

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

E360INSIGHT, LLC,	)	
an Illinois Limited Liability Company, and	)	
DAVID LINHARDT, an individual	)	
	)	
Plaintiffs,	)	<b>06 CV 3958</b>
	)	
v.	)	<b>Judge Kocoras</b>
	)	
THE SPAMHAUS PROJECT,	)	<b>Magistrate Judge Brown</b>
a company limited by guarantee and	)	
organized under the laws of England, aka	)	
THE SPAMHAUS PROJECT LTD,	)	
	)	
Defendant.	)	

**e360INSIGHT, LLC AND DAVID LINHARDT’S RESPONSE  
IN OPPOSITION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, e360Insight, LLC and David Linhardt (collectively “Plaintiffs”), by and through their attorneys, Synergy Law Group, L.L.C., and for their Response in Opposition to Defendant’s Motion For Summary Judgment, state as follows:

Plaintiffs obtained a default judgment against Defendant in the amount of \$11,715,000 on September 13, 2006. Defendant then appealed. The Appellate Court upheld the entry of default judgment but remanded the case for a more extensive inquiry into Plaintiffs damages. Defendant has moved for summary judgment, alleging that Plaintiffs will be unable to prove any of their damages. As discussed below, Plaintiffs can establish their damages with a reasonable degree of certainty and summary judgment should therefore be denied.

## **I. Plaintiffs Can Establish Damages to a Reasonable Degree of Certainty**

### **a. Linhardt is Qualified to Testify as to the Damages Incurred by e360Insight and Linhardt**

Linhardt, as president and owner of e360Insight, has personal knowledge of e360Insight's business, its accounts and its income. (St. ¶¶1-2) As discussed in Plaintiffs Response to Defendants Motion to Exclude Linhardt's testimony, Linhardt is qualified to testify as to the damages sustained by himself and e360Insight. Linhardt's calculations of the damages sustained by the Plaintiff are based on the lost contracts and lost income due to the improper acts of Spamhaus. Specifically, Linhardt testified in his deposition regarding the contracts e360Insight lost due to the actions of Spamhaus (St. ¶¶4-10). Linhardt had personal knowledge of the value of these contracts. (*Id.*) Linhardt also had knowledge regarding e360Insight's expectancy that these contracts would continue. (*Id.*) The Defendant has offered no evidence to the contrary. Defendant argues that Linhardt is not an expert in business valuation and therefore cannot testify as to any damages sustained by e360Insight. Computing the direct damages sustained by e360 does not require any specialized knowledge or expertise. These calculations are made by the president of the corporation based upon his personal knowledge. Defendant's line of reasoning ignores the very nature of the direct damages sustained by e360Insight.

Linhardt has also calculated damages based on the loss of revenue due to Spamhaus blocks. As discussed in detail below, Linhardt calculated the direct revenue loss per blocked email message. Data relied upon by Linhardt included the number of email messages sent by e360Insight, the number of email messages blocked due to Spamhaus, and the revenue and profits earned by e360Insight on messages and accounts not blocked by Spamhaus. (St. ¶¶15-19). Linhardt has personal knowledge of this information as he regularly worked with and compiled this data.

Accordingly, Linhardt is permitted to testify as to the value, the profits and projected profits of e360Insight.

### **Plaintiffs' Damage Calculations**

e360Insight lost substantial revenue due to Spamhaus unlawful actions. (St. ¶¶3, 17-19). e360Insight is an email marketing company and earned revenue through sending email campaigns on behalf of its clients. e360Insight would send email messages on behalf of their clients to recipients who opted to receive such communications. e360Insight would be paid on a performance basis, meaning that e360Insight would be paid by the client for each “action” taken by the recipient, such as clicking on a link in the email message or visiting the client’s website. Due to the improper acts of Spamhaus, e-mails sent by e360Insight were blocked and did not reach the intended recipients. (St. ¶14) Instead, e360Insight would receive an error message indicating that the email had been blocked due to Spamhaus. (St. ¶15) Linhardt was able to determine the number of emails blocked to due to Spamhaus. (St. ¶16) For example, in 2004, e360Insight sent **[REDACTED]** messages. Of those, **[REDACTED]**, or **[REDACTED]**, were blocked by Spamhaus. *Id.* Because not all of the email messages sent were blocked, e360Insight was able to generate revenue on the unblocked accounts. (St. ¶20) Based on the account history and success of other email campaigns, Linhardt determined average revenue per thousand messages. Because the demographic and other segmentation characteristics between the records blocked and those not blocked by Spamhaus were identical, e360Insight reasonably assumes the blocked email messages would perform in the same way as the unblocked messages. It therefore follows that the blocked messages would generate substantially similar click-through rates, conversion rates and revenue productivity as the unblocked messages. The total amount of lost revenue can then be determined by applying the campaign performance metrics of the unblocked messages to the blocked messages. In 2004,

the average revenue per thousand messages sent was [REDACTED]. (St. ¶18) This amount is then multiplied by the number of records blocked by Spamhaus, [REDACTED], which yields a total direct revenue loss due to Spamhaus blocks in 2004 of [REDACTED]. (St. ¶¶18-19) This process was carried out for the years 2003-2007 and is detailed in Exhibit 4 to Plaintiff's Rule 56.1 Statement of Additional Facts. These calculations yielded a total direct revenue loss due to confirmed Spamhaus blocks of \$[REDACTED]. (St. ¶19).

Plaintiffs have also claimed damage for contracts lost due to Spamhaus' interference. Specifically, Plaintiffs identified Smartbargains, Vendare, Optinbig and Net Blue as clients lost due to Spamhaus. (St. ¶4) The initial damage calculations were the estimated revenues for the contracts over a term of two years and totaled \$2,465,000.00. (St. ¶¶7-13). e360Insight had an established history with the clients lost and the profit history of those clients was used to calculate the lost revenues. (St. ¶20). e360Insight also suffered numerous lost business opportunities and a loss in enterprise value in the amount of \$9,250,000. (St. ¶12). Linhardt testified that e360Insight lost these contracts as a direct result of Spamhaus' actions. (St. ¶¶2, 4-6). As president and owner of e360Insight, Linhardt has personal knowledge of the value of these contracts to e360Insight and can testify accordingly.

## **II. Plaintiff's Damages are Not Commingled with Damages of Non Parties**

Defendant repeatedly and wrongly suggests that Plaintiffs' damages are "commingled" with damages suffered by non-parties Maverick and Bargain Depot. As Linhardt explained in his deposition, a consolidated tax return was filed by Maverick. The mere fact that a consolidated return was filed does not preclude Linhardt and e360Insight from proving their damages. e360Insight's damages are based on the lost contracts and lost income due to the unlawful acts of Spamhaus. Specifically, Linhardt testified in his deposition regarding the contracts e360Insight lost

due to the actions of Spamhaus (St. ¶¶2, 4-6). Linhardt had personal knowledge of the value of these contracts as well as personal knowledge that Spamhaus was the cause the clients cancelled. *Id.* The filing of a consolidated tax return has no effect on the value of these contracts or on the fact they were lost due to the unlawful actions of Spamhaus. In addition, e360Insight has also presented damages for the direct revenue lost per blocked email message. As discussed above, these damages were calculated using the revenue and profits earned by e360Insight from 2003 through 2007. Again, the filing of a consolidated tax return has no effect on what income e360Insight generated. In addition, no other entities owned by Maverick generated any revenue. (St. ¶21). The consolidated tax return has no effect on the Plaintiffs damage calculations.

### **III. The Illinois “New Business Rule” Does Not Bar Plaintiffs’ Damages**

Defendant asserts the Plaintiffs’ damage claims are barred by the Illinois new business rule. The proffered justification for this rule is that “a new business has yet to show what its profits actually are.” *SK Hand Tool Corp. v. Cocoran Partners*, 284 Ill. App. 3d 417, 427 (1st Dist. 1996). However, there are many exceptions to this rule and courts have found that “evidence of prior profits is not the sine qua non of proof of damages ..”. *Id.* The cases relied upon by Defendants are clearly distinguishable from the present case. In both *Dominion Nutrition* and *M.S. Distributing*, the plaintiffs were new businesses with no profit history to use as a basis for their damages. *Dominion Nutrition, Inc. v. Cesna*, 467 F. Supp. 2d 870 (N.D. Ill. 2006); *M.S. Distrib. Co. v. Web Records, Inc.*, 2003 U.S. Dist. LEXIS 8078 (N.D. Ill. 2003).

In contrast, e360Insight has a profit history on which its damage claim is based. Although Spamhaus’ unlawful conduct severely affected e360Insight’s business, e360Insight continued to operate and generate revenues from 2003 through 2008. (St. ¶20-21) As discussed in Linhardt’s deposition and as evidenced in e360Insight’s profit and loss statement, e360Insight generated total

gross profits of [REDACTED] from 2003 through 2008. *Id.* This is not the case of a start-up company that never generated any revenues and has no basis on which to calculate lost profits. e360Insight was able to generate revenue on some of its campaigns despite Spamhaus' actions that caused many of those emails to be blocked. The profits earned by e360Insight provide a reasonably certain basis on which to calculate its damages. "Where there is concrete evidence from which the lost profits for a new venture can be determined to a reasonable degree of certainty, they may be recovered." *Jamsports and Entertainment v. Paradama Productions*, 2004 U.S. Dist. LEXIS 23605, \*16 (N.D. Ill. Nov. 22, 2004). (Ex. A) Courts have also noted,

[W]hile damages cannot be based on pure speculation or guesswork, they also need not be proven with the certainty of calculus. And where the uncertainty of the damages stems from the defendants' illegal conduct, the defendants should not benefit from the uncertainty they created. Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer.

*BE&K Construction Co. v. Will & Grundy Counties Building Trades Council, AFL-CIO*, 156 F.3d 756, 770 (7th Cir. 1998).

e360Insight has an established profit history on which its damages are based. This case is clearly distinguishable from the cases cited by Defendant.

## **Conclusion**

Summary judgment is only appropriate if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if the trier of fact could find in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, a court should construe all facts and inferences in favor of the nonmoving party. *Id.*

Defendant's basis for its motion is that Plaintiffs cannot prove any of their damages. As discussed above, Plaintiffs have claimed damages for lost contracts, lost revenue and defamation. Even if some elements of Plaintiffs damage claims were barred, Plaintiffs would nevertheless be able to prove the remainder of their claims. Unless it is found that Linhardt may not testify as to **any** of the damages suffered by either him or e360Insight, Plaintiffs are entitled to damages and summary judgment is improper. e360Insight has an established profit history upon which its damages are based. Linhardt, as president and owner of e360Insight, has personal knowledge of the damage suffered both by e360Insight and himself and can testify accordingly. Plaintiffs have established that they will be able to prove damages with reasonable certainty and summary judgment should therefore be denied.

e360Insight, LLC and David Linhardt,  
Plaintiffs.

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

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

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing e360Insight, LLC and David Linhardt's Response in Opposition to Defendant's Motion for Summary Judgment was served upon the attorneys listed below electronically through CM/ECF on January 7, 2009.

Craig Christopher Martin    cmartin@jenner.com,docketing@jenner.com

Matthew M. Neumeier    neumeierm@howrey.com,basak@howrey.com

David Eric Jimenez-Ekman    djimenez-ekman@jenner.com,docketing@jenner.com

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

Andrew Bruce Cripe    acripe@hinshawlaw.com,courtfilling@hinshawlaw.com

Stephen M Geissler    sgeissler@jenner.com

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

Evan D Brown    ebrown@hinshawlaw.com

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

Chad Emerson Bell    cbell@jenner.com,docketing@jenner.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, LLC  
730 West Randolph, 6<sup>th</sup> Floor  
Chicago, Illinois 60661  
Telephone: (312) 454-0015  
Facsimile: (312) 454-0261

# **EXHIBIT**

## **A**



Caution

As of: Jan 07, 2009

**JAMSPORTS AND ENTERTAINMENT, LLC, Plaintiff, vs.  
PARADAMA PRODUCTIONS, INC., d/b/a AMA Pro Racing;  
CLEAR CHANNEL COMMUNICATIONS, INC.; SFX  
ENTERTAINMENT, INC., d/b/a Clear Channel Entertainment; and  
SFX MOTOR SPORTS, INC., d/b/a Clear Channel Entertainment  
Motor Sports, Defendants.**

**Case No. 02 C 2298**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF ILLINOIS, EASTERN DIVISION**

**2004 U.S. Dist. LEXIS 23605; 2004-2 Trade Cas. (CCH) P74,622**

**November 22, 2004, Decided**

**SUBSEQUENT HISTORY:** Motion denied by *JamSports & Entmt, LLC v. Paradama Prods.*, 2004 U.S. Dist. LEXIS 25601 (N.D. Ill., Dec. 20, 2004)

**PRIOR HISTORY:** *JamSports & Entm't, LLC v. Paradama Prods.*, 2004 U.S. Dist. LEXIS 23561 (N.D. Ill., Nov. 22, 2004)

**DISPOSITION:** Defendants' motion in limine denied.

**COUNSEL:** [\*1] For JAMSPORTS AND ENTERTAINMENT, LLC, Plaintiff: Bruce S. Sperling, Greg Shinall, Robert David Cheifetz, Thomas David Brooks, Sperling & Slater, Chicago, IL; James David Roberts, Piper Rudnick LLP, Chicago, IL; Jeffrey Singer, Segal, McCambridge, Singer & Mahoney, Ltd., Chicago, IL; Heather Elaine Ross, Legal

Assistance Foundation of Chicago, Chicago, IL; Phillip Mark Crane, Paul E. Wojcicki, Segal, McCambridge, Singer & Mahoney, Ltd., Chicago, IL; Margaret Egan Lawler, Piper Rudnick LLP, Chicago, IL.

For PARADAMA PRODUCTIONS, INC. DBA AMA PRO RACING, Defendant: Steven F. Pflaum, Sandra A. Muhlenbeck, Matthew Boyd Steffens, Mark Jacob Altschul, McDermott, Will & Emery LLP, Chicago, IL; James David Roberts, Piper Rudnick LLP, Chicago, IL; Kevin L Shoemaker, Shoemaker, Winkler, Howarth & Taylor, LLP, Columbus, OH; Timothy J Owens, Owens & Krivda Co., L.P.A., Columbus, OH.

For CLEAR CHANNEL COMMUNICATIONS, INC., SFX ENTERTAINMENT, INC. DBA CLEAR CHANNEL ENTERTAINMENT, SFX

MOTOR SPORTS, INC. DBA CLEAR CHANNEL ENTERTAINMENT-MOTOR SPORTS, Defendants: Lee A. Freeman, Jr., James T. Malysiak, Chris C. Gair, Joseph Paul Adamczyk, Freeman, Freeman & Salzman, P.C. Chicago, IL.

**JUDGES:** MATTHEW [\*2] F. KENNELLY, District Judge.

**OPINION BY:** MATTHEW F. KENNELLY

## **OPINION**

### **MEMORANDUM OPINION AND ORDER**

MATTHEW F. KENNELLY, District Judge:

The defendants in this antitrust / breach of contract / tortious interference case have moved *in limine* to bar the plaintiff from presenting lost profits claims. For the reasons stated below, the Court denies the defendants' motions.

#### **Discussion**

Familiarity with the Court's decision on the parties' summary judgment motions, *see JamSports and Entertainment, LLC v. Paradama Productions, Inc.*, 336 F. Supp. 2d 824 (N.D. Ill. 2004), is presumed, and thus we will forego detailed discussion of JamSports' remaining claims. For present purposes, it will suffice to say that what remains are a claim against the Clear Channel defendants of monopolization in violation of 15 U.S.C. § 2; a claim against AMA Pro for breach of contract; claims against AMA Pro for breach of contract or promissory estoppel; and claims against the Clear Channel defendants for tortious interference with contract or prospective advantage.

#### **1. Antitrust claims**

The Clear Channel defendants have moved to bar JamSports from presenting [\*3] evidence regarding the profits it says it lost as a result of Clear Channel's anticompetitive conduct. In particular, Clear Channel seeks to preclude JamSports' damages expert Stephen Siwek from testifying. Though certain aspects of Clear Channel's attack on Siwek consist of a challenge to admissibility of evidence, the motion as a whole amounts to a request for summary judgment (as Clear Channel itself has suggested at prior court hearings).

Damages in an antitrust market exclusion case consist of the amount that the plaintiff would have made but for the defendant's anticompetitive conduct. "In economic terms, the amount of damages is the difference between what the plaintiff could have made in a hypothetical free economic market and what the plaintiff actually made in spite of the anticompetitive activities." *Dolphin Tours, Inc. v. Pacifico Creative Service, Inc.*, 773 F.2d 1506, 1510 (9th Cir. 1985) (citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574, (1946)). Clear Channel argues that Siwek's lost profits analysis derives from an assumption that had JamSports not been improperly excluded from promoting a supercross series, JamSports [\*4] would have had the field to itself, without competition by Clear Channel. According to Clear Channel, this assumption is contrary to a key premise upon which the Court sustained JamSports' single remaining antitrust claim, and in any event is unsupported by the evidence. We deal with each of these arguments in turn.

In addressing Clear Channel's summary judgment motions on the antitrust claims, the Court rejected Clear Channel's argument that JamSports was claiming only that it was prevented from replacing Clear Channel as the monopolist in the market for promotion of supercross - a theory that, Clear Channel

contended, was insufficient as a matter of law. In this regard, the Court stated that

though JamSports certainly would have liked for Clear Channel to stop promoting supercross entirely if JamSports won the AMA contract, a jury could find that Clear Channel would have promoted a supercross series to compete with JamSports' AMA-sanctioned series. More pointedly, a reasonable jury could find that had Clear Channel not prevented JamSports from promoting the AMA-sanctioned supercross series, both firms would have promoted competing series, resulting in increased output and, [\*5] potentially, decreased ticket prices.

*JamSports*, 336 F. Supp. at 836-37 (footnote omitted). Clear Channel argues that Siwek's lost profits analysis abandons, and is completely contrary to, the "ongoing competition" theory upon which the Court relied in denying summary judgment. Specifically, Clear Channel contends that Siwek ruled out any possibility of competition by Clear Channel.

Even were this so, it would not by itself require exclusion of Siwek's testimony. As JamSports notes, it has an alternative theory of antitrust injury which the Court has not precluded. JamSports contends that under the Seventh Circuit's decision in *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), injury to the competitive process can give rise to a cognizable antitrust claim even if the plaintiff, had it not been excluded from the market, simply would have displaced a monopolist defendant, and even if the defendant's conduct had no measurable effect on consumers. Clear Channel has argued that *Fishman* is no longer

good law and that the views of the dissent in that case now carry the day in the Seventh Circuit. But as this Court noted in the summary [\*6] judgment ruling, "the Seventh Circuit has never explicitly overruled *Fishman*, and we are reticent to find that it has done so *sub silentio*." *JamSports*, 336 F. Supp. 2d at 836. For this reason, and to avoid the need to retry the case were we to guess wrongly that the Seventh Circuit would not today follow *Fishman*, the Court will permit JamSports to present its *Fishman* theory at trial. <sup>1</sup> Thus even if Clear Channel were correct that Siwek's analysis assumes away the possibility of competition, that would not require excluding the analysis.

1 Because JamSports presumably will be presenting two alternative theories, it may be necessary to provide particularized instructions and/or special interrogatories to the jury so that in the event of a verdict for JamSports this Court and, if necessary, the Seventh Circuit can sort out whether JamSports prevailed on a *Fishman* theory alone, or also on an "injury to consumers" theory.

The *Fishman* theory aside, Siwek's report arguably can be [\*7] read as indicating that he assumed Clear Channel would not have competed with JamSports in the "but for" world in which antitrust damages are assessed. Specifically, Siwek stated that

the damage calculations also assume that, but for the conduct of the defendants, the plaintiff would have promoted the AMA Pro Racing Supercross Series with little likelihood of *additional* competitive entry into Supercross by Clear Channel during the term of the contract. For this reason, the damage calculations have not been reduced to reflect some assumed level of Supercross business that would have switched from the

AMA Supercross Series to a hypothetical Clear Channel series.

Siwek 9/14/04 Report P 106 (emphasis in original).

But if one reads on, Siwek's report is best read as indicating not that there would be no competition at all, but rather that there would be no *effective* competition that would have affected JamSports' profits in the "but for" world:

Facing these facts [support of a JamSports - AMA Pro series by original equipment manufacturers, or OEMs], it is clear that a decision by Clear Channel to compete in an alternative, head-to-head Supercross series [\*8] would be fraught with financial peril. The Clear Channel Series would be compelled to showcase inferior riders who had not been selected for the factory teams. The Clear Channel Series' riders would also be compelled to compete using inferior (non-factory) motorcycles. The Clear Channel Series would also need a new sanctioning body, such as the FIM, that would not likely have substantial experience in US Supercross.

For these reasons, it is far more likely that if Clear Channel were to have competed at all in Supercross during the term of the agreement, that competition would likely have sought to capitalize on Clear Channel's relationship with FIM and would have focused heavily if not entirely on non-US markets.

*Id.* PP 109, 112.

Likewise, when he was deposed, Siwek made it clear that he had not completely ruled out the possibility of competition by Clear Channel:

Q: ... You've assumed for purposes of your damages model, that there would be no competing Clear Channel series, is that correct?

A: I haven't explicitly said there would be none. I said there was - very unlikely that there would be a competing series to the point that this would have to be [\*9] reflected in my model.

Q: And you doubt that they [Clear Channel] would do it all, correct?

A: I doubt that they would do it at all, but it's not impossible that they would do it.

Q: And you didn't account for them doing it at all in your calculations?

A: I assumed that whether they had done it or not there would be no need to offset the damage calculations for that possibility.

Q: So you assumed that even if Clear Channel had run an event or two, it would not have caused any decline in attendance or revenues [for JamSports], correct?

A: Based on the assumptions in the but-for world, yes.

Siwek Dep. 109, 111-12.

In sum, though Siwek's report arguably can be read as including an assumption contrary to JamSports' *non-Fishman* theory, that is not the

best reading of the report. The Court therefore rejects Clear Channel's contention that Siwek's report is inconsistent with the primary theory upon which we upheld JamSports' remaining antitrust claim.

Clear Channel's primary argument for excluding the lost profits evidence is that Siwek's purported assumption that Clear Channel would not compete is unsupported by the evidence. The testimony [\*10] of an expert may be excluded if it lacks a foundation in the evidence or is based on unwarranted assumptions. See *MCI Communications Corp. v. AT&T Corp.*, 708 F.2d 1081, 1161, 1166 (7th Cir. 1983); see also, e.g., *Group Health Plan, Inc. v. Phillip Morris USA, Inc.*, 344 F.3d 753, 760 (8th Cir. 2003); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000). As the Court has noted, we do not read Siwek as having assumed that Clear Channel would not have competed at all. But that aside, the evidence forwarded by Clear Channel does not undermine Siwek's conclusions as a matter of law. There is, to be sure, a good deal of evidence that Clear Channel planned to attempt to compete with JamSports even if JamSports had been able to promote the AMA Pro Supercross series. But there are numerous disputed issues regarding whether, and the extent to which, Clear Channel would have been able to do so, and how, if at all, this would have affected JamSports' profits from the AMA series. Clear Channel has not provided the Court with a sufficient basis to take the evaluation of these matters, and thus the consideration of JamSports' [\*11] lost profits evidence, out of the hands of the jury.

Clear Channel also argues that the evidence establishes that JamSports lacked the necessary preparedness to enter the market. To recover damages in a market exclusion case, the plaintiff must show it was prepared to enter the market. See, e.g., *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1982)

(*"Grip-Pak I"*). This is partly a question of standing—the plaintiff's ability to prove an injury - and partly a question of whether damages can be proved with reasonable certainty. See *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 651 F. Supp. 1482, 1501 (N.D. Ill. 1986) (decision following remand) (*"Grip-Pak II"*).

The fact that JamSports was never able actually to promote a supercross tour does not preclude it from recovering damages. "There would be a big gap in the damage remedies of the antitrust laws if [section 4 of the Clayton Act] were read to prevent the recovery of damages by all would-be entrants." *Grip-Pak I*, 694 F.2d at 475. The key problem involves "quantifying lost hopes. While damages for loss of future earnings and profits are familiar [\*12] items in tort and contract cases, the problem of measurement is greater when the loss occurs in a market that the plaintiff is not yet in." *Id.* To "balance the interest in deterrence against the concern with measurement," courts, including the Seventh Circuit, have required a plaintiff that has not yet entered the market "to show that it intended to enter and was prepared to do so within a reasonable time" as a prerequisite to collecting lost profits for being excluded. *Id.* (citing cases).

As the intent and preparedness requirement is generally interpreted, "only a plaintiff who takes demonstrable steps to enter an industry can recover projected lost profits as antitrust damages." *Grip-Pak II*, 651 F. Supp. at 1501. The plaintiff's preparedness to enter the market is determined by assessing its ability to finance the business; consummation of the requisite contracts; affirmative action to enter the business; and background and experience in the prospective business. See, e.g., *In re Dual Deck Video Cassette Recorder Antitrust Litigation*, 11 F.3d 1460, 1465 (9th Cir. 1993); *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979); [\*13] see also, *Zenith Radio Corp. v. Hazeltine*

*Research, Inc.*, 395 U.S. 100, 126, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969).

First, JamSports took affirmative steps to enter the business - among other things, by signing the letter of intent with AMA Pro. Second, in terms of contracts, JamSports thus had, at least until its AMA deal was allegedly undermined by Clear Channel, the key contract it needed to enter the industry, that is, a deal with AMA Pro to promote the AMA Pro-sponsored supercross series. There is also evidence that JamSports had taken other steps in preparation to promote the series, including booking venues and forging a partnership with Speedvision for television coverage. Third, though JamSports obviously had no experience in promoting supercross - the market having been allegedly monopolized by Clear Channel for several years before - it had significant experience in promoting entertainment events,<sup>2</sup> and AMA Pro likewise believed that JamSports was fully qualified to promote the series.

2 The Court rejects Clear Channel's argument that JamSports' reliance on its experience in promoting other events is fatally inconsistent with its proposed definition of the relevant market as limited to supercross. As JamSports argues, Clear Channel's attempt to equate the two amounts to a comparison of apples to oranges.

[\*14] JamSports' evidence of financial backing may be the weakest link in its claim of "intent and preparedness." But a jury reasonably could find, based on the evidence JamSports has offered, that it had sufficient financial wherewithal from its principals to fund operations until outside financing was obtained, and that it was well on the way to obtaining outside funding, until the rug was pulled out as a result of Clear Channel's allegedly anticompetitive activity. The Court finds no support in the law for a hard-and-fast rule that full financing, signed on the bottom

line, must be proven as a prerequisite to recovery of damages for exclusion from a market. If such a rule existed, it would effectively immunize a monopolist that was an efficient enough violator of the antitrust laws to quickly nip in the bud any nascent competitive efforts. This would undermine the deterrence rationale cited by the Seventh Circuit in *Grip-Pak I* as part of the underpinning for the intent-and-preparedness test. *See Grip-Pak I*, 694 F.2d at 475. As the court said in that case, "the whole purpose of the 'intention and preparedness' test is to allow recovery of damages in cases where the [\*15] plaintiff has not entered the business in which he is seeking lost profits." *Id.*

For these reasons, the Court denies Clear Channel's motion *in limine* with regard to lost profits on the antitrust claim.

## 2. State law claims

Both Clear Channel and AMA Pro seek to preclude JamSports' recovery of lost profits on its state law claims. They argue that the lost profits claim is overly speculative and is barred by a rule of Illinois law that restricts the recovery of lost profits by new businesses.

Speculative damages are not recoverable under Illinois law. *See, e.g., Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 316, 515 N.E.2d 61, 66, 113 Ill. Dec. 252 (1987). And as a general rule, a start-up company that has not yet begun to operate is not entitled to recover lost profits. *See, e.g., Drs. Sellke & Conlon, Ltd. v. Twin Oaks Realty, Inc.*, 143 Ill. App. 3d 168, 174, 491 N.E.2d 912, 917, 96 Ill. Dec. 633 (1986). But there is no "inviolable rule that a new business can never prove lost profits." *Milex Products, Inc. v. Alra Laboratories, Inc.*, 237 Ill. App. 3d 177, 192, 603 N.E.2d 1226, 1237, 177 Ill. Dec. 852 (1992). Where there is concrete evidence from [\*16] which the lost profits for a new venture can be determined to a reasonable degree of certainty, they may be recovered. *See*

*id.* (allowing profits to be proven by evidence of an established market for the plaintiff's new product); *Malatesta v. Leichter*, 186 Ill. App. 3d 602, 621-22, 542 N.E.2d 768, 782, 134 Ill. Dec. 422 (1989) (allowing profits to be proven by evidence of profits earned by another person who operated the same business). *See also*, *Fishman*, 807 F.2d at 555-58 (similar to *Malatesta*); *Rhodes v. Sigler*, 44 Ill. App. 3d 375, 380, 357 N.E.2d 846, 850, 2 Ill. Dec. 626 (1976) (same)

JamSports has provided a sufficient basis to take its lost profits claim out of the realm of impermissible speculation and thus permit the claim to be presented to the jury. As was the case in *Malatesta* and *Fishman* (which, like the present case, involved a tortious interference claim in addition to an antitrust claim), JamSports bases its claim not on unsupported speculation, but rather on the profits Clear Channel earned promoting the AMA Pro series. The Court recognizes that there are differences in JamSports' prospective supercross operation and Clear Channel's [\*17] established one that could affect whether JamSports would have earned as much as Clear Channel. But as the court noted in *Malatesta*, "[a] finding that profits are too speculative based on these differences ... would preclude recovery for intentional interference with prospective advantage in most instances" and thus would effectively write such tort claims out of existence. *Malatesta*, 186 Ill. App. 3d at 622, 542 N.E.2d at 783. The Court finds JamSports' evidence to be sufficient to allow its demand for lost profits on its contract and tort claims to be presented to the jury.

### **3. Motion to exclude supplemental report**

Clear Channel has moved to exclude a supplemental report submitted by JamSports' damages expert Siwek following his review of the report of Clear Channel's damages expert, Dr. Dennis Carlton. Clear Channel contends that Siwek's original report was premised on

the assumption that there would have been no competition by Clear Channel had JamSports not been (allegedly) excluded from the supercross market, that JamSports must have belatedly realized the problem created by this approach, and that Siwek sought to switch course under the guise [\*18] of a rebuttal report. The Court denies the motion to strike the rebuttal report. As indicated earlier in this decision, Siwek's original report did not foreclose the possibility of competition. The Court has reviewed the rebuttal report in light of Clear Channel's arguments and finds that it is a proper rebuttal report. The Court will, however, permit Clear Channel to take a short deposition of Siwek on the rebuttal report if it wishes to do so, so that its counsel can prepare properly for trial. The parties are directed to attempt to agree on the length and timing of this deposition; if they cannot do so, the Court will set the parameters.

### **Conclusion**

For the reasons stated above, the Court denies the Clear Channel defendants' motion *in limine* to bar JamSports from presenting lost-profits claims [docket # 203-1 & 2, 205-1 & 2, 206-1 & 2] and defendant Paradama Productions, Inc.'s motion *in limine* to exclude evidence of lost profits [# 207-1]. The Court also denies Clear Channel's motion to preclude JamSports from filing a new expert report [# 228-1]. Finally, the Court denies JamSports' motion to strike Clear Channel's reply brief [# 234-1].

Date: November 22, 2004

[\*19] MATTHEW F. KENNELLY

United States District Judge

