

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
CENTRAL**

**MINUTE ORDER**

DATE: 12/02/2016

TIME: 01:30:00 PM

DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor

CLERK: Kelly Breckenridge

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: O. Godoy

CASE NO: **37-2015-00008210-CU-NP-CTL** CASE INIT.DATE: 03/11/2015

CASE TITLE: **SHARP vs STOCKTIPS.COM [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Non-PI/PD/WD tort - Other

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**EVENT TYPE:** Demurrer / Motion to Strike

**MOVING PARTY:** Coastal Integrated Services Inc

**CAUSAL DOCUMENT/DATE FILED:** Motion to Strike, 09/26/2016

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**APPEARANCES**

George Sharp, self represented Plaintiff, present.

ROBERT JOHN HUSTON III, counsel, present for Defendant(s) telephonically.

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Plaintiff's counsel submit(s) on the Court's tentative ruling.

The Court hears oral argument and CONFIRMS the tentative ruling as follows:

**Ruling on Coastal Integrated Services Motion to Strike Portions of the First Amended Complaint**

*Sharp v. Stocktips.com*, Case No. 2015-08210

December 2, 2016, 1:30 p.m., Dept. 72

**1. Overview and Procedural Posture.**

In the present case, as before,\* Sharp sues defendants for violations of the California Restrictions on Unsolicited Commercial E-mail Advertisers Law (Cal. Bus. & Prof. Code § 17529.5). Plaintiff alleges that all defendants participated in a scheme to disseminate spam emails containing false and misleading information to encourage plaintiff and other members of the public to purchase publicly traded penny stock of the defendants. According to the complaint, plaintiff has become well-known as a crusader against this sort of thing. Instead of just deleting the emails and/or placing the senders in his spam filter, Sharp filed this lawsuit in which he alleges that the defendants engaged in fraudulent and deceptive actions by initiating the sending of numerous unlawful spam e-mails on behalf of themselves and other defendants between late 2013 and March of 2015. ROA 1. Plaintiff seeks statutory damages exceeding \$200,000.00.

The case has been slow to gain traction. See ROA 28, 39, 52, 69, 97, 109. It has been set for numerous CMCs. ROA 140-141, 146. Plaintiff claims this is the result his inability to join all the defendants because of defendants' unwillingness to disclose the identities of those responsible for the spam emails containing false and misleading information. But as will appear, most of these newly added defendants seem to be disappearing, leaving the court to wonder "why the wait?"

A demurrer was calendared and then vacated. ROA 16, 21. Plaintiff scheduled and then rescheduled a motion to compel. ROA 40-42. That motion never went forward. See ROA 44. Defendant Tiger Oil sought a protective order preventing plaintiff from deposing plaintiff's PMK beyond an additional 12.5 hours. ROA 60. The court granted the motion in part on March 25, 2016. ROA 69. After several amendments to the complaint (adding Doe defendants – ROA 71-78, 92), plaintiff on May 27, 2016 filed (by stipulation) his first amended complaint. (FAC). ROA 91, 93. Defendants Tiger Oil and Empire Stock Transfer answered the FAC. ROA 100, 101. Defendant Coastal Integrated Services has not answered the FAC, but it did answer the original complaint after it was added as Doe 1. ROA 19, 23.

Plaintiff filed two motions to compel directed at defendant Coastal Integrated Services. ROA 85-90. [One of the motions was inexplicably filed twice; ROA 87 is the same as ROA 89, and ROA 88 is the same as ROA 90.] Plaintiff sought responses from Coastal Integrated Services as to his first document demand, and further responses from Coastal Integrated Services as to his second document demand. Neither motion was opposed. On August 5, 2016, the court granted the motions. ROA 110.

Recently, a newly added defendant (AWeber Systems, Inc., Doe 5) demurred to the FAC. ROA 106. The demurrer was founded upon three arguments: AWeber is immune under 47 U.S.C. § 230, which preempts state regulation; Bus. & Prof. Code § 17529.5(b)(1)(D) provides a safe harbor for email service providers that are only involved in the routine transmission of the e-mail advertisement over their computer networks; and forty-eight of the seventy-two emails upon which Mr. Sharp bases his complaint are barred by the one year statute of limitations under Cal. Bus. & Prof. Code § 17529.5. On October 7, 2016, the court sustained the demurrer with leave to amend. ROA 137. AWeber was later dismissed. ROA 151-152.

Plaintiff has settled with and dismissed three defendants (Tiger Oil, Quicksilver Stock Transfer, and Empire Stock Transfer). ROA 142-145.

Most recently, another newly added defendant, Harold Gewerter (Doe 7), sought an order quashing the proof of service filed September 22, 2016 (ROA 114). Gewerter's theory is that the court *lacks in personam* jurisdiction over him. ROA 121. According to Sharp's proof of service, Gewerter was served via Certified Mail in Chalfont, Pennsylvania (although the Certified Mail receipt reflects Las Vegas, NV, and Gewerter states he is a Nevada lawyer). Rather than file opposition, Sharp dismissed Gewerter in late October. ROA 147-148.

The matter was at last set for a jury trial in August of 2017. ROA 160-164.

Presently, Coastal Integrated Services, which as mentioned above previously answered the original complaint, now seeks an order striking certain portions of the FAC. ROA 122-125. Sharp filed tardy opposition. ROA 165. Coastal Integrated Services filed reply. ROA 166-167. The court has reviewed the papers.

## **2. Applicable Standards.**

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A motion to strike lies either to strike any "irrelevant, false, or improper matter inserted into any pleading" or to strike any pleading or part thereof "not drawn or filed in conformity with the laws of this State, a court rule or order of court." Code of Civil Procedure § 436. As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice (e.g. the court's own files or records). Code of Civil Procedure § 437. As with demurrers, motions to strike are disfavored; the policy of the law is to construe pleadings liberally with a view to substantial justice. Code of Civil Procedure § 452. When ruling on a motion to strike, in the absence of contradictory facts that the court is required to take judicial notice of, the factual allegations set forth in a complaint must be construed as true. *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255. When granting a motion to strike, a court may allow an amended complaint upon such terms as may be just. Code of Civil Procedure § 472a(d); *Courtesy Ambulance Service v. Superior Court* (1992) 8 Cal.App.4th 1504, 1519 n. 12.

### **3. Discussion and Ruling.**

The motion to strike portions of the FAC is denied.

A motion to strike any pleading must be filed "within the time allowed to respond to the pleading", i.e., 30 days after service of the pleading unless extended by court order or stipulation. See Code of Civil Procedure § 435(b)(1) ["Any party, within the time allowed to respond to a pleading may serve and file a notice of motion to strike the whole or any part thereof..."]

The FAC was filed on May 27, 2016 pursuant to stipulation and order that permitted Coastal Integrated Services to answer the FAC within 30 days of the order. ROA 91, 93. Coastal Integrated Services filed the motion to strike on September 26, 2016, approximately 3 months after the time period had expired to bring the motion. ROA 122-125. As such, the motion is time-barred. Accordingly, it is denied.

The court declines to exercise its discretion *sua sponte* to strike the FAC pursuant to Code of Civil Procedure section 436, as requested in the reply papers at p. 2. See Code of Civil Procedure § 436 ["The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper ..."] Coast Integrated Systems fails to offer any reasonable excuse or justification why it delayed approximately 3 months to bring the motion to strike, and as noted above, it has taken a long time to get the case in a posture from which it can proceed regularly to trial.

Coastal Integrated Services has 10 days to answer the FAC. In lieu of answering, Coastal Integrated Services may deem its answer to the complaint as its answer to the FAC. If so, Coastal Integrated Services shall forthwith inform plaintiff of this election, in writing.

As noted above, on October 7, 2016, the court sustained the AWeber demurrer with leave to amend. ROA 137. Mr. Sharp did not amend; instead, AWeber was later dismissed. ROA 151-152. The court assumes Mr. Sharp intends the case to proceed to trial on the FAC as to the appearing, non-dismissed parties. If this is incorrect, Mr. Sharp should raise it at the hearing.

**IT IS SO ORDERED.**

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\*See *Sharp v. Cuba Beverage Company*, Case No. 2011-90093; *Sharp v. IDO*, Case No. 2012-101057; *Sharp v. Xumanii*, Case No. 2013-48310.

Plaintiff waives jury trial.



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Judge Timothy Taylor