No. 20-15717

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION AND
STATE OF NEVADA,
Plaintiffs-Appellees,

v.

SHAD COTTELLI, FKA SHAD APPLEGATE,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Nevada
No. 2:18-cv-00035-APG-NJK
Hon. Andrew P. Gordon

BRIEF OF THE FEDERAL TRADE COMMISSION AND THE STATE OF NEVADA

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

MARIEL GOETZ
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2763
mgoetz@ftc.gov

Of Counsel:
MEGAN COX
SANGJOON HAN
Attorneys

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

JURISDICTION

The district court had jurisdiction of the federal claims under 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a) and 53(b), and of the state claims under 28 U.S.C. § 1367. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

Shad Cottelli operated a website that published intimate pictures and videos of victims without their consent, and then charged them hundreds of dollars to remove the offensive content. The Federal Trade Commission and State of Nevada sued Cottelli for violating the FTC Act and Nevada's deceptive practices statute. After extensive efforts to locate and personally serve Cottelli proved unsuccessful, the district court authorized service by email, using four email accounts Cottelli had recently used. Cottelli never responded, and the district court entered default judgment, ordering him to pay $2 million to compensate the victims of his scheme.

Nearly two years later, Cottelli appeared and asked the district court to set aside the judgment, claiming he had not received the service emails and had only learned of the judgment six months earlier. The district court refused, finding that email service satisfied due process and that Cottelli actually knew about the FTC's investigation and lawsuit all along but failed to respond.

QUESTIONS PRESENTED

1. Did the district court err in refusing to set aside the judgment as void for lack of personal jurisdiction under Federal Rule of Civil Procedure 60(b)(4)?

2. Did the district court err in refusing to set aside the judgment under Rule 60(b)(6), which allows a district court to set aside a judgment "for any other reason that justifies relief" if the motion is made "within a reasonable time"?

STATEMENT OF THE CASE

A. Cottelli's Nonconsensual Pornography Website MyEx.com

For years, Cottelli and his company EMP Media, Inc. ("EMP") operated a publicly accessible website called MyEx.com. The site solicited and published intimate pictures and videos of victims, together with their personal information – including full name, age, address, employer, phone number, social media account information, and email address. The images typically showed private body parts or otherwise depicted sexual conduct, and the victims did not consent to the publication. ER 352 ¶ 83, ER 373 ¶ 124 (Thomas Decl.). MyEx.com then extorted victims by requiring them to pay hundreds of dollars to have their pictures, videos, and information removed from the site. ER 359-72 ¶¶ 117-18 (Thomas Decl.).

MyEx.com was a nonconsensual pornography (or "revenge porn") site that provided a means for former intimate partners of the victims to harm them. The very name of the site indicates the nature of the business, and any doubt was removed by its advertising, with the tagline "MYEX GET REVENGE!" and an

offer to publicly post "Naked Pics of Your Ex." ER 343-344 ¶ 55, ER 354 ¶ 92 (Thomas Decl.); SER 17-20 (Attach. E); SER 63-64 (Attach. HH). To ensure maximum harm, the site allowed the posting of content only if the user provided the first and last name of the person pictured, their gender, a title for the post, and a narrative about the images, which it described as "The Dirty Details." ER 343-44 ¶ 55 (Thomas Decl.); SER 17-20 (Attach. E). The site provided a selection of "tags" and required the submitter to choose at least one to display with each post, including "Bad In Bed," "Cheater," "Drug Addict," "Ex Con," "Gold Digger," "Has Jungle Fever," "Liar," "Physically Abusive," and "Slut." ER 343-44 ¶ 55 (Thomas Decl.); SER 17-20 (Attach. E). Before submitting, users were told to check a box if the photo was nude, and to ensure that the face of the victim "must be visible in at least one picture." ER 347 ¶ 67 (Thomas Decl.); ER 1153-55 (Attach. N).

The site's publicly available landing page published intimate images of victims located directly next to their personal information, which could include name, date of birth, city and state, and links to their email and social media accounts. When a visitor clicked on an entry, he or she would be brought to a more detailed MyEx.com page featuring the full entry. A site-specific search function – advertised as "Find Someone You Know" – enabled visitors to search for images by name, date of birth, gender, city, and state, among other options. ER 347-49 ¶¶ 68-72 (Thomas Decl.); ER 1156-63 (Attachs. T-U); SER 36-58 (Attachs. O-S).

MyEx.com also added its own content to the already invasive images and personal information, such as view counts and interactive star ratings, and assigned a "MyEx ID number" to each person portrayed in posted images. ER 346 ¶¶ 63-64, ER 352 ¶ 82 (Thomas Decl.); SER 26-27 (Attach. K).

Cottelli knew that the individuals whose images and information were posted on MyEx.com did not consent to these postings. Many victims explicitly told the site through email that this material was posted without their consent. Cottelli also was informed that some photos on his site were images of children under the age of consent. ER 339 ¶ 41, ER 340 ¶ 46 (Thomas Decl.); ER 1140-41 (Attach. B).

Cottelli profited through significant fees – typically $399 or $499 – charged to victims to remove their images and information from MyEx.com. ER 359-72 ¶¶ 117-18 (Thomas Decl.); SER 128-71 (Attach. UU). He also made money through advertising on the site. ER 357-58 ¶¶ 108-15 (Thomas Decl.); SER 122-27 (Attachs. PP, RR, TT). Bank records show that Cottelli and EMP took in millions of dollars while MyEx.com was in operation. ER 1187-89 ¶¶ 3-6 (Van Wazer Decl.).

Cottelli, who went by the surname Applegate at the time, led and participated in all of these activities. He registered the domain MyEx.com under his own name, listing himself as the registrant, administrative contact, and technical contact. ER 334 ¶ 15, ER 337-41 ¶¶ 29-50, ER 354-55 ¶¶ 94-100

(Thomas Decl.); ER 1095 (Attach. A); ER 1126-52 (Attach. B); ER 1171-74 (Attach. II); ER 1200-01 (Investigational Hearing Transcript) ("Hearing Tr."); SER 88-96 (Attach. JJ). He provided his own gmail address, shadapplegate@gmail.com, as the contact email for GoDaddy, the internet registrar that provided him with the MyEx.com domain name. ER 64 ¶ 16 (Thomas Decl.); ER 137 (Attach. H). Cottelli also founded and directed the incorporation of EMP, and opened EMP's bank accounts. ER 1196, 1198, 1200-01 (Hearing Tr.); ER 355-56 ¶¶ 99-103 (Thomas Decl.); SER 88-96 (Attach. JJ). He served as EMP's president (October 2012 - March 2013), secretary (October 2013 - July 2015), treasurer (May 2010 - January 2014), and director (October 2012 - March 2014). ER 355 ¶ 98 (Thomas Decl.); SER 65-87 (Attach. II).

Cottelli launched MyEx.com in November 2011 and ran it thereafter,[1] serving as the site's main point of contact with domain name registrars (such as GoDaddy), the banks used for processing payments, and other business partners. ER 334 ¶ 15, ER 337-41 ¶¶ 29-50, ER 355 ¶ 100 (Thomas Decl.); ER 1126-52 (Attach. B); SER 88-96 (Attach. JJ).

[1] EMP was listed as the site's operator from at least August 2012 through January 2013. ER 342-43 ¶¶ 53-54 (Thomas Decl.).

B. Law Enforcement Inquiries Into MyEx.com And Cottelli's Changes To The Site's Registration

In May 2013, GoDaddy told Cottelli that an investigator from an internet-crimes-against-children taskforce was trying to get in touch with the operators of MyEx.com regarding reports of child exploitation. ER 339 ¶ 41 (Thomas Decl.); ER 1140 (Attach. B). GoDaddy also told Cottelli that another police department had received reports that the site hosted underage content. ER 340 ¶ 46; ER 1141.

Shortly thereafter, Cottelli changed the nominal registration of the website to different persons and entities. ER 335 ¶¶ 19-20, ER 341 ¶ 48 (Thomas Decl.); ER 1071-72, 1087 (Attach. A); ER 1127 (Attach. B). Cottelli first changed the contact name with GoDaddy to "Eun Kim" and changed the contact address to one in the Netherlands. ER 335 ¶ 20, ER 339 ¶ 40. But he listed the contact email for "Eun Kim" as shad@myex.com. ER 339 ¶ 40. When GoDaddy inquired about these changes, asking him for documentation for the new entity, Cottelli replied that it was "not a company" but rather a "made up name for the address [and] phone number in the Netherlands," and commenced an expletive-laden email exchange in which he demanded GoDaddy transfer the domain as he directed. ER 338 ¶ 38 ("The fucking domain is in my godaddy account. I own it . . ."), ER 339 ¶ 39 ("Change the god damn email.").

Cottelli then moved MyEx.com to a different registrar, EuroDNS S.A., providing it with the contact name "kim Eun" and listing a fictitious business

name, Web Solutions B.V., as the purported site operator. As the contact address, Cottelli listed the same address in the Netherlands he had given to GoDaddy for the "made up" entity. ER 338-40 ¶¶ 38, 40, 42; ER 347 ¶ 66; ER 349-50 ¶ 73; ER 1128, 1131-34, 1138 (Attach. B); ER 1164-66 (Attach. V); SER 28-35 (Attach. M).

In July 2015, Cottelli legally changed his surname from Applegate to Cottelli, later updating his GoDaddy contact email from shadapplegate@gmail.com to shadcottelli@gmail.com. ER 341 ¶ 49, ER 356-57 ¶¶ 105-06; ER 1126-52 (Attach. B); SER 97-121 (Attach. OO). Cottelli continued operating the site thereafter under various names.

C. The FTC and Nevada Enforcement Suit

In January 2018, the FTC and Nevada filed their complaint to stop the practice of posting sexually explicit images and personal information on MyEx.com without the consent of the victims depicted in the images. ER 258-80 (Compl.). The complaint alleges that Cottelli, EMP, and others violated Section 5 of the FTC Act, which bars unfair or deceptive practices in or affecting commerce, and similar prohibitions in Nevada law. *See* 15 U.S.C. § 45(a); Ch. 598 of the Nevada Revised Statutes. The day the complaint was filed, the site was taken down. ER 353 ¶ 90.

The complaint followed an extensive investigation into MyEx.com and its owners and operators. The FTC obtained records and information from domain

name registrars, banks, and other third parties, as well as documents, information, and testimony from Aniello "Neil" Infante, a former president of EMP who was Cottelli's business partner. ER 332 ¶¶ 4-6, ER 354-55 ¶¶ 95-97 (Thomas Decl.); ER 1196 (Hearing Tr.). All this information showed that Cottelli was the driving force behind the MyEx.com operation.[2]

D. The Fruitless International Search For Cottelli

The FTC repeatedly tried to locate Cottelli both before and after filing the complaint, but he evaded them throughout the search.

The FTC first tried to find Cottelli during the investigation, to serve him with a civil investigative demand ("CID") for the production of documents and information. They identified his last known address in the United States – on West Flamingo Road in Las Vegas, Nevada – and attempted to serve him there, but it turned out to be a commercial mail receiving agency. ER 63-64 ¶¶ 9, 11-13 (Thomas Decl.). The agency signed for delivery of the CID, but Cottelli never responded. ER 63 ¶ 12.

The FTC then hired an investigator who conducted a comprehensive search and identified two other Nevada addresses associated with Cottelli. ER 178-79

[2] Others assisted Cottelli and participated in the unlawful conduct, and were named as co-defendants, including Infante, who immediately settled. *See* ER 260-62 ¶¶ 8-11 (Compl.); ER 26-41 (Joint Stipulation For Permanent Injunction And Monetary Judgment As To Defendant Aniello Infante); SER 1-16 (Order Granting Joint Stipulation) (DE 9).

¶¶ 5-10 (Hicks Decl.). The investigator attempted to serve the CID at both addresses, but was told at each that Cottelli did not live there. *Id.*

Infante then testified at an investigational hearing that Cottelli routinely travels internationally, often to South Africa and the Philippines. ER 186, 188-90 (Hearing Tr.); *see also* ER 192 ¶ 7 (Infante Decl.). Using that information, FTC investigators discovered substantial connections between Cottelli and South Africa.

The FTC retained a private law firm in South Africa to investigate further, and identified a possible residential address for Cottelli in Cape Town. But when an investigator visited that address, two caretakers informed him that Cottelli was currently "overseas." ER 221-23 ¶¶ 4-9, 12 (DePaul Decl.). The South African Department of Home Affairs later confirmed that Cottelli had left South Africa in August 2016 for London. ER 223-24 ¶ 14. The FTC then requested assistance from U.K. authorities, who were unable to provide any additional information. ER 224 ¶ 16.

After filing the complaint, Plaintiffs attempted to reach Cottelli at six different phone numbers, and hired a process server to attempt service at Cottelli's last known address in the U.S., in Henderson, Nevada. The process server was able to serve a man at that address who identified himself as Cottelli's father and co-resident. ER 234-36 (Nielsen Aff.). Later, the owner of the Henderson home – EMP's former attorney – emailed FTC staff to say that Cottelli did not live there

and that he was not authorized to accept service on Cottelli's (or EMP's) behalf. ER 237-39 (email from J. Fisher to M. Cox and A. Lefrak).

E. The District Court's Authorization Of Service By Email

Unable to locate Cottelli despite all these efforts, the FTC sought the district court's permission to serve the complaint on him by email. Federal Rule of Civil Procedure 4(f) permits alternative service on a person within a foreign country by any means ordered by the court and not prohibited by international agreement. Fed. R. Civ. P. 4 (f)(3). The FTC asked the court for allowance to serve Cottelli using four known email accounts he had used within the past year to communicate with Infante, his lawyer, and others. The FTC provided the district court with examples of these communications. *See* ER 42-59 (Motion for Alternative Service) (describing, in January 2018 motion, emails Cottelli sent or received through the four accounts in January, February, June, August, and October 2017); ER 193-94 ¶¶ 10, 14-19 (Infante Decl.); ER 195-96 (Attach. A); ER 204-19 (Attachs. E-J). The recent emails included a revealing message sent on October 20, 2017 – just three months earlier– in which Cottelli wrote Infante about possible defenses to the case, telling him, "There's no money trail" and "All website owners are completely protected against 3rd party content on their websites." ER 194 ¶ 17 (Infante Decl.); ER 211-13 (Attach. H). The emails were supported by the sworn declaration of Infante, who testified, based on his personal knowledge, that they were true and correct copies of communications to or from Cottelli. ER 192.

The district court allowed email service through the four accounts. ER 1-6 (Order Granting Alternative Service). The court acknowledged the FTC's extensive efforts to locate Cottelli within the U.S. and abroad, and Cottelli's pattern of evasive conduct. *See id.* at 2-6. These facts, the court found, "[were] indicative of a defendant who is actively evading process." *Id.* at 3. It found that email service was especially appropriate because the claims at issue arose from Cottelli's "engagement in an Internet-business" and because Cottelli "heavily relies on emails as a means of communicating and conducting his business" – including as recently as late 2017, when he communicated via email with Infante. *Id.* at 4-5. In these circumstances, the court determined, service by email was proper and satisfied due process. *Id.* at 2-6.

On February 2, 2018, the FTC emailed the summons and complaint to the four specified addresses: shadapplegate@gmail.com, shadcottelli@gmail.com, eroticmp@gmail.com, and enzovalentino@protonmail.com. ER 252-55 (Certificate of Service). It received a bounce-back error message from the first three emails, but no bounce-back from the fourth email, indicating that it was delivered successfully.[3] ER 254-55 ¶¶ 2-5 (Smith Decl.). The account that sent no

[3] Notably, the FTC had received no bounce-back messages when it emailed two of the other three addresses in September 2017, indicating that Cottelli likely closed those accounts in the intervening months to evade service. *See* ER 243 ¶ 4 (Davis Decl.) (no bounce-back from shadapplegate@gmail.com), ¶ 5 (no bounce-back from shadcottelli@gmail.com).

bounce-back was the same one that Cottelli had used for his most recent email to Infante in October 2017, further indicating that it was Cottelli's current account. *See* ER 194 ¶ 17 (Infante Decl.); ER 211-13 (Attach. H).

F. Cottelli's Failure To Respond And The Resulting Default Judgment

Cottelli had until May 3, 2018, to answer or otherwise respond to the complaint, but failed to do so. On May 11, 2018, the clerk entered defaults against both EMP and Cottelli, and the FTC and Nevada asked the court to enter default judgments shortly thereafter. ER 304-28 (Mot. for Default Judgment). The motion set forth supporting evidence and explained how the seven factors from *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986), weighed heavily in favor of granting default judgment. ER 308-23. The FTC and Nevada asked for a permanent injunction and equitable monetary relief of $2,022,930, a "reasonably estimated floor to the total consumer injury" caused by MyEx.com.[4] ER 322-26. They served the motion on Cottelli by sending it to the four email addresses previously used for serving the complaint and summons. ER 328.

[4] This amount represents what would have been paid in takedown fees by the 5,070 consumers whose photos and information were posted on MyEx.com during the period in which it charged takedown fees, using the conservative amount of $399 per consumer (despite evidence that many consumers paid substantially more). *See* ER 325-26. It did not include amounts the site earned from advertising. *See id.*

On June 15, 2018, the district court granted the motion, finding that the complaint stated claims upon which relief could be granted, that jurisdiction and venue were proper, and that the clerk properly entered default. ER 7-17 (Order Granting Motion For Default Judgment And Final Order For Permanent Injunction And Other Relief) ("Final Order"). The court permanently enjoined Cottelli and EMP from disseminating intimate images without consent, transmitting or benefiting from others' personal information or intimate images without consent, charging consumers takedown fees, and operating nonconsensual pornography websites, among other restrictions. ER 10-17. The court ordered Cottelli and EMP jointly and severally to pay $2,022,930 as equitable monetary relief. ER 12.

G. Cottelli's Belated Motion To Set Aside The Default Judgment

Twenty-one months later, on March 13, 2020, Cottelli appeared through counsel and asked the district court to set aside the default judgment under Federal Rule of Civil Procedure 60. SER 172-86 (Mot. To Set Aside Default Judgment) ("Rule 60 Mot.") (DE 33). Cottelli claimed that he had "never received any email notifications from the FTC of this action" and that he learned of the default judgment only in September 2019, when his former lawyer told him about it. SER 172-73, 180; ER 1203 ¶¶ 2-3, ER 1207-08 ¶¶ 28-30 (Cotelli Decl.). Cottelli did not explain why he had waited for six months after allegedly learning of the default judgment to file his motion.

The district court denied Cottelli's motion to set aside the judgment. ER 19-22 (Order Denying Mot. To Set Aside Default) ("Order Denying Relief"). First, the court found that Cottelli actually "knew about the investigation and impending lawsuit" before the complaint was filed, citing emails from that time period between Cottelli and Infante discussing potential defenses. ER 21 (citing Infante Decl. ¶ 17 (ER 194) and Attach. H (ER 211-13)). Even accepting Cottelli's claim that he learned of the default judgment in September 2019, "he waited at least another six months before moving to set it aside in March 2020." ER 21. Especially given "Cottelli's prior knowledge of the FTC's investigation and impending lawsuit," the court found that his delay "was not reasonable." *Id.*

Second, the court determined that the FTC would be "significantly prejudiced" if the court set aside the judgment. ER 22. After judgment was entered, the FTC had destroyed "evidence it would need at trial" in order to "protect the privacy of the revenge porn victims." *Id.* The FTC thus would be "at a severe disadvantage" if the judgment were set aside and the case reopened at this late date. *Id.*

Third, the court rejected Cottelli's argument that the judgment was void for inadequate service of process. *See* ER 20-21. It reiterated that alternative service on Cottelli by email was proper under Rule 4(f) and satisfied due process. ER 21. The court reviewed the "great lengths" the FTC went to in trying to contact Cottelli, including hiring investigators in Nevada, South Africa, and the United

Kingdom, and tracking him "through various email accounts he had used." *Id.* The court emphasized that "Cottelli is an elusive, globe-trotting person, which both made it difficult to find and serve him with process and would make it difficult to conduct discovery and a trial." ER 22. Ordering service through "several email addresses that he had used in the recent past" was reasonably calculated to inform Cottelli of the lawsuit and was well within "the sound discretion of the district court." ER 21.

The court acknowledged that "entry of default judgment is a drastic step," but concluded that "the unique circumstances of this case make it appropriate to keep in place the default judgment." ER 21. It denied Cottelli's motion. *Id.*

Cottelli now appeals from that order.

SUMMARY OF ARGUMENT

The district court properly declined to set aside the default judgment. The judgment was not void for lack of personal jurisdiction under Rule 60(b)(4) because Cottelli was properly served by email. The Federal Rules of Civil Procedure allow service by any non-prohibited means, and this Court has expressly approved service by email so long as it is reasonably calculated, under all the circumstances, to apprise the party of the action.

Email service on Cottelli was proper and comported with principles of due process. He relied heavily on email to run his internet-based businesses (including MyEx.com), did not maintain a physical office, and had moved abroad leaving no

forwarding address. And compelling documentary and testimonial evidence shows the Cottelli knew of the lawsuit. His business partner testified that he told Cottelli about the case directly and that he communicated with Cottelli through three of the email addresses used for service. Emails obtained by the FTC corroborated that testimony. And the FTC received no bounce-back error message from one of the email addresses used for service, indicating that the message went through.

Cottelli did not show good cause to set aside the judgment under Rule 60 (b)(6), which gives the district court discretion to set aside a judgment "for any other reason that justifies relief" if a motion is made "within a reasonable time." The district court properly found that the FTC would be prejudiced if the case were reopened, and that finding is itself sufficient to preserve the judgment. In reliance on the final judgment, the FTC destroyed much of the evidence, including the intimate and invasive photos that Cottelli published on his website, and the agency would have difficulty bringing the case to trial without that material. Even if that ground were not independently sufficient, the record amply shows that the other two factors under Rule 60(b)(6) weigh heavily against Cottelli. His conduct leading to the default was culpable because he had actual notice of the case but deliberately failed to appear, and he identified no meritorious defense to the underlying charges. Considerable evidence showed that Cottelli was the driving force behind MyEx.com. Indeed, Cottelli admitted that he "made up" information about the Netherlands company he now claims is responsible for the violations.

The district court properly declined to reverse the default judgment for the independent reason that Cottelli unreasonably waited at least six months after the judgment to request setting it aside. For one thing, the evidence showed that Cottelli knew about the case and the default judgment all along, so there is no excuse for the delay. In addition, even if it were possible to credit his claim that he did not learn of the case until well after judgment had been entered, he still has no good reason for having waited another six months.

STANDARD OF REVIEW

The entry of default judgment is reviewed for abuse of discretion. Well-pleaded allegations regarding liability are deemed true upon default and findings as to damages are reviewed for clear error. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002).

The Court reviews de novo the legal question "whether a default judgment is void because of lack of personal jurisdiction due to insufficient service of process," but "the district court's factual findings regarding jurisdiction are reviewed for clear error." *SEC v. Internet Solutions for Bus., Inc.*, 509 F.3d 1161, 1165 (9th Cir. 2007). The clear error standard is "significantly deferential," and the trial court's findings should be accepted unless there is a "definite and firm conviction that a mistake has been committed." *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004).

ARGUMENT

THE DISTRICT COURT PROPERLY DECLINED TO SET ASIDE THE JUDGMENT

Cottelli contends that the district court erred in declining to set aside the default judgment because the judgment was void for lack of personal jurisdiction, since he was not served properly; his inability to be reached while traveling and living abroad constitutes "good cause" to set aside the judgment; and his delay in seeking relief was reasonable. None of these arguments justifies reversal. [5]

I. THE JUDGMENT WAS NOT VOID FOR LACK OF PERSONAL JURISDICTION

Rule 60(b)(4) allows a district court to set aside a judgment if it is void, including for lack of personal jurisdiction. Fed. R. Civ. P. 60(b)(4). Cottelli argues that the judgment was void for lack of personal jurisdiction because he was not properly served with the summons and complaint, and that the court therefore erred in refusing to set the judgment aside on that basis. Br. 25-27.

[5] Cottelli's one-paragraph attack on the monetary relief and initial entry of default judgment, Br. 32, likewise has no merit. He did not challenge the monetary relief calculation in his motion to set aside the judgment, and may not do so now. *In re Rains*, 428 F.3d 893, 902-03 (9th Cir. 2005) (issues not first presented to the district court are waived). Even so, the amount of the relief is irrelevant to the questions presented here. And his passing argument that the court abused its discretion in entering default judgment in the first place is unpersuasive for the same reasons discussed below and in the FTC's motion for default judgment. *See* ER 314-26 (analyzing *Eitel* factors).

The district court found as a fact that Cottelli knew about the case, and it declined to set aside the judgment for lack of personal jurisdiction. Cottelli shows no error in that decision.

Rule 4(f)(3) allows service on persons located in a foreign country by any "means not prohibited by international agreement, as the court orders." Fed. R. Civ. P. 4(f)(3).[6] This Court has determined that the Rule permits service by email. *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002). Email service authorized by a district court will be deemed inadequate only if it does not satisfy the principles of due process, which require it to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 1016.

The email service ordered by the district court satisfied due process because it was reasonably calculated to reach Cottelli. Cottelli is an experienced businessman who has made millions running several internet-based businesses, including MyEx.com. He did not maintain any physical office location, instead choosing to manage the site virtually, using email to receive and respond to communications about it. He regularly used his email addresses as contact points with GoDaddy and others, and communicated by email with his business partner Infante – including about this very matter. Moreover, the site's business model

[6] Cottelli does not contend that any international agreement bars email service.

depended on email, since it required victims to send an email through the site (and pay a fee) to have their images removed. The district court thus properly found that Cottelli "heavily relies on emails as a means of communicating and conducting his business," and that service through four recently used email accounts was reasonably calculated to reach him.[7] ER 5-6 (Order Granting Alternative Service).

Rio Properties squarely applies here. In that case, this Court approved service by email on a Costa Rican company that owned domain names involved in a trademark dispute. 284 F.3d at 1015-18. After several failed attempts to locate the company either in the United States or in Costa Rica, the district court authorized alternative service through the company's email address.[8] This Court held that service by email comported with principles of due process. Observing that email "has been zealously embraced within the business community" and that the defendant in particular "has embraced the modern e-business model and profited immensely from it," the Court concluded:

> [i]f any method of communication is reasonably calculated to provide [the defendant] with notice, surely it is email – the method of communication which [it] utilizes and prefers. Indeed, when faced

[7] Contrary to Cottelli's claim, Br. 26, the FTC did not know then that three of the accounts had been closed. It had sent emails to them just several months earlier and had received no bounce-backs, indicating they were active. *See supra*, at 15-16 & n.3.

[8] The defendant had listed a Florida address with the domain name registrar, but it turned out to be for its international courier. Service then was attempted through California counsel, but he declined to accept it. The plaintiff next tried to locate the defendant in Costa Rica, but was unsuccessful there too. *Id.* at 1016.

> with an international ebusiness scofflaw, playing hide-and-seek with the federal court, email may be the only means of effecting service of process.

Id. at 1017-18. So too here.

Cottelli claims that he did not receive the emails, but the contention rings hollow. The district court found that he in fact had actual notice of both the investigation and the lawsuit. ER 21-22 (Order Denying Relief). Where a defendant has actual notice of the proceeding but waits until after default judgment is entered before claiming insufficient service, he bears the burden of showing that service did not occur. *SEC v. Internet Solutions for Bus. Inc.*, 509 F.3d 1161, 1165-66 (9th Cir. 2007). That is because "[t]he defendant who chooses not to put the plaintiff to its proof, but instead allows default judgment to be entered and waits, for whatever reason, until a later time to challenge the plaintiff's action, should have to bear the consequences of such delay." *Id.* at 1166.

Cottelli's disavowal of receiving the emails does not meet that burden. Compelling documentary and testimonial evidence showed that Cottelli had notice, and he has shown nothing to the contrary. Infante swore under oath that he communicated with Cottelli about the case one week before his testimony in March 2017 and had previously told him about the investigation. Infante also stated under oath that he communicated with Cottelli through three of the email addresses used for service, including enzovalentino@protonmail.com, ER 194 ¶ 17

(Infante Decl.),[9] and the FTC submitted emails documenting those communications. Although the FTC received bounce-backs from several of the emails, one of them did not generate such an error notification, indicating that the message went through.[10] And it strains logic to believe that none of the individuals at Cottelli's four addresses whom investigators questioned – the representative at his mail receiving agency in Las Vegas, people present at the Henderson residence, the guard at the Las Vegas residence, the caretakers at the South African property, or his own former attorney – informed him of government attempts to locate him in connection with this case.[11] In response, Cottelli offered only an unsupported declaration simply disavowing knowledge and refuting none of the actual

[9] Cottelli's claim that "that conversation, alone" cannot prove the email was from Cottelli, Br. 22, ignores Infante's testimony that Cottelli indeed was the sender. And contrary to Cottelli's argument, Br. 21, Infante's declaration and his earlier hearing testimony were not inconsistent. At the March 28, 2017 hearing, Infante testified that he emailed Cottelli at his shadapplegate@gmail.com address. ER 186 at 27:3-4 (Hearing Tr.) ("What I was using was ShadApplegate@gmail.com."). Six months later, Infante stated in his December 13, 2017 declaration that Cottelli emailed *him* from two other accounts: enzovalentino@protonmail.com, on October 20, 2017, and eroticmp@gmail.com, on February 8, 2017. ER 194 ¶¶ 17-19.

[10] Courts "have found service of process by email to be reasonably calculated to provide actual notice when the test email is not returned as undeliverable or bounced back." *Toyo Tire & Rubber Co., Ltd. v. CIA Wheel Grp.*, No. SA CV 15-0246-DOC (DFMx), 2016 U.S. Dist. LEXIS 43128, at 8-9 (C.D. Cal. Mar. 25, 2016) (collecting cases).

[11] The evidence showing Cottelli's knowledge thus was far more than one sentence in a declaration, as Cottelli wrongly contends (Br. 21).

evidence. The district court rightly discredited Cottelli's claim.[12] ER 21 (Order Denying Relief).

Cottelli complains throughout his brief (Br. 3, 8-9, 11, 21, 27, 29, 33) that the FTC made inadequate efforts to locate him before serving him by email. The claim is a red herring.[13] This Court has made clear that "Rule 4(f)(3) is an equal means of effecting service," not a last resort, so exhausting traditional means of service is not required. *Rio Properties*, 284 F.3d at 1016; *see also AngioDynamics, Inc. v. Biolitec AG*, 780 F.3d 420, 428-29 (1st Cir. 2015).

Even if the FTC had been required to search for Cottelli before using email service, however, it did so extensively. It engaged domestic and international investigators, hired foreign law firms, and inquired with foreign law enforcement agencies about Cottelli's whereabouts. *See* ER 47-49 (Mot. for Alternative Service). Personal service was attempted at four physical addresses connected with Cottelli. *Id.* The FTC also called six phone numbers to try to reach him.[14] ER 49.

---

[12] The district court rejected Cottelli's claim on the merits, not, as he argues (Br. 18-19), because it was untimely. The court's discussion of timeliness pertained to its analysis under Rule 60 (b)(6), not 60(b)(4). *See infra*, at 35-36. In any event, this Court may affirm the denial of relief "on any ground supported by the record," *SEC v. Internet Solutions*, 509 F.3d at 1165, and the record clearly shows that here denial of Rule 60 (b)(4) relief was warranted on the merits.

[13] So too is the claim (Br. 14-15, 24) that the FTC did not promptly seek to enforce the judgment, which is incorrect but also irrelevant.

[14] Cottelli accuses the FTC of purposefully misrepresenting facts, confusing the court, and "jumbling" information about the site's ownership. Br. 3, 8, 31, 32. There is no basis for these assertions, which the FTC firmly denies.

Given Cottelli's status as "an elusive, globe-trotting person" who well "knew about the investigation and impending lawsuit" but chose not to respond, ER 21-22 (Order Denying Relief), email not only was reasonably calculated to reach Cottelli, it was "the method of service *most* likely to reach" him. *Rio Properties*, 284 F.3d at 1017 (emphasis added). The district court properly "balanc[ed] the limitations of email service against its benefits" and reasonably determined it was appropriate given Cottelli's evasive conduct and his regular use of email. *Id.* at 1018; ER 21 (Order Denying Relief); ER 4-6 (Order Granting Alternative Service). Email service was proper and the judgment was not void for lack of jurisdiction.[15]

II. COTTELLI DID NOT SHOW GOOD CAUSE TO SET ASIDE THE JUDGMENT UNDER RULE 60(B)(6) AND HIS DELAY WAS UNREASONABLE

A court may grant relief from a final judgment under Rule 60(b)(6) for "any other reason that justifies relief," Fed. R. Civ. P. 60(b)(6), as long as the party seeks it "within a reasonable time," Fed. R. Civ. P. 60(c)(1).

[15] Before this Court, Cottelli asserts for the first time that "there were no minimum contacts to justify personal jurisdiction." Br. 26. He made no such argument before the district court and therefore waived it. *In re Rains*, 428 F.3d at 902-03. Personal jurisdiction may be waived just like other arguments. *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 701-05 (1982). In any event, Cottelli conducted extensive business in Nevada, where he lived for years, and plainly is subject to its jurisdiction.

To avail himself of that rule, Cottelli had to show "good cause." *TCI Grp. Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001). He bore the burden of demonstrating that the three relevant factors, known as the *Falk* factors, favored relief: (1) whether the defendant's culpable conduct led to the default judgment; (2) whether the defendant has no meritorious defense; and (3) whether the plaintiff would be prejudiced by the relief. *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam); *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 815 (9th Cir. 1985). Finding that any single factor weighs against relief is sufficient to deny it, and the district court need not even evaluate the other two factors before denying the motion. *Pena*, 770 F.2d at 815; *Franchise Holding II, Ltd. Liab. Co. v. Huntington Rests. Grp., Inc.*, 375 F.3d 922, 925-26 (9th Cir. 2004).

Here, Cottelli failed to demonstrate that any of the factors warranted setting aside the judgment, and the district court properly denied the motion. The court primarily relied on the third *Falk* factor – prejudice to the FTC – but the other two factors weigh just as firmly against Cottelli. The district court's additional determination that Cottelli's delay in seeking relief was not reasonable independently supports the same result.

A. The FTC Would Be Significantly Prejudiced If The Judgment Was Set Aside.

The district court correctly found that the FTC would be "significantly" prejudiced by setting aside the judgment. ER 22 (Order Denying Relief).

Because much of the underlying evidence of Cottelli's unfair conduct consisted of intimate photos of victims and other private information, and in reliance on the entry of final judgment, the FTC properly destroyed that evidence afterward in order to protect victim privacy. ER 22; *see also* SER 187-204 (DE 40). At this point, the government would be at a severe disadvantage if the case were reopened and proceeded to trial. Beyond that, the passage of time – more than 21 months since the default judgment was entered, and now nearly three years since the case was filed – would hinder discovery, since information from the investigation would be stale, witnesses more difficult to reach, and other evidence potentially destroyed or lost.[16]

Courts regularly refuse to set aside default judgments where prejudice is far less concrete. Indeed, defaults have been affirmed where prejudice was only a "possibility." *Franchise Holding II*, 375 F.3d at 926-27; *accord NewGen, Ltd. Liab. Co. v. Safe Cig, Ltd. Liab. Co.*, 840 F.3d 606, 616-17 (9th Cir. 2016) (affirming default judgment where plaintiff "sufficiently demonstrated the possibility of prejudice"). The district court did not abuse its discretion in denying Cottelli's motion here, where prejudice was certain and significant.

[16] Cottelli contends that the government must identify specific pieces of lost evidence or describe it with granularity (Br. 24, 30-31), but he cites nothing that supports such a claim.

B. Cottelli's Culpable Conduct Led To His Default.

Conduct leading to a default judgment is culpable if the defendant had actual or constructive notice of the proceedings and failed to respond. *Franchise Holding II*, 375 F.3d at 926. Cottelli's conduct plainly was culpable. As discussed above, he knew about the case yet did not answer or otherwise respond, as all litigants must do. Beyond that, the evidence showed that Cottelli deliberately evaded service in an attempt to avoid having to answer for his misdeeds. Indeed, knowing that law enforcement had recently inquired about illegal content on MyEx.com, Cottelli changed his name, left the United States to travel abroad indefinitely, and closed email accounts that he had used for years. He provided no forwarding address to anyone, including his business partner Infante, his former attorney, or the commercial mail-receiving agency he had used in Nevada. Cottelli plainly was on notice that litigation, regulatory scrutiny, or law enforcement contact – or all three – was likely and that email would be the primary way others would try to contact him about these matters. The evidence demonstrates "a devious, deliberate, willful, or bad faith failure to respond."[17] *TCI Group*, 244 F.3d at 698.

[17] By contrast, in *United States v. Mesle*, 615 F.3d 1085 (9th Cir. 2010), the Court found culpability lacking where an unrepresented layperson "was ignorant of the law and unable to understand correctly his legal obligations" from a letter and forfeiture notice. *Id.* at 1093. It specifically distinguished that situation from one where, as here, defendants "act to avoid service in order to thwart . . . attempts to bring suit against them," which indicates culpability. *Id.* at 1094.

This Court has recognized that relief from a default judgment is inappropriate when a failure to receive actual notice of litigation is due to the defendant's own failure to keep contact information up to date with relevant parties. In *Pena*, for example, the plaintiff sent a summons and complaint to a Mexico-based insurance company at the address on file with the state's insurance regulator. 770 F.2d at 815. Acknowledging that the defendant never received actual notice of the suit because the address was wrong, this Court nonetheless upheld the default judgment because the defendant's "failure to provide its correct address to parties with whom it does business" constituted culpable conduct and precluded relief under Rule 60(b). *Id.* Likewise, in *Employee Painters Trust v. Ethan Enters.*, 480 F.3d 993 (9th Cir. 2007), the Court found that the defendants' "failure to update their address made it difficult for the opposing party to contact them" and "preclude[ed] normal service of process." *Id.* at 1000. Especially where they "reasonably should have expected contact with" the plaintiffs, that failure was culpable, and relief from the default judgment unwarranted. *Id.* And in *In re Hammer*, 940 F.2d 524 (9th Cir. 1991), this Court similarly held that the defendant's own "culpable conduct led to the default judgment" where he failed to update his address with a bankruptcy court. *Id.* at 526. These cases show that Cottelli exaggerates the influence of the policy preference to decide cases on the merits, Br. 17, and overlooks entirely that "there is a compelling interest in the finality of judgments which should not lightly be disregarded." *Rodgers v. Watt*,

722 F.2d 456, 459 (9th Cir. 1983) (en banc) (superseded by statute on other grounds); *see also Pena*, 770 F.2d at 814.

In response, Cottelli mistakenly relies on *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989). That case involved a foreign sovereign that failed to appear because it had a reasonable belief that it was immune from suit. *Id.* at 1525-26. Cottelli had no reasonable basis to believe that he was not subject to the ordinary demands of litigation. The case thus more closely resembles *Meadows v. Dominican Republic*, 817 F.2d 517, 521-22 (9th Cir. 1987), where the Court found that foreign defendants' purported reasons for not responding to litigation were not credible or reasonable, and refused to set aside the default judgment.[18]

C. Cottelli Demonstrated No Meritorious Defense.

Cottelli did not set forth a meritorious defense to the underlying charges. He claims that he merely owned the domain name MyEx.com and had no involvement in the content of the site.[19] Br. 30; ER 1204-05 ¶¶ 9-14 (Cottelli Decl.). As he tells it, he leased the domain name in 2013 to a Dutch company called Web Solutions, which is the entity responsible for the unlawful site. ER 1204-06 ¶¶ 9-19. This "defense" cannot be squared with the undisputed evidence. Cottelli himself told

[18] *Meadows* involved Rule 60(b)(1), relief for mistake and excusable neglect, but the same considerations apply here. 817 F.2d at 521 (discussing *Falk* factors).

[19] Cottelli contends that the FTC should have prosecuted other entities, Br. 6-7, but whether and who to prosecute for violations of the laws it enforces is committed to agency discretion and not subject to attack here. The same is true of settlement decisions. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

GoDaddy in 2013 that the entity he now claims was responsible for the site was "not a company" but rather "a made up name for the address [and] phone number in the Netherlands." ER 65-66 ¶¶ 20-23 (Thomas Decl.), ER 130 (text of email). And, as Cottelli admits in his own declaration (ER 1205 ¶ 15), he listed shad@myex.com as the contact email for the supposed unrelated Netherlands purchaser.[20]

Even if Cottelli had identified a meritorious defense, reversal still would not be warranted. District courts have considerable discretion in weighing the three *Falk* factors and deciding whether to set aside a default judgment. *See, e.g.*, *Pena*, 770 F.2d at 814 (emphasizing that an appeals court will reverse "only upon a *clear showing* of abuse of discretion") (cleaned up); *Meadows*, 817 F.2d at 521. "If a default judgment is entered as the result of a defendant's culpable conduct," the Court "need not consider whether a meritorious defense was shown." *Meadows*, 817 F.2d at 521; *see also Pena*, 770 F.2d at 815 (no abuse of discretion where district court denied motion based solely on culpable conduct factor); *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988) (same). The same is true where prejudice alone is the basis for the denial. Here, both the prejudice and culpable conduct factors weigh firmly against Cottelli. The district

[20] The evidence connecting Cottelli to the site was extensive and not mere "unfounded innuendo," Br. 26. *See supra*, at 8-11.

court was not required to evaluate the merits of Cottelli's purported defense, and this Court need not either.

D. Cottelli's Delay In Seeking Relief Was Not Reasonable

Rule 60(b)(6) requires not only that the three *Falk* factors weigh in the defendant's favor, but also that the defendant seek relief "within a reasonable time." Fed. R. Civ. P. 60(c)(1). The district court found that Cottelli's delay in seeking relief – six months after he claimed to have learned of the judgment – was not reasonable. ER 21 (Order Denying Relief). Cottelli acknowledges that the "reasonable time" requirement applies, is highly fact-dependent, and is reviewed only for clear error. *See* Br. 18-20. But he claims that the court's ruling was clearly erroneous because it rested on the "predicate factual finding" that Cottelli knew about the investigation and lawsuit. *Id.*

There was no error, much less clear error. The district court properly determined that waiting six months to seek relief was "not reasonable" in the context of this case. ER 21. For one thing, Cottelli identified below no legitimate reason for having waited six months to seek relief from the default judgment. He claimed that "there is no evidence" that he was "aware of the judgment until more than one year after it was entered," SER 180, 184-85 (Rule 60 Mot.), but that purported excuse does not even address the additional six-month lag. On appeal, Cottelli cites for the first time a slew of excuses, including difficulties retaining counsel, "the intervening holidays," "counsel's obligation to other clients," and

"difficulties and delay occasioned by international communication many time zones away." Br. at 23-24. Even if the claims had been preserved, they are unsupported by any sworn declaration or other actual facts.[21] "[U]nsworn contention[s]" are "mere legal conclusion[s] that cannot support disturbing the underlying judgment." *In re Hammer*, 940 F.2d 524, 525-27 (9th Cir. 1991). In any event, those factors do not nearly justify a delay of six months.

The six-month delay was even less excusable given the district court's findings that Cottelli knew of the investigation and lawsuit from the beginning. As discussed above, the district court's finding about Cottelli's knowledge was well supported by the record and not clearly erroneous. *See supra* at 25-27. The court properly considered that knowledge as one reason to conclude that Cottelli's moving to vacate the default judgment six months after learning of it, and over two years after the complaint was served on him by email, was not "within a reasonable time." ER 21.

CONCLUSION

For the forgoing reasons, the judgment of the district court should be affirmed.

[21] In his reply brief, Cottelli asserted that counsel had to review the "relatively voluminous record," Reply at 9 (DE 42), but there is no factual basis for believing that this required anything close to six months.

Respectfully submitted,

ALDEN F. ABBOTT
General Counsel

JOEL MARCUS
Deputy General Counsel

September 23, 2020

/s/ Mariel Goetz
MARIEL GOETZ
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

AARON FORD
Attorney General

/s/ Laura Tucker
LAURA TUCKER
Senior Deputy Attorney General

OFFICE OF THE NEVADA ATTORNEY GENERAL
8945 W. RUSSELL, SUITE 204
Las Vegas, Nevada 89148
(702) 486-6525
LMTucker@ag.nv.gov

Of Counsel:

MEGAN COX
SANGJOON HAN
Attorneys

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7), in that it contains **8,052** words.

September 23, 2020

/s/ Mariel Goetz

Mariel Goetz
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580