

**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 RECONSIDER PURSUANT TO F. R. C. P. 59(E)**

NOW COMES, Plaintiff, e360Insight, LLC (“e360”) 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 its Motion to Reconsider pursuant to Fed.R.Civ. P. 59(e), states as follows:

## **INTRODUCTION**

Plaintiffs move to reconsider the ruling for Defendant of Judgment on the Pleadings for the simple reason that it appears Plaintiff's assertions in its complaint, including the assertion that it was not and is not a "spammer" were wholly disregarded in rendering the opinion. The second line of the Opinion and Order states "Some, perhaps even a majority of people in this country would call it a spammer" is indicative of this bias and erroneous assumption made in this case. In the complaint, e360 states that it is not a spammer and states that all email messages are requested by its customers. These statements must be taken as true by the court in this motion, and clearly it has not been, as the statement above indicates. This is merely one statement that was not taken as true and is indicative of the erroneous ruling based on improper factual assumptions in this case.

## **ARGUMENT**

### **A. Legal Standard.**

A motion for reconsideration filed within ten<sup>1</sup> days following the entry of an order is governed by Fed. R.Civ.P. 59(e). The grounds for a Rule 59(e) motion include "newly discovered evidence, an intervening change in the controlling law, and manifest error of law [or fact]." *Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998). It is the duty of the moving party to "clearly establish" the aforementioned grounds. *Harrington v. City of Chicago*, 433

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<sup>1</sup> Rule 59(e) requires that motions to alter or amend a judgment must be filed within 10 days. Pursuant to Rule 6(a), when computing time, the day of the entry of the judgment is not included and when the amount of time proscribed is less than 11 days, intermediate Saturdays and Sundays shall be excluded. The Judgment on the Pleadings was granted on April 10, 2008 (Docket No. 44) and thus, ten days later not including intermediate Saturdays and Sundays is April 24, 2008.

F.3d 542, 546 (7th Cir. 2006). A party is not entitled to “to undo its own procedural failures or present new evidence or arguments that could and should have been presented to the district court prior to judgment.” *Woolner v. Flair Comm'cns Agency, Inc.*, 2005 U.S. Dist. LEXIS 42489, at \*1 (N.D. Ill. Jan. 31, 2005). The Rule is designed to enable “a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings.” *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995).

**B. Comcast is not immune under the Communications Decency Act.**

E360 has pled the absence of good faith in Comcast’s action toward it and thus Comcast is not entitled to the exemption offered under the Communications Decency Act in any reading of the statute. *see* 47 USCS § 230(c)(2)(A). In its Complaint, e360 states: (i) it has complied with Comcast’s Acceptable Use Policy (paragraph 13 of Complaint), (ii) Comcast refuses to provide e360 with any information as to how e360 could modify its email messages to avoid triggering the block of its rightfully sent email messages (Complaint p. 16); (iii) Comcast blocks based on content such as the use of the word “free” (see generally p. 19 Plaintiff’s Complaint) (iv) Comcast has regularly blocked double-confirmed emails (Complaint p. 19); (v) Comcast arbitrarily censors e360’s email (Complaint p. 19); (vi) Comcast has transmitted fraudulent “bounce data” making it impossible for Plaintiff to reasonably ascertain how or why the emails are being blocked (p. 24 of Complaint); and (vii) that Comcast is blocking e360’s email messages that are compliant with Comcast’s policies and allowing other email marketers with substantially similar business practices as those employed by e360 to send messages to Comcast’s customers (Complaint p. 58). These paragraphs detail Plaintiff’s allegations that Comcast is acting arbitrarily in blocking email sent by e360 to its customers who wish to receive the email. Assuming Plaintiff’s Complaint to be true, this is a sufficient allegation of bad faith

on the part of Comcast, and should be sufficient to allow the case to move forward and additional discovery to be undertaken to determine the full extent of Defendant's bad faith. *see Gillman v. Burlington N. R. Co.*, 878 F.2d 1020, 1022 (7<sup>th</sup> Cir. 1989) (when ruling on a motion for judgment on the pleadings, district court is required to accept as true all facts alleged in the complaint and to draw all reasonable inferences from the pleadings in favor of the non-moving party).

**C. e360 Has Plead Each Count of Its Complaint Properly.**

**1. Plaintiff has properly pled its claim for tortious interference with prospective economic advantage.**

The ruling of the court dismisses this count with a footnote stating the count is difficult to understand and the Court seems to characterize Plaintiff's business as mere advertisement, with the inability to send the advertisement being the sole source of the potential damage. This statement is clearly in error as it seems to focus on potential damages which could be proven in the course of a trial rather than proper pleading.

In addition, the Court made a fundamental error of fact when it falsely assumed that every message e360 sends is perceived to be spam by "perhaps even a majority of people in this country." As stated in its complaint, Plaintiff states "e360...sends emails to consumers who...purchase goods and services from its proprietary company owned website." (Complaint p. 27). E360 sends different types of email messages to its customers, including signup confirmation messages, order confirmation messages, back-order notification messages and order shipping notices. These messages are sent in e360's normal course of business as an e-commerce service provider. The vast majority, if not nearly all e-commerce websites send these types of transactional messages and consumers have come to expect to receive them. E360 is unaware of any organization or individual, including Comcast who believes an order confirmation message is spam. Nevertheless, Comcast blocks all of these messages, advertising

messages and transactional messages, and does so without explanation or justification and with intent to cause e360 harm.

Plaintiff has alleged each and every element of the tort. Plaintiff had a expectancy of a valid business relationship with those who had signed up to receive email offers from Plaintiff; defendant clearly knew of this relationship, as it was aware of the offers and blocked the delivery of the offers, thus such interference was intentional, and the failure of such delivery has damaged Plaintiff, as is alleged in the complaint and must be taken as true. *Cook v. Winfrey*, 141 F.3d 322 (7<sup>th</sup> Cir. 1998) (identifying elements necessary to state a cause of action for tortious interference). Plaintiff will be able to prove those damages at trial. Plaintiff has a vast amount of empirical evidence that directly links its ability to deliver email messages to a direct and substantial affect on Plaintiff's revenue and Plaintiff should be allowed to prove its adequately pled case.

**2. e360 has properly pled its claims for violations of the Computer Fraud and Abuse Act ("CFAA").**

Although difficult to understand, and also in a footnote, Plaintiff's claim for violation of the CFAA is dismissed for (evidently) the reason that any initiation of computer to computer contact is at the door of e360 and not Comcast. The Court clearly misconstrues the action alleged in this claim. Plaintiff alleges in its Complaint that Comcast has engaged in "denial-of-service" attacks, which must be accepted as true at this stage of the case. 18 U.S.C. § 1030(a)(5)(A)(i) and (iii). It is incorrect to assume that because e360 is sending email to a client who has an expectation of receiving such email that the intended recipient's email service provider should be entitled to tie up the sender's computer for hours for a message that should take seconds to deliver merely due to the fact that there are several more emails to others originating from the same computer. This type of attack is initiated by Comcast, draws the e360

computers into a slow dialogue, and denies e360 computers the ability to continue at proper speed. This is the equivalent of bombarding a computer with information causing the computer to be unable to function properly (akin to many of the computer worms and viruses that gave rise to this law). Plaintiff has alleged such attacks have occurred and should be allowed to prove its case.

The Court misconstrues Plaintiff's claim that "Comcast frequently transmits false bounce information to e360's mail servers." (Complaint p. 42). As stated in its complaint, Plaintiff defines false bounce information as "false information on the status of an email account." e360's customers have signed up using email addresses managed by Comcast, including those addresses containing a "@comcast.net" address. In these instances Comcast is the sole authority as to the status of these email addresses and whether the email addresses are in an active status and able to receive email messages. Plaintiff has pled that Comcast intentionally sends false information to e360 about the status of Comcast email addresses provided to e360 by e360 customers. For example, if e360 sends an email message to JohnSmith@comcast.net, Comcast sends a message back to e360 stating: JohnSmith@comcast.net is "not our customer" or "account is no longer active" or "mailbox is currently unavailable." Plaintiff has properly pled that these statements made by Comcast are false statements and thus in bad faith. In addition, since Comcast is the sole authority on the status of a comcast.net email account and e360 has no other way to confirm or verify the status of its customers' email addresses, and Plaintiff has pled that "...Comcast's actions have directly resulted in the destruction of e360's proprietary data and asset, its database." (Complaint p. 43). The Court improperly dismisses Plaintiff's claim, again in a footnote and states, "I do not understand what is being alleged." Clearly, the Court simply

dismissed Plaintiff's claim based on a lack of understanding even though Plaintiff clearly stated and defined the terms used in its claim.

**3. e360 has properly pled unfair competition and business practices.**

Again in a footnote, the Court dismisses Plaintiff's claim for unfair business practices. The Court is clearly in error to determine factually, without presentment of any evidence, that Comcast did not deceive e360. E360 has pled Comcast did deceive it and that fact must be accepted as true at this stage of the pleadings. Further, the Court has stated e360 is not a consumer, but this is a clear error of law, as *Roche v. Country Mut. Ins. Co.* sets forth that a party need not be a consumer itself to bring a claim under this act so long as there is a "consumer nexus". *Roche v. Country Mut. Ins. Co.*, 2007 U.S. Dist. LEXIS 48921 \*25 (S.D. Ill 2007). When, as is the case here, both entities are commercial entities, "the test for standing is whether the alleged conduct invokes trade practices addressed to the market generally or otherwise implicates consumer protection concerns." *Stepan Co. v. Winter Panel Corp.*, 948 F.Supp. 802, 805-06 (N.D. Ill. 1996). Here, consumer protection is clearly implicated as Comcast's actions are directly impacting consumers (Comcast customers) that have requested to receive e-mail from e360 and are being denied access to e360's e-mail through the arbitrary actions of Comcast. Moreover, e360 has adequately pled its cause of action and should be allowed to discover the facts necessary to prove its case, not be cut off by a premature determination that no deception has taken place.

**D. Conclusion.**

In summary, this Court must overturn its ruling in favor of Defendants on this matter, as there is a manifest error in law and fact. The Court has improperly assumed certain facts that must be taken as true as alleged by Plaintiff. It is improper to make assumptions of facts such as whether Plaintiff is a spammer and whether Comcast has deceived Plaintiff. It is improper to

base a ruling at this stage of the case on what the Court deems of its own accord to be an absence of damages. It is improper to dismiss a claim based on an exemption that is not available when the Defendant shows bad faith and when Defendant's bad faith is pled in Plaintiff's Complaint. Plaintiff respectfully requests the Court reconsider its prior ruling and deny Defendant's Motion for Judgment on the Pleadings for the reasons set forth herein.

Respectfully submitted,

Plaintiff

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 Reconsider pursuant to Fed.R.Civ. P. 59(e) was served upon the attorneys listed below electronically through CM/ECF on April 24, 2008.

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