

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

JOHN W. FERRON,	:	
	:	
Plaintiff,	:	Civil Action No: 07 CV 1193
	:	
vs.	:	Judge: Sargus
	:	
e360Insight, L.L.C., <i>et al.</i> ,	:	Magistrate Judge: King
	:	
Defendants.	:	

**MOTION OF DEFENDANTS TO DISMISS COMPLAINT**

NOW COME DEFENDANTS, e360Insight, LLC and David Linhardt, by and through counsel, and, pursuant to Fed. R. Civ. Proc. 12(b)(2) move this Court to dismiss Plaintiff's Complaint against them. The reasons for this Motion are set forth in the accompanying Memorandum in Support.

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Lead Attorney to Be Noticed  
for Defendants E360Insight, LLC and  
David Linhardt

## MEMORANDUM IN SUPPORT

### **I. INTRODUCTION**

Plaintiff's Complaint names as defendants both a foreign limited liability company and its President, individually. Pursuant to the complaint, Linhardt is an owner and officer of Defendant e360Insight, LLC. e360Insight, LLC, is an Illinois limited liability company. Linhardt is a resident of the State of Illinois. Pursuant to Ohio's long-arm statute, R.C. 2307.382 and Fed. R. Civ. Proc. 12(B)(2), the Court lacks personal jurisdiction over either of the defendants. As such, Plaintiff's Complaint against them must be dismissed.

### **II. FACTS**

Pursuant to Plaintiff's Complaint, Plaintiff received numerous emails allegedly sent by defendants, offering deeply discounted prices for various consumer goods and then providing knock-offs of those items and using the word "free" in a consumer transaction and failing to set forth all of the terms and conditions of the offer in type size half as large as the word, "free." (Complaint, at para. 14-15). The complaint alleges that both the company and Linhardt are suppliers and that both caused to be transmitted the large quantity of emails.

Plaintiff resides in Ohio. Defendant e360Insight, LLC, is an Illinois limited liability company with its principal place of business in Illinois (*see* Affidavit of Dave Linhardt, attached hereto). E360Insight has no offices in Ohio (Linhardt Affidavit, at 2). Any contacts with Ohio by e360Insight are fortuitous and are insufficient to establish minimum contacts under Ohio's long-arm statute. Linhardt is an individual who resides in Illinois (Linhardt Aff., at 4). Linhardt does not own any businesses, conduct any business, or own any real estate in Ohio (Linhardt Aff., at 4).

### **III. LAW AND ARGUMENT**

#### **A. Standard of Review**

An appellate court reviews a district court's dismissal for lack of personal jurisdiction *de novo*. The burden of establishing jurisdiction generally lies with the Plaintiff. *American Greetings Corp. v. Cohn*, 839 F. 2d, 1164, 1168 (6<sup>th</sup> Cir. 1988). When jurisdiction is challenged, the plaintiff may not rely solely on the pleadings in the case; rather, he must show by affidavit or other documentary evidence specific facts establishing personal jurisdiction. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6<sup>th</sup> Cir. 1991). Jurisdiction may be either general or specific. *Bird v. Parsons*, 289 F.3d 865, 873 (6<sup>th</sup> Cir. 2002). General jurisdiction exists over a defendant when his or its "contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state." *Id.* (citing *Third Nat'l Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1089 (6<sup>th</sup> Cir. 1989)). Specific jurisdiction exists if the defendant's contacts are related to the case at hand. Here, neither general nor specific jurisdiction exists and Plaintiff will not be able to meet his burden of proof to establish personal jurisdiction over either defendant.

#### **B. Neither General Nor Specific Jurisdiction Exists.**

There is a two-step analysis to determine personal jurisdiction under the laws of Ohio. First, whether the state's long-arm statute and the applicable civil rule confer personal jurisdiction; and second, whether granting jurisdiction under the statute and rule would deprive the defendant of the right to due process of law pursuant to the U.S. Constitution. *Oasis Corp. v. Judd*, 132 F.Supp.2d 612 (S.D. Ohio 2001).

Section 2307.382 of the Ohio Revised Code, provides, in pertinent part:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state;
- (3) Causing tortious injury by an act or omission in this state;

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

The Sixth Circuit has recognized that Ohio's long-arm statute does not reach the full limits of the federal constitution. *Bird, supra*, 289 F.3d, at 871.

In the instant case, the complaint against defendants is based upon the Ohio Consumer Sales Practices Act (Revised Code section 1345.02) and Revised Code Section 2307.64 - a state statute which governs electronic advertisements. While the complaint claims that Defendants sent him numerous emails offering products at discounted prices or advertised them as free in violation of the Ohio Consumer Sales Practices Act, noticeably absent from Plaintiff's complaint is any allegation that Plaintiff entered into any business transactions with Defendants. Moreover, there is no basis under either statute to include David Linhardt as a defendant in the action.

In order for a website or internet activity to create personal jurisdiction, it must satisfy the three-prong test established by the Sixth Circuit in *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6<sup>th</sup> Cir. 1968). That test is, as follows: (1) whether the website constitutes purposeful availment, (2) whether it is the basis of the cause of action against the defendant, and (3) whether jurisdiction over the defendant is reasonable. "The operation of an internet website can constitute the purposeful availment of the privilege of acting in a forum state...if the website is interactive to a degree that reveals specifically intended interaction with

residents of the state.” *Bird, supra*, at 874. There is no allegation that the Defendant, E360Insight’s website is interactive, at all, or that its website is specific to interact with residents of the State of Ohio. While Plaintiff’s internet service provider’s are in Ohio and Plaintiff is a resident of Ohio, Plaintiff can access his email or Defendant’s website from anywhere in the country; if not the world. As such, whether Defendant reads his email or accesses the internet while sitting at home in Ohio, on vacation in Florida, on business in New York, or anywhere else is simply irrelevant. The relevant issue is whether Defendants intended to specifically interact with residents of Ohio. The answer is “no.” (Linhardt Aff., at 5). Most email addresses do not divulge the location of the email addressee. For instance, Plaintiff’s email address [jferron@ferronlaw.com](mailto:jferron@ferronlaw.com) provides no indication where his email address may be. There is, therefore, no revelation that contact with residents of the State of Ohio is intended by Defendants. As such, neither the first nor third prong of *Southern Machine* is met in the instant case.

### **C. Personal Jurisdiction Not Consistent With Due Process**

If authority exists under Ohio’s long-arm statute to exercise jurisdiction over Defendants, which it does not, the Court must also consider whether the jurisdiction granted under the long-arm statute is consistent with “traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). In order to meet the *International Shoe* standard, defendant must have engaged in “continuous and systematic” conduct in the forum state. *Id. See also, Nationwide Mut. Ins. Co. v. Tryg Int’l Ins. Co.*, 91 F.3d 790, 793 (6<sup>th</sup> Cir. 1996). Even if Plaintiff received numerous email messages from Defendant’s website, hailing Defendants into Court in Ohio is not reasonable and offends the notions of fair play and substantial justice. This is because the email addresses to which communications are

sent are automatically sent via internet (interstate commerce), with no specific intent to send advertisements to Ohio residents. When the defendant's alleged contact with the forum state occurs via the internet, the plaintiff faces an initial hurdle in showing where this internet conduct took place for jurisdictional purposes. The Sixth Circuit holds that the operation of a website that is accessible to anyone over the Internet is insufficient to justify general jurisdiction, even where the website enables the defendant to do business with residents of the forum state, because such activity does not approximate physical presence within the state's borders. *The Cadle Company v. Schlichtmann*, 123 Fed. Appx. 675, 677. Similarly, the automated emails merely present an opportunity to do business with persons in every state, and, in fact, in different countries; and should not and does not constitute physical presence within the State of Ohio. As is averred by Mr. Linhardt, any contact with Ohio is merely fortuitous and unintended (Linhardt Aff., at 5).

**D. Personal Jurisdiction Over Linhardt Does Not Exist.**

Even if this Court determines that personal jurisdiction exists over defendant E360Insight, LLC, there is no personal jurisdiction over David Linhardt and the claims against him must be dismissed. Analyzing jurisdiction relative to Linhardt, there is no allegation or evidence that Linhardt himself transacted business in Ohio, personally caused the Plaintiff injury in Ohio, or any other element listed in Ohio's long-arm statute. In fact, the affidavit of Linhardt reflects that Linhardt does not live, work, transact business, or own real estate in Ohio. He is a resident of Illinois. Based upon *Southern Machine, supra*, there is no basis to assert personal jurisdiction over Linhardt.

Even if personal jurisdiction exists over Linhardt, which it does not, Plaintiff cannot establish that Linhardt is a supplier under Section 1345.02 of the Revised Code, as alleged by

Plaintiff. Nor has Plaintiff alleged in his complaint facts sufficient to pierce the corporate veil of E360Insight, LLC and include Linhardt as a Defendant. Without either of these bases, the claims against Linhardt personally must be dismissed.

Revised Code section 1345.01 defines a supplier as:

(C) "Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. If the consumer transaction is in connection with a residential mortgage, "supplier" does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 of the Revised Code. For purposes of this division, in a consumer transaction in connection with a residential mortgage, "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.

Other than the bare assertion that defendants are suppliers, there is no allegation that Linhardt sent or caused to be sent, on behalf of himself or E360Insight, any communication to Plaintiff. Even if E360Insight, LLC, is a supplier, which it is not, its member and officer is not necessarily a supplier for purposes of the statute. Nor is a member or officer of a business entity personally liable for the acts of such entity. Thus, assuming personal jurisdiction over E360Insight exists, and assuming further that E360Insight is a supplier, Plaintiff's complaint still fails to allege facts sufficient to include Linhardt personally.

Generally, corporate officers and shareholders are not liable for the debts of their entities. *See, e.g.* Presser, *Piercing the Corporate Veil* (1991) 1-4. A shareholder or officer of a corporation may be personally liable for violations of the Ohio Consumer Sales Practices Act but only if the Plaintiff can meet the elements necessary to pierce the corporate veil. *State ex. Rel. Fisher v. Warren Star Theater*, 84 Ohio App.3d 435, 443 (Ohio Ct. App. 1992). In the instant case, the elements to pierce the corporate veil are not present and have not been alleged in Plaintiff's Complaint.

In the Sixth Circuit, the corporate form may be disregarded and individual shareholders held liable for corporate misdeeds when (1) control over the corporation by those to be held liable is so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Belvedere Condominium Unit Owners' Association v. R.E. Roark Companies, Inc.*, 67 Ohio St. 3d 274, 289 (1993).

Here, Plaintiff has not alleged any of the three *Belvedere* elements and, as such, there is simply no basis for piercing the corporate veil of E360Insight, LLC, to reach Linhardt. There has been no allegation and certainly no evidence presented that E360Insight is controlled by Linhardt such that the entity has no separate mind, will, or existence of its own. Plaintiff has not made sufficient allegations to warrant piercing the corporate veil. As such, Linhardt is an improper party defendant.

#### **IV. CONCLUSION**

For the foregoing reasons, Plaintiff's Complaint Against Defendants must be dismissed.

Respectfully Submitted,

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Lead Attorney to Be Noticed on Behalf of  
Defendants E360Insight, LLC and David  
Linhardt


**CERTIFICATE OF SERVICE**

This undersigned certifies that a true and accurate copy of the foregoing was served upon Lisa Wafer, Ferron & Associates, 580 North Fourth Street, Suite 450, Columbus, Ohio 43215 and Kevin Humphreys, The Brunner Firm, 545 E. Town Street, Columbus, Ohio 43215 via first class mail, postage pre-paid and, where possible, via the Court's electronic filing system on November 21, 2007.

S/Karen S. Hockstad  
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<b>e360Insight, L.L.C., et al.,</b>	:	<b>Magistrate Judge:</b>
	:	
<b>Defendants.</b>	:	
	:	
<b>STATE OF ILLINOIS</b>	:	
	:	<b>SS</b>
<b>COUNTY OF <u>Cosh</u></b>	:	

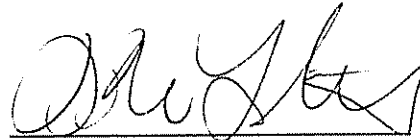
**AFFIDAVIT OF DAVID LINHARDT**

David Linhardt, after being duly cautioned and sworn, deposes and states:

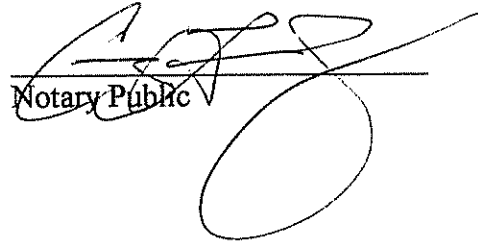
1. My name is Dave Linhardt, and I am the President of e360Insight, LLC. In that capacity, I am responsible for overseeing the day-to-day operations of the company. I am also an individual defendant in this litigation. As such, I have personal knowledge of the matters herein stated.
2. e360Insight, LLC is in the online marketing business and is an Illinois limited liability company with its principal and only place of business in Illinois.
3. e360Insight, LLC conducts all of its online marketing business via the internet and does not conduct business in Ohio. The company website does not specifically market to residents of the State of Ohio.
4. I am a resident of the State of Illinois and do not own real estate or business in Ohio nor do I conduct business in the State of Ohio.

5 e360Insight, LLC does not know to whom many emails are sent as the email addresses do not indicate the state of origin. As such, any emails to any individual in Ohio, including Plaintiff, is merely fortuitous. Contact with Ohio residents is insubstantial, random, and attenuated.

AFFIANT FURTHER SAYETH NAUGHT.

  
\_\_\_\_\_  
David Linhardt

Sworn to and subscribed before me, a notary public, this 16<sup>th</sup> day of November, 2007.

  
\_\_\_\_\_  
Notary Public

