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,	)	
Plaintiffs,	)	Case No. 06 C 3958
v.	)	District Judge Charles P. Kocoras Magistrate Judge Geraldine Soat Brown
THE SPAMHAUS PROJECT, a company limited by guarantee and organized under the laws of England, a/k/a THE SPAMHAUS PROJECT, LTD.,	)	
Defendant.	)	

DEFENDANT THE SPAMHAUS PROJECT'S MOTION TO DISMISS PURSUANT TO RULE 37(B)(2)(A) FOR PLAINTIFFS' FAILURE TO OBEY ORDERS OF THIS COURT

Defendant The Spamhaus Project ("Spamhaus"), pursuant to Federal Rule of Civil Procedure 37(b), moves this Court for entry of an order (1) dismissing all of Plaintiffs' claims with prejudice pursuant to Rule 37(b)(2)(A)(v) as a sanction for Plaintiffs' failure to obey the Court's July 30, 2008 Order ("7/30/2008 Order") to provide full and complete responses to all of Spamhaus' Interrogatories by August 13, 2008, and (2) awarding Spamhaus all reasonable legal fees incurred in bringing this Motion. In support of this Motion, Spamhaus states:

Introduction and Factual Background

Your Honor has twice granted motions to compel ordering Plaintiffs e360 Insight, LLC and David Linhardt (collectively "Plaintiffs") to provide complete answers to Spamhaus' basic interrogatories. (Ex. 1, 4/29/2008 Order; Ex. 2, 7/30/2008). Consistent with their past delay and unexplained non-compliance, Plaintiffs have simply failed to comply with the Court's most recent July 30, 2008 Order, which required them to provide complete answers on or before

August 13, 2008. (Ex. 2). The deadline has come and gone; two weeks have passed since; and Plaintiffs have still not provided answers to interrogatories that were served in November 2007 or contacted Spamhaus to explain why.

We respectfully ask the Court this time to declare that "enough is enough." The Court will recall that this is discovery on the prove-up of ***Plaintiffs'*** damages claim based on the default entered when Spamhaus was represented by predecessor counsel. We have spent months and months attempting to get the most basic information about the basis for Plaintiffs' claim. Plaintiffs have defaulted, stonewalled, and neglected. Plaintiffs defaulted on their responses to written discovery and waived their objections, delayed many months in producing basic responsive documents (only to produce them after depositions had been scheduled), and failed to appear at two properly noticed depositions. (A general chronology of Plaintiffs' discovery defaults, previously submitted to the Court, is attached to this motion as Exhibit 3.) When we last sought relief from Your Honor, the Court granted our motion for sanctions and to compel in part, but ruled that the sanction of barring evidence was not yet warranted at that time. (Ex. 4, 7/30/2008 Tr. at 14). But the Court entered a very clear order requiring compliance with our interrogatories by August 13, 2008, and we provided a copy of that order and the transcript to Plaintiffs' counsel. (Ex. 5 & 6). Without explanation or excuse, Plaintiffs simply disobeyed the Court's order. We now ask the Court to take the action that is clearly warranted by Plaintiffs' contemptuous conduct, and dismiss Plaintiffs' claims.

The specific contempt for Court orders that warrants this relief is failure to comply with the Court's second order compelling interrogatory answers. (Ex. 2). Here is the timeline for that default:

Date	Event
11/30/2007	Spamhaus serves First Requests for Production of Documents and First Set of Interrogatories on Plaintiffs. (Ex. 7 – attachments not included)
1/2/2008	Plaintiffs' interrogatory responses due.
1/3/2008 thru 1/22/2008	Spamhaus repeatedly attempts to contact Plaintiffs' counsel regarding the status of their delinquent discovery responses. (Ex. 8)
1/22/2008	Plaintiffs provide untimely and incomplete responses to interrogatories which assert objections that have been waived and provide almost no substantive information.
1/24/2008	Spamhaus' counsel emails Plaintiffs' counsel detailing the deficiencies in Plaintiffs' Response to Spamhaus' First Set of Interrogatories. (Ex. 9)
1/29/2008 thru 2/4/2008	Spamhaus repeatedly attempts to schedule a Rule 37.2 conference to discuss deficiencies in Plaintiffs' Response to Spamhaus' First Set of Interrogatories. (Ex. 10)
2/8/2008	Plaintiffs move for extension of discovery, incorrectly stating that both parties "have exchanged written discovery" and failing to advise the Court that they had provided untimely and incomplete responses to Spamhaus' First Set of Interrogatories. (Ex. 11)
2/14/2008	In hearing before Judge Kocoras, Judge Kocoras extends the discovery close date, stating that Plaintiffs have "no reason to, if you will, dilly-dally" in providing discovery to Spamhaus. Fact discovery is extended to April 28, 2008. (Ex. 12)
2/14/2008-4/10/2008	Despite Judge Kocoras' admonition that discovery be conducted without delay, Plaintiffs fail to respond to Spamhaus' discovery requests, fail to make any document production, and fail to amend their response to Spamhaus' First Set of Interrogatories.
4/10/2008 thru 4/14/2008	Spamhaus continues its repeated requests for discovery responses. (Ex. 13)
4/23/2008	Spamhaus files a Motion to Compel and For Extension of Time. (Ex. 14)
4/29/2008	The parties appear before the Court, and Judge Kocoras grants Spamhaus' motion to compel and orders Plaintiffs to fully respond to Spamhaus' discovery requests. (Ex. 1)
5/13/2008	Plaintiffs provide inadequate and incomplete Revised Answers to Spamhaus' First Set of Interrogatories. (Ex. 15 – attachments not included)
5/16/2008	Spamhaus' counsel emails Plaintiffs' counsel detailing the deficiencies in Plaintiffs' Revised Response to Spamhaus' First Set of Interrogatories and requesting a Local Rule 37.2 Conference. (Ex. 16)
5/23/2008	The parties meet for a Local Rule 37.2 conference.
5/30/2008	Plaintiffs provide Amended Answers to Spamhaus' First Set of Interrogatories. These answers remain insufficient and incomplete. (Ex. 17)
6/13/2008	Spamhaus' counsel emails Plaintiffs' counsel detailing the deficiencies in Plaintiffs' Amended Response to Spamhaus' First Set of Interrogatories. (Ex. 18)

Date	Event
7/9/2008	Counsel for Plaintiffs and Spamhaus meet for a Local Rule 37.2 Conference, and are unable to resolve deficiencies each side contends exist in the others' discovery responses.
7/28/2008	After Plaintiffs failed to appear for three properly noticed depositions and otherwise disregarded discovery deadlines and obligations, Spamhaus files Motion for Various Relief for Persistent Discovery Defaults, requesting that the Court bar Mr. Linhardt from providing evidence at any hearing in the case as a sanction for these discovery failures, and alternatively requesting that the Court compel Plaintiffs to fully and completely respond to Spamhaus' Interrogatories. (Ex. 19)
7/30/2008	The parties appear before the Court. Stating that "[t]here has been enough of [Plaintiffs'] recalcitrance" in responding to Spamhaus' interrogatories, and that Plaintiffs' failure to provide complete and timely responses to interrogatories was "taxing on [the Court's] patience," Judge Kocoras orders Plaintiffs to fully respond to Spamhaus' Interrogatories by August 13, 2008.[1] (Ex. 2; Ex. 4 7/30/2008 Tr. at 18). Counsel for Spamhaus provided the transcript and order to the remaining counsel for Plaintiffs (as the counsel who appeared on July 30, 2008 had withdrawn). (Ex. 5 & 6)
8/13/2008 thru 8/29/2008	Plaintiffs fail to provide full and complete Amended Answers to Spamhaus' First Set of Interrogatories as ordered by the Court on July 30, 2008 or otherwise contact Spamhaus' counsel to request additional time or address the issue.

ARGUMENT

"Throughout the range of the law, there are time limits imposed on litigants at every stage of the case: some are mandatory and admit of no deviations; others are more flexible. But in each instance, lawyers who do not pay heed to deadlines do so at substantial peril to their and their clients' interests. Even a day's delay can be fatal." *Autotech Technologies Ltd. P'ship v. Automationdirect.com, Inc.*, 236 F.R.D. 396, 399 (N.D. Ill. 2006). Plaintiffs have disregarded all discovery deadlines in this case, whether imposed by the Rules or by orders of this Court, delaying discovery on their damages for over seven months. Plaintiffs are now in contempt of this Court's order that they provide complete and full responses to Spamhaus' interrogatories by

[1] The July 30, 2008 Order also ordered Plaintiffs: (1) to pay the court reporter costs associated with the cancelled depositions of David Linhardt; (2) to pay $200 to Spamhaus as sanctions; and (3) to promptly schedule the depositions of David Linhardt and the Rule 30(b)(6) witness, with the depositions to be completed by September 30, 2008. (Exhibit 2, 7/30/08 Order).

August 13, 2008, and Defendants respectfully request that the Court sanction Plaintiffs for this contempt and disregard of Court orders by dismissing the case with prejudice pursuant to Rule 37(b)(2)(A)(v), and by awarding Spamhaus the amount of all legal fees incurred in bringing this Motion.

Plaintiffs have been afforded multiple opportunities to remedy the deficiencies in their interrogatory responses, as this Court has attempted to cajole Plaintiffs into complying with their discovery obligations through extensions of time, discovery orders, and even sanctions. We respectfully say to Your Honor that "enough is enough." Plaintiffs' repeated failures to comply with their duty to provide full and complete responses to interrogatories, including non-compliance with the Court's July 30, 2008 order, warrant a complete dismissal of these damages proceedings with prejudice.

Under Federal Rule of Civil Procedure 37(b), a court may dismiss an action or proceeding when a litigant fails to obey a court order directing discovery such as a complete response to interrogatories. "A district court has the discretion to dismiss a claim when a party demonstrates a pattern of dilatory and evasive discovery tactics and when the party willfully persists in such tactics in violation of court warnings and orders." *Govas v. Chalmers*, 965 F.2d 298, 303 (7th Cir. 1992); *see also Hindmon v. National-Ben Franklin Life Ins. Corp.*, 677 F.2d 617, 620 (7th Cir. 1982) (affirmed Rule 37 dismissal against plaintiff who failed to appear for deposition, failed to properly answer interrogatories, and failed to respond to request for production of documents). Dismissal of a party's case is an appropriate sanction for failing to comply with court orders. *Sere v. Bd. of Trustees*, 852 F.2d 285, 290 (7th Cir. 1988) (upheld dismissal against party that willfully failed to comply with court orders). Actions can be dismissed "when there is a clear record of delay or contumacious conduct, or when other less

drastic sanctions have proven unavailing." *Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998).

Plaintiffs' record of delay in discovery and multiple failures to provide discovery in a timely or complete fashion is well-known to this Court (Ex. 3 provides a full chronology of this conduct), and Plaintiffs' latest failure to provide full responses to Spamhaus' interrogatories by the court's imposed August 13, 2008 deadline is merely the latest in a long line of contumacious and irresponsible discovery conduct. Dismissing Plaintiffs' damages claim would be a suitable sanction for Plaintiffs' multiple failures in conducting discovery, and is certainly warranted given Plaintiffs' delinquency in observing discovery deadlines.

Furthermore, a sanction dismissing Plaintiffs' damages claim is also warranted based on this Court's prior entry of a default judgment against Spamhaus (a non-profit United Kingdom corporation) for a 30-day failure to appear. By contrast, Plaintiffs' pattern of delayed and inadequate responses to discovery requests, failure to appear for three properly noticed depositions, and blatant disregard for court orders and their discovery responsibilities has stalled this case for almost seven months – a far more egregious pattern of contumacious and sanctionable behavior.

In addition to dismissing Plaintiffs' damages claims with prejudice, Spamhaus also requests that this Court order Plaintiffs to pay the reasonable fees incurred by Spamhaus in bringing this Motion. Rule 37(b)(2)(C) states that in addition to the sanction of dismissal for failing to obey a discovery order, a court "***must*** order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust" (emphasis added). Here, Plaintiffs' position is not "substantially justified" –

they are simply in contempt of this Court's order. We regret having to bring this motion, and ask Your Honor to award our fees for doing so.

Respectfully submitted,

THE SPAMHAUS PROJECT

Dated: August 28, 2008

By: s/ David Jiménez-Ekman

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CERTIFICATE OF SERVICE

I, Chad Emerson Bell, an attorney, hereby certify that I served the foregoing **Defendant The Spamhaus Project's Motion to Dismiss Pursuant to Rule 37(B)(2)(A) for Plaintiffs' Failure to Obey Orders of This Court** upon:

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by electronic mail and hand-delivery on this 28th day of August 2008.

s/ Chad Emerson Bell
Chad Emerson Bell