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

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| 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<br>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 IN LIMINE**
**TO EXCLUDE DAMAGES OPINION TESTIMONY OF DAVID LINHARDT**

Defendant The Spamhaus Project ("Spamhaus"), pursuant to Federal Rules of Evidence 402 and 702, respectfully moves this Court for entry of an order excluding all opinion testimony of David Linhardt regarding the amount of damages or the method of calculating that amount, including without limitation Linhardt's original $11.7 million damages calculation and revised $136 million damages calculation. In support of this Motion, Spamhaus states:

1. The sole issue on remand is the amount of damages Plaintiffs e360 Insight LLC ("e360") and David Linhardt ("Linhardt") incurred. Plaintiffs do not claim any actually incurred, out-of-pocket liquidated damages. To meet their burder of showing their damages to a "reasonable certainty," *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 602 (7th Cir. 2007), Plainiffs have proffered Linhardt (individual plaintiff and CEO of corporate plaintiff e360) as their sole expert witness in support of their lost projected revenue and lost enterprise value claims in connection with this litigation.

2. Linhardt has offered an opinion that Plaintiffs incurred total damages of $11.7 million due to Spamhaus' alleged misconduct. A subsequent opinion that Plaintiffs instead actually incurred approximately $136 million in damages was excluded by this Court's October 15, 2008 Order due to Plaintiffs' repeated defaults on their discovery obligations. (Doc. 173.) The Court should exclude all of Linhardt's testimony regarding the amount of damages, and methodology for calculating damages, for three reasons.

3. ***First***, Linhardt admitted under oath in his deposition that he is not an expert in corporate valuations or in calculating damages for litigation; has no experience calculating damages prior to this case; and has no understanding of the legal standards for calculating damages. (Linhardt Dep., Ex. 1 at 85, 305-08). Linhardt does not "have sufficient specialized knowledge to assist the jurors in deciding the particular issues of the case" under Fed. R. Evid. 702, and is therefore unqualified to offer an opinion as an expert on these subjects. *Goodwin v. MTD Products, Inc.*, 232 F.3d 600 (7th Cir. 2000); *Ammons v. Aramark Unif. Servs.*, 368 F.3d 809 (7th Cir. 2004); *Ancho v. Pentek Corp.*, 157 F.3d 512, 519 (7th Cir. 1998).

4. ***Second***, Linhardt's $11.7 million damages estimate cannot be admitted because he admitted that it is not reliable under Rule 702. Linhardt testified during his depositions that his $11.7 million calculation is not "accurate." (Linhardt Dep., Ex. 1 at 258-59). Moreover, all of his calculations are based on financial results from e360's non-party parent company Maverick Direct Marketing Solutions, Inc. ("Maverick"), and thus included revenue not only from e360 by also from non-party Bargain Depot Enterprises ("Bargain Depot") and several other non-party entities owned by Maverick. (Linhardt Dep., Ex. 1 at 8-11, 99-100). And Linhardt was also unable to say what methodology was used to arrive at his $11.7 million damages calculation, and could produce no workpapers to explain his methodology. (Linhardt

Dep., Ex. 1 at 286-89). Linhardt's $11.7 million calculation is thus not "the product of reliable principles and methods . . . applied . . . reliably to the facts of the case," and is therefore inadmissible under Fed. R. Evid. 702. *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Fuesting v. Zimmer*, 421 F.3d 528, 535 (7th Cir. 2005); *Kempner Mobile Electronics, Inc. v. Southwestern Bell Mobile Systems*, 428 F.3d 706 (7th Cir. 2005).

5. ***Third***, while the Court's October 15, 2008 Order struck Linhardt's opinion and analysis for reaching his $136 million damages estimate (Doc. 173), Linhardt's $136 million opinion would be inadmissible under Fed. R. Evid. 702 even if it had not been stricken. Linhardt admitted that he lacks the expertise to testify regarding corporate valuation or lost revenue damages; Linhardt's $136 million damages calculation is also based on financial data from non-party Maverick; and Linhardt's testimony reveals that his putative methodology is flawed on its face. (Linhardt Dep., Ex. 1 at 8-11, 85, 99-100, 113-62, 258-59, 286-89, 305-08). These failures in Linhardt's methodology make his testimony inadmissible as unreliable under Fed. R. Evid. 702.

6. In further support of this motion, Spamhaus submits the accompanying memorandum of law and exhibits thereto.

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 in Limine to Exclude Opinion Testimony of David Linhardt 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