*Chapter 2*

**Courts and Alternative Dispute Resolution**

***Case 2.1***

C.A.3 (Virgin Islands),2013.

Mala v. Crown Bay Marina, Inc.

704 F.3d 239

United States Court of Appeals,

Third Circuit.

**Kelley Joseph MALA, Appellant**

**v.**

**CROWN BAY MARINA, INC.**

No. 10–4710.

Submitted Pursuant to Third Circuit L.A.R. 34.1(a) Dec. 3, 2012.

Filed: Jan. 7, 2013.

OPINION

[SMITH](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0223182001&FindType=h), Circuit Judge.

Kelley Mala sued Crown Bay Marina after his boat exploded. The District Court conducted a bench trial during which Mala represented himself and after which the court rejected his negligence claims. Mala now contends that the court should have provided him with additional assistance because of his status as a pro se litigant. He also contends that the court wrongfully denied his request for a jury trial and improperly ruled on a variety of post-trial motions. We reject these contentions and we will affirm.

I

Mala is a citizen of the United States Virgin Islands. On January 6, 2005, he went for a cruise in his powerboat near St. Thomas, Virgin Islands. When his boat ran low on gas, he entered Crown Bay Marina to refuel. Mala tied the boat to one of Crown Bay's eight fueling stations and began filling his tank with an automatic gas pump. Before walking to the cash register to buy oil, Mala asked a Crown Bay attendant to watch his boat.

By the time Mala returned, the boat's tank was overflowing and fuel was spilling into the boat and into the water. The attendant manually shut off the pump and acknowledged that the pump had been malfunctioning in recent days. Mala began cleaning up the fuel, and at some point, the attendant provided soap and water. Mala eventually departed the marina, but as he did so, the engine caught fire and exploded. Mala was thrown into the water and was severely burned. His boat was unsalvageable.

More than a year later, Mala sued Crown Bay in the District Court of the Virgin Islands.[FN1](#Document1zzB00112029570914) Mala's pro se complaint asserted two claims: first, that Crown Bay negligently trained and supervised its attendant, and second, that Crown Bay negligently maintained its gas pump. The complaint also alleged that the District Court had admiralty and diversity jurisdiction over the case, and it requested a jury trial. At the time Mala filed the complaint, he was imprisoned in Puerto Rico. Although the record is silent on the reason for his imprisonment, it is fair to say that he is a seasoned litigant—in fact, he has filed at least twenty other pro se lawsuits.[FN2](#Document1zzB00222029570914) *See* Appellee's Br. at 21–22.

[FN1.](#Document1zzF00112029570914) Chief Judge Curtis Gomez was initially assigned the case, but Judge Juan Sanchez took over in the middle of 2010 and presided over the trial.

[FN2.](#Document1zzF00222029570914) Mala requested a court-appointed attorney in this case, but the District Court denied the request because his history of filing frivolous lawsuits prevented him from securing *in forma pauperis* status. *See* [28 U.S.C. § 1915](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1915&FindType=L).

Mala's original complaint named “Crown Bay Marina Inc.” as the sole defendant. But Mala soon amended his complaint by adding other defendants—including Crown Bay's dock attendant, Chubb Group Insurance Company, Crown Bay's attorney, and “Marine Management Services Inc, [a] registered corporation entity duly licensed to conduct business in the State of Florida ..., d/b/a Crown Bay Marina Inc, [ ] a corporate entity duly licensed to conduct business in St. Thomas Virgin Islands of the Unites States.” JA 55. The District Court allowed Mala to amend his complaint a second time by adding his wife as a plaintiff—though the court dismissed her loss-of-consortium claim shortly thereafter. Mala later attempted to amend his complaint a third time by adding Texaco as a defendant. The District Court rejected this attempt for failing to comply with [Federal Rule of Civil Procedure 15(a)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR15&FindType=L) (requiring the other side's consent or the court's leave).[FN3](#Document1zzB00332029570914)

[FN3.](#Document1zzF00332029570914) Because the District Court refused to add Texaco as a defendant, *see* JA 94 n.2, we have omitted “Texaco Puerto Rico” from the case caption.

As the trial approached, two significant incidents took place. First, the District Court decided on its own to identify the parties to the case. It concluded that the only parties were Mala and “Marine Services Management d/b/a Crown Bay Marina, Inc.” JA 132. It thereby dismissed all other defendants that Mala had named in his various pleadings.

Next, Crown Bay filed a motion to strike Mala's jury demand. Crown Bay argued that plaintiffs generally do not have a jury-trial right in admiralty cases—only when the court also has diversity jurisdiction. And Crown Bay asserted that the parties were not diverse in this case, which the court itself had acknowledged in a previous order. In response to this motion, the District Court ruled that both Mala and Crown Bay were citizens of the Virgin Islands. The court therefore struck Mala's jury demand, but nevertheless opted to empanel an advisory jury.

The trial began at the end of 2010—nearly four and a half years after Mala filed his complaint. The delay is partly attributable to the District Court's decision to postpone the trial until after Mala's release from prison. At the close of Mala's case-in-chief, Crown Bay renewed a previous motion for summary judgment. The court granted the motion on the negligent-supervision claim but allowed the negligent-maintenance claim to go forward. At the end of the trial, the advisory jury returned a verdict of $460,000 for Mala—$400,000 for pain and suffering and $60,000 in compensatory damages. It concluded that Mala was 25 percent at fault and that Crown Bay was 75 percent at fault. The District Court ultimately rejected the verdict and entered judgment for Crown Bay on both claims.

After his loss at trial, Mala filed a flurry of motions, asking the court to vacate its judgment and hold a new trial. These motions contained numerous overlapping objections. A magistrate judge prepared three Reports and Recommendations that summarized Mala's claims and urged the District Court to reject all of them. Judge Sanchez adopted these recommendations and explained his reasoning in an eight-page opinion.

This appeal followed. Mala argues that the District Court made three reversible errors. First, the court failed to accommodate Mala as a pro se litigant. Second, it improperly denied his request for a jury trial. Third, it erroneously adopted the magistrate's recommendations. We consider and reject these arguments in turn.[FN4](#Document1zzB00442029570914)

[FN4.](#Document1zzF00442029570914) The District Court had admiralty jurisdiction under [28 U.S.C. § 1333(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1333&FindType=L&ReferencePositionType=T&ReferencePosition=SP_f1c50000821b0). Mala argues that the court also had diversity jurisdiction under [28 U.S.C. § 1332](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1332&FindType=L). This argument determines the outcome of Mala's jury claim, so we will discuss it in Part III. At all events, we have jurisdiction under [28 U.S.C. § 1291](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1291&FindType=L).

II

Mala first argues that the District Court did not give appropriate consideration to his status as a pro se litigant. Specifically, he claims that the District Court should have provided him with a pro se manual—a manual that is available to pro se litigants in other districts in the Third Circuit and throughout the country. We conclude that pro se litigants do not have a right to general legal advice from judges, so the District Court did not abuse its discretion by failing to provide a manual.

According to Mala, “[t]here is comparatively little case law regarding the responsibility of courts to provide information and assistance to the *pro se* party.” Appellant's Br. at 7. A more accurate statement is that there is *no* case law requiring courts to provide general legal advice to pro se parties. In a long line of cases, the Supreme Court has repeatedly concluded that courts are under no such obligation. *See, e.g.,* [*McKaskle v. Wiggins,* 465 U.S. 168, 183–184, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984104104) (“A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course.”); [*McNeil v. United States,* 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1993105335); [*Faretta v. California,* 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1975129837).

[[1]](#Document1zzF12029570914)[[2]](#Document1zzF22029570914) The Supreme Court revisited this line of cases nearly a decade ago. In [*Pliler v. Ford,* 542 U.S. 225, 124 S.Ct. 2441, 159 L.Ed.2d 338 (2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2004610847), the Court rejected the idea that district courts must provide a specific warning to pro se litigants in certain habeas cases. It concluded that “[d]istrict judges have no obligation to act as counsel or paralegal to *pro se* litigants.” [*Id.* at 231, 124 S.Ct. 2441.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2004610847) After all, a “trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal ‘chores' for the defendant that counsel would normally carry out.” [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2004610847) (quoting [*Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.,* 528 U.S. 152, 162, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2000029542)) (quotation marks omitted). Because of this general rule, courts need not, for example, inform pro se litigants of an impending statute of limitation. *See* [*Outler v. United States,* 485 F.3d 1273, 1282 n. 4 (11th Cir.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2012228871&ReferencePosition=1282) (“[N]o case has ever held that a *pro se* litigant should be given actual notice of a statute of limitations.”).

[[3]](#Document1zzF32029570914) The general rule, then, is that courts need not provide substantive legal advice to pro se litigants. Aside from the two exceptions discussed below, federal courts treat pro se litigants the same as any other litigant. This rule makes sense. Judges must be impartial, and they put their impartiality at risk—or at least might *appear* to become partial to one side—when they provide trial assistance to a party. *See* [*Pliler,* 542 U.S. at 231, 124 S.Ct. 2441](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2004610847) (“Requiring district courts to advise a *pro se* litigant ... would undermine district judges' role as impartial decisionmakers.”); [*Jacobsen v. Filler,* 790 F.2d 1362, 1364 (9th Cir.1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1986127663&ReferencePosition=1364); *see also* Julie M. Bradlow, Comment, [*Procedural Due Process Rights of Pro Se Civil Litigants,* 55 U. Chi. L.Rev. 659, 671 (1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3039&FindType=Y&ReferencePositionType=S&SerialNum=0101628657&ReferencePosition=671) (“[E]xtending too much procedural leniency to a pro se litigant risks undermining the impartial role of the judge in the adversary system.”). Moreover, this rule eliminates the risk that judges will provide bad advice. *See* [*Pliler,* 542 U.S. at 231–32, 124 S.Ct. 2441](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2004610847) (noting that warnings and other legal advice “run the risk of being misleading themselves”); *see also* Robert Bacharach & Lyn Entzeroth, [*Judicial Advocacy in Pro Se Litigation: A Return to Neutrality,* 42 Ind. L.Rev. 19, 42 (2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=2442&FindType=Y&ReferencePositionType=S&SerialNum=0344573730&ReferencePosition=42) ( “[G]iving legal advice is prohibited by multiple canons of judicial conduct.”).

To be sure, some cases have given greater leeway to pro se litigants. These cases fit into two narrow exceptions. First, we tend to be flexible when applying procedural rules to pro se litigants, especially when interpreting their pleadings. *See, e.g.,* [*Higgs v. Att'y Gen.,* 655 F.3d 333, 339 (3d Cir.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2025930692&ReferencePosition=339) (“The obligation to liberally construe a *pro se* litigant's pleadings is well-established.”). This means that we are willing to apply the relevant legal principle even when the complaint has failed to name it. [*Dluhos v. Strasberg,* 321 F.3d 365, 369 (3d Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003171029&ReferencePosition=369). And at least on one occasion, we have refused to apply the doctrine of appellate waiver when dealing with a pro se litigant. [*Tabron v. Grace,* 6 F.3d 147, 153 n. 2 (3d Cir.1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1993191107&ReferencePosition=153). This tradition of leniency descends from the Supreme Court's decades-old decision in [*Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1972127052). In [*Haines,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1972127052) the Court instructed judges to hold pro se complaints “to less stringent standards than formal pleadings drafted by lawyers.” [*Id.* at 520, 92 S.Ct. 594;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1972127052) *see* [*Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2012395796).

We are especially likely to be flexible when dealing with imprisoned pro se litigants. Such litigants often lack the resources and freedom necessary to comply with the technical rules of modern litigation. *See* [*Moore v. Florida,* 703 F.2d 516, 520 (11th Cir.1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1983115936&ReferencePosition=520) (“Pro se prison inmates, with limited access to legal materials, occupy a position significantly different from that occupied by litigants represented by counsel”). The Supreme Court has “insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed and [has] held that some procedural rules must give way because of the unique circumstance of incarceration.” [*McNeil v. United States,* 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1993105335) (citations omitted). Accordingly, the Supreme Court has concluded that pro se prisoners successfully file a notice of appeal in habeas cases when they deliver the filings to prison authorities—not when the court receives the filings, as is generally true. [*Houston v. Lack,* 487 U.S. 266, 270–71, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1988082106) (“Such prisoners cannot take the steps other litigants can take to monitor the processing of their notices of appeal and to ensure that the court clerk receives and stamps their notices of appeal before the 30–day deadline.”).

[[4]](#Document1zzF42029570914)[[5]](#Document1zzF52029570914) Yet there are limits to our procedural flexibility. For example, pro se litigants still must allege sufficient facts in their complaints to support a claim. *See* [*Riddle v. Mondragon,* 83 F.3d 1197, 1202 (10th Cir.1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1996104515&ReferencePosition=1202). And they still must serve process on the correct defendants. *See* [*Franklin v. Murphy,* 745 F.2d 1221, 1234–35 (9th Cir.1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1984149538&ReferencePosition=1234). At the end of the day, they cannot flout procedural rules—they must abide by the same rules that apply to all other litigants. *See* [*McNeil,* 508 U.S. at 113, 113 S.Ct. 1980](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1993105335) (“[W]e have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.”); [*Kay v. Bemis,* 500 F.3d 1214, 1218 (10th Cir.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2013188504&ReferencePosition=1218).

[[6]](#Document1zzF62029570914) The second exception to our general rule of evenhandedness is likewise narrow. We have held that district courts must provide notice to pro se prisoners when converting a motion to dismiss into a motion for summary judgment. *See* [*Renchenski v. Williams,* 622 F.3d 315, 340 (3d Cir.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2023218929&ReferencePosition=340). In particular, courts must tell pro se prisoners about the effects of not filing any opposing affidavits. [*Id.;*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2023218929) *see also* [*Somerville v. Hall,* 2 F.3d 1563, 1564 (11th Cir.1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1993178757&ReferencePosition=1564); [*Neal v. Kelly,* 963 F.2d 453, 457 (D.C.Cir.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1992093170&ReferencePosition=457); [*Klingele v. Eikenberry,* 849 F.2d 409, 411 (9th Cir.1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1988077662&ReferencePosition=411) (concluding that the rule applies only to pro se prisoners). *But see* [*Williams v. Browman,* 981 F.2d 901, 903–04 (6th Cir.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1992214804&ReferencePosition=903) (holding that such notice is unnecessary); [*Martin v. Harrison Cnty. Jail,* 975 F.2d 192, 193 (5th Cir.1992)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1992170803&ReferencePosition=193) (same).

Similarly, the Supreme Court has required district courts to provide notice to pro se litigants in habeas cases before converting any motion into a motion to vacate under [28 U.S.C. § 2255](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS2255&FindType=L). *See* [*Castro v. United States,* 540 U.S. 375, 383, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003915490). The underlying principle is simple: when a court acts on its own in a way that significantly alters a pro se litigant's rights—for example, by converting one type of motion into a different type of motion—the court should inform the pro se party of the legal consequences. But as the Supreme Court made clear only a few months after [*Castro,*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2003915490) notice is the exception. Nonassistance is the rule. *See* [*Pliler,* 542 U.S. at 231, 233–34, 124 S.Ct. 2441](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2004610847).

That brings us back to Mala's claim. Mala argues that the District Court should have provided him with a pro se manual. Various district courts have created manuals to help pro se litigants navigate the currents of modern litigation. *See,* *e.g.,* U.S. District Court for the Eastern District of Pennsylvania, *Clerk's Office Procedural Handbook* (2012), http: //www. paed. uscourts. gov/ documents/ handbook/ handbook. pdf; U.S. District Court for the Western District of Pennsylvania, *Pro Se Package: A Simple Guide to Filing a Civil Action* (2009), http:// www. pawd. uscourts. gov/ Documents/ Forms/ PROSE\_ manual\_ 2009. pdf; U.S. District Court for the District of New Jersey, *Procedural Guide for Pro Se Litigants* (2006), http:// www. njd. uscourts. gov/ rules/ proselit- guide. pdf. These manuals are generally available online and in the clerk's office. They explain how to file a complaint, serve process, conduct discovery, and so forth. In addition, public-interest organizations have supplemented these manuals by publishing their own guides for pro se litigants. *See, e.g.,* Columbia Human Rights Law Review, *A Jailhouse Lawyer's Manual* (9th ed.2011), http:// www 3. law. columbia. edu/ hrlr/ jlm/ toc/.

These manuals can be a valuable resource for pro se litigants. They may help litigants assert and defend their rights when no lawyer is available. And they can reduce the administrative burden on court officials who must grapple with inscrutable pro se filings. Because these manuals do not provide case-specific advice and because they are available to all litigants—not just to pro se litigants—they do not impair judicial impartiality. *See* Nina I. VanWormer, Note, [*Help at Your Fingertips: A Twenty–First Century Response to the Pro Se Phenomenon,* 60 Vand. L.Rev. 983, 1018 (2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1277&FindType=Y&ReferencePositionType=S&SerialNum=0333617974&ReferencePosition=1018) (“By providing pro se litigants with easy, understandable, and reliable access to both procedural and substantive law, court systems can uphold their mandate to impartially administer justice to all, while at the same time increasing the efficiency with which they can manage their dockets.”). Without a doubt, these manuals are informative, and inexperienced litigants would do well to seek them out.

[[7]](#Document1zzF72029570914)[[8]](#Document1zzF82029570914) That said, nothing requires district courts to provide such manuals to pro se litigants. *See* [*Pliler,* 542 U.S. at 231, 124 S.Ct. 2441](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2004610847) (“District judges have no obligation to act as counsel or paralegal to *pro se* litigants.”). To put it another way, pro se litigants do not have a right—constitutional, statutory, or otherwise—to receive how-to legal manuals from judges. *See* [*McKaskle,* 465 U.S. at 183–184, 104 S.Ct. 944](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984104104) (“[T]he Constitution [does not] require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course.”). And Mala has less reason to complain than the neophyte pro se litigant, having filed more than twenty suits in the past. *See* Appellee's Br. at 21–23. His experiences have made him well acquainted with the courts. *See* [*Davidson v. Flynn,* 32 F.3d 27, 31 (2d Cir.1994)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1994163931&ReferencePosition=31) (refusing to be flexible when interpreting a complaint because the plaintiff was “an extremely litigious inmate who [was] quite familiar with the legal system and with pleading requirements”); [*Cusamano v. Sobek,* 604 F.Supp.2d 416, 445–46 (N.D.N.Y.2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2017977196&ReferencePosition=445). The District Court's failure to provide Mala with a pro se litigation manual was not an abuse of discretion.[FN5](#Document1zzB00552029570914)

[FN5.](#Document1zzF00552029570914) We would reject Mala's claim even if the District Court had an obligation to provide a pro se manual. For one thing, Mala never identified anything that he would have done differently if he had access to such a manual. Moreover, it is unclear why he needed a pro se manual from the District Court of the Virgin Islands. He could have received a manual from other district courts or from public-interest organizations. These manuals are easy to access through an internet search, which Mala could have performed while doing his legal research at the local library. Any error therefore would be harmless.

[[9]](#Document1zzF92029570914) Mala also suggests that the District Court abused its discretion by not considering his status as a prisoner during the early stages of litigation. His problem, however, is that he has not identified anything in particular that the court should have done differently. In fact, the court was solicitous of Mala's needs as an incarcerated litigant—delaying the trial until his release from prison and allowing him to amend the complaint at least once despite his noncompliance with [Rule 15(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR15&FindType=L). Contrary to Mala's suggestion, the court accommodated his status as a prisoner.

III

[[10]](#Document1zzF102029570914) Mala next argues that the District Court improperly refused to conduct a jury trial. This claim ultimately depends on whether the District Court had diversity jurisdiction. The court concluded that it had only admiralty jurisdiction, and Mala urges us to conclude otherwise. We generally exercise plenary review over jurisdictional questions, but factual findings that “underline a court's determination of diversity jurisdiction ... are subject to the clearly erroneous rule.” [*Frett–Smith v. Vanterpool,* 511 F.3d 396, 399 (3d Cir.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2014559368&ReferencePosition=399) (citation and quotation marks omitted). Here, the District Court found that both Mala and Crown Bay were citizens of the Virgin Islands. These findings were not clearly erroneous, and so we conclude that Mala did not have a jury-trial right.

[[11]](#Document1zzF112029570914)[[12]](#Document1zzF122029570914)[[13]](#Document1zzF132029570914)[[14]](#Document1zzF142029570914) The Seventh Amendment creates a right to civil jury trials in federal court: “In Suits at common law ... the right of trial by jury shall be preserved.” U.S. Const. amend. VII. Admiralty suits are not “Suits at common law,” which means that when a district court has only admiralty jurisdiction under [28 U.S.C. § 1331(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1331&FindType=L), the plaintiff does not have a jury-trial right. [*Complaint of Consolidation Coal Co.,* 123 F.3d 126, 132 (3d Cir.1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1997173453&ReferencePosition=132) (citing [*Waring v. Clarke,* 46 U.S. (5 How.) 441, 458–60, 12 L.Ed. 226 (1847)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1800151011&ReferencePosition=458)). But the saving-to-suitors clause in [§ 1333(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1333&FindType=L&ReferencePositionType=T&ReferencePosition=SP_f1c50000821b0) preserves state common-law remedies. [*U.S. Express Lines Ltd. v. Higgins,* 281 F.3d 383, 390 (3d Cir.2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2002130973&ReferencePosition=390). This clause allows plaintiffs to pursue state claims in admiralty cases as long as the district court also has diversity jurisdiction. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2002130973) In such cases, [§ 1333(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1333&FindType=L&ReferencePositionType=T&ReferencePosition=SP_f1c50000821b0) preserves whatever jury-trial right exists with respect to the underlying state claims. [*Gorman v. Cerasia,* 2 F.3d 519, 526 (3d Cir.1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1993162062&ReferencePosition=526) (noting that the saving-to-suitors clause saves “common law remedies, including the right to a jury trial”); *see also* [*Ross v. Bernhard,* 396 U.S. 531, 537–38, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1970134179).

[[15]](#Document1zzF152029570914) Mala argues that the District Court had both admiralty and diversity jurisdiction. As a preliminary matter, the court certainly had admiralty jurisdiction. The alleged tort occurred on navigable water and bore a substantial connection to maritime activity. *See* [*Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 534, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1995052521) (explaining the two-part test for admiralty jurisdiction under [§ 1333(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1333&FindType=L&ReferencePositionType=T&ReferencePosition=SP_f1c50000821b0)).

[[16]](#Document1zzF162029570914)[[17]](#Document1zzF172029570914) The grounds for diversity jurisdiction are less certain. District courts have jurisdiction under [28 U.S.C. § 1332](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1332&FindType=L) only if the parties are completely diverse. [*Barefoot Architect, Inc. v. Bunge,* 632 F.3d 822, 836 (3d Cir.2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2024378405&ReferencePosition=836). This means that no plaintiff may have the same state or territorial citizenship as any defendant. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2024378405) The parties agree that Mala was a citizen of the Virgin Islands. He was imprisoned in Puerto Rico when he filed the suit, but his imprisonment is of no moment. Prisoners presumptively retain their prior citizenship when the gates close behind them. *See* [*Hall v. Curran,* 599 F.3d 70, 72 (1st Cir.2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2021610057&ReferencePosition=72); [*Smith v. Cummings,* 445 F.3d 1254, 1260 (10th Cir.2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2008984640&ReferencePosition=1260); [*Sullivan v. Freeman,* 944 F.2d 334, 337 (7th Cir.1991)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1991155520&ReferencePosition=337). No one challenges that presumption here.

[[18]](#Document1zzF182029570914) Unfortunately for Mala, the District Court concluded that Crown Bay also was a citizen of the Virgin Islands. Mala rejects this conclusion, stating that the sole defendant was Marina Management Services—a Florida corporation that operated Crown Bay Marina as one of its divisions. For its part, Crown Bay acknowledges that Marina Management Services managed the day-to-day operations at Crown Bay Marina, but Crown Bay argues that the two were separate legal entities. We recognize that the District Court could have done more to clarify the relationship between these two entities.[FN6](#Document1zzB00662029570914) Even so, Mala's claim must fail.

[FN6.](#Document1zzF00662029570914) A few months before trial, the District Court decided to “clarify the pre-trial status of [the] case.” JA 131. Because no one else had been served, the court dismissed all defendants other than “Marine Services Management d/b/a Crown Bay Marina, Inc.” JA 132. The acronym “d/b/a” stands for “doing business as” and typically indicates that the second name (here, “Crown Bay Marina, Inc.”) is the party's trade name, whereas the first name (here, “Marine Services Management,” which seems to be a reference to Marina Management Services) is the party's legal name. *See, e.g.*, [*Tai–Si Kim v. Kearney,* 838 F.Supp.2d 1077, 1090 (D.Nev.2012)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2026918340&ReferencePosition=1090). This suggests that a Florida corporation was the sole defendant.

On the other hand, during the pre-trial proceedings, Crown Bay claimed to be a Virgin Islands entity, separate from Marina Management Services, *see* JA 122, and later provided testimony to support that claim, *see* Trial 12/6 at 75–76. Also, the District Court concluded that it lacked diversity jurisdiction. *See* JA 96. n.3. This suggests that the sole defendant was a Virgin Islands business and that Marina Management Services was a separate entity.

[[19]](#Document1zzF192029570914) Mala bears the burden of proving that the District Court had diversity jurisdiction. [*McCann v. Newman Irrevocable Trust,* 458 F.3d 281, 286 (3d Cir.2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2009736718&ReferencePosition=286) (“The party asserting diversity jurisdiction bears the burden of ... proving diversity of citizenship by a preponderance of the evidence.”). Mala failed to meet that burden because he did not offer evidence that Crown Bay was anything other than a citizen of the Virgin Islands. Mala contends that Crown Bay admitted to being a citizen of Florida, but Crown Bay actually denied Mala's allegation that Crown Bay Marina was a division of “Marine Management Services.” *Compare* JA 55 ¶ 9 (alleging that Crown Bay Marina was a “corporate entity” under “Marine Management Services”), *with* JA 61 ¶ 9 (admitting that “Marine Management Services” is a Florida corporation but denying everything else).[FN7](#Document1zzB00772029570914)

[FN7.](#Document1zzF00772029570914) Mala also points out that during a pretrial hearing, Crown Bay's attorney introduced himself as “Mark Wilczynski on behalf of Marina Management Services, Inc.” JA 144. But this statement does not appear to be an admission that Crown Bay was the same entity as Marina Management Services. Indeed, Crown Bay's attorney might have introduced himself this way simply because the District Court had previously identified the defendant as “Marine Services Management d/b/a Crown Bay Marina, Inc.”

Absent evidence that the parties were diverse, we are left with Mala's allegations. Allegations are insufficient at trial. [*McCann,* 458 F.3d at 286](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2009736718&ReferencePosition=286) (requiring a showing of diversity by a preponderance of the evidence). And they are especially insufficient on appeal, where we review the District Court's underlying factual findings for clear error. [*Frett–Smith,* 511 F.3d at 399.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2014559368&ReferencePosition=399) Under this standard, we will not reverse unless “we are left with the definite and firm conviction” that Crown Bay was in fact a citizen of Florida. [*Id.*](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=2014559368) (quotation mark omitted). Mala has not presented any credible evidence that Crown Bay was a citizen of Florida—much less evidence that would leave us with the requisite “firm conviction.”

[[20]](#Document1zzF202029570914)[[21]](#Document1zzF212029570914) Mala tries to cover up this evidentiary weakness by again pointing to his pro se status. He argues that we should construe his complaint liberally to find diversity. But Mala's problem is not a pleading problem. It is an evidentiary problem. Our traditional flexibility toward pro se pleadings does not require us to indulge evidentiary deficiencies. *See* [*Brooks v. Kyler,* 204 F.3d 102, 108 n. 7 (3d Cir.2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000058032&ReferencePosition=108) (indicating that pro se litigants still must present at least affidavits to avoid summary judgment). Accordingly, the parties were not diverse and Mala does not have a jury-trial right.[FN8](#Document1zzB00882029570914)

[FN8.](#Document1zzF00882029570914) At various times, Mala suggested that the District Court also had supplemental jurisdiction. It is unclear whether he was referring to supplemental jurisdiction under [28 U.S.C. § 1367](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1367&FindType=L), or whether he was calling diversity jurisdiction by the wrong name. Either way, the argument fails. As noted above, the parties were not diverse. And even if he was referring to supplemental jurisdiction under [§ 1367](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1367&FindType=L), such jurisdiction exists only when there is no independent basis for federal jurisdiction. *See* [28 U.S.C. § 1367(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=28USCAS1367&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4) (stating that supplemental jurisdiction is limited to “other claims” over which district courts do not have “original jurisdiction”). Here, the District Court had admiralty jurisdiction over all parts of Mala's claim, as both parties acknowledge. The court did not need supplemental jurisdiction.

[[22]](#Document1zzF222029570914)[[23]](#Document1zzF232029570914) Mala also claims that the District Court erred by rejecting the advisory jury's verdict. [Federal Rule of Civil Procedure 39(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR39&FindType=L) states that “[i]n an action not triable of right by a jury, the court, on motion or on its own ... may try any issue with an advisory jury.” District courts are free to use advisory juries, even absent the parties' consent. *Compare* [Fed.R.Civ.P. 39(c)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR39&FindType=L) (requiring consent for a nonadvisory jury when the party does not have a jury-trial right), *with id.* 39(c)(1) (not requiring consent for an advisory jury); *see also* [*Broadnax v. City of New Haven,* 415 F.3d 265, 271 n. 2 (2d Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2006975552&ReferencePosition=271). District courts are also free to reject their verdicts, as long as doing so is not independently erroneous. [*Wilson v. Prasse,* 463 F.2d 109, 116 (3d Cir.1972)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1972110855&ReferencePosition=116) (“[F]indings by an advisory jury are not binding.”). As a result, the District Court did not err in this case by empanelling an advisory jury or by rejecting its verdict.

IV

Mala's final claim is that the District Court erroneously ruled on a handful of post-trial motions. After losing at trial, Mala asked the court to vacate the judgment under [Federal Rule of Civil Procedure 60(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR60&FindType=L) and to grant a new trial under Rules 50(b) and 59. These motions contained several overlapping arguments.[FN9](#Document1zzB00992029570914) A magistrate judge recommended that the District Court reject these motions, and the court adopted the magistrate's recommendations. We conclude that the court did not make a mistake in doing so.

[FN9.](#Document1zzF00992029570914) Among other things, Mala claimed that he should have received a jury trial, that the District Court improperly ignored evidence, that the court did not have jurisdiction once Mala had filed a recusal motion, and that Crown Bay had committed fraud on the court.

[[24]](#Document1zzF242029570914) In reviewing a district court's decision to adopt a magistrate's recommendations, “[w]e exercise plenary review over the District Court's legal conclusions and apply a clearly erroneous standard to its findings of fact.” [*O'Donald v. Johns,* 402 F.3d 172, 173 n. 1 (3d Cir.2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2006366256&ReferencePosition=173) (per curiam). Mala claims that “the Court stubbornly maintained that its rulings were correct and proper; no real review took place of the facts of the case, especially on the issue of jurisdiction allowing the Plaintiff a jury trial, nor acknowledging that the Court's decision to empanel an advisory jury during the pretrial conference was unclear and confusing to the Plaintiff at best.” Appellant's Br. at 23.

Mala's claim has little substance. The magistrate prepared three Reports and Recommendations that discussed Mala's arguments and urged the District Court to deny his motions. Judge Sanchez explained his reasons for doing so in an eight-page opinion. Both judges were meticulous and thorough. Mala has given us no reason to accept his general argument that “no real review took place.”

Beyond this general argument, Mala alleges two specific shortcomings. First, he bemoans the District Court's refusal to conduct a jury trial. As noted above, this was not an error. Although the court could have been clearer about Crown Bay's citizenship, Mala nevertheless failed to meet his burden of proving diversity. Second, Mala asserts that he failed to understand that the jury's findings would be nonbinding. This was not the District Court's fault. The court plainly stated that the jury would be advisory. *See* JA 147 (“[CROWN BAY'S ATTORNEY]: And is that in fact the Court's position that there will be an advisory jury? THE COURT: Yes.”). We therefore reject Mala's final claim.

\* \* \*

Mala is a serial pro se litigant. In this case, he convinced a jury of his peers to award him over $400,000 in damages. Unfortunately for Mala, the jury was advisory, and the District Court rejected the verdict. We conclude that the court did not err by using an advisory jury or by rejecting its verdict. Nor did the court err by adopting the magistrate's recommendations or by failing to provide a pro se manual. For these reasons we will affirm the District Court's judgment.

***Case 2.2***

N.D.Cal.,2011.

Gucci America, Inc. v. Wang Huoqing

Not Reported in F.Supp.2d, 2011 WL 31191 (N.D.Cal.)

Only the Westlaw citation is currently available.

United States District Court,

N.D. California.

**GUCCI AMERICA, INC., et al., Plaintiffs,**

**v.**

**WANG HUOQING, Defendant.**

No. C–09–05969 JCS.

Jan. 3, 2011.

[Anne Elizabeth Kearns](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0342177201&FindType=h), [Kenneth E. Keller](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0136860801&FindType=h), Krieg Keller Sloan Reilley & Roman LLP, San Francisco, CA, [Stephen Michael Gaffigan](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0154521301&FindType=h), Stephen M. Gaffigan, P.A., Ft. Lauderdale, FL, for Plaintiffs.

**[AMENDED] REPORT AND RECOMMENDATION RE MOTION FOR FINAL DEFAULT JUDGMENT AGAINST DEFENDANT [Docket No. 28]**

[JOSEPH C. SPERO](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0122876501&FindType=h), United States Magistrate Judge.

**I. INTRODUCTION**[FN1](#Document1zzB00112024302036)

[FN1.](#Document1zzF00112024302036) This Report and Recommendation is identical to Docket No. 46 except for the filing date at the end of the order, which has been corrected to reflect that the filing date of the Report and Recommendation is January 3, 2011 rather than January 3, 2010.

In this trademark infringement action, Plaintiffs Gucci America, Inc. (“Gucci”), Bottega Veneta International, S.A.R.L. (“Bottega”), and Balenciaga S.A. (“Balenciaga”) bring a Motion for Final Default Judgment Against Defendant (“Motion” or “Default Judgment Motion”) in which they seek default judgment, an award of statutory damages, costs of the suit and a permanent injunction against Defendant Wang Huoqing. A hearing on the Motion was held on October 8, 2010. For the reasons stated below, it is recommended that the Motion be GRANTED.

**II. BACKGROUND**

Plaintiff Gucci is a New York corporation with its principal place of business located at 685 Fifth Avenue, New York, New York 10022. First Amended Complaint (First Am. Compl.) ¶ 3; *see also* Declaration of Stacy Feldman in Support of Plaintiff's Motion for Final Default Judgment Against Defendant (“Feldman Decl.”) ¶ 2. Gucci manufactures and distributes high quality luxury goods, including footwear, belts, sunglasses, handbags, wallets, hats, jewelry, scarves, ties, and umbrellas, which are sold throughout the United States and worldwide. First Am. Compl. ¶ 3; Feldman Decl. ¶ 3. Gucci operates boutiques within this judicial district. First Am. Compl. ¶ 3. Gucci owns twenty-one federally registered trademarks consisting of the word “Gucci” and other symbols, which are used in connection with the manufacture and distribution of its products (the “Gucci Marks”). First Am. Compl. ¶ 13; Feldman Decl. ¶ 4; Request for Judicial Notice in Support of Plaintiffs' Motion for Final Default Judgment (“RJN”), Ex. A (“Gucci Trademark Registrations”).[FN2](#Document1zzB00222024302036)

[FN2.](#Document1zzF00222024302036) Plaintiffs request the Court take judicial notice of their United States trademark registrations. Under [Federal Rule of Evidence 201](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRER201&FindType=L), “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” The Court finds that Plaintiff's trademark registrations meet the requirements of [Rule 201](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRER201&FindType=L). Accordingly, the Court recommends that Plaintiffs' request for judicial notice be granted.

Plaintiff Bottega is a foreign corporation organized under the laws of Luxembourg with its principal place of business located at 12 Rue Leon Thyes, Luxembourg L–26–36. First Am. Compl. ¶ 4. Bottega manufactures and distributes high quality luxury goods including, but not limited to, handbags in the United States and worldwide under a federally registered trademark (the “Bottega Mark”). First Am. Compl. ¶ 15; Feldman Decl. ¶ 5; RJN, Ex. B (“Bottega Trademark Registrations”). Bottega operates boutiques within this judicial district. First Am. Compl. ¶ 4.

Plaintiff Balenciaga is a foreign corporation organized under the laws of France with its principal place of business located at 15 rue Cassette, Paris, France 75006. First Am. Compl. ¶ 5. Balenciaga manufactures and distributes high quality luxury goods including, but not limited to, handbags under three federally registered trademarks (the “Balenciaga Marks”). First Am. Compl. ¶ 17; Feldman Decl. ¶ 6; RJN, Ex. C (“Balenciaga Trademark Registrations”). Balenciaga operates boutiques within this judicial district. First Am. Compl. ¶ 5.

Plaintiffs filed the Complaint in this action on December 21, 2009, naming Wang Huoqing (also known as Hubert Wang) [FN3](#Document1zzB00332024302036) and Does 1–10 as Defendants. Plaintiffs filed a First Amended Complaint on January 29, 2010. In the First Amended Complaint, Plaintiffs allege that the Defendant is an individual who resides in the People's Republic of China, and has registered, established or purchased and currently maintains the following twenty-four domain names: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com. First Am. Compl. ¶¶ 6, 11 & Schedule A (List of Domain Name Entities). In the First Amended Complaint, Plaintiffs allege that Defendant's websites offer for sale products incorporating Gucci, Bottega, and Balenciaga Marks that are of a substantially different quality than Plaintiffs' genuine goods. First Am. Compl. ¶¶ 9, 29. Plaintiffs further allege that Defendant sells the counterfeit goods with the knowledge that such goods will be mistaken for the genuine products offered for sale by Plaintiffs and that the Defendant's actions will result in the confusion of the relevant trade and consumers, who will believe Defendant's counterfeit goods are the genuine goods originating from, associated with, and approved by Plaintiffs. *Id.* Plaintiffs allege Defendant is engaging in wrongful counterfeiting and infringing activities knowingly and intentionally or with reckless disregard or willful blindness to Plaintiffs' rights for the purpose of trading on the goodwill and reputation of Plaintiffs and that these infringing activities are likely to cause and actually are causing confusion, mistake, and deception among members of the trade and general consuming public as to the origin and quality of the Defendant's Counterfeit Goods bearing the Plaintiffs' Marks. *Id.* ¶¶ 33, 34. Plaintiffs further allege Defendant conducts business throughout the United States and this Judicial District through the operation of the domain names listed above. *Id.* ¶¶ 6, 9. Finally, Plaintiffs allege they are suffering irreparable injury and damage as a result of Defendant's unauthorized and wrongful use of the Plaintiffs' respective marks. *Id.* ¶ 36.

[FN3.](#Document1zzF00332024302036) Plaintiffs stipulated at the October 8 hearing to removing the alias Hubert Wang from the judgment. *See also* Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Entry of Final Default Judgment p. 3 n. 2.

Plaintiffs allege they have expended substantial time, money and other resources developing, advertising, and otherwise promoting their respective marks. *Id.* ¶ 21. Plaintiffs allege they have never assigned or licensed their respective marks to the Defendant in this matter nor have the Plaintiffs' marks ever been abandoned. *Id.* ¶ 19, 20. Plaintiffs further allege Defendant has had full knowledge of Plaintiffs' respective ownership of the Plaintiffs' Marks including their respective, exclusive rights to use and license such intellectual property and the goodwill associated therewith and that Defendant does not have, nor has ever had, the right or authority to use Plaintiffs' Marks for any purpose. *Id.* ¶ 27; Feldman Decl. ¶ 10. On the basis of these allegations, Plaintiffs assert two claims: (1) trademark counterfeiting and infringement under [15 U.S.C. § 1114](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1114&FindType=L), and (2) false designation of origin under [15 U.S.C. § 1125(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1125&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4).

Plaintiffs filed an Application for Order Authorizing Alternate Service of Process on Defendants Pursuant to [Federal Rule of Civil Procedure 4(f)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR4&FindType=L) on March 9, 2010. (“App. for Alt. Serv.”). In their application, Plaintiffs requested an order allowing for service of process via electronic mail pursuant to [Rule 4(f)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR4&FindType=L) because they were unable to locate Defendant or serve him in any other manner. Plaintiffs claimed service of process via electronic mail was appropriate because Defendant: 1) operates anonymously via the Internet using false physical address information in order to conceal his location and avoid liability for his unlawful conduct, and 2) relies solely on electronic communications to operate his business. App. for Alt. Serv. at 2.

Filed concurrently with the Application for Alternate Service was the declaration of Stephen M. Gaffigan. *See* Declaration of Stephen M. Gaffigan in Support of Plaintiffs' *Ex Parte* Application For Order Authorizing Alternate Service of Process on Defendant Pursuant To [Federal Rule Of Civil Procedure 4(f)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR4&FindType=L) (“Gaffigan Decl. In Support of App. For Order Authorizing Alt. Service”). In his declaration, Gaffigan stated that he “conducted Whois searches regarding the Subject Domain Names through www.whois.domaintools.com in order to identify the contact data the Defendant provided to his registrars.” *Id.* ¶ 3. Gaffigan included a number of tables displaying for each domain name the Whois contact information and the Whois email address associated with the site. *Id.* ¶¶ 3, 4. In the declaration and tables, Gaffigan states that the following sites are registered to Defendant Wang Huoqing: b2do.com, bagdo2.net, bagpo.com, ebagdo.com, ibagdo.com, ibagto.com, my4shop.net, my5shop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com. *Id.* ¶ 3 & Ex. 1. The declaration and tables further indicate that the following sites are registered to a “Dongshi (Shi Dong)”: bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagxo.com, bagxp.com, my4shop.com, my5shop.com, and myashop.com. and myashop.net. *Id.* Finally, the site bag2do.cn is registered to an organization called “chenxi” and is associated with the Registrant Name “yangtao.” *Id.* Gaffigan states that “[a]nalysis of the information provided by the Defendant in connection with the Whois registrations for each of the Subject Domain Names, as well as provided by the Defendant on his Internet websites operating thereunder demonstrates the connection between each of the Subject Domain Names and Defendant's control and operation thereof.” *Id.* ¶ 5.[FN4](#Document1zzB00442024302036)

[FN4.](#Document1zzF00442024302036) At the October 8 hearing, the Court asked Plaintiffs to submit a declaration that states the Defendant's connection to all the websites for which the Plaintiffs seek judgment. On November 8, 2010, Plaintiffs submitted: 1) the Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Entry of Final Default Judgment, 2) the Supplemental Declaration of Stacy Feldman in Support of Plaintiffs' Motion for Final Default Judgment Against Defendant Wang Huoqing, and 3) the Supplemental Declaration of Stephen M. Gaffigan in Support of Plaintiffs' Motion for Final Default Judgment Against Defendant Wang Huoqing. These declarations establish a connection between the Defendant and all the websites named in the Motion for Default Judgment.

The Court granted Plaintiffs' application on March 11, 2010. The Summons, Complaint, and First Amended Complaint were served on Defendant via email on March 13, 2010, pursuant to the Court's order authorizing alternate service of process. Declaration of Anne E. Kearns in Support of Plaintiffs' Motion for Final Default Judgment Against Defendant (“Kearns Decl.”) ¶ 2 & Ex. 2 (copies of emails sent showing proof of service). Defendant failed to file a responsive pleading or otherwise appear in this action. Kearns Decl. ¶ 5. The clerk entered default pursuant to [Rule 55(a) of the Federal Rules of Civil Procedure](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) on April 16, 2010.

Plaintiffs now bring a motion for default judgment asking for an award of statutory damages, costs, prejudgment interest and injunctive relief. In the Motion, Plaintiffs seek default judgment as to twenty-two federally registered trademarks (eighteen marks owned by Gucci, one mark owned by Bottega and three marks owned by Balenciaga) rather than the twenty-five trademarks listed in their First Amended Complaint.[FN5](#Document1zzB00552024302036)

[FN5.](#Document1zzF00552024302036) Plaintiffs stipulated at the October 8 hearing that they only intend to seek judgment as to the twenty-two trademarks listed in their RJN and in the Motion.

In the Motion, Plaintiffs assert that the twenty-four websites listed in the First Amended Complaint, as well as four additional websites—do2bag.com, do2bag.net, myamart.com, and myamart.net—are used by the Defendant, Wang Huoqing, to operate interactive commercial websites that advertise and sell counterfeit, infringing products bearing the Plaintiffs' trademarks. Feldman Decl. ¶¶ 13–15; Gaffigan Decl. In Support of App. For Order Authorizing Alt. Service ¶¶ 3–5 & Exs. 2–25 (showing printouts from the websites).

In support of the Default Judgment Motion, Plaintiffs filed the declaration of investigator Robert Holmes (“Holmes”) of IPCybercrime.com, LLC, who was retained to investigate the sale of counterfeit products by Defendant. Holmes Decl. In Support of FDJ ¶ 3. Holmes states that he accessed the Internet website operating under the domain name bag2do.cn and completed a pretextual purchase of a Gucci branded wallet from that website. Holmes Decl. In Support of App. For Order Authorizing Alt. Service ¶¶ 11, 12 and Exs. 1, 2. Holmes requested that the wallet from bag2do.cn be sent to his address in San Jose, California and he received a confirmation of his purchase via email. Holmes Decl. In Support of FDJ ¶ 5. Holmes states that he received a Gucci branded wallet from the bag2do.cn website and submitted the wallet to Plaintiffs' representative, Stacy Feldman, who is Gucci's Intellectual Property Coordinator. *Id.* ¶ 6, Ex. 1 (photographs of the wallet and shipping label from Holmes' online purchase). Feldman states that she examined the wallet and determined it to be a non-genuine Gucci branded product. Feldman Decl. In Support of FDJ ¶ 13.

According to Robert Holmes, on April 12, 2010, subsequent to his purchase of the wallet through the bag2do.cn website, he received an email advertisement from the email address “julia4868@gmail.com.” Holmes Decl. In Support of FDJ ¶ 7 & Ex. 2. The email stated that www.bag2do.cn was “closing all of [its] websites” and opening two new websites, do2bag.com and do2bag.net, where one could find “the products on these two websites as usual.” *Id.* Holmes states he provided a copy of this email to Plaintiffs' counsel, Stephen M. Gaffigan. *Id.* In a separate declaration, Gaffigan states that he subsequently determined the Internet websites operating under the domain names do2bag.com and do2bag.net as well as two additional websites, myamart.com and myamart.net, are operated by the Defendant and are used by the Defendant to offer for sale Gucci, Bottega and Balenciaga branded products. Gaffigan Decl. In Support of FDJ ¶ 4 and Comp. Exs. 1, 2. Gaffigan explains in his declaration the four new websites each use the same Google Analytics tracking code (UA–15639021) and are all located in the IP range 174.133.40.22X (where X is a variable number). Gaffigan Decl. In Support of FDJ ¶ 4. Plaintiffs claim that where multiple sites employ a Google tracking code with the same base number, it is almost always the case that those domains are all tracked from a single account, and thus, have a common operator. *Id.* at 3 n. 2. Plaintiffs claim that where only a very small number of sites are hosted on a server, or in cases where sites are hosted on servers with sequential numbers, there is a strong likelihood that these sites are connected, as the hosting servers are either privately owned or exclusively leased servers. *Id.* at 3, n. 3 & Exhibit 1 (printouts showing the common Google Analytics tracking codes and common IP addresses for do2bag.com, do2bag.net, myamart.com, and myamart.net).

Plaintiffs also offer a declaration by Ms. Feldman addressing the counterfeit nature of the products offered for sale by the Defendant on the Subject Domain Names. Feldman Decl. in Support of FDJ ¶¶ 13–15. Ms. Feldman reviewed and visually inspected printouts of the items bearing the Gucci, Bottega and Balenciaga Marks offered for sale on the Defendant's Internet websites and determined the products offered for sale to be non-genuine Gucci, Bottega and Balenciaga products. Feldman Decl. ¶ 14; Gaffigan Decl. In Support of FDJ, Ex. 2 (print-outs reviewed by Feldman).

Finally, in support of the Default Judgment Motion, Plaintiffs provide a declaration by another IPCybercrime.com investigator, Jason Holmes, stating that he conducted a search of the Department of Defense Manpower Data Center and determined that Wang Huoqing is not on active military duty. Declaration of Jason Holmes in Support of Plaintiffs' Motion for Final Default Judgment Against Defendant ¶ 4 & . Ex. 1.

In the Motion, Plaintiffs request the following relief: 1) an injunction prohibiting Wang Huoqing [FN6](#Document1zzB00662024302036) from infringing Plaintiffs' trademarks; 2) an order transferring the twenty-eight domain names discussed above to Plaintiffs' control or cancelling them; 3) an award of statutory damages against Defendant in the total amount of $606,000.00, that is, $594,000.00 to be awarded to Gucci, $3,000.00 to be awarded to Bottega, and $9,000.00 to be awarded to Balenciaga; 4) $700.00 for costs of the suit, to be divided equally among the three Plaintiffs; and 5) prejudgment interest from the date of filing of the action. *See* Proposed Judgment and Permanent Injunction.

[FN6.](#Document1zzF00662024302036) Plaintiffs originally requested the injunction also include the alias Hubert Wang, but stipulated to dropping the alias from the order. Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Entry of Final Default Judgment p. 3 n. 2.

At the October 8 hearing, the Court asked Plaintiffs to provide a declaration that establishes the basis upon which Plaintiffs believe all the sites listed in their Motion for Default Judgment are owned or controlled by the Defendant. In response, Plaintiffs submitted the Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs Motion for Entry of Final Default Judgment, the Supplemental Declaration of Stacy Feldman in Support of Plaintiffs' Motion for Final Default Judgment Against Defendant Wang Huoqing, and the Supplemental Declaration of Stephen M. Gaffigan in Support of Plaintiffs' Motion for Final Default Judgment Against Defendant Wang Huoqing. *See* Docket No. 44 In these declarations Plaintiffs have identified specific instances of Defendant's infringement in each website for which they seek default judgment and have established the basis for their belief that the Defendant owns or controls all twenty-eight websites at issue in this case.

**III. ANALYSIS**

**A. Personal Jurisdiction**

As a preliminary matter, this Court has an affirmative obligation to determine whether or not it has personal jurisdiction over Defendant Wang Huoqing, who is alleged to reside and/or conduct substantial business in the People's Republic of China. *See* [*In re Tuli,* 172 F.3d 707, 712 (9th Cir.1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1999095737&ReferencePosition=712) (holding that the court properly raised sua sponte the question of whether there was personal jurisdiction over Iraq before determining whether default judgment should be entered). In *Tuli,* the Ninth Circuit explained that where a plaintiff seeks default judgement, the court may not assume the existence of personal jurisdiction, even though ordinarily personal jurisdiction is a defense that may be waived, because a judgment in the absence of personal jurisdiction is void. *Id.* Where there are questions about the existence of personal jurisdiction in a default situation, the court should give the plaintiff the opportunity to establish the existence of personal jurisdiction. *Id.*

Personal jurisdiction in this District is proper provided it is consistent with the California long-arm statute and if it comports with due process of law. [*Boschetto v. Hansing,* 539 F.3d 1011, 1021–22 (9th Cir.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016791313&ReferencePosition=1021). Under California's long-arm statute, [Cal.Code Civ. Proc. § 410.10](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000201&DocName=CACPS410.10&FindType=L), federal courts in California may exercise jurisdiction to the extent permitted by the Due Process Clause of the Constitution. *Id.; see also* [*Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements, Ltd.,* 328 F.3d 1122, 1129 (9th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003342828&ReferencePosition=1129) (citing [Cal.Code Civ. Proc. § 410.10](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000201&DocName=CACPS410.10&FindType=L)). The Due Process Clause allows federal courts to exercise jurisdiction where either: 1) the defendant has had continuous and systematic contacts with the state sufficient to subject him or her to the general jurisdiction of the court; or 2) the defendant has had sufficient minimum contacts with the forum to subject him or her to the specific jurisdiction of the court. [*Panavision v. Toeppen,* 141 F.3d 1316, 1320 (9th Cir.1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1998089734&ReferencePosition=1320). The courts apply a three-part test to determine whether specific jurisdiction exists:

(1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable.

*Id.* (quoting [*Omeluk v. Langsten Slip & Batbyggeri A/S,* 52 F.3d 267, 270 (9th Cir.1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1995088735&ReferencePosition=270) (quotation marks omitted)). As discussed below, the factual allegations and evidence support a finding of specific jurisdiction over the Defendant in this case, Wang Huoqing.[FN7](#Document1zzB00772024302036)

[FN7.](#Document1zzF00772024302036) Because Plaintiffs have not pointed to facts indicating that Defendant's contacts with California are continuous and systematic, and because this Court concludes that specific jurisdiction exists, the Court need not reach the question of whether it has general jurisdiction over the Defendant. The Court notes, however, that the standard for establishing general jurisdiction is high, requiring that a defendant's contacts approximate physical presence. [*Bancroft & Masters v. Augusta Nat'l Inc.,* 223 F.3d 1082, 1086 (9th Cir.2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2000479809&ReferencePosition=1086). Based on the facts alleged in the First Amended Complaint, it does not appear that this standard is met.

**1. Purposeful Availment**

In order to satisfy the first prong of the test for specific jurisdiction, a defendant must have either purposefully availed itself of the privilege of conducting business activities within the forum or purposefully directed activities toward the forum. *Id.* Purposeful availment typically consists of action taking place in the forum that invokes the benefits and protections of the laws of the forum, such as executing or performing a contract within the forum. [*Schwarzenegger v. Fred Martin Motor Co.,* 374 F.3d 797, 802 (9th Cir.2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2004646045&ReferencePosition=802). To show purposeful availment, a plaintiff must show that the defendant “engage[d] in some form of affirmative conduct allowing or promoting the transaction of business within the forum state.” [*Gray & Co. v. Firstenberg Mach. Co.,* 913 F.2d 758, 760 (9th Cir.1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1990129909&ReferencePosition=760). A showing that a defendant purposefully directed his conduct toward a forum state, by contrast, usually consists of evidence of the defendant's actions outside the forum state that are directed at the forum, such as the distribution in the forum state of goods originating elsewhere. [*Schwarzenegger,* 374 F.3d at 803](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2004646045&ReferencePosition=803) (*citing* [*Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1984114017) (finding purposeful direction where defendant published magazines in Ohio and circulated them in the forum state, New Hampshire)). Purposeful direction is determined using an “effects test.” *Id.* A defendant “purposefully directs” activity at a forum state when he: (a) commits an intentional act, that is (b) expressly aimed at the forum state and that (c) causes harm that he knows is likely to be suffered in that jurisdiction. *Id.*

“In the internet context, the Ninth Circuit utilizes a sliding scale analysis under which ‘passive’ websites do not create sufficient contacts to establish purposeful availment, whereas interactive websites may create sufficient contacts, depending on how interactive the website is.” [*Jeske v. Fenmore,* 2008 WL 5101808, at \*4 (C.D.Cal. Dec.1, 2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2017590998) (citing [*Boschetto v. Hansing,* 539 F.3d 1011, 1018 (9th Cir.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2016791313&ReferencePosition=1018)). “[T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet.” [*Cybersell, Inc. v. Cybersell, Inc.,* 130 F.3d 414, 419 (9th Cir.1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1997235568&ReferencePosition=419) (quoting [*Zippo Mfg. Co. v. Zippo Dot Com, Inc.,* 952 F.Supp. 1119, 1124 (W.D.Pa.1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=345&FindType=Y&ReferencePositionType=S&SerialNum=1997044255&ReferencePosition=1124)). Personal jurisdiction is appropriate where an entity is conducting business over the internet and has offered for sale and sold its products to forum residents. *See* [*Stomp, Inc. v. NeatO, LLC,* 61 F.Supp.2d 1074, 1077–78 (C.D.Cal.1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=1999196978&ReferencePosition=1077) (holding that the exercise of personal jurisdiction was appropriate based on the “highly commercial” nature of defendant's website); *see also* [*Allstar Marketing Group, LLC, v. Your Store Online, LLC,* 666 F.Supp.2d 1109, 1122 (C.D.Cal.2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2019946692&ReferencePosition=1122) (holding that the exercise of personal jurisdiction was appropriate because “by operating a highly commercial website through which regular sales of allegedly infringing products are made to customers in [the forum state], [the defendant has] purposefully availed [itself] of the benefits of doing business in this district”).

Here, the allegations and evidence presented by Plaintiffs in support of the Motion are sufficient to show purposeful availment on the part of Defendant Wang Huoqing. Plaintiffs have alleged that Defendant operates “fully interactive Internet websites operating under the Subject Domain Names” and have presented evidence in the form of copies of web pages showing that the websites are, in fact, interactive. First Am. Compl. ¶ 1; Gaffigan Decl. In Support of FDJ & Exs. 1–3 (printouts from some of the websites displaying counterfeit merchandise for sale). Additionally, Plaintiffs allege Defendant is conducting counterfeiting and infringing activities within this Judicial District and has advertised and sold his counterfeit goods in the State of California. First Am. Compl. ¶¶ 1, 3–6, 9, 31. Plaintiffs have also presented evidence of one actual sale within this district, made by investigator Robert Holmes from the website bag2do.cn. Holmes Decl. In Support of FDJ ¶¶ 5–6. Finally, Plaintiffs have presented evidence that Defendant Wang Huoqing, own or controls the twenty-eight websites listed in the Motion for Default Judgment. Supplemental Declaration of Stacy Feldman in Support of Plaintiffs' Motion for Final Default Judgment Against Defendant Wang Huoqing (“Supp. Feldman Decl.”) pp. 2–18; Gaffigan Decl. in Support of App. For Order Authorizing Alt. Service ¶ 3; *See Gray & Co.,* 913 F.2d at 770. Such commercial activity in the forum amounts to purposeful availment of the privilege of conducting activities within the forum, thus invoking the benefits and protections of its laws.   [*Schwarzenegger,* 374 F.3d at 802](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2004646045&ReferencePosition=802) (quoting [*Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=1958121475)). Accordingly, the Court concludes that Defendant's contacts with California are sufficient to show purposeful availment.

**2. Claims Arise out of Forum Related Activities**

The second prong of the test for specific jurisdiction requires that the claim be one that arises out of or relates to the defendant's activities in the forum. [*Panavision,* 141 F.3d at 1320](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1998089734&ReferencePosition=1320). This requires a showing of “but for” causation. [*Id.* at 1322](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=1998089734) (“We must determine if the plaintiff Panavision would not have been injured ‘but for’ the defendant Toeppen's conduct directed toward Panavision in California.”). Here, Defendant's contacts with the forum are his sales of infringing and counterfeit products to customers in this state. Therefore, the Court finds that “but for” Defendant's infringing activity, Plaintiffs would not have been injured. Accordingly, the Court concludes that the second requirement for specific jurisdiction is satisfied.

**3. Reasonableness of Exercise of Jurisdiction**

The third prong of the test for specific jurisdiction provides that the exercise of jurisdiction must comport with fair play and substantial justice. *Id.* at 1320. To determine whether the exercise of jurisdiction over a non-resident defendant comports with fair play and substantial justice, a court must consider seven factors:

(1) the extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

[*Core–Vent Corp. v. Nobel Indus.,* 11 F.3d 1482, 1487–88 (9th Cir.1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1993235643&ReferencePosition=1487). There is a presumption that the exercise of jurisdiction is reasonable when the first two prongs of the specific jurisdiction test have been met; at that point, the burden shifts to the defendant to establish unreasonableness. *See Schwarzenegger,* 374, F.3d at 802 (stating that after the plaintiff meets his burden to satisfy the first two prongs, the burden then shifts to the defendant to present a “compelling case” that jurisdiction is unreasonable). The reasonableness factors enumerated in *Core–Vent* weigh in favor of finding that the exercise of jurisdiction comports with fair play and substantial justice in this case.

First, the forum state has a strong interest in adjudicating the dispute. Although none of the parties is a California citizen, Plaintiffs allege that Defendant sells the infringing products to California citizens, that Plaintiffs operate boutiques in this forum, and that they have suffered damages as a result of Defendant's infringing activities in this forum. *See* [*Nissan Motor Co. Ltd. v. Nissan Computer Corp.,* 89 F.Supp.2d 1154, 1161 (C.D.Cal.2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2000084104&ReferencePosition=1161) ( “California has a strong interest in protecting its citizens from trademark infringement and consumer confusion”). This factor thus favors a finding that the exercise of jurisdiction is reasonable.

Second, the extent of Defendant's purposeful interjection into the forum state's affairs is unknown as Plaintiffs have not alleged or presented evidence of the amount of infringing products Defendant sells to California customers. Therefore this factor is neutral.

Third, the burden on the Defendant, as a resident of China, to litigate in California is significant, but the inconvenience is not so great as to deprive him of due process, particularly given Defendant's purposeful availment of the benefits of conducting business within the forum. *See* [*Panavision,* 141 F.3d at 1323](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1998089734&ReferencePosition=1323) (“A defendant's burden in litigating in the forum is a factor in the assessment of reasonableness, but unless the ‘inconvenience is so great as to constitute a deprivation of due process, it will not overcome clear justifications for the exercise of jurisdiction.’ ”).

Fourth, consideration of the most efficient judicial resolution is “no longer weighed heavily given the modern advances in communication and transportation,” therefore this factor is also neutral because there may be witnesses and evidence located in both California and China. *Id.*

Fifth, with respect to the existence of an alternative forum, Defendant has not come forward to request an alternative forum and the Court is unaware of whether there is such a forum. This factor is neutral.

Sixth, with respect to the importance of the forum to the plaintiff's interest in convenient and effective relief, courts generally give little weight to a plaintiff's inconvenience. *See Id.* However, if a forum is available in China, it would be costly and inconvenient for Plaintiffs to litigate in China, therefore this factor weighs slightly in Plaintiffs' favor.

Finally, regarding the extent to which the exercise of jurisdiction would conflict with the sovereignty of Defendant's state, “[l]itigation against an alien defendant creates a higher jurisdictional barrier than litigation against a citizen from a sister state because important sovereignty concerns exist.”   [*Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.,* 328 F.3d 1122, 1133 (9th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003342828&ReferencePosition=1133) (quoting [*Sinatra v. Nat'l Enquirer,* 854 F.2d 1191, 1199 (9th Cir.1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1988107798&ReferencePosition=1199)). While this factor weighs in favor of the Defendant, it is not sufficient to defeat the Court's exercise of personal jurisdiction where the other *Core–Vent* factors support a finding of personal jurisdiction.

Balancing these seven factors, the Court concludes that the exercise of jurisdiction over the Defendant is reasonable.

**B. Legal Standard Regarding Entry of Default Judgment**

Pursuant to [Rule 55(b)(2) of the Federal Rules of Civil Procedure](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L), the court may enter a default judgment where the clerk, under [Rule 55(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L), has previously entered the party's default based upon failure to plead or otherwise defend the action. [Fed.R.Civ.P. 55(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L). Once a party's default has been entered, the factual allegations of the complaint, except those concerning damages, are deemed to have been admitted by the non-responding party. [Fed. R. Civ. Proc. 8(b)(6)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR8&FindType=L); *see also* [*Geddes v. United Fin. Group,* 559 F.2d 557, 560 (9th Cir.1977)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1977123186&ReferencePosition=560) (stating the general rule that “upon default[,] the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true”). A defendant's default, however, does not automatically entitle the plaintiff to a court-ordered default judgment. [*Draper v. Coombs,* 792 F.2d 915, 924–25 (9th Cir.1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1986132658&ReferencePosition=924).

“Granting or denying a motion for default judgment is a matter within the court's discretion.” [*Landstar Ranger, Inc. v. Parth Enterprises, Inc.,* 2010 WL 2889490, at \*2 (C.D.Cal. Jul.19, 2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2022605747) (quoting [*Elektra Entertainment Group Inc. v. Bryant,* No. CV 03–6381 GAF (JTLx), 2004 WL 783123, at \*1 (C.D.Cal. Feb.13, 2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2004321904)). The Ninth Circuit has directed that courts consider the following factors in deciding whether to enter default judgment:

(1) the possibility of prejudice to plaintiff; (2) the merits of plaintiff's substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning the material facts; (6) whether defendant's default was the product of excusable neglect; and (7) the strong public policy favoring decisions on the merits.

[*Eitel v. McCool,* 782 F.2d 1470, 1471–72 (9th Cir.1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1986108930&ReferencePosition=1471).

**C. *Eitel* Factors**

**1. Possibility of Prejudice to Plaintiff**

The first Eitel factor considers whether plaintiffs will suffer prejudice if a default judgment is not entered. [*Pepsico, Inc. v. California Security Cans,* 238 F.Supp.2d 1172, 1177 (C.D.Cal.2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2003072973&ReferencePosition=1177). To the extent that Defendant has failed to appear in, or otherwise defend this action, Plaintiffs will be left without a remedy if default judgment is not entered in their favor. Therefore, this factor weighs in favor of entry of default judgment.

**2. Merits of Plaintiffs' Substantive Claim and Sufficiency of the Complaint**

The second and third *Eitel* factors weigh the substantive merit of the plaintiff's claims and the sufficiency of the pleadings to support these claims. In order for these factors to weigh in favor of entering a default judgment, the plaintiffs must state a claim upon which they may recover.   [*Pepsico,* 238 F.Supp.2d at 1175;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2003072973&ReferencePosition=1175) *see also* [*Danning v. Lavine,* 572 F.2d 1386, 1388 (9th Cir.1978)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1978103135&ReferencePosition=1388) (stating that the allegations in the complaint must state a claim upon which the plaintiffs may recover).

**a. Trademark Counterfeiting & Infringement**

To prevail on a claim for trademark infringement, a holder of a registered service mark must show that another person is using: (1) any reproduction, counterfeit, copy or colorable imitation of a mark; (2) without the registrant's consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion, or to cause a mistake or to deceive. [15 U.S.C. § 1114(1)(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1114&FindType=L&ReferencePositionType=T&ReferencePosition=SP_9f800000f2221); [*Century 21 Real Estate Corp. v. Sanlin,* 846 F.2d 1175, 1178 (9th Cir.1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1988066937&ReferencePosition=1178). Neither intent nor actual confusion are necessary to establish a likelihood of confusion. *Id.* The critical determination is, “whether an alleged trademark infringer's use of a mark creates a likelihood that the consuming public will be confused as to who made that product.” [*Jada Toys, Inc. v. Mattel, Inc.,* 518 F.3d 628, 632 (9th Cir.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2015297940&ReferencePosition=632) (quoting [*Brother Records, Inc. v. Jardine,* 318 F.3d 900, 908 (9th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003117400&ReferencePosition=908)) (quotation marks omitted).

Here, Plaintiffs have alleged that they are the respective owners of Gucci, Bottega, and Balenciaga Marks that are registered with the United States Patent and Trademark Office and they have provided trademark registrations in support of that assertion. First Am. Compl. ¶¶ 3–5; Feldman Decl. ¶¶ 4–6; RJN, Exs. A, B, C. Plaintiffs have also alleged that Defendant Wang Huoqing uses the Marks to sell counterfeit products bearing the Gucci, Bottega, and Balenciaga Marks over the internet, and that these activities are causing confusion, mistake, and deception among members of the trade and the general consuming public as to the origin and quality of Defendant's counterfeit goods. First Am. Compl. ¶¶ 9, 27–29, 34. Further, Plaintiffs have presented evidence that the twenty-eight websites listed in the Motion for Default Judgment are owned or controlled by Wang Huoqing and offer for sale non-authentic products that carry Plaintiffs' trademarks. Finally, Plaintiffs have presented evidence that they actually purchased an item offered on one of the websites controlled by Wang Huoqing and determined that it infringed.

Plaintiffs have presented the trademark registrations for the Gucci, Bottega, and Balenciaga Marks in support of the Motion. *See* RJN, Exs. A, B, C. This evidence establishes that the Plaintiffs are the owners of the respective trademarks presented in the RJN. In addition, from Stacy Feldman's supplemental declaration, it appears the Plaintiffs' Marks have been infringed upon by Defendant. *See* Supp. Feldman Decl. ¶¶ 5–7 (stating Feldman personally reviewed printouts downloaded by Attorney Gaffigan and noted specific examples of the Defendant's infringement of the Plaintiffs' Marks on each of his Internet websites). Therefore, this factor weighs in favor of granting a default judgment.

**b. False Designation of Origin**

Plaintiffs allege that Defendant's use of the Gucci, Bottega, and Balenciaga marks constitutes false designation of origin in violation of section 43(a) of the Lanham Act, [15 U.S.C. § 1125(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1125&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4). That section provides as follows:

Any person who, or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

[15 U.S.C. § 1125(a)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1125&FindType=L&ReferencePositionType=T&ReferencePosition=SP_7b9b000044381).

In order to prevail in an action for false designation of origin, a plaintiff must show that: 1) the terms or logos in question are valid and protectable trademarks; 2) the plaintiff owns these marks as trademarks; 3) the plaintiff used these marks in commerce; and 4) the defendants “used terms or designs similar to plaintiff's marks without the consent of the plaintiff in a manner that is likely to cause confusion among ordinary purchasers as to the source of the goods.” [*Chimney Safety Inst. Of Am. v. Chimney King,* 2004 WL 1465699, at \*2 (N.D.Cal. May 27, 2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2004646869) (citing [*Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.,* 174 F.3d 1036, 1046–47 n. 8 (9th Cir.1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=1999106097&ReferencePosition=1046)).

Plaintiffs have presented evidence satisfying all of the elements listed above with respect to the twenty-two Gucci, Bottega, and Balenciaga Marks contained in the RJN. First, Plaintiffs have presented evidence that they own the twenty-two Marks, thus satisfying the first two elements of the claim. *See* RJN Exs. A, B, C. Second, Plaintiffs have presented evidence that they use the marks in commerce, thus satisfying the third element of the claim. Feldman Decl. in Support of FDJ ¶¶ 7, 9. Third, Plaintiffs have presented evidence the Defendant used designs that are copies of or substantially similar to the Marks without the consent of the Plaintiffs and this use is likely to cause confusion among ordinary purchasers as to the source of the products. Feldman Decl. in Support of FDJ ¶ 14. Therefore, this factor weighs in favor of granting a default judgment on Plaintiffs' false designation of origin claim.

**3. Amount at Stake**

The fourth *Eitel* factor balances the amount of money at stake in the claim in relation to the seriousness of the defendant's conduct. [*Eitel,* 782 F.2d at 1471–72](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1986108930&ReferencePosition=1471).

Here, Plaintiffs request $606,000.00 in statutory damages against Defendant, as well as an award of costs and prejudgment interest. This amount, while significant, is commensurate with the seriousness of Defendant's alleged misconduct, namely, engaging in willful infringement of numerous trademarks owned by Plaintiffs. Therefore, the Court finds that this factor favors entry of default judgment.

**4. Possibility of Dispute**

The fifth *Eitel* factor weighs the possibility that material facts may be in dispute. [*Eitel* 782 F.2d at 1471–72](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1986108930&ReferencePosition=1471). Here, because Defendant has failed to respond in this action, there is an absence of material facts in dispute in the record from which the Court may weigh this factor. Therefore, this factor is neutral.

**5. Possibility of Excusable Neglect**

The sixth *Eitel* factor weighs whether the defendant's default may have been the product of excusable neglect. *Id.* Here, Plaintiffs have properly served the Defendant in this action pursuant to the Court's Order Authorizing Alternate Service of Process on Defendant Pursuant to [Federal Rule of Civil Procedure 4(f)(3)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR4&FindType=L). Holmes Decl. In Support of FDJ. ¶ 8; Holmes Decl. In Support of App. For Order Authorizing Alt. Service ¶ 14 (stating Holmes received Return Receipts from ReadNotify.com, indicating his pretextual messages had been opened, for emails sent to the addresses: huoqing@gmail.com, dongshi007 @gmail.com, cnreg@hichina.com, bagdo.com@gmail.com, myashop@gmail.com, bagpo.com@gmail.com, my4shop@gmail.com, and julia3318@gmail.com). There is no evidence in the record that Defendant's failure to appear and otherwise defend was the result of excusable neglect. Rather, Defendant failed to appear after being served with the Complaint in this action, indicating that his failure to appear was willful. Therefore, this factor weighs in favor of entry of default judgment.

**6. Policy for Deciding Cases on the Merits**

The seventh *Eitel* factor balances the policy consideration that whenever reasonably possible, cases should be decided upon their merits.   [*Eitel,* 782 F.2d at 1472](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1986108930&ReferencePosition=1472). The existence of [Rule 55(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR55&FindType=L) though, indicates, that this preference towards disposing of cases on the merits is not absolute.   [*Pepsico,* 238 F.Supp.2d at 1177](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2003072973&ReferencePosition=1177). Here, because Defendant has failed to respond or otherwise defend himself in this action, deciding the case upon the merits is not possible and this factor is therefore neutral.

As discussed above, *Eitel* factors 1, 2, 3, 4, and 6 weigh in favor of granting the final default judgment and factors 5 and 7 are neutral. Therefore, the *Eitel* analysis weighs in favor of granting final default judgment. Accordingly, it is recommended that default judgment be entered against the Defendant on Plaintiffs' trademark infringement and false designation of origin claims.

**D. Remedies**

**1. Injunctive Relief**

Plaintiffs have requested the Court grant two forms of injunctive relief. First, Plaintiffs request that the Court grant a permanent injunction barring Defendant from further interfering with Plaintiffs' businesses. Proposed Judgment and Permanent Injunction at 2–4. Second, Plaintiffs request the Court order the Subject Domain Names transferred to Plaintiffs. *Id.* at 4.

Injunctive relief is available to prevent future trademark infringement under the Lanham Act. [15 U.S.C. § 1116](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1116&FindType=L). “Injunctive relief is the remedy of choice for trademark and unfair competition cases, since there is no adequate remedy at law for the injury caused by a defendant's continuing infringement.”   [*Century 21,* 846 F.2d at 1180](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1988066937&ReferencePosition=1180). In order to obtain injunctive relief, a plaintiff must show either: (1) probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions on the merits and the balance of hardships tipping in its favor. [*Vision Sports, Inc. v. Melville Corp.,* 888 F.2d 609, 612 (8th Cir.1989)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=350&FindType=Y&ReferencePositionType=S&SerialNum=1989153302&ReferencePosition=612). In an action for trademark infringement, “once the plaintiff establishes a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive relief is not granted.” *Id.*

Here, Plaintiffs request entry of the following injunction: [FN8](#Document1zzB00882024302036)

[FN8.](#Document1zzF00882024302036) The language of the injunctive relief is taken verbatim from the Plaintiffs' Proposed Order except that the Court has corrected a few minor typographical errors.

Defendant and his respective officers, agents, servants, employees, and attorneys, and all persons acting in concert and participation with him are hereby permanently restrained and enjoined from:

(a) manufacturing or causing to be manufactured, importing, advertising, or promoting, distributing, selling or offering to sell counterfeit and infringing goods using the Plaintiffs' Marks;

(b) using the Plaintiffs' Marks in connection with the sale of any unauthorized goods;

(c) using any logo, and/or layout which may be calculated to falsely advertise the services or products of Defendant offered for sale or sold via the Subject Domain Names [FN9](#Document1zzB00992024302036) and/or any other website or business, as being sponsored by, authorized by, endorsed by, or in any way associated with Plaintiffs;

[FN9.](#Document1zzF00992024302036) In the Proposed Order, Plaintiffs define “Subject Domain Names” as including the following: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com.

(d) falsely representing himself as being connected with Plaintiffs, through sponsorship or association;

(e) engaging in any act which is likely to falsely cause members of the trade and/or of the purchasing public to believe any goods or services of Defendant offered for sale o[r] sold via the Subject Domain Names and/or any other website or business are in any way endorsed by, approved by, and/or associated with Plaintiffs;

(f) using any reproduction, counterfeit, copy or colorable imitation of the Plaintiffs' Marks in connection with the publicity, promotion, sale, or advertising of any goods sold by Defendant via the Subject Domain Names and/or any other website or business, including, without limitation, footwear, belts, sunglasses, handbags, wallets, hats, jewelry, including, [sic] necklaces and bracelets, scarves, ties, and/or umbrellas;

(g) affixing, applying, annexing or using in connection with the sale of any goods, a false description or representation, including words or other symbols tending to falsely describe or represent goods offered for sale or sold by Defendant via the Subject Domain Names and/or any other website or business, as being those of Plaintiffs or in any way endorsed by Plaintiffs;

(h) offering such goods in commerce;

(i) otherwise unfairly competing with Plaintiffs;

(j) secreting, destroying, altering, removing, or otherwise dealing with the unauthorized products or any books or records which contain any information relating to the importing, manufacturing, producing, distributing, circulation, selling, marketing, offering for sale, advertising, promoting, renting or displaying of all unauthorized products which infringe the Plaintiffs' Marks; and

(k) effecting assignments or transfers, forming new entities or associations or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth above.

Proposed Judgment and Permanent Injunction at 2–4. Plaintiffs have also requested transfer of the Domain names as follows:

(a) In order to give practical effect to the Permanent Injunction, the Subject Domain Names are hereby ordered to be immediately transferred by Defendant, his assignees and/or successors in interest or title, and the Registrars to Plaintiffs' control. To the extent the current Registrars do not facilitate the transfer of the domain names to Plaintiffs' control within ten (10) days of receipt of this judgment, the United States based Registry shall, within thirty (30) days, transfer the Subject Domain Names to a United States based Registrar of Plaintiffs' choosing, and that Registrar shall transfer the Subject Domain Names to Plaintiffs;

(b) Upon Plaintiffs' request, the top level domain (TLD) Registries for the Subject Domain Names shall place the Subject Domain Names on Registry Hold status within thirty (30) days of receipt of this Order, thus removing them from the TLD zone files maintained by the Registries which link the Subject Domain Names to the IP addresses where the associated websites are hosted [.] [FN10](#Document1zzB010102024302036)

[FN10.](#Document1zzF010102024302036) In their original proposed order, Plaintiffs also requested that the following provision be included:

(c) Upon Plaintiffs' request, Defendant, those acting in concert with him, and those with notice of the Injunction, including any Internet search engines, including Google, Yahoo! and Bing, Web hosts, domain-name registrars, and domain-name registries that are provided with notice of the Injunction, shall be and are hereby restrained and enjoined from facilitating access to any or all websites through which Defendant engages in the sale of counterfeit and infringing goods using the Plaintiffs' Marks.

However, in their supplemental memorandum, Plaintiffs stipulated they are no longer requesting the inclusion of this provision in the Court's order. Plaintiffs Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Entry of Final Default Judgment p. 9.

In support of their request for injunctive relief, Plaintiffs provided evidence of Defendant's infringing activity, thereby showing a probability of success on the merits. Plaintiffs have also established a likelihood of confusion by showing Defendant's use of counterfeit Gucci, Bottega, and Balenciaga Marks, giving rise to a presumption that Plaintiffs will suffer irreparable harm if injunctive relief is not granted. Further, Plaintiffs assert that they have invested substantial time and money in advertising and promoting the Gucci, Bottega, and Balenciaga Marks, as a result of which Plaintiffs' marks have become widely recognized and Plaintiffs have developed reputation and goodwill. *See* [*Phillip Morris USA, Inc. v. Shalabi,* 352 F.Supp.2d 1067 (C.D.Cal.2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&SerialNum=2006063498) (considering plaintiff's investment in advertising and promoting, reputation, and goodwill in finding irreparable harm). Because Plaintiffs will suffer irreparable injury to their reputation and goodwill if injunctive relief is not granted, the Court recommends that Plaintiffs' request for a permanent injunction be granted.

Having determined that Plaintiffs are entitled to injunctive relief, the Court must determine the appropriate scope of the injunctive relief. [Rule 65 of the Federal Rules of Civil Procedure](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR65&FindType=L) requires that “[e]very order granting an injunction ... shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail ... the act or acts sought to be restrained.” [Fed.R.Civ.P. 65(d)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1004365&DocName=USFRCPR65&FindType=L). Generally, “an injunction must be narrowly tailored to remedy only the specific harms shown by the plaintiffs rather than to enjoin all possible breaches of the law.” [*Iconix, Inc. v. Tokuda,* 457 F.Supp.2d 969, 998–1002 (N.D.Cal.2006)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2010383264&ReferencePosition=998) (citing [*Price v. City of Stockton,* 390 F.3d 1105, 1117 (9th Cir.2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2005697029&ReferencePosition=1117)).

Applying this standard to the first form of injunctive relief requested, prohibiting Defendant from engaging in further infringement, the Court finds the relief to be narrowly tailored to remedy the harms shown by Plaintiffs and necessary to effectuate the purpose of preventing the Defendant from unlawfully infringing on the Plaintiffs' marks. The Plaintiffs have established Defendant's ownership or control over all twenty-eight domain names at issue (b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com). Additionally, the requested relief is in line with injunctive relief granted by other courts. *See e.g., Chanel, Inc. v. Sophia Zhang,* Case No. 3:09–cv–01977–MMC (N.D.Cal. Dec. 7, 2009) (including nearly identical language in permanent injunction); [*Chanel, Inc. v. Lin,* 2010 WL 2557503 (N.D.Cal. May 7, 2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2022396171) (including nearly identical language in permanent injunction). Additionally, the broad scope of the injunction is reasonable given that the Defendant has used the counterfeit marks to sell the same types of goods as offered by Gucci, Bottega and Balenciaga. *See* [*Perfumebay.com Inc. v. eBay Inc.,* 506 F.3d 1165, 1177 (9th Cir.2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2013921933&ReferencePosition=1177) (“When the infringing use is for a similar service, a broad injunction is especially appropriate”). Accordingly, the Court recommends that Plaintiffs' proposed injunction be adopted in its entirety with regard to all twenty-eight websites listed in the Motion for Default Judgment (b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com).

As to the second form of relief requested, the transfer of the domain names to the Plaintiffs, the Court also finds Plaintiffs' request to be reasonable and necessary even though it will be directed in part, to entities that are not parties to this action. This Court has specifically addressed the issue of enforcing its order on a third party in the context of a similar trademark infringement action and has concluded that under [15 U.S.C. § 1116](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1116&FindType=L), the Court is authorized to issue such an order against a third party because it is necessary to effectuate the purposes of the injunction. [*Chanel, Inc., v. Lin,* 2010 WL 2557503, at \*12 (N.D.Cal. May 7, 2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2022396171); *see also Louis Vuitton Malletier, S.A. v. Absolutee Corp.., Ltd.,* Case No. 3:09–cv–05612 MMC (N.D. Cal. April 19, 2010) (ordering transfer of domain names on default judgment where plaintiff asserted claims for trademark infringement and false designation of origin under Lanham Act but did not assert cyberpiracy claim). As stated above, Plaintiffs have provided evidence showing the Defendant is tied to all twenty-eight websites listed in the Motion for Default Judgment (b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com). Therefore, the second form of injunctive relief should be granted. Finally, Plaintiffs have stipulated that the twenty-eight domain names at issue should all be transferred to Plaintiff Gucci, as it is responsible for the Plaintiffs' anti-counterfeiting programs. Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Entry of Final Default Judgment p. 9.

**2. Statutory Damages**

The Lanham Act provides that a trademark owner may recover: (1) defendant's profits; (2) any damages sustained by the plaintiff; and (3) the costs of the action where a plaintiff has established trademark infringement. [15 U.S.C. § 1117(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1117&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4). As an alternative to seeking damages in the form of lost profits, a plaintiff may elect to receive an award of statutory damages in trademark actions involving the use of a counterfeit mark. [15 U.S.C. § 1117(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1117&FindType=L&ReferencePositionType=T&ReferencePosition=SP_4b24000003ba5). Under the Lanham Act, a court may award “not less than $1,000 or more than $200,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.” [15 U.S.C § 1117(c)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1117&FindType=L&ReferencePositionType=T&ReferencePosition=SP_10c0000001331). A court may grant enhanced damages of up to $2,000,000 per counterfeit mark on a finding of willful infringement. [15 U.S.C. § 1117(c)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1117&FindType=L&ReferencePositionType=T&ReferencePosition=SP_fcf30000ea9c4). Willful infringement occurs when the defendant knowingly and intentionally infringes on a trademark. *See* [*Earthquake Sound Corp. v. Bumper Indus.,* 352 F.3d 1210, 1216–1217 (9th Cir.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2003922279&ReferencePosition=1216). Willfulness can also be inferred from a defendant's failure to defend. [*Philip Morris USA, Inc. v. Castworld Prods., Inc.,* 219 F.R.D. 494, 500 (C.D.Cal.2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=344&FindType=Y&ReferencePositionType=S&SerialNum=2004043522&ReferencePosition=500). If statutory damages are elected, a court has wide discretion in determining the amount of statutory damages to be awarded.   [*Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham,* 259 F.3d 1186, 1194 (9th Cir.2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=506&FindType=Y&ReferencePositionType=S&SerialNum=2001670303&ReferencePosition=1194). Although [Section 1117(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1117&FindType=L&ReferencePositionType=T&ReferencePosition=SP_4b24000003ba5) does not give any specific guidance as to how a court should determine an appropriate statutory damage award, many courts have looked to the following factors that are considered for the award of statutory damages under an analogous provision of the Copyright Act:

(1) the expenses saved and the profits reaped; (2) the revenues lost by the plaintiff[s]; (3) the value of the copyright; (4) the deterrent effect on others besides the defendant; (5) whether the defendant's conduct was innocent or willful; (6) whether a defendant has cooperated in providing particular records from which to assess the value of the infringing material produced; and (7) the potential for discouraging the defendant.

[*Cartier v. Symbolix Inc.,* 544 F.Supp.2d 316, 318 (S.D.N.Y.2008)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2015651548&ReferencePosition=318) (quoting [*John Wiley & Sons, Inc., et al. v. Kanzin Rukiz Entertainment and Promotions et al,* No. 06 Civ. 12949, 2007 WL 1695124](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2012468426), at\*3 (S.D.N.Y. June 12, 2007)); *see also* [*Adobe Systems Inc. v. Tilley,* No. C 09–1085 PJH, 2010 WL 309249, at \*5 (N.D.Cal. Jan.9, 2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2021229863) (“courts in this district have also considered whether the damages sought bear a plausible relationship to the plaintiff's actual damages”) (quotations omitted). The Court considers these factors below.

First, as to *expenses saved and profits reaped* as a result of the Defendant's infringement, there is no evidence in the record of Defendant Wang Huoqing's expenses saved or profits reaped because the Defendant has failed to appear or otherwise defend this action. Therefore, this factor does not offer the court any guidance as to the appropriate amount of statutory damages. As to *revenues lost,* Plaintiffs have not provided any evidence of lost revenue and it may be difficult to quantify such. Therefore, this factor does not provide guidance in this case. As to the *value of the intellectual property,* the Plaintiffs have not provided any evidence as to the actual value of their trademarks, though Ms. Feldman has stated that the Plaintiffs' Marks are “vital” to their businesses and represent “virtually the entire respective value of the companies and their associated images.” Feldman Decl. in Support of FDJ ¶ 9. As to the *deterrent effect on others beside defendant,* a significant award to the Plaintiffs would clearly have some degree of deterrent effect on other infringers. As to *whether defendant's conduct was willful,* the incomplete registration information for the domain names, the failure to appear after being properly served, and the blatant use of the Plaintiffs' names suggest that the Defendant's conduct is willful and not innocent. As to *whether the defendant has cooperated in providing records,* as stated above, the Defendant has failed to appear or otherwise defend this action. Therefore, this factor is not applicable. As to the *potential for discouraging the defendant,* although a smaller damage award would probably be persuasive in deterring the Defendant, the Plaintiffs have alleged that he resides in the People's Republic of China and therefore any judgment, regardless of the amount of damages imposed may not have a deterring effect because enforcing the judgment may prove difficult. Weighing these factors, the Court concludes that Plaintiffs are entitled to a significant award of statutory damages. Below, the Court considers the appropriate methodology for setting a dollar amount on those damages.

In the Motion, Plaintiffs have requested a damage award based upon the number of registered marks, multiplied by the types of counterfeit goods sold (e.g.handbags, sunglasses, jewelry, etc.), multiplied by $3,000, that is, the amount of damages sought as to each type of good. This methodology gives rise to damages in the amounts of $594,000 (Gucci), $3,000 (Bottega), and $9,000 (Balenciaga). The Court finds that this methodology is problematic for two reasons. First, Plaintiffs have not provided evidence showing that each registered mark was used on each type of good. In particular, it is not possible to determine from the print-outs provided by Plaintiffs which particular marks are infringed by the products shown or even whether each type of product for which damages are sought is shown. Second, even if all twenty-two trademarks have been infringed in each type of product, the Court notes that many of the Marks appear very similar. Other courts that have addressed this issue have concluded that where the infringing acts are based on very similar marks, it may be appropriate to take this fact into account when calculating statutory damages to ensure that the Plaintiffs do not receive a windfall. *See, e.g.,* [*Adobe Systems, Inc. v. Tilley,* 2010 WL 309249, at \*5 (N.D.Cal. Jan.19, 2010)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=0000999&FindType=Y&SerialNum=2021229863); 2–5 Gilson on Trademarks § 5.19 (“If there are multiple marks involved, rather than give plaintiff[s] a windfall, courts tend to award an amount without multiplying it by the number of marks or to lower the award given per mark”); [*Louis Vuitton Malletier & Oakley, Inc. v. Veit,* 211 F.Supp.2d 567, 584–85 (E.D.Pa.2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4637&FindType=Y&ReferencePositionType=S&SerialNum=2002423812&ReferencePosition=584) (noting “[i]n similar cases concerning multiple marks, courts have been inclined to either award the maximum without multiplication or to lower the per mark award”).

In light of these concerns, the Court adopts the methodology used by Judge Chen in a similar situation to calculate damages.[FN11](#Document1zzB011112024302036) *See Chanel, Inc. v. Casondra Tshimanga,* Case No. 3:07–cv–03592 EMC (N.D.Cal. Jul. 15, 2008) (involving websites registered to Tshimanga that sold counterfeit goods that infringed marks registered to Chanel where a number of the infringed marks were identical or substantially similar to other marks for which Chanel sought recovery). In *Tshimanga,* Judge Chen chose to eliminate substantially similar trademarks from the damages calculation and to then use a higher per violation award for a lesser number of violations. As a result, damages were reduced from the requested amount of $678,000 to $450,000.

[FN11.](#Document1zzF011112024302036) At the October 8 hearing, Plaintiffs stipulated that they did not object to the Court's application of this framework to determine the amount of damages in this case.

Applying that methodology to this case, there are eight Gucci marks which are substantially similar to other Marks for which Gucci is requesting damages. Removing these Marks for the purpose of calculating damages would leave ten Gucci Marks upon which to base their damages.[FN12](#Document1zzB012122024302036) Bottega has only requested damages with regard to one Mark and therefore, there are no other substantially similar Marks to remove. Balenciaga has one Mark which is substantially similar to another one of the Marks for which it is requesting damages and therefore, for calculation purposes, Balenciaga's Marks would be reduced to two.[FN13](#Document1zzB013132024302036) At the same time, the Court finds that the amount per violation should be increased from $3,000 (as requested by Plaintiffs) to $4,000, which is a relatively low per-violation amount, given that Defendant's infringement was willful. Calculating Plaintiffs' damages with these adjustments results in a total damage award of $452,000.[FN14](#Document1zzB014142024302036) This award represents 74.6% of the Plaintiffs' original request of $606,000.[FN15](#Document1zzB015152024302036)

[FN12.](#Document1zzF012122024302036) Trademark registration numbers 1,097,555 and 3,660,040 appear substantially similar to registration number 1,097,483. Registration numbers 1,168,477 and 1,200,991 appear substantially similar to registration number 0,876,292. Registration numbers 3,039,630 and 3,376,129 appear substantially similar to registration number 3,039,629. Registration number 3,072,547 appears substantially similar to 3,072,549. Registration number 3,470,140 appears substantially similar to 3,039,631. At the October 8 hearing, Plaintiffs stipulated to removing the substantially similar marks for the purposes of calculating statutory damages. Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Entry of Default Judgment, p. 8.

[FN13.](#Document1zzF013132024302036) Trademark registration number 3,344,631 appears substantially similar to registration number 3,044,207.

[FN14.](#Document1zzF014142024302036) For Gucci: 10 trademarks x 11 types of goods x $4,000 = $440,000. For Bottega: 1 trademark x 1 type of good x $4,000 = $4,000. For Balenciaga: 2 trademarks x 1 type of good x $4,000 = $8,000.

[FN15.](#Document1zzF015152024302036) Judge Chen's methodology produced a result that was approximately 66% of the requested amount in *Tshimanga.*

**3. Costs**

Under the Lanham Act, a plaintiff that prevails on a claim under [§ 1125(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1125&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4) is entitled to costs. [15 U.S.C. § 1117(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1117&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4). Plaintiffs have prevailed on their false designation of origin claim under [§ 1125(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1125&FindType=L&ReferencePositionType=T&ReferencePosition=SP_8b3b0000958a4) and therefore are entitled to costs. Plaintiffs state that they have incurred costs in the amount of $700.00, consisting of the filing fee ($350.00) and the process server fees ($350.00). *See* Kearns Decl. ¶ 13; Holmes Decl. ¶ 8.

Under Civil Local Rule 54–3, an award of costs may include the clerk's filing fee and fees for service of process “to the extent reasonably required and actually incurred.” Therefore, Plaintiffs' costs of $350.00 in filing fees and $350.00 for service, totaling $700.00, are allowable and should be awarded in full and apportioned as follows: $233.34 for Gucci, $233.33 for Bottega, and $233.33 for Balenciaga, as requested in Plaintiffs' Proposed Judgment and Permanent Injunction. Proposed Judgment and Permanent Injunction at 5.

**4. Prejudgment Interest**

Plaintiffs have requested an award of prejudgment interest in this case and the Court concludes the Plaintiffs are entitled to receive an award of prejudgment interest. Under [15 U.S.C. § 1117(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1117&FindType=L&ReferencePositionType=T&ReferencePosition=SP_a83b000018c76), assuming the court has found intentional use of a mark or designation as defined in [section 1116(d)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1116&FindType=L) of the same title, “the court may award prejudgment interest on such amount at an annual interest rate established under section 6621(a)(2) of Title 26, [FN16](#Document1zzB016162024302036) beginning on the date of service of the claimant's pleadings setting forth the claim for such entry of judgment and ending on the date such entry is made, or for shorter time as the court considers appropriate.” [15 U.S.C. § 1117(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=15USCAS1117&FindType=L&ReferencePositionType=T&ReferencePosition=SP_a83b000018c76).

[FN16.](#Document1zzF016162024302036) Section 6621(a)(2) provides that the prejudgment rate shall be equal to the Federal short-term rate as defined by the Secretary in the first month of each calendar quarter plus 3 percentage points.

Here, the Summons, Complaint and First Amended Complaint were all served on March 13, 2010 and therefore, the Court calculates prejudgment interest from that date to the date of this Report and Recommendation. Using an annual rate of 3.64%,[FN17](#Document1zzB017172024302036) Plaintiffs should be awarded $13,117.16 in prejudgment interest.[FN18](#Document1zzB018182024302036) The prejudgment interest should be apportioned as follows: for Gucci, $12,768.92 [FN19](#Document1zzB019192024302036); for Bottega, $116.08 [FN20](#Document1zzB020202024302036); and for Balenciaga, $232.16.[FN21](#Document1zzB021212024302036)

[FN17.](#Document1zzF017172024302036) The short-term rate for March, 2010 was 0.64%, corresponding to the month in which the complaint was served in this action. (This figure was determined based on information from http://www.irs.gov/pub/irs–drop/rr–10–08.pdf). Thus, the rate used to calculate Plaintiffs' prejudgment interest should be 3.64%. In their Supplemental Memorandum, Plaintiffs stipulated to the prejudgment interest rate of 3.64%. Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Entry of Final Default Judgment, p. 9 n. 4.

[FN18.](#Document1zzF018182024302036) The prejudgment interest figure of $13,117.16 was computed by converting the annual rate of 3.64% to a daily rate of 9.97260274 x 10 –5 (.0364 ÷ 365), then multiplying by 291, representing the 291 days between service of the complaint in this action (March 13, 2010) and the date of this Report and Recommendation, then multiplying by $452,000.00, representing the total statutory damages to be awarded.

[FN19.](#Document1zzF019192024302036) 9.97260274 x 10 –5 x $440,000.00 = $12,768.92

[FN20.](#Document1zzF020202024302036) 9.97260274 x 10 –5 x $4,000.00 = $116.08

[FN21.](#Document1zzF021212024302036) 9.97260274 x 10 –5 x $8,000.00 = $232.16

**IV. CONCLUSION**

It is recommended that the Court GRANT the Motion. Default judgment should be entered against the Defendant on Plaintiffs' trademark infringement and false designation of origin claims. The Court should award statutory damages to each Plaintiff in the following amounts: for Gucci America, Inc. $440,000; for Bottega Veneta International S.A.R.L. $4,000; and for Balenciaga S.A. $8,000. The Court should award prejudgment interest to each Plaintiff in the following amounts: for Gucci America, Inc. $12,768.92; for Bottega Veneta International S.A.R.L. $116.08; and for Balenciaga S.A. $232.16. Additionally, the Court should award $233.33 in costs to each Plaintiff on the basis of Defendant's trademark infringement, for which Defendant shall be liable.

A permanent injunction should be entered against the Defendant as follows:

Defendant and his respective officers, agents, servants, employees, and attorneys, and all persons acting in concert and participation with him are hereby permanently restrained and enjoined from:

(a) manufacturing or causing to be manufactured, importing, advertising, or promoting, distributing, selling or offering to sell counterfeit and infringing goods using the Plaintiffs' Marks;

(b) using the Plaintiffs' Marks in connection with the sale of any unauthorized goods;

(c) using any logo, and/or layout which may be calculated to falsely advertise the services or products of Defendant offered for sale or sold via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business, as being sponsored by, authorized by, endorsed by, or in any way associated with Plaintiffs;

(d) falsely representing himself as being connected with Plaintiffs, through sponsorship or association;

(e) engaging in any act which is likely to falsely cause members of the trade and/or of the purchasing public to believe any goods or services of Defendant offered for sale o[r] sold via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business are in any way endorsed by, approved by, and/or associated with Plaintiffs;

(f) using any reproduction, counterfeit, copy or colorable imitation of the Plaintiffs' Marks in connection with the publicity, promotion, sale or advertising of any goods sold by Defendant via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business, including, without limitation, footwear, belts, sunglasses, handbags, wallets, hats, necklaces, bracelets, scarves, ties, and/or umbrellas;

(g) affixing, applying, annexing or using in connection with the sale of any goods, a false description or representation, including words or other symbols tending to falsely describe or represent goods offered for sale or sold by Defendant via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business, as being those of Plaintiffs or in any way endorsed by Plaintiffs;

(h) offering such goods in commerce;

(i) otherwise unfairly competing with Plaintiffs;

(j) secreting, destroying, altering, removing, or otherwise dealing with the unauthorized products or any books or records which contain any information relating to the importing, manufacturing, producing, distributing, circulation, selling, marketing, offering for sale, advertising, promoting, renting or displaying of all unauthorized products which infringe the Plaintiffs' Marks; and

(k) effecting assignments or transfers, forming new entities or associations or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth above.

Finally, the Court should further order as follows:

(l) In order to give practical effect to the Permanent Injunction, the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com are hereby ordered to be immediately transferred by Defendant, his assignees and/or successors in interest or title, and the Registrars to Plaintiff Gucci's control. To the extent the current Registrars do not facilitate the transfer of the domain names to Plaintiffs' control within ten (10) days of receipt of this judgment, the United States based Registry shall, within thirty (30) days, transfer the Subject Domain Names to a United States based Registrar of Plaintiffs' choosing, and that Registrar shall transfer the Subject Domain Names to Plaintiff Gucci; and

(m) Upon Plaintiffs' request, the top level domain (TLD) Registries for the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com shall place the websites on Registry Hold status within thirty (30) days of receipt of this Order, thus removing them from the TLD zone files maintained by the Registries which link the websites to the IP addresses where the associated websites are hosted.

# *Case 2.3*

Fla.App. 3 Dist.,2013.

Espresso Disposition Corp. 1 v. Santana Sales & Marketing Group, Inc.

105 So.3d 592, 38 Fla. L. Weekly D88

District Court of Appeal of Florida,

Third District.

**ESPRESSO DISPOSITION CORP.1 and Rowland Coffee Roasters, Inc., Appellants,**

**v.**

**SANTANA SALES & MARKETING GROUP, INC., Appellee.**

No. 3D12–1147.

Jan. 2, 2013.

*On Motion for Rehearing*

[CORTIÑAS](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=PROFILER-WLD&DocName=0343975301&FindType=h), J.

We grant Santana Sales & Marketing Group, Inc.'s (“Appellee”) amended motion for rehearing, withdraw our former opinion dated November 14, 2012, and substitute the following opinion in its stead:

Espresso Disposition Corporation 1 and Rowland Coffee Roasters, Inc. (collectively “Appellants”) seek review of the trial court's order denying their motions to dismiss Appellee's third amended complaint. Appellants claim that the trial court erred in denying their motions to dismiss because the plain and unambiguous language in the parties' brokerage agreement contains a mandatory forum selection clause requiring that all lawsuits brought under the agreement shall be in Illinois. We agree.

Espresso Disposition Corporation 1 and Santana and Associates entered into the brokerage agreement in 2002.[FN1](#Document1zzB00112029548971) The agreement provides for a mandatory forum selection clause in paragraph 8. The provision states:

[FN1.](#Document1zzF00112029548971) Rowland assumed the agreement in May 2011. Rowland purchased Espresso Disposition Corporation f/k/a Rowland Coffee Roasters. Thus, Rowland acquired Rowland Coffee Rosters. As such, the Rowland Coffee Roasters named in the 2002 agreement in now Espresso Disposition Corporation.

The ***venue*** with respect to *any action pertaining to this Agreement* ***shall be the State of Illinois.*** The *laws of the State of Illinois shall govern* the application and interpretation of this Agreement.

(Emphasis added). However, Appellee filed a lawsuit against Appellants alleging a breach of the agreement in Miami–Dade County, Florida. In fact, Appellee filed four subsequent complaints—an initial complaint, amended complaint, second amended complaint, and third amended complaint—after each and every previous pleading's dismissal was based upon venue as provided for in the agreement's mandatory forum selection clause. Appellee's third amended complaint alleges the forum selection clause was a mistake that was made at the time the agreement was drafted. Additionally, Appellee attached an affidavit which states that, in drafting the agreement, Appellee's principal copied a form version of an agreement between different parties, and by mistake, forgot to change the venue provision from Illinois to Florida. In response, Appellants filed their motions to dismiss the third amended complaint, which the trial court denied.[FN2](#Document1zzB00222029548971) Because the trial court erred in denying Appellants' motions to dismiss that sought to enforce a forum selection clause, we reverse and remand for entry of an order dismissing the third amended complaint.

[FN2.](#Document1zzF00222029548971) During the pendency of the underlying lawsuit, Appellants filed and served three separate motions for sanctions pursuant to [section 57.105, Florida Statutes](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLSTS57.105&FindType=L), claiming that Appellee's lawsuit was frivolous given the well-established law on mandatory forum selection provisions and the substantive deficiencies in Appellee's allegations.

[[1]](#Document1zzF12029548971)[[2]](#Document1zzF22029548971) Florida appellate courts interpret a contractual forum selection clause under a de novo standard of review. [*Am. Safety Cas. Ins. Co. v. Mijares Holding Co., LLC,* 76 So.3d 1089, 1091 (Fla. 3d DCA 2011)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1091) (citations omitted). Likewise, “[a]s the trial court's order denying [appellant's] motion to dismiss is based on the interpretation of the contractual forum selection clause, this Court's standard of review is de novo.” [*Celistics, LLC v. Gonzalez,* 22 So.3d 824, 825 (Fla. 3d DCA 2009)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2020513217&ReferencePosition=825). Therefore, the narrow issue before this Court is whether the brokerage agreement provides for a mandatory forum selection clause that is enforceable under Florida law.

[[3]](#Document1zzF32029548971) Florida courts have long recognized that “forum selection clauses such as the one at issue here are presumptively valid.” [*Corsec, S.L. v. VMC Int'l Franchising, LLC,* 909 So.2d 945, 947 (Fla. 3d DCA 2005)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2007143271&ReferencePosition=947) (enforcing forum selection clause in agreement that stated: “[t]he parties expressly submit to the jurisdiction of the courts and tribunals of the capital City of Madrid....”). This is because forum selection clauses “provide a degree of certainty to business contracts by obviating jurisdictional struggles and by allowing parties to tailor the dispute resolution mechanism to their particular situation.” [*Am. Safety Cas.,* 76 So.3d at 1091](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1091) (quoting [*Manrique v. Fabbri,* 493 So.2d 437, 439 (Fla.1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1986143659&ReferencePosition=439)). Moreover, “[f]orum selection clauses reduce litigation over venue, thereby conserving judicial resources, reducing business expenses, and lowering consumer prices.” [*Am. Safety Cas.,* 76 So.3d at 1091](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1091).

[[4]](#Document1zzF42029548971)[[5]](#Document1zzF52029548971) Because Florida law presumes that forum selection clauses are valid and enforceable, the “party seeking to avoid enforcement of such a clause must establish that enforcement would be unjust or unreasonable.” [*Am. Safety Cas.,* 76 So.3d at 1092;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1092) *see also* [*Corsec,* 909 So.2d at 947;](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2007143271&ReferencePosition=947) [*Manrique,* 493 So.2d at 440, n. 4.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1986143659&ReferencePosition=440) Under Florida law, the clause is only considered unjust or unreasonable if the party seeking avoidance establishes that enforcement would result in “no forum at all.” [*Am. Safety Cas.,* 76 So.3d at 1092](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3926&FindType=Y&ReferencePositionType=S&SerialNum=2026765905&ReferencePosition=1092) (quoting [*Corsec,* 909 So.2d at 947);](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2007143271&ReferencePosition=947) *see also* [*Golden Palm Hospitality, Inc. v. Stearns Bank Nat'l Ass'n,* 874 So.2d 1231, 1235 (Fla. 5th DCA 2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2004522553&ReferencePosition=1235) (“Thus, it is generally appropriate for a court in Florida, as a procedural issue, to determine the validity and enforceability of a forum selection clause despite a choice of law provision in the agreement.”). There is absolutely no set of facts that Appellee could plead and prove to demonstrate that Illinois state courts do not exist. Illinois became the twenty-first state in 1818, and has since established an extensive system of state trial and appellate courts. Clearly, Appellee failed to establish that enforcement would be unreasonable since the designated forum—Illinois—does not result in Appellee's having “no forum at all.”

[[6]](#Document1zzF62029548971)[[7]](#Document1zzF72029548971)[[8]](#Document1zzF82029548971)[[9]](#Document1zzF92029548971) Further, “[a]s we have said on a number of occasions, if a forum selection clause ‘unambiguously’ mandates that litigation be subject to an agreed upon forum, then it is reversible error for the trial court to ignore the clause.” [*Sonus–USA, Inc. v. Thomas W. Lyons, Inc.,* 966 So.2d 992, 993 (Fla. 5th DCA 2007)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013300192&ReferencePosition=993). Generally, the clause is mandatory where the plain language used by the parties indicates “exclusivity.” [*Sonus–USA, Inc.,* 966 So.2d at 993](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013300192&ReferencePosition=993) (quoting [*Golden Palm Hospitality, Inc.,* 874 So.2d at 1236.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2004522553&ReferencePosition=1236) Importantly, “[i]f the forum selection clause state[s] or clearly indicate[s] that any litigation must or **shall** be initiated in a specified forum, then it is mandatory.” [*Sonus–USA, Inc.,* 966 So.2d at 993](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013300192&ReferencePosition=993) (quoting [*Shoppes L.P. v. Conn,* 829 So.2d 356, 358 (Fla. 5th DCA 2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2002691599&ReferencePosition=358) (internal quotation marks omitted) (emphasis added). Here, the agreement's plain language provides that the venue for any action relating to a controversy under the agreement any litigation “shall be the State of Illinois.” *See* [*Sonus–USA, Inc.,* 966 So.2d at 993](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2013300192&ReferencePosition=993) (holding that the agreement's use of the word shall indicated the forum selection clause was a mandatory provision that must be enforced); *see also* [*Corsec, S.L.,* 909 So.2d at 946.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2007143271&ReferencePosition=946) The clear language unequivocally renders the forum selection clause mandatory.

[[10]](#Document1zzF102029548971) Appellee would have us create an exception to our jurisprudence on mandatory forum selection clauses based on their error in cutting and pasting the clause from another agreement. Of course, the origin of “cutting and pasting” comes from the traditional practice of manuscript-editing whereby writers used to cut paragraphs from a page with “editing scissors,” that had blades long enough to cut an 8 1/2 "—wide page, and then physically pasted them onto another page. Wikipedia, http:// en. wikipedia. org/ wiki/ Cut,\_ copy,\_ and\_ paste (last visited September 17, 2012). Today, the cut, copy, and paste functions contained in word processing software render unnecessary the use of scissors or glue. However, what has not been eliminated is the need to actually read and analyze the text being pasted, especially where it is to have legal significance. Thus, in reviewing the mandatory selection clause which Appellant seeks to enforce, we apply the legal maxim “be careful what you ask for” and enforce the pasted forum.

[[11]](#Document1zzF112029548971) Accordingly, we reverse trial court's denial of the motions to dismiss Appellee's third amended complaint on the basis of improper venue, and remand for entry of an order of dismissal.[FN3](#Document1zzB00332029548971)

[FN3.](#Document1zzF00332029548971) Appellee did not argue unilateral mistake to the trial court. However, even if Appellee had so argued, any purported unilateral mistake resulted from an inexcusable lack of due care on the part of Appellee's counsel, thereby precluding relief under a theory of unilateral mistake. *See* [*Stamato v. Stamato,* 818 So.2d 662 (Fla. 4th DCA 2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=2002364816); [*BMW of N. Am., Inc. v. Krathen,* 471 So.2d 585 (Fla. 4th DCA 1985)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=1985129992).

Although Appellee argued mutual mistake, that argument was equally meritless as there was simply no evidence in the record of any mistake whatsoever by Appellants. *See* [*Keystone Creations, Inc. v. City of Delray Beach,* 890 So.2d 1119 (Fla. 4th DCA 2004)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&SerialNum=2005640316); [*Feldman v. Kritch,* 824 So.2d 274, 277 (Fla. 4th DCA 2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=2002528386&ReferencePosition=277) (“It is never the role of the trial court to rewrite a contract to make it more reasonable for one of the parties or to relieve a party from what turns out to be a bad bargain.”).

Reversed and remanded.