

Nos. 06-3779 and 06-4169

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

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

Defendant-Appellant,

vs.

e360 INSIGHT, LLC, an Illinois
Limited Liability Company, and
DAVID LINHARDT, an individual,

Plaintiffs-Appellees.

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

**REPLY BRIEF OF DEFENDANT-APPELLANT
THE SPAMHAUS PROJECT**

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ARGUMENT

- I. e360's Supplemental Appendix Consists Almost Entirely of Materials That Were Not a Part of the District Court Record and These Materials, and Any Arguments Based on Them, Should Be Stricken and Ignored.

This Court should note a major deficiency in e360's Response Brief — namely, that it references and relies on a great deal of “evidence” that was never part of the district court record. In fact, of the seventeen documents included in e360's Supplemental Appendix, only one complete document — the Temporary Restraining Order (SA. 408-11) — was actually before the district court.¹ An astonishing 415 of the 419 pages of e360's Supplemental Appendix are thus wholly irrelevant to this appeal.

While the Federal Rules of Appellate Procedure and the rules of this Court do not authorize a motion to strike portions of an appellate brief, *see Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 726-28 (7th Cir. 2006), this Court has consistently refused to consider arguments or evidence presented by a party that were not within the district court record. *United States v. Raymond*, 228 F.3d 804, 809 n.5 (7th Cir. 2000) (inclusion of documents in appellee's appendix to its brief “that were not included in the record before the district court below...was improper”); *Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1393 n.4 (7th Cir. 1990) (references in appellee's brief to documents that were not entered into the record were properly stricken). “The appellate stage of the litigation process is not the place to introduce new evidentiary

¹ While parts of other documents in the Supplemental Appendix did appear in the district court's official record, the Temporary Restraining Order is the only complete document from e360's Supplemental Appendix to appear in its entirety in the district court's official record.

materials.” *Berwick Grain Co., Inc. v. Ill. Dep’t of Agric.*, 116 F.3d 231, 234 (7th Cir. 1997).

Included in the Supplemental Appendix’s extraneous and irrelevant materials are a number of purported Affidavits of Service, claiming that various pleadings were personally served on Spamhaus in the United Kingdom (SA. 021, 192, 412-14). Beyond being outside of the record, the inclusion of these documents is improper for two additional reasons. First, Spamhaus has consistently refuted any suggestion that service of process was ever effected upon it.² Second, these affidavits were never before the district court at any point before, during, or after it entered its default judgment. e360’s improper inclusion of these documents demonstrates that the district court’s entry of default judgment against Spamhaus was void, because the district court lacked any evidence that Spamhaus had been properly served or that it had personal jurisdiction over Spamhaus. Proof of valid service of process is a prerequisite to asserting personal jurisdiction over a defendant, and absent such proof the default judgment is void. *See Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297, 301 (7th Cir. 1991) (“This court has long held that valid service of process is necessary in order to assert personal jurisdiction over a defendant . . . Moreover, it is well recognized that a ‘defendant’s actual notice of the litigation . . . is insufficient to satisfy Rule 4’s requirements.’”) (quoting *Way*

² Should this Court vacate the district court’s default judgment, Spamhaus is prepared to offer affidavit evidence by Tony Overington stating that he was not authorized to accept service on behalf of Spamhaus and never did so, in direct contradiction to the purported Affidavits of Service e360 has improperly included in its Supplemental Appendix.

v. Mueller Brass Co., 840 F.2d 303, 306 (5th Cir. 1988)) (internal citations omitted). Spamhaus therefore respectfully requests that this Court disregard these materials from outside of the district court's record, as well as Plaintiffs-Appellees' arguments based on them.

II. The Entry of Default Judgment Must be Vacated Because the District Court Failed to Find that Service of Process was Properly Effected and to Determine Whether it Had Personal Jurisdiction over Spamhaus.

Rather than addressing the merits of Spamhaus' argument that the district court failed to consider whether service of process was proper upon Spamhaus and whether it had personal jurisdiction over this United Kingdom company, e360 instead attempts to argue that Spamhaus waived or forfeited its personal jurisdiction and service of process related objections. (Resp. Br. 13-14). In an ironic twist, e360's improper submission of extraneous documents actually solidifies the basis of Spamhaus' appeal: the district court erred both because it lacked any evidence regarding proper service of process upon Spamhaus, and because it never inquired into its *personal* jurisdiction³ over Spamhaus.

A. Spamhaus did not Waive or Forfeit its Defenses Regarding Lack of Personal Jurisdiction and Improper Service of Process.

e360 contends that Spamhaus waived its objections to service of process and personal jurisdiction by (i) removing the case; (ii) failing to file a motion to dismiss under Fed. R. Civ. P. 12(b); and (iii) withdrawing its answer. (Resp. Br. 13-14). These arguments are not legally supported.

³ e360 confuses personal jurisdiction and subject matter jurisdiction. Subject matter jurisdiction is not an issue in this appeal.

1. Spamhaus' removal of the case on diversity grounds did not waive or forfeit its personal jurisdiction and service of process defenses.

Spamhaus' removal of this case to federal court did not waive its defenses based on a lack of personal jurisdiction and improper service of process. A party does not waive any defenses previously available to it merely by removing an action to federal court. *See Allen v. Ferguson*, 791 F.2d 611, 614-15 (7th Cir. 1986) (removal of a case does not waive any objections defendant may have regarding personal jurisdiction); *Morris & Co. v. Skandinavia Ins. Co.*, 81 F.2d 346, 351-52 (7th Cir. 1936) (questions involving validity of service of process on a foreign corporation are to be determined by the federal court irrespective of state law or decision, even though the case had been removed to federal court); *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 157 (2d. Cir. 1996) ("Removal does not waive any Rule 12(b) defenses."); *Product Components, Inc. v. Regency Door & Hardware, Inc.*, 568 F. Supp. 651, 655 (D. Ind. 1983) ("Nor does removal of an action from state to federal court result in a waiver of the defense of lack of personal jurisdiction.") "A petition for removal to a federal court is an assertion of a federal right . . . and does not result in the petitioner appearing generally" and thus waiving personal jurisdiction related defenses. 6 C.J.S. Appearances § 32 (2000).

Spamhaus' defenses regarding personal jurisdiction and service of process are still preserved and valid.

2. Spamhaus did not waive its Fed. R. Civ. P. 12(b) defenses by failing to file them in a pre-answer motion.

Under Federal Rules of Civil Procedure 12(g) and (h)(1), a defendant can raise defenses of lack of personal jurisdiction and/or improper service of process in either a Rule 12(b) motion or its responsive pleading. *American Patriot Ins. Agency, Inc. v. Mutual Risk Mgmt., Ltd.*, 364 F.3d 884, 887-88 (7th Cir. 2004). There is no requirement that a party must raise these defenses in a pre-answer motion. *See Perry v. Sullivan*, 207 F.3d 379, 381-83 (7th Cir. 2000) (while Rule 12 permits certain defenses to be raised before filing a responsive pleading, there is no requirement to raise those defenses until filing a responsive pleading).

Spamhaus did not file a Rule 12(b) motion, but it properly raised lack of personal jurisdiction and improper service of process defenses in both its Notice of Removal (A. 2) and in its first responsive pleading in the district court, which was its Answer. When that Answer was withdrawn without objection by e360 or the district court, Spamhaus was put back in a position as if it had simply never appeared or responded.

3. Spamhaus was granted permission, without objection from e360, to withdraw both its Answer and its appearance in the case, and therefore has done nothing that could have waived its jurisdictional defenses.

Spamhaus' withdrawal of its Answer did not forfeit or waive its objections to personal jurisdiction and service of process. e360 fails to cite any precedent supporting a contrary conclusion. There is a dearth of case law on the procedural posture of a case upon the withdrawal of an answer, but the few

cases that address this issue support Spamhaus. See *White v. Cleveland Foundry Co.*, 24 Ohio C.C. (n.s.) 180, 183 (1902) (“permission having been given to the defendant to withdraw his answer, the case stood as if no answer had been filed”); *Wheeler v. Sunbelt Tool Co., Inc.*, 181 Ill. App. 1088, 1105-06, 537 N.E.2d 1332, 1344, 130 Ill. Dec. 863 (1989) (“The withdrawal of an earlier pleading leaves the issues in the same status as if the abandoned pleading had not been filed”) (citing *Guebard v. Jabaay*, 117 Ill. App. 3d 1, 7, 452 N.E.2d 751, 756, 72 Ill. Dec. 498 (1983)); 71 C.J.S. Pleadings § 589 (2000) (“A withdrawal of a pleading removes it from consideration, and leaves the issues in the same status as though the withdrawn pleading had never been filed.”) e360 failed to address this argument in its Response.

e360 essentially alternates between two contradictory, but similarly incorrect, positions: (a) Spamhaus waived its personal jurisdiction and service of process defenses by *filing* its Answer; and (b) by *withdrawing* the same Answer, Spamhaus waived its personal jurisdiction and service of process defenses. (Resp. Br. 13-17). As for the first contention, Spamhaus raised its challenge to improper service of process in both the Notice of Removal (A. 002) and the Answer (A. 031). Spamhaus further included its challenge to personal jurisdiction in its Answer. (A. 031).

As for e360’s second contention, the Answer was withdrawn with the district court’s permission and with no objection from e360. (A. 161, 164). In fact, e360’s counsel expressly stated, “I don’t have any objection to them withdrawing the answer.” (A. 161). At that time, e360’s counsel stated that if

the answer was withdrawn and Spamhaus was then in default, he would expect a default judgment. (*Id.*). e360 and the district court both treated the withdrawal of the Answer as if no answer had ever been filed, and thus a default judgment was entered. (A. 162-66).

e360 essentially concedes that a defaulting party does not forfeit a jurisdictional challenge by citing *Swaim v. Moltan Co.*, 73 F.3d 711, 717 (7th Cir. 1996) (Resp. Br. 20), where this Court held that defaulted parties generally have not waived personal jurisdiction defenses because “it is unfair to strip parties of a defense that may explain the omission that is potentially the basis for judgment against them.” Other courts likewise hold that a personal jurisdiction defense is not waived by a party in default. *E.g.*, *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110, 1120 (6th Cir. 1994). What e360’s argument misses is that by withdrawing the Answer with the express permission of the district court and without objection by e360, Spamhaus was returned to a position as if the Answer had never been filed. *Wheeler*, 181 Ill. App. at 1105-06, 537 N.E.2d at 1344, 130 Ill. Dec. 863; *Guebard*, 117 Ill. App. 3d at 7, 452 N.E.2d at 756, 72 Ill. Dec. 498; 71 C.J.S. Pleadings § 589 (2000). Since Spamhaus neither filed a responsive pleading nor appeared in the case (its appearance was withdrawn at the same time as its Answer (A. 162-66)), it was impossible for Spamhaus to waive its personal jurisdiction and service of process defenses, either by response or by conduct.

e360 attempts to distinguish *Swaim* from the situation before this Court by arguing that Spamhaus invoked the district court’s jurisdiction by removing

the case, appearing, answering the complaint, and then later withdrawing the answer. (Resp. Br. 20). However, as discussed above, removal alone is insufficient to waive or forfeit challenges to personal jurisdiction and service of process, and the removal petition explicitly raised the lack of service defense. Furthermore, as discussed above, by allowing Spamhaus to withdraw its Answer and appearance and stating that default would be entered for a failure to defend the case, the district court placed Spamhaus back in a position as if it had never appeared or answered. Thus, Spamhaus is a traditional defaulting party under *Swaim* and has not forfeited its jurisdictional challenges.

Finally, in *Swaim*, this Court held that the defendant had not waived his personal jurisdiction defenses by failing to answer and having a default entered, but rather had waived those defenses because the defendant failed to include personal jurisdiction arguments in its initial Rule 60(b) motion. *Swaim*, 73 F.3d at 717. Spamhaus, however, has preserved its lack of personal jurisdiction defense in every motion it has made to the district court, including its Rule 60(b) Motion to Vacate. (A. 150-54). Spamhaus has thus properly preserved its personal jurisdiction and lack of service defenses, and these issues should have been considered by the district court before entering the default judgment and before denying the Motion to Vacate.

B. The District Court Erred in Failing to Consider Whether Service was Properly Effected on Spamhaus, and Whether it had Personal Jurisdiction over Spamhaus.

e360 fails to address the fact that the district court erred by failing to consider whether service was properly effected on Spamhaus, and whether the

court had personal jurisdiction over Spamhaus. Rather, e360 attempts to jump into the merits of whether service was proper by filing a Supplemental Appendix that improperly includes documents that were never before the district court. e360 relies on these extraneous documents and essentially argues that because of the evidence presented, the result would be the same. (Resp. Br. 16-17).⁴ The issue currently before this Court, however, is whether the district court ever *considered* service of process. Spamhaus asserts and e360 does not refute that the district court failed to do so.

e360 further contends that there was nothing before the district court to suggest that service or personal jurisdiction was insufficient. *Id.* This assertion is simply erroneous. Spamhaus asserted an objection to service of process in both the Notice of Removal and the Answer, and the court had notice of potential personal jurisdiction problems as well, given that Spamhaus was a foreign non-profit organization. (A. 2, 24-33). Thus, the district court knew that service of process and personal jurisdiction was disputed and at issue in the case. It is also clear that e360 failed to submit anything into the record before the district court to show that service had been properly effected — a prerequisite to a district court asserting personal jurisdiction.

⁴ Spamhaus recognizes that this is not the proper forum to present new evidence. However, as noted earlier, Spamhaus disputes whether Tony Overington represented that he was authorized to accept service, and upon vacating of the default judgment and remand, Spamhaus plans to refute e360's claims. The opportunity to fairly litigate the issue of service of process (as well as personal jurisdiction) is central to Spamhaus' appeal from the district court's refusal to vacate the default judgment.

In fact, e360 admits that the original complaint was never served on Spamhaus. (Resp. Br. 15). Tellingly, when the case was removed to the district court, this original complaint that was admittedly never properly served on Spamhaus was the only complaint that made it into the record. (A. 5-20). The Amended Complaint was never placed before the district court and was also never properly served on Spamhaus.

In this sense, Spamhaus' case is similar to the prior decision of this Court in *Silva v. City of Madison*, 69 F.3d 1368 (7th Cir. 1995). In *Silva*, the plaintiff filed suit against the defendant in state court, but improperly served process of the complaint upon a law firm that was not authorized to receive service of process on the City's behalf. *Id.* at 1370. When the City came into possession of a copy of the complaint, it removed the case to federal court despite having never been served properly. *Id.* When the City then failed to answer the complaint, plaintiff filed a motion for default judgment which was denied by the trial court. Plaintiff subsequently properly served the defendant with his complaint and lost on the merits. *Id.* On appeal to this Court, plaintiff argued that the City's failure to answer the complaint within the time prescribed by Fed. R. Civ. P. 81(c) constituted a failure to plead or otherwise defend the case as required by Rule 55(a), and thus the district court erred in denying his motion for default judgment. *Id.* at 1370-71.

On appeal, this Court held that under Rule 81(c), the duty to respond to plaintiff's complaint did not attach onto the City until it had been properly

served, since proper service was required for personal jurisdiction; as this Court noted:

[W]e perceive nothing in the statute, the rule, or their respective legislative histories that would justify our concluding that the drafters, in their quest for evenhandedness and promptness in the removal process, intended to abrogate the necessity for something as fundamental as service of process....Requiring a responsive pleading before service is effected is at odds with a fundamental principle of federal procedure — that a responsive pleading is required only after service has been effected and the party has been made subject to the jurisdiction of the federal courts....Without service, there is no personal jurisdiction over the defendant. This right is not waived by filing a petition for removal to federal court.... Only a court that has jurisdiction over the defendant may require that the defendant state its substantive position in the litigation.

Id. at 1376. In other words, without a finding that a defendant has been properly served, a district court can not enter a default judgment.

The parallels to Spamhaus' situation are readily apparent. Spamhaus, like the City in *Silva*, contended that it was never properly served with process in the suit and therefore not within the personal jurisdiction of the court, but nonetheless chose to file a Notice of Removal of the state case to federal district court. (A. 2). Similar to the City, Spamhaus obtained a copy of e360's complaint without proper service and chose to remove based on this document — this accounts for the glaring fact that Spamhaus' Notice of Removal attaches e360's original Complaint, and not the Amended Complaint, despite the fact that Spamhaus removed the case nearly a month after e360

filed its Amended Complaint.⁵ (A. 5-20; SA. 1-17). Finally, having removed the case but lacking proper service of process and personal jurisdiction, both Spamhaus and the City chose the same legitimate legal tactic, and refused to file a responsive pleading until service of process had been perfected.

Where *Silva* and the present case differ, however, is the response of the district court to plaintiffs' request for a default judgment. In *Silva*, the district court inquired into service of process and personal jurisdiction before making a decision on granting default judgment. *Silva*, 69 F.3d at 1377. Finding service of process and personal jurisdiction lacking, the district court refused to order a default judgment since the City was under no obligation to answer (and thus could not have defaulted) until it was properly served. *Id.* ("Here, the City had a legitimate basis for not filing a responsive pleading: it had not been served"). By contrast, in Spamhaus' case the district court never inquired into whether service had been effected upon Spamhaus before entering its default judgment, nor whether it had personal jurisdiction over Spamhaus, even though it was obvious that these were issues because Spamhaus was based in the United Kingdom. (A. 159-69). Furthermore, even if the district court had attempted to review whether service of process had been effected upon Spamhaus, the inquiry would have been futile because there was nothing in the district court's record to support an inference that service of process had been perfected.

⁵ This also demonstrates a strong probability that Spamhaus never received proper service (or, indeed, any service) of e360's Amended Complaint; if Spamhaus had received the Amended Complaint, it presumably would have been attached to the Notice of Removal.

As this Court held in *Silva*, absent a finding of proper service of process, a district court lacks the jurisdiction over the defendant necessary to require a responsive pleading, and thus lacks the authority to impose a default judgment. *Silva*, 69 F.3d at 1376-77. The district court failed to make that inquiry here, and further lacked any evidence in the record on which to base such a determination. The default judgment should therefore be vacated as void for lack of proper service or personal jurisdiction.

III. The Entry of Default Judgment Must Be Vacated Because the District Court Failed to Properly Apply the Traditional Test for Injunctive Relief and Federal Rule of Civil Procedure 65, and Entered an Injunction that Violates the First Amendment.

A. The District Court Failed to Apply the Traditional Four-Factor Test for Injunctive Relief and Rule 65, and Therefore Improperly Entered a Preliminary and Permanent Injunction.

e360 argues that the Illinois court properly considered the four-factor test prior to entering the Temporary Restraining Order. (Resp. Br. 21-22). This argument is completely unsupported by the district court record, and conveniently ignores the fact that the state court record was never before the district court. The district court therefore had no basis for entering an injunction based in any part on the propriety of the state court's TRO determination.

In addition to demonstrating a likelihood of success on the merits, a plaintiff seeking a permanent injunction must prove: (1) it has suffered irreparable injury; (2) any remedies available at law are inadequate to compensate for the injury; (3) when considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would

be served by the issuance of the permanent injunction. *Ebay Inc. v. Mercexchange, LLC*, 126 S. Ct. 1837, 1839 (2006). e360 contends that the state court's determination was sufficient to justify conversion of the Temporary Restraining Order into a preliminary and then permanent injunction. (Resp. Br. 21-26). But, there was no record of the state court's proceedings before the district court when either the preliminary or permanent injunction was entered, and the district court never considered these four factors.

In fact, when considering the preliminary injunction, the district court noted that in federal court a Temporary Restraining Order has a limited life of ten days. Nonetheless, without any state court record, the district court never bothered to consider why the state court had allowed a Temporary Restraining Order to remain in effect without a limited life, or whether that procedure was proper under Illinois law. (A. 162-163). The record demonstrates that the state court entered the TRO on July 20, 2006 (A. 21-23), but the hearing before the district court where the TRO was adopted as a preliminary injunction was on August 23, 2006. (A. 117). Thus, the district court adopted a TRO that had run more than three times the amount of time allowed under the Federal Rules without looking into the traditional four-factor test or determining whether the TRO was properly entered by the state circuit court in the first instance. e360 admits that the district court must exercise its discretion in entering injunctive relief by using the four-factor framework. (Resp. Br. 23). There is nothing in the record, either oral or written, that shows the district court actually considered the four-factor test prior to entering the preliminary injunction. The entry of

the preliminary injunction (and later, the permanent injunction) was therefore an abuse of the district court's discretion.

Furthermore, it is clear from the plain language of Fed. R. Civ. P. 65(b) that the district court abused its discretion in converting the TRO entered by the state court into a preliminary injunction without conducting a hearing. As this Court has held, injunctions that fail to adequately explain their reasons for issuance should be vacated, since “[a]n injunction so poorly buttressed by explanation flunks Fed. R. Civ. P. 65(d).” *EEOC v. Severn Trent Serv., Inc.*, 358 F.3d 438, 442, 446 (7th Cir. 2004). At the time the preliminary injunction was entered by the district court: (i) Spamhaus’ counsel had been permitted to withdraw by the district court and without objection by e360 (A. 159-66); (ii) Spamhaus had filed no responsive pleadings because it had not been properly served with process and was therefore not required to file an Answer under Rule 81(c); (iii) the district court had never found it had proper jurisdiction or that service had been properly effected upon Spamhaus; and (iv) the district court was without any record from the state court regarding the propriety of entering the Temporary Restraining Order. Indeed, mere moments before entering the Temporary Restraining Order, the district court asked, “What is this case about?” (A. 161). Despite the lack of any presentation of evidence, the district court then summarily entered a preliminary injunction without requiring e360 to post any security as required in Fed. R. Civ. P. 65(c). (A. 162-165). If the “specificity provisions of Rule 65(d) are no mere technical requirements,” *Atiyeh v. Capps*, 449 U.S. 1312, 1317 (1981), then the district

court abused its discretion by making no inquiry into and no findings regarding the rationale for imposing the preliminary injunction.

e360 contends that Spamhaus incorrectly asserts that the district court did not have evidence before it about any irreparable injury, inadequate remedy at law, balance of hardships, or public interest considerations. (Resp. Br. 24.) Spamhaus, however, stands by its assertion that e360's motion for permanent injunction (1) failed to cite any authority regarding the requirements for entry of an injunction, (2) failed to list the inquiry the district court should undertake, and (3) failed to allege any irreparable injury, inadequate remedies at law, why equitable relief is warranted after balancing the hardships of the plaintiff and defendant, and that public interest would not be disserved by the issuance of an injunction. (A. 118-23). e360 fails to cite any point in the record where it made any such showing to the district court.

e360 further argues that any issues regarding the injunction should have been brought before the district court. (Resp. Br. 28-29.) In fact, those issues were raised before the district court in Spamhaus' Motion to Vacate the Default Judgment and the Motion to Stay Enforcement of the Judgment that were filed on October 26, 2006. (A. 150-157). The district court's failure to consider these arguments and its summary dismissal of Spamhaus' motions are indeed properly before this Court today. This failure constitutes an abuse of the district court's discretion and grounds to reverse.

Finally, e360 argues that Spamhaus "quibbles with certain immaterial aspects of the terms of the injunction." (Resp. Br. 28). While it is unclear what

part of the injunction e360 deems “immaterial,” Spamhaus’ arguments against the injunction are based on traditional federal law, the Federal Rules of Civil Procedure, and most importantly, the Constitution of the United States. Spamhaus does not find these challenges to be “quibbles with certain immaterial aspects of the terms of the injunction.” For failing to follow the common law four-part test regarding injunctive relief and Rule 65, the district court’s injunction should be vacated.

B. The Permanent Injunction Entered by the District Court Violates the First Amendment.

1. Spamhaus’ opinion regarding spam is protected speech under the First Amendment.

e360 argues that Spamhaus’ SBL and ROKSO list are conduct, rather than speech, and thus not afforded protection under the First Amendment. (Resp. Br. 29-30). In this assertion, e360 again relies on information not properly before the Court. e360 attempts to argue that because Spamhaus sells the SBL and ROKSO list (a fact that has never been established and is false),⁶ its opinions somehow became conduct rather than speech. *Id.* However, the Supreme Court has held that dissemination of literature informing the public of discriminatory real estate practices was protected under the First Amendment, and the injunction prohibiting this dissemination was held to be an unconstitutional prior restraint. *Organization for a Better Austin v. Keefe*,

⁶ e360 cites to SA. 415-19 to argue that Spamhaus Project sells its lists. (Resp. Br. 29). However, those documents are not a part of the record on appeal. Furthermore, the documents are invoices from Spamhaus Technology Ltd, not Spamhaus Project. As counsel for e360 has been assured, Spamhaus Technology is a separate legal entity from the Spamhaus Project. Thus, this evidence does not prove that Spamhaus Project sells its lists.

402 U.S. 415, 417 (1971). As in *Keefe*, Spamhaus' dissemination of information and opinions informing the public of negative spamming practices constitutes protected speech.

Rather than address Spamhaus' First Amendment contentions, e360 instead attempts to challenge the accuracy of Spamhaus' decision to place e360 and Mr. Linhardt on these lists, and complains that Spamhaus should not enjoy First Amendment protections "when it conducts itself badly." (Resp. Br. 30.) These complaints have no basis in First Amendment jurisprudence; indeed, many cases involving First Amendment protections involve the expression of distasteful or "bad" ideas. *See Cohen v. California*, 403 U.S. 15 (1971) (overruling petitioner's conviction for disturbing the peace after finding that wearing a jacket with obscenity in a courthouse was protected speech); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992) (vacating conviction for burning cross in yard of an African-American family under ordinance prohibiting the display of a symbol that "arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender" because it constituted an impermissible content-based restriction).

The law is clear that opinions remain protected regardless whether others do not agree with it, and may not be subjected to a prior restraint so long as the means of communication are peaceful. *See Keefe*, 402 U.S. at 419 (overturning an injunction prohibiting leaflet distributors who were engaged "in making the public aware of practices they believed were wrong"); *Alexander v. United States*, 509 U.S. 544, 550 (1993) (a permanent injunction is a classic

prior restraint, even if it is imposed after a finding of liability). Indeed, the unpopular or bothersome nature of the content of the message to its recipients (or those that it identifies or mentions) does not remove the message from the reach of the First Amendment. *See Keefe*, 402 U.S. at 415. e360's response conveys that it does not agree with Spamhaus' message and believes the message. But, even bothersome or unpopular expressions may not be subjected to a prior restraint. Spamhaus' expression of opinions through its ROKSO and SBL lists is protected and can not be subject to the injunction.

2. The Injunction impermissibly compels speech.

e360 argues that requiring Spamhaus to publish a message expressing an opinion in the shape of a 1 inch by 1 inch square containing the assertion that e360 is not a "spammer," and was "erroneously listed on the website as" a "spammer" (A. 141) is "essentially a retraction." (Resp. Br. 32.) But, this is not merely a "retraction." A retraction would require removing information from the website and possibly saying that it was posted in error. In contrast, this injunction requires Spamhaus to place a message on its website affirmatively opining that e360 is not a "spammer" continuing into the future. Spamhaus wholeheartedly disagrees with that opinion and has a factual basis for its views. Forcing Spamhaus to express an opinion it categorically disagrees with violates the First Amendment, which embodies the principle that "each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Entm't Software Assoc. v. Blagojevich*, 404 F. Supp. 2d 1051, 1071 (N.D. Ill. 2005) (quoting *Turner Broad.*

Sys. v. FCC, 512 U.S. 622, 641 (1994)). Moreover, the opinion that is required would cover conduct by e360 *after* the acts at issue in the Complaint and essentially give e360 a “seal of approval” even if its future conduct constitutes “spamming” under any definition.

While e360 discusses the “commercial arena” (Resp. Br. 33), Spamhaus’ activity is not commercial speech because it does not propose a commercial transaction. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Nor is the information that the district court ordered Spamhaus to place on its website purely factual and uncontroversial — it is instead contrary to Spamhaus’ learned opinion that e360’s email policies, in Spamhaus’ view, constitute “spamming,” and touch upon the controversial topic of spam on the Internet today. Because there is no universally accepted definition of what constitutes “spamming,” whether or not someone is a “spammer” is necessarily a matter of opinion on which people may disagree without fear of sanctions. Further, there is no interest in preventing deception of consumers in this situation because Spamhaus does not sell its lists, nor do the lists advocate any commercial transaction or conduct. Instead, Spamhaus’ opinion is one of many available on the Internet regarding which email IP addresses and companies engage in the improper and often illegal transmission of unsolicited bulk email. It neither compels nor encourages a commercial transaction, but rather offers its views as to whether ISPs and individual email users should accept or reject email from these addresses so as to avoid unsolicited commercial materials. In this sense, Spamhaus’ ROKSO and SBL

lists are akin to the Fodors Restaurant Guide: the ROKSO and SBL list do not advocate or entice consumers into a particular commercial transaction but rather state an opinion based on Spamhaus' own criteria and research as to what email messages it considers worth accepting or rejecting. Just as this Court would never order Fodors to state that a restaurant Fodors' believed unappealing was actually "fabulous," this Court should not order Spamhaus to publish on its website an opinion that Spamhaus strongly disagrees with — namely, that e360 is not a "spammer."

In sum, the injunction impermissibly compels the expression of views in a manner that contravenes basic First Amendment principles.

3. The Injunction is Impermissibly Broad.

e360 suggests that the issue of the injunction's impermissible breadth is not "ripe as the language of the retraction message has not yet been determined." (Resp. Br. 33.) Spamhaus, however, challenges the injunction as a whole, and not merely the compelled message that e360 is not a spammer. Spamhaus contends that the language of the injunction is overbroad because it fails to specify which businesses owned or controlled by e360 are covered under the injunction, or designate who constitutes a "customer or supplier" of e360. (Br. 41-42, 47.) Spamhaus also contends that the injunction's legal standard of "clear and convincing" evidence to prove emails were actually spam is inconsistent with federal law, making the injunction confusing and unclear. (Br. 41.) Finally, Spamhaus believes that the lack of clarity in the permanent injunction threatens to place the district court in the role of perpetual censor,

constantly being called upon to determine what speech is allowed and what is prohibited. (Br. 47.) e360 simply fails to address these issues.

IV. The District Court Erred in Denying Spamhaus' Federal Rule of Civil Procedure 60(b) Motion to Vacate the Default Judgment.

e360 focuses on the district court's denial of Spamhaus' Rule 60(b)(1) motion, arguing that it does not protect Spamhaus' intentional choices. (Resp. Br. 35-37). Spamhaus, however, did not raise this Rule 60(b)(1) argument in its appeal. (Br. 48-52). Instead, Spamhaus argues that the district court abused its discretion by denying the Rule 60(b) motion without granting Spamhaus an opportunity to fully brief the motion or present extrinsic evidence regarding the service of process and personal-jurisdiction related defenses. *Id.* at 48. e360 misconstrues this argument and asserts that Spamhaus had many opportunities to contest jurisdiction and service of process. (Resp. Br. 36.) However, e360 does not dispute that the district court summarily refused to vacate the default judgment and failed to provide Spamhaus with any opportunity to present evidence.

While e360 argues that additional briefing would not have served any useful purpose, (Resp. Br. 37), "a defendant is entitled to one fair opportunity to litigate issues of fact and law essential to a court's exercise of personal jurisdiction over that defendant," and inherent in this opportunity is the right to present evidence on fundamental jurisdictional questions. *Bd. of Trustees v. Elite Erectors, Inc.*, 64 F. Supp. 2d 839, 843, 845 (S.D. Ind. 1999). The question is not whether additional briefing would have had any "discernable effect," but rather whether the district court abused its discretion by not giving Spamhaus

any opportunity to present evidence on these jurisdictional issues. Had the district court properly allowed Spamhaus to present evidence regarding its jurisdiction related defenses, it would have become clear that the district court erred in entering the default judgment and permanent injunction in this case, as Spamhaus has indeed demonstrated in its appeal.

e360 further asserts that the district court had no obligation to affirmatively determine whether service of process was proper or whether it had jurisdiction over Spamhaus because Spamhaus submitted itself to the court's jurisdiction. (Resp. Br. 38.) But, Spamhaus never waived or forfeited its objections to service of process and personal jurisdiction. Furthermore, when Spamhaus attempted to "shoulder the burden of proof" in contesting jurisdiction, the district court simply denied the motion without any proper consideration of the crucial issues raised. This refusal to permit Spamhaus an opportunity to present extrinsic evidence on these issues was an abuse of discretion, and grounds to reverse.

In addition, e360 argues that Rule 60(b)(6) also provided Spamhaus with no relief, claiming that its Amended Complaint adequately stated a claim. *Id.* However, e360 fails to confront Spamhaus' argument that the Communications Decency Act, 47 U.S.C. § 230 *et seq.* (1996), and the Controlling the Assault of Non-Solicited Pornography and Marketings (CAN-SPAM) Act of 2003, 15 U.S.C. § 7701-7713 (2003), immunize it from liability related to the blocking of selected email transmissions. (Br. 34-35.)

Finally, e360 argues that a hearing on damages was unnecessary. (Resp. Br. 40.) This argument by e360, however, ignores the issues raised by Spamhaus, and e360 failed to cite any precedent in support of its bald assertions. The record remains unclear whether the district court actually considered the “evidence” submitted by e360 prior to entering the damages amount. Damages on a default judgment that are not liquidated, as here, may not be entered without an evidentiary hearing. *Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983). The damages claimed by e360 were based entirely on the legally insufficient affidavit of David Linhardt, which consisted entirely of unsupported opinion, speculation, unqualified expert opinion, and factual assertions not supported by any documentary evidence. *See, e.g., Eden v. Klaas*, 165 Neb. 323, 328 (Neb. 1957) (statements in affidavits about opinion, belief, or conclusions of law are to be given no effect); *Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 736 (7th Cir. 2001) (affidavits must be based on personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is a competent witness on those matters).

e360’s only response to these issues raised by Spamhaus is one paragraph that conclusorily asserts that the damages were supported by Mr. Linhardt’s affidavit and that Spamhaus “cryptically concludes that this was not good enough although it is entirely unclear what additional information Spamhaus would conclude is sufficient.” (Resp. Br. 40.) Spamhaus did not “cryptically conclude” anything related to damages, but rather carefully discussed the

requirements for an affidavit under the Federal Rules. Just like the affidavit used by e360 to attempt to establish its damages award, e360's argument here is conclusory and not supported by any evidence or precedent.

CONCLUSION

For the reasons set forth above, Defendant-Appellant The Spamhaus Project respectfully requests this court reverse the district court's default judgment order in favor of Plaintiff-Appellee e360 Insight, LLC. Alternatively, Defendant-Appellant The Spamhaus Project respectfully requests this court reverse the district court's denial of Defendant-Appellant's Motion to Vacate the Default Judgment and For Leave to File a Memorandum In Support, and remand the Motion to the district court for briefing and proceedings regarding whether service of process was effected and whether the district court has personal jurisdiction over Defendant-Appellant The Spamhaus Project.

DATED: This 6th day of April, 2007.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS**

1. This reply brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,676 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)iii.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Bookman Old Style 12 font.

Matthew M. Neumeier

Dated: April 6, 2007

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)

The undersigned, one of the attorneys for Defendant-Appellant, hereby certifies that, pursuant to Circuit Rule 31(e), I have filed electronically versions of the reply brief, and I hereby verify that the same is virus free.

Matthew M. Neumeier

Dated: April 6, 2007

CERTIFICATE OF SERVICE

I, Matthew M. Neumeier, an attorney, hereby certify that I served: (1) two copies of the foregoing Reply Brief of Defendant-Appellant The Spamhaus Project; and (2) a CD containing the Reply Brief of Defendant-Appellant The Spamhaus Project in a searchable PDF format upon:

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