

**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,	)	Case No. 06 C 3958
	)	
v.	)	District Judge Charles P. Kocoras
	)	Magistrate Judge Geraldine Soat Brown
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  
REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

**Introduction**

In our opening brief, we demonstrated that Spamhaus is entitled to summary judgment on damages for three reasons: (1) Plaintiffs will have no evidence to prove their damages claims if our motion in limine directed at David Linhardt’s damages testimony is granted; (2) Plaintiffs cannot show damages to a reasonable certainty because their financial data is co-mingled with non-parties Maverick and Bargain Depot; and (3) Plaintiffs’ damages are barred by Illinois’ “new business” rule, which prevents the recovery as damages of lost profits for a new business. Plaintiffs’ response makes three principal arguments, none of which has merit.

*First*, Plaintiffs’ defense of the proffered testimony of Linhardt based on the response to the motion in limine fails for the reasons explained in our reply in support of our motion in limine. *Second*, Plaintiffs’ argument that a consolidated tax return does not mean damages cannot be separately proved for the entities, while correct, does not cure Plaintiffs’ admission

that the books and records of e360 make separating that data out impossible. *Third*, Plaintiffs' contention that the "new business" rule does not apply ignores that, at the time their claims arose, they were a "new business," and even today, e360 has no history of revenues which could even come close to justifying the \$11.7 million in damages they seek.

**I. 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 our opening memorandum (Doc. 187 ("Op. Br.") at 5), we demonstrated that Spamhaus is entitled to summary judgment because the Court should exclude Linhardt's damages testimony, and that is the only evidence Plaintiffs have to sustain their burden of proof on damages. In their response, Plaintiffs do not contest (i) that they bear the burden of proof, (ii) that they must show damages to a "reasonable certainty," or (iii) that Linhardt's testimony is the only evidence of their damages. Instead, Plaintiffs argue that Linhardt's testimony is admissible based on the same arguments articulated in Plaintiffs' opposition to our motion in limine. We rely on our Reply in Support of the Motion in Limine as a full reply to those arguments and, to the extent necessary, incorporate our reply here. However, Plaintiffs' response makes clear that, if our motion in limine is granted, they have no defense to summary judgment, and it should be granted.

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

In our opening brief (Op. Br. at 6), we showed that Plaintiffs cannot recover damages in any event because there are no separate financial records for the only corporate party, e360. Instead, those records are inextricably commingled with financial data from non-parties, and

therefore e360 cannot meet its burden of showing its own damages to a “reasonable certainty.” Plaintiffs’ response (Doc. 192 (“Resp.”) at 4-5) does not dispute the legal standard, the identity of the parties, or the inability of non-parties to recover damages. Instead, Plaintiffs claim they can proceed because, in their view (Resp. at 4), “The mere fact that a consolidated return was filed does not preclude Linhardt and e360Insight from proving their damages.”

But Plaintiffs’ claim (Resp. at 5) that the “filing of a consolidated tax return has no effect on the value” of contracts underlying their damages claims, or their damages claims themselves, mixes the apple of a consolidated tax return with the oranges of co-mingled books. We agree that the mere filing of a consolidated tax return does not, by itself, mean that Plaintiffs were unable to separate financial data of the party e360 from the non-parties Maverick and Bargain Depot. Certainly, even if consolidated tax returns are filed, separate books and accounting records can be kept, which would allow each entity to prove its own damages. But that is not what Linhardt testified to at his deposition. What he conceded, and is admitted by Plaintiffs in their Local Rule 56.1 statement, is:

- 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” (Doc. 194 at 2; Linhardt Dep. at 97-99); and
- There is “no way of separating out results and data for e360 from, for example, Bargain Depot.” (Doc. 194 at 2; Linhardt Dep. at 99-100.)<sup>1</sup>

Plaintiffs have no separate data for e360 which would allow them to offer testimony relevant to e360’s damages whatsoever.

Nor can Plaintiffs rely on their current claim that only e360 generated revenue. Linhardt testified at his deposition that he included Bargain Depot’s numbers in his damages calculations

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<sup>1</sup> Citations to “Linhardt Dep.” refer to the transcript of Linhardt’s November 10-11, 2008 Deposition in this case, previously provided to the Court as Ex. 1 to Spamhaus’ Memorandum of Law in Support of its Motion in Limine (Doc. 186).

for e360. In explaining the discrepancy between an older and more recent version of his quantitative analysis, Linhardt said, “Well, one thing I forgot to include was cost of goods sold for any e-commerce revenue. So, you know, the variable cost of the business of getting one e-mail delivered where it would have otherwise been blocked, there’s a data royalty cost that’s included here, but I forgot to include e-commerce cost of goods sold. So if Bargain Depot sells a pair of sunglasses, there’s a product cost associated with that item that was not reflected, so I made an adjustment to account for that.” (Linhardt Dep. at 87-88.) Linhardt said that he included e-commerce revenue and cost of goods sold in his damages calculations, yet he later agreed that e360 did not sell any goods; Q: “I understood from your testimony this morning that e360 did not itself sell any physical goods or services other than e-mail marketing, correct?” A: “Correct.” (Linhardt Dep. at 97.) Linhardt further testified, “when a product is sold, the revenue goes to the Maverick-reported number, which is essentially – and the costs go there as well. There’s only one set of consolidated books.” (Linhardt Dep. at 100.) Linhardt also responded to the follow question: “Q: Is it your testimony that all revenue, regardless of the entity that generated it, including Bargain Depot, flowed into e360’s account?” A: “Yes.” (Linhardt Dep. at 103.)

Thus, while Plaintiffs now argue that “no other entities generated any revenue,” including, presumably, Bargain Depot, Linhardt’s own testimony undermines this statement. Furthermore, this position is in direct conflict with statements made by Plaintiffs (or, at least by Linhardt as indirect owner of Bargain Depot) in past litigation. In *Maui Jim Inc. v. Bargain Depot Enterprises, LLC*, No. 06-cv-01169 (C.D. Ill.) (Mihm, J.), Bargain Depot stated that it was “undisputed” that Bargain Depot “offered for sale sunglasses.” (Bargain Depot’s Response to Maui Jim’s Motion for Summary Judgment at 3, filed April 20, 2007, attached as Ex. 1.) If

Bargain Depot were not generating revenue, it is unlikely that Bargain Depot would have even participated in a lawsuit regarding patent infringement (since Bargain Depot presumably could not infringe a sunglasses patent without producing or selling sunglasses), much less admit that it “offered for sale sunglasses.”

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

In our opening brief (Op. Br. at 6-8), we demonstrated that Plaintiffs’ damages are barred by Illinois’ “new business” rule because e360 was started for \$5,000 in 2003, and had no profit history before Spamhaus’ allegedly unlawful conduct later in 2003. In their response (Resp. at 5-6), Plaintiffs claim that the rule does not apply because e360 operated and has a history of revenue and profit from 2003 through 2008. Plaintiffs’ argument is unpersuasive for three reasons.

*First*, Plaintiffs’ assertion that e360 was not a new business based on its five years of operating and generating revenues from 2003 to 2008 ignores that their claims arose, not in 2008 or 2009, but in December 2003, only nine months after e360 began operations. The cases we cite in our motion for summary judgment support e360’s designation as a new business based on its status when its claims arose (Op. Br. at 7-8), and, given the purposes of the rule, that is what matters: the issue Plaintiffs must prove is what their profits would have been “but for” Spamhaus’ allegedly unlawful conduct.<sup>2</sup> Plaintiffs’ revenues and profits *after* that conduct occurred cannot, by definition, show what the revenues and profits would have been but for Spamhaus’ conduct, and therefore are no way for Plaintiffs to make the showing required of

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<sup>2</sup> We note that, due to the default, Your Honor will accept the truth of the factual allegations regarding Spamhaus’ conduct. However, Spamhaus respectfully believes that it has many defenses on the merits to Plaintiffs’ claims, and that it is Plaintiffs who engaged in unlawful conduct (spamming), not Spamhaus.

causation. In fact, any revenue and profits by Plaintiffs' after Spamhaus' alleged conduct in late 2003 would go exclusively to the *other* side of the coin, and show Plaintiffs' performance in the actual world (in the presence of Spamhaus' conduct). The nine months or so of Plaintiffs' performance prior to Spamhaus' conduct places Plaintiffs' claims squarely within the prohibition of the "new business" rule.

*Second*, even if (contrary to fact) nine months of history were enough to avoid application of the new business rule, that history would not entitle Plaintiffs to *any* damages. That is because, according to Plaintiffs, the profit during that period was actually *lower* than it was after Spamhaus' conduct. (Ex. 2 to Doc. 186 – e360Insight LLC Profit & Loss.) (We put aside that this profit was for *all* of the consolidated companies, not just e360, and therefore independently cannot prove Plaintiffs' damages claims for the reasons discussed in Part II.) The net profits actually went *up* for the next three years after Spamhaus' alleged conduct, which would prevent Plaintiffs from showing that Spamhaus was the "but for" cause of a reduction in any profit based on the short pre-conduct profit history available to Plaintiffs.

*Third*, the cases Plaintiffs cite do not rescue their claim from the new business rule. Plaintiffs' reliance on *Jamsports and Entertainment, LLC v. Paradama Productions, Inc.*, 2004 U.S. Dist. LEXIS 23605, \*16 (N.D. Ill. Nov. 22, 2004) is misplaced because in that case, there was a specific competitor who operated the exact business that Jamsports would have operated but for defendant's conduct which provided a basis for the "but for" showing. Here, Plaintiffs have no evidence of a directly analogous business, required by the *Jamsports* court, to circumvent the new business rule. The other case Plaintiffs cite, *BE&K Construction Co. v. Will & Grundy Building Trades Council, AFL-CIO*, 156 F.3d 756, 770 (7th Cir. 1998), is even farther afield: it does not address the application of the new business rule and instead is cited for the

proposition that damages need not be proved “with the certainty of calculus.” While that may be true, it does nothing to weaken the application of the new business rule here.

## Conclusion

For the foregoing reasons, Spamhaus is entitled to summary judgment on all of Plaintiffs' damages claims under Federal Rule of Civil Procedure 56.

Respectfully submitted,

THE SPAMHAUS PROJECT

Dated: January 28, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of January 2009, a copy of the foregoing The Spamhaus Project's Reply in Support of Its Motion for Summary Judgment 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