

**No. 06 C 3958
(Judge Charles P. Kocoras)**

**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,

v.

**THE SPAMHAUS PROJECT, a company limited by guarantee and organized
under the laws of England, a/k/a THE SPAMHAUS PROJECT, LTD.,**

Defendant.

**THE SPAMHAUS PROJECT'S MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT ON DAMAGES**

CRAIG C. MARTIN
DAVID JIMÉNEZ-EKMAN
CHAD E. BELL
Jenner & Block LLP
330 N. Wabash Ave
Chicago, IL 60611
(312) 222-9350

December 9, 2008

Attorneys for Defendant

REDACTED

Introduction

Plaintiffs' basic damages claim in this case is that they should be awarded \$11.7 million for lost projected revenue and lost enterprise value for a now-defunct internet marketing company that (i) was started for \$5,000, (ii) operated for just 5 years, and (iii) averaged (with its affiliates) just a year in unaudited income (with its affiliates). The only ground for this pie-in-the-sky claim is the proffered opinion testimony of individual plaintiff and former CEO of the corporate plaintiff David Linhardt. In our companion motion to exclude, which we respectfully suggest the Court review and resolve *before* turning to this motion for summary judgment, we have moved to exclude Linhardt's testimony under Federal Rule of Evidence 702. In that motion, we demonstrate that Linhardt's testimony is inadmissible under Rule 702 for three reasons: (1) Linhardt admitted that he is not an expert on the topics of his testimony; (2) Linhardt's \$11.7 million estimate is admittedly not "accurate" and Linhardt could not recall any of the methodology he used to make the estimate; and (3) Linhardt's subsequent \$136 million estimate has been excluded by the Court's October 15, 2008 order and is otherwise inadmissible under Rule 702.

We bring this motion to make three related legal arguments. *First*, if our motion to exclude Linhardt's testimony is granted, we are entitled to judgment as a matter of law because Plaintiffs bear the burden of proof on damages and they will have none. (Part II.A.) *Second*, even if Linhardt's testimony were otherwise admissible, Plaintiffs cannot meet their burden of proof with it because Linhardt cannot distinguish between damages to the parties and to non-party affiliates. (Part II.B.) *Third*, even assuming Linhardt's testimony is admissible and leaving aside that Plaintiffs have not isolated the damages to the plaintiff entity, Plaintiffs' damages are barred as a matter of law by Illinois' "new business rule." (Part II.C.)

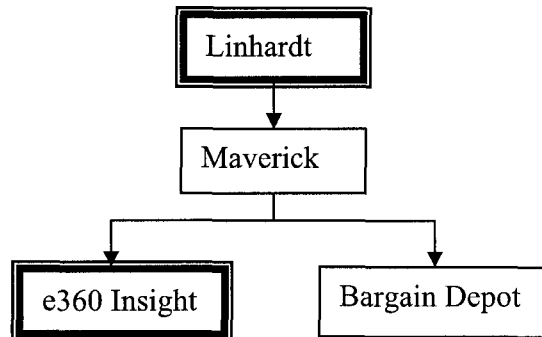
I. Statement Of Undisputed Facts.

A. The Business Of e360 Insight And Its Revenues.

e360 Insight And Its Affiliates

Linhardt started e360 Insight as a new business in March 2003; it has no earnings or profits before that time. (St. ¶ 1.) e360 is wholly owned by non-party Maverick Direct Marketing Solutions, Inc. ("Maverick"), which also wholly owns non-party Bargain Depot

Enterprises and several other entities. (St. ¶ 2.) Plaintiff David Linhardt owns Maverick. (St. ¶ 3.) The ownership structure (with only the two parties in bold) therefore looked like this:



Non-party Maverick kept books on a “consolidated” basis; that is, “the books were kept at the Maverick level, so there aren’t separate financial statements for Bargain Depot and e360.” (St. ¶ 5.) There is “no way of separating out results and data for e360 from, for example, Bargain Depot.” (St. ¶ 6.)

The only plaintiff entity, e360 Insight, which ceased operating in early 2008, was an “internet marketing” company. (St. ¶ 7.) Essentially, e360 Insight received revenue from client companies who desired to market products and services. (St. ¶ 8.) The client companies provided content for an e-mail message, and e360 Insight assembled an e-mail message and sent it to numerous e-mail addresses contained in an “opt-in database” that e360 Insight, in large part, licensed from third party database providers.¹ (St. ¶ 9.)

e360 Insight’s Variable Revenues

The revenue e360 Insight or its affiliates received from this process for any particular client was highly variable because fees were based on a transactional agreement. (St. ¶ 10.) Specifically, e360 Insight generally received no revenue from merely sending e-mails, and only received revenue when the e-mails generated a “transaction” from an ad recipient, for example, a recipient’s clicking through to a client’s website. (St. ¶ 11.) The amount of revenue provided by e360 Insight’s clients was therefore determined on a “campaign by campaign” basis, with long-

¹ As the Court knows, the origin of the lawsuit relates to whether the databases 360 Insight used in fact consisted of e-mail addresses whose owners had consented to receive marketing messages (and were therefore “opt-in”), or whether the e-mail 360 Insight sent was actually unsolicited e-mail, or “spam.” Because a default has been entered on liability, and the spam / opt-in issue is irrelevant to this motion, we recite the testimony of Linhardt as given, but by no means concede or agree that the databases were truly “opt-in.”

term agreements being “rare.” (St. ¶ 12.) The revenue generated by a particular campaign, in turn, could depend on a variety of factors, including (St. ¶ 13):

The strength of the offer . . . what is being offered in the marketing message; the amount of requirements that you place on the consumer, what do they need to do to redeem the offer; and their level of interest and needs as it matches up or doesn’t match up with the offer in question.

As Linhardt described at his deposition, the transactional nature of the business makes it very difficult to accurately determine at the outset how much revenue a particular client relationship will generate:

Q: And, I take it, you mention [the transactional structure of the business] at this point because it illustrates some of the difficulty in accurately estimating what revenues would have been lost [due to Spamhaus’ conduct]?

A: Exactly, and – yes.

(St. ¶ 14.)

During the time that e360 Insight operated, from 2003 through the end of 2007, the unaudited, consolidated Maverick books (which included e360 Insight’s numbers, as well as the other entities’ numbers), showed an average annual net income of approximately . (St. ¶ 15.) Maverick’s books show a maximum net income of and a minimum net income of . (St. ¶ 16.) During the same time, gross revenues of Maverick ranged from a low of about to a high of about . (St. ¶ 17.)

B. e360 Insight’s Claims, The Seventh Circuit’s Opinion, And The Current Procedural Status.

As Your Honor knows, before the Court is an attempt to prove up \$11.7 million of damages based on a default finding the Court entered in September 2006. Basically, the Plaintiffs (Linhardt and e360 Insight) allege that Spamhaus listed them as a known “spammer” in December 2003; that Spamhaus refused to remove them; and that the listing caused e360 Insight to lose revenue because clients would not engage e360 Insight. (St. ¶ 18.) The Court defaulted Spamhaus (then represented by predecessor counsel) and entered judgment for tortious interference with contract, tortious interference with prospective economic advantage, and defamation. (St. ¶ 19.) Relying on a sworn affidavit submitted by Linhardt, the Court also awarded the full compensatory damages sought, of \$11.7 million. (St. ¶ 20.)

REDACTED

Spamhaus, represented by current counsel, appealed. The default finding was sustained, but the Seventh Circuit remanded for a more detailed examination of damages. *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 602-03 (7th Cir. 2007). The Seventh Circuit held that judgment by default may not be entered without a hearing on damages unless “the amount claimed is liquidated or capable of ascertainment from definite figures contained in the documentary evidence or in detailed affidavits.” *Id.* at 602. The court went on:

Mr. Linhardt's affidavit [claiming \$11.7 million in damages] is a conclusory statement of the lost value of his business, based largely on his calculations of lost future profits. It provides a list of businesses involved in “actual and pending contracts” and a total calculation of his calculation of loss, but says nothing about the status of his relationship with those businesses before e360 was listed on the [Spamhaus’ list of spammers]. That is, the affidavit claims profit loss in absolute numbers, but provides no information whatsoever to support a finding that such future profits were certain prior to Spamhaus' act. Particularly given the difficulties that Illinois courts have acknowledged in proving non-speculative amounts of lost future profits, [cases omitted], this affidavit alone cannot provide the requisite “reasonable certainty” for a damages award without the necessity of a hearing.

Id. at 603.

On remand, discovery opened in November 2007, and the Court will recall that e360 Insight and Linhardt defaulted numerous times on their discovery obligations. (St. ¶ 25.) As a result, Spamhaus moved to dismiss as a discovery sanction. On October 15, 2008, the Court denied Spamhaus’ motion but granted alternate relief. While the Court held that outright dismissal was “too onerous a remedy for the wrong it seeks to correct,” the Court agreed that Plaintiffs had failed to “comply with their discovery obligations” and struck the 16 new witnesses identified in Plaintiffs’ responses as a sanction for Plaintiffs’ untimely conduct. The Court also “order[ed] stricken . . . any amounts stated in the Supplemental Amended Responses to Interrogatories 16 and 17 in excess of \$11.7 million” and ordered Plaintiffs to pay Spamhaus’ fees and costs incurred in bringing the motion to dismiss. (St. ¶ 29.) Plaintiffs have not sought or obtained reconsideration and, consequently, all that remains at issue in the damages prove-up is Linhardt’s original damages calculation of \$11.7 million.

II. The Court Should Grant Summary Judgment On Plaintiffs' Damages Claims.

Summary judgment “shall be rendered forthwith” when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If Spamhaus meets its initial burden of showing it is entitled to summary judgment, the burden shifts to Plaintiffs to go beyond the pleadings and set forth specific facts showing that there is a genuine issue of material fact. *Cont'l Cas. Co. v. Nw. Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005); Fed. R. Civ. P. 56(e). A genuine issue of material fact exists when the evidence is sufficient to support a reasonable jury verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To avoid summary judgment, Plaintiffs must do more than merely allege the existence of a factual dispute; they must offer admissible evidence sufficient to support a damages judgment in their favor. *Basith v. Cook County*, 241 F.3d 919, 926 (7th Cir. 2001). An expert opinion cannot supply such evidence unless the proponent of the expert opinion first establishes its admissibility. *See, e.g., Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007).

A. If The Court Grants Our Motion To Exclude Linhardt's Testimony, Spamhaus Is Entitled To Summary Judgment Because Plaintiffs Have No Evidence To Meet Their Burden Of Showing Damages To “A Reasonable Certainty.”

In its opinion on appeal, the Seventh Circuit held that Plaintiffs' must demonstrate their damages at a hearing “to a reasonable certainty.” 500 F.3d at 602. Prior to the appeal, and in discovery after, the Plaintiffs have offered to documentary evidence or even a theory of a specific, liquidated damages amount. Instead, as demonstrated at length in our motion to exclude (at 6-10), Plaintiffs claim that their damages are “lost revenues” and “lost enterprise value” based exclusively on calculations made by Linhardt. Consequently, if our motion to exclude Linhardt's opinion testimony is granted, Plaintiffs have no evidence to sustain their burden of proof, and the hearing is unnecessary – Spamhaus is entitled to judgment as a matter of law.

B. Alternatively, Plaintiffs Cannot Show Their Damages To A Reasonable Certainty Because They Are Commingled With Damages Suffered By Non-Parties, Maverick And Bargain Depot.

At his deposition in this case, Linhardt testified that there were no separate books for e360 Insight. Instead, non-party Maverick kept books on a “consolidated” basis; that is, “the books were kept at the Maverick level, so there aren’t separate financial statements for Bargain Depot and e360.” (St. ¶ 5.) There is “no way of separating out results and data for e360 from, for example, Bargain Depot.” (*Id.*)

While this may, as Linhardt testified, be fine for federal income tax purposes, it is fatal to Plaintiffs’ ability to prove damages. The basic but insurmountable problem is that neither Maverick nor Bargain Depot is a party to the case. Because damages for e360 Insight (if any) cannot, according to Linhardt, be separated from those suffered by Maverick and Bargain Depot, e360 Insight cannot establish its damages here to “a reasonable certainty.” Nor does the fact that Plaintiffs may have some ownership interest in the non-parties help them: except for certain circumstances not present here, a shareholder has no standing to seek damages for an injury to a corporation. *Fidelity National Title Insurance Co. of New York v. Intercounty National Title Insurance Co.*, 161 F. Supp. 2d 876, 881 (N.D. Ill. 2001); *Nocula v. UGS Corp.*, 520 F.3d 719, 726-27 (7th Cir. 2008); *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d 750, 757 (7th Cir. 2008). Even assuming (contrary to fact) that Linhardt’s testimony was admissible and otherwise sound, it cannot meet Plaintiffs’ burden as a matter of law.

C. Alternatively, Plaintiffs Cannot Recover Damages Because Illinois Law Bars Lost Profits For A New Business.

Illinois law requires that Plaintiffs prove their damages with “reasonable certainty,” namely that damage awards not be based on false assumptions or speculative numbers.” *TAS Distrib. Co., Inc. v. Cummins Engine Co., Inc.*, 491 F.3d 625, 635 (7th Cir. 2007). A “start-up company should not be permitted to obtain pie-in-the-sky damages . . . damages must be proved, not just dreamed.” *Dominion Nutrition, Inc. v. Cesca*, 467 F. Supp. 2d 870, 883-84 (N.D. Ill. 2006) (citing *MindGames, Inc. v. Western Publ’g Co.*, 218 F.3d 652, 658 (7th Cir. 2000)). Applying these principles, Illinois law generally prohibits the recover of lost profits for a new business. *Stuart Park Assoc. Ltd. P’ship v. Ameritech Pension Fund*, 51 F.3d 1319, 1328 (7th

Cir. 1995); *SK Hand Tool Corp. v. Dresser Indus., Inc.*, 284 Ill. App. 3d 417, 672 N.E. 2d 341, 348 (1st Dist. 1996). As the Seventh Circuit explained in *TAS Distrib. Co.*, 491 F.3d at 635:

Relevant to this analysis is Illinois' "new business rule" which states that the reasonable certainty requirement for recovery of lost profits damages may be satisfied by comparable "past profits in an established business, but that the lost profits of a new business would be too speculative" on which to base recovery. *Malatesta v. Leichter*, 186 Ill. App. 3d 602, 134 Ill.Dec. 422, 542 N.E.2d 768, 782 (1989). The general rule under Illinois law is that a new business has no right to recover lost profits. See, e.g., *Stuart Park Assoc. Ltd. P'ship v. Ameritech Pension Trust*, 51 F.3d 1319, 1328 (7th Cir. 1995) (interpreting Illinois law). Illinois courts have upheld damage awards based on comparable businesses where the "profits [are] of a person other than plaintiff, who operated the same established business at the identical location for the period of time which plaintiff seeks damages." *Id.* In situations where the plaintiff operated an established business at an identical location during the same time period as a party for whom profit information is available, Illinois courts have held these comparisons to be "not of such a speculative nature to require a finding that plaintiff's lost profits may not be proved to a reasonable certainty." *Id.* The reasoning behind the rule is simply that a new business has not demonstrated yet what its profits will be. See *Millex Prods.*, 177 Ill. Dec. 852, 603 N.E.2d at 1236; see also *Kinesoft Dev. Corp. v. Softbank Holdings Inc.*, 139 F.Supp.2d 869, 908 (N.D. Ill. 2001).

Here, Plaintiffs' damages are barred by the new business rule. It is undisputed – as Linhardt testified – that e360 Insight was a startup business with no history of revenues or profits in March 2003. (St. ¶ 1.) Plaintiffs allege that Spamhaus' tortious conduct occurred in December 2003. (St. ¶ 18.) There was no history of past revenues or profits upon which to base any quantification of alleged lost future revenues or profits from December 2003. Moreover, the speculative nature of the claim is compounded by the transactional nature of the business, which Linhardt admitted made it difficult to project any lost revenues. (St. ¶ 10.) Consequently, even if Plaintiffs otherwise had competent evidence to support damages, as a matter of law, their claim for lost revenues and lost enterprise value fall under the new business rule.

The courts have repeatedly found claims for lost profits unrecoverable as a matter of law in similar circumstances. For example, in *Alexander Binzel Corp. v. Nu-Tecsys Corp.*, 2000 WL 310304, at *13 (N.D. Ill. March 24, 2000) (Ex. A), the court determined that Nu-Tecsys fell under the new business rule and was barred from lost profits damages because it had entered the relevant market only seven months prior to the time of filing its suit. The court disregarded any prior success it had in a similar enterprise in deciding not to award lost profits. *Id.* Also, in *Dominion Nutrition*, the court held that Dominion Nutrition, a start-up company with no record

of profits, fell under the new business rule. 467 F. Supp. 2d at 883-84. The court noted that Dominion Nutrition could not have proven lost profits with reasonable certainty because as a start-up company, it had numerous hurdles to clear before it had a chance of becoming profitable. *Id.* And in *M.S. Distrib. Co. v. Web Records, Inc.*, 2003 WL 21087961, at *10 (N.D. Ill. May 13, 2003) (Ex. B), a case very similar to that here, the court applied the new business rule to a new web venture where the exact amount of lost profits was admittedly unknown. Although the owner of the venture claimed (just as Linhardt does here) that she could estimate lost profits, the court found that her lack of expertise in opining on projected sales prevented the claim for lost profits because they could not be proven with a reasonable certainty. *Id.*

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Spamhaus on all Plaintiffs' damages claims.

Dated: December 9, 2008.

Respectfully submitted,
s/ David Jiménez-Ekman
Craig C. Martin
David Jiménez-Ekman
Chad E. Bell
Jenner & Block LLP
330 N Wabash Avenue
Chicago, IL 60611
(312) 923-2782 telephone
(312) 840-7782 facsimile
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2008, a copy of the foregoing The Spamhaus Project's Memorandum In Support Of 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