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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK NEMIROFSKY,
Plaintiff,
v.
SEOK KI KIM,
Defendant.

No. C 07-2769 JL
BRIEFING ORDER

On Plaintiff Nemirofsky's 's motion to dismiss Defendant Seok Ki Kim's counterclaim for abuse of process (Docket # 85), Plaintiff for the first time in his Reply brief raised the issue of the litigation privilege as an affirmative defense to this counterclaim. The Court hereby grants to Kim an opportunity to respond, within twenty days of the issuance of this Order.

The Court is particularly interested in the following cases: *Rusheen v. Cohen*, 37 Cal.4th 1048 (2006); *Brown v. Kennard*, 94 Cal. App. 4th 40 (2001); *Profile Structures, Inc. v. Long Beach Bldg. Material Co.*, 181 Cal. App. 3d 437 (1986), and the following questions: (1) what, if any, non-litigation alternatives to the Abuse of Process claim were available to Kim to address the allegedly excessive TPO, and (2) whether Nemirofsky has

1 waived the affirmative defense of the litigation privilege as provided by Rule 8(c), Federal
2 Rules of Civil Procedure by not raising the issue in his 12(f) motion but only in his Reply?
3 Nemirofsky may respond within fourteen days of service of Kim's response and the
4 matter will be deemed submitted at that time. The parties should limit their briefs to no
5 more than fifteen pages.

6 IT IS SO ORDERED.

7 DATED: February 21, 2008

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10 _____
11 James Larson
12 Chief Magistrate Judge

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