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

e360INSIGHT, LLC, and DAVID LINHARDT, an individual	))	
Plaintiffs,	)	**06 CV 3958**
v.	)	**Hon. Charles P. Kocoras**
THE SPAMHAUS PROJECT,	)	**Magistrate Judge Geraldine Soat Brown**
Defendant.	)	

e360INSIGHT, LLC AND DAVID LINHARDT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO RULE 37(B)(2)(A)

Plaintiffs, e360Insight, LLC and David Linhardt (collectively "Plaintiffs"), by and through their attorneys, Synergy Law Group, L.L.C., and for their Response to Defendant's Motion to Dismiss Pursuant to Rule 37(B)(2)(A), state as follows:

1. Defendant Motion seeks (1) dismissal of *all* of Plaintiff's claims with prejudice as a sanction for Plaintiffs' failure to obey the Court's July 30, 2008 Order to provide responses to Defendant's Interrogatories by August 13, 2008; and (2) an award to Defendant legal fees incurred in bringing its Motion. Defendant's requested relief is overly punitive and inequitable in light of fact that Plaintiff has complied with the Court's order.

2. The Court's July 30, 2008 Order required Plaintiffs to (1) pay the costs for the Court Reporter associated with the cancelled depositions of David Linhardt; (2) complete David Linhardt's deposition before September 30, 2008; (3) pay Defendant $200.00; and (4) respond to all outstanding interrogatories by August 13, 2008. (ECF #156 and Exhibit 2 to Defendant's Motion to Dismiss.)

3. Plaintiffs have sent payment to the Court Reporter, have sent payment to Defendant in the amount of $200.00, and have responded to all outstanding interrogatories.

Plaintiffs have called Defendant's counsel to make them aware of dates on which Mr. Linhardt is available for his deposition so that it will be completed before September 30, 2008. Defendant's counsel has indicated that the actual scheduling of the deposition will occur after the hearing on this motion on Thursday, September 4, 2008.

4. In the July 30, 2008 the Court granted Mr. Daniel J. Peters' Motion to Withdraw as counsel for Plaintiffs. (ECF #156.) Mr. Peters indicated that he would be sending Plaintiff's amended interrogatory responses ("Amended Responses") to Defendant's counsel before his departure from Synergy Law Group, L.L.C. two days later on August 1, 2008.

5. Mr. Linhardt provided the Amended Responses to his counsel in a timely manner on July 30, 2008. At this same time Mr. Loethen, Plaintiffs' lead counsel, along with Mr. Joseph Kish, Plaintiff's other attorney of record in this matter were involved in a trial in Lake County Illinois from July 30, 2008 through August 14, 2008.

6. Mr. Peters had been tasked with ensuring the Amended Responses be delivered to Defendant's counsel. Mr. Peters left his position at Synergy Law Group, L.L.C. on August 1, 2008.

7. Plaintiff's remaining counsel of record, Mr. Loethen and Mr. Kish, were not aware that the Amended Responses had not in fact been delivered to Defendant.

8. Plaintiff and its remaining counsel did not learn of the mistake until receiving the current Motion to Dismiss on August 28, 2008 at 5:23pm. After discovering this oversight, Plaintiffs' counsel sent the Amended Responses to Defendant on August 29, 2008.

9. Defendant filed its Motion to Dismiss knowing that Plaintiffs had complied or were in the process of complying with all of the Court's orders.

10. Defendants were aware of Mr. Peters' withdrawal from the case and that Mr. Loethen was on trial and would be on trial for a few weeks. (See Defendant's Exhibits 4 and 5 to its Motion to Dismiss.)

11. Plaintiff acknowledges that it was not Defendant's obligation to inquire regarding about the late responses before filing its Motion to Dismiss but under these circumstances that Defendant was aware of, Defendant could have avoided incurring the costs of its current Motion by indicating to Plaintiffs' counsel that it had not yet received the Amended Responses and therefore would be filing a motion to dismiss. There was no malice or willfulness behind this delay, only overlapping schedules and unintended miscommunications associated with the departure of Mr. Peters.

12. Plaintiffs realize that they are partly responsible for the delays that have occurred in this case and are committed to ensuring an expedited resolution of the only remaining issue in this case—damages.

13. Defendant's Motion to Dismiss should be denied because the relief Defendant seeks, complete dismissal of Plaintiffs; claims is inequitable considering the circumstances surrounding the Amended Responses. A complete dismissal under Rule 37 is not appropriate under these circumstances. *See Beshear v. Weinzapfel*, 474 F.2d 127, 132 (7th Cir. 1973) (recognizing that district courts should infrequently resort to the sanction of dismissal with prejudice); *Schilling v. Walworth County Park & Planning Com'n*, 805 F.2d 272, 275 (7th Cir. 1986) (noting that "[i]n the normal course of events, justice is dispensed by the hearing of cases on their merits; only when the interests of justice are best served by dismissal can this harsh sanction be consonant with the role of courts.").

14. Further, as noted above, Mr. Linhardt and e360Insight provided the Amended Responses to their attorneys in a timely manner and should not be penalized with a complete dismissal because of a clerical error on the part of their attorneys.

15. Plaintiffs concede that because of an onerous trial schedule in Lake County, combined with the withdrawal of one of Plaintiffs' counsel, Daniel J. Peters, the amended interrogatory responses were inadvertently served 12 business days late, on August 29, 2008.

16. Plaintiffs have complied with all aspects of the Court's July 30, 2008 Order, though admittedly, service of the Amended Responses was delayed.

17. Plaintiffs respectfully request that the Court deny Defendant's Motion in its entirety because Defendant has suffered no prejudice due to the delay in receiving the Amended Interrogatory Responses.

Respectfully submitted,
e360Insight, LLC and David Linhardt, Plaintiffs.

By: /s/ Bartly J. Loethen
One of Their Attorneys

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Plaintiffs' Response to Defendant's Motion to Dismiss Pursuant to Rule 37(B)(2)(A) was served upon the attorneys listed below electronically through CM/ECF on September 3, 2008.

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