

**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 RULE 56.1
STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendant The Spamhaus Project (“Spamhaus”), pursuant to Northern District of Illinois Local Rule 56.1(a)(3), hereby submits the following Statement of Facts in support of their Motion for Summary Judgment on damages against e360 Insight, LLC and David Linhardt (the “Plaintiffs”):

A. The Business Of e360 Insight And Its Revenues.

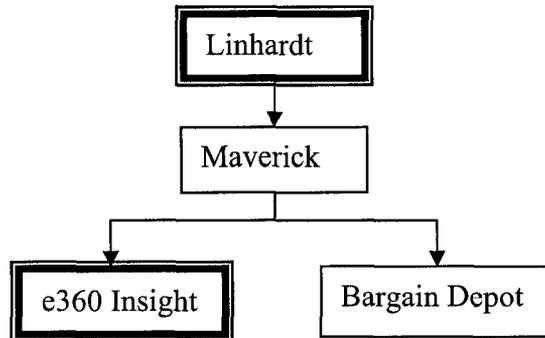
e360 Insight And Its Affiliates

1. Linhardt started e360 Insight as a new business in March 2003; it has no earnings or profits before that time. (Ex. 1, Linhardt Dep. at 7-8.)¹
2. 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. (Ex. 1, Linhardt Dep. at 8-11.)

¹ References to exhibits refer to exhibits attached to Spamhaus’ Memorandum in Support of its Motion in Limine to Exclude Damages Opinion Testimony of David Linhardt, which was filed with this document on December 9, 2008. We incorporate those exhibits as if filed with this pleading rather than file the same exhibits with the Court twice.

3. Plaintiff David Linhardt owns Maverick. (Ex. 1, Linhardt Dep. at 17.)
4. The ownership structure (with only the two parties in bold) therefore looked like

this:



5. 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.” (Ex. 1, Linhardt Dep. at 97-99.)

6. There is “no way of separating out results and data for e360 from, for example, Bargain Depot.” (Ex. 1, Linhardt Dep. at 100.)

7. The only plaintiff entity, e360 Insight, which ceased operating in early 2008, was an “internet marketing” company. (Ex. 1, Linhardt Dep. at 17, 97.)

8. Essentially, e360 Insight received revenue from client companies who desired to market products and services. (Ex. 1, Linhardt Dep. at 39, 45.)

9. 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.² (Ex. 1, Linhardt Dep. at 36, 41-42.)

² 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.”

e360 Insight's Variable Revenues

10. 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. (Ex. 1, Linhardt Dep. at 45-46.)

11. Specifically, e360 Insight generally received no revenue from merely sending e-mails, and only received revenue when the e-mails generated an "action" from an ad recipient, for example, a recipient's clicking through to a client's website. (Ex. 1, Linhardt Dep. at 45.)

12. The amount of revenue provided by e360 Insight's clients was therefore determined on a "campaign by campaign" basis, with long-term agreements being "rare." (Ex. 1, Linhardt Dep. at 177-78.)

13. The revenue generated by a particular campaign, in turn, could depend on a variety of factors, including

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.

(Ex. 1, Linhardt Dep. at 165.)

14. 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.

(Ex. 1, Linhardt Dep. at 214.)

15. 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 . (Ex. 2, Profit and Loss Statement, e360-001723.)

16. Maverick's books show a maximum net income of , and a minimum net income of (Ex. 2, Profit and Loss Statement, e360-001723.)

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17. During the same time, gross revenues of Maverick ranged from a low of about
o a high of about . (*Id.*)

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

18. 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. (Doc. 1, Complaint ¶¶ 15, 16, 18, 21.)

19. 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. (Doc. 24, 9/13/06 Order.)

20. Relying on a sworn affidavit submitted by Linhardt, the Court also awarded the full compensatory damages sought, of \$11.7 million. (Doc. 24, 9/13/06 Order.)

21. Spamhaus, represented by current counsel, appealed. (Doc. 30, 10/13/06 Notice of Appeal.)

22. 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).

23. 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.

24. 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.

25. On remand, discovery opened in November 2007, and the Court will recall that e360 Insight and Linhardt defaulted numerous times on their discovery obligations. (Docs. 139-42, 145-47, 154-66, 173..)

26. As a result, Spamhaus moved to dismiss as a discovery sanction. (Doc. 157, Spamhaus’ Motion to Dismiss 8/28/08.)

27. On October 15, 2008, the Court denied Spamhaus’ motion but granted alternate relief. (Doc. 173, 10/15/08 Order.)

28. 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. (Doc. 173, 10/15/08 Order.)

29. 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. (Doc. 173, 10/15/08 Order.)

30. 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.

Respectfully submitted,

THE SPAMHAUS PROJECT

Dated: December 9, 2008

By: s/ David Jiménez-Ekman

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