11 engaged in a pattern and practice sending spam that contains materially false and  
12 materially misleading headers which misrepresents hides the true identity of the sender of  
13 the spam. See **Exhibit A.**  
14

15       93. Plaintiff is informed and believe that and therefore alleges that Defendants  
16 knowingly relayed their spam though Plaintiff's servers without authorization to do so.  
17

18       94. Plaintiff is informed and believes and therefore alleges that Defendants  
19 engaged in a pattern and practice of sending spam that failed to contain the sender's  
20 physical postal address.  
21

22       95. Defendants profited from their wrongful conduct.  
23

24       96. Plaintiff suffered damages as a result of Defendants' wrongful conduct.  
25 WHEREFORE, Plaintiff prays for judgment against all Defendants, except Moniker, herein for  
26 damages as set forth in the Prayer for relief.  
27

**THIRD CAUSE OF CAUSE OF ACTION**

1 (TRESPASS TO CHATTEL)  
2 (Against All Defendants)

3 97. Plaintiff hereby incorporates by reference paragraphs 1 through 73,  
4 inclusive, as if the same were fully set forth herein.

5 98. Plaintiff is informed and believes and therefore alleges that Defendants took  
6 control of Plaintiff's servers and work stations without authorization.

7 99. Plaintiff further alleges that during the periods that Plaintiff's systems were  
8 following the instructions sent by the Defendants, Plaintiff was unable to access, read, or  
10 send desired e-mail.

12 100. During the time that Defendants controlled Plaintiff's server, Plaintiff's  
13 computers were required to devote resources to processing Defendants' instructions.

14 101. As a result of the Defendants' intermeddling, Plaintiff's systems allocated  
15 memory and disk storage to the Defendants's requests.

17 102. During Defendants' unauthorized possession and control of Plaintiff's  
18 computers, Plaintiff's computers was unable to perform the tasks that Plaintiff desired.

19 103. Defendants' alleged actions requires Plaintiff to perform more computer  
20 system maintenance and increased monitoring of Plaintiff's systems to reduce the risk of  
22 data loss.

23 104. Plaintiff suffered damages as the result of Defendants' wrongful conduct.

24 105. If Defendants' behavior is allowed to continue unchecked, it would  
26 encourage others to engage in similar intermeddling with Plaintiff's systems causing  
27 Plaintiff's systems to become entirely unusable.

1 106. Plaintiff suffered damages as a result of Defendants' wrongful conduct.

2 107. Plaintiff is informed and believes and thereon alleges that Defendants have  
3 willfully engaged in, and are willfully engaging in, the acts complained of with  
4 oppression, fraud, and malice, and in conscious disregard of the rights of Plaintiff.

5 Plaintiff therefore is entitled to and demands exemplary damages in an amount sufficient  
6 to deter the Defendants, and others, from behaving in such egregious behavior.

7 WHEREFORE, Plaintiff prays for judgment against all Defendants herein for damages as set  
8 forth in the Prayer for relief.

11

12 **FOURTH CAUSE OF ACTION**  
13 (CALIFORNIA PENAL CODE § 502)  
14 (Against All Defendants)

15 108. Plaintiff hereby incorporates by reference paragraphs 1 through 107,  
16 inclusive, as if the same were fully set forth herein.

17 109. Defendants were not authorized to access Plaintiff's computer systems.

19 110. Defendants knowingly and without permission used or causes to be used  
20 computer services of Plaintiff's computers.

21 111. Defendants knowingly and without permission accessed and without  
22 permission added data to Plaintiff's computer systems.

24 112. Plaintiff is informed and believes and thereon alleges that Defendants have  
25 willfully engaged in, and are willfully engaging in, the acts complained of with  
26 oppression, fraud, and malice, and in conscious disregard of the rights of Plaintiff.

27 Plaintiff therefore is entitled to and demands exemplary damages, as permitted under

1 California Penal Code § 502(e)(4), in an amount sufficient to deter the Defendants, and  
2 others, from behaving in such egregious behavior.  
3

4 WHEREFORE, Plaintiff prays for judgment against all Defendants herein for damages as  
5 set forth in the Prayer for relief.  
6

7 **FIFTH CAUSE OF ACTION**  
8 (NEGLIGENCE PER SE)  
9 (Against All Defendants)  
10

11 113. Plaintiff hereby incorporates by reference paragraphs 1 through 112,  
12 inclusive, as if the same were fully set forth herein.  
13

14 114. Pursuant to California Penal Code § 502, Defendants owed a non-delegable  
15 duty to Plaintiff, to refrain from exceeding authorized access of Plaintiff's servers.  
16

17 115. Pursuant to California Penal Code § 502, Defendants owed a non-delegable  
18 duty to Plaintiff to insure that their agents, servants, and employees refrain from  
19 exceeding authorized access of Plaintiff's servers.  
20

21 116. Defendants, either directly or through their agents, servants, or employees,  
22 exceeded authorized access of Plaintiff's servers.  
23

24 117. Plaintiff is a class of person who is intended to be protected by California  
25 Penal Code § 502.  
26

27 118. 18 U.S.C. 1037(4) prohibits materially falsifying identity of the actual  
28 registrant of two or more domain names that are used in the sending of commercial e-mail  
messages.  
29

30 119. Plaintiff is informed and believes and therefore alleges that many of the  
31 domain names in the complained of e-mails indicated that Moniker was the registrant of  
32

1 the domain name, when in fact the other Defendants were the registrant of the domain  
2 name.  
3

4 120. Plaintiff is informed and believes and therefore alleges Moniker was aware  
5 that these domain names were to be used in combination with the initiation of commercial  
6 e-mail messages.  
7

8 121. Plaintiff is a class of person who is intended to be protected by 18 U.S.C.  
9 1037(4).  
10

11 122. Pursuant to 18 U.S.C. 1037(4), Defendants owed a non-delegable duty to  
12 Plaintiff, under the law, to have use accurate domain name registrant information  
13 associated with domain names that are used in combination with the initiation of  
14 commercial e-mail messages.  
15

16 123. Pursuant to 18 U.S.C. 1037(4), Defendants owed a non-delegable duty to  
17 Plaintiff, under the law, to not permit the use of domain names that failed to have accurate  
18 registrant information that are used in combination with the initiation of commercial e-  
19 mail messages.  
20

21 124. Pursuant to both California Business and Professions Code § 17529.5 and  
22 the CAN-SPAM Act, Defendants owed a non-delegable duty to Plaintiff, to refrain from  
23 using deceptive headers in commercial e-mail advertising.  
24

25 125. Pursuant to both California Business and Professions Code § 17529.5 and  
26 the CAN-SPAM Act, Defendants owed a non-delegable duty to Plaintiff, to ensure that  
27 their agents, servants, and employees, refrain from using deceptive headers in commercial  
28 e-mail advertising.  
29

1       126. Pursuant CAN-SPAM Act, Defendants owed a non-delegable duty to  
2 Plaintiff to include valid physical postal address of the sender in their commercial e-mail  
3 advertising.  
4

5       127. Pursuant CAN-SPAM Act, Defendants owed a non-delegable duty to  
6 Plaintiff, to ensure that their agents, servants, and employees, include a valid physical  
7 postal address of the sender in their commercial e-mail advertising.  
8

9       128. Plaintiff is a class of person who is intended to be protected by both  
10 California Business and Professions Code § 17529.5 and the CAN-SPAM Act..  
11

12       129. Defendants, either directly or through their agents, servants, or employees,  
13 used deceptive headers in commercial e-mail advertising.  
14

15       130. Defendants, either directly or through their agents, servants, or employees,  
16 include a valid physical postal address of the sender in their commercial e-mail  
17 advertising.  
18

19       131. Plaintiff suffered damages as a result of Defendants' wrongful conduct.  
20

21       132. Plaintiff is informed and believes and thereon alleges that Defendants have  
22 willfully engaged in, and are willfully engaging in, the acts complained of with  
23 oppression, fraud, and malice, and in conscious disregard of the rights of Plaintiff.  
24 Plaintiff therefore is entitled to and demands exemplary damages in an amount sufficient  
25 to deter the Defendants, and others, from behaving in such egregious behavior.  
26

27 WHEREFORE, Plaintiff prays for judgment against all Defendants herein for damages as  
28 set forth in the Prayer for relief.  
29

**SIXTH CAUSE OF ACTION**  
(Libel Per Se)  
(Against Defendants E360 and David Linhardt)

133. Plaintiff hereby incorporates by reference paragraphs 1 through 73, inclusive, as if the same were fully set forth herein.

134. "USENET is an abbreviation of "user network." This term refers to an international collection of organizations and individuals (known as "peers") whose computers connect to one another and exchange messages posted by USENET users. See Ellison v. Robertson, 189 F. Supp. 2d 1051, 1053 (C.D. Cal. 2002)." Ellison v. Robertson, 357 F.3d 1072, 1074 (9th Cir. 2004).

135. On June 28, 2007, Linhardt published a statement onto Usenet, using Google News, that Plaintiff is a “criminal vigilante.”

136. The aforementioned statement, of Linhardt, is false as Plaintiff is neither a  
vigilante nor a criminal.

137. The aforementioned unprivileged false statement was made negligently, recklessly, or with malice.

138. Linhardt's published false statements that implied that Plaintiff illegally accessed e360's servers and used e360's servers to send pornographic e-mails to approximately 297,000 clients of e360's clients.

139. The aforementioned statements implying that Silverstein illegally accessed e360's servers were made negligently, recklessly, or with malice.

140. Plaintiff has never been charged with a crime.

1 141. Plaintiff has never been convicted of a crime.

2 142. On June 29, 2007, Silverstein demanded a retraction from Linhardt of the  
3 false statements.  
4

5 143. On July 10, 2007 Linhardt explicitly refused to make a retraction of the  
6 complained of statements.  
7

8 144. Plaintiff is informed and believes, and therefore alleges that Linhardt has a  
9 personal Google account identified as dlinhardt@gmail.com.  
10

11 145. Plaintiff is informed and believes, and therefore alleges that Linhardt has a  
12 business Google account identified as e360Insight@gmail.com.  
13

14 146. Plaintiff is informed and believes, and therefore alleges that Linhardt made  
15 these false statements in his official capacity as president of e360Insight using his  
16 business Google account.  
17

18 147. Plaintiff examination of the Usenet heading of the aforementioned posting  
19 indicated posting and found that the posting was made from Linhardt's Corporate Google  
20 account using a server in California.  
21

22 148. Linhardt made the false statements knowing that Silverstein resides in Los  
23 Angeles, California.  
24

25 149. Plaintiff is informed and believes, and therefore alleges that Linhardt made  
26 the complained of statements knowing that the harm would be felt in California.  
27

28 150. Plaintiff suffered damages as a result of Defendants' wrongful conduct.  
29

30 151. Plaintiff is informed and believes and thereon alleges that Defendants have  
31 willfully engaged in, and are willfully engaging in, the acts complained of with  
32

1 oppression, fraud, and malice, and in conscious disregard of the rights of Plaintiff.  
2 Plaintiff therefore is entitled to and demands exemplary damages in an amount sufficient  
3 to deter the Defendants, and others, from behaving in such egregious behavior.  
4  
5 WHEREFORE, Plaintiff prays for judgment Defendants e360 and Linhardt for damages as set  
6 forth in the Prayer for relief.  
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**PRAYER FOR RELIEF**

2

3 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them as  
4 follows:

5 A. An Order of this Court enjoining Defendants, and each of them, and their  
6 agents, affiliates, servants, employees, and all persons acting under, in concert with them,  
7 from:

8

- 9 1. sending commercial e-mail to Plaintiff or though Plaintiff's servers;

10 2. sending misleading commercial e-mail advertising;

11 3. registering, or permitting to be registered, domain names that do not  
12 accurately identify the registrant of that domain name;

13 4. from registering domain names that do not fully and properly identify  
14 their business; and

15 5. from using multiple domain names e-mail advertising.

16 B. statutory damages of \$1,000 for each the complained of e-mails in accordance  
17 with California Business & Professions Code 17529.5;

18 C. statutory damages of \$125.00 per e-mail under CAN-SPAM.  
19 D. aggravated damages of \$375.00 per e-mail accordance with 15 U.S.C. §  
20 7706(g)(3)(C)

21 E. general damages in an amount to be determined at trial;  
22 F. punitive damages in an amount to be determined by this Court, but not less  
23 than \$11,700,000.00;

24 G. attorney's fees, at \$350.00 per hour and costs owed by law; and

1 H. for such other and further relief as the Court may deem just and proper.  
2  
3

4 Dated: July 23, 2007

5 Respectfully submitted

6 By \_\_\_\_\_  
7

8 F. Bari Nejadpour  
9 Attorney for William Silverstein

10 VERIFICATION

11  
12 The undersigned, for himself, declares:

13 I am Plaintiff in the above-entitled action. I have read the foregoing complaint and know  
14 the contents thereof. With respect the causes of action alleged by me, the same is true of  
15 my own knowledge, except as those matters which are therein stated on information and  
16 belief, and, to those matters, I believe them to be true. I declare under the penalty of  
17 perjury under the laws of the United States of America that the forgoing is true and  
18 correct.

19  
20  
21 Executed on July 23, 2007 in Los Angeles, California.

22  
23  
24  
25 William Silverstein, Plaintiff  
26  
27  
28