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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 WILLIAM SILVERSTEIN, an individual,  
11 Plaintiff,  
12 vs.  
13 E360INSIGHT, LLC, et al,  
14 Defendants.

Case No.: CV07-02835-CAS (VBKx)

**PLAINTIFF'S REPLY TO  
DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
RECONSIDERATION**

Date: October 1, 2007  
Time: 10:00 am  
Courtroom: 5

16 **A. Introduction.**

17 Plaintiff's motion not only raises new facts on the old issues, but also presents new  
18 authority on identical fact patterns, as well as highlights Linhardt's standing in the  
19 Spamhaus case – the elephant in the room that was ignored.<sup>1</sup> e360 and Linhardt directs  
20 the Court to ignore that they voluntarily dismissed the matter of e360Insight, LLC and  
21 David Linhardt v. Mark James Ferguson, Susan Wilson, Rob Saecker, Rich Tietjens,  
22 William Silverstein, Tim Skirvin, Case No. 07 L 004983. ("Ferguson case").  
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26 1. E360Insight and David Linhardt v. The Spamhaus Project, Case No. 1:06-cv-03958 and  
27 2007 U.S. App. LEXIS 20725 (7th Cir. Ill. Aug. 30, 2007).

1 **B. Estoppel still is applicable to this case.**

2 The rule of judicial estoppel prevents parties from "playing 'fast and loose with the  
3 courts' which has been emphasized as an evil the courts should not tolerate." Scarano v.  
4 Central R. Co., 203 F.2d 510 (3d Cir. 1953). Defendants rely upon New Hampshire v.  
5 Maine, 532 U.S. 742, 750 for the proposition that for judicial estoppel to apply one must  
6 succeed in another court using the inconsistent position. Defendants are correct, the New  
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9 Hampshire Court ruling continued to say

10 "In enumerating these factors, we do not establish inflexible prerequisites or an  
11 exhaustive formula for determining the applicability of judicial estoppel.  
12 Additional considerations may inform the doctrine's application in specific  
13 factual contexts. New Hampshire v. Maine, 532 U.S. 742, 750 (US 2001).

14 In light of this, Defendants' argument must fail. Defendants are correct in that their  
15 position was not decided in their favor by the Ferguson Court, but that was by their own  
16 game of brinkmanship. Defendants neglected to mention is that the Court's failure to  
17 decide this was solely due to e360 and Linhardt dismissing the Ferguson case at the  
18 hearing on the motion to dismiss, on August 31, 2007.<sup>2</sup> Again, e360 and Linhardt attempt  
19 to convince the Court to ignore their status as Plaintiff in the Ferguson caset – where  
20 Linhardt alleges that individuals located in California, Oregon, and Washington are  
21 subject to jurisdiction in Illinois for making allegedly libelous UUNET newsgroup  
22 postings about Illinois residents.  
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27 2. E360's and Linhardt's action causes one to wonder if e360 and Linhardt filed the  
28 Ferguson lawsuit, knowing that jurisdiction was improper, and dismissed the suit, only after  
Defendants spent monies on legal fees and costs, the moment that there would be an adverse  
ruling against them – subjecting them to a malicious prosecution claim.

1 **C. Goldhaber is new law applicable in this case.**

2 Goldhaber v. Kohlenberg, 395 N.J. Super. 380, 387 (App. Div. 2007) is new law in  
3 that (Defendants do not dispute this) that Goldhaber was not published until two Court  
4 days prior to the hearing in this case. Defendants attempt to characterize this recent ruling  
5 as solely a rehash of Calder v. Jones.

6  
7 Goldhaber is the first appellate court case (that Plaintiff is aware of) that applies  
8 Calder to a UUNET newsgroup posting – as opposed to a web site. A web site is solely  
9 one location on the internet and remains in that location, whereas a UUNET posting is  
10 placed on one server (in the instant case, located in California) with the intent of being  
11 replicated to other servers around the world (similar to purchasing an advertisement on  
12 the wall behind first base in Dodger Stadium, knowing that every game broadcast will  
13 transmit that same advertisement around the world). Furthermore, the web site referred to  
14 in Blakey, was restricted to members only – different from a newsgroup that is accessible  
15 to the general public.

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17 Goldhaber's reference to the identification of the municipality indicates precise  
18 knowledge of where the harm is directed, not that failing to specify the municipality  
19 would have divested New Jersey of jurisdiction.<sup>3</sup> Linhardt does not dispute knowing that  
20 Silverstein was in Los Angeles and the harm would be felt in Los Angeles, when Linhardt  
21 made the complained of postings to a server in California. In fact, e360 and Linhardt cited  
22 Goldhaber in their opposition to dismiss for lack of jurisdiction (filed August 10, 2007) in  
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28 3. Though not relevant, Defendants, in their libelous posting, refer to a scanned copy  
of the June 25<sup>th</sup> ruling of this Court, which specifically refers to Los Angeles, California.

1 the Ferguson case for the proposition that there is jurisdiction against an individual in  
2 another state based on internet postings on UUNET  
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6 **D. Plaintiff is asserting an argument based on evidence the Court did not consider.**

7 Defendant is correct that the evidence of Linhardt’s standing in the Spamhaus case  
8 was before the Court. Though this evidence, regarding standing, was before the Court, it  
9 was apparently never considered by the Court, permitting the instant motion under Local  
10 Rule 7-18(c).  
11

12 The Court ruled that the statements in the Spamhaus case, contained within the  
13 affidavit in support of Default judgment, “e360 and I lost....” combined with Linhardt’s  
14 explaining away those statements by saying that he really meant “e360 and I in my  
15 capacity as president...” conferred jurisdiction in California. In evaluating the statements,  
16 the Court clearly did not consider Linhardt’s standing as Plaintiff in the Spamhaus case,  
17 as to have standing as Plaintiff, Linhardt would personally have had to suffer damages –  
18 not in his role as President.  
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21 Judicial estoppel also applies in this context of his standing in the Spamhaus case.  
22 Linhardt, to be an individual Plaintiff would have to have suffered personal damages, and  
23 alleged so when he made the “e360 and I lost....” statements and asked the Court for  
24 punitive damages for both himself and e360 when he said, “e360 and I should be awarded  
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1 punitive damages.”<sup>4</sup> In the Spamhaus case, as an individual Plaintiff, Linhardt  
2 maintained his standing as an individual suffering harm, and received a judgment for  
3 himself personally along with e360. While this damage award and injunction was vacated  
4 by the appeals court on August 30, 2007, the judgment still remains – and is pending  
5 reconsideration by the trial court as to damages only..<sup>5</sup>

7 Defendants classifying Linhardt’s standing in the Spamhaus as a non-sequitur is  
8 disingenuous. Linhardt desires this Court to ignore that he maintained his standing in the  
9 Spamhaus case as Plaintiff, representing that he personally suffered damages so that he  
10 may receive a judgment.

## 15 **E. Conclusion**

16 Plaintiff has a valid basis for a motion for reconsideration. Plaintiff respectfully  
17 requests that the Court does reconsider its granting of Linhardt’s 12(b)(2) motion, taking  
18 into account his actions in the Ferguson case, his status as Plaintiff in the Spamhaus case,  
19 and that another Court found jurisdiction for UUNET postings.

21 Judicial estoppel is fatal to Linhardt’s 12(b)(2) motion, if the Court reconsiders it.  
22 Defendants are not consistent with their stories to this or any other Court. Defendants ask

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24 4. Please see § 37 of Linhardt’s affidavit, attached as Exhibit C to Silverstein’s motion for  
25 reconsideration.

26 5. “We therefore affirm the judgment as to liability and the denial of the motion for relief  
27 under Rule 60(b). We further conclude, however, that the district court failed to undertake an  
28 inquiry into the proof of damages and the necessity of injunctive relief and issued an injunction  
that is overbroad.” e360 Insight v. Spamhaus Project, 2007 U.S. App. LEXIS 20725 (7th Cir.  
2007)

1 for the libel claim be dismissed, attributing it to Linhardt personally, though signed as  
2 president, while Linhardt used his standing as president to avoid personal jurisdiction in  
3 this case.<sup>6</sup> Linhardt brought a libel claim in Illinois, the Ferguson case, arguing  
4 jurisdiction where the harm of the internet postings would be felt, Linhardt resides – the  
5 same basis that Silverstein asserts jurisdiction of Linhardt in the instant case.<sup>7</sup> To obtain a  
6 judgment from the Spamhaus Linhardt, in his declaration, represented to the Spamhaus  
7 that both he and e360 suffered damages and deserved punitive damages.<sup>8</sup> Linhardt,  
8 controverting his own representations made to the Spamhaus Court, now claims he had no  
9 personal business with California and suffered none of the damages that he claimed in  
10 order to receive the Spamhaus judgment.<sup>9</sup> The Court should give no credence to  
11 Linhardt’s word, where he fast and loose with the truth while refusing to provide any real  
12 evidence.  
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16 Linhardt only separates himself from his corporate shells when it conveniences him.  
17 Linhardt merges e360 and himself so that **he and e360** may obtain a judgment in the  
18 Spamhaus case.  
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22 6. In Linhardt’s 12(b)(2) motion, the Court accepted Linhardt’s argument that the  
23 application for the mail receiver in California identifying him as a member and officer of Bay  
24 City Hosting sufficiently indicating his corporate role avoiding his personal liability.

25 7. Not only is this the basis Linhardt’s argument against dismissal of Ferguson case for lack  
26 of jurisdiction, but the basis for jurisdiction of the Ferguson complaint.

27 8. Linhardt’s affidavit states, under oath, that both “e360 and I” lost business and business  
28 opportunities valued at \$11,715,000 with seven companies, four of which are in California.

9. Linhardt only provided his own declarations as evidence, permitting him to change the  
facts to suit his immediate need.

1 For the preceding reasons, Plaintiff respectfully requests that the Court reconsider its  
2 ruling dismissing Linhardt for lack of personal jurisdiction.  
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6 Dated: September 23, 2007  
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9 Respectfully submitted,  
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14 Attorney for Plaintiff, William Silverstein  
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