

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

e360 INSIGHT, LLC, an Illinois Limited	)	
Liability Company, and DAVID LINHARDT,	)	
an individual,	)	06 CV 3958
	)	
Plaintiffs,	)	Judge Kocoras
	)	Magistrate Judge Brown
v.	)	
	)	
THE SPAMHAUS PROJECT, a company	)	
limited by guarantee and organized under the	)	
laws of England, a/k/a THE SPAMHAUS	)	
PROJECT, LTD.,	)	
	)	
Defendant.	)	

**DEFENDANT’S RESPONSE  
TO PLAINTIFFS’ MOTION TO COMPEL**

**Introduction**

Plaintiffs e360 Insight, LLC and David Linhardt’s (collectively “Plaintiffs”) motion to compel the production of documents from The Spamhaus Project, Ltd. (“Project”)<sup>1</sup> is meritless and should be denied. Plaintiffs do not and cannot claim that Project has failed to produce documents relating to Project that are in the custody or control of Project. Instead, Plaintiffs’ motion is an overreaching attempt to obtain discovery from two *other and separate* entities, Spamhaus Technology, LTD (“Technology”) and Ultradesign, LTD. But Project does not own or otherwise control either Technology or Ultradesign. Plaintiffs have not sued or served either Technology or Ultradesign. And Plaintiffs have no evidence of any kind that Project has access to the documents of Technology or Ultradesign. In fact, as we repeatedly advised counsel for

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<sup>1</sup> Defendant expressly objects to this Court’s jurisdiction over The Spamhaus Project because Defendant is based solely in the United Kingdom and does not conduct or transact business in Illinois. Moreover, Defendant reserves its arguments based on Plaintiffs’ failure to properly effect service of process.

Plaintiffs before this motion was filed, Project has no access to those documents. And while Plaintiffs' motion is made on "information and belief" that Project can access the documents of the other entities, we attach to this sworn testimony that it cannot. The Court should deny Plaintiffs' improper attempt to shortcut the rules of service and, if Plaintiffs desire information regarding Technology and Ultradesign, they should go through the proper legal method to obtain discovery from these United Kingdom entities, Technology and Ultradesign.

**I. Factual and Procedural Background.**

**A. The Facts Regarding Project, Technology And Ultradesign.**

These are post-judgment proceedings against a single defendant, Project. Plaintiffs have never sued or served any individual or any other entity in this action, let alone Technology or Ultradesign. Steve Linford, the sole director of Project, has provided in attached affidavits the following information regarding the three entities at issue in Plaintiffs' motion:

**1. Project.**

The Spamhaus Project, Ltd. is a non-profit company organized under the laws of the United Kingdom whose mission is to track spam senders and publish lists of verified spam sources, which are available on the internet free of charge. (Ex. A, Linford Spam Teq Aff. ¶ 3.) Steve Linford is the sole Director of Project. (*Id.* ¶ 1.) Project is the only defendant in this lawsuit and the only entity over which the Court has purportedly exercised jurisdiction.

**2. Technology.**

Spamhaus Technology, Ltd., also known as SpamTeq, is a British data service company that manages data synchronization systems in the United Kingdom. (Linford Spam Teq Aff. ¶ 5.) Technology merges data derived from approximately four (4) open-source spam filter organizations (only one of which is the Spamhaus Project, Ltd.) into data formats utilized by the

spam filter industry. (*Id.*) The company website is <http://www.spamteq.com>. (*Id.*) Technology has no offices or staff outside the United Kingdom, nor does it enter into any contracts outside the United Kingdom. (*Id.* ¶ 5.)

Technology has no parents, subsidiaries or related entities. (*Id.* ¶ 6.) Project and Technology are separate, independent legal entities, governed by separate boards of directors, incorporated under separate charters, and engaged in separate endeavors. (*Id.* ¶ 7.) Technology is a partnership governed by a Board of Directors consisting of five (5) members. (*Id.* ¶ 12.) Under the charter, decisions are made by the majority. (*Id.* ¶ 12; Ex. B, Technology Charter.) Thus, individually, Steve Linford has no authority over the books and records of Technology. (Linford Spam Teq Aff. ¶ 12.) Project has no ownership interest in Technology. (*Id.* ¶ 7.) Likewise, Technology has no ownership interest in Project. (*Id.*) Project receives no income from Technology. (*Id.* ¶ 8.) Likewise, Project does not pay any fees to Technology. (*Id.*)

Technology and Project maintain separate books and records that are kept in different locations. (*Id.* ¶ 9.) Technology and Project each have their own separate tax records and each company maintains its own separate computers. (*Id.* ¶ 10.)

### **3. Ultradesign.**

Ultradesign.com, also known as Ultradesign LTD, is a United Kingdom based Internet hosting company that provides web hosting and email services. (Ex. C, Linford Ultradesign Aff. ¶ 5.) Ultradesign has no offices or staff outside of Europe, nor does it enter into any contracts outside the United Kingdom. (*Id.*) Ultradesign is registered at Suite 6, 50 Churchill Square, Kings Hill, West Malling, Kent ME 19 4YU. (*Id.* ¶ 6.) The registered company number is 04154838. (*Id.*)

Ultradesign has no parents, subsidiaries or related entities. (*Id.* ¶ 7.) Project and Ultradesign are separate, independent legal entities, governed by separate boards of directors, incorporated under separate charters, and engaged in separate endeavors. (*Id.* ¶ 8.) Ultradesign is a partnership consisting of two partners. (*Id.* ¶ 13.) The partnership decisions are only made unanimously. (*Id.*) Thus, individually, Steve Linford has no authority over the books and records of Ultradesign. (*Id.*) Project has no ownership interest in Ultradesign. (*Id.* ¶ 8.) Likewise, Ultradesign has no ownership interest in Project. (*Id.*) Project receives no income from Ultradesign. (*Id.* ¶ 9.) Likewise, Project does not pay any fees to Ultradesign. (*Id.*)

Ultradesign and Project maintain separate books and records that are kept in different locations. (*Id.* ¶ 10.) Although Ultradesign donates to Project a server in its server racks in the United Kingdom, Ultradesign and Project each have their own separate tax records and each company maintains its own separate computers. (*Id.* ¶¶ 8, 11.)

**B. Project's Compliance With The Court's Orders And Provision Of Responsive Information.**

Project originally responded to the October 23, 2006 citation on November 10, 2006. In that response, Project answered Plaintiffs' questions and Steve Linford provided an affidavit certifying those responses. (Ex. D.) Those responses provided all of the information sought regarding Project. Furthermore, Steve Linford expressed his willingness to sit for a telephonic deposition relating to the assets of Project. Plaintiffs never pursued the option of a telephonic deposition of Steve Linford. Nor did they timely object to the responses provided by Spamhaus on November 10, 2006. Instead, Plaintiffs waited almost 3 months to complain about the answers asserted in the November 10, 2006 response. On January 31, 2007, Plaintiffs filed a second citation to discover assets that was substantively and procedurally defective. (Ex. E.)

Upon receiving a letter from counsel for Project regarding the defective nature of the citation to discover assets, Plaintiffs withdrew the second citation. (Ex. F.)

On March 7, 2007, Project answered additional questions presented by Plaintiffs. (Ex. G.) On March 13, 2007, Plaintiffs asked Project to revise its answers to the citation to discover assets regarding its related companies. (Ex. H.) Project responded to that request by reiterating that it had disclosed its assets and that it does not own Technology. (Ex. I.) However, on March 15, 2007, Plaintiffs filed a Motion for Rule to Show Cause, alleging that **Project** should be held in contempt for wrongfully withholding information about **Technology**. The parties appeared before this Court on March 20, 2007. At that hearing, this Court denied the Motion for Rule to Show Cause and ordered Project to “respond to all reasonable questions” about Technology. (Ex. J, 3/20/07 Tr. at 6.)

After that hearing, counsel for Project engaged in numerous conversations with Plaintiffs’ counsel regarding the additional information sought, providing information telephonically and indicating that further information would be provided. On May 15, 2007, Project’s counsel contacted Plaintiffs’ counsel and agreed to provide “reasonable” information pursuant to an agreed protective order. On May 18, 2007, Project provided general information about Spamhaus Technology, including (1) the office address for Spamhaus Technology; (2) a list of officers, board members, investors, and owners of Spamhaus Technology; and (3) a copy of the Spamhaus Technology charter. (Ex. K - with information redacted pursuant to discussions on an agreed protective order.)

In addition to seeking information about Technology, Plaintiffs are now seeking information related to Ultradesign, based on their unsupported belief that Ultradesign is related to Project. (Mot. ¶ 11; *see also* Ex. L.) In fact, the only connections between Project and

Ultradesign are the commonality of one director and that Ultradesign donates to Project a server in its server racks in the United Kingdom. As with Technology, counsel for Project informed Plaintiffs' counsel that Ultradesign is not owned or controlled by Project and that Project does not possess any of the information sought about Ultradesign.

**II. The Court Should Deny Plaintiffs Motion Because Project Has Complied With The Court's Order And Does Not Control The Additional Information Plaintiffs Seek.**

While reserving its right to contest jurisdiction (currently on appeal), Project has already provided certain general public information it was aware of regarding Technology. (See Ex. K, May 18, 2007 letter.) By disclosing this information, Project fully complied with this Court's March 20, 2007 order directing Spamhaus Project to respond to "all reasonable questions." The remaining information sought by Plaintiffs is non-public information that Project has no right to access or provide.<sup>2</sup> Project cannot be compelled to provide information it does not have and cannot legally obtain, and Plaintiffs motion should be denied.

Under Federal Rule of Civil Procedure 34, a party may only be compelled to produce documents in that party's "possession, custody, or control." However, if a party cannot "order" a third party to turn over documents to the party, the documents are not within the "custody or control" of that party. *Chaveriat v. Williams Pipe Line*, 11 F.3d 1420, 1426-27 (7th Cir. 1993). Indeed, "the fact that a party could obtain a document if it tried hard enough and maybe if it

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<sup>2</sup> Spamhaus has provided all of this information as it relates to Project. However, in addition to the public information related to Technology that Project provided on May 18, 2007, Plaintiffs demand the following information related to Spamhaus Technology, Ltd.: (1) the amount of compensation paid to each officer or board member; (2) the amount of investment of any investors; (3) a list of employees including their salaries and/or other payments made to the employees for the past two years; (4) the percentage of ownership of each owner; (5) the accounts receivable for the past two years (including a list of companies subscribing to Spamhaus Technology, Ltd.'s services); (6) accounts payable for the past two years; (7) bank statements for the past two years; (8) profit and loss ledgers for the past two years; and (9) the dates and amounts of any dividends paid to shareholders. (Mot. ¶ 8.) Plaintiffs have made a similar demand for information relating to Ultradesign. (*Id.* ¶ 15.)

didn't try hard at all does not mean that the document is in its possession, custody, or control; in fact it means the opposite." *Id.*

In *Chaveriat*, plaintiff alleged that defendant contaminated its land, and retained Eiler to clean up the contamination. *Id.* at 1423. Eiler subsequently retained TSC to take soil samples of the land, and TSC then hired NET to test the soil samples that were collected and report its findings to TSC. *Id.* After receiving the results from NET, TSC reported its findings to Eiler. *Id.* After being sued for the cost of cleaning up the contamination, Defendant requested that Plaintiff produce the chromatograms related to the contamination testing. Plaintiff, however, only had the final reports of TSC and NET in its possession, not the chromatograms, which NET had prepared and still possessed. The Seventh Circuit held that under Rule 34(a)(1), Plaintiff did not have to produce the documents requested because Plaintiff did not have custody or control over the documents and could not order NET to surrender the documents to them. *Id.* at 1426-27. Furthermore, even though Plaintiff could have asked NET for the documents through a subpoena duces tecum and NET would have been required to comply, there was no duty on TSC to produce them. *Id.*

Furthermore, in *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138, 1142-44 (N.D. Ill., 1979), a number of discovery demands were made involving a combination of foreign and domestic parents and subsidiaries. The Court found there was no control over the requested documents because (1) the parent company owned 43.8% of subsidiary; (2) a minority of subsidiary directors were officers of parent; (3) the subsidiary kept its own books and records; (4) the subsidiary held its own corporate meetings separate and apart from parent; and (5) the subsidiaries shares were publicly traded and owned by more than 11,000 shareholders. *Id.* at 1152. However, the Court found "control" over two subsidiaries because the subsidiaries were

wholly-owned by the parent company. *Id.* at 1152-54. Thus, the Court held that the test for determining whether a court could order a corporation to produce the documents of an alleged subsidiary was “[I]f a corporation has power, either directly or indirectly, through another corporation or series of corporations, to elect a majority of the directors of another corporation, such corporation may be deemed a parent corporation and in control of the corporation whose directors it has the power to elect to office.” *Id.* at 1144-45.

In addition, the Third Circuit has held that the mere fact that a director and minority shareholder of a U.S. corporation was the Chairman of the Board of a related Swiss Corporation was insufficient to compel the U.S. Corporation to produce documents in the possession of the non-litigating Swiss Corporation. *Gerling Int’l Ins. Co. v. Commissioner*, 839 F.2d 131, 141 (3d Cir. 1988).

Here, the simple fact is that Project has no possession or control over the documents Plaintiffs have requested regarding Technology or Ultradesign:

- Project does not own any percentage of Technology or Ultradesign.
- Technology shares only one director with Project and Ultradesign shares only one partner with Project, and therefore has no managerial control over either entity.
- Project, Technology, and Ultradesign each maintain separate books and records in different physical locations.

(Linford Spam Teq Aff. ¶¶ 7, 9, 11, 12; Linford Ultradesign Aff. ¶¶ 8, 10, 12, 13.) Steve Linford, individually or in his role as the Director of Project, has no authority to access the books or records of Technology or Ultradesign. (Linford Spam Teq Aff. ¶¶ 11, 12; Linford Ultradesign Aff. ¶¶ 12, 13.) Just as Al Gore, as a Director of both Google and Apple, would have no authority to provide documents relating to Apple in a suite against Google, Steve Linford lacks any authority as a Director of Project to provide any non-public information or documents relating to Technology or Ultradesign. Simply put, Plaintiffs want to force Steve Linford, as the

Director of Project, to misuse his role as a Director of Technology and Ultradesign, in an attempt to force these companies to produce documents. That is improper.

Despite their opportunity to obtain documents from Project, and even to take a telephone deposition of Mr. Linford, Plaintiffs have not gathered or offered any factual basis, other than their abject speculation, that Project can “order” the production of documents by either of these separate entities as required by *Chaveriat*. And, like the parent company in *In re Uranium Antitrust Litigation*, Project has no “control” over Technology or Ultradesign. Plaintiffs have simply glossed over this threshold question. Plaintiffs’ motion is baseless and should be denied.

The denial of Plaintiffs’ motion is *not* a ruling that they are not entitled to the information on relevance grounds, nor does it mean Plaintiffs cannot seek the information. Rather, Plaintiffs must use an available alternative route for obtaining the desired information - an attempt to obtain the information by obtaining proper service on the entities that do control the information, at which time those issues can be addressed in a UK court.

Respectfully submitted,

THE SPAMHAUS PROJECT

Dated: June 13, 2007

By:     Craig C. Martin    

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CERTIFICATE OF SERVICE

I, Carrie A. Fino, an attorney, hereby certify that I served the foregoing **Defendant's**

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by depositing a copy of same in the United States Mail, postage prepaid, on this 13th day of June  
2007.

s/ Carrie A. Fino