UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

E360INSIGHT, LLC, Plaintiff, v. COMCAST CORPORATION, Defendant.	)	**Case No. 08 C 0340** **Judge Coar** **Magistrate Judge Mason**
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.	)	

PLAINTIFF'S, COUNTER-DEFENDANT'S AND THIRD-PARTY DEFENDANTS' MOTION TO VACATE ALL PRIOR ORDERS PURSUANT TO F.R.C.P. 60(b)(6)

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, the Law Office of Carla E. Buterman and Synergy Law Group, L.L.C., and in support of the motion to vacate all prior orders pursuant to Federal Rule of Civil Procedure 60(b)(6) state as follows:

1. e360 commenced this action against Comcast Corporation ("Comcast") on January 15, 2008. At that time, e360 filed a Disclosure Statement identifying the parties that would be involved in the suit.

2. On April 10, 2008, Judge Zagel granted Comcast's Motion for Judgment on the Pleadings and dismissed e360's complaint in its entirety. (See ECF Docket Entry No. 43, Memorandum Opinion and Order dated April 10, 2008).

3. On April 30, 2008, Judge Zagel denied e360's Motion to Reconsider, stating that Plaintiff had not added anything new but simply attempted to clarify its prior pleadings. (See ECF Docket Entry No. 53 dated April 30, 2008). e360's Motion to Reconsider pointed out that the Court failed to take Plaintiff's well-pled facts as true for the purpose of deciding Comcast's Motion for Judgment on the Pleadings. (See ECF Docket Entry No. 51 dated April 24, 2008). Further, the Motion to Reconsider pointed out that the Court improperly relied on its own factual determinations, without the parties presenting any evidence to support such determinations, when deciding to dismiss e360's complaint in its entirety. *Id.*

4. On July 2, 2008, Judge Zagel denied e360's Motion to Dismiss Comcast's counterclaims. (See ECF Docket Entry No. 61, Memorandum Opinion and Order dated July 2, 2008.)

5. On September 5, 2008, Judge Zagel voluntarily recused himself, stating that "I have a financial interest in the defenant [*sic*] corporation to this action." (See ECF Docket Entry No. 65, Transfer of Case to the Executive Committee for a Reassignment dated September 5, 2008.)

I. The Court's Violation of § 455(a) Justifies Vacatur Pursuant to F.R.C.P. 60(b)(6)—Judge Zagel's Financial Interest in Comcast Casts Doubt as to his Impartiality.

6. The United States Code requires "[a]ny justice, judge, or magistrate judge of the United States [to] disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Vactaur of prior rulings, pursuant to Federal Rule of Civil Procedure 60(b)(6), is a proper remedy for a violation of § 455(a). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 848 (1988).

7. Impartiality can be reasonably questioned where a Judge has a financial interest in one of the parties even if the Judge does not have knowledge of the financial interest. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 851-52 (1988) (finding a vacatur of a final judgment appropriate even where the judge did not have actual knowledge of his financial interest in a party to a case at the time of trial but where a reasonable observer would expect that the judge would have known of his personal interest given the facts and circumstances of the case).

8. Thus, regardless of whether Judge Zagel knew of his financial interest in Comcast, Judge Zagel's failure to disqualify himself from this case is grounds for vacating the Orders entered and rulings made by him because a reasonable observer would expect him to realize his interest after receiving the Disclosure Statement clearly identifying Comcast as a party to the proceeding.

II. The Court's Violation of § 455(b)(4) Justifies Vacatur Pursuant to F.R.C.P. 60(b)(6)—After Receiving the Disclosure Statement Judge Zagel Should Have Known of His Financial Interest in Comcast.

9. Furthermore, a judge *must* disqualify himself if "he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceedings." 28 U.S.C. § 455(b)(4); *see Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 851-52 (1988) (pointing out that §455(b)(4) "requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety.")

10. If at the time a judge was hearing a case he or she had knowledge, within the meaning of 28 U.S.C. § 455, of a reason for his or her disqualification then all his or her rulings must be vacated. *Davis v. Xerox*, 811 F.2d 1293, 1296 (9th Cir. 1987).

11. While it is not entirely clear whether Judge Zagel knew of his financial interest in Comcast before e360 filed its complaint or whether Judge Zagel became aware of his financial interest later in the case, for the purposes of resolving this Motion for Vacatur (and absent a statement to the contrary), the Court should err on the side of concluding Judge Zagel knew of his financial interest in Comcast after receiving the Disclosure Statement.

12. Because Judge Zagel had a financial interest in Comcast, he had a statutory duty to disqualify himself upon his initial review of the Disclosure Statement presented at the time the case was filed.

13. Judge Zagel, however, did not disqualify himself at that time; rather, he disqualified himself after he had already issued several rulings. (See ECF Docket Entry Nos. 43 (Order granting Comcast's Motion for Judgment on the Pleadings); 53 (Order denying e360's

Motion to Reconsider); and 61 (Order denying e360's Motion to Dismiss Comcast's counterclaims)).

14. A vacatur has been found appropriate where a judge learned about his financial interest after making two non-final orders. *Brown v. Burlington N. R.R. Co.*, No. 95C3474 (N.D. Ill. Apr. 11, 1996). In this unpublished opinion, Illinois District Judge Shadur disqualified himself under 28 U.S.C. § 455(b)(4) and vacated the two non-final orders when he learned that his wife held stock in the Defendant corporation.

15. This case presents an even more compelling reason to vacate the prior rulings than found in either *Brown* or *Liljeber*g in light of the fact e360's complaint was dismissed in its entirety and the Court denied its Motion for Reconsideration. Here, vacatur of the prior rulings is appropriate and indeed necessary to accomplish justice. *See Liljeberg*, 486 U.S. at 863 (applying Federal Rule of Civil Procedure 60(b)(6) to relieve a party of a final judgment in order to accomplish justice and stating that "[w]e must continuously bear in mind that to perform its highest function in the best way justice must satisfy the appearance of justice") (internal quotations omitted).

16. In light of the above, Plaintiff, Counter-Defendant and Third Party Defendants respectfully request all prior rulings in this case be vacated pursuant to Federal Rule of Civil Procedure 60(b)(6) because of Judge Zagel's violation of U.S.C. § 455(a), or alternatively U.S.C. § 455(b). Specifically the following rulings should be vacated:

a. Judge Zagel's April 10, 2008, Memorandum Opinion and Order granting Comcast's Motion for Judgment on the Pleadings and dismissing e360's complaint as a whole (ECF Docket Entry No. 43);

b. Judge Zagel's April 30, 2008, Order denying e360's Motion to Reconsider (ECF Docket Entry No. 53); and

c. Judge Zagel's July 2, 2008, Memorandum Opinion and Order denying e360's Motion to Dismiss Comcast's counterclaims (ECF Docket Entry No. 61).

WHEREFORE, Plaintiff, Counter-Defendant and Third-Party Defendants respectfully request that this Court enter an Order vacating all prior judgments entered by Judge Zagel without prejudice and any other relief this Court deems just and appropriate.

Respectfully submitted,
Plaintiff, Counter-Defendants and Third-Party Defendants

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

Bartly J. Loethen (6225484)
Joseph L. Kish (6197916)
Shaina A. Moss (6283585)
Synergy Law Group, L.L.C.
730 West Randolph, 6th Floor
Chicago, Illinois 60661
Telephone: (312) 454-0015
Facsimile: (312) 454-0261

Carla E. Buterman (6281101)
Law Office of Carla E. Buterman
555 Skokie Blvd., Ste 500
Northbrook, IL 60062
Telephone: (847) 480-1020
Facsimile: (847) 480-5879

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Plaintiff's, Counter-Defendant's And Third-Party Defendants' Motion to Vacate All Prior Orders Pursuant to F.R.C.P. 60(B)(6) was served upon the attorneys listed below electronically through CM/ECF on October 8, 2008.

Bartly Joseph Loethen bart@synergylawgroup.com, nmcdonald@synergylawgroup.com

Carla Elizabeth Buterman cbuterman@butermanlaw.com

Douglas N. Masters dmasters@loeb.com

Joseph L Kish jkish@synergylawgroup.com, nmcdonald@synergylawgroup.com

Nathan John Hole nhole@loeb.com, chicagopto@loeb.com, vmelero@loeb.com

Shaina Anne Moss smoss@synergylawgroup.com, nmcdonald@synergylawgroup.com

Sharon A. Ceresnie sceresnie@loeb.com, chicagopto@loeb.com

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

Bartly J. Loethen (6225484)
Joseph L. Kish (6197916)
Shaina A. Moss (6283585)
Synergy Law Group, L.L.C.
730 West Randolph, 6th Floor
Chicago, Illinois 60661
Telephone: (312) 454-0015
Facsimile: (312) 454-0261

Carla E. Buterman (6281101)
Law Office of Carla E. Buterman
555 Skokie Blvd., Ste 500
Northbrook, IL 60062
Telephone: (847) 480-1020
Facsimile: (847) 480-5879