

Nos. 06-3779 and 06-4169

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

e360INSIGHT, LLC, an Illinois
Limited Liability Company, and
DAVID LINHARDT, an individual,

Plaintiffs – Appellees.

vs.

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

Defendant – Appellant,

Appeal from the United States District Court
For the Northern District of Illinois
District Court No. 06 C 3958
The Honorable Judge Charles P. Kocoras, District Judge

**RESPONSE TO BRIEF OF DEFENDANT - APPELLANT,
e360INSIGHT, LLC AND DAVID LINHARDT**

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ORAL ARGUMENT REQUESTED

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: _____ Date: _____

Attorney's Printed Name: _____

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No _____

Address: _____

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Attorney's Signature: _____ Date: _____

Attorney's Printed Name: _____

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** _____

Address: _____

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JURISDICTIONAL STATEMENT

Appellant's jurisdictional statement is incorrect and should be stated to read as follows. Plaintiffs-Appellees e360Insight, LLC ("e360") and David Linhardt ("Mr. Linhardt") filed their lawsuit against Defendant-Appellant The Spamhaus Project, Ltd. ("Spamhaus") on June 21, 2006 in the Circuit Court of Cook County, Illinois County Department, Chancery Division (A. 5-20.) e360 and Mr. Linhardt learned of additional facts supporting their claims against Spamhaus and filed an Amended Complaint on June 23, 2006. (Supplemental Appendix ("SA.") 001-019.) It is from this Amended Complaint that this appeal is properly taken although for purposes of this appeal, the documents are the same.

Spamhaus removed this case to the United States District Court for the Northern District of Illinois, Eastern Division, on July 21, 2006. (A. 1-4.) Spamhaus' removal occurred after the Circuit Court entered a temporary restraining order against Spamhaus, which proceeding was properly noticed but in which Spamhaus failed to participate.

Spamhaus' removal is based on diversity of citizenship. Mr. Linhardt is a citizen of the State of Illinois. (A. 2.) e360 is Illinois limited liability company located in Wheeling, Illinois. (A. 6.) e360's sole member is Maverick Direct Marketing Solutions, Inc., an Illinois corporation with its principal place of business in Wheeling, Illinois.

On September 13, 2006 the District Court entered an order for default judgment against Spamhaus. (A. 140-143.) On October 13, 2006 Spamhaus filed a notice of appeal for the entry of default judgment. (A. 144.) On October 31, 2006

the District Court denied Spamhaus' Motion to Vacate the Default Judgment and for Leave to File a Memorandum in Support. (A. 158.) On November 28, 2006 Spamhaus filed a notice of appeal from the denial of its Motion to Vacate. (A. 194.)

This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES

e360 and Mr. Linhardt respectfully submit that the issues as presented by Spamhaus are unduly argumentative and in certain respects without record support. e360 and Mr. Linhardt have attempted to recast the issues presented by Spamhaus in this appeal in a neutral yet informative manner, which is concise without being vague or too general.

1. Did the District Court erred by entering a default judgment against Spamhaus based on the information provided to the District Court by the parties to this appeal either because of improper service of process on Spamhaus or because the District Court lacked personal jurisdiction over Spamhaus?

2. Is the permanent injunction entered by the District Court constituted an impermissible prior restraint?

3. Did the District Court erred by denying Spamhaus' Motion to Vacate the Default Judgment given the circumstances leading up to and the reasons stated at the time of the Motion's presentment to the District Court?

STATEMENT OF CASE

e360 filed suit against Spamhaus on June 21, 2006 in the Circuit Court of Cook County, alleging state law claims for tortious interference with contract, tortious

interference with prospective economic advantage, defamation *per se*, and defamation per quod. (A. 12-20.) The Complaint was amended two days later to include newly discovered acts being perpetrated by Spamhaus. (SA. 001-019.) The Amended Complaint was served by special process server, which complied with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.

On June 20, 2006 the Circuit Court, by the Honorable Phillip Bronstein, entered a temporary restraining order and ordered expedited discovery against Spamhaus after conducting a properly noticed hearing at which Spamhaus failed to appear. (SA. 408-411.) Spamhaus complied with the terms of the TRO requiring that references to e360 and Mr. Linhardt be removed from the ROKSO list. On July 21, 2006 Spamhaus complied with the language of the temporary restraining order; removed the case to the United States District Court for the Northern District of Illinois, Eastern Division (A. 1-4) and filed an Answer to the Complaint. (A. 24-33.) The Hinshaw Culbertson law firm filed appearances for two of their attorneys to represent Spamhaus.

Spamhaus failed to respond to the expedited discovery propounded by e360 and Mr. Linhardt when such discovery was due on August 20, 2006. In addition to failing to comply with the Circuit court's discovery order, Spamhaus also posted new references to e360 and Mr. Linhardt in violation of the temporary restraining order. e360 and Mr. Linhardt filed Motions for Rules to Show Cause why Spamhaus should not be sanctioned or held in contempt for its failure to abide by the Circuit Court's prior orders. (ECF Docket Entry ## 11 and 12) At the August

23, 2006 hearing on these motions, Spamhaus' counsel announced that he was authorized by Spamhaus to do two things only that day: Withdraw Spamhaus' Answer and then withdraw his appearance. (A. 159-166.) e360 and Mr. Linhardt's motions for rules to show cause were not heard. Instead, the District Court granted Spamhaus' Motion to Withdraw the Appearances of Counsel (A. 117) and Motion for Leave to Withdraw its Answer to the Complaint. (*Id.*) The District Court also granted e360's Motion for Entry of Default (*Id.*) and converted the Circuit Court's temporary restraining order into a preliminary injunction. (*Id.*)

On September 13, 2006 on motion from e360 and Mr. Linhardt, the District Court entered an order for default judgment against Spamhaus, which did not appear despite being properly notified of the proceedings. (SA. 413.) Spamhaus filed its Notice of Appeal on October 13, 2006, which was docketed by the United States Court of Appeals for the Seventh Circuit as Case No. 06-3779. (A. 144.) On October 17, 2006 this Court entered an initial briefing schedule for this appeal, which was revised on November 3, 2006 pursuant to Circuit Rule 33.

On October 26, 2006 Spamhaus filed a Motion to Vacate Default Judgment and For Leave to File a Memorandum in Support under Federal Rule of Civil Procedure 60(b). (A. 150-154.) The District Court denied the Motion to Vacate on October 31, 2006. (A. 158.) Spamhaus filed its second Notice of Appeal from the denial of the Motion to Vacate on November 28, 2006 (A. 194.) which was docketed by this Court as Case No. 06-4169. On December 5, 2006 this Court consolidated Case Nos. 06-3779 and 06-4 169.

STATEMENT OF FACTS

e360 and Mr. Linhardt are legitimate internet marketers who are and were, at all times relevant to this lawsuit, engaged in legitimate email marketing activity and were not engaged in any activity that could be deemed to be "spamming." (SA. 001-019.) In fact, e360 gains permission from the recipient of its email marketing messages before sending them. e360 has no interest in sending spam or messages to potential customers who do not wish to receive its messages. (SA. 003-004.) Moreover, they have complied at all times with all laws pertaining to the sending of e-mail and internet-based advertisement, including CAN-SPAM. (*Id.*) There is nothing in the record before this Court that suggests otherwise despite Spamhaus' assertions and inferences to the contrary.

Spamhaus holds itself out to be a United Kingdom non-profit limited liability company located in London, United Kingdom (A. 6.) Contrary to representations made on its website, Spamhaus, in fact, does not rely solely on donations to fund its operations, but charges for its services. (SA. 415-419.) Spamhaus is not a citizen of Illinois, but e360 and Mr. Linhardt alleged in their Complaint, and sought by way of the discovery to which Spamhaus never responded, information that would confirm that Spamhaus conducts business in Illinois by providing services to Internet Service Providers ("ISPs") in the State of Illinois, including United Online, Inc. (*see* www.untld.com) and others. (A. 006.) Despite the information contained in the Declaration of Steve Linford (A. 190-92.), the allegations contained in paragraph 4 of the Complaint are not refuted.

Spamhaus generates the Register of Known Spam Operations (“ROKSO”) list and the Spamhaus Block List (“SBL”), identifying individuals or entities that have been terminated from ISPs three or more times for engaging in spam offenses. (A.113-116.) At the time Spamhaus placed e360 and Mr. Linhardt on the ROSKO list, they were not terminated from any ISPs, let alone three of them. (A.170-178.) This fact was noted to Spamhaus, who refused to remove e360 or Mr. Linhardt from the ROKSO list. The SBL lists IP addresses that purportedly associate with known spammers.

e360 filed suit against Spamhaus on June 21, 2006 in the Circuit Court of Cook County, alleging state law claims for tortious interference with contract, tortious interference with prospective economic advantage, defamation *per se*, and defamation *per quod*. (A. 12-20.) The Complaint was amended two days later to include newly discovered acts being perpetrated by Spamhaus. (SA. 001-019.) The Amended Complaint was served by special process server employing procedures that complied with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.

Initially, e360 and Mr. Linhardt filed a motion for preliminary injunction. (SA. 022-076.) Due to the exigency of the circumstances facing e360 and Mr. Linhardt, they then filed a motion for temporary restraining order. (SA. 197-387.) The Circuit Court, by the Honorable Phillip Bronstein, entered a temporary restraining order and ordered expedited discovery against Spamhaus after conducting a properly noticed hearing at which Spamhaus failed to appear. (SA.

189.) Spamhaus was provided with a copy of the temporary restraining order through the special process server as well as by FedEx express mail delivery and e-mail. (SA. 412.) Spamhaus complied with the temporary restraining order prior to the July 24, 2006 before the deadline imposed by the Circuit Court.

On July 21, 2006, Spamhaus took the affirmative act of invoking the District Court's jurisdiction when it filed a Notice of Removal in the United States District Court for the Northern District of Illinois, asserting diversity of citizenship and damages in excess of \$10 million was being sought. (A. 1-2.) The petition for removal does not allege that personal jurisdiction is lacking over Spamhaus. Also on July 21, 2006 Spamhaus filed an Answer that purported to assert affirmative defenses for lack of personal jurisdiction and improper service of process. (A. 24-33.) Spamhaus never filed a Rule 12 motion to dismiss based on these affirmative defenses.

Spamhaus never responded to the expedited discovery propounded by e360 and Mr. Linhardt. When the due date for the expedited discovery came, Spamhaus failed to respond and also posted new references to e360 and Mr. Linhardt arguably in violation of the temporary restraining order. e360 and Mr. Linhardt were thus compelled to file motions with the District Court for Rules to Show Cause why Spamhaus should not be sanctioned or held in contempt for its failure to abide by the Circuit Court's prior orders. (ECF Docket Entry ## 11, 15, and 17.) At the August 23, 2006 hearing on these motions, e360 and Mr. Linhardt's Motions for Rules to Show Cause were not heard. The District Court's rulings on these motions

were preempted by what even Spamhaus' counsel viewed as an "unconventional maneuver." (A. 160.) Despite the fact that only one month prior, Spamhaus had invoked the jurisdiction of the District Court, at this hearing Spamhaus' counsel announced that Spamhaus "wants to participate in the defense no further", and that he was authorized by Spamhaus to do two things only that day: Withdraw Spamhaus' Answer and withdraw his appearance. (A. 161.) Counsel for e360 and Mr. Linhardt aptly noted it was Spamhaus that had removed the case to the District Court, all the while failing to comply with the Circuit Courts' orders. (*Id.*) Counsel for e360 and Mr. Linhardt explained the continuing harm that was occurring and further explained the scope of the Temporary Restraining Order that the Circuit Court had previously entered, including the fact that it remained in force at that time. (A. 162-163.)

Spamhaus' counsel reiterated that Spamhaus "wants to do absolutely nothing" and, in response to the District Court's inquiry "do they want to lose?" responded, in a most telling fashion: "They [Spamhaus] have been fully informed of the fact that the default judgment is a real possibility. And they are aware of that and are prepared to take that risk." (A. 163.)

The District Court allowed Spamhaus to withdraw its answer and further allowed counsel leave to withdraw. (A. 164.) The District Court informed Spamhaus' counsel that he was doing so on the assumption that counsel had informed Spamhaus it was a dead bang certainty that default is going to be entered without any resistance to the lawsuit. (*Id.*) The District Court also informed

Spamhaus' counsel that he was making his rulings on the condition that he was going to reinstate, as a preliminary injunctive relief matter, the language of the TRO that was entered in the Circuit Court. (*Id.*) The District Court made clear that it was finding Spamhaus in default on this date, but not entering any judgment against Spamhaus at that time. (A. 165.) Before relieving Spamhaus' counsel from any further legal obligation with respect to the case, the District Court required Spamhaus' counsel to inform Spamhaus what happened at the hearing, and that the first step has been taken toward an entry of a judgment against Spamhaus as a result of its default. (*Id.*)

As was contemplated during the August 23, 2006 hearing (A. 164-165.), e360 and Mr. Linhardt filed a motion for default judgment on August 30, 2006. (A. 118-138.) This motion was supported by affidavits from Mr. Linhardt and Bartly Loethen, one of e360 and Mr. Linhardt's attorneys. A hearing was held on September 12, 2006 and the matter taken under advisement. (A. 139.) On September 13, 2006 the District Court entered an order for default judgment against Spamhaus. (A. 140-143.) Spamhaus failed to appear despite being properly notified of the proceedings. (A. 413.) On October 13, 2006 Spamhaus filed its Notice of Appeal from the default judgment (which was then docketed by the United States Court of Appeals for the Seventh Circuit as Case No. 06-3779.) (A. 144.)

On October 26, 2006, Spamhaus filed a Motion to Vacate Default Judgment and For Leave to File a Memorandum in Support under Federal Rule of Civil

Procedure 60(b). Spamhaus' counsel argued without success that Spamhaus was receiving conflicting information regarding its response to the Complaint. (A. 177-178). The District Court noted that Spamhaus' actions regarding its withdraw of counsel were intentional and consciously made, precluding any reliance on Federal Rule of Civil Procedure 60(b)(1). (A. 174-184.) The District Court also was not persuaded by the non-specific arguments that, despite Spamhaus' overt act of removing the case to District Court it lacked jurisdiction over Spamhaus or that service of process was improper. (*Id.*) The District Court found that Spamhaus' failure to participate in litigation and present its jurisdictional arguments prevented those issues from being "crystallized by way of counter-affidavits or some other such thing," and thus "[t]here was not anything about this case that at least suggested itself to me that I lacked personal jurisdiction, either over the person of the defendant or the subject matter of the case." (*Id.*) The District Court denied this Motion to Vacate on October 31, 2006. (A. 158.)¹ Spamhaus filed its second Notice of Appeal from the denial of the Motion to Vacate (but not the motion for a stay of enforcement of judgment or motion to quash the citation to discover assets) on November 28, 2006 (which was docketed by this Court as Case No. 06-4169.) (A. 194) On December 5, 2006, this Court consolidated Case Nos. 06-3779 and 06-4 169.

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion by entering the default judgment against Spamhaus for any of the reasons asserted in this appeal. Service

¹ The district court also denied Spamhaus' motion for a stay of enforcement of judgment pending appeal and motion to quash e360 and Mr. Linhardt citation to discover Spamhaus' assets, neither of which are subject of Spamhaus' appeal.

of process of the amended Complaint was effective on Spamhaus on July 4, 2006 according to the requirements set out in the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. *White v. Ratcliffe*, 285 Ill.App.3d 758, 765 (2d Dist. 1996).

The District Court also had personal jurisdiction over Spamhaus at the time it entered the default judgment against it. Spamhaus voluntarily appeared and filed an Answer in the District Court case after removing this case from the Circuit Court of Cook County. Spamhaus then withdrew its Answer and took no further action in this case, even though it was informed of all of the proceedings against it, including the motion for the entry of the default judgment, which included a proposed judgment, and the entry of the judgment itself. Spamhaus never challenged personal jurisdiction through a motion to dismiss nor did it raise this defense at the time it withdrew its Answer, even though the district court warned Spamhaus' counsel that a default would ensue given Spamhaus' withdrawal.

Sufficiency of process and lack of personal jurisdiction were not raised by Spamhaus until several months later when it filed a motion to vacate the default judgment pursuant to Fed. R. Civ. P. 60(b). The District Court did not abuse its discretion in denying this motion, which was based on sub-sections 1, 4 and 6 for relief. The District Court appropriately rejected the argument made by Spamhaus under subsection 1 that excusable neglect or mistake occurred when in fact Spamhaus' intentional withdrawal of its answer was the reason for the default judgment. The District Court was also well within its discretion when it determined

that the judgment was not void pursuant to subsection 4 for any of the reasons asserted by Spamhaus. The District Court was similarly within its discretion when it rejected Spamhaus arguments under subsection 6 because the Amended Complaint stated viable claims against Spamhaus and e360 and Mr. Linhardt sufficiently established damages.

The District Court also did not abuse its discretion when it entered a permanent injunction against Spamhaus. The injunction violates no first amendment or other constitutional principals because it does not prohibit protected speech, is not a prior restraint overbroad.

STANDARD OF REVIEW

An appellate court reviews a District Court's entry of a default judgment and a District Court 's decision on a Rule 60(b) motion to vacate a default judgment for an abuse of discretion. *Homer v. Jones-Bey*, 415 F.3d 748, 753 (7th Cir. 2005); *Robinson Eng'g Co. Pension Plan & Trust v. George*, 223 F.3d 445, 448 (7th Cir. 2000). Constitutional issues are reviewed *de novo*. *United States v. Wilson*, 154 F.3d 658, 662 (7th Cir. 1998); *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 633 (7th Cir. 1990).

ARGUMENT

Despite the Quixotic notions on which Spamhaus believes this appeal is warranted, this case involves nothing more then Spamhaus' interference with e360's legitimate business operations and Spamhaus' disdain for the United States courts that required Spamhaus to do more than ignore this case. Spamhaus now,

ironically, criticizes the District Court for its actions in response to Spamhaus machinations designed to avoid its prosecution, by asking this Court to remand the case for additional proceedings - - proceedings to which Spamhaus refused to avail itself originally and which will ultimately result in the same outcome for Spamhaus, a default judgment and permanent injunction. This appeal, and the relief it seeks, are merely the latest in a series of steps Spamhaus is taking to avoid having to compensate e360 and Mr. Linhardt for the devastating wrongs Spamhaus has perpetrated on them.

I. SPAMHAUS FORFEITED THROUGH CONDUCT ITS DEFENSES OF INSUFFICIENCY OF PROCESS AND LACK OF PERSONAL JURISDICTION

Objections to personal jurisdiction or to service of process must be raised in a timely fashion, i.e., as a party's first pleading in the case, or they are waived.

Broadcast Music, Inc. v. M.T.S. Enterprises, Inc., 811 F.2d 278, 281 (5th Cir. 1987); Fed. R. Civ. P. 12(h)(1); *Giannakos v. MV BRAVO TRADER*, 762 F.2d 1295, 1298 (5th Cir. 1985). “That defense, like the other privileged defenses referred to in Rule 12(h)(1), may be waived by ‘formal submission in a cause, or by submission through conduct.’” *Id.* “A party need not actually file an answer or motion before waiver is found.” *Id.*; *Marcial Ucin, S.A. v SS Galicia*, 723 F.2d 994, 996-97 (1st Cir. 1983); *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987) (conduct of counsel may rise to level of voluntary appearance resulting in waiver of defense of insufficiency of service). Spamhaus’ assertion that it was reserving its jurisdiction defenses is not a complete shield from liability. *Continental Bank v.*

Meyer, 10 F.3d 1293 (7th Cir. 1992) (citing *Burton v. Northern Dutchess Hosp.*, 106 F.R.D. 477, 481 (S.D.N.Y. 1985) for the proposition that “asserting jurisdictional defect in answer does ‘not preserve the defense in perpetuity’”). In the instant case it was Spamhaus who invoked the jurisdiction of the District Court in this matter, appearing through counsel and initially filing and later withdrawing its Answer to the Complaint, thus subjecting itself voluntarily to the jurisdiction of the District Court.

Spamhaus never filed a motion to dismiss for either insufficiency of process or lack of personal jurisdiction in the Circuit Court. Although receiving service of process of the Amended Complaint, receiving notice of the Motion for the temporary restraining order and receiving the order for the temporary restraining order (S.A. 412.), all through proper service of process (SA.021.), Spamhaus stood idly by, never once raising either lack of service of process or personal jurisdiction as defenses throughout the Circuit Court proceedings. Instead, Spamhaus momentarily complied with the TRO but refused to respond to discovery, removed the case to the District Court and answered, but did not move to dismiss, the complaint. Spamhaus then voluntarily, and knowingly, withdrew its Answer, which it knew was the only Spamhaus pleading even addressing these defenses through a “reservation” of objections to personal jurisdiction and to service of process styled as affirmative defenses. By doing so, Spamhaus effectively - - and knowingly - - forfeited these defenses. Spamhaus thus submitted itself to the District Court’s jurisdiction.

II. SERVICE OF PROCESS ON SPAMHAUS WAS PROPER

A. The Amended Complaint Was Served In Accordance with the Illinois Code of Civil Procedure and the Hague Convention

Spamhaus concludes, without providing any analysis why, service of process of the Amended Complaint was ineffective. In fact, e360 and Mr. Linhardt's service of process was in compliance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents as well as the Illinois Code of Civil Procedure.

The original Complaint was never served because at about the time it was filed, e360 and Mr. Linhardt learned of new wrongs being perpetrated by Spamhaus. Thus, on June 23, 2006 an Amended Complaint was filed with the Circuit Court of Cook County. (SA. 001-019.)

The Amended Complaint was served personally on Spamhaus through a process server, Mr. David Llewelyn Morgan. Mr. Morgan was appointed as a special process server by the Circuit Court on July 5, 2006. (SA. 020.) As confirmed by Mr. Morgan's affidavit (SA. 021.), Spamhaus was served on July 4, 2006 by Mr. Morgan personally handing to and leaving with Tony Overington a true copy of the Summons and First Amended Complaint of W 1 Office. (*Id.*) Tony Overington represented himself to Mr. Morgan to be authorized to accept service of documents on behalf of The Spamhaus Project. (*Id.*) Tony Overington was served at Communications House, 26 York Street, London, W1U 6PZ, England, the Registered Office of The Spamhaus Project. (*Id.*) This is the same address listed on Spamhaus' website as the "registered office address" and "address for documents."

The manner by which Spamhaus was served with the Amended Complaint complied in all respects with the requirements of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. This is made clear in *White v. Ratcliffe*, 285 Ill.App.3d 758, 765 (2d Dist. 1996) (rejecting argument that the Hague Convention does not allow personal service by an independent process server) The court in *White* recognized that “[a]lthough the Central Authority is always to be made available as a means to effectuate service, its use is not compulsory.” e360 and Mr. Linhardt use of an independent special process server was appropriate on two distinct grounds under the Hague Convention. First, the use of an independent special process server complies with the internal laws of England. *White v. Ratcliffe*, 285 Ill.App.3d 758, 766 (recognizing that: “Article 19 expressly permits service of process by any method of service allowed by ‘the internal law of the contracting State’ and that English law specifically permits the use of an independent process server to properly effectuate service). Secondly, Article 10(c) of the Hague Convention allows use of an independent process server. Article 10(c) provides that “the freedom of any person interested in judicial proceedings to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.”

Thus, even if Spamhaus had moved the District Court for dismissal of the Amended Complaint based on insufficient service of process, there is no doubt that the District Court would have appropriately denied the motion. Equally, if not more importantly, there was nothing before the District Court to suggest that service of

process was insufficient in any way. Thus, the District Court did not abuse its discretion by concluding that service of process was sufficient.

B. The District Court Properly Considered Service of Process on Spamhaus Before Entering the Default Judgment and Permanent Injunction

Spamhaus forfeited its right to challenge service of process when it submitted to the District Court's jurisdiction without challenging service of process. Although Spamhaus noted in its Notice of Removal that "service has not been perfected against Spamhaus," it never made any motion for a determination of this baseless assertion at the hearing on August 23, 2006 or at any other time. Spamhaus could not be successful on such a motion because the Amended Complaint was properly served on July 4, 2006. At the August 23, 2006 hearing before the District Court, when Spamhaus withdrew its answer and waived any further defense based on sufficiency of process, Spamhaus had the forum and opportunity to challenge service of process before withdrawing its answer, but affirmatively chose not to do so. After Spamhaus abandoned the proceedings, all arguments asserting improper service of process disappeared.

Under these circumstances, it is entirely unclear what Spamhaus believes is further required of the District Court before entering a default judgment or permanent injunction. The District Court did not abuse its discretion.

III. THE DISTRICT COURT PROPERLY EXERCISED PERSONAL JURISDICTION OVER SPAMHAUS

A. e360's Complaint Adequately Alleged Personal Jurisdiction

A federal district court sitting in diversity looks to the long-arm statute of the state in which it is sitting to determine whether it has personal jurisdiction over the defendants. *E.g., Vilchis v. Miami Univ. of Ohio*, 99 Fed. Appx. 743 (7th Cir. 2004).

In Illinois, the statute governing personal jurisdiction states, in pertinent part, as follows:

§ 2-209. Act submitting to jurisdiction -- Process. (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of such acts:

- (1) The transaction of any business within this State;
- (2) The commission of a tortious act within this State; ...

Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 402 (7th Cir. 1986): 735 ILCS 5/2-209.

e360's Complaint and Amended Complaint adequately alleges that Illinois courts could properly exercise personal jurisdiction over Spamhaus. Paragraph 4 of the Amended Complaint states, in part, that "Spamhaus does business in Illinois by, among other things, marketing its services to companies, and specifically internet service providers, located in Illinois." (SA. 002.) This allegation, in and of itself, provided a sufficient bases for the District Court to conclude that it could exercise personal jurisdiction over Spamhaus. This assertion was never challenged by Spamhaus at anytime while this matter was before the Circuit Court or while

Spamhaus appeared in this matter before the District Court. Spamhaus had ample opportunity to file pleadings with the District Court incident to its initial removal. In failing to do so, Spamhaus waived any right to assert this defense now. *See Swaim v. Moltan Company*, 73 F. 3d 711, 717 (7th Cir. 1996) (explaining the concepts of forfeiture and waiver under Rules 12 and 60(b)).

e360 and Mr. Linhardt also alleged facts to support a finding that Spamhaus committed tortious conduct within the state. Spamhaus consciously and intentionally targeted e360 and Mr. Linhardt, both residents of Illinois. The Supreme Court has allowed the exercise of jurisdiction over a defendant whose only "contact" with the forum state is the "purposeful direction" of a foreign act having effect in the forum state. *See, e.g., Calder v. Jones*, 465 U.S. 783, 789, 104 S. Ct. 1482, 1487, 79 L. Ed. 2d 804 (1984). Accordingly, the District Court properly exercised personal jurisdiction over Spamhaus.

B. Spamhaus Waived Lack of Personal Jurisdiction as a Defense

Spamhaus' appeal is erroneously premised on the notion that it can ignore the events leading up to its filing of the Rule 60(b) motion because the District Court did not have personal jurisdiction over it and, therefore, could not impose a default judgment or a permanent injunction on Spamhaus. It cannot. As noted in *Swaim*, "the failure to challenge personal jurisdiction in a responsive pleading amounts to a forfeiture of that claim". *Swaim v. Moltan Company*, 73 F. 3d at 717, citing *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 914 (7th Cir. 1994). *Swaim* acknowledges that a defaulting party is generally treated differently and does

not forfeit its jurisdictional challenge. *Id.*, citing *Reynolds v. International Amateur Athletic Fed'n*, 23 F.3d 1110, 1120 (6th Cir. 1994). This different treatment, however, is premised on a defaulting party failing to appear or filing an answer. *Id.* Here, Spamhaus was the party invoking the jurisdiction of the District Court, it appeared through counsel, answered the Amended Complaint, and later chose to withdraw its Answer despite the District Court's warnings that a default judgment would be entered against it. Under these circumstances, Spamhaus is not the non-appearing defendant who failed to file an answer who should then be afforded the opportunity to challenge personal jurisdiction, notwithstanding that it was not previously raised.

Spamhaus essentially confuses the concepts of forfeiture with a waiver. Forfeiture is the failure to make a timely assertion of a right before a tribunal competent to determine such right. *Swaim v. Moltan Company*, 73 F. 3d at 718, note 4, citing *Yakus v. United States*, 321 U. S. 414, 444, 64 S. Ct. 660, 677, 88 L. Ed. 834 (1994). Waiver, by contrast, is the "intentional relinquishment or abandonment of a known right." *Swaim v. Moltan Company*, 73 F. 3d at 718, note 4, citing *Johnson v. Zerbst*, 304 U. S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938).

While the ability to assert personal jurisdiction is merely forfeited if not challenged by a timely motion to dismiss under Rule 12 or an amended or supplemental pleading under Rule 15, it can be asserted again in a Rule 60(b) motion, Spamhaus did far more than merely forfeit its ability to assert lack of

personal jurisdiction. Spamhaus, through its affirmative conduct of first appearing and answering the Complaint, then withdrawing that answer, waived any further right to assert lack of personal jurisdiction as a defense in this case. The District Court aptly noted that Spamhaus does not get two bites at the same apple and that it would be unfair to e360 and Mr. Linhardt if it did. (A. 183.) Given Spamhaus' conduct throughout the course of this litigation, the District Court was well within its discretion to find that it had personal jurisdiction over Spamhaus.

IV. THE INJUNCTION AGAINST SPAMHAUS IS APPROPRIATE AND CONSTITUTIONAL

A. The Injunction Issued Against Spamhaus Is Appropriate

1. The District Court Properly Adopted the Temporary Restraining Order as Its Preliminary Injunction

Spamhaus does not contest the validity of the Temporary Restraining Order issued by the Circuit Court and even complied with it for a brief period of time. The Circuit Court properly considered all four factors of the traditional test for injunctive relief. (S.A. 388-407) It found in granting the temporary restraining order:

- a) Plaintiffs have shown that they have a clearly ascertainable right in need of protection that is, the continuation of e360Insight as a going concern;
- b) Plaintiffs have shown that there is a fair question that Plaintiffs will succeed on the merits in that there appears to be an issue as to whether Defendant, The Spamhaus Project, aka The Spamhaus Project Ltd., properly included e360Insight and Mr. Linhardt on the ROKSO list;

- c) Plaintiffs have shown that they will suffer irreparable harm if an injunction does not issue, namely that e360Insight will cease operating; and
- d) Plaintiffs have shown that they have no adequate remedy at law or in equity, because damages will not compensate for e360Insight, LLC or Mr. Linhardt's loss of good will or damage to reputations, nor re-establish e360Insight, LLC as a going concern.

The District Court was well within its discretion to adopt the TRO as its preliminary injunction. "Decisions to grant or deny preliminary injunctive relief are addressed to the sound discretion of the District Court, and appellate review of such a decision is limited." *Wesley-Jessen Div. of Schering Corp. v. Bausch & Lomb, Inc.*, 698 F.2d 862, 864 (7th Cir. 1983); *American Hospital Association v. Harris*, 625 F.2d 1328, 1330 (7th Cir. 1980); *Ideal Industries v. Gardner Bender, Inc.*, 612 F.2d 1018, 1022 (7th Cir. 1979), cert. denied, 447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 (1980). The court's discretion is guided by consideration of four factors: (1) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not enter; (2) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant; (3) whether the plaintiff has at least a reasonable likelihood of success on the merits; and, (4) whether the granting of a preliminary injunction will disserve the public interest. *Wesley-Jessen Div. of Schering Corp. v. Bausch & Lomb, Inc.*, 698 F.2d 862, 864 (7th Cir. 1983); *O'Conner v. Board of Education*, 645 F.2d 578, 580 (7th Cir.), cert. denied, 454 U.S. 1084, 70 L. Ed. 2d 619, 102 S. Ct. 641 (1981). These factors are essentially the same as those considered by the Circuit

Court, which led the Circuit to conclude that the temporary relief e360 and Mr. Linhardt sought was appropriate.

While the District Court's judgment must be exercised within this framework, this court has said on prior occasions that it will not substitute its judgment for that of the District Court unless it is convinced that the court abused its discretion. *Wesley-Jessen Div. of Schering Corp. v. Bausch & Lomb, Inc.*, 698 F.2d 862, 864 (7th Cir. 1983); *See Helene Curtis Industries v. Church & Dwight Co.*, 560 F.2d 1325, 1330 (7th Cir. 1977), cert. denied, 434 U.S. 1070, 55 L. Ed. 2d 772, 98 S. Ct. 1252 (1978). “Moreover, if the District Court decides that a preliminary injunction is appropriate, it has considerable discretion in fashioning suitable temporary relief.” *Wesley-Jessen Div. of Schering Corp. v. Bausch & Lomb, Inc.*, 698 F.2d 862, 864 (7th Cir. 1983); *Banks v. Trainor*, 525 F.2d 837, 841 (7th Cir. 1975), cert. denied, 424 U.S. 978, 47 L. Ed. 2d 748, 96 S. Ct. 1484 (1976).

Fed. R. Civ. P. 65(b) establishes the procedure whereby the party against whom a temporary restraining order has issued can move to dissolve or modify the injunction, upon short notice to the party who obtained the order. Spamhaus never did this. Indeed, Spamhaus’ counsel raised no objection whatsoever at the August 23, 2006 hearing in which the District Court announced its attention to convert the TRO into a preliminary injunction. Because the District Court was informed of the existence of the TRO, and was further informed by Spamhaus’ counsel that Spamhaus did not intend to participate in a defense in any fashion, the District Court was well within its discretion to adopt the Circuit Court’s TRO as the District

Court's preliminary injunction in order to protect e360 and Mr. Linhardt from the continuing harm that Spamhaus was perpetrating on them.

Spamhaus incorrectly asserts that “[w]hen the district court made the preliminary injunction determination, it had no evidence before it about any irreparably injury, inadequate remedies at law, the balance of hardships, or public interest considerations.” (Appellant’s Brief at 38-39). To the contrary, the evidence the District Court had before it regarding the continuing harm to e360 and Mr. Linhardt as well as Spamhaus counsel’s representation that Spamhaus had chosen to abandon any and all defenses to the lawsuit left the District Court with but one choice - - to continue the protection afforded to e360 and Mr. Linhardt by the Circuit Court’s TRO. There was nothing presented to the District Court that mitigated the necessity of this protection and, indeed, the only abuse of discretion that could have resulted under these circumstances is if the District Court had not adopted the TRO.

A court must consider four traditional criteria in deciding whether to grant injunctive relief: (1) whether the plaintiff has a reasonable likelihood of success on the merits; (2) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (3) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant; and (4) whether the granting of the injunction will harm the public interest. *N.L.R.B. v. Electro-Voice, Inc.*, 83 F.3d 1559, 1567 (7th Cir. 1996); *Faheem-*

El v. Klinicar, 841 F.2d 712, 716 (7th Cir. 1988). The District Court had all of the information necessary to afford e360 and Mr. Linhardt preliminary injunctive relief.

The District Court had before it a copy of the TRO and affidavit of Mr. Linhardt that were filed as part of the motions being considered at the August 23, 2006 hearing. (See ECF docket entry ## 11, 15 and 17.) Those motions as well as the TRO, affidavit and other information, none of which was countered or object to by Spamhaus, demonstrated to the District Court the propriety of it entering the preliminary injunction. Sufficient evidence existed before the District Court to support that e360 did not have an adequate remedy at law and would suffer irreparable harm if the preliminary injunction was not entered; that the threatened injury to the e360 (going out of business/ blocking e360's ability to send e-mails to anyone from e360's internet lines outweighed the threatened harm the injunction may inflict on the Spamhaus (a few mouse clicks/key strokes to remove e360 from the ROSKO list); that e360 had a reasonable likelihood of success on the merits, in light of the evidence presented to the Circuit Court and bolstered by Spamhaus' counsel withdrawing its appearance and Spamhaus withdrawing its answer; and that the preliminary injunction would not disserve the public interest because 1) Spamhaus was not complying with the TRO, and compliance with judicial orders is in the public interest; 2) Spamhaus did not present any evidence to support finding that e360 and Mr. Linhardt were conducting any illegal activity and accordingly, had no public interest in listing a legitimate company on its ROSKO list. These points were reiterated to some degree at the August 23, 2006 hearing while

Spamhaus' counsel stood idly by. (A. 162-163.) The District Court did not abuse its discretion in issuing a preliminary injunction.

2. The District Court Properly Entered the Permanent Injunction According to Federal Rule of Civil Procedure 65.

When seeking a permanent injunction, the first of the four traditional factors set out above is slightly modified because the issue now is not whether the plaintiff has demonstrated a reasonable likelihood of success on the merits, but whether he has in fact succeeded on the merits. *See Amoco v. Village of Gambell*, 480 U.S. 531, 94 L. Ed. 2d 542, 107 S. Ct. 1396, 1404, n.12 (1987). Here, there is no doubt that e360 and Mr. Linhardt succeeded on the merits of this case as a result of Spamhaus first appearing and defending this case, then withdrawing its attorneys' appearances, withdrawing its answer and abandoning its defense of this case until after judgment was entered against it.

The permanent injunction comported with the specificity requirement set forth by Rule 65(d), which requires the order to set forth (1) the reasons for the issuance of the injunction; (2) the specific terms of the injunction; and (3) the terms must be described in reasonable detail. As Spamhaus acknowledges on page 40 of its brief, "the explanation can be oral or written and the absence of an explanation can be forgiven if the justification is clear from the record." *See EEOC v. Severn Trent Serv., Inc.*, 358 F.3d 438, 442 (7th Cir. 2004).

The permanent injunction adequately sets forth the reasons for its issuance. The District Court found that Spamhaus has wrongfully placed e360 and Mr.

Linhardt on its black list of companies who have sent spam e-mail; tortiously interfered with e360 and Mr. Linhardt's contracts with its suppliers and customers; tortiously interfered with e360 and Mr. Linhardt's prospective economic advantage by blocking e-mail e360 and Mr. Linhardt attempted to send; and defamed e360 and Mr. Linhardt by publishing false statements about plaintiffs on its website. (A. 140.)

The permanent injunction also sets forth five specific terms for the injunction, all of which are sufficiently detailed assure Spamhaus' compliance.

- a) Spamhaus shall not take any action to cause email sent by Plaintiffs or their affiliates, subsidiaries, or related companies owned or controlled by Plaintiffs to be blocked, delayed, altered, or interrupted in any way (including, without limitation, by listing Plaintiffs on Spamhaus' ROKSO list, within an SBL listing on Spamhaus' website, using blacklisting technology in concert or conjunction with others, or taking any other action to cause any such interference) unless Spamhaus can demonstrate by clear and convincing evidence that Plaintiffs have violated relevant United States law. Such clear and convincing evidence may only be shown after providing Plaintiffs with an opportunity to review any alleged offending email, including a review of the email header and content (in its entirety), and providing Plaintiffs with an opportunity to show the offending email was not sent in violation of United States law to the satisfaction of a reasonable person. If such clear and convincing evidence is shown, then and only then may Spamhaus list the Internet Protocol (IP) address, and only the IP address, from which the offending email was sent on its website.
- b) Spamhaus shall not list entire networks or ranges of IP addresses owned or operated by Plaintiffs simply because they are registered in the Plaintiffs' names or physical addresses without meeting the clear and convincing standard for the IP address in question.
- c) Spamhaus shall post, within five business days of the date of this order, on its website at both the main home page and at

the ROKSO jump page, a message of 1 inch by 1 inch, the text of which is to be reasonably approved by Plaintiffs, and which, generally, indicates that Plaintiffs were erroneously listed on the website as spammers and that Plaintiffs are not spammers. Defendant Spamhaus shall leave such message on its site for a period of six months.

- d) Spamhaus shall not contact or cause others to contact any customers or suppliers of the Plaintiffs in efforts to cause said customers or suppliers to cease doing business with Plaintiffs.
- e) Spamhaus shall not contact or cause others to contact any customers or suppliers of Plaintiffs and allege or assert that Plaintiffs are spammers or other like term.

Despite the lengths to which the District Court went to fashion an injunction that is, in all respects compliant with Rule 65, Spamhaus now quibbles with certain immaterial aspects of the terms of the injunction.

Spamhaus should have sought any relief concerning the injunction in the District Court because the District Court is the proper venue to redress such concerns. An application for an order staying, suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance to the district court. Fed. R. App. P. 8(a)(1)(C). This rule applies even when a notice of appeal has been filed or the appeal has been docketed in the court of appeals. Because of its familiarity with the case, a district court can best determine whether the stay or modification should be granted and, if granted, determine the amount of any bond necessary to protect the rights of the party who prevailed. This relief may be granted pending an appeal on such terms as to bond or otherwise as the trial court considers proper for the protection of the rights of the adverse party. Fed.R.Civ.P. 62(c). Thus, any issues Spamhaus has regarding the

language of the permanent injunction should have been resolved before the District Court.

B. The Permanent Injunction Against Spamhaus is Constitutional

1. The Activity Enjoined By The District Court Is Not Protected Speech But Conduct

Spamhaus' entire first amendment argument is based on the erroneous proposition that its tortious activity is speech. It is not. The "speech" Spamhaus argues is protected involves Spamhaus placing e360 and Mr. Linhardt on the ROKSO and SBL automated lists that Spamhaus generates and maintains according to certain rules it establishes for inclusion on the list. (SA. 115.) Placement on the ROKSO list is based on objective, verifiable criteria, the primary one being that only persons or entities that have been removed from three ISPs. Spamhaus also has objective criteria for removing a listed individual or entity from its lists. Spamhaus makes these objective criteria very clear on its own website. (*Id.*)

Placement on both the SBL list and the ROKSO causes the listed party to be unable to send email to ISPs using the Spamhaus lists and this is facilitated through an automated function at Spamhaus which consistently updates the blocking technology sold by Spamhaus to the ISPs. Both the ROKSO list and the SBL list are sold by Spamhaus to ISPs and others (SA. 415-419.), who buy it not because they are interested in paying for Spamhaus' opinions, which by the way Spamhaus offers for free elsewhere on its website, but for the service Spamhaus provides, a list of verifiable internet scofflaws that engage in a whole host of

activities from which ISPs and others deem undesirable. This clearly results in the listings being more than mere speech, but graduating to conduct.

e360 and Mr. Linhardt, however, have never been removed from any ISPs at the time they were listed on the ROKSO, nor did they engage in any activity that would warrant inclusion on the SBL list. e360 and Mr. Linhardt employ methodologies that assure the recipient of the emails sent by e360 and Mr. Linhardt want to receive those emails. (S.A. 003-004.) There is no conduct that Spamhaus can point to that would warrant e360 or Mr. Linhardt being placed on the ROKSO or SBL lists. Despite repeated efforts to be removed from the ROKSO and SBL lists, Spamhaus would not adhere to its own rules regarding placement and removal of individuals and entities from these lists.

All of Spamhaus' activity pertaining to e360 and Mr. Linhardt is conduct, which does not fall under the protections afforded by the first amendment. *See e.g. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (U.S. 2006) (rejecting the view that conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea and reaffirming that the Court has extended First Amendment protection only to conduct that is inherently expressive). Spamhaus cannot now shield itself behind the first amendment when it conducts itself badly. Here, Spamhaus has failed to abide by its own rules pertaining to the conduct that it has itself determines who is placed on the ROKSO and SBL lists.

Stated simply, the injunction against Spamhaus precludes conduct, not speech, for which there is no first amendment protection. None of Spamhaus' speech is being subjected to a prior restraint that would preclude the enforcement of the injunction as currently written.

2. Spamhaus Does Not Engage in Protected Speech Because Its Statements Involving e360 are False

Even if Spamhaus' activities are deemed to be speech, they still are not protected by the first amendment. There is "no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 338 (1974) (acknowledging that "making slanderous statements and defamatory falsehoods of a primarily private concern ... are on the lowest rung of the protection of the First Amendment"); *Barlow v. Sipes*, 744 N.E.2d 1, 9 (1st Dist. 2001). "False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cannot easily be repaired by counterspeech, however persuasive or effective." *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988); *Barlow v. Sipes*, 744 N.E.2d 1, 9 (1st Dist. 2001) (upholding an injunction that "primarily operates to address alleged private wrongs committed ... imputing dishonest business practices and discouraging individuals from patronizing the ... business).

"The intentional lie does not materially advance society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Barlow v. Sipes*, 744 N.E.2d 1, 9 (1st Dist. 2001) quoting *New York Times Co. v. Sullivan*, 376 U.S. 254,

265 (1964). “Falsehoods belong to that category of utterances that ‘are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” *Barlow v. Sipes*, 744 N.E.2d 1, 9 (1st Dist. 2001) quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

The speech here is precisely the type of speech that the first amendment does not protect. The ROKSO and SBL lists purportedly contain facts, not opinions, and e360 and Mr. Linhardt’ inclusion on this list renders these facts, at least as to them, false. e360 and Mr. Linhardt are without recourse given the factual falsity of the statements pertaining to them. Spamhaus’ intentional lies should not be afforded the protection of the first amendment that legitimate speech deserves.

3. The Injunction Does Not Constitute Impermissible Compelled Speech

The injunction, in part, requires Spamhaus to print on its website what is essentially a retraction of the prior false statements of fact Spamhaus placed on the ROKSO lists. The injunction does not constitute compelled speech because it only requires Spamhaus to correct the prior erroneous placement of e360 and Mr. Linhardt on the ROKSO list. Here, Spamhaus is not obliged to express a message with which it disagrees because Spamhaus created the misconception that e360 and Mr. Linhardt are spammers by ignoring its own criteria for being a “spammer” under Spamhaus’ definition of that term. Accordingly, Spamhaus cannot disagree with the

message because Spamhaus was originally incorrect, according to its own standards, by listing e360 as a “spammer.”

Moreover, “[t]he First Amendment's guarantee of freedom from ‘compelled speech’ is not absolute. Particularly in the commercial arena, the United States Constitution permits the state to require speakers to express certain messages without their consent, the most prominent examples being warning and nutritional information labels. The United States Supreme Court has allowed states to require the inclusion of purely factual and uncontroversial information as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.” *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006).

4. The Injunction Is Not Impermissibly Broad

An injunction is overbroad only if it could proscribe conduct which is more broad than necessary to accomplish the permissible goals of the injunction. *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (U.S. 1994) (noting that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs). Spamhaus’ argument here is not even ripe as the language of the retraction message has not yet been determined. As a concept, however, requiring language that requires Spamhaus to acknowledge its prior erroneous placement of e360 and Mr. Linhardt on the ROKSO list is not overbroad nor unconstitutional. The District Court did not abuse its discretion by requiring Spamhaus to engage in conduct - - to post what amounts to be nothing more than a retraction - - to correct prior conduct that harmed e360 and Mr. Linhardt.

In the final analysis, the permanent injunction entered by the District Court appropriately addressed Spamhaus' continuing conduct and fashioned remedies for e360 and Mr. Linhardt that went only as far as needed under the circumstances of this case. None of the remedies contained in the permanent injunction run afoul of Spamhaus' first amendment rights or present any constitutional concerns whatsoever. The District Court acted well within its discretion when it entered the permanent injunction against Spamhaus.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING SPAMHAUS' MOTION TO VACATE THE DEFAULT JUDGMENT

“Relief from a judgment under Fed. R. Civ. P. 60(b) is an extraordinary remedy and is granted only in exceptional circumstances.” *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 400 (7th Cir. 1986) (holding that “[t]he decision to grant relief under rule 60(b) is left to the sound discretion of the trial court, and review of a trial court's decision to grant or deny rule 60(b) relief is subject to an abuse of discretion standard.”). There are no exceptional circumstances here.

Fed. R. Civ. P. 60(b) provides, in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect . . . (4) the judgment is void ... (6) any other reason justifying relief from the operation of the judgment

None of these grounds provide Spamhaus with the relief it seeks.

A. Rule 60(b)(1) Does Not Provide Relief for Spamhaus; There Is No Excusable Neglect, Inadvertence, and/or Mistake Exists

Rule 60(b)(1) does not protect Spamhaus' intentional choice not to challenge personal jurisdiction or service of process before the District Court. Spamhaus had every opportunity to contest jurisdiction and service of process, but chose instead to abandon the proceedings.

Spamhaus claims that some unspecified misunderstandings regarding federal civil procedure, and an apparent miscommunication between Spamhaus' United States counsel and United Kingdom counsel, account for the situation that Spamhaus now finds itself in. e360 and Mr. Linhardt respectfully submit that even if all of this is true, it is irrelevant for purposes of challenging any aspect of this case pursuant to Rule 60(b)(1). No excusable neglect, inadvertence or mistake occurred here. Spamhaus intentionally chose a path of conscience disregard for the District Court's authority, a path down which it proceeded throughout this case. It continued down that path, teeth into the wind, despite the District Court's explicit warnings as to the consequences of doing so. Spamhaus continued to take this path even upon facing the motion for entry of default judgment. In this context, the District Court was well within its discretion to deny Spamhaus' request for what essentially amounts to a "do over" pursuant to Rule 60(b)(1).

Moreover, Spamhaus' Motion to Vacate the Default Judgment asserts that Spamhaus was "denied ... its opportunity to present extrinsic evidence and affidavits regarding service of process and personal jurisdiction." (Appellant's Brief at 50). This statement is irrelevant, if not false. Spamhaus had multiple

opportunities to contest jurisdiction including: a motion filed incident to the original removal to District Court; filing a 12(b)(2) motion incident to its initial removal petition; at the August 23, 2006 court hearing, challenging the District Court's jurisdiction and/or service before it withdrew its Answer and appearance; opposing e360's Motion for Default Judgment; filing an affidavit in support of its Motion to Vacate the Default Judgment attesting to a lack of service and/or personal jurisdiction. Spamhaus failed to do any of these things.

The most Spamhaus did was file a declaration by Steve Linford, who represents himself out to be the sole Director of Spamhaus, for the purpose of certifying Spamhaus' responses to a citation to discover assets. (A. 190-192.) In it, Mr. Linford claims he is making his statements in part to "preserve any objections to this Court's personal jurisdiction over The Spamhaus Project, LTD..." (A. 190.)

Putting aside the numerous infirmities that preclude the declaration from being considered by the District Court (including the lack of Mr. Linford's competency and personal knowledge to support many of the statements he makes, irrelevancy to the purpose for which the declaration is offered, hearsay and unsubstantiated conclusions lacking foundation) the declaration is most telling for what it does not contain - - a refutation of the jurisdictional assertion by e360 and Mr. Linhardt, that "Spamhaus does business in Illinois by, among other things, marketing its services to companies, and specifically internet service providers (ISPs), located in Illinois." (SA. 002.). In other words, even if this declaration had been properly submitted to the District Court , and assuming it contained

admissible evidence, the District Court would have properly found that nothing in the declaration precluded a finding of personal jurisdiction over Spamhaus.

Spamhaus makes much of the fact that it was not allowed to file a memorandum of law to support its Rule 60(b) motion, but the District Court was well within its discretion to deny this request based on what had been presented to it up to that point in the lawsuit as well as in the Rule 60(b) motion itself. Spamhaus' counsel's argument at the hearing (A. 174-184.) shed no additional light on what purpose additional briefing would have served. The declaration of Mr. Linford makes clear that any additional evidence that Spamhaus might offer would have failed to address any point that would have led the District Court to void the judgment. The only discernable effect of allowing the continued proceedings Spamhaus sought was to further drag out Spamhaus' ability to defy the injunctive relief contained in the judgment and avoid paying the damages assessed against it. The District Court had the discretion to put a stop to Spamhaus' delaying tactics, and exercised that discretion appropriately.

B. Rule 60(b)(4) Does Not Provide Relief To Spamhaus; The Judgment Is Not Void

Spamhaus' appeal suggests that the District Court's judgment is void because of 1) insufficiency of process; or 2) lack of personal jurisdiction. The District Court properly exercised its discretion in denying Spamhaus' Motion to Vacate the Default Judgment based on Rule 60(b)(4). At the hearing for the Motion to Vacate the Default Judgment, Spamhaus' attorney only argued that "I have not seen any

finding that there was proper service, as required by the Hague Convention” and that he had “not seen any statement that the Court had jurisdiction – personal jurisdiction – in any of this.” (A. 179). The District Court was under no obligation to make an affirmative finding as to service of process and personal jurisdiction where Spamhaus, through its appearance and answer, had submitted itself to the District Court’s jurisdiction and had the opportunity to challenge both, but instead intentionally abandoned the proceedings with knowledge of the impending default judgment.

“If a defendant, after receiving notice, chooses to let the case against them go to a default judgment, the defendant must then shoulder the burden of proof when the defendant decides to contest jurisdiction in a post judgment Fed. R. Civ. P. 60(b)(4) motion.” *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398 (7th Cir. 1986). Spamhaus did not meet its burden to have the default judgment vacated. Notwithstanding the District Court’s refusal to allow Spamhaus to file a memorandum in support of its Motion to Vacate, the burden remains with Spamhaus to prove the default judgment should be vacated on improper service grounds. *Trustees of Central Laborers’ Welfare Fund, v. Keith and Dennis Lowery*, 924 F.2d 731, 732 (7th Cir. 1991) (affirming District Court’s refusal to vacate judgment on service grounds where defendant did not carry its burden of demonstrating that service was inadequate and the court found “some indication in the record” of service); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 404 (7th Cir. 1986) (holding that defendant had the burden of proving a judgment is void for

lack of service). Spamhaus never produced any of evidence demonstrating that service against it was improper before the Circuit Court or the District Court, nor could it given e360 and Mr. Linhardt's compliance with the Hague Convention. Because Spamhaus did not offer any proof of invalid service, the District Court did not err in denying Spamhaus' Motion to Vacate the Default Judgment. *Trustees of Central Laborers' Welfare Fund, v. Keith and Dennis Lowery*, 924 F.2d 731, 732 (7th Cir. 1991); *Jones v. Jones*, 217 F.2d 239, 242 (noting that because the defendants failed to offer any proof, such as affidavits, there was no grounds upon which to find the judgment void).

The District Court's judgment is not void for lack of personal jurisdiction either. That personal jurisdiction exists here was clearly established above in section III(B). The District Court did not abuse its discretion in entering the judgment against Spamhaus.

C. Rule 60(b)(6) Also Provides No Relief to Spamhaus

Spamhaus attempts to invoke Rule 60(b)(6) on three bases: (1) e360 and Mr. Linhardt fail to state any claims against Spamhaus; (2) there was no evidentiary hearing on damages producing findings of fact; and (3) there was insufficient evidentiary support for the award of damages. Spamhaus' attempts are without merit.

Other than Spamhaus' conclusory statement that the Amended Complaint fails to state a claim, nothing in the record even remotely suggests this to be the case. e360 and Mr. Linhardt's Amended Complaint complies in all respects to the

plain and concise statement required by Fed.R.Civ.P. 8. The allegations contained in the Amended Complaint more than adequately put Spamhaus on notice of the claims against it, and indeed, Spamhaus even answered those claims. There is no basis to find the District Court abused its discretion by not agreeing with Spamhaus' notion that the Amended Complaint does not state claims adequately.

Similarly, Spamhaus' argument that a lack of an evidentiary hearing producing findings of fact precludes judgment against Spamhaus, is as erroneous as the premise on which it is based. Spamhaus, despite notice of the Motion for Entry of a Default Judgment, which included the evidence that e360 and Mr. Linhardt were prepared to present to the District Court, failed to challenge that evidence and thus no additional evidentiary hearing was necessary over and above the District Court duly considering the affidavits presented to it. The record is clear that the District Court, in fact, appropriately considered the evidence before it, and indeed, rejected e360 and Mr. Linhardt's request for punitive damages and attorneys fees. The record is clear that the compensatory damages sought by e360 and Mr. Linhardt were appropriate and substantiated.

Finally, Spamhaus argues that there was an insufficient basis for the damages awarded by the District Court. The damages were supported by an affidavit presented by e360's President, Mr. Linhardt, which detailed, over eight pages and forty one paragraphs, the damages sought from Spamhaus. (A. 124-131.) Spamhaus now cryptically concludes that this was not good enough although it is entirely unclear what additional information Spamhaus would conclude is

sufficient. Regardless of Spamhaus' views, Mr. Linhardt's affidavit, which was duly considered by the District Court, is more than sufficient to substantiate the monetary dollar judgment obtained from Spamhaus.

In the final analysis, none of the arguments Spamhaus raises under Rule 60(b)(6) suggest that the District Court abused its discretion in entering the judgment against Spamhaus based on the claims asserted in the Amended Complaint and the evidence supporting e360 and Mr. Linhardt's damages.

CONCLUSION

For the reasons stated in this brief, e360Insight, LLC and David Linhardt respectfully request that the default judgment entered by the District Court be affirmed in all respects.

Dated: March 23, 2007

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**CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7) AND CIRCUIT
RULE 31(e)(1) CERTIFICATION**

The undersigned, counsel of record for the Plaintiffs-Appellees, e360Insight, LLC and David Linhardt, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7).

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionality spaced font. The length of the brief is 11,918 words.

The undersigned also certifies that I have filed a digital version of the Brief of Appellees on a virus-free disc in a non-scanned PDF format, and I certify that the contents of the Supplemental Appendix are not available in digital versions that can be generated by printing to PDF from the original word processing file.

Dated: March 23, 2007

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CERTIFICATE OF SERVICE

I, Joseph L. Kish, an attorney, hereby certify that I served a copy of the foregoing RESPONSE TO BRIEF OF PLAINTIFFS-APPELLEES, e360INSIGHT, LLC AND DAVID LINHARDT upon:

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by depositing same in the United States Mail, postage prepaid, on this 23rd day of March 2007.

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