

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

E360INSIGHT, LLC,)	
Plaintiff,)	
)	
v.)	
)	Case No. 08 C 0340
COMCAST CORPORATION,)	
Defendant.)	Judge Zagel
)	
COMCAST CORPORATION,)	Magistrate Judge Mason
Counterclaimant,)	
v.)	
E360INSIGHT, LLC,)	
Counterdefendant,)	
)	
DAVID LINHARDT,)	
)	
MAVERICK DIRECT MARKETING)	
SOLUTIONS, INC.,)	
)	
BARGAIN DEPOT ENTERPRISES, LLC,)	
d/b/a bargaindepot.net and)	
bargainshoppecorp.com,)	
)	
NORTHSHORE HOSTING COMPANY, LLC)	
d/b/a ROCKY MOUNTAIN INTERNET)	
SERVICES, LLC and BAY CITY HOSTING,)	
LLC,)	
)	
RAVINIA HOSTING COMPANY, LLC,)	
)	
NORTHGATE INTERNET SERVICES, LLC,)	
)	
JOHN DOES 1-50,)	
Third-Party Defendants.)	

MOTION TO DISMISS

NOW COMES, Plaintiff, e360Insight, LLC (“e360”) and Third-Party Defendants David Linhardt (“Mr. Linhardt”), Maverick Direct Marketing Solutions, Inc. (“Maverick”), Bargain Depot Enterprises, LLC (“BDE”), Northshore Hosting Company, LLC (“Northshore”), Ravinia

Hosting Company, LLC (“Ravinia”) and Northgate Internet Services, LLC (“Northgate”) (collectively “Defendants”) and by and through its attorneys, Carla E. Buterman of the Law Office of Carla E. Buterman and Bartly J. Loethen of Synergy Law Group, LLC, and for their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), state as follows:

A. Introduction.

Counter-Plaintiff, Comcast Corporation (“Comcast”), has filed a seven count counterclaim alleging causes of action based on multiple violations of 15 U.S.C. § 7704 *et. seq.*, CAN-SPAM (Counts I and II), Violation of Illinois Electronic Mail Act, 815 ILCS 511/10 (Count III), Violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5) (Count IV), Trespass to Chattels (Count V), Unjust Enrichment (Count VI) and Abuse of Process (Count VII).

The Counterclaim should be dismissed against Mr. Linhardt because it does not adequately identify the acts of Mr. Linhardt that give rise to finding personal liability for his actions as an officer or agent of the other Third-Party Defendants.

Counts I and II are premised on allegations that Defendants sent e-mail that contained false and misleading information about the origin of the e-mail, the author of the e-mail, and the IP address of the sender of the e-mail (Count I) and sent e-mails that contained subject headings that mislead the recipient (Count II). These Counts should be dismissed for failure to comply with Fed. R. Civ. P. 9(b) which requires that “all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” These Counts should also be dismissed for failure to state a claim upon which relief can be granted.

Count III, under the Illinois Electronic Mail Act, should be dismissed because for failure to comply with Fed. R. Civ. P. Rule 9(b) for the same reasons as Counts I and II should be

dismissed. Also, Count III should be dismissed for failure to state a claim upon which relief can be granted.

Count IV should be dismissed because it is barred by the applicable statute of limitation proscribed by 18 U.S.C. § 1030(g) which requires any action brought under the act to be commenced within two (2) years of the date of the complained of act.

Count VI should be dismissed because Comcast has not adequately pled a cause of action for unjust enrichment. Comcast must allege that it is entitled to any monies earned by Defendants. Comcast's failure to plead such facts renders Count VI fatally flawed.

To prevail on a claim of trespass to chattels, Counter-Plaintiff must allege and prove actual damages. Count V should be dismissed because Counter-Plaintiff cannot claim any actual damages arising from the alleged transmission of the e-mails at issue.

Count VII of the Counterclaim should be dismissed because the mere filing of a lawsuit, even with malicious intent is not a sufficient basis for the filing of a claim for abuse of process. Rather, Comcast would need to allege some actual misuse of the judicial process to state a claim for abuse of process.

B. Mr. Linhardt Should Be Dismissed Because He Is Not Liable For The Acts Of The Companies.

Under Illinois law, "corporate officers and directors are afforded a qualified privilege to use their business judgment and discretion on behalf of the corporation." *United Labs., Inc. v. Savaiano*, 2007 U.S. Dist. LEXIS 94034 *9 (N.D. Ill 2007); see also *National Acceptance Co. of America v. Pintura Corp.*, 94 Ill. App. 3d 703, 706, 418 N.E.2d 1114, 50 Ill. Dec. 120 (Ill App. 2nd 1981) (corporate officers are generally not liable for the corporation's torts). In cases, like this, where the director is acting "to further the corporation's interest rather than his own" he is not liable. *Pikes v. Riddle*, 38 F. Supp. 2d 639, 640, 1998 U.S. Dist. LEXIS 12665, *3 (N.D. Ill.

1998). To overcome the qualified privilege, Plaintiff bears the burden of alleging and proving “that the officer's conduct was unjustified or malicious, and therefore outside the scope of the privilege.” *United Labs., Inc. v. Savaian*, at *9; see also, *Mittelman v. Witous*, 135 Ill. 2d 220, 249, 552 N.E.2d 973, 987 (Ill. 1989) (corporate officers are not personally liable for the acts of the companies absent a showing that their actions as a corporate officer were done “without justification or maliciously.”) (disapproved on other grounds). Here, there are no allegations that Mr. Linhardt was acting in his own interests or that he acted without justification or maliciously. Mr. Linhardt is not personally liable for the actions of the Third-Party Defendant companies and he should be dismissed with prejudice from this litigation.

Mr. Linhardt recognizes that corporate officers are liable for fraudulent acts of the companies if they participated in the fraud. *Allabastro v. Cummins*, 90 Ill. App. 3d 394, 398, 413 N.E.2d 86, 45 Ill. Dec. 753 (Ill App. 1st 1980). The elements of common law fraud are: “(1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce the plaintiff act; (4) plaintiff's reliance upon the truth of the statement; and (5) plaintiff's damages resulting from reliance on the statement.” *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 496, 675 N.E.2d 584, 591 (Ill. 1996).

Here, Comcast has alleged none of the elements to support a fraud claim. While Comcast does make general accusations against Mr. Linhardt (ECF Doc. No. 28-2 at ¶¶ 33-34), the allegedly fraudulent statements made by Mr. Linhardt are not material to any of the causes of action alleged in the Counterclaim. Moreover, Comcast does not allege any reliance on the allegedly fraudulent statements nor does it claim any damages as a result of the allegedly fraudulent statements.

Mr. Linhardt should be dismissed from the Counterclaim because the only acts alleged to have been undertaken by him were done within the scope of his employment as an officer of the company and any allegedly fraudulent statements made by Mr. Linhardt were not material to the causes of action asserted by Comcast.

C. All Third-Party Corporate Defendants should be Dismissed from this Action.

All third-party corporate defendants should be dismissed from this action. As with most of Comcast's allegations in this Complaint, Comcast has asserted allegations only on "information and belief" regarding these entities and has done so only off of belief that such entities are in some way affiliated with e360. However, simply being a corporation that is affiliated or does business with e360 is insufficient to allow Comcast to maintain such frivolous accusations against these entities without any evidence of wrongdoing.

Each of these corporations are separate, individual corporations with separate business models and separate business functions. As such, they cannot be liable for the acts for other separate entities, even affiliated ones. A corporation is a separate and distinct legal entity from its corporate affiliates. *Three Way Drywall, Inc. v. Spoons Restaurant, Inc.*, 1987 U.S. Dist. LEXIS 2014, 1987 WL 8158 (N.D.Ill. 1987) (citing *Main Bank of Chicago v. Baker*, 86 Ill. 2d 188, 204, 427 N.E.2d 94, 101, 56 Ill. Dec. 14 (1981)). Thus, unless Comcast can show some action or wrongdoing in regards to each corporation beyond its "information and belief" pleading, all corporate defendants should be dismissed.

For example, Comcast merely alleges that Northgate is an affiliate of e360. Para. 13. Comcast makes no other allegations against Northgate. In fact, Northgate, as its name states, is an internet services provider that provides provide a full range of Internet services, including web hosting, bandwidth, co-location services, systems administration, application support and development, and IT consulting services. This has nothing more to do with sending of emails

than Comcast has to do with the sending of emails by entities. This is essentially what Comcast has alleged with regards to all third-party corporate defendants and as such all should be dismissed.

D. Northshore Hosting, Ravinia Hosting And Northgate Are Not Liable Under CAN-SPAM.

The third-party complaint alleges that Northshore Hosting, Ravinia Hosting, and Northgate are engaged in activities that make them Internet Service Providers. (ECF Doc. No. 28-2 at ¶ 22). The definitions of CAN-SPAM make clear that an Internet Service Provider engaged in the “routine conveyance” of allegedly offending e-mails is not deemed to have “initiated” the allegedly offending e-mail. *see* 15 U.S.C.S. § 7702 (9). Given that Northshore Hosting, Ravinia Hosting, and Northgate are internet service providers and there only involvement with the allegedly offending e-mails would have been the “routine conveyance”, the claims based on alleged violations of CAN-SPAM fail and must be dismissed with prejudice.

E. Comcast’s Allegations Under CAN-SPAM Fail as a Matter of Law.

Comcast’s counterclaim and third-party complaints are nothing more than a fishing expedition and should be dismissed. A party may not indulge in a fishing expedition or file a complaint on a rumor or a hunch. *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 684 (7th Cir. 1992). This is exactly what Comcast has done. Comcast has filed complaints based on nothing more than suspicions and accusations without any evidence. This is clearly shown when the factual allegations are examined. Nearly fifty percent (50%) on the factual allegations alleged are upon “information and belief.”¹

Courts generally disfavor pleadings on “information and belief” because of Rule 11’s requirement that counsel make a reasonable inquiry before filing a complaint. *Trans Union, LLC*

¹ Additionally, many of Comcast’s allegations stated within specific Counts are alleged on “information and belief.”

v. Credit Research Inc. et al., 2001 U.S. Dist. LEXIS 7559 (N.D.Ill.) (J. Moran). Here, it appears that Comcast and its counsel have failed to make any attempt to support their frivolous allegations but rather pray that they will be allowed to fish for evidence long after the case has been filed in an effort to support their claims. Nor has Comcast provided any grounds for their suspicions. Rather, Comcast relies on mere speculation in their complaints. Such actions walk the line of Rule 11 and should not be tolerated.

Additionally, as Comcast's CAN-SPAM allegations sound in fraud they are required to be pled under the heightened pleadings requirement of Rule 9(b). Rule 9(b) applies to "averments of fraud," not claims of fraud, so whether the rule applies will depend on the plaintiff's factual allegations. *Borsellino, et al. v. Goldman Sachs Group, Inc.*, 477 F. 3d 502 (7th Cir. 2007). A claim that "sounds in fraud" – in other words, one that is premised upon a course of fraudulent conduct – can implicate Rule 9(b)'s heightened pleading requirements. *Id.* Both of Comcast's Counts under CAN-SPAM sound in fraud and should be held to Rule 9(b)'s heightened requirements.

Count I of Comcast's Complaint is brought under 15 U.S.C. § 7704(a)(1), which states:

§ 7704. Other protections for users of commercial electronic mail

(a) Requirements for transmission of messages.

(1) Prohibition of false or misleading transmission information. It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is *materially false or materially misleading*. For purposes of this paragraph--

(A) header information that is technically accurate but includes an originating electronic mail address, domain name, or Internet Protocol address the access to which for purposes of initiating the message was *obtained by means of false or fraudulent pretenses or representations shall be considered materially misleading*; (emphasis added).

This language as well as Comcast's factual allegations based on this language clearly sound in fraud as they require a violator of the statute to engage in fraudulent conduct designed to *mislead* or to obtain information through *false or fraudulent pretenses*. Hence, Comcast's allegations based on "information and belief," notably paragraph 25, must be plead under Rule 9(b).²

Similarly, Comcast's Count II is brought under CAN-SPAM, 15 U.S.C. § 7704(a)(2), which states:

(a) Requirements for transmission of messages.

(2) Prohibition of deceptive subject headings. It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message if such person has *actual knowledge, or knowledge fairly implied on the basis of objective circumstances*, that a subject heading of the message would *be likely to mislead a recipient*, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message (consistent with the criteria used in enforcement of section 5 of the Federal Trade Commission Act (*15 U.S.C. 45*)). (emphasis added).

This language as well as Comcast's factual allegations based on this language clearly sound in fraud as it requires a violator to have actual knowledge that the email they are sending will likely mislead its recipient. Hence, Comcast's allegations must be plead under Rule 9(b). Comcast's allegations, notably paragraph 26, is plead on "information and belief" and is insufficient under Rule 9(b).

While factual fraudulent allegations proffered on "information and belief" are not improper per se, they will only comport with Rule 9(b) if they are accompanied by an

² Similarly, Comcast failed to plead any factual allegations in support of its claims under Paragraph 53 that accuses e360 of "regularly send[ing] messages that include originating e-mail address, domain names, and IP addresses that were obtained by means of false or fraudulent pretenses or representations that are materially misleading." This Court need not accept blanket conclusory allegations stated without a shred of supporting evidence.

explanation as to why the facts are unavailable and a statement of the grounds for believing the existence of those facts. See, *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 684 (7th Cir. 1992). Here, Comcast has failed to state why they have pled on “information and belief”, why the facts alleged are unavailable or what grounds they have for believing their allegations to be true. Indeed, Comcast would have a hard time stating why they don’t have information related to their allegations or why the facts are unavailable to them considering Comcast claims both in its Motion to Dismiss and here that they filter emails based on content and have sophisticated means on identifying what is in emails so that they can block spam. If Comcast is so sure of the reasons they have blocked e360’s emails to its customers then why do they need to plead on “information and belief.” Why can’t Comcast provide the Court and Defendants with at least one email or shred of evidence to support their absurd claims?

Fed. R. Civ. P. Rule 9(b) imposes more stringent pleading requirements upon complaints charging fraud than on complaints charging other types of misconduct. Fed. R. Civ. P. 9(b). In *DiLeo v. Ernst & Young*, the Seventh Circuit held that plaintiffs must plead the circumstances constituting fraud in detail -- the "who, what, when, where, and how. . ." *DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir.), cert. denied, 498 U.S. 941, 111 S. Ct. 347, 112 L. Ed. 2d 312 (1990). Comcast’s pleadings are essentially devoid of any detail. Thus, Comcast’s pleadings are insufficient as a matter of law and should be dismissed.

F. Comcast’s Allegations Under CAN-SPAM Fail to State A Claim Upon Which Relief Can be Granted.

In Count I, Comcast alleges that Defendants violated CAN-SPAM’s requirements concerning the accuracy of header information. The Act provides “it is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message...that contains, or is accompanied by, header information that is materially false or

materially misleading.” 15 U.S.C. 7740 (a)(1). Thus, Comcast must allege that Defendants have initiated and/or transmitted email messages to a protected computer with materially false or misleading header information.

Comcast has failed to so allege. Comcast’s allegations state only that “on information and belief, some of Defendant’s commercial emails contain misleading or false header or subject line information.” D. Comp. ¶ 25. There is no allegation that e360 materially mislead or used fraudulent means as required. Simple inaccuracies, if any existed at all, (which e360 denies) are insufficient to meet the CAN-SPAM. *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 357 (4th Cir. 2006). Comcast’s failure to allege or attach even a single email to its Counterclaim and Complaint showing anything false or materially misleading regarding e360’s emails is indicative that this is nothing more than a fishing expedition.

Similarly, Comcast’s allegations that e360 has sent “hundreds or thousands, if not millions, of email messages” in violation of the Act while failing to provide even one single email showing a violation further shows that Comcast’s Counterclaim and Complaint is a fishing expedition meant only to intimidate and harass.

G. Comcast Fails to Properly Plead its Claim for Violation of the Illinois Electronic Mail Act and Fails to State A Claim Upon which Relief May be Granted.

Just as the CAN-SPAM Act is subject to Rule 9(b) pleading requirements so too should the Illinois Electronic Mail Act (hereafter “Illinois Act”), 815 ILCS 511/10. Under the Illinois Act, “No individual or entity may initiate or cause to be initiated an unsolicited electronic mail advertisement if the electronic mail advertisement...contains false or misleading information in the subject line.” 815 ILCS 511/10. Such language assumes violators will use knowingly false statements to induce recipients to act in reliance on such statements and that the recipients will

thus be damaged. These are the exact requirements for Illinois common law fraud.³ Similarly, under 815 ILCS 511/15, the Illinois Legislature contemplated that a “violation of this Act constitutes an unlawful practice under the Consumer Fraud and Deceptive Business Practices Act.” Thus, Comcast’s allegations must be pled under Rule 9(b).

Comcast’s allegations are insufficient as a matter of law under Rule 9(b). Comcast pleadings are, as mentioned above, on “information and belief” without the proper statements as to why Comcast doesn’t have the information necessary to properly plead. This is especially troubling because Comcast throughout its own Motion to Dismiss claimed thorough knowledge of e360’s emails and their contents. Comcast’s Complaint of nearly fifty percent “on information and belief” pleading is nothing more than a fishing expedition and should be dismissed.

Comcast also failed to state a claim upon which relief can be granted. Comcast is required to plead that e360 has sent or attempted to send unsolicited electronic mail advertisements that contain false or misleading information in the subject line. Comcast is also to plead that consumers relied on such statements to their detriment. Here, Comcast has pled “on information and belief” that “some of [e360’s] commercial emails contain misleading or false header or subject line information.” Para. 25 And that “on information and belief, not all of the intended recipients of [e360’s] commercial emails have opted in to receive such email messages.” Para. 28. So Comcast essentially pleads that “on information and belief” some of e360’s emails have been sent to consumers who didn’t want to receive them and some may have “on information and belief” contained false statements. Another way to view Comcast’s allegations is that e360 “on information and belief” sent emails with perfectly correct statements

³ In Illinois, the elements of common law fraud are: (1) a false statement of material fact; (2) defendant's knowledge or belief that the statement was false; (3) defendant's intent to induce plaintiff to act; (4) plaintiff's reliance on the truth of the statement; and (5) plaintiff's damages resulting from that reliance. Board of Educ. v. A, C & S, Inc., 131 Ill. 2d 428, 546 N.E.2d 580, 591, 137 Ill. Dec. 635 (Ill. 1989).

in the subject line to consumers who requested to receive them. Of course, since everything is on “information and belief” and Comcast offers nothing but conjecture it is hard to determine what is actually being plead.

Similarly, Comcast failed to plead that anyone relied on any statement made by e360 to its detriment. In fact, under Comcast’s statements no consumers have received e360’s commercial emails because Comcast has been blocking them since 2005. Para. 31. Comcast’s pleadings fail as a matter of law without such pleading. Comcast’s failure to state a claim upon which relief can be granted is grounds for dismissal of Count III.

H. Count IV Should Be Dismissed As Barred By The Applicable Statute Of Limitations.

Count IV of the Counterclaims attempts to state a cause of action based on the violation of 18 U.S.C. § 1030. Comcast alleges: “Comcast’s Filtering Technology has filtered out Defendant’s spam since as early as 2005.” (ECF Doc. No. 28-2 at ¶ 31). Comcast does not allege any subsequent wrongful acts.

§ 1030(g) states that “No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage.” By Comcast’s own admission, it was aware of the allegedly harmful acts of Defendants as early as 2005. However, Comcast did not institute its claim based on alleged violations of 18 U.S.C. § 1030 until March 18, 2008.

Comcast’s claim based on 18 U.S.C. § 1030 is barred by the statute of limitation imposed by § 1030(g) and should be dismissed with prejudice.

I. Count V Should Be Dismissed For Failure To State A Cause Of Action.

To prevail on a claim for Trespass to Chattels, Counter-Plaintiff must allege and prove actual damages. *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 359 (4th Cir.

2006). Nominal damages are insufficient to prevail on a claim for Trespass to Chattels. *Id. see also Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1 Cal. Rptr. 3d 32, 71 P. 3d 296, 302 (Cal. 2003) (quoting *Restatement (Second) of Torts* § 218 cmt. e (1965)). Counter-Plaintiff's Counterclaim makes clear that it suffered, at most, nominal damages and therefore Count V should be dismissed with prejudice.

Counter-Plaintiff alleges that it "filters about 500,000,000 spam e-mails per day". (ECF Doc. No. 28-2 at ¶ 2). Counter-Plaintiff further alleges that Defendants "have attempted to send hundreds of thousands, if not millions, of spam e-mails to Comcast's subscribers since as early as 2005 ..." *Id.* at ¶ 30. Even assuming that Defendants sent 2,000,000 e-mail to Comcast's subscribers, and assuming that all of the e-mail were sent on the same day, that would only account for .4% of all of the allegedly spam e-mail Comcast claims to receive on a given day. Accepting Comcast's allegations as true demonstrates that the allegedly offending e-mails Comcast claims were sent by Defendants represent nothing more a nominal incursion and are therefore not actionable.

J. Count VI Should Be Dismissed For Failure To State A Cause Of Action.

Count VI of Comcast's Counterclaim is based on the theory of unjust enrichment. In cases such as this, where the alleged unjust benefit flowed from a third-party, Comcast must allege "the benefit should have been given to [Comcast], but the third party mistakenly gave it to the defendant instead; (2) the defendant procured the benefit through the third party through some type of wrongful conduct; or (3) the plaintiff for some other reason had a better claim to the benefit than the defendant." *HPI Health Care Serv., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill.2d 145, 160, 545 N.E.2d 672, 137 Ill. Dec. 19 (IL 1989).

First, Comcast has failed to state a cause of action because it does not state what wrongful conduct, and by which parties, resulted in the acquisition of a benefit to which the Defendants are not entitled.

Assuming *arguendo* that Comcast did sufficiently identify the wrong, the claim still fails because a “defendant's ‘wrongful conduct’ alone will not support a claim for unjust enrichment under the second method if [Comcast] has no ‘claim’ or ‘entitlement’ to the monies.” *Sotelo v. DirectRevenue, LLC*, 384 F. Supp. 2d 1219, 1234, 2005 U.S. Dist. LEXIS 18877, *40 (N.D. IL 2005) *See McCabe v. Crawford & Co.*, 210 F.R.D. 631, 642-43 (N.D. Ill. 2002) (dismissing unjust enrichment claim because plaintiff did not allege that he paid any money to defendants). Here, Comcast does not make, and cannot make, a claim on any monies allegedly earned by Defendants through the allegedly harmful act of sending commercial e-mails to Comcast’s customers. For this reason, Comcast has failed to state a claim for unjust enrichment and this Count VI should be dismissed with prejudice.

K. Count VII Should Be Dismissed Because The Mere Filing Of A Lawsuit Is Not Sufficient To Allege Abuse Of Process.

In order to state a cause of action for abuse of process, Comcast must allege “that defendants had an ulterior purpose for filing a lawsuit and that they acted in a way that was not proper in the regular prosecution of the suit.” *Bonney v. King*, 201 Ill. 47, 50-51, 66 N.E. 377, 378 (Ill. 1903). To satisfy the second element, the party asserting the cause of action “must allege that ‘process has been used to accomplish some result which is beyond the purview of the process or which compels the party against whom it is used to do some collateral thing which could not legally be compelled to do.’” *Baldwin Piano, Inc. v. Deutsche Wurlitzer GMBH*, 2003 U.S. Dist. LEXIS 13425 *9 (N.D. Ill. 2003) (reversed on other grounds) quoting *Doyle v. Shlensky*, 120 Ill. App. 3d 807, 458 N.E.2d 1120, 1128, 76 Ill. Dec. 466 (Ill. App. Ct. 1983).

“Illinois law *unequivocally* requires acts beyond the mere filing of a complaint to create a cause of action for abuse of process.” *Marchese v. Dobry*, 2001 U.S. Dist. LEXIS 5985 *5 (N.D. Ill. 2001) (emphasis added). Thus, the “mere institution of a legal proceeding, even without foundation and merely intended to harass the defendant, does not constitute abuse of process.” *Wabash Publishing Co. v. Flanagan*, 1990 U.S. Dist. LEXIS 2102, 1990 WL 19977, *5 (N.D. Ill. 1990) see also *Installation Servs. v. Elecs. Research, Inc.*, 2005 U.S. Dist. LEXIS 29832 *21 (N.D. Ill. 2005) (The mere filing of a lawsuit [] is not enough to sustain a claim for abuse of process). An abuse of process claim “lies in the improper use of the legal process *after* it has been issued.” *Wade v. Am. Airlines, Inc.*, 2003 U.S. Dist. LEXIS 15300 *7 (N.D. Ill. 2003). (emphasis in original). Finally, “Illinois courts have generally taken a very restrictive view of the tort of abuse of process [and] the word “process” has been given its literal meaning. *Commerce Bank, N.A. v. Plotkin*, 255 Ill. App. 3d 870, 872, 627 N.E.2d 746, 748 (Ill. App. 3rd 1994). See also *Doyle v. Shlensky* 120 Ill. App. 3d 807, 816, 458 N.E.2d 1120, 1128, 76 Ill. Dec. 466 (Ill App. 1st1983), (“Process is issued by the court, under its official seal and must be distinguished from pleadings, which are created and filed by the litigants”).

Comcast’s Counterclaim is void of any allegation that e360 has misused the legal process. Comcast’s only allegations relate to the allegedly ulterior purpose e360 had in filing the lawsuit. Nowhere does Comcast allege that e360 has done some act not proper in the regular prosecution of the suit.

Count VII of Comcast’s Counterclaim should be dismissed with prejudice because Comcast has not and cannot allege an improper act in the prosecution of its lawsuit against Comcast.

WHEREFORE, Counter Defendant and Third-Party Defendants respectfully request that this Court enter an Order dismissing David Linhardt from this action and dismissing all Counts with prejudice and any other relief this Court deems just.

Respectfully submitted,

Counter-Defendants and Third-Party Defendants

By: /s/ Bartly J. Loethen
One of their Attorneys

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion to Dismiss the Counterclaim and Third-Party Claim was served upon the attorneys listed below electronically through CM/ECF on April 16, 2008.

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