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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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OAKLAND DIVISION

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

Case No. C-04-1687 (SBA)

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Plaintiff,

**NOTICE OF MOTION, MOTION AND
MEMORANDUM OF POINTS &
AUTHORITIES IN SUPPORT OF IRONPORT
AND SPAMCOP'S APPLICATION FOR AN
EXTENSION OF TIME TO RESPOND TO
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

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v.

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IRONPORT SYSTEMS, INC. dba
15 SPAMCOP.NET, INC., a Delaware
Corporation registered to do and doing
16 business in California and DOES 1 through
100, inclusive,

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Defendants.

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NOTICE OF MOTION AND MOTION

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TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

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PLEASE TAKE NOTICE that in **Courtroom 3** of the United States District Court for

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Northern District of California, located at 1301 Clay Street, Suite 400 S, Oakland, California,

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defendants SpamCop.net, Inc. and IronPort Systems, Inc. (collectively, "SpamCop") will and

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does hereby move for an extension of time to respond to the First Amended Complaint filed by

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plaintiff Optinrealbig.com, LLC.

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Defendants IronPort Systems, Inc. and SpamCop.Net, Inc., hereby apply pursuant to

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Local Rule 6-3, subsection (b) and 6-1(b), for an emergency order to extend the deadline for

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responding to Plaintiff's First Amended Complaint ("FAC"). This Emergency Motion is based

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upon this Notice, the attached Memorandum of Points and Authorities, the accompanying Declaration of Anjali Kumar, the pleadings, records and files in this action, all matters of which the Court may take judicial notice, and such further argument as may be presented to the Court during or at the hearing on defendants’ Special Motion to Strike on July 13, 2004.

Pursuant to Federal Rule of Civil Procedure 15(a), Defendant IronPort Systems, Inc. and SpamCop.Net, Inc.’s (collectively, “SpamCop”) deadline to file a response to Plaintiff’s FAC is Monday, July, 12, 2004, ten court days after service of the pleading. SpamCop responded to the original complaint by filing a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (“12(b)(6) Motion”) and a Motion to Strike Pursuant to Cal. Code Civ. Proc. § 425.16 (“Anti-SLAPP Motion”). While the Motion to Dismiss was rendered moot by Plaintiff’s First Amended Complaint, the Court currently has under submission the unopposed Anti-SLAPP Motion, as well as Plaintiff’s Motion to Strike SpamCop’s Reply Brief. With these motions still pending, and the hearing date for the motions set for July 13, 2004, SpamCop requests an extension of time to answer the FAC ten days after the Court has ruled on the SpamCop’s Anti-SLAPP Motion and Plaintiff’s related Motion to Strike. Plaintiff has been notified of the request for this extension. Accordingly, pursuant to Local Rule 6-1(a), SpamCop applies to this Court for an extension, permitting it to answer the First Amended Complaint no sooner than July 23, 2004, or ten court days after the Court has ruled on the Motions to Strike, whichever is later. SpamCop has never previously requested an extension to the time limits and this extension in no way affects the dates from the Court’s June 4, 2004 Scheduling Order.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

On April 29, 2004, Plaintiff Optinrealbig.com (“Optin”) filed a complaint (“Original Complaint”) alleging tortious violations and seeking injunctive relief, naming IronPort and SpamCop (“SpamCop”) as Defendants. Optin asserted that SpamCop’s identification and reporting of Optin as an alleged spammer interfered with Optin’s business and reputation. Plaintiff’s original complaint claimed tortious interference with contract, interference with contractual relations, intentional and negligent interference with prospective economic advantage, unfair competition, and trade libel. In addition, Optin sought both a Temporary Restraining Order (TRO) and a Preliminary Injunction (PI).

On the May 10, 2004, before the Court had received SpamCop’s opposition papers, the Court granted Optin’s TRO. One day later, after receiving and reading SpamCop’s papers, the Court dissolved the TRO and set the briefing and hearing schedule for the Preliminary Injunction motion. *See* 5/10/04 Order Granting TRO; *See also* 5/11/04 Order Dissolving TRO. After receiving additional briefing and oral argument on the Preliminary Injunction motion, this Court, on June 25, 2004 denied the Preliminary Injunction and declared SpamCop immune from the allegations in the complaint under the Communication Decency Act (CDA), noting that Plaintiff was unlikely to succeed on the merits of their claims, even absent the Court’s finding of immunity under the CDA. *See* 6/25/04 Order Denying Preliminary Injunction.

The same day that the Order Denying the Preliminary Injunction was signed, June 25, Optin filed a First Amended Complaint (FAC), raising two new causes of action. SpamCop had already filed a Motion to Dismiss Pursuant to Fed. R. Civ. Proc 12(b)(6) on May 24, 2004, and a Motion to Strike Pursuant to Cal. Civ. Code § 425.16, on May 18, 2004, which both remained unopposed at the time Optin filed its FAC. SpamCop’s 12(b)(6) motion was rendered moot by the FAC because Federal Rule of Civil Procedure 15(a) allows a plaintiff one amendment of right before Defendant has filed a response. SpamCop believes that their Anti-SLAPP motion was not necessarily rendered moot through the amendment, and to that end, SpamCop filed a Reply Brief in

1 support of its motion on June 29, 2004. On July 1, 2004, Optin filed a Motion to Strike this Reply
2 Brief, declaring that the Anti-SLAPP motion was rendered moot by the filing of the First Amended
3 Complaint. These issues and papers are now under submission before this Court and the hearing
4 on this issue is scheduled for July 13, 2004.

5 Beginning on Tuesday, June 29, 2003, when SpamCop filed the Reply Brief, SpamCop has
6 been repeatedly trying to contact counsel for Optin, with no success, in order to discuss an
7 extension of time for SpamCop to respond to the First Amended Complaint. *See* Kumar Decl. ¶ 2.
8 Today, July 8, 2004, SpamCop asked that Plaintiff stipulate to a ten-day extension on its deadline to
9 answer the First Amended Complaint, allowing the Court time to rule on the pending Motions to
10 Strike and permitting SpamCop to respond ten court days after the Court has ruled. Counsel for
11 the Plaintiff was unable to contact their client or co-counsel and therefore was not able to stipulate
12 to the extension, however they were made aware of it. *See* Kumar Decl ¶ 5; [Proposed] Order
13 attached hereto.

14 **II. ARGUMENT**

15 The Court's June 25, 2004 Order rendered moot many of the claims that Plaintiff made
16 with regards to irreparable harm and SpamCop's CDA immunity. *See* 6/4/04 Order, at 2. While
17 Federal Rule of Civil Procedure 15(a) provides that a responsive pleading must be filed with ten
18 days of service, Local Rule 6-1(b) permits a party to apply for an extension of time for filing a
19 responsive pleading.

20 Good cause exists for this Court to grant SpamCop's application. As a preliminary matter,
21 Optin is not prejudiced by the extension. Given that the ruling on the Motions to Strike will affect
22 the posture of the case, it would be in the best interest of both the Court and the parties to permit
23 an answer *after* the ruling on these motions. Further, since Optin's FAC raises two new causes of
24 action for Federal Unfair Competition and negligence, giving SpamCop more than the statutory ten
25 court days to respond to the FAC is only fair. Moreover, due to the Court's busy schedule,
26 extending the deadline will allow SpamCop to take into account any new facts or law of the case
27 that the Court uses in ruling on the pending motions. The July 13 hearing and a subsequent order
28 from the court may narrow the issues in the case and allow SpamCop to respond in a more

1 streamlined and efficient way, without wasting time discussing issues that the Court may end up
2 striking pursuant to the concurrent motions. Finally, this extension will not disrupt the Court's
3 schedule, as SpamCop has never previously applied for an extension, and does not currently seek
4 to extend any other deadlines on the Court's Scheduling Order.

5 **III. CONCLUSION**

6 For the foregoing reason, SpamCop requests that this Court grant its application for an
7 order extending its time to respond to the Plaintiff's First Amended Complaint to ten days after the
8 Court has ruled on the pending Motion to Strike.

9 Dated: July 8, 2004

FENWICK & WEST LLP

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By: /S/ Tyler G. Newby
Tyler G. Newby

Attorneys for Defendant
IRONPORT SYSTEMS, INC. and
SPAMCOP.NET, INC