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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 OBJECTIONS AND
REQUEST TO STRIKE PLAINTIFF'S
BELATEDLY FILED MAY 25, 2004
MEMORANDUM AND DECLARATIONS**

**This document relates to the hearing held on
May 18, 2004**

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

25 **I. INTRODUCTION**

26 Defendants IronPort Systems, Inc. and its wholly-owned subsidiary SpamCop.Net, Inc.
27 (“SpamCop”) object to and seek an order striking the following documents belatedly filed after
28 8:00 p.m. by Optinrealbig.com on May 25, 2004 in support of its Motion for Preliminary
Injunction (“May 25 Pleadings”): (1) Declaration of Andrew Westmoreland; (2) Second
Declaration of Doug Wolfe; (3) Declaration of Ray Everett-Church; and (4) Plaintiff’s
Supplemental Memorandum Regarding Communications Decency Act Issues. There is no
justification for submitting these materials more than one week after oral argument, and the
Court’s consideration of them in ruling on Plaintiff’s motion for preliminary injunction would be
unfair, as defendants will not have had an opportunity to respond. Further, even if Plaintiff’s

1 newly submitted declarations had been submitted on time, they should be disregarded, as they
2 consist of hearsay and speculation, rather than admissible evidence, and in any event do not
3 materially alter their failure to carry their burden on the pending motion.

4 Plaintiff's newly filed declarations and brief, which it submitted without leave of the
5 Court, introduce new allegations and arguments that Plaintiff had four chances to assert before
6 and during the May 18, 2004 hearing. During the May 18, 2004 hearing, the Court specifically
7 requested only that SpamCop submit a supplemental declaration answering certain technical
8 questions that the Court had about the operation of SpamCop's system. During that hearing,
9 Plaintiff did not request, nor did the Court grant, leave for Plaintiff to file supplemental briefing
10 or declarations, and the Court did not request such supplemental material from Plaintiff. In short,
11 Plaintiff's belated "supplemental" submissions are simply an improper attempt to ambush
12 SpamCop with new allegations without giving SpamCop the opportunity to respond before the
13 Court rules. To avoid any prejudice to SpamCop, the Court should strike and disregard all of
14 Plaintiff's May 25 Pleadings, or give SpamCop a reasonable opportunity to respond.

15 **II. DISCUSSION & OBJECTIONS**

16 **A. Plaintiff's May 25 Pleadings Should Be Stricken in Their Entirety Due to**
17 **Their Late Submission**

18 It is a well-established rule of civil procedure that the introduction of new facts or legal
19 arguments, even in a moving party's reply brief, is improper, particularly where it could have
20 been raised in the party's moving papers. *See, e.g., Schwartz v. Upper Deck Co.*, 183 F.R.D. 672,
21 682 (S.D. Cal. 1999) ("It is well accepted that raising of new issues and submission of new facts
22 in reply brief is improper"), *citing Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996), *cert.*
23 *denied*, 118 S. Ct. 48, 139 L. Ed. 14 (1997). Plaintiff's submission of its May 25 Pleadings
24 ignores this well-established rule, and instead seeks the unfair advantage of surprise at
25 SpamCop's expense. What's more, Plaintiff does not even attempt to explain why its new
26 allegations and arguments were not included in its opening or reply papers on either its TRO
27 application or its preliminary injunction motion. In short, there is no excuse for the belated
28 submission of the May 25 Pleadings, and Plaintiff should not be permitted to rely on them in

1 support of its motion.

2 Plaintiff has had four separate opportunities to submit the declarations and raise the new
3 legal arguments made in its May 25 Pleadings. First, Plaintiff could have raised them when it
4 filed its *ex parte* Application for a Temporary Restraining Order (“TRO”) on May 4, 2004.
5 Instead, it chose to limit the arguments and evidence that it put forward to conclusory arguments
6 and declarations made by Doug Wolfe and Scott Richter. Plaintiff had another chance to raise
7 these arguments and introduce its new declarations on May 12, 2004, when it submitted its
8 Motion for Preliminary Injunction and supporting declarations. At that point, Plaintiff had
9 received SpamCop’s brief in opposition to its *ex parte* TRO application and was well aware of
10 SpamCop’s assertion that the Communications Decency Act (“CDA”) immunizes SpamCop from
11 the claims that Plaintiff has asserted. However, instead of addressing the CDA issues or
12 introducing any new declarations, Plaintiff simply recycled its previously filed *ex parte*
13 application for TRO.

14 Further, there is no reason for Plaintiff’s delay until a week after the May 18 hearing to
15 submit additional declarations in support of its motion. Had it submitted those declarations in its
16 TRO papers, its Opening or Reply pleadings on its motion for preliminary injunction, or even
17 during the hearing, SpamCop would have had the opportunity to respond to them.

18 Plaintiff did not address the CDA issues that it now seeks to address further in its
19 “Supplemental Brief” until it submitted its Reply brief on May 14, 2004. Even then, however, it
20 did not cite the two cases that it now discusses in its May 25 “Supplemental Memorandum”:
21 *MCW, Inc. v. BadBusinessBureau.com, L.L.C.*, 2004 WL 833595 (N.D. Tex., April 19, 2004) and
22 *Mainstream Loudoun v. Bd. of Trustees*, 2 F. Supp. 2d 783 (E.D. Va. 1998). There is no
23 justification for Plaintiff’s failure to address these cases before or during the May 18 preliminary
24 injunction hearing, or for waiting more than a week after that hearing to raise them for the first
25 time. *Mainstream Loudon* is a six-year old case, and *MCW*, while not published in an official
26 reporter, was issued on April 19, 2004, before Plaintiff even filed suit.

27 Had Plaintiff addressed those cases in a timely manner, SpamCop easily could have
28 distinguished them. First, in *MCW*, which is a non-binding, unpublished district court opinion

1 from the Northern District of Texas, there was no showing that defendant actually owned or
2 operated the web site at issue. Without such evidence, the Court found that defendants were not
3 interactive computer service providers or users. Further, the *MCW* court expressly acknowledges
4 that its construction of when an interactive computer service becomes a content provider under
5 the CDA is narrower than the construction that the Ninth Circuit reached in *Batzel v. Smith*, 33
6 F.3d 1018 (9th Cir. 2003) and *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).
7 *See MCW*, 2004 WL 833595 at *8 n.7. The *MCW* court noted that “the Ninth Circuit has gone
8 even farther, stating that ‘so long as a third party willingly provides the essential published
9 content, the interactive service provider receives full immunity regardless of the specific editing
10 or selection process.’” *See id.*

11 Thus, *MCW* itself acknowledged that its views differed from those of the Ninth Circuit. It
12 is the Ninth Circuit’s construction that is binding on this court, however, not the dicta of a district
13 court in Texas. In addition, in *MCW*, unlike here, defendant did not deny that it actually authored
14 many of the disparaging comments about the plaintiff’s business that were posted on the web site
15 in question. *See id.* at *9-*10. As made clear in SpamCop’s opposition papers and in the
16 Declaration of Julian Haight and Supplemental Declaration of Julian Haight, SpamCop adds no
17 content to the messages that are posted to its system; it merely republishes third party messages.

18 *Mainstream Loudoun*, which involved a declaratory judgment action concerning content
19 filtering software for use at public libraries, is also inapposite. That action involved a completely
20 different section of the CDA, which grants immunity for imposing restrictions on access to
21 material that “the provider considers to be obscene, lewd, lascivious, filthy, excessively violent,
22 harassing or otherwise objectionable.” 47 U.S.C. § 230(c)(2), *Mainstream Loudon*, 2 F. Supp. 2d
23 at 789-90. The CDA immunity provision at issue here is 47 U.S.C. § 230(c)(1), which
24 immunizes interactive computer service providers and users, like SpamCop, from suits for the
25 republication of third party content. Indeed, if Section 230(c)(1) of the CDA did not provide
26 immunity against tort-based actions seeking injunctive relief for the republication of third party
27 content, the legislative purpose of “prevent[ing] lawsuits from shutting down websites and other
28 services on the Internet” would not be served. *See Batzel*, 33 F.3d at 1028.

1 **B. Plaintiff's New Declarations, Which Are Nothing More Than Hearsay and**
2 **Speculation, Should Be Disregarded**

3 The supplemental declarations submitted by Plaintiff (without leave of court) speculate
4 about SpamCop's activities, lack foundation, are inadmissible hearsay, and should therefore be
5 stricken from the record. Hearsay is inadmissible unless it comes under one of the exceptions set
6 forth in Federal Rule of Evidence 803. *See Henein v. Saudi Arabian Parsons Ltd.*, 818 F.2d
7 1508, 1512 (9th Cir. 1987). For evidence containing multiple layers of hearsay, the evidence is
8 inadmissible unless "each of [the out of court statements] meets the requirements of an exception
9 to the hearsay rule." Fed. R. Evid. § 805. Thus, such multiple hearsay statements are properly
10 excluded from evidence where one or more statements do not meet the requirements of a hearsay
11 exception. *United States v. Collicott*, 92 F.3d 973, (9th Cir. 1996).

12 The second Wolfe declaration and the newly submitted Everett-Church declaration about
13 what SpamCop's policies supposedly are and what "upstream providers" use to make their
14 decisions lack foundation and contain speculation and multiple hearsay without any exceptions
15 for each layer of hearsay. For example, Wolfe Decl. ¶ 6, attempting to establish the standard of
16 the "ISP industry", is not fact but speculation, since Mr. Wolfe is the Abuse Desk manager of
17 Optigate Networks and, at best, has only hearsay statements from upstream providers to support
18 his claims that they actually rely on the number of SpamCop complaints as the "determining
19 factor with regard to terminating customers." Wolfe Decl. ¶ 6.

20 In addition, the declaration of Mr. Everett-Church, no doubt included by Plaintiffs for the
21 import of the name rather than the relevance of the substance, includes nothing but speculation
22 regarding the methodologies of SpamCop's "blocklist" – which are not contested by Plaintiff's
23 complaint or motion – and without significant discussion given to the SpamCop reports. In fact,
24 Everett-Church's declaration makes no mention of the Reports and only speculates as to the "high
25 false-positive rate" without establishing any foundation for his purported, and plainly hearsay,
26 knowledge. Everett-Church Decl. ¶ 7.

27 Similarly, the Westmoreland declaration is pure hearsay and speculation offered to show
28 the reasons why his ISP terminated his company's Internet services. Westmoreland merely

1 speculates about the decision making process of his ISP and repeats what he claims his ISP told
2 him. *See generally* Declaration of Andrew Westmoreland, ¶¶ 2-4.

3 The hearsay rule prevents these declarations from entering into the Court's record rumors
4 or conjecture regarding SpamCop's actions or the ISP industry's reaction to these complaints.
5 Even if Plaintiff could overcome the first layer of hearsay, it cannot overcome the multiple
6 hearsay barrier: A third party's recounting of the statements or stories regarding SpamCop
7 Complaints. As such, all three declarations lack foundation and are hearsay offered for the truth
8 of the matters asserted, and should be stricken from the record.

9 **III. CONCLUSION**

10 Because Plaintiff's May 25 Pleadings are untimely, and because all of the newly
11 submitted declarations lack foundation and consist of inadmissible hearsay, the Court should
12 strike all of the May 25, 2004 pleadings. In the alternative, SpamCop respectfully requests that
13 the Court permit SpamCop a reasonable opportunity to submit a response.

14 Dated: May 26, 2004

FENWICK & WEST LLP

15 By: /s/ Darryl M. Woo

Darryl M. Woo

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17 Attorneys for Defendant
18 IRONPORT SYSTEMS, INC. and
19 SPAMCOP.NET, INC.

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