



(Ex 1, 10/15/2008 Order.) Thus, Plaintiffs are left with the burden to prove their \$11.715 damages claim.

3. Spamhaus is entitled to summary judgment against both e360 and David Linhardt on the grounds of Plaintiffs' inability to prove up its damages as required by the law. Plaintiffs cannot prove their damages to a "reasonable certainty," as required by the Seventh Circuit, *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 692 (7th Cir. 2007), for three reasons.

4. **First**, Plaintiffs will be unable to meet their burden of defeating Spamhaus' Motion in Limine to Exclude the Damages Opinion Testimony of David Linhardt on the issue of damages. David Linhardt is the sole witness on the issue of damages. Without his testimony, Plaintiffs can not prove their damages. The preclusion of Linhardt based on our companion Motion in Limine from testifying on damages will necessitate summary judgment for Spamhaus.

5. **Second**, Plaintiffs failed to maintain separate records for e360. The non-party parent company of e360, Maverick Direct Marketing Solutions, Inc. ("Maverick") commingled records for e360 with other entities such that Linhardt testified it is impossible to ascertain e360's damages with any reasonable certainty. Also, Plaintiff David Linhardt, as an owner of non-party Maverick, has no standing to for damages incurred by e360.

6. **Third**, e360 was a start-up company with no history of revenues or profits for the time period in which it claimed it lost profits. The Illinois new business rule prevents a party from recovering lost profits where the profits of the business would be too speculative on which to base recovery. *TAS Distrib. Co., Inc. v. Cummins Engine Co, Inc.*, 491 F.3d 625, 635 (7th Cir. 2007). Plaintiffs' failure to provide reliable projections of lost profits – and the lack of any basis to do so – bars their recovery of lost profits under the new business rule.

7. In further support of this motion, Spamhaus submits the accompanying memorandum of law, factual statement under Local Rule 56.1, and appendix of supporting materials.

Respectfully submitted,

THE SPAMHAUS PROJECT

Dated: December 9, 2008

By: s/ David Jiménez-Ekman

Craig C. Martin  
David Jiménez-Ekman  
Chad Emerson Bell  
JENNER & BLOCK LLP  
330 North Wabash Avenue  
Chicago, IL 60611  
Telephone: (312) 222-9350  
Facsimile: (312) 527-0484

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of December 2008, a copy of the foregoing The Spamhaus Project's Motion for Summary Judgment on Damages was filed electronically with the Court's CM/ECF system. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ David Jiménez-Ekman