

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

e360 INSIGHT, LLC, an Illinois Limited	)	
Liability Company, and DAVID LINHARDT,	)	
an individual,	)	06 CV 3958
	)	
Plaintiffs,	)	Judge Kocoras
	)	Magistrate Judge Brown
v.	)	
	)	
THE SPAMHAUS PROJECT, a company	)	
limited by guarantee and organized under the	)	
laws of England, a/k/a THE SPAMHAUS	)	
PROJECT, LTD.,	)	
	)	
Defendant.	)	

**DEFENDANT’S MOTION TO VACATE DEFAULT JUDGMENT AND FOR LEAVE TO  
FILE A MEMORANDUM IN SUPPORT**

NOW COMES the Defendant The Spamhaus Project, by and through its attorneys Jenner & Block LLP, and in support of this Motion<sup>1</sup> to Vacate the Default entered on August 23, 2006 and the Default Judgment entered on September 13, 2006, states as follows:

1. On September 13, 2006, this Court entered an order for default judgment in favor of Plaintiff and against Defendant, including a permanent injunction.
2. Pursuant to Federal Rules of Appellate Procedure 3 and 4(a)(3), the Notice of Appeal was due on October 13, 2006. Defendant retained Jenner & Block, LLP on that same day. The Notice of Appeal was timely filed to preserve any appeal relating to the entry of the default judgment. *See e.g., Sharma v. Sprint Commc’n Co.*, No. 97-1513, 1997 U.S. App.

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<sup>1</sup> Defendant expressly objects to this Court’s jurisdiction over The Spamhaus Project because Defendant is based solely in the United Kingdom and does not conduct or transact business in Illinois. Moreover, Defendant reserves its arguments based on Plaintiff’s failure to properly effect service of process. These objections are made notwithstanding Defendant’s filing of this Motion, and had previously been raised in the Notice of Removal and Answer to the Complaint that was withdrawn with leave of this Court.

LEXIS 30148, at \*2 (7th Cir. Oct. 29, 1997) (holding that a motion to vacate does not toll the time for filing a notice of appeal); *Hope v. United States*, 43 F.3d 1140, 1143 (7th Cir. 1994) (holding that Rule 60(b) motions do not toll the time for filing a notice of appeal).

3. This Court retains jurisdiction and the authority to grant this Motion to Vacate notwithstanding the pending appeal. *See e.g., Brown v. United States*, 976 F.2d 1104, 1110-11 (7th Cir. 1992) (holding that “parties may file motions under Rule 60(b) in the district court while an appeal is pending”). In *Brown*, the Seventh Circuit directed that the district court “review such [60(b)] motions promptly, and either deny them or, if the court is inclined to grant relief, to so indicate so that we may order a speedy remand.” *Id.* *Brown* has been widely recognized and followed in the Northern District of Illinois. *See e.g., Whitehead v. Gateway Chevrolet*, No. 03 C 5684, 2004 U.S. Dist. LEXIS 11979, at \*1 (N.D. Ill. June 28, 1999) (Conlon, J.); *United States v. Antonelli*, No. 97 CR 194, 1999 U.S. Dist. LEXIS 4115, at \*1 (N.D. Ill. March 22, 1999) (Gottschall, J.); *Stephan v. Rocky Mountain Chocolate Factory, Inc.*, No. 96 C 4587, 1997 U.S. Dist. LEXIS 2655, at \*1 (N.D.Ill. March 7, 1997) (Shadur, J).

4. The appeal in the Seventh Circuit is still at an early stage of the proceedings, with the Appellant’s brief being due on November 27, 2006. Thus, the appeal will not be fully briefed until at least January 2007. However, if this Court decides to vacate the default judgment, the issue currently on appeal becomes moot and need not be decided by the Seventh Circuit. *See e.g., Brown*, 976 F.2d at 1110-11.

5. Jenner & Block LLP has been retained for less than two weeks. Although the undersigned attorneys have not had sufficient time to complete their factual investigation and analysis of all the issues raised by this Court’s rulings to date, at a minimum, we believe that Federal Rules of Civil Procedure 60(b)(1), (4), and (6) provide adequate grounds to vacate the

default judgment. Furthermore, a complete review of this Court's rulings to date has been restricted in part because the transcripts from this Court's proceedings are not yet available, even though they have been ordered.

6. Based on our current knowledge, we believe that Federal Rule of Civil Procedure 60(b) provides three pertinent grounds to vacate the default judgment. First, under Rule 60(b)(1), the default judgment may be vacated because of excusable neglect, inadvertence, and/or mistake because Defendant's conduct prior to the default judgment was not willful, but rather was based on confusion regarding United States' court procedures, exasperated by the fact that Defendant is a United Kingdom corporation. Second, under Rule 60(b)(4), the default judgment may be vacated because this Court lacks personal jurisdiction over Defendant and Plaintiff failed to effect proper service of process. The jurisdictional statements alleged by Plaintiff in the Complaint are insufficient to demonstrate a prima facie showing of general personal jurisdiction based on "doing business" in Illinois. Finally, under Rule 60(b)(6), the default judgment may be vacated for any other reason justifying relief, and vacating the default judgment in this case would be manifestly in the interest of justice.

7. For example, for purposes of Rule 60(b)(6), there are multiple grounds for vacating the default judgment. First, Plaintiff's Complaint facially fails to allege facts sufficient to support the elements of the causes of action, because it is based primarily on conclusory statements of opinion and law, not facts. Furthermore, the damages were awarded without a hearing, findings of fact, or a sufficient evidentiary basis for the award. In particular, the affidavit submitted by Plaintiff in support of the damages request is invalid on its face, because it consists merely of speculation, opinions, legal conclusions and purported expert testimony without any demonstration of expertise, let alone adherence to *Daubert* standards. The

magnitude of the award of damages, including damages for injury to reputation, is based solely on unsupported and inadmissible affidavit testimony of the party in interest, and thus suggests a clear deviation from accepted principles of common law and federal procedure.

8. Moreover, the terms and scope of the permanent injunction do not fully comply with the requirements of Federal Rule of Civil Procedure 65, in that it is vague, overbroad, lacks specificity and adopts an evidentiary standard that is not consistent with federal law. Furthermore, an award of injunctive relief was not warranted in this case because Plaintiff failed to demonstrate irreparable harm or the lack of an adequate remedy at law, and no findings support such relief. The injunctive relief awarded in the default judgment thus applies an improper legal standard and improperly shifts the burden of proof onto Defendant.

9. In addition, the permanent injunction prohibits Defendant from expressing its opinion as to what conduct constitutes “spamming,” and whether companies should conduct or transact any business whatsoever with Plaintiff. Thus, if enforced, the injunction would constitute an improper prior restraint on Defendant’s freedom of speech under the First Amendment. Likewise, the portion of the injunctive order requiring Defendant to publish, on its own website, an opinion that Plaintiff is not a “spammer” also violates Defendant’s rights under the Free Speech Clause.

10. Most importantly, the Defendant believes it has meritorious defenses that in the interest of justice require a trial on the merits, should this Court conclude that it possesses personal jurisdiction. *See Passarella v. Hilton Int’l Co.*, 810 F.2d 674, 675 (7th Cir. 1987) (recognizing that there is a “well-established policy favoring a trial on the merits over a default judgment.” (quoting *C.K.S. Eng’r, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984))).

11. In light of the limited time that counsel has been involved in this case and the fact that counsel has not had access to the transcripts from the prior court proceedings, the Defendant respectfully requests that this Court grant the Defendant additional time to file its Memorandum in Support of this Motion. Defendant therefore respectfully requests that the Court set a briefing schedule on the Motion to Vacate.

WHEREFORE, Defendant The Spamhaus Project respectfully requests that this Court grant leave to file its Memorandum in Support of this Motion and enter an order vacating the default entered on August 23, 2006 and the default judgment entered on September 13, 2006.

Respectfully submitted,

THE SPAMHAUS PROJECT

Dated: October 26, 2006

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