

**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.)	

**REPLY IN SUPPORT OF COUNTER-DEFENDANT AND THIRD-PARTY
DEFENDANT’S 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, including Mr. Linhardt, “Counter-Defendants”) and by and through their attorneys, Carla E. Buterman of the Law Office of Carla E. Buterman and Bartly J. Loethen of Synergy Law Group, LLC, and for their Reply in support of their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), state as follows:

A. Introduction.

The counter claim should be dismissed in its entirety. Mr. Linhardt should be dismissed because he is not liable for the torts of the companies he directs unless he did so in his own interests, without justification or maliciously – which, he did not. The third-party defendants should be dismissed because Counter-Plaintiff has not stated causes of action against them. Counts I, II and III should be dismissed because Counter-Plaintiff has failed to plead with the requisite particularity. Count IV fails because it is barred by the applicable statute of limitation. Count VI should be dismissed for failure to adequately plead a cause of action. Count V should be dismissed because Counter-Plaintiff cannot claim any actual damages arising from the alleged transmission of the e-mails at issue. And 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.

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

Counter-Plaintiff claims that Mr. Linhardt is liable for his participation in allegedly fraudulent activity. However, Counter-Plaintiff fails to plead that Mr. Linhardt was doing anything other than directing the companies in a manner he thought best advanced the companies’ interest. Under Illinois law, 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). Counter-Plaintiff has made and cannot make any allegations that Mr. Linhardt was acting in his own interests, 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.

Even if this Court determines that Counter-Plaintiff has pled the elements necessary to seek recovery from Mr. Linhardt personally, they have certainly not done so with the particularity of Rule 9(b). Mr. Linhardt is only responsible if he participated in the allegedly fraudulent activity. To state a claim based on fraud against Mr. Linhardt, Comcast must allege: “(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). Comcast has not alleged the necessary elements of fraud and therefore Mr. Linhard should be dismissed from this lawsuit.

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

The third-party defendants are not liable for any of the alleged causes of action based solely on their alleged affiliation with e360. Rather, Counter-Plaintiff must allege causes of action based on the independent actions of each individual defendant. Counter-Plaintiff has failed to do so and each of the third-party defendants should be dismissed from this action. Moreover, any allegations made against the third-party defendants for violations of CAN-SPAM

should be dismissed because CAN-SPAM imposes liability on the sender of an offending e-mail. A sender “means a person who initiates such a message *and* whose product, service, or Internet web site is advertised or promoted by the message.” 15 USCS § 7702(16)(a) (emphasis added). Here, there are no allegations that the third-party defendants initiated or advertised, let alone that they did both. Finally, Counter-Plaintiff 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). Under the CAN-SPAM definitions, Internet Service Providers 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). Northshore Hosting, Ravinia Hosting, and Northgate, as alleged by Counter-Plaintiff, are internet service providers and the mere “routine conveyance” of the allegedly offending e-mails requires that the claims based on alleged violations of CAN-SPAM must be dismissed with prejudice.

D. Counts I, II And III Should Be Dismissed For Failing To Comply With Federal Rules Of Civil Procedure 9(b).

Counter-Plaintiff’s CAN-SPAM allegations and its claim based on a violation of Illinois Electronic Mail Act (“ILEMA”) sound in fraud and 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 Counter-Plaintiff’s Counts under CAN-SPAM sound in fraud and should be held to Rule 9(b)’s heightened requirements.

Counter-Plaintiff argues that this Court should follow a single case where a court held that alleged CAN-SPAM violations are not required to be pled with particularity. However,

other courts have ruled that a party must allege, with the specificity required by Rule 9(b), all allegations arising under CAN-SPAM. see *Silverstein v. E360insight, LLC*, 2008 U.S. Dist. LEXIS 36858 *3-4 (C.D. Cal. 2008), *Asis Internet Servs. v. Optin Global, Inc.*, 2006 U.S. Dist. LEXIS 73669 *7 (N.D. Cal. 2006). Both of Counter-Plaintiff's Counts under CAN-SPAM sound in fraud and should be held to Rule 9(b)'s heightened requirements.

Likewise, Counter-Plaintiff's claims under ILEMA sound in fraud and should be dismissed for failure to plead with the requisite particularity. 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. The legislature could not have been more clear when it stated that under 815 ILCS 511/15, a "violation of this Act constitutes an unlawful practice under the Consumer Fraud and Deceptive Business Practices Act." There can be no argument that Counter-Plaintiff's claim based on a violation of ILEMA must be pled under Rule 9(b).

Counter-Plaintiff disingenuously argues that if it is in fact required to plead with particularity, it should be forgiven for its failure because the information needed regarding the allegedly fraudulent conduct is in the possession of the Counter-Defendants. This argument is laughable. The gravamen of Comcast's counterclaim is that the counter defendant and third party defendants sent e-mail to Counter-Plaintiff's servers. How can Counter-Plaintiff claim that it does not have access to the allegedly offending e-mails? They can't and this argument should be dismissed by the Court.

Counts I, II and III should each be dismissed for failure to plead with the particularity required by Rule 9(b).

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

Counter-Plaintiff's Response does not address its failure to plead, in Count I, that Defendants initiated and/or transmitted email messages to a protected computer with materially false or misleading header information. Rather, Counter-Defendants seeks to ask this Court to read beyond what it alleges and infer the necessary pleading requirement. This Court should reject that request as Counter-Plaintiff repeatedly demonstrated that it does not have a basis for any of its claim and instead relies on repeated use of "on information and belief". However, there are no allegations that e360, or any of the defendants, materially mislead or used fraudulent means as required. Moreover, simple inaccuracies are insufficient to meet the CAN-SPAM. *Omega World Travel, Inc. v. Mummagraphics, Inc*, 469 F.3d 348, 357 (4th Cir. 2006). The failure to attach any of the allegedly offending e-mails demonstrates the specious nature of Counter-Plaintiff's claims.

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

Once again, Counter-Plaintiff seeks to have this Court accept an "implication" of the required elements of a cause of action. Specifically, Counter-Plaintiff claims that its CFAA claim is not time barred because its allegation that "Comcast's Filtering Technology has filtered out Defendant's spam since as early as 2005." (ECF Doc. No. 28-2 at ¶ 31) should be read to include e-mails sent after that date. However, one is left to guess as to the dates on which Counter-Plaintiff claims Counter-Defendants sent the allegedly offending e-mails. The fact is that § 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." Counter-Plaintiff was aware of the allegedly harmful acts of Counter-Defendants as early as 2005. Certainly, any claim based on the 2005 e-mails is time barred. Whether there are

any allegedly offending e-mails after 2005 is a mystery to Counter-Defendants and is not contained in the counterclaim. However, Counter-Plaintiff did not institute its claim based on alleged violations of 18 U.S.C. § 1030 until March 18, 2008. Counter-Plaintiff'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.

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

Counter-Plaintiff's response demonstrates its inability to allege and prove actual damages. *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 359 (4th Cir. 2006). Moreover, Counter-Plaintiff seeks to distract this Court by suggesting that "nominal damages" are buzz words that are not significant. However, Counter-Plaintiff cannot refute that 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 makes no response to the fact that even assuming that Counter-Defendants sent 2,000,000 a day (a number Counter-Plaintiff cannot substantiate), that would only represent .4% of the allegedly offending e-mails Counter-Plaintiff filters per day. (ECF Doc. No. 28-2 at ¶ 2). Accepting Counter-Plaintiff's allegations as true demonstrates that the allegedly offending e-mails Counter-Plaintiff claims were sent by Counter-Defendants represent nothing more a nominal incursion and are therefore not actionable.

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

Counter-Plaintiff literally makes no argument in support of is claim based on the theory of unjust enrichment and Counter-Defendants assume Counter-Plaintiff concedes that it does not have a valid claim for unjust enrichment.

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

Again, Counter-Plaintiff makes no response to the case law cited by Counter-Defendants. Rather, Counter-Plaintiff seeks to distract this Court with allegations of Counter-Defendants actions in *other* lawsuits. Specifically, Counter-Plaintiff alleges the filing of *other* frivolous lawsuits; the alleged marketing of services based on an injunction in *another* lawsuit. What Counter-Plaintiff fails to do is identify any “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).

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

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
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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 May 22, 2008.

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