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11 SPAMCOP.NET, INC.

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

15 OPTINREALBIG.COM, LLC, a Nevada
16 Limited Liability Company,

17 Plaintiff,

18 v.

19 IRONPORT SYSTEMS, INC. dba
20 SPAMCOP.NET, INC., a Delaware
21 Corporation registered to do and doing
22 business in California and DOES 1
23 through 100, inclusive,

24 Defendants.

Case No. C-04-1687 (SBA)

**IRONPORT SYSTEMS, INC. AND
SPAMCOP.NET, INC.'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION TO DISMISS
OPTINREALBIG.COM'S COMPLAINT
PURSUANT TO FED. R. CIV. P. 12(b)(6)**

**Date: July 13, 2004
Time: 1:00 p.m.
Ctrm: Hon. Sandra B. Armstrong
Courtroom 3**

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1 **I. INTRODUCTION**

2 Plaintiff Optinrealbig.com filed this lawsuit with scant facts and six improperly pled
3 causes of action, ostensibly in an effort to deter its detractors from complaining about its business
4 practices.¹ Optinrealbig hopes that by bringing this lawsuit, it will be able to prevent or at least
5 discourage people who object to having their email in-boxes flooded with unsolicited
6 advertisements for pornography, anatomical “enhancement” pills and mortgage offers, from
7 sending their complaints about Plaintiff’s spam to the Internet Service Providers (“ISPs”) that
8 provide Optinrealbig with the Internet bandwidth over which Plaintiff’s spam is sent.

9 Defendants IronPort Systems, Inc. and SpamCop.net, Inc. (“SpamCop”), however, have
10 done nothing wrong, even assuming, as one must for the purposes of this motion only, the truth of
11 Plaintiff’s allegations. Each of the six causes of action alleged in Optinrealbig’s Complaint fails
12 to adequately identify the facts necessary to justify the relief it seeks, impermissibly forcing the
13 parties and the court to guess. These claims – tortious interference with contract, interference
14 with contractual relations, intentional and negligent interference with prospective economic
15 advantage, unfair competition, and trade libel – all appear to stem from Plaintiff’s claim that
16 SpamCop’s forwarding of spam complaints somehow defame Plaintiff or cast it in a false light,
17 yet there are no allegations of falsity or special damages required to sustain such claims. For
18 example, to the extent that the alleged conduct casts Plaintiff as a “spammer” or that it engages in
19 mass emailing that may be contrary to an ISP’s Acceptable Use Policies (“AUP”), there is no
20 allegation that such characterizations are false.

21 Plaintiff’s Complaint, on its face, also shows that each of its causes of action is subject to
22 the statutory immunity of the Communications Decency Act (“CDA”), which protects SpamCop
23 from exactly the claims that Optinrealbig raises in its Complaint. Because, on the facts alleged,
24 the immunity conferred by the CDA controls, an amendment to attempt to avoid dismissal would
25 be futile. For these reasons, and those set forth below, Plaintiff’s Complaint should be dismissed
26 with prejudice.

27
28 ¹ Defendants have filed and concurrently have pending a special motion to strike under Cal. Code
of Civ. Proc. § 425.16.

1 **II. ALLEGATIONS OF THE COMPLAINT**

2 The background and relevant facts of this case are set forth in Plaintiff's Complaint and
3 papers submitted in support of its motion for TRO and for a preliminary injunction. Plaintiff
4 contends that SpamCop's forwarding of complaints from recipients of its spam messages to the
5 ISPs that provide Internet bandwidth to Optinrealbig has, in some vague, unspecified way,
6 damaged Plaintiff's reputation and has interfered with its existing and potential contracts.
7 Complaint ¶ 1. Optinrealbig makes vague suggestions that these actions are wrongful, but it
8 points to no false statements either generally or specifically. At best, it seems that Optinrealbig
9 contends that the net effect of SpamCop's forwarding is to cast Plaintiff as a "spammer" based on
10 a vague contention that SpamCop's reporting somehow inaccurately magnifies the number of
11 complaints about Plaintiff's mailings. Complaint ¶ 17. But there is no allegation this is false.

12 Plaintiff filed its Complaint on April 29, 2004 against SpamCop and IronPort Systems.²
13 SpamCop is an interactive Internet-based service that helps individuals and ISPs reduce
14 unsolicited bulk email, often referred to as "spam," by forwarding complaints from recipients of
15 spam to ISPs that provide Internet access to the senders of spam. Complaint ¶ 11. Optinrealbig,
16 on the other hand, floods email inboxes across the country with millions of commercial emails a
17 day. Complaint ¶ 9. Optinrealbig claims that recipients of its email have given "implied consent"
18 to receive its bulk emails, which implied consent Optinrealbig claims is derived from a user's
19 "visitation to various websites." Complaint ¶ 9.

20 SpamCop's online service is a tool for allowing unwitting recipients of Optinrealbig's
21 spam messages to notify ISPs and "other interested parties" that they do not believe that they
22 solicited Optinrealbig's email. Complaint ¶¶ 9, 11. By this litigation, Optinrealbig seeks to put a
23 stop to SpamCop's forwarding of spam complaints to ISPs so that it may continue to send
24 "millions of emails each day" without fear that the ISPs that provide it with bandwidth will
25 receive recipients' complaints and find out about Plaintiff's mass emailing activities. Complaint
26 ¶ 9. SpamCop provides email recipients with an easy means of notifying the sender's ISPs that

27 ² Optinrealbig initially sued SpamCop as a "dba" of IronPort Systems. The Court amended the
28 pleadings to identify SpamCop as a wholly-owned subsidiary of IronPort during the May 18,
2004 hearing on Plaintiff's Motion for Preliminary Injunction.

1 they received unsolicited emails. Complaint ¶ 11. After SpamCop’s software analyzes the source
2 information in the headers of a reported message, SpamCop automatically republishes the
3 complaint to the direct or upstream ISPs identified as providing Internet access to the source of
4 the underlying email in the complaint, to an ISP which relays the email, and/or to an ISP that
5 hosts a website advertised or promoted in the underlying email. Complaint ¶ 14. Before
6 forwarding a reported message complaint to ISPs, SpamCop’s software automatically removes
7 the name, email address and other personal identifying information (if the reporting individual
8 has not already done so) to protect the privacy of users. Complaint ¶ 13. The receiving ISPs then
9 may make a decision regarding how they will use the forwarded complaints that they receive.
10 Complaint ¶ 14.

11 SpamCop’s posted policies on their website, referenced by Plaintiff in its Complaint,
12 expressly states that SpamCop cannot verify the accuracy of what its users report through
13 SpamCop’s interactive services.³ See Request for Judicial Notice (“RFJ”), Ex. A; Complaint ¶
14 17. Therefore, how ISPs treat SpamCop’s reports, and the actions taken by ISPs, are outside of
15 SpamCop’s control. The Complaint does not allege that SpamCop has any interaction with ISPs
16 concerning how ISPs should use the complaints that they receive, other than the forwarding of
17 user complaints.

18 The six causes of action that Plaintiff alleges include tortious interference with contract,
19 interference with contractual relations, intentional and negligent interference with prospective
20 economic advantage, unfair competition, and trade libel. All center around SpamCop’s re-
21 publication and distribution of unsolicited commercial email sent by Plaintiffs. In short, Plaintiff

22 ³ Although a Motion to Dismiss is limited to the face of the pleadings, when documents are
23 referenced or relied upon by Plaintiff in the complaint, the court may properly take judicial notice
24 in deciding a Rule 12(b)(6) motion to dismiss. See *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir.
25 1994) (Granting Motion to Dismiss stating: “We have said that a document is not ‘outside’ the
26 complaint if the complaint specifically refers to the document and if its authenticity is not
27 questioned. The leading commentators state that “when [the] plaintiff fails to introduce a
28 pertinent document as part of his pleading, [the] defendant may introduce the exhibit as part of his
motion attacking the pleading.” 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and
Procedure* § 1327, at 762-63 (2d ed. 1990).”); see also *In re Copper Mt. Secs. Litig.*, No C-00-
3894, 2004 U.S. Dist. LEXIS 5437 (N.D. Cal. Mar. 30, 2004); *Wietschner v. Monterey Pasta Co.*,
294 F. Supp. 2d 1102, 1109 (N.D. Cal. 2003). Here, Plaintiff alleges that “SpamCop was not
following SpamCop’s posted policies as to how spam complaints were to be distributed.”
Complaint ¶ 17. Thus, judicial notice of SpamCop’s posted policies, available at
www.spamcop.net, the authenticity of which no one questions, may properly be taken.

1 alleges that by forwarding to ISPs that provide bandwidth to Plaintiff complaints that third party
2 recipients of Optinrealbig’s emails post to SpamCop’s system, SpamCop is interfering with
3 Plaintiff’s contracts with its existing bandwidth suppliers and interfering with its unidentified,
4 potential future business relationships with ISPs with whom it does not currently have contracts.
5 Complaint ¶¶ 20-34. However, Plaintiff identifies only one contract that it currently has – with
6 Optigate – and does not allege that its contract has been breached in a way that has resulted in
7 damages. Complaint ¶¶ 12-14. Furthermore, Plaintiff does not allege any facts supporting a
8 claim that the receipt of complaints from SpamCop by Optigate or other ISPs has been the cause
9 of any termination of contracts.

10 Finally, Plaintiff’s claims of Unfair Competition and Trade Libel are included seemingly
11 by reflex without any thought or discussion given to SpamCop’s immunity or the fact that the
12 accused statements at issue were true. Importantly, Plaintiff’s Complaint does not identify a
13 single false statement that SpamCop has allegedly published. Instead, it merely alleges that
14 SpamCop republishes email messages that third parties who did not want to receive those
15 messages post to its service. Complaint ¶¶ 11, 13, 38-42. Yet it does not identify a single
16 allegedly false message, nor facts that could lead one to determine how a complaint could be
17 false. As SpamCop’s web site policies state, users must believe their complaints to be true. *See*
18 RFJ Ex. B, SpamCop FAQ: Rules! Here, SpamCop was acting well within both their own posted
19 policies and the confines of the law, making a claim that “members of the public are likely to be
20 deceived” in relation to an “unlawful, unfair or fraudulent business practice” both inadequately
21 pled and untrue. *See* 5 Witkin, Summary of Cal. Law (9th ed. 1998) Torts § 471, p. 558.

22 **III. ARGUMENT**

23 **A. Dismissal Is Appropriate Where a Complaint Has No Basis in Law or Fact**

24 Dismissal is appropriate under Rule 12(b)(6) of the Federal Rules of Civil Procedure
25 where “plaintiff can prove no set of facts in support of his claim which would entitle him to
26 relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On such a motion, the Court considers the
27 legal sufficiency of the material facts alleged in the Complaint, ignoring conclusory allegations.
28 *See McGlinchy v. Shell Chemical. Co.*, 845 F.2d 802, 810 (9th Cir. 1988)(affirming dismissal of

1 antitrust claim on grounds that plaintiff had not sufficiently alleged antitrust injury). “Although
2 the federal procedural standards for notice pleading . . . are liberal, they are not so liberal as to
3 allow purely conclusory statements to suffice to state a claim that can survive a motion to
4 dismiss.” *Miller v. Cont’l Airlines, Inc.*, 260 F. Supp. 2d 931, 935 (N.D. Cal. 2003).

5 A motion to dismiss should be granted where there is either a lack of a cognizable legal
6 theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*
7 *Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1988). Thus, when “it appears beyond doubt
8 that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to
9 relief,” the challenged claim can be dismissed. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-
10 338 (9th Cir. 1996); *see also Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). Moreover, a
11 motion to dismiss can be granted without leave to amend when “it is absolutely clear that the
12 deficiencies of the complaint could not be cured by amendment.” *McKesson HBOC, Inc. v. New*
13 *York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1096 (9th Cir. Cal. 2003) (affirming motion
14 to dismiss with prejudice because no allegation of additional facts would cure deficiencies) *see*
15 *also Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

16 As discussed in more detail below, Optinrealbig has not sufficiently pled any of its causes
17 of action, instead relying on conclusory allegations. Furthermore, no facts can be pled that would
18 prevent dismissal because SpamCop, as an interactive Internet site that merely re-publishes the
19 complaints and/or alleged defamatory material of others, is immune from liability under Section
20 230 of the Communications Decency Act. When an affirmative defense, such as absolute
21 immunity or other bar to relief, is apparent from the face of the pleadings, a Rule 12(b)(6) motion
22 should be granted. *Willis Corroon Corp. of Utah, Inc. v. United Capitol Ins. Co.*, No. 97-2208,
23 1998 U.S. Dist. LEXIS 23226 (N.D. Cal. Jan. 5, 1998) (granting motion to dismiss on the basis of
24 an affirmative defense); *see also* 2A J. Moore, W. Taggart & J. Wicker, *Moore’s Federal Practice*,
25 § 12.07 at 12-68 to 12-69 (2003) (*citing Imbler v. Pachtman*, 424 U.S. 409 (1976)). Indeed, such
26 immunity here points to a dismissal with prejudice, because “amendment would be futile.”
27 *DeSoto v. Yellow Freight Sys.*, 957 F.2d 655, 658 (9th Cir. 1992).

28

1 **B. Because of SpamCop’s Immunity From Suit, Plaintiff Fails to State a Cause**
2 **of Action For Which Relief Can Be Granted**

3 **1. SpamCop Is Immune From Liability Under Section 230 of the**
4 **Communications Decency Act**

5 All of Optinrealbig’s claims rest on its unsupported allegation that SpamCop republishes
6 the allegedly defamatory statements of others to third party ISPs. There is no allegation that
7 SpamCop itself makes defamatory statements about Optinrealbig or adds any defamatory content
8 to the complaints posted to its service by others. Rather, SpamCop only acts as an online
9 clearinghouse and re-publisher of others’ complaints notifying interested parties that an email
10 recipient has received “spam”. *See* Complaint ¶ 11.

11 As such, SpamCop is immune from liability under Section 230 of the Communications
12 Decency Act, 47 U.S.C. § 230(c)(1) (“CDA § 230”). That section provides:

13 TREATMENT OF PUBLISHER OR SPEAKER- No provider or user of an
14 interactive computer service shall be treated as the publisher or speaker of any
15 information provided by another information content provider.

16 As discussed below, CDA § 230 has been applied broadly by courts – including the Ninth Circuit
17 – to immunize service providers like SpamCop from claims making exactly the types of
18 allegations made by Optinrealbig – that SpamCop should be held liable for the alleged
19 defamatory statements of users of its site and services when SpamCop electronically re-publishes
20 those statements over the Internet, including via email.

21 In the seminal case of *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997),
22 the 4th Circuit recognized that Congress’ purpose in conferring broad immunity on interactive
23 computer services for others’ speech was, in part, “to maintain the robust nature of Internet
24 communication and accordingly, to keep government interference in the medium to a minimum.”
25 *Id.* at 330 (4th Cir. 1997), cited with approval in *Batzel v. Smith*, 333 F.3d 1018, 1027-28 (9th Cir.
26 2003), rehearing denied, 351 F.3d 904 (9th Cir. 2003). Further, the Ninth Circuit recently
27 recognized that in enacting CDA § 230, Congress “sought to prevent lawsuits from shutting down
28 websites and other services on the Internet.” Yet that is exactly what Optinrealbig hopes to
 accomplish by this lawsuit and by its Motion for Preliminary Injunction – the silencing of
 complaints by recipients of its unsolicited bulk email messages.

1 **a. SpamCop is an interactive computer service provider or user**

2 As evidenced by the “posted policies” referenced in Plaintiff’s Complaint, SpamCop is
3 merely a republisher of Internet content. *See* RFJ Ex. D, SpamCop FAQ “What is this? How
4 does this work? How do I use it?” Optinrealbig’s description of SpamCop itself describes
5 SpamCop as an interactive computer service provider or user, as those terms are defined by CDA
6 § 230 and as they have been interpreted by the Ninth Circuit. *See* Complaint ¶ 11. The statutory
7 language broadly defines an interactive computer service as “any information service, system, or
8 access software provider that provides or enables computer access by multiple users to a
9 computer server. . . .” 47 U.S.C. § 230(f)(2).

10 The Ninth Circuit has recently interpreted this definition very broadly to include any
11 Internet-based information service or system that allows multiple users to access a server. *Batzel*,
12 333 F.3d at 1030. Under this definition, there can be no doubt under the facts alleged by Plaintiff
13 that SpamCop is an interactive service provider. In addition to providing other features,
14 SpamCop provides an Internet-based information service that allows multiple users to access its
15 servers to make complaints about receiving unsolicited bulk email, as long as they adhere to the
16 posted policies. *See* RFJ Ex. E, SpamCop FAQ “Parsing and reporting spam.”

17 Furthermore, even if it were not an interactive service “provider”, SpamCop is an
18 interactive service “user” – a fact also mentioned in SpamCop’s posted policies – and thus
19 provided with immunity under CDA § 230. *See* RFJ Ex. A, SpamCop FAQ “Rules – Everybody
20 Read!”; *See Batzel*, 333 F.3d at 1030-31. In *Batzel*, the court held that any service that accesses
21 an ISP is an interactive service “user” within the meaning of CDA § 230. There, plaintiff
22 republished an allegedly defamatory email that it received issue over the Internet, also via email.
23 The Ninth Circuit held that CDA immunity should apply, because, in sending the email, plaintiff
24 had to access the Internet and was therefore an interactive computer “user”. *Id.* The allegations
25 in Optinrealbig’s Complaint are indistinguishable; Optinrealbig alleges that SpamCop forwards
26 third party complaints of emails over the Internet via email to ISPs. Complaint ¶ 11, 13, 14.
27 *Batzel* establishes, as a matter of law, that this activity makes SpamCop an interactive computer
28 service “user” and thus immune. *Id.*

1 deciding which emails to re-publish. The court held: “The ‘development of information’
2 therefore means something more substantial than merely editing portions of an email and
3 selecting material for publication.” *Batzel*, 333 F.3d at 1031. Accordingly, merely because
4 SpamCop removes the name and email address of a third party that complains about receiving
5 unsolicited bulk email before it re-publishes the complaint [Complaint ¶ 15], does not make
6 SpamCop the “content provider” of the complaint.

7 Finally, *Batzel* held that, for CDA § 230 immunity to apply to republication of an email,
8 the information service provider or user – here, SpamCop – must reasonably have perceived or
9 known that the original author of the allegedly defamatory message intended it to be republished.
10 *Id.* at 1034.⁴ Here, the Complaint alleges that SpamCop reasonably understands or knows that
11 when an individual forwards or posts to SpamCop’s site a complaint about an unsolicited
12 commercial email that he receives, he does so with the intention that it be republished through the
13 Internet, as that is the very nature of the service that SpamCop provides and is so disclosed on the
14 very web site used to forward the complaint. *See* Complaint ¶ 11. Optinrealbig acknowledges as
15 much in its Complaint, and nowhere does Plaintiff allege that people send emails to SpamCop
16 without knowing that they will be forwarded to ISPs that provide Internet access to the source of
17 the spam. *See* Complaint ¶¶ 11, 13, 14.

18 Although the Complaint does not expressly allege that SpamCop encourages the
19 submission of complaints for republication through its service, even if the Complaint were read
20 liberally to include such a claim, SpamCop would still be protected by CDA § 230. In
21 *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), a district court held that AOL, as an
22 interactive service provider, was immune from suit for defamatory statements made in a gossip
23 column that it solicited and promoted, and for which it compensated the author. There, the
24 columnist (Drudge) provided the content to AOL by email, and AOL then posted the content on
25 its service without engaging in any fact checking, even though it had a contractual right to edit or
26 withhold the content. *Id.* at 47. AOL actively promoted the column, including a press release,

27 ⁴In *Batzel*, the Ninth Circuit remanded for determination of whether the interactive service
28 provider reasonably believed or knew that the sender of an email message intended for that
message to be re-published to others through the Internet, since the record was unclear on that
point.

1 and urged potential subscribers to sign on to AOL in order to receive it. *Id.* at 51. In holding that
2 AOL was immune under CDA § 230, the court recognized that Congress had made a “policy
3 choice by providing immunity even where the interactive service provider has an active, even
4 aggressive role in making available content prepared by others.” *Id.* at 52.

5 Because SpamCop merely re-publishes the complaints of others through its online service,
6 it falls squarely within CDA § 230’s broad immunity provisions and furthers Congress’ purpose
7 in enacting that provision. Without such immunity and the concomitant ability to bring an early
8 end to suits like this one, services like SpamCop could effectively be forced to shut down, since
9 spammers could then sue them for even marginal instances of alleged defamation, forcing them to
10 incur prohibitively expensive legal fees.

11 **C. Because Optinrealbig Has Not Identified a Single False Statement, Identified**
12 **any Pecuniary Harm, or Shown Actual Malice by Clear and Convincing**
13 **Evidence, it Fails to Allege Sufficient Facts to Allege a Trade Libel Claim**

14 **1. Optinrealbig Has Not Identified a Single False Statement of Fact as the**
15 **Basis of its Trade Libel Claim**

16 Plaintiff has not adequately pled a claim for either trade libel or defamation. Without
17 identifying any allegedly defamatory statements about Optinrealbig’s business that can be
18 attributed to Plaintiff, Optinrealbig merely makes a conclusory allegation that SpamCop has
19 defamed its business. However, Plaintiff’s “conclusory allegations of law and unwarranted
20 inferences are insufficient to defeat a motion to dismiss for failure to state a claim” under Fed. R.
21 Civ. P. 12(b)(6). *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*,
22 228 F.3d 1043, 1049 (9th Cir. Cal. 2000).

23 The only allegedly defamatory statements of which Optinrealbig seems to complain –
24 even though it has not identified a single, allegedly false statement – are the complaints that third
25 party recipients of Optinrealbig’s email send to SpamCop for republication to ISPs. However,
26 Optinrealbig has not identified a single allegedly defamatory statement made by SpamCop itself
27 about Optinrealbig. Instead, it makes only the conclusory allegation that SpamCop “caused to be
28 published false and non-privileged communications tending to directly reflect negatively on
Optin’s business and professional reputation.” Complaint ¶ 39. Without a false statement,

1 however, there can be no claim for trade libel or defamation.

2 Mere opinions alone cannot be the basis for a claim of trade libel; the statements must be
3 false statements of fact. *ComputerXpress v. Jackson*, 93 Cal. App. 4th 993, 1010-11 (2001).
4 Whether a statement is fact or opinion is a question of law, and a court must put itself in the place
5 of an average reader and determine the natural and probable effect of the statement, considering
6 both the language and the context. *Id.* at 1011. In *ComputerXpress*, for example, the court noted
7 that plaintiff had failed to demonstrate how defendants' Internet postings about plaintiff's
8 business were false or defamatory. There, plaintiff's trade libel claim was insufficiently pled,
9 because plaintiff had not identified "which of the numerous postings included in the record it
10 contends were actionable. Instead, *ComputerXpress* simply refers this court to the 131 pages of
11 Internet postings contained in the record, apparently assuming it is the court's obligation to
12 determine how they support *ComputerXpress's* position." *Id.*

13 Here, *Optinrealbig* has not even done that much. *Optinrealbig* has not identified in either
14 its Complaint, its TRO or in its PI papers a single allegedly false statement. Without such an
15 allegation, the Complaint is defectively pled, as the Court cannot determine whether the statement
16 is false or mere opinion. As the Ninth Circuit has recognized, "No action for defamation can go
17 forward" without a false statement. *See Cort v. St. Paul Fire and Marine Ins. Companies, Inc.*,
18 311 F.3d 979, 985 (9th Cir. 2002)("An essential element of defamation is that the publication in
19 question must contain a false statement of fact."). Without identifying any allegedly false
20 statements, Plaintiff has not adequately pleaded facts showing that SpamCop knew or disregarded
21 that the complaints that it republished were false. In any event, because SpamCop does not
22 represent that the complaints of spam that it receives from third parties that it republishes were, in
23 fact, unsolicited emails, those republications are not statements of fact. *See* RFJ Ex. B, SpamCop
24 FAQ "What do I need to know to get started reporting Spam?"

25 **2. Optinrealbig Has Not Pled Special Damages, a Necessary Pleading**
26 **Requirement for a Claim of Trade Libel**

27 Trade libel is different from the tort of defamation, which Plaintiff has not expressly pled.
28 Trade libel is an intentional disparagement of the quality of property or a service, which results in

1 pecuniary damage. *See ComputerXpress*, 93 Cal. App. 4th at 1010. Defamation, on the other
2 hand, impugns a company’s reputation. *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 1362
3 (1998). Here, Optinrealbig has expressly pled only trade libel. It does not claim that SpamCop
4 made any false statements maligning Optinrealbig’s reputation; it only claims that SpamCop has
5 republished complaints about Optinrealbig’s products and services – its bulk, unsolicited emails.
6 Complaint ¶¶ 38-42. The distinction is relevant, because trade libel has specific pleading
7 requirements that Optinrealbig has not satisfied.

8 Optinrealbig has not sufficiently pled trade libel not only because it has failed to allege
9 any false statements, but also due to its failure to identify special damages. Bare allegations of
10 pecuniary loss, such as those made by Optinrealbig, are insufficient to plead special damages, a
11 required element of pleading trade libel. *See Erlich v. Etner*, 224 Cal. App. 2d 69, 73-74 (1964)
12 (“plaintiff must identify the particular purchasers who have refrained from dealing with him, and
13 specify the transactions of which he claims to have been deprived” and identify specific losses);
14 *see also Isuzu Motors Ltd. v. Consumers Union of United States*, 12 F. Supp. 2d 1035, 1047 (C.D.
15 Cal. 1998)(allegation that plaintiff “suffered and continues to suffer special damages from the
16 loss of revenue from wholesale and retail sales” was insufficient without specific identification of
17 lost sales attributed to allegedly defamatory statements). As in *Erlich* and *Isuzu Motors Ltd.*,
18 Optinrealbig has not identified in its Complaint any specific monetary losses that it attributes to
19 the mysterious, unidentified defamatory statements that it seeks to attribute to SpamCop.

20 **3. Optinrealbig Has Not Adequately Pled That SpamCop Has Acted**
21 **With Actual Malice**

22 Under California law, a claim for trade libel requires a showing that the publisher made
23 the false statement with “actual malice” – knowledge that it was false or with reckless disregard
24 of the truth. *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344, 1362-63 (1998). Even if Plaintiff’s
25 trade libel claim were re-cast as a claim for defamation, rather than trade libel, it would need to
26 plead (and prove) facts showing that SpamCop acted with actual malice, since the as-yet
27 undefined allegedly defamatory statements were a matter of public concern. *See Melaleuca*, 66
28 Cal. App. 4th at 1362-63. Plaintiff even describes their activities as doing “business on a

1 commercial level, sending millions of emails each day.” Complaint ¶ 9. In *Melaleuca*, the court
2 held that defendant’s statements about the quality of widely distributed consumer goods was a
3 matter of public concern, thus elevating the bar to the actual malice standard. *Id.* Similarly here,
4 all statements that SpamCop makes and republishes concern the issue of spam – an undeniable
5 issue of current public concern, particularly in light of recently enacted federal legislation
6 concerning spam. *See e.g.* CAN-SPAM Act, Pub. L. No. 108-187, 117 Stat. 2699 (2003), Sec. 2
7 (Congressional findings on the threat to commerce posed by, and rising costs imposed upon
8 Internet users by, unsolicited commercial email).

9 To plead actual malice, Optinrealbig must allege facts showing that SpamCop subjectively
10 knew the alleged falsity of the statements that it republished, or recklessly disregarded whether
11 those statements were false. *See Melaleuca*, 66 Cal. App. 4th at 1365; *see also New York Times*
12 *Co. v. Sullivan*, 376 U.S. 254 (1964)(originating actual malice standard). Optinrealbig’s
13 Complaint fails to meet this pleading requirement, as it makes only conclusory allegations that
14 SpamCop republished complaints submitted by recipients of Plaintiff’s spam, without pleading a
15 single fact to support actual malice. Complaint ¶ 40; *see e.g. Nicosia v. De Rooy*, 72 F. Supp. 2d
16 1093, 1109 (N.D. Cal. 1999)(An Internet publisher’s motion to dismiss trade libel claim for
17 failure to state a claim was granted.); *Carafano v. Metrosplash, Inc.*, 207 F. Supp. 2d 1055, 1070
18 (C.D. Cal. 2002) (The court dismissed plaintiff’s claims for defamation, negligence, and
19 misappropriation because she failed to show that defendant had acted with actual malice.) In fact,
20 Plaintiff pleads only that SpamCop republishes messages that it receives from third parties. Pled
21 that way, what SpamCop allegedly knows is the truth – that the third parties did not want to
22 receive the messages that they posted to SpamCop.

23 **D. Optinrealbig Fails to State a Cognizable Claim in Its Tortious Interference**
24 **With Contract or Interference with Contractual Relations**

25 Optinrealbig’s Complaint does not allege specific facts regarding its claims for
26 interference with contractual relations. Instead, Plaintiff makes nothing more than conclusory
27 allegations or inferences that SpamCop knew about these relationships and that SpamCop caused
28 any of the resulting action. *See* Complaint ¶ 26.

1 To plead a tortious interference with contract claim, the Plaintiff’s Complaint must
2 contain allegations showing: (1) the existence of a valid business relationship; (2) knowledge of
3 the relationship on the part of the defendant; (3) an intentional interference by the defendant
4 which; (4) induces a breach of the contract or termination of the relationship, and (5) results in
5 damage to the plaintiff. *See Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118,
6 1126-1127 (1990). Similarly, a cause of action or interference with contractual relationship also
7 requires (1) a valid contract between plaintiff and a third party; (2) defendant’s knowledge of this
8 contract; (3) defendant’s intentional acts designed to induce a breach or disruption of the
9 contractual relationship; (4) actual breach or disruption of the contractual relationship; and
10 (5) resulting damage.” *Dryden v. Tri-Valley Growers*, 65 Cal. App. 3d 990, 997-998 (1977).

11 To survive a motion to dismiss, Optinrealbig must show that SpamCop had actual
12 knowledge of Optinrealbig’s contracts or contractual relationships. *Summit Machine Tool*
13 *Manufacturing Corp. v. Victor CNC Systems, Inc.*, 7 F.3d 1434 (9th Cir. 1993). When analyzing
14 “interference” torts, California courts disregard conclusory language, looking instead for well-
15 pled facts to support each element of the claim. *See Tuchscher Development Enterprises, Inc. v.*
16 *San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1240 (2003) (striking complaint alleging
17 causes of action similar to Optinrealbig’s where “the record is absent any admissible direct
18 evidence or evidence from which we may infer respondents’ actions induced a breach or
19 disruption”). A bare allegation of knowledge by SpamCop is insufficient. *Westside Center*
20 *Associates v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 527-28 (1996) (holding that plaintiff
21 may not establish an intentional interference claim without establishing the existence of a specific
22 relationship with which defendant was alleged to have interfered). Other than Optigate, with
23 which Optinrealbig apparently *still has a contract*, Optinrealbig has not identified any specific
24 contractual relationships, nor has it even attempted to plead that SpamCop knew of them.
25 Instead, Optinrealbig makes only vague claims of a business relationship between itself and
26 various ISPs that were “part of the bandwidth network on which all ISPs rely.” Complaint ¶ 14.

27 Further, Plaintiff pleads no facts purporting to show that SpamCop’s actions specifically
28 induced the breach of any contracts. Since the Complaint mentions only one specific contract –

1 with Optigate – but does not allege that the contract was actually broken or that its breach was
2 induced solely by SpamCop, Plaintiff’s claim is insufficient to state a cause of action. *See Pacific*
3 *Gas & Electric Co.*, 50 Cal. 3d at 1126-1127 (Dismissal of intentional interference with
4 contractual relationship claim affirmed because plaintiff failed to state an actual interference or
5 injury).

6 Moreover, Optinrealbig has pled no harm that has come to it as a result of SpamCop’s
7 conduct. Instead, it makes only the vague and conclusory statement that SpamCop’s
8 republication of complaints about Optinrealbig’s bulk email has caused the termination of its
9 contracts with ISPs, resulting in harm to it. Such conclusory allegations, without identifying the
10 specific contracts that were terminated or the value of those contracts are insufficient to state a
11 cause of action.

12 **E. The Complaint Fails to Plead Adequate Facts for its Intentional and**
13 **Negligent Interference with Prospective Economic Advantage Allegations**

14 Optinrealbig’s Complaint does not allege specific facts regarding its claims for intentional
15 and *negligent* interference with prospective economic advantage. A claim for negligent
16 interference requires allegations of facts showing that (1) an economic relationship between the
17 plaintiff and a third party, which contained a reasonably probable future economic benefit or
18 advantage to plaintiff; (2) that defendant should have been aware that if it did not act with due
19 care, its actions would interfere with this relationship and cause plaintiff to lose in whole or in
20 part the probable future economic benefit or advantage of the relationship; (3) the defendant was
21 negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually
22 interfered with or disrupted, and plaintiff lost in whole or in part the economic benefits or
23 advantage reasonably expected. Similarly, to plead *intentional* interference, Plaintiff must plead
24 facts showing that (1) it had a potential business relationship with a third party (2) which the
25 defendant knew about; and (3) the defendant interfered with the relationship; which (4) caused
26 the plaintiff economic harm as well as a degree of wrongfulness or bad faith that Plaintiff fails to
27 plead or mention altogether. *See, e.g., Rickel v. Schwinn Bicycle Co.*, 144 Cal. App. 3d 648, 658-
28 659 (1983) (Appeals court affirmed summary judgment of plaintiff’s intentional interference with

1 prospective economic advantage claim because plaintiff failed to show that defendant had no
2 knowledge of potential relationships); *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1040
3 (1986) (Supreme Court upheld lower court’s demurrer of complaint with negligent interference
4 with prospective economic advantage where plaintiff was an author who was suing because his
5 name was not included on the New York Times’ Best Seller List.).

6 These causes of action both require that SpamCop know of specific, potential
7 relationships between Optinrealbig and third parties. *See Della Penna v. Toyota Motor Sales,*
8 *U.S.A., Inc.*, 11 Cal. 4th 376, 393 (1995). However, the Complaint pleads no specific facts to
9 support this knowledge element. In *Della Penna*, the court dismissed the interference with
10 prospective advantage claim based in part on the fact that “defendants were not aware of the
11 relation between plaintiffs and the breaching third party.” *Id.* Here, Plaintiff has not identified a
12 single potential business relationship with which SpamCop has interfered by forwarding third
13 party complaints to ISPs, let alone that SpamCop knew about those potential business
14 relationships. Instead, Optinrealbig alleges in only the most conclusory of terms that SpamCop
15 has interfered with “providers, customers and potential customers” without identifying any of
16 them. Complaint ¶¶ 30, 33. These vague claims are insufficiently specific to survive a motion to
17 dismiss.

18 The intentional interference claim additionally requires that Plaintiff plead and offer facts
19 regarding the “wrongfulness” of defendant’s action. *Della Penna*, 11 Cal. 4th at 393; *see also*
20 *Tuchscher Development Enterprises, Inc. v.*, 106 Cal. App. 4th at 1242 (plaintiff must alleged
21 conduct that was “wrongful by some legal measure other than the fact of interference itself.”).
22 Optinrealbig has not pled anything “wrongful” about SpamCop’s activities. Plaintiff “must plead
23 and prove as part of its case-in-chief that the defendant not only knowingly interfered with the
24 plaintiff’s expectancy, but engaged in conduct that was wrongful by some legal measure other
25 than the fact of the interference itself.” *Della Penna*, 11 Cal. 4th at 393 The only “wrongful” act
26 that Optinrealbig alleges, however, is trade libel, which, as discussed in detail above, fails to state
27 a claim upon which relief can be granted.

28 In addition, Optinrealbig has the burden of pleading causation for its interference claims,

1 meaning that it must allege facts that the actions of SpamCop proximately induced the breach or
2 elimination of the potential economic advantage. *See Dryden v. Tri-Valley Growers*, 65 Cal.
3 App. 3d 990, 997-998 (1977). Without alleging facts to support this element, the interference
4 torts, as a whole, fail. *Id.* (“It goes without saying that in the absence of a showing that
5 respondent's act was the proximate cause of the injury, appellants failed to allege a valid cause of
6 action based on interference with contractual relations.”).

7 Here, Optinrealbig makes only conclusory allegations that SpamCop attempts to “advise,
8 counsel, persuade or otherwise induce” various ISPs to terminate their contracts with Plaintiff.
9 Complaint ¶ 25. Plaintiff has not pled any facts showing that SpamCop has actually induced the
10 elimination of a prospective business relationship, let alone what that business relationship is.
11 Instead, it merely speculates that SpamCop’s alleged actions “have or threaten to alter and/or
12 disrupt OptIn’s contractual relationships [or prospective economic advantage] with its providers,
13 customers and potential customers.” Complaint ¶¶ 25, 30. This speculation, without ever
14 alleging or even hinting at SpamCop’s knowledge, or even reckless disregard, of these
15 relationships or prospective relationships, cannot survive a motion to dismiss. *See Stolz v. Wong*
16 *Communications Limited Partnership*, 25 Cal. App. 4th 1811, 1825 (1994) (Court dismissed
17 plaintiff’s claims stating: “Plaintiff's complaint was plainly deficient. It contained no allegations
18 as to the existence of any contract or prospective economic advantage, defendants’ knowledge,
19 intentional acts to disrupt the relationship, or damage resulting from the alleged interference.”).

20 **F. Plaintiff’s Unfair Competition Claim States No Facts or Allegations That**
21 **Warrant Relief**

22 To properly state a claim for Unfair Competition under California Business and
23 Professions Code § 17200 *et. seq.*, a Plaintiff must “describe with reasonable particularity the
24 facts supporting the violation.” *Khoury v. Maly's of California, Inc.*, 14 Cal. App. 4th 612, 619
25 (1993). In *Khoury*, the appeals court sustained a dismissal because “the complaint refers to an
26 “effect” of “misleading” appellant’s customers, but the facts clearly do not involve deceptive
27 advertising, nor do the facts explain the manner of misleading appellant's customers. The
28 complaint does not describe the manner in which respondent's practice is ‘unlawful.’” *Id.*

1 In much the same way here, Plaintiff fails to allege any ‘wrongful’ activity on the part of
2 SpamCop that in any way harms or restrains competition. Plaintiff attempts to use the same set of
3 alleged facts – that SpamCop republished the offending email to various ISPs with redacted user
4 information – to support this additional cause of action. Complaint ¶ 36. However, this attempt
5 must fail. In seeking relief under Cal. B&P Code § 17200, *et. seq.*, Plaintiff must allege, among
6 other things, that SpamCop’s conduct “had an adverse effect on competition.” *Gregory v.*
7 *Albertson’s, Inc.*, 104 Cal. App. 4th 845, 856-857 (2002). Here, Plaintiff merely claims that
8 OptIn’s reputation “will be disparaged” or that Plaintiff’s “business is continually interrupted,”
9 without pleading any facts regarding the competition or the impact on the industry. Complaint
10 ¶ 37. “Such allegations are too vague and conclusionary [sic] to support a claim” under § 17200,
11 *et seq.*, for restraint of trade or other unfair business practice. *Gregory*, 104 Cal. App. 4th at 857.
12 Thus, Plaintiff’s allegation does not imply that SpamCop’s actions “reduce market choices
13 otherwise available to consumers,” causes a diminution of competition or in any other way is an
14 unfair business practice and therefore does not state a claim upon which relief can be granted. *Id.*

15 **IV. CONCLUSION**

16 For the reasons stated above, Plaintiff’s Complaint should be dismissed without leave to
17 amend.

18 Dated: May 24, 2004

Respectfully Submitted,

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24104/00404/LIT/1193339.2

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