UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

E360INSIGHT, LLC, Plaintiff, v. COMCAST CORPORATION, Defendant.	)	
COMCAST CORPORATION, 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.	)	Case No. 08 C 0340 Judge Zagel Magistrate Judge Mason Jury Trial Demanded

COUNTERCLAIM AND THIRD-PARTY COMPLAINT

Comcast Corporation ("Comcast") brings this counterclaim and third-party complaint against e360insight, LLC, David Linhardt, Maverick Direct Marketing Solutions, Inc., Bargain

Depot Enterprises, LLC, Northshore Hosting Company, LLC, Ravinia Hosting Company, LLC, Northgate Internet Services, LLC, and John Does 1-50 (collectively, the "Defendants").

I. NATURE OF THE ACTION

1. Defendants operate a business designed to facilitate the e-mail marketing of products and services through, among other things, the sending of unwanted, unauthorized, unlawful and/or otherwise objectionable commercial e-mail messages (generally referred to as "spam").

2. Internet service providers ("ISPs"), such as Comcast, with the assistance of others, filter e-mail messages to prevent spam from reaching consumers. It is essential to the operation of its ISP services that Comcast utilize the tools at its disposal, tools sanctioned by federal and state law, to protect its subscribers from receiving spam. About 90% of all e-mail sent to Comcast's subscribers is spam. Comcast filters about 500,000,000 spam e-mails per day.

3. Spammers, on the other hand, try to mask their identities, the origins of their e-mails, and the nature of their services in order to deliver spam to consumers and to remain profitable. Defendants here utilize a variety of illegal and fraudulent activities to pursue their objectives, and have undertaken various efforts to obscure the nature, scope, and participants in their activities. Indeed, the filing of this action and pursuit of a preliminary injunction and expedited discovery are part of Defendants' attempts to pressure and harass those who protect consumers from Defendants' objectionable e-mails.

4. Comcast brings this counterclaim and third-party complaint to prevent Defendants' ongoing assault on Comcast's business and to hold Defendant liable for its unlawful acts.

II. JURISDICTION

5. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332. The amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states. The Court also has federal question jurisdiction over the claims arising under the Controlling the Assault of Non-Solicited Pornography and Marketing Act, 15 U.S.C. § 7701 ("CAN-SPAM") and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("CFAA"), jurisdiction being conferred in accordance with 28 U.S.C. §§ 1331 and 1338(a).

III. PARTIES

6. Counterclaimant, Comcast, is a Pennsylvania corporation with a principal place of business located at One Comcast Center, Philadelphia, Pennsylvania 19103.

7. Counterdefendant, e360insight, LLC ("e360"), is an Illinois limited liability company with a principal place of business at 600 Northgate Pkwy., Ste. A, Wheeling, Illinois 60090.

8. Third-party Defendant, David Linhardt ("Linhardt"), is an individual residing at 500 Sumac Road, Highland Park, Illinois 60035. On information and belief, Linhardt is the president and founder of e360, the majority and only shareholder of Maverick, the owner of Ravinia Hosting, the president of Northshore Hosting (as these entities are defined below), and directs and controls the complained of activities of each of the named Defendants.

9. Third-party Defendant, Maverick Direct Marketing Solutions, Inc. ("Maverick"), is an Illinois corporation with its principal place of business at 600 Northgate Pkwy., Ste. A, Wheeling, Illinois 60090. On information and belief, Maverick wholly owns e360, Bargain Depot and Northshore Hosting.

10. Third-party Defendant, Bargain Depot Enterprises, LLC ("Bargain Depot"), d/b/a bargaindepot.net and bargainshoppecorp.com, is an Illinois limited liability company with its principal place of business at 600 Northgate Pkwy., Ste. A, Wheeling, Illinois 60090. On information and belief, Bargain Depot is a division of e360 and is wholly owned by Maverick.

11. Third-party Defendant, Northshore Hosting Company, LLC d/b/a Rocky Mountain Internet Services, LLC and Bay City Hosting, LLC ("Northshore Hosting"), is a Delaware limited liability company. On information and belief, its principal place of business is at 600 Northgate Pkwy., Ste. A, Wheeling, Illinois 60090, or another location in Illinois, and it is wholly owned by Maverick.

12. Third-party Defendant, Ravinia Hosting Company, LLC ("Ravinia Hosting"), is a Delaware limited liability company. On information and belief, its principal place of business is at 600 Northgate Pkwy., Ste. A. Wheeling, Illinois 60090, or another location in Illinois, and it is owned and controlled by Linhardt.

13. Third-party Defendant, Northgate Internet Services, LLC ("Northgate"), is a Delaware limited liability company. On information and belief, its principal place of business is at 600 Northgate Pkwy., Ste. A, Wheeling, Illinois 60090, or another location in Illinois, and it is an affiliate of e360.

14. Third-party Defendants, John Does 1-50, are companies or individuals with unknown identities and addresses that are business partners or affiliates of the other Defendants or provide services or assistance to, or facilitate the complained of activities of, the Defendants.

IV. FACTUAL BACKGROUND

A. Comcast's Cable and Internet Services.

15. Comcast, by or through its subsidiaries, is one of the leading cable and internet service providers in the country with over thirteen million high-speed internet subscribers.

16. Consumers subscribe to Comcast High-Speed Internet services, in part, because of the stability, security and reliability of its network. Comcast's network remains secure and reliable in part because the system is maintained by filtering out spam and preventing it from reaching subscribers' inboxes. Comcast, using a proprietary and highly confidential system in accordance with industry standards, filters and otherwise limits spam from reaching subscribers' inboxes ("Comcast's Filtering System").

17. Comcast's Filtering System is a continually evolving system that relies on a variety of resources to determine whether an incoming e-mail is spam. These resources include third-party software, lists generated by anti-spam organizations, subscriber complaints, the sender's reputation, and other highly proprietary and confidential systems and methods.

18. If an e-mail is filtered out by Comcast's Filtering System, the sender receives an error message with a code and links to follow for instructions on why the e-mail was filtered out and how to address the issue that caused the e-mail to be filtered out.

B. Defendants' Unlawful Activities.

19. Defendants market products and services using spam directed at hundreds of thousands, if not millions, of consumers, including Comcast's subscribers.

20. On information and belief, Maverick wholly owns e360, Bargain Depot, and Northshore, and directs and controls the sending of hundreds of thousands, if not millions, of spam e-mails by Defendants.

21. On information and belief, Bargain Depot, among other things, provides knock-off, counterfeit or otherwise unauthorized goods marketed through mass e-mails sent by Defendants.

22. On information and belief, Northshore Hosting, Ravinia Hosting, Northgate, and John Does 1-50 ("Third-Party Marketers") are in the business of registering domain names and

IP addresses and sending spam on behalf of Defendants. On information and belief, the Third-Party Marketers also register IP and domain name addresses in their own name, often with private registry services, for the purposes of masking the true identity of the owners of the IP addresses and domain names, and the true parties responsible for sending spam.

C. Defendants' Email Practices.

23. Defendants, acting together, have engaged in a concerted scheme to send millions of unsolicited commercial e-mails for their own commercial benefit, including to many thousands of Comcast subscribers.

24. Defendants have used numerous domain names and IP addresses to conceal their identities and scheme and to facilitate the sending of the unsolicited e-mails.

25. On information and belief, some of Defendants' commercial e-mails contain misleading or false header or subject line information.

26. On information and belief, some of Defendants' commercial e-mails advertise, promote, and sell counterfeit or unauthorized goods supplied by Bargain Depot.

27. On information and belief, some of Defendants' commercial e-mails advertise "free" promotions when the goods or services are not, in fact, free.

28. On information and belief, not all of the intended recipients of Defendants' commercial e-mails have opted in to receive such e-mail messages.

29. On information and belief, Defendants fabricate opt-in records of intended e-mail recipients.

30. On information and belief, Defendants have attempted to send hundreds of thousands, if not millions, of spam e-mails to Comcast's subscribers since as early as 2005, including e-mails advertising Bargain Depot's counterfeit or unauthorized goods.

31. Comcast's Filtering Technology has filtered out spam sent by Defendants to Comcast's subscribers. On information and belief, Comcast's Filtering Technology has filtered out Defendant's spam since as early as 2005.

32. On information and belief, when Defendants' commercial e-mails have been filtered out by Comcast's Filtering Technology, Defendants have received an error message and link to follow to learn why their e-mails were filtered out and how to revise their e-mail practices so that Defendants' e-mails may reach the intended Comcast subscribers.

33. To facilitate the business of the Defendants, Linhardt has made fraudulent misrepresentations to Comcast about the commercial e-mails sent by or through Defendants to Comcast's subscribers.

34. For example, on January 6, 2006, Linhardt telephoned Comcast and falsely and fraudulently represented to a Comcast employee that all of the intended recipients of e360's e-mail messages have opted-in to receive such messages. Additionally, on March 4, 2007, Linhardt sent a letter to Arthur J. Block of Comcast making the following fraudulent representations: "All of the individuals requesting emails from us have signed up with us through web sites operated by us or by our partners. Our customers have all been through an opt-in process that exceeds all requirements in the provisions of CAN-SPAM." The letter went on to notify Comcast of a default judgment obtained in this Court against a United Kingdom-based anti-spam operation, seeking to use that default judgment to coerce Comcast into allowing Defendants' unsolicited e-mails through Comcast's Filtering Technology. A copy of the letter is attached hereto as Exhibit A.

35. After e360 commenced this litigation, Comcast offered to work with e360 to review e360's e-mail practices in order to evaluate the e-mails to Comcast's subscribers and the

reasons they have been filtered out. e360 refused the offer, asserting that it would learn how to circumvent Comcast's Filtering System through discovery.

D. Defendants' Abuse Of The Legal Process To Circumvent Anti-Spam Initiatives.

36. Spamhaus Project ("Spamhaus"), a non-profit Internet watchdog group located in the United Kingdom, generates and maintains the Register of Known Spam Operations ("ROKSO") which is a collation of information and evidence on known professional spam operations that have been terminated by a minimum of three ISPs for spam offenses. Spamhaus also offers the Spamhaus Block List ("SBL"), which is a database of IP addresses that have been identified as the source of spam.

37. ISPs, such as Comcast, rely on the ROKSO and/or SBL lists as part of the process of filtering e-mails.

38. As early as 2006, e360 discovered that it was listed on the ROKSO and/or SBL lists and, as a result, numerous ISPs were blocking Defendants' spam.

39. On June 21, 2006, e360 and Linhardt sued Spamhaus in the Circuit Court of Cook County, Skokie, Illinois, asserting claims arising from Spamhaus' listing of e360 on its ROKSO and/or SBL lists. On information and belief, e360 and Linhardt sued Spamhaus in Illinois knowing that the Illinois courts did not have jurisdiction over Spamhaus for the improper purpose of undermining Spamhaus' ability to engage in legitimate and lawful anti-spam activities.

40. Spamhaus did not contest the action. As a result, the Northern District of Illinois (upon removal of the case) granted a default judgment and entered an order drafted by e360 requiring Spamhaus to "not take any action to cause email sent by [e360] or their affiliates, subsidiaries, or related companies … to be blocked, delayed, altered or interrupted in any way …

unless Spamhaus can demonstrate by clear and convincing evidence that Plaintiff's have violated relevant United States law" (the "Court Order").

41. After the Court Order was entered, Defendants' began marketing a new service called "IP Protection Services" to unrelated third-party e-mail marketers whose e-mail marketing messages were blocked by various ISPs, so that Spamhaus would be required to de-list those marketers from its lists.

42. The IP Protection Service entails modifying the third-party marketers' IP addresses to appear as if they are e360's IP addresses, or providing the third-party internet marketers access to e360's servers for use in sending mass e-mail marketing messages through e360's servers that have been de-listed with Spamhaus pursuant to the Court Order. e360 describes how it plans to use the Court Order to mislead Spamhaus:

> "As you know, the American Registry of Internet Numbers (ARIN) assigns all IP address in the U.S. ARIN maintains a registry of all IP addresses on www.arin.net which acts as a kind of phone book for the Internet. When Spamhaus investigates the originating IP address for an email message, they rely heavily on the information provided by ARIN. E360's IP Identity Management Solution effectively modifies the ARIN listing for your existing ip addresses and points them to one of our legally-protected entities. The result is immediate protection against Spamhaus listings as provided by the federal injunction. This solution protects against future listings, and also forces Spamhaus to remove any existing SBL listings." [Emphasis Supplied]

Attached as Exhibit B are marketing materials issued by e360 advertising the IP Protection Service.

43. Once the third-party e-mail marketer enrolls in the IP Protection Services, Defendants use the Court Order to request that Spamhaus de-list the third-party marketers' IP addresses from the ROKSO and/or SBL lists on the basis that the third party is now an "affiliate" of e360 within the meaning of the Court Order.

44. On information and belief, some third-party internet marketers who have enrolled in the IP Protection Service are purveyors of dpam.

45. On information and belief, a purpose of the IP Protection Services is to launder third-party spam that would otherwise be blocked through e360's de-listed IP addresses and servers.

46. For example, e360 entered into an agreement with Virtumundo, Inc. ("Virtumundo") on June 6, 2007, to provide the IP Protection Service. Attached hereto as Exhibit C is a copy of the Services Agreement entered into between e360 and Virtumundo.

47. On information and belief, Virtumundo sends spam.

48. After entering into the Services Agreement with Virtumundo, e360 demanded that Spamhaus de-list Virtumundo's IP addresses from the ROKSO and/or SBL lists on the basis that Virtumundo is now an "affiliate" of e360 within the meaning of the Court Order.

49. e360 and Linhardt have filed and threatened to file lawsuits in the Illinois courts against parties who call e360 and/or Linhardt a "spammer" or block e360's e-mails. e360 and Linhardt routinely file, drop, and re-file these actions against the same parties. For example, e360 and Linhardt sued Mark Ferguson for defamation in the U.S. District Court for the Northern District of Illinois in March 2007; voluntarily dismissed it without prejudice in May 2007; filed a similar lawsuit against Mark Ferguson in Circuit Court of Cook County, Illinois, later in May 2007, dismissed it without prejudice in August 2007; and then refiled an action against Mark Ferguson in U.S. District Court for the Northern District of Illinois in January 2008.

50. On information and belief, these litigation tactics are pursued for the improper purpose of undermining Spamhaus' ability to engage in legitimate and lawful anti-spam

activities and to disrupt the ability of ISPs, such as Comcast, to rely on anti-spam data generated by Spamhaus and other anti-spam entities.

COUNT I

VIOLATION OF THE CONTROLLING THE ASSAULT OF NON-SOLICITED PORNOGRAPHY AND MARKETING ACT ("CAN-SPAM") OF 2003 – 15 U.S.C. § 7704(a)(1)

51. Comcast re-alleges and incorporates by reference each of the allegations contained in paragraphs 1 through 50.

52. Defendants regularly initiate the transmission of e-mails to Comcast subscribers and other consumers that contain false and misleading information about the origin of the e-mail, the author of the e-mail, and the IP address of the sender of the e-mail in violation of 15 U.S.C. § 7704(a)(1).

53. Defendants regularly send e-mail messages that include originating e-mail addresses, domain names, and IP addresses that were obtained by means of false or fraudulent pretenses or representations that are materially misleading in violation of 15 U.S.C. § 7704(a)(1).

54. Defendants have sent hundreds of thousands, if not millions, of e-mail messages in violation of 15 U.S.C. § 7704(a)(1) and, therefore, Comcast is entitled to statutory damages of $100 for each violation in accordance with 15 U.S.C. § 7706(g)(A)(i).

55. Each of these violations of this section was committed willingly and knowingly and, accordingly, Comcast is entitled to aggravated damages under 15 U.S.C. § 7706(g)(3)(C)(i).

COUNT II

VIOLATION OF CAN-SPAM – 15 U.S.C. § 7704(a)(2)

56. Comcast re-alleges and incorporates by reference each of the allegations contained in paragraphs 1 through 50.

57. Defendants knowingly send and/or attempt to send to Comcast subscribers and other consumers e-mails that contain subject headings that mislead the recipient, including, but not limited to statements regarding "free" consumer merchandise and the origin of designer or luxury goods, in violation of 15 U.S.C. § 7704(a).

58. Defendants have sent hundreds of thousands, if not millions, of e-mail messages that violate § 7704(a) and, therefore, Comcast is entitled to statutory damages of $25 for each violation of this section in accordance with 15 U.S.C. § 7706(g)(A)(ii).

59. Each violation of this section has been committed willingly and knowingly and, accordingly, Comcast is entitled to aggravated damages under § 7706(g)(3)(C)(i).

COUNT III

VIOLATION OF ILLINOIS ELECTRONIC MAIL ACT – 815 ILCS 511/10

60. Comcast re-alleges and incorporates by reference each of the allegations contained in paragraphs 1 through 50.

61. Defendants send and attempt to send to Comcast subscribers and other consumers e-mails that contain false or misleading information in the subject line, in violation of Illinois Electronic Mail Act, 805 ILCS 511/10(a)(ii), and the laws of various states.

62. Defendants have sent hundreds of thousands, if not millions, of e-mail messages violating the laws of various states, including 805 ILCS 511/10(a)(ii), and, therefore, Comcast is at least entitled to statutory damages of the lesser of $10 per e-mail message or $25,000 per day, in accordance with 805 ILCS 511/10(d).

COUNT IV

VIOLATION OF THE COMPUTER FRAUD AND ABUSE ACT – 18 U.S.C. § 1030(a)(5)

63. Comcast re-alleges and incorporates by reference each of the allegations contained in paragraphs 1 through 50.

64. Computers used by Comcast in its role as an ISP constitute "protected computers" under the Computer Fraud and Abuse Act.

65. Defendants have knowingly bombarded Comcast's network and servers with hundreds of thousands, if not millions, of e-mails, causing Comcast's network to operate more slowly, and reducing the service provided to Comcast's subscribers, in violation of 18 U.S.C. §§ 1030(a)(5) and 1030(g).

66. The damages suffered by Comcast as a result of e360's conduct include the impairment of the integrity and/or availability of data, programs, systems, and/or information on Comcast's protected computers. Comcast's damages aggregate at least $5,000 in value in the year preceding the date of filing of this counterclaim and third-party complaint.

COUNT V

TRESPASS TO CHATTELS

67. Comcast re-alleges and incorporates by reference each of the allegations contained in paragraphs 1 through 50.

68. The computers, servers, and networks that support Comcast's ISP services are the personal property of Comcast.

69. Defendants have intentionally and repeatedly obtained access to, and made use of, Comcast's computers, servers, and networks for their own economic benefit.

70. Even after knowledge that e-mails were blocked by Comcast's Filtering System, Defendants continued to bombard Comcast's servers and networks with massive amounts of e-mails. This practice of repeatedly transmitting e-mail messages through Comcast's network and servers constitutes a wrongful exercise of dominion over Comcast's network and services in denial of Comcast's rights to that property. Such wrongful exercise of dominion over Comcast's network and servers has deprived Comcast and its subscribers of the legitimate use of the network and servers.

71. Under the common law of the various states, including the State of Illinois, Defendants' conduct constitutes trespass to Comcast's chattels.

COUNT VI

UNJUST ENRICHMENT

72. Comcast re-alleges and incorporates by reference each of the allegations contained in paragraphs 1 through 50.

73. By transmitting spam through Comcast's servers and networks and to Comcast's subscribers, Defendants have knowingly obtained, conferred, or retained economic benefits acquired at Comcast's expense. This knowing acquisition of these benefits has occurred under circumstances that render it inequitable for Defendants to retain the benefits.

74. As a result of the Defendants' unjust enrichment, Defendants should be ordered to compensate Comcast for the value of the wrongfully obtained benefits and ordered to disgorge all profits derived from the sending of unsolicited commercial e-mails to Comcast's subscribers. A constructive trust should also be imposed in favor of Comcast on all monies received by Defendants and on all profits generated by the Defendants' illegal activities as a result of sending

Spam, and on all real property, motor vehicles, and other personal property purchased with monies received by Defendants as a result of their illegal activities.

COUNT VII

ABUSE OF PROCESS

75. Comcast re-alleges and incorporates by reference each of the allegations contained in paragraphs 1 through 50.

76. On information and belief, e360 knew when it filed the complaint in this action that Comcast is immune from Plaintiff's claims under the Communications Decency Act, CAN-SPAM, and the laws of the various states including Illinois and Pennsylvania, and that Comcast is not a state actor subject to liability under the First Amendment.

77. On information and belief, e360 is pursuing this meritless legal attack for the improper purposes of: a) learning how to circumvent the lawful Comcast Filtering System; b) obtaining discovery, the purpose of which is to undermine the viability of filtering systems used by ISPs, including Comcast's Filtering Systems, and to undermine the ability of Spamhaus to provide reliable data to ISPs such as Comcast.

78. Based on the allegations of the Complaint, e360 knew of its claims as early as 2005, three years prior to the commencement of this litigation. e360's Motion for Expedited Discovery is not proper in the regular prosecution of this proceeding. The discovery sought is not needed in an expedited manner, and the scope of the discovery evidences e360's improper motivation to learn how to circumvent Comcast's Filtering System.

79. e360's misuse of the Court Order in the Spamhaus matter is an attempt to undermine the ability of Spamhaus to provide reliable data to ISPs such as Comcast.

80. e360's threats to sue, and the multitude of suits already brought (and routinely dropped and re-filed) in Illinois, against those who have identified e360 and Linhardt, as a "spammer" or blocked Defendants' commercial e-mails, have been pursued for the improper purpose of undermining the ability of Spamhaus and ISPs, such as Comcast, from legally identifying and filtering out spam.

81. As a result of e360's abuse of process, Comcast has incurred significant expenses and damages, including but not limited to its attorneys' fees and costs.

V. PRAYER FOR RELIEF

WHEREFORE, Comcast requests entry of judgment in its favor and against the Defendants as follows:

1. A preliminary and permanent injunction enjoining Defendants, their officers, agents, servants, employees, attorneys, and any persons or entities in active concert or participation with any of them, from:

   a. directly or indirectly sending unsolicited or unauthorized commercial emails, including but not limited to any such e-mails that reference or use in any way Comcast's property, computers, domains, servers, networks, or users;

   b. directly or indirectly circumventing Comcast's Filtering System for the purposes of sending commercial e-mails to Comcast's subscribers;

   c. directly or indirectly sending any commercial e-mail messages, whether or not lawful, unless and until each Defendant has certified to the Court and Comcast, and confirmed the certification at periodic intervals, that it and all their affiliates and business partners comply with the best practices set forth by the Messaging Anti-Abuse Working Group ("MAAWG") Sender Best Communications Practices, attached hereto as Exhibit D, or such other practices as this Court may deem appropriate to order; and

   d. directly or indirectly profiting from any of the acts prohibited by paragraphs 1(a), (b) and (c).

2. Within ten (10) days of entry of any injunctive order, Defendants be required to file and serve an affidavit detailing the form and manner in which each has complied with the terms of the injunction;

3. An award of statutory, compensatory, and aggravated damages to Comcast;

4. Disgorgement of the Defendants' profits and imposition of a constructive trust on all moneys received and all profits generated by Defendants' illegal activities;

5. An award of Comcast's attorneys' fees and costs; and

6. An award of such other and further relief as may be just or equitable.

Date: March 18, 2008

Respectfully submitted,

LOEB & LOEB LLP

By: ___/s/ Douglas N. Masters_____

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DEMAND FOR JURY TRIAL

Pursuant to Fed. R. Civ. P. 38(b), Comcast respectfully demands a trial by jury of all issues in its counterclaim and third-party complaint that are triable by a jury.

Date: March 18, 2008

Respectfully submitted,

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