

STATE OF ILLINOIS )  
 ) SS  
COUNTY OF COOK )

AFFIDAVIT OF DAVID LINHARDT

I, David Linhardt, under oath states as follows:

1. I am the President of e360Insight, LLC (e360). I am 36 years old and competent to testify. I have personal knowledge of the matters stated in this affidavit and can and will truthfully testify as to those matters.

2. e360 is an email based marketing company whose business practices have, at all times, complied with federal and state requirements and standards pertaining to the sending of commercial email, including the *Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, 15 U.S.C. § 7701 (CAN-SPAM).

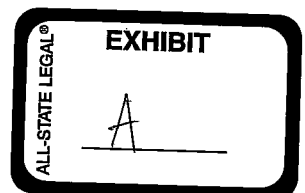
3. e360 uses Internet Service Providers (ISPs) to facilitate its marketing efforts on behalf of its business partners. At all times relevant to this case, e360 has complied with all Accepted Use Policies and Terms Of Service agreements stated by the ISPs.

4. e360 does not engage in "spamming". The internet marketing in which e360 engages employs a variety of permission processes that e360 controls, and that its marketing partners use, to obtain permission and consent from, and provide notice to, the consumers that receive the email messages.

5. Before December 2003, e360 had never been removed from any ISP for violating its Authorized Use Policy, Terms of Service, or any other policies and procedures.

6. Spamhaus acts as a blacklisting agent for ISPs, who purchase Spamhaus' blocking technology in order to police their Accepted Use Policies and Terms of Use Agreements for compliance. ISPs do this so they can assure their customers that they will not be inundated by unwanted email solicitations and messages.

7. One of the automated lists that Spamhaus generates is the ROKSO list.



8. Spamhaus notes on its website: *“ROKSO is a "3 strikes" register. We don't list inadvertent spammers or newbie marketing departments spamming 'by mistake'. To get to 3 strikes (i.e.: 3 terminations for spam offences such as emailing spam, hosting spammers, selling spamware) requires a very determined spam outfit. Being thrown off an ISP takes a lot of doing, nobody is thrown off an ISP without having been given ample warnings and chances to stop violating the ISPs Terms of Service. Being thrown off ISPs \*twice\* for the spam offences means the spammer is determined, knows the consequences, and has actually signed up to a new ISP with the specific intention of breaking the ISPs Terms of Service. Being thrown off \*three\* ISPs for spam offences means the spammer is a committed hard-line spam operation which regards ISPs as simply throwaway resources.” Id.*

9. On its website, Spamhaus promotes the efficacy of the ROSKO list by noting that it includes only serious offenders: *“ROKSO is a register of known hard-line professional spam operations (bulk emailers and "spam gangs") that have been thrown off Internet Service Providers 3 times or more for spamming or spam-related offenses. As the ROKSO database collates information and evidence on each gang, it's an invaluable tool for ISP Abuse Desks to vet prospective customers. For the legal departments of ISPs who are looking for the information linking the spam they get to the spammers sending it. Global Law Enforcement Agencies also use the data to help track down and bring to justice spammers who are violating any number of laws when spamming.” See <http://www.spamhaus.org/faq/answers.lasso?section=ROKSO%20FAQ>. Thus, by placing e360 and Linhardt on the ROKSO, even erroneously, Spamhaus can justify its heavy-handed tactics to third parties by telling them that they are dealing with a “hard-line” professional spam operation. As Spamhaus notes: *“No ISP with any sense will allow ROKSO spammers on their network.” See <http://www.spamhaus.org/rokso/about.html>.**

10. In December 2003, Spamhaus listed me and e360 on the ROKSO list.

11. Neither I nor e360 had ever been terminated from, or “thrown off of” any ISPs for violating any Acceptable Use Policy, Terms Of Service, or any other policy or procedure prior to the ROKSO listing.

12. I immediately brought Spamhaus’ error to its attention. I made numerous additional attempts to have my and e360’s names removed from the ROKSO list by communicating the problem directly to Spamhaus. Spamhaus refused and continued to keep me and e360 on the ROKSO list.

13. In addition to placing me and e360 on the ROKSO list, and refusing to remove me and e360 from it, Spamhaus continued to directly cause damage to e360 and me by coercing and intimidating e360’s business partners by conveying that continued involvement with e360 and me by such parties would have dire consequences for the partner’s ability to continue engaging in e-commerce on the internet.

14. Spamhaus facilitates these threats by labeling the partner a spammer solely due to its association with e360 and me. Spamhaus then indiscriminately blocks *all* of the partner’s e-mail from being sent regardless of its content. This action effectively puts partner out of business and prevents their customers from receiving important and legitimate email from the partner. Only when an e360 partner would terminate its agreement(s) with e360 and me would Spamhaus release the block.

15. Based on the circumstances stated above, e360 and I obtained a Temporary Restraining Order on July 20, 2006.

16. Defendant removed the then occurring references to e360 and me from the Spamhaus website on July 24, 2006.

17. Defendant subsequently removed the litigation to the Northern District of Illinois and answered the complaint.

18. On August 17, 18 and 19, 2006 Defendant placed new references to Plaintiffs, specifically “E360 Insight”; “E360Insight: Ravinia Hosting Company LLC”; “E360

Insight/e360data.com”; “e360Insight:bargaindepot.net/bargainshoppecorp.com”; “Discount Accessories aka e360data.com”; “Northgate Internet Services aka e360data.com”; and “E360 Insight/e360data.com: home base” on the Spamhaus website. These references are located on the Spamhaus website at the following internet addresses:

<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL26394>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45581>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45582>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45583>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45584>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45585>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45586>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45587>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45648>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45649>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45651>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45652>  
<http://www.spamhaus.org/sbl/sbl.lasso?query=SBL45685>

(True and correct copies of these pages are attached to this affidavit as Exhibit C.)

19. Discount Accessories, a sister company of e360 and a company owned by me was also listed as new Spamhaus blacklist references, which listings include references to me personally.
20. Ravinia Hosting Company, LLC a sister company of e360 and a company owned by me was also listed as new Spamhaus blacklist references, which listings include references to me personally.
21. Bargaindepot.net/Bargainshoppecorp.com, a division of e360 was also listed as new Spamhaus blacklist references, which listings include references to me personally.
22. The webpages referenced in paragraph 23 are all false because they connote that e360 and I are engaged in activity that is illegal, violates ISP’s Acceptable Use Policy, Terms Of Service, and other policies or procedures. e360, Discount Accessories, and I do not engage in any such activity.
23. The webpages referenced in paragraph 18 connote that e360 and I are “Spammers”, which we are not.

24. The webpages referenced in paragraph 18 are also false in the following specific ways: SBL45581, SBL45582, SBL45583, SBL 45584, SBL45648 and SBL45649 are all used to send messages to those “opting-in” to receive messages from a partner of e360 or one of the other listed entities. All of these listings comply with CAN-SPAM, none are unsolicited, and none of these listings have ever been associated with Brian Haberstroh or Atriks.

25. The webpages referenced in paragraph 18 are also false in the following specific ways: The ISP sending domains listed in SBL 45585, SBL 45586, and SBL 45587 were never used or controlled by me and were instead registered in error to Discount Accessories by the ISP. There is no possible way these Internet addresses were blocked due to e360 (or another listed entity owned by me) sending email messages, as I have never had the ability to send email from such Internet addresses.

26. The webpages referenced in paragraph 18 are also false in the following specific ways: SBL45651 is a listing that only has names which are “double confirmed,” such that the user has elected, by clicking a link for a second time to provide an additional affirmative consent, to receive the message. Thus, these listings conform to not only CAN-SPAM as well as all ISP Acceptable Use Policy, Terms Of Service and other policies and procedures, they conform to Spamhaus’ own guidelines for what are acceptable email transmissions that are exempt from listing on the Spamhaus website. None of these listings have ever been associated with Brian Haberstroh or Atriks.

27. The webpages referenced in paragraph 18 are also false in the following specific ways: SBL45652 is for an IP address that e360 has not owned or controlled since at least July 24, 2006. Thus the listing referenced could not have arisen as is indicated in the listing of August 18, 2006, as is alleged by Defendant.

28. The webpages referenced in paragraph 18 are also false in the following specific ways: SBL45685 references the static IP address for my personal cable modem located at my house. It is not used for transmitting any messages pertaining to e360 business except internally and no

bulk email has ever been sent from this address. Thus, this listings conforms to not only CAN-SPAM as well as all ISP Acceptable Use Policy, Terms Of Service and other policies and procedures, it conforms to Spamhaus' own guidelines for what are acceptable email transmissions that are exempt form listing on the Spamhaus website. This IP address has never been associated with Brian Haberstroh or Atriks.

29. The webpages referenced in paragraph 18 are also false in the following specific ways. SBL26394 conforms to CAN-SPAM as well as all ISP Acceptable Use policy, Terms Of Service and other policies and procedures.

30. The false listings and negative connotations arising therein have caused our sending of commercial email messages to cease. Thus we are unable to realize revenue from our business. Further, such listings are jeopardizing our data lines, our relationship with our ISPs, and our ability to earn revenue from legitimate business activity.

31. e360 and I have suffered disastrous consequences as a direct result of being placed on the Spamhaus lists and being subjected to Spamhaus' tactics. e360 generates revenue based on the volume of emails it sends to people on its client lists who have opted-in (that is, requested or agreed to receive the emails). e360 cannot generate this revenue when Spamhaus blocks e360 from sending the messages.

32. e360 and I also have had active and pending contracts cancelled as a result of Spamhaus' conduct. Contracts that have been cancelled include SmartBargains, Vendare Media, and OptinBig. I have calculated the loss of revenue from having these active and pending contracts cancelled as a result of Spamhaus' conduct to be \$2,465,000.00.

33. e360 and I also have lost numerous opportunities to obtain future work as a result of Spamhaus' conduct. Lost business opportunities include Net Blue, Cogent, Habeas, Yipes. I have determined that the lost value of the business as a result of the inability to monetize the revenue potential from the company and in the lost enterprise value to be at least \$9,250,000.

34. The calculation of lost enterprise value results from the following consideration: businesses operating proprietary opt-in email marketing lists are valued at twice the annual revenue of the business. Similarly, most email marketing companies with opt-in lists are valued at somewhere between \$0.25 and \$0.50 per active unique opt-in email address. For most of our competition, these valuations are roughly equivalent. Due to our trouble in sending from our list due to the Spamhaus listings, our revenue is roughly \$1,000,000 per year, thus the valuation based upon revenue is \$2,000,000; despite the fact that we have 45 million unique opt-in email addresses, which would equate to a valuation in a range of \$11,250,000 to \$22,500,000, thus a reduced valuation due to the inability to monetize our opt-in list of at least \$9,250,000.

35. Over and above financial losses stated above, e360 and my reputation in the business community has suffered significantly and continues to suffer, all as a direct consequence of Spamhaus' wrongful acts. In my professional experience, there is nothing more damaging to an Internet marketing business than to be labeled a "spammer". I believe my and e360's reputation in the Internet marketing industry has been damaged in an amount equal to at least \$9,250,000, as is detailed above.

36. The fact that e360 and Linhardt remain on the ROKSO list, and remain on the SBL list, make it increasingly difficult and, in some cases, impossible to purchase bandwidth from ISPs, without which e360 simply ceases to be able to operate.

37. I further believe that e360 and I should be awarded punitive damages as well, in the amount of \$15,000,000.00 given Defendant's intentional conduct, disregard for my and e360's rights and the laws of the United States. Defendant knew as early as December of 2003 that they had wrongfully listed e360 and me. Rather than taking any corrective measures, Defendant not only continued posting the incorrect listings of e360 and me, it posted additional listings of e360 and me, none of which were posted in compliance with Defendant's own guidelines, United States laws or any foreign law.

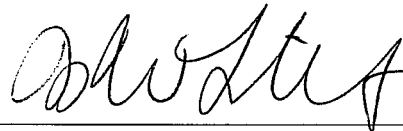
38. After the filing of the litigation in this matter and after the entry of the temporary restraining order against Spamhaus, Defendant removed the improper listings temporarily, but rather than provide discovery materials and comply with the rule of United States law, Spamhaus chose to enter new listings, all of which (as detailed above) are false in complete disregard for the orders of United States courts.

39. Defendant called e360 and me "spammers" even though Defendant knew that e360 and I complied with all recognized laws as well as the policies and procedures of the ISPs e360 and I were involved with and were never accused of violating any Acceptable Use Policy, Terms Of Service, or any other policy or procedure prior to the original wrongful ROKSO listing.

40. In addition to the damages sought above, I seek a permanent injunction in order to stop Defendant's wrongful, intentional and malicious conduct from continuing in the future. Defendant has previously disregarded the Temporary Restraining Order so I fear that it might do so in the future.

41. If Defendant does not obey the orders for injunctive relief, the only way to force them to cease the offending action would be to cause a registry of Internet domain names to require the domain name of Defendant (www.spamhaus.org) to be turned over to a third party to ensure compliance with the court's order.

Further Affiant Sayeth Naught.



David Linhardt

Signed and Sworn to before me on

this 30<sup>th</sup> day of August 2006

  
Notary Public

(Seal)

My commission expires on 2/16/09

