

No. 06 C 3958  
(Judge Charles P. Kocoras)

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**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,**

**v.**

**THE SPAMHAUS PROJECT, a company limited by guarantee and organized  
under the laws of England, a/k/a THE SPAMHAUS PROJECT, LTD.,**

**Defendant.**

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**THE SPAMHAUS PROJECT'S MEMORANDUM IN SUPPORT OF MOTION IN  
LIMINE TO EXCLUDE DAMAGES OPINION TESTIMONY OF DAVID LINHARDT**

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## Introduction

Plaintiffs' basic damages claim in this case is that they should be awarded \$11.7 million for lost projected revenue and lost enterprise value for a now-defunct internet marketing company that (i) was started for \$5,000, (ii) operated for just 5 years, and (iii) averaged (with its affiliates) just a year in unaudited income. The only ground for this pie-in-the-sky claim is the proffered opinion testimony of individual plaintiff and former CEO of the corporate plaintiff David Linhardt. But Linhardt, who certainly has some experience in "internet marketing" (as described below), admitted that he is *not* an expert in calculating damages or in calculating corporate values. And Linhardt had no workpapers to explain his \$11.7 million estimate, which he described as "back of the envelope" and as no longer "accurate." Moreover, at his deposition, Linhardt could not articulate *anything* about the methodology he used to come up with that estimate.

As the Court observed at the status hearing on December 2, 2008, Linhardt's testimony must meet the standards of any expert under Federal Rule of Evidence 702. We bring this motion because this is the somewhat rare case where Linhardt's deposition admissions preclude him, as a matter of law, from serving as his own bargain-basement damages expert in this case. After we explain the procedural and factual background (Part I), we show that there are three reasons that Linhardt cannot testify.

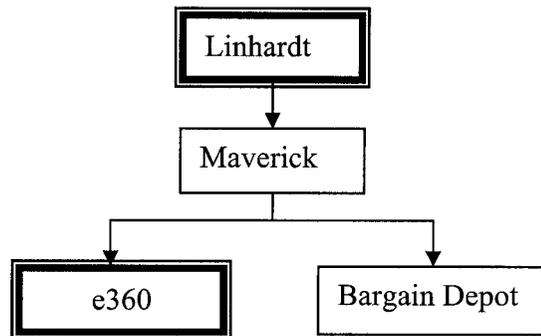
*First*, Linhardt admitted that he is not an expert on the topics of his testimony, and his testimony about his background makes clear that his admission is correct. (Part II.A.) *Second*, Linhardt's \$11.7 million estimate should be excluded because Linhardt admits that it is not "accurate," it fails to separate financial data of parties from non-parties, and Linhardt could not recall any of the methodology he used to make the estimate. (Part II.B.) *Third*, Linhardt's subsequent \$136 million estimate has been excluded by the Court's October 15, 2008 order. But even if it were not, Linhardt could not testify to it under Rule 702 because it suffers from the same problems with expertise and methodology as the \$11.7 million initial estimate. (Part II.C.)

**I. Factual And Procedural Background.**

**A. The Business Of e360 And Its Revenues.**

**e360 And Its Affiliates**

Linhardt started e360 as a new business in March 2003; it has no earnings or profits before that time. (Ex. 1, Linhardt Dep. at 8.) 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. (*Id.* at 8, 10-11.) Plaintiff David Linhardt owns Maverick. (*Id.* at 17.) The ownership structure (with only the two parties in bold) therefore looked like this:



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.” (*Id.* at 99-100.) There is “no way of separating out results and data for e360 from, for example, Bargain Depot.” (*Id.*)

The only plaintiff entity, e360, which ceased operating in early 2008, was an “internet marketing” company. (*Id.* at 30.) Essentially, e360 received revenue from client companies who desired to market products and services. (*Id.*) The client companies provided content for an e-mail message, and e360 assembled an e-mail message and sent it to numerous e-mail addresses contained in an “opt-in database” that e360, in large part, licensed from third party database providers.<sup>1</sup> (*Id.* at 30, 35-36.)

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<sup>1</sup> As the Court knows, the origin of the lawsuit relates to whether the databases e360 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 e360 sent was actually unsolicited e-mail, or “spam.” Because a default has been entered on liability, and the spam/opt-in issue is irrelevant

### e360's Variable Revenues

The revenue e360 or its affiliates received from this process for any particular client was highly variable because fees were based on a transactional agreement. (*Id.* at 212-15.) Specifically, e360 generally received no revenue from merely sending e-mails, and only received revenue when the e-mails generated a “transaction” from an ad recipient, for example, a recipient’s clicking through to a client’s website. (*Id.* at 212-13, 45.) The amount of revenue provided by e360’s clients was therefore determined on a “campaign by campaign” basis, with long-term agreements being “rare.” (*Id.* at 178.) The revenue generated by a particular campaign, in turn, could depend on a variety of factors, including (*id.* at 165):

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.

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.

(*Id.* at 214.)

During the time that e360 operated, from 2003 through the end of 2007, the unaudited, consolidated Maverick books (which included e360’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.) Maverick’s books show a maximum net income of , and a minimum net income of . (*Id.*) During the same time, gross revenues of Maverick ranged from a low of about to a high of about . (*Id.*)

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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.”

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

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) allege that Spamhaus listed them as a known "spammer" in December 2003; that Spamhaus refused to remove them; and that the listing caused e360 to lose revenue because clients would not engage e360. (Complaint, Doc. 1 ¶¶ 12-24.) 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. 19.) Relying on a sworn affidavit submitted by Linhardt, the Court also awarded the full compensatory damages sought, of \$11.7 million. (Doc. 24.)

Spamhaus, represented by current counsel, appealed. 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). 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. 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.

On remand, discovery opened in November 2007, and the Court will recall that e360 and Linhardt defaulted numerous times on their discovery obligations. (Docs. 139-42, 145-47, 154-66, 173.) In particular, e360's interrogatory responses did not include any damages calculation other than the \$11.7 million contained in his original affidavit, despite Spamhaus' filing two

motions to compel and obtaining orders on both those motions. When Plaintiffs *still* did not serve complete answers, Spamhaus filed a motion to dismiss as a sanction. (Doc. 162.) After the motion was filed, on September 19, 2008, Plaintiffs served supplemental amended interrogatory responses that for the first time contained a new damages calculation methodology which resulted in a range of damages up to more than ten times the original damages amount, more than \$136 million. (Supp. Am. Resp., Ex. 5 at 27-38.)

On October 15, 2008, the Court denied Spamhaus' motion but granted alternate relief. 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. 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.) 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.

### C. An Overview Of Linhardt's Qualifications.

As the Seventh Circuit's opinion makes clear, 500 F.3d at 603, Plaintiffs' claims are not for any liquidated or actual out-of-pocket costs or damages. Instead, they are for lost future "revenues" and "lost profits." However, Plaintiffs have not retained any third-party economist, accountant or damages expert to quantify those claimed damages. Rather, Plaintiffs' only timely-disclosed expert is the individual plaintiff, David Linhardt.

While we do not dispute that Linhardt has experience with internet marketing businesses, he does *not* have the training or experience, or any other qualification, to qualify him as an expert in calculating future revenues, profits, or business valuations. Linhardt received a Bachelor of Science degree in Chemical Engineering from Purdue University in 1992. (Linhardt Dep., Ex. 1 at 48). Following a stint in product development and marketing for Proctor & Gamble, Linhardt obtained a Master of Business Administration degree from Harvard University in 1996. (*Id.* at 48-49). Linhardt testified that his MBA curriculum included classes on corporate finance and valuation, but his "focus [was] on technology and direct marketing." (*Id.* at 50.) Linhardt testified that before starting e360, he held a number of marketing positions, with

a particular focus on internet marketing. (*Id.* at 51-63.) He has never held a position whose duties involved performing actual valuations of companies (although he once supported investment bankers in due diligence) or assessing damages from lost profits. (*Id.* at 68-69, 305.)

At his deposition, Linhardt was candid about the limits of his knowledge. While Mr. Linhardt considers himself an expert in e-mail marketing, he admitted that he is not an expert on the topics that are required to convert the financial results of Maverick into lost profits and lost enterprise value for e360. At his deposition, Linhardt testified that:

- He does not “consider [himself] an expert in company valuations” (*id.* at 85);
- It is “fair to say” that he is not “an expert in calculating damages in lawsuits” and he “has never calculated damages in any lawsuit before” (*id.* at 305); and
- He has no knowledge of the legal standards for calculating damages, and did not have any legal standard for damages in mind when he formed his estimates regarding plaintiffs’ damages (*Id.* at 306-08).

### **C. Linhardt’s Proffered Damages Estimates.**

#### **1. Linhardt’s “Back Of The Envelope,” And No Longer “Accurate,” \$11.7 Million Damages Estimate.**

Linhardt’s sworn affidavit from August 30, 2006 – the basis of Your Honor’s original default judgment – contained an estimate of \$11.7 million in total compensatory damages. (Linhardt 8/30/06 Aff., Ex. 3 ¶¶ 32-34.) At his deposition, Linhardt testified that when “he first prepared this, we did kind of a back-of-the-envelope analysis.” (Linhardt Dep., Ex. 1 at 224.) The back-of-the-envelope analysis contained two components: (1) “loss of revenue from having . . . active and pending contracts cancelled” of \$2,465,000, and (2) “lost value of the business as a result of the inability to monetize the revenue potential from the company” of \$9,250,000. (Linhardt 8/30/06 Aff., Ex. 3 ¶¶ 32-34.) At his deposition, Linhardt testified about his basis for each of the numbers.

*First*, the “loss of revenue” estimate was based on a chart that Linhardt prepared listing “Direct Damages” relating to four clients or potential clients, SmartBargains.com, Vendare Media, Optinbig, and Net Blue. (Ex. 4, “Direct Damages from Spamhaus ROKSO Listing” (Dep. Ex. 10).) Linhardt testified that in preparing that chart, he multiplied some assumed monthly revenue for each client or potential client by an assumed number of future months. (Linhardt Dep., Ex. 1 at 271-287.) However, Linhardt could not say for sure how he came to the

monthly revenue amount, or even whether it was at the high, average, or low end of any historic amounts for each client. (*Id.* at 272, 277, 279.) Nor could Linhardt say with certainty what number of future months he used, let alone the rationale behind using that number of months. (*Id.* at 270, 275-76, 281.) Linhardt testified that he had no backup documents or workpapers that might refresh his recollection as to how the amounts were calculated. (*Id.* at 272, 275, 280.)

Linhardt was equally unable to describe how the total of the figures on the chart he prepared, which was [REDACTED], became the \$2.465 million in his affidavit. Linhardt testified (*id.* at 286-87):

Q: Are there any additional calculations that were used to arrive at the number in paragraph 32 [of your affidavit]?

A: I don't remember specifically how we got from the numbers that I put on the sheet –

Q: That being Exhibit 10 [, your chart]?

A: Yes.

– into what was submitted. I think it's fair to say that they were both estimates and just a result of discussions with legal counsel on what the proper figure should be.

Q: Just to be clear, you are not able to testify today as to the precise methodology used to get from the numbers in [your chart] to the number in paragraph 32 of [your affidavit], correct?

A: I don't recall specifically.

Q: And you don't have any papers which reflect that, correct?

A: I do not.

*Second*, the “lost value of the business” estimate was apparently calculated in two ways. Linhardt testified that the first way, stated in paragraph 33 of his original damages affidavit, was based on “lost business opportunities” for three entities, but that he did not know how he arrived at the \$9.25 million estimate, and had no papers that explained the calculation (*id.* at 288-89):

Q: . . . There's a number of \$9.25 million. As you sit here today, can you tell me anything about the methodology that you used to come up with the \$9.25 million?

A: No. I don't recall the specific methodology.

Q: And you don't have any documents that reflect that, correct?

A: That's correct.

The second way Linhardt came up with an estimate – the exact same estimate of \$9.25 million – was by asserting that the value of e360 without Spamhaus' interference should have been determined based on the offering price of an opt-in database (of a defunct company) now being sold as an asset. (*Id.* at 250-51.) Linhardt asserted that because e360 had *licensed* opt-in

databases from others containing 45 million e-mail addresses, it should be valued as if it *owned* those addresses and could license them to others. (*Id.* at 251.) But Linhardt also admitted that e360 was required to pay a royalty of 20% when re-licensing the databases it licensed, which was not the case with the outright sale offering price for the list by the defunct company. (*Id.* at 255-59.)

Ultimately, whichever method was used, Linhardt testified that his initial, “back of the envelope” calculation of \$9.25 million (the only calculation now before the Court) was not “accurate.” (*Id.* at 258-59.) At his deposition, Linhardt testified (*id.*):

Q: . . . As of today, as you sit here today, and looking at the numbers in paragraph 34 of [your affidavit], do you think that they are, as you sit here today, accurate?

A: I think they were the best estimate at the time, but I think that there – the revised estimate is more accurate.

Q: So as you sit here today, do you think that the \$9.25 million estimate is accurate today?

A: No. I think it is higher.

**2. Linhardt’s Tardy (And Now Stricken) Estimate That Damages Are More Than Ten Times Higher Than His Initial “Back Of The Envelope” Estimate.**

The “revised estimate” Linhardt said was “more accurate” is the \$136 million estimate of lost enterprise value (for an entity that never earned more than the Court struck in its ruling on October 15, 2008. (Supp. Am. Res., Ex. 5 at 36.) Because it has been stricken, we will not go into great detail concerning the basis for this estimate. However, Linhardt’s revised analysis used a completely different approach. Rather than being based on specific, existing relationships with actual or potential clients, Linhardt’s revised approach attempted to estimate the number of e-mails that had been blocked, and project lost revenue and lost enterprise value on that basis. (*Id.* at 27-36.)

Linhardt’s revised analysis essentially engaged in four steps, *none* of which were involved in his original “back of the envelope” estimate. *First*, Linhardt assumed that whenever a sample e-mail campaign for a client did not result in any actions from e-mails sent to a particular domain, that meant that the domain was blocked, and that it was blocked because of Spamhaus’ listing. (Linhardt Dep., Ex. 1 at 113-14, 118.) *Second*, Linhardt assumed that the blocked e-mails would have resulted in the same rate of client actions (and therefore same revenue) as e360 received on other domains for the same campaign, and declared that lost

revenue. (*Id.* at 135-37, 148.) *Third*, Linhardt extrapolated from certain non-randomly chosen sample campaigns to assume the same rate of lost revenue for the more than 6.5 *billion* e-mail messages e360 sent. (*Id.* at 135-37, 141-48.) *Fourth*, Linhardt selected a trading multiple, based on several highly capitalized, publicly traded companies, and, using the revenue loss less variable cost of goods sold as a proxy for earnings before debt, interest and taxes (“EBIDTA”), estimated the lost enterprise value. (*Id.* at 149-62.)

While the revised (and now stricken) analysis had more steps, and more supporting papers, Linhardt’s revised analysis was no more methodologically rigorous than his original. Linhardt repeatedly testified that he ignored potentially relevant factors in the interest of simplicity. (*Id.* at 112-14, 130-31, 137-38, 145-46, 159-60.) More importantly, at numerous points in the four-step process, Linhardt testified that he either could not recall the justification for his methodology, or had not taken steps that even a lay person would find obviously necessary. For example:

- For the first step, Linhardt assumed that all blocked messages for a particular e-mail provider were blocked because of the Spamhaus listing, and did nothing to empirically investigate that assumption, even though he acknowledged other factors (such as other spam-fighting programs) might cause messages to be blocked. (*Id.* at 113-14, 118.)
- For the second step, Linhardt averaged all campaigns in a month together to determine his “average revenue per thousand delivered messages” value, despite his own testimony that different campaigns had different response rates due to the type of offer (i.e., its attractiveness) involved and customers targeted. (*Id.* at 148.)
- For the third step, Linhardt based his calculation of the “average unblocked click-through rate” of 5.3 percent on a hand-selected, non-random, “sample” of 10 out of over 10,000 campaigns, without consulting with a statistician. (Tr. 135-37, 164). This sample was then further massaged by “eyeballing” each campaign’s results and removing all domains that did not receive at least 20 messages in a campaign, and then by removing any domain where no recipients “clicked-through” at all, and then averaged across all ten campaigns to reach the 5.3% “average unblocked click-through rate.” (*Id.* at 137-47.)

And, finally, in the fourth step that Linhardt used to conclude that a company that had never earned more than \_\_\_\_\_ annually had lost more than \$136 million in value, Linhardt used public company trading multiples without making any adjustments to them even though he was not able to find the “perfect comparable.” Linhardt testified (*id.* at 159-60 (emphasis supplied)):

REDACTED

Q: Did you consider making any adjustments [to the trading multiples], discounts, anything like that?

A: Sure. I mean, you could say, with scale that our multiple shouldn't be as high. *You know, I'll accept that.*

But I didn't really have much of a basis without knowing – without having a comparable that was about a million in revenue and that did exactly what e360 does. I mean, there are plenty of companies out there like that, but I don't have access to any of their financials. So I wasn't really able to find, you know, the perfect comparable. So what I relied on was what was publicly available.

Linhardt said he did not go through “the exercise” of consulting any treatises or other sources to determine if any adjustments should be made because he “just wanted to keep it simple for the purposes of this analysis.” (*Id.* at 160.)

## II. The Court Should Exclude Linhardt's Proffered Damages Testimony.

“Evidence which is not relevant is not admissible.” Fed. R. Evid. 402. Opinion testimony of a scientific, technical, or other specialized nature – such as the statistical forecast of lost revenues and business value at issue here – is only admissible under Rule 702 of the Federal Rules of Evidence if (1) the designated witness is properly qualified as an expert, (2) the opinion testimony is “based upon sufficient facts or data,” (3) the opinion testimony is “the product of reliable principles and methods,” (4) “the witness has applied the principles and methods reliably to the facts of the case,” and (5) the testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. These requirements apply to scientific and non-scientific expert testimony alike. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

To gauge the reliability of expert testimony, a court must determine whether the expert is qualified in the relevant field and whether the methodology underlying the expert's conclusions is reliable. *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000). Under these standards, to qualify as an expert, a witness must have “sufficient specialized knowledge to assist the jurors ‘in deciding the particular issues of the case.’” *Kumho*, 526 U.S. at 156 (citations omitted). “[T]he trial judge must [also] determine whether [an expert's] opinion was grounded in the ‘methods and procedures of science,’ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993), and whether such testimony had sufficient ‘factual underpinnings,’ *Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 586 (7th Cir. 2000).” *Bourelle v. Crown Equip. Corp.*, 220 F.3d 532, 536 (7th Cir. 2000); accord *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir.

2007) (upholding exclusion of expert testimony, despite purported use of an accepted methodology, for failure to point to such data). The proponent of expert testimony – here, Plaintiffs – bears the burden of demonstrating admissibility under these standards. *See, e.g., Drebing v. Provo Group, Inc.*, No. 05 C 5480, 2007 WL 2982224, at \*2 (N.D. Ill. Oct. 11, 2007).

**A. The Court Should Exclude All Damages Testimony From Linhardt Because He Testified He Is Not Qualified Under Rule 702 As An Expert.**

The first question under Fed. R. Evid. 702 to determine whether expert opinion testimony is admissible is whether the “particular expert ha[s] sufficient specialized knowledge to assist the jurors in deciding the particular issues of the case.” *Kumho*, 526 U.S. at 156 (internal quotations and citations omitted). The expert’s expertise must be in the specific area of his testimony; general qualifications do not suffice if those qualifications do not “qualif[y the witness] to opine on the specific matters he needs to address.” *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 813 (N.D. Ill. 2005). Thus, the Seventh Circuit has held that a “scientist, however well credentialed he may be, is not permitted to be the mouthpiece of a scientist in a different specialty.” *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002). “Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness’s testimony.” *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990).

We understand that the question of expertise, and the fit of the expertise to the opinion, can often be debatable. This is not such a case. Here, Linhardt *admitted* that he simply is not an expert in the areas in which he seeks to provide testimony – lost potential future revenues and changes in company valuations based on those. Linhardt is not an economist; he *admitted* in so many words that he is not a “damages” expert and has no experience calculating damages prior to this case and no understanding of the legal standards for damages; and he admitted he is not an expert in corporate valuations. (Linhardt Dep., Ex. 1 at 85, 305-08.) We also recognize that admitting at a deposition that one is not an “expert” on a particular topic might, under some circumstances, not completely preclude some testimony under Rule 702 on that topic. But the testimony that preceded those admissions in this case makes it clear that Linhardt had it just right. He has never calculated damages before and has never, inside or outside of litigation, before performed actual corporate valuations (although he did assist those making the valuations

by providing due diligence twice), let alone calculated changes in those valuations based on revenue changes. (*Id.* at 85, 305-08.)

Linhardt's admissions are dispositive of this motion and this case under well-established Seventh Circuit law. The court has upheld the exclusion of testimony in numerous situations where the fit between expert experience and topic of the opinion was far closer than it is here. For example, in *Goodwin v. MTD Products, Inc.*, 232 F.3d 600 (7th Cir. 2000), the Seventh Circuit held that an engineer could not give expert testimony on whether a plaintiff in a products liability action had injured his eye due to a lawn mower discharging a plastic wing nut because "an individual with a degree in mechanical engineering is not qualified to give expert testimony on medical questions, including the cause of an eye injury." *Id.* at 609. See also *Loeffel Steel*, 387 F. Supp. 2d at 813 (excluding appraisal expert who lacked industry-specific experience); *Ammons v. Aramark Unif. Servs.*, 368 F.3d 809 (7th Cir. 2004) (admitted expert in field of vocational rehabilitation was not qualified to testify in the case due to a lack of familiarity with the machinery at issue in the case); *Ancho v. Pentek Corp.*, 157 F.3d 512, 519 (7th Cir. 1998) (affirming exclusion of testimony of mechanical engineer expert who lacked experience concerning the configuration of a corrugated cardboard production plant).

**B. Alternatively, The Court Should Exclude Testimony Regarding The Initial \$11.7 Million Damages Estimate Because Linhardt Admits It Is Not "Accurate" And Because It Does Not Meet Rule 702 Standards.**

Expert testimony must rest on a "reliable foundation," *Daubert*, 509 U.S. at 597, and the district court must "assess the reliability of the methodology the expert has employed in arriving at his opinion." *Fuesting v. Zimmer*, 421 F.3d 528, 535 (7th Cir. 2005). "It is axiomatic that proffered expert testimony must be 'derived by the scientific method.'" *Clark*, 192 F.3d at 756 (citations and internal quotations omitted). "An expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and this estimate must be testable. Someone else using the same data and methods must be able to replicate the result." *Zenith*, 395 F.3d at 419.

**1. The Court Should Exclude The Initial \$11.7 Million Damages Estimate Because Linhardt Admits It Is Not Accurate.**

The Court is again faced with the rare circumstances where the purported expert conceded *in so many words* at his deposition that the proffered testimony does not meet Rule 702 standards. The initial \$11.7 million estimate – the only one in play – obviously used a

completely different methodology than the revised and stricken estimate (and reached a dramatically different result). But even putting that aside, Linhardt simply admitted that the estimate was not prepared using any rigorous methodology and instead was, in his own words, a “back of the envelope” estimate that is no longer “accurate.” (Linhardt Dep., Ex. 1 at 224, 236, 258-59.) It must be excluded on that basis alone.

**2. Independently, The Initial \$11.7 Million Damages Estimate Does Not Meet Rule 702 Standards.**

Even if Linhardt had not admitted that his estimate did not meet Rule 702 standards, the underlying testimony also demonstrates that the now-abandoned “back of the envelope” estimate is not admissible for two principal reasons. *First*, the initial damages estimate will not assist the trier of fact because it includes amounts for the non-party Maverick entities. “[E]xpert testimony must be relevant and factually linked to the case in order to meet Rule 702’s ‘helpfulness’ requirement.” *United States v. Gallardo*, 497 F.3d 727, 733 (7th Cir. 2007); *see also Haager v. Chicago Rail Link, LLC*, 232 F.R.D. 289 (N.D. Ill. 2005) (expert testimony of locomotive engineer concerning railroad’s termination of employee excluded as irrelevant since claims stemmed from employee’s injury to his knee, not from his termination, and the termination was not an issue in the case). Here, Linhardt testified that he could not separate financial results for the two non-party entities, Maverick and Bargain Depot, from e360’s results. (Linhardt Dep., Ex. 1 at 95-106.) But Maverick and Bargain Depot are not parties and therefore are not entitled to any damages, and e360 has no basis to seek damages on their behalf. Consequently, even if otherwise admissible, Linhardt’s testimony would not be helpful to the trier of fact because it addresses the damages to the consolidated Maverick entities, *not* the only party.

The Seventh Circuit affirmed the exclusion of expert testimony regarding revenues and profits in an even more difficult case in *Kempner Mobile Electronics, Inc. v. Southwestern Bell Mobile Systems*, 428 F.3d 706 (7th Cir. 2005). In *Kempner*, Kempner proffered an expert to testify to fraud damages incurred by Kempner when it turned down a lucrative deal with Nextel based on Cingular’s representations it would provide competitive equipment and service pricing. *Id.* at 709-11. On appeal, the Seventh Circuit affirmed the exclusion of testimony from Kempner’s damages witness on the ground that the expert could not segregate relevant losses from irrelevant ones: “Kempner’s damages evidence could not be offered as a basis for its theory of fraud because Kempner’s damages evidence failed to separate profits Kempner would

have gained from sales of Nextel products and services from profits gained from sales of Cingular products and services . . . the expert testimony submitted by Kempner would not assist the trier of fact to determine the issue of fraud damages in this case.” *Id.* at 713; *accord Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661 (7th Cir. 2004).

**Second**, Linhardt cannot show that the Initial Damages Estimate uses a “reliable methodology” because Linhardt could not even say what the methodology was and he had no workpapers to explain that methodology. “A witness who invokes ‘my expertise’ rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term.” *Zenith*, 395 F.3d at 419. While “[e]xperts commonly extrapolate from existing data,” the extrapolation must be in accordance with sound methodological principles; “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.” *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997). Here, Linhardt had no work papers showing how he came to his initial \$11.7 million damages calculation. (Linhardt Dep., Ex. 1 at 287.) But more importantly, at his deposition, Linhardt could not even recall **anything** about crucial steps in that methodology. (*Id.* at 286-89.) Where there is not even a methodology to review, the proffered testimony cannot be admitted under Rule 702. Mere “hunch[es] . . . lacking scientific rigor” are unreliable and therefore inadmissible as expert testimony. *See, e.g., Rosen v. Civa-Geigy Corp.*, 78 F.3d 316, 319-20 (7th Cir. 1996); *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 186-87 (7th Cir. 1993).

**C. Alternatively, The Court’s October 15 Order Bars Linhardt’s Revised \$136 Million Damages Estimate, Which Also Cannot Be Admitted Under Rule 702.**

The Court’s October 15 Order struck the analysis on which Plaintiffs now hope to rely. (Doc. 173.) Consequently, we will not address at length all of the methodological flaws in that testimony. However, even if Plaintiffs’ egregious discovery violations did not preclude their introducing testimony addressed at the \$136 million later estimate, it would be inadmissible on the merits for three reasons similar to those that bar testimony regarding the initial \$11.7 million estimate.

**First**, as explained above (at 11-12), Linhardt admitted that he lacks the expertise to offer an expert opinion regarding corporate valuation. The revised \$136 million estimate is no less dependent on projections regarding future hoped-for revenues than the initial estimate.

*Second*, as explained above (at 12-14) with respect to the initial \$11.7 million estimate, Linhardt has no way of offering testimony that would be helpful to the trier of fact because he cannot isolate plaintiff e360's alleged loss of profit from non-parties (Maverick and Bargain Depot) whose alleged damages are not at issue. The \$136 million revised estimate is based on the same commingled data as the original \$11.7 million estimate was.

*Third*, the methodological flaws unique to the revised \$136 million estimate, described above at 8-10, render the testimony inadmissible as unreliable. As the Seventh Circuit explained, lost profit and lost enterprise value estimates by company personnel begin as inherently suspect. Such projections:

rest on [the company's] say-so rather than a statistical analysis. Like many other internal projections, these represent hopes rather than the results of scientific analysis. . . . Reliable inferences depend on more than say-so, whether the person doing the saying is a corporate manager or a putative expert . . . [V]aluations prepared in connection with potential sales of the business don't provide a reliable estimate of [damages].

*Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 420 (7th Cir. 2005) (citations omitted). Linhardt's unjustified assumptions regarding the cause of blocks (Linhardt Dep., Ex. 1 at 113-14, 118), prediction that blocked e-mails would have the same rate of client actions as non-blocked domains (*id.* at 135-37, 148), the use of the non-random samples which he further manipulated (*id.* at 135-37, 141-48), and admission that he could not find a good comparable company (*id.* at 149-62) prevent him from offering any reliable damages testimony.

### CONCLUSION

For the foregoing reasons, the Court should exclude all of Linhardt's opinions.

Dated: December 9, 2008.

Respectfully submitted,

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 Memorandum In Support Of Motion In Limine To Exclude Damages 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