

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

E360INSIGHT, LLC,)	
Plaintiff,)	
v.)	
COMCAST CORPORATION,)	
Defendant.)	
_____)	
)	
COMCAST CORPORATION,)	Case No. 08 C 0340
Counterclaimant,)	
v.)	Judge Zagel
E360INSIGHT, LLC,)	
Counterdefendant,)	Magistrate Judge Mason
)	
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,)	
and)	
)	
JOHN DOES 1-50,)	
Third-Party Defendants.)	

**COMCAST’S MEMORANDUM IN OPPOSITION TO
DEFENDANTS’ MOTION TO DISMISS**

Counterclaimant, Comcast Corporation (“Comcast”), submits this memorandum in opposition to the Motion to Dismiss filed by Counterdefendant e360insight, and third-party defendants David Linhardt, Maverick Direct Marketing Solutions, Inc., Bargain Depot

Enterprises, LLC, Northshore Hosting Company, LLC, Ravinia Hosting Company, LLC and Northgate Internet Services, LLC (collectively referred to as “Defendants”).

I. INTRODUCTION

Comcast’s claims address Defendants’ assault on Comcast’s subscribers, their inboxes, Comcast’s network, and the integrity and reliability of its Internet and e-mail services. Comcast’s Counterclaim and Third Party Complaint clearly alleges that Defendants are engaged in a scheme to market their products and services to hundreds of thousands, if not millions, of consumers, through the sending of unsolicited, false, and/or misleading commercial e-mails, or spam. (*See, e.g.*, Comcast’s Compl. ¶¶ 19, 23.) Comcast explicitly pleads that each Defendant participates in the scheme and sends spam on its own behalf as well as on behalf of and in concert with the other Defendants. (*See generally* Comcast Compl. ¶¶ 23-35.)

Comcast also alleges that, to facilitate their wrongful behavior, Defendants have taken extensive steps to hide their identities and the nature of their business activities and products. (Comcast Compl. ¶¶ 3, 22, 24, 42.) Naturally, since the purpose and result of Defendants’ conduct has been the concealment of their identities and involvement in the spam scheme, certain facts (and much of the evidence) showing the details of Defendants’ wrongful behavior are not presently within Comcast’s knowledge or control.

To distract the Court from Comcast’s well-pleaded allegations, Defendants’ Motion to Dismiss urges incorrect legal standards, and mischaracterizes, ignores, and in some cases merely denies the clear allegations of Comcast’s Complaint.

Defendants are not entitled to dismissal simply by telling the Court that they have not done what Comcast alleges they have done, nor by pointing to the absence of certain magic words or labels in Comcast’s pleading. Comcast’s pleading complies with Rule 8, FED. R. CIV. P., and sufficiently states claims against each Defendant. For these reasons and the reasons discussed herein, Comcast respectfully requests that the Court deny Defendants’ motion.

II. ARGUMENT

When deciding a motion to dismiss under FED. R. CIV. P. 12(b)(6), the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Erickson v. Pardus*, 551 U.S. ___, 127 S. Ct. 2197, 2200 (2007); *McMillan v. Collection Professionals Inc.*, 455 F.3d 754, 758 (7th Cir. 2006). A court may dismiss a claim “only if the complaint fails to set forth ‘enough facts to state a claim to relief that is plausible on its face.’”

St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 625 (7th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)).

A. Comcast's Pleading Complies With FED. R. CIV. P. 8

1. Comcast Need Not Plead Evidence in its Complaint

Ignoring federal pleading requirements, Defendants repeatedly fault Comcast for not presenting "evidence" to support its claims and suggest that failure to do so warrants dismissal. (*See, e.g.*, Defs. Mot. pp. 5, 6, 9, 10.) Specifically, Defendants argue that Comcast: has no "evidence of wrongdoing" by the Third-Party Defendants (Defs. Mot. p. 5); filed its complaint "without any evidence" (Defs. Mot. p. 6), and that it failed to provide "a shred of evidence" to support its claims. (Defs. Mot. p. 9.)

Comcast is not required to plead evidentiary support in its complaint. The Supreme Court has recognized that, in setting forth the short and plain statement required by Rule 8(a), "specific facts are not necessary," *Erickson v. Pardus*, 551 U.S. at ___, 127 S. Ct. at 2200, and this Court has stated that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations." *Walker v. S.W.I.F.T. SCRL*, 491 F. Supp. 2d 781, 788 (N.D. Ill. 2007).

2. "Information and Belief" Allegations Are Proper and Sufficient

Defendants also argue – without support – that Comcast's Complaint should be dismissed because Comcast has pleaded some of its allegations "on information and belief" (Defs. Mot. pp. 5, 6, 8, 9.) This Court has routinely held that allegations made "on information and belief" satisfy the short, plain statement requirement of Rule 8(a). *See, e.g., Mitsubishi Electric Corp. v. IMS Technology Inc.*, 44 U.S.P.Q.2d 1904, 1912 (N.D. Ill. 1997) (denying defendant's motion to dismiss on the basis that plaintiff's allegations were made "on information and belief").

"Information and belief" allegations are particularly justified here. Comcast has alleged that Defendants have intentionally obscured information about their activities, making such information particularly within their knowledge and control. For example, because Defendants send spam from a variety of IP addresses and domain names, registered to a variety of entities (masking the true owner of the IP addresses and domain names in question), Comcast cannot identify with certainty spam originating from Defendants without a list of all IP and domain addresses owned and controlled by Defendants. (*See Comcast Compl.* ¶ 22.) Defendants should

not be allowed to complain that Comcast cannot pinpoint details of facts Defendants have made a concerted effort to hide.

3. Comcast's Claims Do Not Require Pleading With More Particularity

Defendants assert that Comcast's CAN-SPAM and Illinois Electronic Mail Act ("ILEMA") claims "sound in fraud" and are therefore subject to the requirements of FED. R. CIV. P. 9(b). (Defs. Mot. pp. 7-9, 10-11.) Like most federal courts, this Court has yet to consider whether claims under CAN-SPAM and the state's anti-spam laws are subject to heightened pleading requirements. District courts in Washington have considered the issue, however, holding that claims under CAN-SPAM and the analogous Washington anti-spam statute do not "sound in fraud." *Gordon v. Virtumundo, Inc.*, No. 06-0204-JCC, 2006 WL 3873368, at *3 (W.D. Wash. Dec. 8, 2006); *Gordon v. Impulse Mktg Group, Inc.*, 375 F.Supp.2d 1040, 1048 (E.D. Wash. 2005).¹

In *Virtumundo*, the plaintiff claimed that defendants (also online marketing companies) had sent commercial e-mails containing materially misleading subject lines in violation of CAN-SPAM and Washington's anti-spam statute.² Acknowledging that the "materially misleading" subject line allegation could be considered an allegation of a false representation of material fact, the court nevertheless held that neither the claims nor the plaintiff's factual allegations "sounded in fraud." 2006 WL 3873368 at *3. The court ruled that plaintiff's claim did not involve assertions akin to common law fraud, namely that defendants *knew* the subject lines were misleading, that they had the *intent* to deceive, nor that plaintiffs took action in *reliance* on the misrepresentations. *Id.* Accordingly, the court refused to dismiss plaintiff's CAN-SPAM and related state claims for failure to plead in accordance with Rule 9(b). *Id.* Likewise, in *Impulse Marketing*, the Washington district court held that claims under Washington's anti-spam statute do not "sound in fraud." 375 F. Supp. 2d at 1048. As in *Virtumundo* and *Impulse Marketing*, Comcast's claims under CAN-SPAM and the ILEMA, and the facts alleged to support these

¹ The Washington Commercial Electronic Mail Act is nearly identical to the ILEMA, prohibiting "the transmission of a commercial electronic mail message...that...contains false or misleading information in the subject line." RCW § 19.190.020. Likewise, the ILEMA prohibits the sending of "unsolicited electronic mail advertisement if the electronic mail advertisement ... (ii) contains false or misleading information in the subject line." 815 ILCS 511/10(a)(ii).

² Notably, *Virtumundo* is one of the companies that Comcast has alleged cooperated with Defendants to exploit the injunction obtained by Defendant e360 against anti-spam website and organization Spamhaus, by default. (Comcast Compl. ¶¶ 46-48.)

claims, are not “averments of fraud” subject to the heightened pleading requirements of Rule 9(b).

Even if this Court were to construe Comcast’s CAN-SPAM and ILEMA claims as “averments of fraud” subject to Rule 9(b), Comcast has sufficiently pleaded these claims. It is well established that, under Illinois law, the requirements of Rule 9(b) are relaxed when, as here, the plaintiff lacks access to all facts necessary to provide the details of the claim because necessary information is particularly within defendants’ knowledge and control. *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998); *U.S. ex rel. Kennedy et al. v. Aventis Pharmaceuticals*, 512 F.Supp.2d 1158, 1167 (N.D. Ill. 2007); *Deluxe Media Services, LLC v. Direct Disc Network, Inc.*, No. 06 C 1666, 2007 WL 707544, at *4 (N.D. Ill. March 2, 2007); *Interlease Aviation Investors II (Aloha) LLC v. Vanguard Airlines, Inc.*, 262 F. Supp. 2d 898, 914 (N.D. Ill. 2003); *Trans Union, LLC v. Credit Research Inc.*, No. 00 C 3885, 2001 WL 648953, at *3 (N.D. Ill. June 4, 2001). This Court has further recognized that a plaintiff is most likely to lack access to specific details when it makes allegations against multiple defendants engaged in a collective scheme. *Vanguard*, 262 F. Supp. 2d at 914 (“[i]t is obvious that a plaintiff may not be privy to the workings of a group of defendants who have acted in concert to defraud him”). Under the relaxed Rule 9(b) standard, this Court has held “information and belief” pleading can be enough. *See Deluxe Media*, 2007 WL 707544, at *4; *Aventis*, 512 F. Supp. 2d at 1167.

Defendants are a group of at least six businesses and an individual engaged in a scheme to send unlawful e-mails. They facilitate their unlawful activities by concealing their identities, the nature of their activities, and the source of their spam. (*See Comcast Compl.* ¶¶ 3, 22.)³ Thus, specific details about Defendants’ e-mail practices are particularly within Defendants’ knowledge and control, making it impossible for Comcast to allege such details in the Complaint. Although Comcast cannot identify all of the details, Comcast has set forth facts regarding the role of each Defendants in the spam scheme. (*See Comcast Compl.* ¶¶ 7-14, 20-22.) Comcast has pleaded facts regarding the nature of the Defendants’ e-mails, the intended recipients of the e-mails, and the method by which the Defendants mask their identities and the

³ In fact, because Defendants conceal their identities and the nature of their activities, Comcast has pleaded these claims not only against the named Defendants, but also against as yet unidentified parties.

sources of their spam. (*See* Comcast Compl. ¶¶ 22-29.) Comcast's Complaint demonstrates that Comcast has reasonable grounds for its suspicion that each Defendant has taken part in the spam scheme and that the spam violates CAN-SPAM and ILEMA, claims that Comcast reasonably anticipates will be brought out by discovery in this case.⁴

If the Court finds that Comcast's Complaint is not properly pleaded under the applicable standard, the appropriate remedy would be for the Court to grant Comcast leave to amend its Complaint, not dismissal.

B. Comcast Has Stated Claims Against Each Defendant

1. Comcast Has Adequately Pleaded Claims Against Linhardt

Comcast has alleged that Linhardt personally directs and controls Defendants' activities (Comcast Compl. ¶ 8), has made misrepresentations to Comcast in furtherance of Defendants' unlawful activities (Comcast Compl. ¶ 33), and has brought numerous frivolous lawsuits in further pursuit of the Defendants' illegal scheme (Comcast Compl. ¶¶ 34, 39, 49). He is liable individually for the alleged torts.

The Seventh Circuit has held that where a corporate officer directs and controls the activities of his various companies, makes day-to-day decisions, and furthers an unlawful scheme to defraud consumers, the corporate officer is personally liable for such wrongdoings. *FTC v. Bay Area Business Council, Inc.*, 423 F.2d 627, 636 (7th Cir. 2005) (“[a]s the mastermind behind the entire scheme... there is no question that [the corporate officer] had authority to control the defendant corporations” and was therefore liable for its unlawful activities).

Further, it is well-established that, under Illinois law, a corporate officer is liable for torts committed by his company if he participates in the tortious conduct. *ITOFCA, Inc. v. Hellhake*, 8 F.3d 1202, 1204 (7th Cir. 1993); *Veteran Supply co. v. Swaw*, 548 N.E.2d 667, 669-70 (Ill. App. 6th 1989); *Nat'l Acceptance Co. v. Pintura Corp.*, 418 N.E.2d 1114, 1117 (Ill. App. 2d 1981). Although Illinois courts have not specifically considered whether a corporate officer is liable for his company's CAN-SPAM violations, a Washington District Court recently denied a corporate officer's motion to dismiss a CAN-SPAM claim against him. *Omni Innovations, LLC v. Impulse Marketing Group, Inc.*, No. C06-1469MJP, 2007 WL 2110337, at *2 (W.D. Wash.

⁴ Furthermore, Comcast's Complaint satisfies the broad purpose of Rule 9(b) - to put Defendants on adequate notice of Comcast's claims so that they may respond to Comcast's Complaint. Defendants cannot play “hide the ball” and then claim they don't know where the “ball” is. Rule 9(b) was not designed to encourage such tactics.

July 18, 2007). In that case, the plaintiff claimed that the defendant, an officer, director and majority shareholder of his company, was directly liable for the company's CAN-SPAM violations since he assisted the company in sending the unlawful e-mails. *Id.* On a motion to dismiss, the court held that because the plaintiff alleged that defendant participated in the sending of the unlawful e-mails, plaintiff had properly pleaded a claim for the officer's personal liability under CAN-SPAM. *Id.*

Defendants' caselaw is inapposite; it posits that a corporate officer enjoys a qualified immunity for the wrongs of his company under contract or torts related to contracts, not claims such as the ones alleged here. (*See* Defs. Mot. p. 3.) Nor is there any merit to Linhardt's claims that he is shielded from personal liability because he is an officer of each of the corporate Defendants. Comcast is not seeking to hold Linhardt liable for torts committed by his companies simply because of his officer role. To the contrary, just as the plaintiff in *Bay Area Business Counsel*, Comcast has alleged that Linhardt is the mastermind of Defendants' scheme – directing, controlling, and participating the sending of unwanted and unlawful e-mails. Linhardt is therefore personally liable for such activities. *See Bay Area*, 423 F.2d at 636.

2. Comcast Has Alleged That Each Third-Party Defendant Has Engaged in Unlawful Activities

Comcast has sufficiently pleaded claims against Maverick, Bargain Depot, Northshore Hosting, Ravinia Hosting, and Northgate (the "Third-Party Defendants"). Comcast recognizes (and in fact, has pleaded) that the Third-Party Defendants are each separate businesses. Contrary to Defendants' assertion, Comcast is not seeking to hold them liable for the actions of any other Defendant, but for their own participation in the spam scheme.

Comcast clearly and explicitly alleges that each Third-Party Defendant has itself engaged in unlawful activities. For example, Comcast alleges as follows: "Maverick ...directs and controls the sending of hundreds of thousands, if not millions, of spam e-mails by Defendants" (Comcast Compl. ¶ 19); "Bargain Depot, among other things, provides knock-off, counterfeit or otherwise unauthorized goods marketed through mass e-mails sent by Defendants" (Comcast Compl. ¶ 20); "Northshore Hosting, Ravinia Hosting, Northgate and John Does 1-50 are in the business of registering domain names and IP addresses and sending spam on behalf of Defendants. [They] also register IP and domain name addresses ... often with private registry services, for the purposes of masking the true identity of the owners ... and the true parties responsible for sending spam." (Comcast Compl. ¶ 22.)

3. Comcast Alleges That Third-Party Defendants Are Engaged in More Than “Routine Conveyance”

Defendants’ assertion that Northshore Hosting, Ravinia Hosting and Northgate are immune under CAN-SPAM is baseless. Comcast has clearly alleged that each of them registers domain names and IP addresses in their own name to mask other Defendants’ activities and to themselves send spam. (*See* Comcast Compl. ¶¶ 22-30.) These activities go far beyond the “routine conveyance” of e-mails that is excluded from liability under CAN-SPAM.⁵ In addition, the CAN-SPAM Act makes clear that more than one entity can be liable for initiating an e-mail message.⁶ While each Defendant may have partaken in different parts of the initiation of spam e-mails, each can be held liable for violating CAN-SPAM, exactly as Comcast has alleged here.⁷ As such, Comcast has adequately pleaded claims against Northshore Hosting, Ravinia Hosting and Northgate.

C. Comcast Has Sufficiently Pleaded The Elements of Each Cause of Action⁸

Comcast has adequately pleaded its claims for violation of the CAN-SPAM Act, the Illinois Electronic Mail Act (“ILEMA”), trespass to chattels, the Computer Fraud and Abuse Act (“CFAA”), and abuse of process. In the service of their motion, Defendants ignore Comcast’s explicit allegations, and attempt to graft additional elements onto clear statutory causes of action.

⁵ “Routine conveyance” is defined under the CAN-SPAM Act as “the transmission, routing, relaying, handling, or storing, through an automatic technical process, or an electronic mail message for which another person has identified the recipients or provided the recipient addresses.” 15 U.S.C. § 7702(15).

⁶ 15 U.S.C. § 7702(9) & (12); *see also Omni Innovations*, 2007 WL 2110337, at *2.

⁷ Defendants appear to make the silly argument that because Northgate’s corporate name contains the term “Internet Services,” this establishes the scope of its activities and, thus, its immunity from liability. This is yet another instance of Defendants ignoring the clear allegations of Comcast’s complaint, which state that Northgate is involved in far more than “routine conveyance,” regardless of what its corporate name might suggest.

⁸ While Comcast does not agree with Defendants’ characterization of its unjust enrichment claim, Comcast is willing to withdraw unjust enrichment as a separate cause of action without prejudice. At this juncture, the Court may consider Comcast’s unjust enrichment claim to be a claim for relief on the other substantive causes of action. However, because the facts surrounding Defendants’ conduct are yet to be fully explored in discovery, Comcast requests that the Court allow it to re-allege the claim at a later date should additional relevant facts be discovered.

1. Comcast Has Stated Claims Under Section 7704(a)(1) of CAN-SPAM⁹

Comcast has sufficiently pleaded facts to support its claim under Section 7704(a)(1) of CAN-SPAM. While acknowledging Comcast's allegation that Defendants' e-mails contain "misleading or false header or subject line information" (Comcast Compl. ¶ 25), Defendants argue that Comcast has failed to state a claim under Section 7704(a)(1) because "there is no allegation that e360 *materially* mislead[s]" the recipients of its e-mails. (Defs. Mot. p. 10) (emphasis added).

This court has reiterated that "there are no magic words required to survive a motion to dismiss." *McDorman v. Smith*, No. 05 C 0448, 2006 WL 2355574, at *5 (N.D. Ill. Aug. 11, 2006). Even if lacking the supposedly magic word "materially," a cursory reading of Comcast's allegations shows that Comcast has sufficiently alleged that Defendants' e-mails contain "materially false or materially misleading header information" as required by 7704(a)(1). For example, Comcast alleges that Defendants conceal their IP and domain name addresses for purposes of sending spam and that such spam contains misleading and false subject lines. (*See* Comcast Compl. ¶¶ 24, 25.) Such concealment qualifies as "materially misleading" in violation of Section 7704(a)(1) of CAN-SPAM. *See FTC v. Bryant*, No. 3:04-CV-897-J-32MMH, 2004 WL 2504357, at *3 (M.D. Fla. Oct. 4, 2004) ("'materially,' when used with respect to header information, includes the alteration or concealment of header information in a manner that would impair the ability...to identify, locate, or respond to a person who initiated the electronic mail message..."). Thus, taking the facts alleged as true, Comcast is entitled to relief under CAN-SPAM and this Court should not dismiss such claims.

2. Comcast Has Stated a Claim for Violation of the ILEMA

The plain language of Section 109(a)(ii) of the ILEMA is clear: a plaintiff must allege that defendant sent (i) an unsolicited e-mail advertisement that (ii) contained false or misleading information in the subject line. 815 ILCS 811/10(a)(ii). Without any support or basis, Defendants read the extra elements of knowledge, intent, and reliance into the ILEMA claim, speculating that "[s]uch language assumes violators will knowingly use false statements to induce recipients to act in reliance on such statements and that the recipients will thus be

⁹ Defendants have not challenged Comcast's claim under Section 7704(a)(2) of CAN-SPAM. Thus, the Court can assume that Defendants' Motion to Dismiss does not seek dismissal for failure to state a claim under Count II of Comcast's Complaint.

damaged.” (Defs. Mot. pp. 10-11.) Those elements are nowhere to be found in the ILEMA; Defendants have created them from whole cloth.¹⁰

Although this Court has yet to apply the ILEMA, courts in other jurisdictions have applied nearly identical state anti-spam statutes without reading the extra elements of knowledge, intent and reliance into the claims. *See, e.g., Virtumundo, Inc.*, 2006 WL 3873368 at *3; *Impulse Mktg Group, Inc.*, 375 F. Supp. 2d at 1048. Here, Comcast has sufficiently pleaded facts that establish Defendants send unsolicited e-mail advertisements containing misleading subject line information. (*See* Comcast Compl. ¶¶ 24-29.) Therefore, Comcast has stated its claim under the ILEMA and this Court should deny Defendants’ Motion to Dismiss.

3. Comcast Has Adequately Pleaded a Claim For Trespass to Chattels

A long line of federal court cases, including before this Court, have expressly recognized trespass to chattels as a theory of liability against spammers. *Sotelo v. Directrevenue, LLC*, 384 F. Supp. 2d 1219, 1230 (N.D. Ill. 2005) (allegation that defendant’s activities overburdened and diminished the functioning of plaintiff’s computer and connection supported a claim for trespass to chattels); *see also America Online, Inc. v. IMS*, 24 F.Supp.2d 548 (E.D. Va. 1998) (sending spam through AOL’s system constituted trespass to chattels); *Hotmail Corp. v. Van\$ Money Pie Inc.*, C-98 JW PVT ENE, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998) (same); *America Online, Inc. v. LCGM, Inc.*, 46 F.Supp.2d 444, 452 (E.D. Va. 1998) (same); *America Online, Inc. v. Prime Data Systems, Inc.*, No. Civ.A. 97-1652-A, 1998 WL 34016692, at *3 (E.D. Va. Nov. 20, 1998) (same); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (sending spam to plaintiff ISP’s customers damaged plaintiff’s system by demanding disk space, draining processing power, and imposing inconvenience and Internet connection costs on plaintiff’s customers).

Like other ISPs that have successfully alleged trespass to chattels claims against spammers, Comcast alleges that Defendants have deprived it and its subscribers of the legitimate use of its network and services by sending millions of spam e-mails through Comcast’s network. (*See* Comcast Compl. ¶ 23.) The sending of spam through Comcast’s network drains Comcast’s

¹⁰ Defendants appear to argue that because the ILEMA was codified within the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”) it is subject to Rule 9(b)’s heightened pleading requirement. (Defs. Mot. p. 11.) This Court has held, however, that the fact that a statutory claim falls under the ICFA does not, in and of itself, make it an “averment of fraud;” the ICFA prohibits not only fraud, but a broad array of unfair practices. *See Gaddy v. Galarza Motor Sport L.T.D.*, No. 00 C 3893, 2000 WL 1364451, *4 (N.D. Ill. Sept. 20, 2000).

resources, degrades Comcast's network, and interferes with Comcast's ability to provide services to its subscribers. As set forth in the Complaint, Comcast expends significant resources protecting the integrity of its network by, among other things, filtering out Defendants' spam. (See Comcast Compl. ¶ 2, 16, 17, 31.)¹¹ In Illinois, this type of alleged harm supports a claim for trespass to chattels. See *Sotelo*, 384 F. Supp. 2d at 1229.

Defendants again attempt to distract the Court from the well-pleaded facts of Comcast's Complaint by using the buzz words "nominal damages" to assert that Comcast's trespass to chattels claim fails. (Defs. Mot. p. 13.) Despite Defendants' reliance on *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 328, 360 (4th Cir. 2006), Illinois courts do not require allegation and proof of actual damages as Defendants assert, and expressly recognize that an ISP's allegation against spammers that results in interference with the use of the network is enough to plead trespass to chattels.¹² *Sotelo*, 384 F.Supp.2d at 1230.

4. Comcast's CFAA Claim is Not Barred By The Statute of Limitations

In its own Complaint, e360 alleged that it sent e-mails (and thereby accessing Comcast's "protected computers") as recently as August 23, 2007 and December 11, 2007. (e360 Compl. ¶¶ 15, 18.) Now, Defendants claim that Comcast's CFAA claim is time-barred by the two year statute of limitations. Comcast alleges that Defendants have been accessing Comcast's protected computers "since 2005," with the clear implication that their activities have continued from 2005 to the present. (Comcast Compl. ¶ 31.) Certainly, claims arising from Defendants' activities in

¹¹ Notably, Defendants have admitted that their e-mail practices include continually bombarding Comcast's system by repeatedly attempting to send e-mail messages through Comcast's network even after Comcast's Filtering Technology has notified Defendants that their e-mails have been filtered out. (See e360 Compl. ¶ 18-19.)

¹² Furthermore, Comcast's Complaint alleges harm well beyond the harm alleged in *Mummagraphics*, 469 F.3d at 360. In that case, the Fourth Circuit, applying Oklahoma law, held that plaintiff failed to state a claim for trespass to chattels based on the sending of only *eleven* e-mails to its computers. *Id.* The Court held the sending of only eleven e-mails was insufficient to support a claim not only because the plaintiff failed to provide evidence supporting anything more than "nominal damages," but also because Oklahoma law had not recognized trespass to chattels as a theory of liability against spammers. *Id.* In contrast, Illinois courts do expressly recognize trespass to chattels in cases like this one, and Comcast has alleged that Defendants send *millions* of e-mails a day to its subscribers. (See Comcast Compl. ¶ 23, 30.) In any event, Comcast's allegations are not based solely on the number of spam e-mails sent by Defendants, but also on factors such as the nature of, and the means by which Defendants send spam. (See Comcast Compl. ¶¶ 23-32.)

2007 are not barred by the two year statute of limitations.¹³ Moreover, statute of limitations is an affirmative defense, and not properly subject of a motion to dismiss. *Doe v. GTE*, 347 F.3d 655, 657 (7th Cir. 2003).

5. Comcast Has Properly Alleged Its Abuse of Process
Claim Against e360 and Linhardt

Once again, Defendants ignore the well-pleaded allegations of Comcast's abuse of process claim to mischaracterize the scope of the allegations. Comcast has alleged numerous facts regarding e360 and Linhardt's actions far beyond merely filing a lawsuit. (Comcast Compl. ¶¶ 36-50, ¶¶ 76-80.) Comcast complains that e360 and Linhardt filed its frivolous lawsuit against Comcast with the ulterior motive of circumventing Comcast's Filtering Technology, and that they have taken additional steps in furtherance of this motive. For example, e360 moved for a preliminary injunction and expedited discovery regarding stale three-year old claims. e360 then refused Comcast's offer to evaluate e360's e-mails, indicating it would use what it learned in discovery to circumvent Comcast's Filtering Technology. (See Comcast Compl. ¶¶ 35, 76, 77, 78).

It is simply not true that "Comcast's only allegations relate to the allegedly ulterior purpose e360 had in filing the lawsuit." (Defs. Mot. p. 15.) Comcast has alleged that e360's lawsuit is part of e360 and Linhardt's pattern of filing frivolous lawsuits, using the legal system to intimidate ISPs, anti-spam organizations, and individuals dedicated to fighting spam, all for the purpose of undermining their legitimate and sanctioned anti-spam initiatives. (See Comcast Compl. ¶¶ 49, 50, 79, 80.) Comcast has alleged that e360 marketed or sold the injunction it obtained by default in the *e360 v. Spamhaus* proceeding in this Court (Comcast Compl. ¶¶ 36-50); surely selling an injunction entered by this Court to unrelated third parties to enable those parties to circumvent anti-spam measures relied upon by Comcast constitutes abuse of process.

¹³ The CFAA provides that the statute of limitations begins to run either on the date of the act complained of or upon *discovery* of the cause of action. 15 U.S.C. § 1030(g). Here, Comcast could not reasonably have discovered that e360 and Defendants were unlawfully accessing Comcast's protected computers prior to 2006 when Linhardt contacted Comcast. Comcast receives more than 500,000,000 spam e-mails daily and Defendants conceal the source of their spam e-mails. Moreover, despite Defendants' assertions to the contrary, Comcast has not admitted being "aware" of Defendants' activities since 2005; Comcast only learned that Defendants have been sending spam to Comcast's protected computers since 2005 from e360's January 15, 2008, Complaint.

Taking these allegations as true and drawing all reasonable inferences in Comcast's favor, Comcast has properly pleaded a claim for abuse of process against e360 and Linhardt.

III. CONCLUSION

For the foregoing reasons, Comcast respectfully asks the Court to deny Defendants' Motion to Dismiss Comcast's Counterclaim and Third-Party Complaint. In the alternative, to the extent the Court finds any deficiencies in Comcast's pleading, Comcast respectfully suggests that any such deficiencies are merely technical, and that it be given leave to replead.

Dated: May 8, 2008

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By: /s/ Douglas N. Masters

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CERTIFICATE OF SERVICE

I, Douglas N. Masters, hereby certify that a copy of **COMCAST'S MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** has been served upon:

Joseph L. Kish and Bartley J. Loethan
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730 West Randolph, 6th Floor
Chicago, Illinois 60661

Carla E. Buterman
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Via ECF Notification on this 8th day of May, 2008.

_____/s/ Douglas N. Masters_____