

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION**

E360INSIGHT, LLC,)	
)	
Plaintiff,)	
)	Case No. 08 C 0340
v.)	
)	Judge Zagel
COMCAST CORPORATION,)	Mag. Judge Mason
)	
Defendant.)	

NOTICE OF FILING

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CERTIFICATE OF SERVICE

The undersigned certifies that copy of the **Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings** was served upon the attorneys listed above electronically via CM/ECF on March 20, 2008.

/s/ Carla E. Buterman
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**PLAINTIFF’S RESPONSE TO DEFENDANT’S
MOTION FOR JUDGMENT ON THE PLEADINGS**

NOW COMES, Plaintiff, e360Insight, LLC, by and through its attorneys, Carla E. Buterman, Bartly Loethen and Joseph Kish, and for its Response to Defendant’s Motion for Judgment on the Pleadings, states as follows:

INTRODUCTION

E360Insight, LLC (hereafter “e360”) is an email and internet marketing company founded by David Linhardt.¹ E360 does not engaging in “spamming” as Defendant alleges in its Motion. In fact, e360 *only* sends email to persons who first sign-up or “opt-in” to receive its or its partners emails and e360 has a common practice of sending emails that request a person to “double-confirm” that they would like to receive the emails sent by e360. As a matter of practice and business model, e360 does *not* send unsolicited email and has always complied with or exceeded all federal and state requirements, laws and standards pertaining to the sending of commercial email, including the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 USC § 7701 (CAN-SPAM).

¹ Mr. Linhardt has over twelve years of experience in internet marketing including executive-level management positions at large Fortune 100 companies. Ironically, Mr. Linhardt while working as Vice President of Marketing of the Telecommunications, Energy & Cable division of Experian worked closely with Defendant Comcast in developing its direct marketing solutions to help Comcast acquire and manage its customers more efficiently.

Electronic mail, commonly referred to as email, is an extremely important and popular means of communication, relied on by millions of Americans everyday for personal and commercial purposes. 15 USC §7701(a)(1). E360, as well as Comcast, recognizes that unsolicited email, commonly called “spam,” is a serious problem that inhibits the flow of email communication. This is precisely the reason e360 never sends unsolicited email.

E360 is required to use internet service providers (“ISPs”) such as Comcast to deliver its emails to the persons who have signed up to receive such emails. Comcast is an ISP that provides email service to its customers and who has agreed to act as an intermediary in delivering and receiving emails on behalf of its customers.

In its zeal to control spam, Comcast has taken draconian steps to prevent e360 from being able to send any email to its subscribers despite being repeatedly told by e360 that it only sends email to Comcast subscribers who have requested, and in some cases double-confirmed, that they wish to receive e360 or its partner’s emails. As early as 2005, Comcast began indiscriminately blocking e360’s emails but would release such block after being advised by e360 of the nature of its emails to Comcast subscribers. However, by 2007, Comcast would no longer release the block on e360’s emails and in fact, all but refused to communicate with e360.

Comcast has also engaged in ‘denial-of-service’ attacks on e360’s network and computer system. Such attacks overwhelm and disable e360’s network and prevent them from sending or receiving emails from e360’s consumers in an attempt to halt e360’s business. Comcast has transmitted fraudulent bounce information to e360’s email servers specific to email addresses contained on e360’s opt-in marketing list. Such conduct causes significant damage to e360’s business.

Comcast's unilateral and unreasonable blocking of all of e360's email messages has nearly cost e360 its business, good will and reputation and millions of dollars in revenue. Thereby, leaving e360 with no recourse but to file this proceeding before the Court.

Comcast's response to e360's complaint is simply that "Plaintiff is a spammer." Comcast then goes on to incorrectly claim immunity under Communications Decency Act. Similarly, as a last ditch effort, Comcast then seeks to dismiss the counts of the complaint as having failed to state a claim upon which relief can be granted. Such defenses utterly fail when the actions of the Defendant are examined.

ARGUMENT

I. Standard of Review

A motion for judgment on the pleadings under FRCP Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6). *Craigs, Inc. v. Gen. Elec. Capital Corp.*, 12 F.3d 686, 688 (7th Cir. 1993). Thus, a court must view the facts of the complaint in the light most favorable to the nonmoving party and cannot grant the motion unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief. *Thomason v. Nachtrieb*, 888 F.2d 1202, 1204 (7th Cir. 1989). All that is required under Rule 8(a) is that Plaintiff set forth factual allegations sufficient to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007). E360 has clearly set forth factual allegations in every count of its complaint sufficient to give notice of its claim to relief and to support such claims to relief.

II. Comcast Not Entitled to Immunity under The Communications Decency Act

Comcast's reliance on the Communications Decency Act for immunity is misplaced. The Communications Decency Act (hereafter "CDA") and its Good Samaritan provision were

enacted by Congress with the specific purpose of overruling *Stratton-Oakmont v. Prodigy Services Co.*, 1995 N.Y. Misc. LEXIS 229 (NY Sup. Ct. 1995). *Stratton-Oakmont* had held that an internet access provider that used filtering technology could be held liable for libelous third-party statements. *Id.* Congress did not intend to grant a “vast, limitless immunity” to internet providers. *Chicago Lawyers’ Committee*, 461 F. Supp.2d 681 (N.D.Ill. 2006) affirmed by the Seventh Circuit in Case No. 07-1101 decided 3-14-08.

The Court in *Chicago Lawyers’ Committee* relied on the Seventh Circuit’s opinion in *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) in holding that previously court opinions that held that Section 230 (c)(1) provided ICSs with broad, robust immunity as Comcast relies on in this case were incorrect. Instead, the Seventh Circuit in *Doe*, called into question such immunity. *Id.* at 659-60. The Seventh Circuit held that if there was immunity under Section 230(c)(1) it likely depended on the ISP acting a publisher. “Limiting the immunity afforded under Section 230 to those claims that require “publishing” as an essential element—as opposed to any cause of action—gives effect to the” entire statute. *Chicago Lawyers’ Committee* at 697. This is consistent with both the intent of statute and other court’s holding that ISPs could not be held liable for third-party content placed on message boards or other forums provided by the ISP. It was not meant to cover the actions of an ISP such as blocking of emails.

The Seventh Circuit recently restated its objections to various courts interpretations of immunity in affirming Judge St. Eve’s holding in *Chicago Lawyers’ Committee*. Case no. 07-1101 decided March 14, 2008.

While Plaintiff was unable to find a case on point with equivalent facts to the case at hand, Comcast’s actions in blocking e360’s emails can in no way be considered equal to that of a publisher. Similarly, e360 is not seeking to hold Comcast liable for the actions or statements of a

third-party, rather e360 is seeking to hold Comcast liable for its own actions: Comcast's indiscriminate and improper blocking of e360's emails.

Additionally, Defendant's caselaw is either irrelevant or has been called into question by courts in this circuit. Several of Defendant's cited cases and their reliance on the CDA were specifically rejected by a Court in this Circuit. See *Chicago Lawyers' Committee*, at 694. (Judge St. Eve rejected *Noah and Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) progeny). Others are simply irrelevant. For example, all of Comcast's caselaw regarding emailers involve unsolicited email or spam.² As noted numerous times both in e360's complaint and Dave Linhardt's affidavit attached to e360's Motion for Preliminary injunction, e360 does not and has never sent unsolicited email. Thus, Comcast's caselaw is irrelevant.

Even if Comcast is correct in its belief that it has the ability, with immunity, to block spam, which it deems objectionable, it does Comcast no good in this case. This case does *not* involve spam. E360 does not send unsolicited emails to anyone. E360 has information including opt-in dates as well as names and other information on all of the people to whom it send email. Comcast has been notified of this important piece of information on numerous occasions. In fact, until 2007, Comcast usually removed the block on e360's emails based on this fact.

The fact that all of Comcast's caselaw involves spam implies that like Plaintiff, Comcast could find no caselaw that would allow it to block solicited and in many cases double-confirmed solicited emails with immunity. The case is truly one of first impression. To allow Comcast to dictate and in fact overrule the decision of its subscribers it simply unfair both to Comcast's subscribers and to e360.

² Many of Defendant's cited cases do require the ICS to be acting as publisher to be granted immunity under the CDA even for cases involving spam.

Comcast's statements that e360's compliance with CAN-SPAM is a red herring is not only incorrect it is a red herring in itself. E360's compliance with the Controlling the Assault on Non Solicited Pornography and Marketing Act of 2003³, 15 USC §7701, is material to showing that e360 does not send spam and follows all laws regarding the sending of email. Comcast's disregard for e360's compliance shows that Comcast's indiscriminate blocking of e360's emails has little to do with controlling spam and more to do with Comcast's belief that it knows better than its subscribers what its subscribers want to receive in their inboxes.

Finally, exemption for the CDA requires Comcast to act in good faith, and as Plaintiff has alleged in its Complaint, Comcast has not acted in good faith. Comcast allows numerous other companies to send bulk emails in greater volume and with greater frequency. Comcast has not acted in good faith by singling out Plaintiff when others behaving in a like manner are not treated in a like fashion. Plaintiff's complaint, which is to be taken as true, alleges the action to be contrary to a good faith action, thus the exemption cannot apply.

III. **Plaintiff Has Plead Each Count of Its Complaint Properly**

A. Plaintiff Has Properly Plead Its Claim for Tortious Interference with Prospective Economic Advantage

Plaintiff has properly pled its claim for Tortious Interference with Prospective Economic Advantage. Under Illinois law, "the tort of interference with prospective economic advantage has four elements: (1) plaintiff must have a reasonable expectancy of a valid business relationship with a third party; (2) defendant must know of the prospective business relationship; (3) defendant must intentionally interfere with the prospective business relationship such that the prospective business relationship never materializes; and (4) the interference must damage the

³ CAN-SPAM effectively provides guidelines for email marketing and what must be contained in emails to ensure that customers and subscribers are only receiving emails that they want in their inboxes.

plaintiff. *Cook v. Winfrey*, 141 F.3d 322 (7th Cir. 1998). Here, Plaintiff has properly alleged each of these elements sufficiently to meet Rule 8 notice pleading requirements.

Defendant argues that Plaintiff must allege a specific third party with which Comcast interfered. This is incorrect. “The Federal Rules do not require that [a] complaint allege [a] specific third party.” *Id.* at 328. Rather, Plaintiff can simply allege a “class” of third-parties with whom it had a business expectancy. *Id.* citing *River Park, Inc. v. City of Highland Park*, 281 Ill.App.3d 154 (Ill.App. 1996). See also, *Celex Group, Inc. v. Executive Gallery, Inc.*, 877 F.Supp. 1114 (N.D.Ill. 1995) (Ct recognized that a showing of a class of prospective customers might be sufficient to survive a motion to dismiss). Thus, Plaintiff must only identify a class of prospective business customers.

However, Defendant is also incorrect when it argues that Plaintiff failed to “identify a single business relationship with which Comcast interfered.” D. memo p. 8. Plaintiff stated in Complaint that it “only sends emails to consumers who: a) purchase goods and services from its proprietary company owned website; or b) sign-up to receive emails either through E360 or through one of its marketing partners.” Comp. ¶27. While Plaintiff did not identify each individual customer that had purchased from its websites or signed up to receive its emails, the Plaintiff did sufficiently identify such individuals.⁴

Defendant’s argument that it didn’t know of e360’s prospective business relationship with anyone and that it never intentionally interfered with any such relationship is outrageous and completely false. First, e360 has notified Comcast of its business relationships with its subscribers on numerous occasions for multiple years since Comcast starting blocking e360’s

⁴ As Plaintiff has almost 843,597 customers and individuals who have signed up to receive their emails that utilize Comcast, it would be burdensome and wasteful to require Plaintiff to specifically identify each individual as Comcast demands.

emails. Secondly, as Comcast blocks e360's emails from reaching Comcast subscribers it seems obvious that Comcast would know exactly who e360 was trying to contact. Finally, as Comcast states that it uses various filters to filter emails and screens based on content, it is also obvious that Comcast knew exactly what was in each email it was blocking. Comcast knew exactly whom e360 was attempting to contact and exactly why e360 was attempting to contact such people. To argue otherwise is absurd and flies in the face of Comcast's own statements.

Finally, Comcast states that the Complaint is void of allegation of damage caused by their actions. Comcast apparently failed to read paragraphs 31, 32 and 34 of the Complaint, all of which specifically allege damages caused by Comcast's unreasonable behavior. Plaintiff has properly pled its allegations of tortious interference with economic advantage.

B. E360 Has Properly Pled Its Claims for Violations of the Computer Fraud and Abuse Act

E360 has properly pled allegations of violations of the Computer Fraud and Abuse Act (hereafter "Act"). 18 U.S.C. § 1030(a)(5)(A)(i) and (iii). Plaintiff alleges that Comcast violated the Act by 1) engaging in denial of service attacks against e360 that cause tremendous damage to e360's servers and 2) providing false information regarding active and inactive email accounts. Defendant argues that it: 1) it did not access e360's computers or servers and did not intentionally cause damage; and 2) that it is e360's fault for believing and relying on Comcast to provide accurate data regarding its subscribers' active email accounts. Defendant's argument fails not only because they are misguided but because they show Comcast's willful disregard for e360 and their subscriber's right to transact business.

Comcast states that e360 has improperly characterized Comcast's actions as a "denial of service attack." According to Carnegie Mellon University's Cert Coordination Center (hereafter "Cert"), a "denial of service attack" is characterized by an explicit attempt by someone to

prevent legitimate users of a service from using that service. Further, the type of attack committed by Comcast is specifically detailed by Cert as a “consumption of scarce resources” attack. Such attacks work by using up all available resources of an entity by establishing a connection with a victim’s server and preventing the victim from breaking the connection; thereby using up all the victim’s bandwidth, memory, CPU time and other resources and preventing the victim from operating. This is exactly what e360 alleged in its Complaint.

Further, Comcast’s statements and analogy that e360 could simply drop the connection or disconnect after a period of time is blatantly false. E360 and the email software it uses follow standard protocols that do not allow a connection to be dropped or disconnected when the servers are communicating like they are when a “denial of service attack” is underway. Comcast knows this and this is why it engages in such attacks.

Plaintiff also alleges that Comcast provides it false bounce data regarding the activity of subscribers accounts, essentially that Comcast lies about whether an account is actually active when it responds to e360’s email requests. Comcast’s argument is that it is e360’s fault that it *believes* Comcast or *relies* on the information Comcast provides regarding its subscribers and deletes entries to database based on such information. This is absurd. E360 *must rely* on Comcast for accurate information regarding its subscribers. It has no other source to get such information. Further, under its operating guidelines and in accordance with industry standard, it must delete entries from its database when informed that they are no longer active. Additionally, because high bounce rates are an indication of “spammer” activity, e360 always deletes emails when told they are no longer active. As e360 must delete emails from its database, Comcast should be liable for providing false information.

C. E360’s Emails Are Entitled to First Amendment Protection

Whether they admit it or not, Comcast and other ISPs are conduits for the communication between 21st century Americans. Although Comcast is not a traditional “state actor”, its private conduct can, and in this case does, constitute “state action” which makes Comcast accountable for violating citizens’ constitutional rights. *See e.g. Adickes v. S.H. Kress & Co.*, 389 U.S. 144, 224 (1970). In this case, Comcast’s refusal to deliver messages intentionally sent from one citizen to another citizen *who requested the message be sent* deprives both actors of their First Amendment rights and falls outside of Comcast’s traditional private actor protections.

Delivering mail is traditionally a state action carried out by a quasi-governmental agency, the United States Postal Service. Currently, however, more mail is sent to American citizens through ISPs to Internet addresses than is sent through the U.S. mail.⁵ American citizens have turned to the digital world to receive information previously obtained through the U.S. mail service. In situations like this, courts have found that private parties can be state actors. *See Ridlen v. Four County Counseling Center*, 809 F. Supp. 1343, 1346-47 (N.D. Ind. 1992) (holding that private conduct can constitute state action where the state and the private party maintain a sufficiently interdependent or symbiotic relationship; where the state requires, encourages, or is otherwise significantly involved in nominally private conduct; and where the private person or entity exercises a traditional state function).

Comcast’s conduct in this case constitutes state action. Comcast’s conduct in this case is unconstitutional because Comcast is blocking emails that senders want to send and receivers want to receive. This case is clearly distinguishable from cases that have held that non-solicited emails are not entitled to unfettered First Amendment protection. *See Cyber Promotions, Inc. v.*

⁵ (*See* <http://www.usps.com/communications/newsroom/postalfacts.htm> stating that the United States Postal Service processes and delivers approximately 703 million pieces of mail everyday; *compare to* <http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm> citing the International Data Corporation’s 2003 report stating that approximately 31 billion emails were being sent a day and that number was expected to double by 2006).

American Online Inc., 948 F. Supp. 436 (E.D.P.A. 1996). Unlike in *Cyber Promotions*, where the emails were unsolicited, here, Comcast is blocking emails *requested* by the Comcast customer. No court has held that requested emails are not entitled to First Amendment protection where the information carrier is an ISP, who is only authorized to act as the mail carrier because of power bestowed upon it by the United States government, and where the ISP is acting in the traditional state role of a United States postal carrier. These emails are entitled to First Amendment protection.

The special treatment awarded ISPs and the exception made for ISPs from certain US laws is a result of the lawmakers understanding that an ISP is a conduit for information, and not the originator of such information. ISPs have been given special treatment in the Digital Millennium Copyright Act, the Communications Decency Act (the “CDA”, as referenced in Defendant’s motion pleadings), and CAN-SPAM to name but a few. *See* 17 U.S.C. §512 *et seq.*; 47 U.S.C. §230(c); and 15 U.S.C. §7701 respectfully; *see also Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003). The protection by the government of ISPs is a benefit conferred by the government with the assumption that requested information would flow freely through ISPs and that the Internet is a place where free speech remains unfettered. In the instant case, Comcast has acted through its own accord and has made an overt decision to not allow the free flow of information but rather to censor the communication sent from one citizen of the United States to another. As an integral part of the mechanism by which most Americans communicate, and as recognized by the United States Government, Comcast must adhere to the Constitutional principles inherent in the First Amendment in order to treat all parties in a manner that is fair and consistent with those Constitutional principles.

In summary, Comcast, as an ISP exempted from litigation pertaining to various laws regarding communication over the Internet, is a state actor as a result of the protection and benefit conferred on Comcast by the government for its role as a conduit for the free flow of information. The government has recognized that any non-objectionable information is to flow freely and Comcast has decided, on its own accord, to intercept the mail sent from one citizen to another. This is not acceptable behavior for a state sanctioned conduit of public communication over a state owned series of internet protocol addresses and this censorship should not be tolerated. Plaintiff should have its opportunity to further prove the state action component and to show the improper censorship and the damage caused Plaintiff by such action of Comcast.

D. E360 Has Properly Pled Unfair Competition and Business Practices

E360 has properly pled claims of unfair competition and business practices based on Comcast's misfeasant behavior. In Illinois, it is unlawful for any business to use unfair methods of competition and business practices, including but not limited to the use or employment of any false pretense, false promise or misrepresentation, in the conduct of trade or business. 815 ILCS 505/2. The elements of a claim are: 1) deceptive act or practice by defendant; 2) the defendant's intent that the plaintiff rely on such act or practice; and 3) the occurrence of the act or practice during a course of conduct involving trade or commerce. *Cripe v. Leiter*, 184 Ill.2d 185, 191 (1998). Recovery may be had for unfair as well as deceptive conduct. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403 (2002).

Here, Plaintiff has alleged that Comcast engaged in deceptive and unfair practices in acting as an intermediary delivering email to its subscribers from e360. Comcast clearly posts their email deliver policies on its websites. See Exhibit A to the Complaint. Comcast by posting such policies clearly expects both its subscribers and persons or entities emailing its subscribers

to follow the policies set forth. It is also reasonable for one to expect that if such policies are complied with that Comcast will act accordingly as a non-bias intermediary. However, Comcast not only fails to follow its own policies, it discriminately targets entities without cause, blocks emails and causes significant damage. Comcast does not seem to contest that such conduct occurs within the course of trade or business. Thus, Comcast's conduct fails squarely under the Illinois Consumer Fraud Act (hereafter "ICFA").

1. Comcast Did Expect E360 to Rely On Their Unfair and Deceptive Conduct and Plaintiff Has So Alleged.

E360 relied on Comcast's posted policies to be a fair and accurate statement of its operating procedure and expected Comcast to act in an unbiased manner as an intermediary delivering email to its subscribers. Comcast publishes, and according to Defendant's brief frequently updates, its policies because it expects people to rely on them. D. memo p. 14. This is simply common sense. If Comcast did not expect anyone to rely on their policies, why post them and why update them?

E360 has also alleged, despite Defendant's claims, that Comcast acted in an unfair and deceptive manner by 1) not delivering emails in accordance with its own policies and 2) by discriminately allowing other companies, whom Plaintiff alleges have agreements with Comcast, to send emails to Comcast subscribers. Comp. ¶ 57-60.

Comcast's claim that it owed no duty to Plaintiff is meritless. As an intermediary, Comcast owes a duty not only to its subscribers but also to individuals communicating with subscribers. Comcast has voluntarily and for profit taken on this duty by assuming the job of an intermediary. This is especially true because entities, such as e360, have no other means of communication with subscribers. Comcast simply should not be allowed to disrupt the only means of communication between two parties based on its own biased opinions or actions.

Comcast's argument that its Acceptable Use Policy gives it the right to "refuse to transmit or post and to remove or block any information or materials, in whole or in part, that it, in its sole discretion, deems to be offensive, indecent, or otherwise inappropriate, regardless of whether this material or its dissemination is unlawful" is a red herring. Def. memo p.14.

Defendant neglects to inform the Court of the title of the section the quote came from, namely "Inappropriate Content and Transmissions." Such statement of disclaimer is intended to allow Comcast to delete inappropriate content or block inappropriate emails. This has no relevance to e360's emails that are completely proper. Nor can Comcast use this statement as a blanket disclaimer that it can simply hide behind to allow it act in any manner it chooses.

2. Defendant's Conduct Relating to E360 is Unfair under the ICFA

Plaintiff's allegations that Comcast conduct in refusing to allow its email to be transmitted to Comcast subscribers while allowing other companies exactly like e360 to conduct business using its systems is patently unfair under the ICFA. Factors in determining whether an activity is unfair include: 1) whether the practice offends public policy; 2) whether it is immoral, unethical, oppressive or unscrupulous; 3) whether it causes substantial injury to consumers. *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). All three criteria do not need to be satisfied to support a finding of unfairness. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403 (2002). Here, Defendant's conduct offends public policy and causes substantial injury to consumers by preventing them from freely conducting business with whomever they choose.

The court in *Robinson* upheld the dismissal of the ICFA claims based on the plaintiff's ability to contract with other companies and its knowledge of the contract it signed. Here, e360 has no ability to deal with any other company other than Comcast when its customers are

Comcast subscribers. Further, e360's customers are completely unaware of the failure of e360 to be able to communicate with them regarding orders or other advertising. Clearly, Comcast's conduct in failing to allow parties to freely transact business and communicate causes substantial injury, especially in light of the fact that consumers are completely unaware of the harm perpetrated against them. Such conduct and Plaintiff's allegations in the Complaint fall squarely within the parameters of the ICFA.

3. Plaintiff Need Not Be A Consumer to Allege Violations of the ICFA

As Plaintiff's allegations directly relate to its and consumers ability to communicate and transact business, Plaintiff claims are within the ICFA. "The Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices. It is to be liberally construed to effectuate its purpose." *Robinson* at 416 citing *Cripe v. Leiter*, 184 Ill.2d 185, 191 (1998). Defendant states that e360's ability to maintain this action "turns on 'whether plaintiff can plead and prove a nexus between the complained-of conduct and consumer protection.'" D. memo pg. 15. Here, Plaintiff's allegations directly relate to its and consumer's ability to freely communicate and transact business. Electronic mail, commonly referred to as email, is an extremely important and popular means of communication, relied on by millions of Americans everyday for personal and commercial purposes. 15 USC §7701(a)(1). This important component of business and communication must be afforded the protection that allows the parties to be free of unfair practices such as Defendant's. Thus, Defendant should not be allowed to practice unfair and deceptive business practices as those alleged by Plaintiff in its Complaint.

CONCLUSION

WHEREFORE, E360Insight, LLC respectfully requests this Court deny Defendant's Motion for Judgment on the Pleadings, enter a preliminary injunction, as requested by e360 in its motion, prohibiting Comcast from engaging in behavior such as indiscriminately blocking e360's emails and engaging in 'denial of service' attacks against e360, and require Comcast to answer the Complaint filed in this case.

Date: March 20, 2008

Respectfully submitted,

/s/ Carla E. Buterman
One of the attorneys for Plaintiff