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10 IRONPORT SYSTEMS, INC., and
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 CASES AND
SUMMARIES IN PREPARATION FOR
HEARING, PURSUANT TO THIS COURT'S
JULY 9, 2004 ORDER**

Date: July 13, 2004

Time: 1:00 p.m.

**Ctrm: Hon. Sandra B. Armstrong
Courtroom 3**

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A. *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068 (Cal. Ct. App., 2001).

Facts and Procedural History: Allstate Insurance sued Lester Simmons and his various businesses for unfair business practices. Simmons responded with a cross-complaint alleging that Allstate’s lawsuits were defamatory and fraudulent. Allstate filed an anti-SLAPP motion to strike and at the hearing on the anti-SLAPP motion, Simmons asked the court for leave to amend the complaint. The court granted the anti-SLAPP motion and denied leave to amend.

Summary: The Court found that an anti-SLAPP motion is akin to a summary judgment motion in that it “pierces the pleadings and requires an evidentiary showing.... If the initial evidentiary burden is met by the moving party, the burden shifts to the party opposing the motion to avoid dismissal of the action.” *Id.* at 1073. In response to that burden, Plaintiff Simmons requested leave to amend the complaint. The Court denied Plaintiff’s request, finding that “[a]llowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16’s quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend.”

“By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent. Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources. This would totally frustrate the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits.” *Id.* at 1073-74.

Denial of leave to amend rested on the court’s finding that Defendants had made a prima facie showing of a connection between the complained-of activity and protected First Amendment speech. The Court remanded the case and awarded fees to the anti-SLAPP

1 defendant.

2 **B. *Navellier v. Sletten*, 106 Cal. App. 4th 763 (Cal. Ct. App. 2003)**

3 **Facts and Procedural History:** Plaintiffs filed a fraud and breach of contract action
4 against Defendant based on counterclaims that Defendant had filed in a former federal suit
5 between the parties. The California Supreme Court reversed the denial of an anti-SLAPP motion
6 to strike, and the appellate court, on remand, granted the motion and awarded fees.

7 **Summary:** The Court granted Defendant’s motion to strike based on the Defendant’s
8 privileged activities and the plaintiff’s inability to demonstrate a probability of success on the
9 merits. In response to Plaintiff’s request to amend, the court found that “a plaintiff cannot use an
10 11th-hour amendment to plead around a motion to strike under the anti-SLAPP statute.” *Id.* at
11 774. Quoting *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068 (Cal. Ct. App., 2001), the court
12 held that “the anti-SLAPP statute makes no provision for amending the complaint once the court
13 finds the requisite connection to First Amendment speech.” *Id.*

14 **C. *Moraga-Orinda Fire Protection Dist. v. Weir*, 115 Cal. App. 4th 477 (Cal. Ct.
15 App. 2004).**

16 **Facts and Procedural History:** Appellants, a homeowners association, filed a rebuttal
17 argument to certain statements made in a voter pamphlet. In response, the Appellees, the Fire
18 Protection District, filed a mandamus petition to strike statements made in the Association’s
19 rebuttal argument. The Association then filed an anti-SLAPP motion against the District. The
20 trial court denied the Fire District’s petition on the grounds that it lacked standing and was
21 untimely. The court then denied the Association’s anti-SLAPP motion for fees as moot, because
22 the underlying petition was no longer operative. The Appeals court reversed, directing the trial
23 court to assess and award fees to the Association in accordance with Cal. Code Civ. P. § 425.16.

24 **Summary:** The trial court erred in not assessing and awarding fees under § 425.16
25 because “resolution of the underlying action does not moot a fee request under the SLAPP
26 statute.” *Id.* at 480. The Fire District argued that the speech in question did not qualify for
27 SLAPP protection because they were not constitutionally protected. The appellate court found
28 that “such a construction ‘would contravene the Legislature’s express command that Section

1 425.16 ‘shall be construed broadly.’” *Id.* at 482 n.3 (Internal citations omitted).

2 The appellate court determined that the actions complained of “arose from protected
3 speech activity” and that the Fire District had failed to “demonstrate a probability of prevailing on
4 their petition.” *Id.* at 482-83. The court remanded the case stating that given the “legal
5 insufficiency” of the Fire District’s petition, “an award of fees and costs is mandatory.” *Id.* at 483.

6 **D. *Lockheed Martin Corp. v Network Solutions*, 175 F.R.D. 640 (C.D. Cal 1997).**

7 **Facts and Procedural History:** Lockheed Martin requested leave to amend its
8 complaint to add a new cause of action during the pendency of defendant’s summary judgment
9 motion.

10 **Summary:** The court denied leave to amend stating, “amendments may not be
11 used as a device to prevent speedy and efficient resolution of cases. Where, as here, a party
12 proposes amendments while a summary judgment motion is pending, the court must look closely
13 to determine whether the proposed amendment is a tactic to prevent termination of the case on
14 summary judgment.” “If it were allowed to amend now, Lockheed will have effectively evaded
15 what could have been the termination of its lawsuit on summary judgment.” 175 F.R.D. at 645.

16 **E. *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097 (9th Cir. Cal. 2003)**

17 **Facts and Procedural History:** Plaintiff filed a class action suit against Defendants for
18 fraudulent business practices in the manufacture and sale of the drug Ritalin. Defendants all filed
19 an anti-SLAPP motion against plaintiff as well as Rule 12(b)(6) motions to dismiss. The District
20 Court granted the Motions to Strike and the Appellate Court affirmed as to two of the three
21 Defendants, awarding those two defendants their attorneys’ fees under Cal. Code Civ. P. §
22 425.16.

23 **Summary:** The Court undertook the two-prong analysis necessary for an anti-SLAPP
24 motion to strike. “First, a defendant ‘must make an initial prima facie showing that the plaintiff’s
25 suit arises from an act in furtherance of the defendant’s rights of petition or free speech.’” *Id.* at
26 1110. Second, “once the defendant has made a prima facie showing, ‘the burden shifts to the
27 plaintiff to demonstrate a probability of prevailing on the challenged claims.’” *Id.* The Court had
28 already found that the Plaintiff could not demonstrate a probability of success on the merits in

1 ruling on the motions to dismiss, so the Court “affirm[ed] the district court's grant of the APA and
2 CHADD’s [Defendants] motion to strike under the anti-SLAPP statute.

3 **F. Fleishman v. Superior Court, 102 Cal. App. 4th 350 (Cal. Ct. App., 2002).**

4 **Facts and Procedural History:** Petitioner filed a complaint alleging numerous torts and
5 seeking injunctive relief. The trial court granted a Temporary Restraining Order as well as a
6 Preliminary Injunction, but a few months later the Plaintiff voluntarily dismissed the complaint.
7 The Defendant then filed a malicious prosecution complaint against the original Plaintiff,
8 whodemurred, claiming that the grant of the Preliminary Injunction conclusively established the
9 reasonableness of the underlying original action.

10 **Summary:** In denying the anti-SLAPP motion and finding no malicious prosecution, the
11 Court gave preclusive effect to the prior grant of the Preliminary Injunction, finding that “[t]he
12 issuance of the preliminary injunction was based upon a hearing on the merits and not solely on
13 technical or procedural grounds. [internal citations omitted]. Its issuance, therefore, conclusively
14 establishes probable cause for bringing the underlying causes of action.” *Id.* at 357-58.

15 Dated: July 12, 2004

Respectfully Submitted,
FENWICK & WEST LLP

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19 By: _____
Darryl M. Woo

20 Attorneys for Defendants
21 IRONPORT SYSTEMS, INC.
22 and SPAMCOP.NET, INC.

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