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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 REPLY BRIEF IN
SUPPORT OF THEIR MOTION TO STRIKE
PURSUANT TO CALIFORNIA CODE OF
CIVIL PROCEDURE § 425.16**

Date: July 13, 2004

Time: 1:00 p.m

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

25 **I. INTRODUCTION**

26 Defendants IronPort Systems, Inc. and its wholly-owned subsidiary SpamCop.Net, Inc.
27 (collectively, "SpamCop") filed a special motion to strike Plaintiff Optinrealbig.com's ("Optin")
28 complaint pursuant to Cal. Code. Civ. Proc. § 425.16 on May 18, 2004. June 22, 2004, the day
for Optin to file its Opposition to SpamCop's special motion, came and passed without any word
from Optin. Instead, three days late, on June 25, 2004, Optin filed a First Amended Complaint,

1 apparently believing that its doing so would render SpamCop’s special motion to strike moot.¹
2 That is not the case.

3 It is well established that even voluntarily dismissing a complaint following the filing of
4 an anti-SLAPP special motion to strike does not absolve the plaintiff of responding to the motion,
5 or from liability for the defendant’s attorneys’ fees should the motion be granted. Any other
6 construction would run counter to the California legislature’s purpose in enacting Code of Civil
7 Procedure § 425.16 – to protect defendants who are exercising their free speech rights from
8 abusive lawsuits and to punish those who seek to chill protected speech activities through
9 litigation.

10 The fact that Optin filed an amended complaint after SpamCop brought its special motion
11 to strike does not erase the fact that Optin forced SpamCop to spend money unnecessarily on
12 attorneys’ fees in order to respond to a Complaint that Optin now appears to concede was
13 defective. Worse, Optin forced SpamCop to respond to an *ex parte* motion for a temporary
14 restraining order and a preliminary injunction motion on shortened time based on causes of action
15 that this Court has held cannot apply to SpamCop in light of § 230 of the Communications
16 Decency Act. *See* June 25, 2004 Order Denying Optin’s Motion for Preliminary Injunction
17 (“6/25/04 Order”) at 9-14. Further, this Court has held that Optin has not shown a likelihood of
18 success on the merits of the claims raised in its Complaint, even if SpamCop were not statutorily
19 immune under CDA § 230. *See id.* at 15-18.

20 Because Optin did not even oppose SpamCop’s motion to strike, it should be deemed to
21 have conceded the points raised therein, and the Court should award SpamCop its attorneys’ fees
22 in responding to Optin’s Temporary Restraining Order, in responding to its Preliminary
23 Injunction Motion, and in connection with this Special Motion to Strike.

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25
26 ¹ SpamCop also filed a motion to dismiss Optin’s complaint pursuant to Fed. R. Civ.
27 Proc. 12(b)(6) on May 24, 2004. For the reasons set forth below, Optin’s First Amended
28 Complaint should be stricken, or in the alternative, Spamcop should not be required to file a
responsive pleading until (a) this Special Motion to Strike is heard and determined; and (b) Optin
can show good cause why its suit should be allowed to continue.

1 **II. ARGUMENT**

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3 **A. Dismissal of an Initial Complaint Following the Filing of an Anti-SLAPP**
4 **Special Motion to Strike Does Not Absolve Plaintiff of Liability for**
5 **Defendant’s Attorneys’ Fees**

6 A plaintiff’s voluntary dismissal of a complaint following defendant’s filing of a special
7 motion to strike pursuant to Cal. Code Civ. Proc. § 425.16 does not protect the plaintiff from
8 liability for defendant’s attorneys’ fees should its special motion to strike be granted. California
9 courts that have considered this issue has reached the same conclusion: that allowing a plaintiff
10 that filed a strategic lawsuit against public participation (“SLAPP”) to skirt responsibility for the
11 defendant’s attorneys’ fees in responding to and seeking to strike the complaint would undermine
12 the policy objective of Cal. Code Civ. Proc. § 425.16 of deterring SLAPPs and of compensating
13 victims of SLAPPs. *See, e.g., Liu v. Moore*, 69 Cal. App. 4th 745, 748, 750-51 (1999); *Kyle v.*
14 *Carmon*, 71 Cal. App. 4th 901 (1999). Similarly, Optin should not be permitted to avoid
15 SpamCop’s anti-SLAPP motion to strike, simply by filing an amended complaint *after* it was
16 required to file an opposition to SpamCop’s motion.

17 *Liu* is instructive here. After defendant brought a special motion to strike the complaint
18 pursuant to § 425.16, plaintiff voluntarily dismissed its complaint rather than file an opposition to
19 the anti-SLAPP motion. Although the trial court held that there was no longer a viable motion to
20 strike following plaintiff’s voluntary dismissal, the court of appeal reversed, finding that
21 permitting a plaintiff to avoid responsibility for defendant’s attorneys’ fees merely by dismissing
22 its SLAPP complaint “works a nullification of an important provision of section 425.16.” *Liu*,
23 69 Cal. App. 4th at 751. The purpose of the statute, the court reasoned, “is clearly to give relief,
24 including financial relief in the form of attorney’s fees and costs, to persons who have been
25 victimized by meritless retaliatory SLAPP lawsuits.” *Id.* at 750. Accordingly, the court held that
26 a party that brings an anti-SLAPP motion to strike has the right to have its motion heard, even if
27 the underlying complaint is dismissed before the hearing. *Id.* at 751. Moreover, if the court
28 grants the special motion to strike, § 425.16 requires an award of attorney’s fees to the defendant.
Id.

1 The fact that Optin belatedly filed a First Amended Complaint rather than voluntarily
2 dismiss its initial complaint does not change the analysis or the policy reasons behind hearing and
3 determining SpamCop's special motion to strike. After filing its initial complaint, which Optin
4 now appears to concede was defective, it filed an *ex parte* application for a TRO and then a
5 motion for a preliminary injunction, both of which were based on the Complaint's allegations and
6 which attempted to stop SpamCop from continuing its practice of republishing complaints about
7 Optin's bulk email business practices. As with any other SLAPP complaint, SpamCop was
8 forced to spend significant resources, here on an expedited basis, including attorneys' fees, in
9 successfully opposing Optin's meritless motions. The Court has already found that Optin is not
10 likely to prevail on its claims. SpamCop, pursuant to Cal. Code Civ. Proc. § 425.16, should be
11 permitted the opportunity to have its special motion to strike heard and determined, so that it may
12 recover its attorneys fees. If plaintiffs were permitted to avoid anti-SLAPP motions simply by
13 amending their complaints, the result would be an endless series of shell games in which
14 plaintiffs would change their complaints in response to each anti-SLAPP motion, thus
15 compounding the problem that Cal. Code of Civ. Proc. § 425.16 was intended to solve.

16 Indeed, consistent with the policy reasons behind Cal. Code Civ. Proc. § 425.16, Optin's
17 First Amended Complaint should be stricken, or in the alternative, SpamCop should not be
18 required to file a responsive pleading thereto until (a) this Special Motion to Strike is heard and
19 determined; and (b) Optin can show good cause why its suit should be allowed to continue in
20 light of the Court's findings in its 6/25/04 Order. To force SpamCop to respond in the interim
21 would work further hardship and costs upon SpamCop needlessly, especially in view of the
22 Court's decision applying the immunity provisions of the CDA § 230. On its face, nothing in
23 Optin's First Amended Complaint is pleaded that would overcome CDA § 230.

24 **B. Optin's Failure to File Any Opposition to SpamCop's Anti-SLAPP Motion**
25 **Concedes the Motion**

26 By failing to file an opposition to SpamCop's special motion to strike under Cal. Code
27 Civ. Proc. § 425.16, Optin has conceded all of the points raised in that motion – namely, that its
28 suit against SpamCop concerned speech on matters of public concern and that it is not likely to

1 prevail on its claims. In addition, it is within the Court’s inherent discretion under the Local
2 Rules² to grant SpamCop’s unopposed special motion to strike based solely on Optin’s failure to
3 file an opposition. *See Gwaduri v. INS*, 362 F.3d 1144, 1147 (9th Cir. 2004) (“Courts have
4 consistently exercised their discretion to grant motions on collateral issues, on the basis that, in
5 failing to respond, the opposing party has consented to such action by the court.”). Furthermore,
6 the Court’s Case Management Scheduling Order (“Order”) entered and served on all parties on
7 June 4, 2004, is unambiguous on this issue: “The failure of the opposing party to file a
8 memorandum of points and authorities in opposition to any motion shall constitute a consent to
9 the granting of the motion.” Case Management Scheduling Order, ¶ C, at 3:28.

10 In spite of these clear warnings, Optin chose not to file any opposition to SpamCop’s
11 special motion to strike, apparently preferring a shell game of trying to change its claims to avoid
12 the appearance of having filed a SLAPP suit. However, as set forth above, merely amending or
13 voluntarily dismissing a SLAPP complaint does not absolve the Plaintiff from opposing a special
14 motion to strike or the consequences of its original filing. Because Optin has chosen not to file
15 any opposition, and for the reasons stated in SpamCop’s May 18, 2004 brief, the Court should
16 grant SpamCop’s motion and award it its attorneys fees.

17 C. **The Court Has Already Ruled That Optin Has Not Shown A Likelihood of**
18 **Prevailing on the Merits of its Claims**

19 Even had Optin filed an opposition to SpamCop’s special motion to strike, this Court has
20 already found, in ruling on the full record in connection with the Preliminary Injunction motion,
21 that Optin has not shown a likelihood of prevailing on the merits of its claims – the same burden
22 that it carries for defeating an anti-SLAPP motion to strike. In the Court’s 6/25/04 Order, it held
23 that SpamCop is immune from suit under CDA § 230 on Optin’s claims arising from SpamCop’s
24 republication and redistribution of third party email complaints about Optin’s bulk email
25 practices. *See* 6/25/04 Order at 9-14. Even Optin’s First Amended Complaint does nothing to
26 plead Optin’s claims around the immunity bestowed on SpamCop by CDA § 230.

27 ² Civil L.R. 7-3 provides: “Any opposition to a motion must be served and filed not less than 21
28 days before the hearing date.” With the hearing set for July 13, 2004, Optin had until June 22,
2004 to file an opposition – more than 30 days after the filing of SpamCop’s Anti-SLAPP special
motion to strike.

1 Similarly, even if SpamCop were not immune under the CDA, the Court held that Optin
2 has failed to show a likelihood of success on *any* of its causes of action. *See id.* at 15-18. Since
3 the Court has already ruled that Optin is not likely to prevail on its causes of action – as is
4 required to defeat a Cal. Code Civ. Proc. § 425.16 special motion to strike – and because Optin
5 has made no further effort to show a likelihood of success, e.g., by filing any opposition to this
6 motion, the Court should grant SpamCop’s special motion to strike and award it its attorneys’
7 fees.

8 **III. CONCLUSION**

9 Because Plaintiff has not opposed SpamCop’s Special Motion to Strike, and because the
10 Court has already determined that Optin has not shown a probability of success on the claims
11 raised in its Complaint, the Court should grant SpamCop’s motion and award it its attorneys’ fees
12 in responding to Plaintiff’s *ex parte* TRO application, in responding to Plaintiff’s motion for
13 preliminary injunction, and in connection with this special motion to strike.

14 In addition, because it changes none of the bases articulated by the Court in denying the
15 Preliminary Injunction motion, and consistent with the principles underlying Cal. Code Civ. Proc.
16 § 425.16, Optin’s First Amended Complaint should be stricken, or in the alternative, SpamCop
17 should not be required to file a responsive pleading thereto until (a) this Special Motion to Strike
18 is heard and determined; and (b) Optin can show good cause why its suit should be allowed to
19 continue in light of the Court’s findings in ruling on the Preliminary Injunction motion, including
20 the application of the immunity conferred by CDA § 230. Otherwise, Spamcop will be forced to
21 file yet another motion to dismiss and special motion to strike, multiplying further the harm
22 inflicted by Optin’s SLAPP suit.

23 Dated: June 29, 2004

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