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 REPLY IN SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE DAMAGES OPINION TESTIMONY OF DAVID LINHARDT

Introduction

In our opening brief, we demonstrated that Plaintiff David Linhardt's proffered damages testimony is inadmissible because he admitted he is not an expert in the areas of his testimony, and he admitted that the only damages calculation that has not been stricken for discovery violations is not "accurate" and is based on financial data that is inseparable from the data of non-parties. Plaintiffs' response does nothing to rehabilitate Linhardt's proffered testimony. Each of Plaintiffs' three principal arguments in response is unpersuasive.

First, Plaintiffs' contention in their Response in Opposition to Spamhaus' Motion in Limine (Doc. 190 ("Resp.") at 3-5) that Linhardt's testimony can be admitted as lay opinion under Rule 701 misapprehends the scope of the rule and the nature of Linhardt's testimony. A party cannot evade "the reliability requirements set forth in Rule 702 . . . through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 cmt. 2000

Amendments. And Linhardt's testimony is plainly beyond the ambit of lay opinion testimony, as courts have routinely rejected lost profits testimony from business owners where the testimony was complex like the testimony Linhardt proffers here. (Part I below.)

Second, Plaintiffs attempt to avoid Linhardt's admissions that he did not know how he prepared his initial damages estimate, and had no papers reflecting how he did so, by submitting a new declaration that squarely contradicts his deposition testimony. (Resp. at 6-7; January 7, 2009 Affidavit of Linhardt, Ex. 1 to Resp.)[1] The Court should refuse to consider this declaration, not only because it is untimely given the Court's prior orders and Plaintiffs' discovery defaults, but also because the declaration contravenes the long-standing Seventh Circuit principle that a party cannot avoid a dispositive motion by submitting a declaration that contradicts prior sworn deposition testimony. Moreover, even if the declaration is considered on the merits, it fails to offer the indicia of reliability that Plaintiffs bear the burden of supplying. (Part II below.)

Third, Plaintiffs' contention (Resp. at 7-9) that the Court should consider the methodology behind Linhardt's later, $136 million damages estimate ignores the purpose of the order striking that estimate and fails to answer the specific gaps in reliability we pointed out in our opening brief. (Part III below.)

ARGUMENT

I. Linhardt Is Not Qualified To Offer The Damages Testimony He Proffers.

In our opening brief (Doc. 186 ("Op. Br.") at 11-12), we demonstrated that Linhardt cannot offer testimony that e360 suffered damages because he admitted – in so many words – that he is not an expert in the areas of his testimony: damages, lost potential future revenues, and

[1] This January 7, 2009 Affidavit of Linhardt (and an exhibit it included) was filed under seal with the Court pursuant to the Agreed Protective Order in this case, and is cited by reference here. The January 7, 2009 Affidavit and its exhibit was also attached as Exhibit 2 to Plaintiffs' Response to Spamhaus' Rule 56.1 Statement of Facts (Doc. 194).

company valuations based on those revenues. In response, Plaintiffs claim that Linhardt should be able to offer his testimony as "lay opinion" under Rule 701, or, alternatively, that he has sufficient general qualifications to testify under Rule 702. Neither claim has merit.

A. Rule 701's "Lay Opinion" Provisions Do Not Assist Plaintiffs.

Plaintiffs' theory (Resp. at 3-5) that Linhardt's damages opinion testimony is admissible as lay opinion under Federal Rule of Evidence 701, without regard to Linhardt's qualifications, is unsupported by the law. A party cannot evade "the reliability requirements set forth in Rule 702 . . . through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 cmt. 2000 Amendments. The commentary to Rule 701 on which Plaintiffs rely applies to basic facts and mathematical calculations supporting a lost profits claim, not to the complex calculations, with attendant complicated assumptions, Linhardt proffers. This principle is demonstrated clearly in the two cases Plaintiffs cite, *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175-77 (3d Cir. 1993) and *Nichols v. Johnson*, No. 00-C-7785, 2002 WL 826482, *6 (N.D. Ill. May 1, 2002).

For example, in *Lightening Lube*, a quick-lube franchisor was permitted to offer testimony about lost profits allegedly sustained due to a motor oil supplier's fraud, tortious interference with contract, and RICO violations. To reach his $74 million compensatory damages calculation in *Lightning Lube*, the franchisor used simple addition, division and multiplication – his testimony did not involve any complex statistical sampling or modeling, and was completely based on actual financial data within his control from franchises that had opened despite the motor oil supplier's wrongdoing.[2] Similarly, in *Nichols v. Johnson*, No. 00-C-7785,

[2] Specifically, the Court in *Lighting Lube* said:

> Venuto calculated future profits in two ways. First, he calculated the profits he would have earned on the 117 franchise contracts

2002 WL 826482, *6 (N.D. Ill. May 1, 2002), owners of a hay business were able to use simple addition, multiplication and division of past company financial data to calculate lost profits for their business due to plaintiff's injury in an automobile accident.

By contrast, courts have repeatedly rejected attempts to admit through a lay owner damages testimony that, as here, relied on specialized knowledge or expertise. As Rule 701's commentary to the 2000 Amendments explains, opinion testimony based on statistical forecasts, sampling, estimates, and comparisons/multipliers based on financial data of other companies, if admissible, "must be scrutinized under the rules regulating expert opinion . . . [because it is ostensibly] testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702." This compelled the Tenth Circuit to reject the admission of a business owner's testimony regarding lost profits as lay opinion under Rule 701 when the owner's calculation "model concerned moving averages, compounded growth rates, and S-curves," stating that the owner "could not testify about these technical, specialized subjects under Rule 701." *Lifewise Master Funding v. Telebank*, 374 F. 3d 917, 929 (10th Cir. 2004). The Tenth Circuit noted that the line of cases in which owners could offer lay testimony under Rule 701

> that he actually sold. Venuto predicted that after four years in business each center would have been generating $28,000 in royalty fees. Given this calculation, plus the money the franchisees would have earned in the first four years, Venuto predicted that he would have earned $27,729,000 in future profits from the 117 existing contracts through 1996. Next, Venuto calculated the lost profits on the franchises he expected to have sold. Based on projections he developed with an accounting firm when he was planning to take the company public, Venuto predicted that he would have sold 370 more franchises over the ten-year period, that all of them would have opened (37 a year), and that he would have earned $48,821,000 from these franchises using the formula discussed above.

4 F.3d at 1174-75.

regarding lost profits was limited to instances where "the owners had sufficient personal knowledge of their respective business *and* of the factors on which they relied to estimate lost profits" or where "owners offered valuations based on straightforward, common sense calculations." *Id.* at 929-30.

The Seventh Circuit also addressed the precise difference between admissible Rule 701 lay opinion testimony regarding lost profits and damages testimony that must be admitted (if at all) as expert testimony under Rule 702 in a case we cited in our opening brief, *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F. 3d 416 (7th Cir. 2005). In *Zenith*, the Court barred the owners of WH-TV from admitting as Rule 701 lay opinion testimony internal projections regarding per-subscriber valuations of the business because these projections involved making complex statistical determinations and was thus properly assessed under the admissibility requirements for expert testimony in Rule 702. *Id.* at 420. As the Court noted, "Rule 701 . . . does not assist WH-TV, because its claimed losses depend on the inferences to be drawn from the raw data, rather than these data (or their internal appreciation) themselves. Reliable inferences depend on more than say-so . . . [a]nd per-subscriber valuations prepared in connection with potential sales of the business don't provide a reliable estimate of the number of subscribers that WH-TV could have secured with better set-top boxes." *Id.* (internal citations omitted).

Plaintiffs therefore cannot avail themselves of Rule 701 here. On its face, Linhardt's revised $136 million damages estimate contains 10 pages of explanation, including statistical sampling, forecasting, and assumptions regarding factors outside of his knowledge. A lay witness cannot offer those opinions. Linhardt reached his $136 million damages opinion by repeatedly substituting assumptions, speculation, and statistical models for personal knowledge:

regarding whether a message was being blocked by Spamhaus, the number of messages blocked by Spamhaus, the average revenue that would have been generated in an unblocked campaign, the similarity of response rates between blocked and unblocked emails, and e360's comparative similarity to other, much larger email marketing companies. (Linhardt Dep. at 112-14, 118, 130-31, 135-38, 141-62, 164.)[3]

B. Linhardt Is Not Qualified As An Expert To Give His Proffered Testimony Under Rule 702.

Plaintiffs' alternative contention (Resp. at 5-6) that Linhardt is qualified as an expert under Rule 702 likewise cannot advance their cause. Plaintiffs do not – because they cannot – dispute, or even address, the fact that Linhardt admitted, in so many words, that he is ***not*** an expert in damages, profit projections, or corporate valuations. (Linhardt Dep. at 68-69, 85, 305-08.) That is fatal to their contention.

But even if it were not, Linhardt's admissions are plainly correct. Plaintiffs point out (Resp. at 5) that Rule 702 and *Daubert* do not necessarily require an expert to possess any particular credential. While that is true, Plaintiffs fail to address the plain requirement in the Seventh Circuit that, whatever the credentials are, they have a "close fit" to the testimony being offered. (*See* Op. Br. at 11-12 (citing *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 813 (N.D. Ill. 2005); *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002); *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990)).) Plaintiffs likewise make no attempt to demonstrate how the qualifications they cite – an undergraduate degree in chemical engineering, an MBA, and experience in e-mail marketing

[3] Citations to "Linhardt Dep." refer to the transcript of Linhardt's November 10-11, 2008 Deposition in this case, previously provided to the Court as Ex. 1 to Spamhaus' Memorandum of Law in Support of its Motion in Limine (Op. Br.).

companies (Resp. at 6) – would qualify Linhardt to offer the lost profits and lost business value damages testimony he proffers. They plainly do not.

II. 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.

In our opening brief (Op. Br. at 12-14), we demonstrated that Linhardt's initial $11.7 million damages estimate cannot be admitted because Linhardt conceded that it is inaccurate and because, in fact, it fails to satisfy Rule 702's reliability requirement. In response, Plaintiffs assert (Resp. at 6-8) that we have mischaracterized Linhardt's concession at his deposition, and that – based on a new affidavit from Linhardt that directly contradicts his deposition testimony – his proffered testimony meets Rule 702's requirements. Plaintiffs also claim that Linhardt has not commingled the financial information of the only corporate plaintiff, e360, with other parties, namely, Maverick and Bargain Depot. None of these assertions helps Plaintiffs' admit Linhardt's damages testimony.

First, Plaintiffs' claim (Resp. at 7) that we "mischaracterize[]" Linhardt's testimony is easily judged by Your Honor. The Court will recall the context: Linhardt initially estimated damages at $11.7 million; then Linhardt prepared an estimate, using a totally different methodology, that reached a result more than ten times that, of $136 million; then the Court struck the later estimate, leaving Plaintiffs with their original damages amount. It was in that context that the following question and answer occurred at Linhardt's deposition (Linhardt Dep. at 258-59):

> Q: . . . As of today, as you sit here today, and looking at the numbers in paragraph 34 of [your affidavit, the initial estimate], 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.

Respectfully, it is a tautological truth that an $11.7 million estimate, and an estimate of more than ten times that amount, cannot at the same time both be "accurate." Apparently unaware during his deposition that the initial $11.7 million estimate was the only one still in play, Linhardt testified that the later, larger estimate was "more accurate," and that he did not think the earlier estimate "is accurate today." There is no mischaracterization. By itself, this concession precludes admission of the earlier opinion, as the Court cannot under Rule 702 admit an analysis that even the proponent admits is second best.

Second, Plaintiffs' defense (Resp. at 6-7) of Linhardt's methodology for the initial $11.7 million estimate, based on a new affidavit that contradicts his deposition testimony, is both outrageous and ineffective. It is outrageous because the Court will recall the long history of discovery defaults by Plaintiffs that resulted in the Court's striking Plaintiffs' $136 million revised estimate on the ground that the methodology was not timely disclosed. (*See* Doc. 157 at 1-4.) The principal driver of our motion, and we respectfully submit, the Court's ruling, was Plaintiffs' refusal to disclose the nature and basis for their damages claim. (Doc. 157 at 5-7; Doc. 173.) Because we needed that information to effectively depose Linhardt, it was only after that was resolved that we took his deposition. And at that deposition, Linhardt repeatedly testified not only that he had no recollection as to the methodology specifics, or assumptions, behind the $11.7 million estimate, but that he had ***no papers*** reflecting that methodology, which might be used to refresh his recollection. (*See* Op. Br. at 6-8, 14; Linhardt Dep. at 270, 272, 275-77, 279-81, 286-89.) In their response, Plaintiffs do not acknowledge – must less address – this testimony.

Instead, without any explanation or acknowledgement, Plaintiffs submit a new, ***and totally contradictory***, declaration from Linhardt. In it, Linhardt claims (January 7, 2009 Affidavit of Linhardt, Ex. 1 to Resp.):

> 7. At the deposition I did not have my financial records from the individual clients and thus could not specifically recall how the damages were computed.
>
> 8. Upon review of financial records I was able to recall how such damages were computed.

Linhardt goes on to give, client by client, a conclusion about his assumption for the monthly revenue of each client he claims Plaintiffs lost, the expected tenure of that client, and the calculation of the expected revenue times the tenure. (January 7, 2009 Affidavit of Linhardt, Ex. 1 to Resp. at ¶¶ 9-16, 19.) Linhardt attaches to his declaration a chart, which was never before produced to us, which purports to "document[]" his "calculations." (Ex. A to January 7, 2009 Affidavit of Linhardt, Ex. 1 to Resp..) However, Linhardt's second declaration provides no more ***basis*** for any of his assumptions or calculations than his first declaration or his deposition testimony.

Particularly in light of their history of discovery violations on this precise topic, Plaintiffs' conduct is outrageous. Not only have they submitted contradictory testimony and materials after numerous ordered deadlines, and too late for us to ask any questions about them, but they have not bothered to advise the Court in their brief as to what they were doing. We are contemporaneously moving to strike the late-submitted affidavit and chart. But whether or not the Court formally strikes those materials for discovery violations, the Court should not credit Linhardt's declaration when it is given in response to a dispositive motion and contradicts his deposition testimony. *See, e.g.*, *Bank of Illinois v. Allied Signal Safety Restraint Sys.,* 75 F.3d 1162, 1168 (7th Cir. 1996) ("parties cannot thwart the purposes of Rule 56 by creating 'sham' issues of fact with affidavits that contradict their prior depositions"); *Ineichen v. Ameritech,* 410

F.3d 956, 963 (7th Cir. 2005) (disregarding plaintiffs' later filed affidavit where she claimed that her coworkers made disapproving comments about her interracial relationship in contradiction to her earlier deposition where she stated that her coworkers never mentioned the interracial nature of her relationship); *Lorillard Tobacco Co., Inc. v. A & E Oil, Inc.*, 503 F.3d 588, 592 (7th Cir. 2007) (holding that Defendant's later filed affidavit contradicting his earlier deposition testimony that he always checked for counterfeit markings was an attempt to create a sham issue which "negate[d] his feigned ignorance").

In addition to being improper, Plaintiffs' conduct is ineffective. Even in his new declaration, Linhardt fails to provide any basis for the assumptions he made and conclusions he reached. Each assertion concerning a client follows this general format:

> NetBlue was a potential client of e360Insight that was lost due [sic] the actions of Spamhaus. It was expected that e360Insight would earn revenues of [amount redacted] from Net Blue for a period of at least forty-eight months.

(January 7, 2009 Affidavit of Linhardt, Ex. 1 to Resp. at ¶ 15.) Linhardt does not explain where the monthly revenue or the time period came from, in his affidavit or anywhere else; he could not do so at his deposition, either. (Linhardt Dep. at 270, 272, 275-77, 279-81, 286-89.) Consequently, even if the Court considers this tardy declaration on the merits, it does not establish that Linhardt's testimony is reliable and admissible under Rule 702.

Third, Plaintiffs' claim (Resp. at 9-10) that the "filing of a consolidated tax return has no effect on the value" of contracts underlying their damages claims, or their damages claims themselves, mixes the apple of a consolidated tax return with the oranges of commingled books. We agree that the mere filing of a consolidated tax return does not, by itself, mean that Plaintiffs were unable to separate financial data of the party e360 from the non-parties Maverick and Bargain Depot. Certainly, separate books and accounting records can be kept, which would allow each entity to prove its own damages, while consolidated returns are prepared for tax

purposes. But that is not what Linhardt testified to at his deposition. What he conceded, and is admitted by Plaintiffs in their Local Rule 56.1 statement, is:

- 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" (Doc. 194 at 2; Linhardt Dep. at 97-99); and

- There is "no way of separating out results and data for e360 from, for example, Bargain Depot." (Doc. 194 at 2; Linhardt Dep. at 99-100.)

Plaintiffs have no separate data for e360 which would allow them to offer testimony relevant to e360's damages whatsoever.

Nor can Plaintiffs rely on their current claim that only e360 generated revenue. Linhardt testified at his deposition that he included Bargain Depot's numbers in his damages calculations for e360. In explaining the discrepancy between an older and more recent version of his quantitative analysis, Linhardt said, "Well, one thing I forgot to include was cost of goods sold for any e-commerce revenue. So, you know, the variable cost of the business of getting one e-mail delivered where it would have otherwise been blocked, there's a data royalty cost that's included here, but I forgot to include e-commerce cost of goods sold. So if Bargain Depot sells a pair of sunglasses, there's a product cost associated with that item that was not reflected, so I made an adjustment to account for that." (Linhardt Dep. at 87-88.) Linhardt said that he included e-commerce revenue and cost of goods sold in his damages calculations, yet he later agreed that e360 did not sell any goods; Q: "I understood from your testimony this morning that e360 did not itself sell any physical goods or services other than e-mail marketing, correct?" A: "Correct." (Linhardt Dep. at 97.) Linhardt further testified, "when a product is sold, the revenue goes to the Maverick-reported number, which is essentially -- and the costs go there as well. There's only one set of consolidated books." (Linhardt Dep. at 100.) Linhardt also responded to the following question: "Q: Is it your testimony that all revenue, regardless of the entity that

generated it, including Bargain Depot, flowed into e360's account?" A: "Yes." (Linhardt Dep. at 103.)

Thus, while Plaintiffs now argue that "no other entities generated any revenue," including, presumably, Bargain Depot, Linhardt's own testimony undermines this statement. Furthermore, this position is in direct conflict with statements made by Plaintiffs (or, at least by Linhardt as indirect owner of Bargain Depot) in past litigation. In *Maui Jim Inc. v. Bargain Depot Enterprises, LLC*, No. 06-cv-01169 (C.D. Ill.) (Mihm, J.), Bargain Depot stated that it was "undisputed" that Bargain Depot "offered for sale sunglasses." (Bargain Depot's Response to Maui Jim's Motion for Summary Judgment at 3, filed April 20, 2007, attached as Ex. 1.) If Bargain Depot were not generating revenue, it is unlikely that Bargain Depot would have even participated in a lawsuit regarding patent infringement (since Bargain Depot presumably could not infringe a sunglasses patent without producing or selling sunglasses), much less admit that it "offered for sale sunglasses."

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

In our opening brief (Op. Br. at 14-15), we showed that Linhardt's later, $136 million damages estimate cannot be admitted because the Court struck it and, even if it had not been stricken, it does not meet the requirements of Rule 702. In response, Plaintiffs argue (Resp. at 7-9) that only the amount, not the methodology, was stricken, and that "the methodology and underlying data provide a reliable basis for the calculation of Plaintiffs' damages." Plaintiffs' arguments are incorrect.

First, Plaintiffs' claim that they are "barred from presenting damages in excess of $11.7 million [but] the Court did not strike the methodology" for the $136 million estimate appears, to us, to be inconsistent with the Court's intent. The Court's October 15, 2008 Order does not

expressly say, one way or the other, whether Plaintiffs can proceed with the methodology underlying the $136 million estimate – it merely strikes the $136 million damages demand as well as Plaintiffs' attempt to untimely identify 16 undisclosed witnesses. However, the interpretation Plaintiffs urge (1) is illogical because it implies that Plaintiffs can present a methodology that arrives at a $136 million number, but then be limited to $11.7 million, (2) ignores that the reason for the order in the first place was to sanction Plaintiffs for failing to disclose the methodology earlier, (3) would not address the prejudice to Spamhaus from Plaintiffs' failure to timely disclose this methodology, and (4) would be inconsistent with the Court's logic in striking the 16 untimely-disclosed witnesses. We respectfully urge the Court to affirm that the Court's order precludes any recovery based on the untimely-disclosed methodology used to arrive at the $136 million estimate.

Second, even if the methodology had not been stricken, Plaintiffs have not addressed the specific methodological flaws that render it unreliable. In our opening brief (Op. Br. at 8-10, 15), we pointed out very specific assumptions or steps that rendered the methodology unreliable: unjustified assumptions regarding the cause of blocks, the use of the non-random samples which Linhardt further manipulated, and the admission that Linhardt could not find a good comparable company. In their discussion of this methodology in their response (Resp. at 8-9), Plaintiffs simply regurgitate a description of the steps. They make no attempt to explain why the assumption regarding the cause of blocks was reasonable or reliable, or why the use of non-random samples was reliable, or why the inability to find a good comparable company is not fatal. And, of course, the commingling of the financial data independently infects all of Linhardt's estimates, including the later, stricken $136 million estimate.

The Court cannot accept Plaintiffs' slanted characterization of Linhardt's methodology and qualifications – it must conduct a careful inquiry and act as a gate-keeper, barring the testimony if the requirements of Rule 702 are not met. Courts are required to determine "whether [expert] testimony has been subjected to the scientific method," and to bar expert opinions that are based on "subjective belief or unsupported speculation." *Wintz v. Northrop Corp.*, 110 F.3d 508, 512 (7th Cir. 1997) (internal citations omitted). Thus, courts are required to "determine whether the testimony is reliable . . . by examining the expert's methodology." *Evoy v. CRST Van Expedited, Inc.*, 430 F. Supp. 2d 775, 781 (N.D. Ill. 2006) (*citing Smith v. Ford Motor Co.*, 215 F.3d 713, 718, 721 (7th Cir. 2000)) (internal citations omitted); *accord Autotech Tech. Ltd. P'ship v. Automationdirect.com*, 471 F.3d 745, 749 (7th Cir. 2006) (holding that the court is a "gate-keeper" who must assess the reliability of an expert's methodology before admitting expert testimony). An expert must "substantiate his opinion; providing only an ultimate conclusion with no analysis is meaningless." *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1087 (7th Cir. 1999) (internal citations omitted). Plaintiffs' response offers nothing but conclusions and therefore Linhardt's testimony is inadmissible under Rule 702.

CONCLUSION

For all the foregoing reasons as well as those set forth in Spamhaus' Motion in Limine, Linhardt's damages opinion testimony should be barred as inadmissible under Rule 702.

Respectfully submitted,

THE SPAMHAUS PROJECT

Dated: January 28, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January 2009, a copy of the foregoing The Spamhaus Project's Reply in Support of Its 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