

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Charles P. Kocoras	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	06 C 3958	DATE	February 23, 2009
CASE TITLE	e360 Insight et al vs. The Spamhaus Project		

DOCKET ENTRY TEXT

Defendants' motion to strike (Doc [207]) the January 2009 affidavit of David Linhardt is granted. Defendants' motion in limine (Doc [184]) and motion for summary judgment (Doc [185]) are denied. Status hearing set for 2/26/2009 at 9:30 a.m. to stand.

■ [For further details see text below.]

Docketing to mail notices.

ORDER

This matter comes before the court on three motions filed by Defendant The Spamhaus Project ("Spamhaus"). The first seeks to strike the January 2009 affidavit of David Linhardt, owner and president of Plaintiff e360 Insight, LLC ("e360"). The second is a motion *in limine* directed toward testimony provided by Linhardt during discovery. The third is a motion seeking summary judgment on the issue of e360's entitlement to any damages in this case. For the reasons set forth below, the motion to strike the January 2009 affidavit is granted. The motion in limine and the motion for summary judgment are denied.

Over the course of the discovery period, e360 produced various documentation and testimony to support its assertion of damages incurred, in accordance with Fed. R. Civ. P. 26 and 33. On December 2, 2008, discovery closed. A few days later, Spamhaus filed the instant motion for summary judgment, and e360's date to respond was set for January 7, 2009. As evidence in support of its opposition to Spamhaus's request for summary judgment on damages, e360 proffered an affidavit and spreadsheet from Linhardt that elaborated on information he had previously offered on the calculation of damages. Although parties are required to supplement previous disclosures or discovery responses, the supplemental information must be provided in a timely manner. Fed. R.

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Civ. P. 26(e)(1)(A). If a party fails to comply with this rule, that party is not allowed to use the new information to supply evidence used for a motion unless the failure was substantially justified or is harmless to its opponent. Fed. R. Civ. P. 37(c)(1). e360 has not supplied any substantial justification for the late appearance of the new calculations. In addition, Spamhaus would be harmed if e360 were permitted to rely upon information to which Spamhaus did not have access during the discovery period. Accordingly, Rule 37(c)(1) prevents e360 from offering the January 2009 affidavit as evidence in opposition to the motion for summary judgment, and it is accordingly stricken. *See Mannoia v. Farrow*, 476 F.3d 453, 456-57 (7th Cir. 2007).

The motion in limine takes aim at the remainder of the evidence Linhardt has provided with regard to damages suffered by e360. According to Spamhaus, Linhardt offers the evidence as expert opinion. Spamhaus takes the position that Linhardt does not qualify as an expert under Fed. R. Evid. 702 and the legal standards set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147-78, 119 S. Ct. 1167, 1174 (1999).

A district court's authority to exclude evidence pursuant to a motion *in limine* is a corollary to its power to manage trials. *Luce v. United States*, 469 U.S. 38, 41 n.4, 105 S. Ct. 460, 463 (1984). Evidence may be excluded before trial only if it is clearly inadmissible on all possible grounds. Otherwise, ruling on admissibility of evidence should be reserved for trial, during which questions of relevancy, foundation, and prejudice may be resolved in context. *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp 1398, 1400 (N.D. Ill. 1993). Thus, denial of a motion *in limine* does not mean that the evidence will come in at trial; instead it means only that the trial judge lacks sufficient information to rule on the admissibility of the challenged evidence prior to trial. *Id.* at 1401. A party is free to object to the proffer of evidence at trial, even when such evidence falls within the scope of a previously denied motion *in limine*. *Id.* A manager or business owner of a small company can offer testimony or other evidence regarding the performance of the company and straightforward projections of future performance without needing to qualify as an expert. *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 420 (7th Cir. 2005); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993). Some aspects of Linhardt's testimony as to damages fall within this area and therefore are outside the scope of a challenge on the ground that he is not an expert in business valuation in the abstract. That some of his testimony may be

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inadmissible does not operate as a bar to that which is not. The deficiencies Spamhaus perceives are better addressed with contemporaneous objection to particular aspects of Linhardt's offering of evidence and effective cross-examination of problematic testimony. Accordingly, the motion *in limine* is denied.

The final motion up for consideration is Spamhaus's motion for summary judgment in its favor on the issue of damages. The motion advances three arguments in support of Spamhaus's contention that e360 cannot provide any evidence of damages in this case. The first argument is predicated on an assumption that the motion *in limine* as to Linhardt's testimony would be granted. In light of the denial of that motion, the first argument fails. The second argument contends that the damages cited are not those only of e360 but instead are mixed in with financial information from other entities that are not parties to this case. Rather than warranting judgment as a matter of law at this stage of the proceedings, this contention is best addressed in the context of cross-examination and countervailing evidence presented to the fact finder. The last argument claims that e360 cannot recover any damages by virtue of the "new business" rule. *TAS Distrib. Co., Inc. v. Cummins Engine Co., Inc.*, 491 F.3d 625, 633 (7th Cir. 2007). According to Spamhaus, this rule operates as an absolute bar to a recovery of lost profits by a new business because of the lack of evidence of long-term profitability for such businesses. Illinois undoubtedly requires that any plaintiff seeking lost profits provide evidence to show that the profits were reasonably certain to occur. *See, e.g., SK Hand Tool Corp. v. Dresser Indus., Inc.*, 672 N.E.2d 341, 348 (Ill. App. Ct. 1996). However, that is not the same as a categorical bar to any recovery by a new business. The question of whether e360 can prove its asserted damages with a reasonable degree of certainty or whether they are the product of speculation and conjecture is one better left to the factfinder in this case. Consequently, Spamhaus's motion for summary judgment is denied.

Dated: February 23, 2009



CHARLES P. KOCORAS
U.S. District Court Judge