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 MOTION FOR SUMMARY JUDGMENT ON DAMAGES

Defendant The Spamhaus Project ("Spamhaus"), pursuant to Federal Rule of Civil Procedure 56 respectfully moves this Court for the entry of an order granting summary judgment in favor of Spamhaus and against e360 Insight, LLC and David Linhardt (the "Plaintiffs") on all of Plaintiffs' damages claim. In support of this motion, Spamhaus states:

1. The sole issue before this Court is Plaintiffs' claim for damages. Although Plaintiffs initially claimed $11,715,000 in compensatory damages, Plaintiffs have recently claimed that their combined compensatory damages are $137,173,577. Of this approximately $137 million, Plaintiffs claim $135,173,577 for total lost enterprise value; $95,357,250 for lost profits; $39,816,327 for defamation to e360, which is the difference between the previous two numbers; and $2,000,000 for damage to Linhardt's reputation. Plaintiffs' previous $11.715 million damages claim was broken down as $2,465,000 for the loss of revenue and $9,250,000 for the loss of enterprise value. Plaintiffs claimed that their damages stemming from their defamation claim were covered by the $9.25 million loss of enterprise value.

2. Your Honor ordered stricken any amounts stated in Plaintiffs' Supplemental Amended Interrogatory responses in excess of the $11.715 million in damages initially claimed.

(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

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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