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

E360INSIGHT, LLC, an Illinois Limited Liability Company, and DAVID LINHARDT, an individual	)	
Plaintiffs,	)	**06 CV 3958**
v.	)	**Judge Kocoras**
THE SPAMHAUS PROJECT, a company limited by guarantee and organized under the laws of England, aka THE SPAMHAUS PROJECT LTD,	)	**Magistrate Judge Brown**
Defendant.	)	

e360INSIGHT, LLC AND DAVID LINHARDT'S
RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE
TO EXCLUDE DAMAGES OPINION TESTIMONY OF DAVID LINHARDT

Plaintiffs, e360Insight, LLC and David Linhardt (collectively "Plaintiffs"), by and through their attorneys, Synergy Law Group, L.L.C., and for their Response in Opposition to Defendant's Motion in Limine to Exclude Damages Opinion Testimony of David Linhardt, state as follows:

Plaintiff's Business

e360Insight is an email based marketing company. e360Insight contracts with companies that wish to market their products or services using the internet. Clients of e360Insight compile the content of the message and e360Insight sends an email containing the client's content to a list of recipients who have opted to receive such communications. e360Insight would be paid on a performance basis, meaning that e360Insight would be paid a pre-negotiated rate by the client for each "action" taken by the recipient, such as clicking on a link in the email message or visiting

the client's website. Due to the unlawful acts of Spamhaus, e-mails sent by e360Insight were blocked and did not reach the intended recipients. Instead, e360Insight would receive an error message indicating that the email had been blocked due to Spamhaus. (Linhardt Dep., 109-110, attached as Exhibit 1 to Defendant's Motion in Limine). Based on the error messages, Linhardt was able to determine which messages were blocked and how many of the blocked messages were due to Spamhaus' activities. *Id.*

The default judgment previously entered by this court was upheld by the Court of Appeals. "As a general rule, 'a default judgment establishes, as a matter of law, that the defendants [are] liable to plaintiff as to each cause of action alleged in the complaint." *Dundee Cement Co. v. Howard Pipe & Concrete Prods., 722 F.2d 1319, 1323 (7th Cir. 1983) citing Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182, 186 (7th Cir. 1982). "Upon default, the well-pleaded allegations of a complaint relating to liability are taken as true." *Id.* Plaintiffs have therefore already established that Spamhaus committed the alleged unlawful acts, namely that Spamhaus wrongfully placed Linhardt and e360Insight on the ROKSO list and tortiously interfered with e360Insight's existing and potential contracts. The Court of Appeals remanded the case for a more extensive inquiry into Plaintiffs' damages due to Spamhaus' unlawful conduct.

e360Insight sustained monetary damages as a result of Spamhaus' improper conduct and lost several contracts due to Spamhaus' interference. In addition, e360Insight lost revenue on the accounts it had because the emails were blocked due to Spamhaus and did not reach the intended recipients. Because the recipients did not receive the emails, they were unable to take any "action" on the emails and e360Insight was unable to generate revenue on those accounts. In addition, Linhardt sustained damages due to defamation by Spamhuas. Linhardt, the president

and owner of e360Insight, has offered testimony support the plaintiffs' damage claims. Defendants seek to exclude in limine Linhardt's testimony.

I. Linhardt is Qualified to Testify as to the Damages Incurred by e360Insight and Linhardt

Linhardt, as president and owner of e360Insight, has personal knowledge of e360Insight's business, its accounts and its income. e360Insight has presented direct damages stemming from its lost contracts and lost revenue as well as damages based on the lost value of the corporation. Defendant mischaracterizes the nature of e360Insight's damages and mistakenly regards them as a single calculation.

Whether Linhardt's testimony falls under the purview of Rule 701 or 702, Linhardt is qualified to testify as to the damages sustained by him and e360Insight. The advisory committee notes to Rule 701 explain that a business owner or officer is allowed to testify without being qualified as an expert because that testimony is tied to his or her personal knowledge:

> [M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp. 4 F.3d 1153 (3d Cir. 1993)* (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis.

Fed. R. Evid. 701 (advisory committee notes).

In *Nichols v. Johnson*, the plaintiff operated a farming business and sought to testify regarding both past and future profits. The court allowed the plaintiff to offer this testimony,

finding that "the owner or officer of a business is entitled to offer testimony as to the profits of the business, without the need to qualify the witness as an accountant, appraiser or other type of expert." *Nichols v. Johnson*, 2002 U.S. Dist. LEXIS 7745, *16-17 (N.D. Ill. April 30, 2002).

Linhardt's calculations of the damages sustained by the Plaintiff are based on the lost contracts and lost income due to the unlawful acts of Spamhaus. Specifically, Linhardt testified in his deposition regarding the contracts e360Insight lost due to the actions of Spamhaus (Linhardt Dep., 268-284). Linhardt had personal knowledge of the value of these contracts. (Linhardt Dep., 185-187; Ex. 1, Second Affidavit of Linhardt, ¶¶4-19). Linhardt also had knowledge regarding e360Insight's expectancy that these contracts would continue. *Id.* Defendants have offered no evidence to the contrary. Linhardt's testimony regarding the value of e360Insight's existing contracts falls under the purview of Rule 701.

Linhardt's calculation of damages based on the loss of revenue due to Spamhaus blocks also falls under the purview of Rule 701. As explained in Linhardt's deposition and as discussed in more detail below, Linhardt calculated the direct revenue loss per blocked email message. Data relied upon by Linhardt included the number of email messages sent by e360Insight, the number of email messages blocked due to Spamhaus, and the revenue and profits earned by e360Insight on messages and accounts not blocked by Spamhaus. Linhardt has personal knowledge of this information as he regularly worked with and accumulated this data. Computing the direct damages sustained by e360 does not require any specialized knowledge or expertise. These calculations are made by the president of the corporation based upon his personal knowledge. Defendant argues that Linhardt is not an expert in business valuation and therefore cannot testify as to any damages sustained by e360Insight. Defendant's line of reasoning ignores the very nature of the direct damages sustained by e360Insight. Linhardt's

calculation of the direct damages fall within the purview of Rule 701. Accordingly, Linhardt is permitted to testify as to the value, the profits and projected profits of e360Insight without qualifying as an expert.

To the extent that Linhardt's testimony is considered to be expert testimony, as defined by Federal Rule of Evidence 702, Linhardt is qualified to offer opinions regarding the value, the profits and projected profits of e360Insight. Rule 702 provides,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
>
> Fed. R. Evid. 702.

Linhardt's testimony is based on the data he collected as president and owner of e360Insight. Linhardt has knowledge of e360Insight's revenue and profits, e360Insight's contracts, the contracts lost by e360Insight due to Spamhaus, and the effect of Spamhaus' conduct on e360Insight's revenues. Linhardt has compiled the data regarding the number of emails blocked due to Spamhaus and has calculated the losses suffered because of the blocks. As the Seventh Circuit has held,

> The notion that *Daubert* requires particular credentials for an expert witness is radically unsound. The Federal Rules of Evidence, which *Daubert* interprets rather than overrides, do not require that expert witnesses be academics or PhDs, or that their testimony be "scientific" (natural scientific or social scientific) in character. Anyone with relevant expertise enabling him to offer responsible opinion testimony helpful to judge or jury may qualify as an expert witness.

Tuf Racing Products, Inc. v. American Suzuki Motor Co., 223 F.3d 585 (7th Cir. 2000).

Linhardt received a Bachelor of Science degree in Chemical Engineering from Purdue University and holds an MBA from Harvard Business School. (Linhardt Dep., 48-49). His studies at Harvard included courses on valuation of companies and valuation of development projects. (*Id.* at 50). Linhardt has substantial experience in the email marketing business. Through his experience as well as his position as president and owner of e360Insight, he is familiar with all facets of the email marketing industry. Linhardt is able to evaluate the value of his business, and in fact completed a valuation of his business prior to this litigation. (Linhardt Dep., 80-84). The Federal Rules do not require that a witness offering testimony under Rule 702 be an "expert" or a hired gun. The rules require that the testimony be based upon sufficient facts, is the product of reliable principles and methods, and the principles have been applied reliably to the facts. Linhardt's testimony meets those three requirements and will assist the trier of fact.

II. The Plaintiffs' Have Established their Damages with Reasonable Certainty

a. Plaintiffs Initial Damage Calculation

Plaintiffs initial damage calculation was based on the contracts lost due to Spamhaus' interference. Specifically, Plaintiffs identified Smartbargains, Vendare, Optinbig and Net Blue as clients lost due to Spamhaus. The initial damage calculations were the estimated revenues for the contracts over a term of four years and totaled $2,465,000.00. (Exhibit 1, Second Affidavit of Linhardt; See Also Affidavit of Linhardt and Direct Damage Calculation, Attached as Exhibits 3 and 4 to Defendant's Motion in Limine, respectivley). e360Insight had an established history with the clients lost and the profit history of those clients was used to calculate the lost revenues. (Exhibit 1, Second Affidavit of Linhardt). e360Insight also suffered numerous lost business

opportunities and a loss in enterprise value in the amount of $9,250,000. (Affidavit of Linhardt, ¶¶33-34, Attached as Exhibits 3 to Defendant's Motion in Limine). Linhardt testified that e360Insight lost these contracts as a direct result of Spamhaus' actions. (Linhardt Dep., 185-187). As president and owner of e360Insight, Linhardt has personal knowledge of the value of these contracts to e360Insight and can testify accordingly.

Defendant mischaracterizes Linhardt's testimony in stating that the initial $11.7 million dollar damage calculation is inaccurate. Linhardt did not testify that this calculation was inaccurate, but rather stated that his total damages exceeded his initial calculation. (Linhardt Dep., 258-259).

The Court entered judgment in favor of Plaintiffs for $11,715,000. (Doc. 24). The Appellate Court upheld the default judgment but remanded the case for a more extensive inquiry into Plaintiffs' damages. Pursuant to the instructions by the Court of Appeals, Plaintiffs then presented a more detailed analysis of the damages they sustained. (See Ex. 2, e360 v. Spamhaus Direct Revenue Loss Analysis; Plaintiffs Supplemental Amended Responses to Defendant's Interrogatories, #16, pp. 27-36, attached as Exhibit 5 to Defendant's Motion in Limine). Upon performing a more detailed analysis, it was determined e360Insight suffered a direct revenue loss due to Spamhaus in the amount of **[REDACTED]**.

In an order dated October 15, 2008, this Court struck "any amounts stated in the Supplemental Amended Responses to Interrogatories 16 and 17 in excess of $11.7 million." (Doc. 173). Although Plaintiffs are barred from presenting damages in excess of $11.7 million, the Court did not strike the methodology. The supplemental damage analysis is not a new claim, but rather a more detailed analysis of the damages originally presented. Defendants have not

raised any issue regarding the methodology employed by Plaintiffs in their revised damage calculation.

b. Plaintiffs' Revised Damage Calculation

e360Insight lost substantial revenue due to Spamhuas unlawful actions. e360Insight is an email marketing company and earned revenue through sending email campaigns on behalf of its clients. e360Insight would send email messages on behalf of their clients to recipients who opted to receive such communications. e360Insight would be paid on a performance basis, meaning that e360Insight would be paid by the client for each "action" taken by the recipient, such as clicking on a link in the email message or visiting the client's website. Due to the improper acts of Spamhaus, e-mails sent by e360Insight were blocked and did not reach the intended recipients. Instead, e360Insight would receive an error message indicating that the email had been blocked due to Spamhaus. Linhardt was able to determine the number of emails blocked due to Spamhaus (Linhardt Dep., 108-111). For example, in 2004, e360Insight sent **[REDACTED]** messages. (Ex. 2, e360 v. Spamhaus Direct Revenue Loss Analysis; Plaintiffs Supplemental Amended Responses to Defendant's Interrogatories, #16, pp. 27-36, attached as Exhibit 5 to Defendant's Motion in Limine) Of those, **[REDACTED]**, or **[REDACTED]**, were blocked by Spamhaus. *Id.* Because not all of the email messages sent were blocked, e360Insight was able to generate revenue on the unblocked accounts. Based on the account history and success of other email campaigns, Linhardt determined average revenue per thousand messages. Because the demographic and other segmentation characteristics between the records blocked and those not blocked by Spamhaus were identical, e360Insight reasonably assumes the blocked email messages would perform in the same way as the unblocked messages. It therefore

follows that the blocked messages would generate substantially similar click-through rates, conversion rates and revenue productivity as the unblocked messages. The total amount of lost revenue can then be determined by applying the campaign performance metrics of the unblocked messages to the blocked messages. In 2004, the average revenue per thousand messages sent was **[REDACTED]**. *Id.* This amount is then multiplied by the number of records blocked by Spamhaus, **[REDACTED]**, which yields a total direct revenue loss due to Spamhaus blocks in 2004 of **[REDACTED]**. This process was carried out for the years 2003-2007 and yielded a total direct revenue loss due to confirmed Spamhaus blocks from 2003 through 2007 of **[REDACTED]**. (Ex. 2, e360 v. Spamhaus Direct Revenue Loss Analysis and Plaintiffs Supplemental Amended Responses to Defendant's Interrogatories, #16, pp. 27-36, attached as Exhibit 5 to Defendant's Motion in Limine).

The methodology and underlying data provide a reliable basis for the calculation of Plaintiffs damages. Furthermore, any potential uncertainty in Plaintiffs calculations should be resolved against the Defendant. As the Seventh Circuit has noted,

> [W]hile damages cannot be based on pure speculation or guesswork, they also need not be proven with the certainty of calculus. And where the uncertainty of the damages stems from the defendants' illegal conduct, the defendants should not benefit from the uncertainty they created. Speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer.

BE&K Construction Co. v. Will & Grundy Counties Building Trades Council, AFL-CIO, 156 F.3d 756, 770 (7th Cir. 1998).

c. Plaintiffs' Damages are Not Commingled with Damages of Non Parties

Defendant repeatedly and wrongly suggests that Plaintiffs' damages are "commingled" with damages suffered by non-parties Maverick and Bargain Depot. As Linhardt explained in his deposition, a consolidated tax return was filed by Maverick (Linhardt Dep., 98). The mere

fact that a consolidated return was filed does not preclude Linhardt and e360Insight from proving their damages. e360Insight's damages are based on the lost contracts and lost income due to the acts of Spamhaus held to be improper. Specifically, Linhardt testified in his deposition regarding the contracts e360Insight lost due to the actions of Spamhaus (Linhardt Dep., 268-284). Linhardt had personal knowledge of the value of these contracts. (Linhardt Dep., 185-187). The filing of a consolidated tax return has no effect on the value of these contracts or on the fact they were lost due to the unlawful actions of Spamhaus. In addition, e360Insight has also presented damages for the direct revenue lost per blocked email message. As discussed above, these damages were calculated using the revenue and profits earned by e360Insight from 2003 through 2007. Again, the filing of a consolidated tax return has no effect on what income e360Insight generated. In addition, no other entities generated any revenue. (Linhardt Dep., 99). The consolidated tax return has no effect on the Plaintiffs damage calculations.

III. Defendant's Motion to Exclude the Testimony of Linhardt Should be Denied

Linhardt is qualified to testify as to the damages sustained by both e360Insight and himself. He is qualified to testify as a lay witness, as he is the owner and president of 360 and has personal knowledge regarding its contracts, profits and value. To the extent any of his testimony is considered to be expert testimony under Rule 702, he is also qualified to offer those opinions for the reasons listed above. Mr. Linhardt is also able to testify regarding the damages he suffered due to Spamhaus' defamation.

Linhardt can establish the Plaintiffs damages to a reasonable degree of certainty and should be permitted to testify at trial. Defendant's criticism of Plaintiffs damage calculations

goes to its weight rather than its admissibility. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Accordingly, Linhardt should be permitted to testify on the issue of Plaintiffs damages and Defendant's motion should be denied.

e360Insight, LLC and David Linhardt,
Plaintiffs.

By: /s/ Bartly J. Loethen
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing e360Insight, LLC and David Linhardt's Response in Opposition to Defendant's Motion In Limine to Exclude Damages Opinion Testimony of David Linhardt was served upon the attorneys listed below electronically through CM/ECF on January 7, 2009.

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EXHIBIT 1

FILED UNDER SEAL PURSUANT TO THE TERMS OF THE AGREED PROTECTIVE ORDER

EXHIBIT 2

FILED UNDER SEAL PURSUANT TO THE TERMS OF THE AGREED PROTECTIVE ORDER