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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPTINREALBIG.COM, LLC,

Plaintiff,

v.

IRONPORT SYSTEMS, INC. and its wholly owned
subsidiary, SPAMCOP.NET, INC.,

Defendants.

No. C 04-1687 SBA

**ORDER DENYING DEFENDANT'S
SPECIAL MOTION TO STRIKE
COMPLAINT PURSUANT to
CALIFORNIA CODE OF CIVIL
PROCEDURE § 425.16 AND DENYING
PLAINTIFF'S MOTION TO STRIKE
REPLY**

[Docket Nos. 40, 60]

This matter comes before the Court on the Special Motion to Strike Complaint Pursuant to California Code of Civil Procedure § 425.16 (the "anti-SLAPP Motion") filed by Defendants Ironport Systems, Inc. and SpamCop.net, Inc. ("SpamCop") [Docket No. 40] and the Motion to Strike the Reply Brief Filed by Defendant Allegedly in Support of Its Special Motion to Strike Plaintiff's Complaint filed by Optinrealbig.com, LLC ("Optin") [Docket No. 60]. Having read and considered the arguments presented by the parties in their moving papers and at the July 13, 2004 hearing, the Court hereby DENIES WITHOUT PREJUDICE SpamCop's anti-SLAPP Motion and DENIES Optin's Motion to Strike.

BACKGROUND

Optin filed its original complaint in this district on April 29, 2004. It then filed a motion for a temporary restraining order, which pursuant to this Court's direction, it converted to a motion for a preliminary injunction. The preliminary injunction motion was filed on May 12, 2004 and was heard on May 19, 2004. The Court issued an order denying the preliminary injunction on June 25, 2004. Between May 19, 2004 and June 25, 2004, SpamCop did not answer Optin's complaint; it filed the anti-SLAPP

1 Motion.¹ Optin did not file a timely opposition. Instead, two days after any opposition would have been
2 due, Optin filed a First Amended Complaint (the "FAC"). Only after SpamCop filed its reply to the anti-
3 SLAPP Motion did Optin indicate to the Court its position regarding the pending motion; it filed a motion to
4 strike the reply, arguing that its FAC mooted the anti-SLAPP Motion.

5 The Court's Standing Orders provide that the Court may grant any motion in which a timely
6 opposition is not filed. At the July 13, 2004 hearing, the Court expressed concern that counsel for Optin
7 had engaged in gamesmanship and reminded all counsel that this Court will not tolerate gamesmanship.
8 Counsel for Option adequately explained to the Court that it was unaware of the Court's Standing Order
9 and satisfied the Court's concerns. The Court trusts that the parties are now well aware of the Court's
10 Standing Orders; that they will abide them; and that all will conduct themselves in a professional manner.

11 **DISCUSSION**

12 The Court must determine whether the FAC mooted the anti-SLAPP Motion because a plaintiff's
13 ability to amend a complaint as of right trumps a defendant's anti-SLAPP Motion, even where the filing of
14 the amended complaint may circumvent the SLAPP statute. For the reasons set forth, infra, the Court
15 finds that it does.

16 **A. Anti-SLAPP Statute**

17 California's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute provides a
18 mechanism for a defendant to strike civil actions brought primarily to chill the exercise of free speech.
19 Metabolife Int'l, Inc. v. Wornick, 213 F.Supp.2d 1220, 1221 (S.D.Cal.2002) (citing Cal.Civ.Proc.Code §
20 425.16(b)(1)). "The California Legislature passed the statute recognizing the public interest to encourage
21 continued participation in matters of public significance ... and finding that this participation should not be
22 chilled through abuse of the judicial process." Id. (citations omitted). Under the anti-SLAPP statute, where
23 an action arises from any act in furtherance of a person's right to petition or to free speech, the action is
24 subject to a special motion to strike unless the plaintiff can demonstrate a probability of prevailing. Batzel v.
25 Smith, 333 F.3d 1018, 1024 (9th Cir.2003).

26 ¹ SLAPP stands for Strategic Lawsuit Against Public Participation and is codified as Cal.C.C.P. §
27 425.16.

1 indeed respondents' cross-complaint against appellant is a SLAPP suit, then the court's
2 decision to not hear the merits of appellant's motion to strike deprives appellant of the
3 monetary relief which the Legislature intended to give her, while at the same time it relieves
4 respondents of the punishment which section 425.16 imposes on persons who use the
5 courts to chill others' exercise of their constitutional rights.

6 Id. Liu, however, is distinguishable from the facts at hand. Liu involved a voluntary dismissal, not an
7 amended complaint. The voluntary dismissal signaled the plaintiff's desire to cease litigation. Here, Optin
8 has indicated its intent to continue to prosecute its case by filing the FAC.

9 In certain circumstances, some courts have found that the filing of an anti-SLAPP motion created
10 an implied stay of the proceedings. In Roberts v. Los Angeles County Bar Assn., 105 Cal.App.4th 604
11 (2003), the plaintiff filed a FAC and the defendant filed an anti-SLAPP motion. The trial court denied the
12 motion and plaintiff then filed a second amended complaint, which was not a matter of right. Id. at 611.
13 The Roberts court held that once the trial court had made a determination as to the anti-SLAPP motion
14 with respect to the FAC, the FAC became the complaint the appellate court was required to consider in
15 the anti-SLAPP appeal. Id. It was the operative complaint because "an implied stay in the proceedings
16 where the plaintiff files an amended complaint prior to the defendant's appeal of the denial of a SLAPP
17 motion to strike is necessary so that a plaintiff cannot deprive a defendant of the right to the appellate
18 review granted by the Legislature so that the appellate court can determine if the defendant had made a
19 prima facie showing." Id. at 613. In contrast to Roberts, however, here Optin filed the FAC as a matter of
20 right and this Court had not yet ruled on the anti-SLAPP motion.

21 At the time of the hearing, only one court, in an unpublished case, had reviewed the question of
22 whether an anti-SLAPP motion is rendered moot by a FAC. In Prospect Health Source medical Group,
23 Inc. v. Dallazadeh, 2004 WL 909443 (Cal.App.2d. April 29, 2004), the appellate court held that it would
24 be procedurally inappropriate to reach the merits of an anti-SLAPP motion as it pertains to the original
25 complaint rather than the FAC. Id. at *3.

26 Since then, the Ninth Circuit has weighed in on the issue: Verizon Delaware, Inc. v. Covad
27 Communications Co., 2004 WL 1662195 (9th Cir. July 27, 2004). Though the decision has not yet been
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1 published, it is persuasive. In it, the Ninth Circuit reasoned that in cases where a plaintiff amends his
2 complaint as of right pursuant to Fed.R.Civ.P. 15(a), “granting a defendant's anti-SLAPP motion to strike a
3 plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with
4 Fed.R.Civ.P. 15(a)'s policy favoring liberal amendment.” Id. at *10.

5 SpamCop argues that such reasoning gives rise to an injustice. An unscrupulous plaintiff could file a
6 complaint that violates the SLAPP statute, drive up litigation costs with a motion for a temporary restraining
7 order or preliminary injunction, and then after it has succeeded in harassing a defendant, it could amend its
8 complaint as of right and circumvent the anti-SLAPP statute's purpose – to prevent such lawsuits. Though
9 it makes no determination as to whether this is what has occurred in the case at hand, in general the Court
10 shares SpamCop's concern. The Legislature, however, was well aware of the right to amend a complaint
11 in state court proceedings (which parallels the right in federal proceedings) and had it intended to deprive a
12 plaintiff of the one-time unilateral right to amend, it would have done so explicitly. See, Prospect Health,
13 WL 909443 at *4. Even if the SLAPP statute explicitly deprived a plaintiff of such a right in state court
14 proceedings, however, the Erie doctrine would have prohibited this Court from depriving Optin of its right
15 in federal court. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938) (federal procedural laws govern
16 all proceedings in the adjudication of an action in federal court).

17 Moreover, the Court observes that an aggrieved defendant's hands are not completely tied. A
18 party may amend its complaint once as a matter of course at any time before a responsive pleading, such as
19 an answer, is served. Fed.R.Civ.Pro. 15(a); Outdoor Sys., Inc. v. City of Mesa, 997 F.2d 604, 613 (9th
20 Cir. 1993). A defendant may remove a plaintiff's right simply by filing an answer. Thus, if a defendant
21 seeks to bring an anti-SLAPP motion to strike early in the proceedings, then the defendant should file an
22 answer to the original complaint.

23 This balance, between a plaintiff's right to amend a complaint, and a defendant's ability to
24 circumscribe that right through an answer reflects the balance the Federal Rules of Civil Procedure have
25 struck to ensure due process to all the parties. “The Federal Rules of Civil Procedure are designed to
26 further the due process of law that the Constitution guarantees....[The rules] shall be construed and
27 administered to secure the just, speedy, and inexpensive determination of every action.” Nelson v. Adams

1 USA, Inc., 529 U.S. 460, 466 (2000) (internal quotations and citations omitted). The Court will not
2 disturb that balance.

3 **C. Optin's Motion to Strike SpamCop's Reply**

4 As the above discussion demonstrates, the issue of whether a FAC moots an anti-SLAPP motion is
5 both straight forward and complicated. It is straight forward because the Federal Rules of Civil Procedure
6 clearly provide a plaintiff the ability to amend a complaint as of right as long as no answer has been filed. It
7 is complicated because such a right seems to theoretically give plaintiffs a loophole that allows them to
8 harass defendants and circumvent the anti-SLAPP statute. The Court has reviewed the case law both from
9 the Ninth Circuit, and its sister courts in districts that have similar types of SLAPP statutes. Until the Ninth
10 Circuit's July 27, 2004 in Verizon, it found no case clearly on point. Thus, given the purpose and policy
11 behind the SLAPP statute, it was not patently obvious that a FAC mooted SpamCop's anti-SLAPP
12 Motion. It was an issue that required briefing, oral argument, and a supplemental presentation of cases.
13 Accordingly, SpamCop's reply in support of its motion was appropriate and the Court DENIES Optin's
14 motion to strike it.

15 **CONCLUSION**

16 For the foregoing reasons,

17 IT IS HEREBY ORDERED THAT SpamCop's Motion to Strike Optin's complaint is DENIED
18 WITHOUT PREJUDICE. If SpamCop wishes to bring an anti-SLAPP motion against Optin, it must bring
19 one against the FAC, not the original complaint.

20 IT IS FURTHER ORDERED THAT Optin's Motion to Strike SpamCop's Reply Brief Filed by
21 Defendant Allegedly in Support of Its Special Motion to the Motion to Strike Plaintiff's Complaint is
22 DENIED.

23 IT IS SO ORDERED.

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25 Dated: July 28, 2004

/s/ Sandra Brown Armstrong
SAUNDRA BROWN ARMSTRONG
United States District Judge