Chapter 2

Courts and Alternative Dispute Resolution

INTRODUCTION

Despite the substantial amount of litigation that occurs in the United States, the experience of many students with the American judicial system is limited to little more that some exposure to traffic court. In fact, most persons have more experience with and know more about the executive and legislative branches of government than they do about the judicial branch. This chapter provides an excellent opportunity to make many aware of the nature and purpose of this major branch of our government.

One goal of this text is to give students an understanding of which courts have power to hear what disputes and when. Thus, the first major concept introduced in this chapter is jurisdiction. Careful attention is given to the requirements for federal jurisdiction and to which cases reach the Supreme Court of the United States. It might be emphasized at this point that the federal courts are not necessarily superior to the state courts. The federal court system is simply an independent system authorized by the Constitution to handle matters of particular federal interest.

This chapter also covers alternatives to litigation that can be as binding to the parties involved as a court's decree. Alternative dispute resolution, including online dispute resolution, is the chapter's third major topic.

Among important points to remind students of during the discussion of this chapter are that most cases in the textbook are appellate cases (except for federal district court decisions, few trial court opinions are even published), and that most disputes brought to court are settled before trial. Of those that go through trial to a final verdict, less than 4 percent are reversed on appeal. Also, it might be emphasized again that in a common law system, such as the United States', cases are the law. Most of the principles set out in the text of the chapters represent judgments in decided cases that involved real people in real controversies.

CHAPTER OUTLINE

I. The Judiciary's Role in American Government

The essential role of the judiciary is to interpret and apply the law to specific situations.

A. JUDICIAL REVIEW

The judiciary can decide, among other things, whether the laws or actions of the other two branches are constitutional. The process for making such a determination is known as judicial review.

B. THE ORIGINS OF JUDICIAL REVIEW IN THE UNITED STATES

Judicial review was a new concept at the time of the adoption of the Constitution, but it is not mentioned in the document. Its application by the United State Supreme Court came soon after the United States began, notably in the case of *Marbury v. Madison.*

ENHANCING YOUR LECTURE—


MARBURY *v.* *MADISON* (1803)


In the edifice of American law, the *Marbury v. Madison*[a] decision in 1803 can be viewed as the keystone of the constitutional arch. The facts of the case were as follows. John Adams, who had lost his bid for reelection to the presidency to Thomas Jefferson in 1800, feared the Jeffersonians' antipathy toward business and toward a strong central government. Adams thus worked feverishly to "pack" the judiciary with loyal Federalists (those who believed in a strong national government) by appointing what came to be called "midnight judges" just before Jefferson took office. All of the fifty-nine judicial appointment letters had to be certified and delivered, but Adams's secretary of state (John Marshall) had succeeded in delivering only forty-two of them by the time Jefferson took over as president. Jefferson, of course, refused to order his secretary of state, James Madison, to deliver the remaining commissions.

MARSHALL'S DILEMMA

William Marbury and three others to whom the commissions had not been delivered sought a writ of *mandamus* (an order directing a government official to fulfill a duty) from the United States Supreme Court, as authorized by Section 13 of the Judiciary Act of 1789. As fate would have it, John Marshall had stepped down as Adams's secretary of state only to become chief justice of the Supreme Court. Marshall faced a dilemma: If he ordered the commissions delivered, the new secretary of state (Madison) could simply refuse to deliver them—and the Court had no way to compel action, because it had no police force. At the same time, if

Marshall simply allowed the new administration to do as it wished, the Court's power would be severely eroded.

MARSHALL'S DECISION

Marshall masterfully fashioned his decision. On the one hand, he enlarged the power of the Supreme Court by affirming the Court's power of judicial review. He stated, "It is emphatically the province and duty of the Judicial Department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . . So if the law be in opposition to the Constitution . . . [t]he Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty."

On the other hand, his decision did not require anyone to do anything. He stated that the highest court did not have the power to issue a writ of *mandamus* in this particular case. Marshall pointed out that although the Judiciary Act of 1789 specified that the Supreme Court could issue writs of *mandamus* as part of its original jurisdiction, Article III of the Constitution, which spelled out the Court's original jurisdiction, did not mention writs of *mandamus*. Because Congress did not have the right to expand the Supreme Court's jurisdiction, this section of the Judiciary Act of 1789 was unconstitutional—and thus void. The decision still stands today as a judicial and political masterpiece.

APPLICATION TO TODAY'S WORLD

Since the *Marbury v. Madison* decision, the power of judicial review has remained unchallenged. Today, this power is exercised by both federal and state courts. For example, as your students will read in Chapter 4, several of the laws that Congress has passed in an attempt to protect minors from Internet pornography have been held unconstitutional by the courts. If the courts did not have the power of judicial review, the constitutionality of these acts of Congress could not be challenged in court—a congressional statute would remain law until changed by Congress. Because of the importance of *Marbury v. Madison* in our legal system, the courts of other countries that have adopted a constitutional democracy often cite this decision as a justification for judicial review.

a. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

ENHANCING YOUR LECTURE—

👎👎 ❾❽❽ 👎👎 JUDICIAL REVIEW IN OTHER NATIONS

The concept of judicial review was pioneered by the United States. Some maintain that one of the reasons the doctrine was readily accepted in this country was that it fit well with the checks and balances designed by the founders. Today, all established constitutional democracies have some form of judicial review—the power to rule on the constitutionality of laws—but its form varies from country to country.

For example, Canada's Supreme Court can exercise judicial review but is barred from doing so if a law includes a provision explicitly prohibiting such review. France has a Constitutional Council that rules on the constitutionality of laws *before* the laws take effect. Laws can be referred to the council for prior review by the

president, the prime minister, and the heads of the two chambers of parliament. Prior review is also an option in Germany and Italy, if requested by the national or a regional government. In contrast, the United States Supreme Court does not give advisory opinions; be before the Supreme Court will render a decision only when there is an actual dispute concerning an issue.

FOR CRITICAL ANALYSIS

In any country in which a constitution sets forth the basic powers and structure of government, some governmental body has to decide whether laws enacted by the government are consistent with that constitution. ***Why might the courts be best suited to handle this task? Can you propose a better alternative?***

II. Basic Judicial Requirements

Before a lawsuit can be heard in a court, certain requirements must be met. These requirements relate to jurisdiction, venue, and standing to sue.

A. JURISDICTION

Jurisdiction is the power to hear and decide a case. Before a court can hear a case, it must have jurisdiction over both the person against whom the suit is brought or the property involved in the suit and the subject matter of the case.

1. Jurisdiction over Persons or Property

Power over the person is referred to as *in personam* jurisdiction; power over property is referred to as *in rem* jurisdiction.

a. Long Arm Statutes and Minimum Contacts

Generally, a court's power is limited to the territorial boundaries of the state in which it is located, but in some cases, a state's long arm statute gives a court jurisdiction over a nonresident.

b. Corporate Contacts

A corporation is subject to the jurisdiction of the courts in any state in which it is incorporated, in which it has its main office, or in which it does business.

ADDITIONAL BACKGROUND—

Long Arm Statutes

A court has personal jurisdiction over persons who consent to it—for example, persons who reside within a court's territorial boundaries impliedly consent to the court's personal jurisdiction. A state **long arm statute** gives a state court the authority to exercise jurisdiction over nonresident individuals under circumstances specified in the statute. Typically, these circumstances include going into or communicating with someone in the state for limited purposes, such as transacting business, to which the claim in which jurisdiction is sought must relate.

The following is New York's long arm statute, New York Civil Practice Laws and Rules Section 302 (NY CPLR § 302).

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED

CHAPTER EIGHT OF THE CONSOLIDATED LAWS
ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

(b) Personal jurisdiction over non-resident defendant in matrimonial actions or family court proceedings. A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal jurisdiction over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state.

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

2. Jurisdiction over Subject Matter
Subject-matter jurisdiction involves limitations on the types of cases a court can hear.

a. General and Limited Jurisdiction
A court of general jurisdiction can hear virtually any type of case, except a case that is appropriate for a court of limited jurisdiction.

b. Original and Appellate Jurisdiction
Courts of original jurisdiction are trial courts; courts of appellate jurisdiction are reviewing courts.

3. Jurisdiction of the Federal Courts

a. Federal Questions

A suit can be brought in a federal court whenever it involves a question arising under the Constitution, a treaty, or a federal law.

b. Diversity of Citizenship

A suit can be brought in a federal court whenever it involves citizens of different states, a foreign country and an American citizen, or a foreign citizen and an American citizen. Congress has set an additional requirement—the amount in controversy must be more than $75,000. For diversity-of-citizenship purposes, a corporation is a citizen of the state in which it is incorporated and of the state in which it has its principal place of business.

CASE SYNOPSIS—

Case 2.1: *Mala v. Crown Bay Marina, Inc.*

Kelley Mala was severely burned when his boat exploded after being over-fueled at Crown Bay Marina in the Virgin Islands. Mala filed a suit in a federal district court against Crown Bay and sought a jury trial. Crown Bay argued that a plaintiff in an admiralty case does not have a right to a jury trial unless the court has diversity jurisdiction. Crown Bay asserted that it, like Mala, was a citizen of the Virgin Islands. The court struck Mala's jury demand. From a judgment in Crown Bay's favor, Mala appealed.

The U.S Court of Appeals for the Third Circuit affirmed that Mala failed to prove diversity "because he did not offer evidence that Crown Bay was anything other than a citizen of the Virgin Islands."

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Notes and Questions

What are the factors that the court looked at in determining whether minimum contacts existed between the defendant and the state of North Carolina? The Court of Appeals of North Carolina stated that North Carolina courts "look at the following factors in determining whether minimum contacts exist: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience of the parties. After examining all of these factors, the court concluded that the defendant had "sufficient minimum contacts with North Carolina to justify the exercise of personal jurisdiction over [the] defendant without violating the due process clause."

ANSWERS TO LEGAL REASONING QUESTIONS AT THE END OF CASE 2.1

1. ***What is "diversity of citizenship?"*** Diversity of citizenship exists when the plaintiff and defendant to a suit are residents of different states (or similar independent political subdivisions, such as territories). When

a suit involves multiple parties, they must be completely diverse—no plaintiff may have the same state or territorial citizenship as any defendant. For purposes of diversity, a corporation is a citizen of both the state in which it is incorporated and the state in which its principal place of business is located.

2. *How does the presence—or lack—of diversity of citizenship affect a lawsuit?* A federal district court can exercise original jurisdiction over a case involving diversity of citizenship. There is a second requirement to exercise diversity jurisdiction—the dollar amount in controversy must be more than $75,000. In a case based on diversity, a federal court will apply the relevant state law, which is often the law of the state in which the court sits.

3. *What did the court conclude with respect to the parties' "diversity of citizenship" in this case?* In the *Mala* case, the court concluded that the parties did not have diversity of citizenship. A plaintiff who seeks to bring a suit in a federal district court based on diversity of citizenship has the burden to prove that diversity exists. Mala—the plaintiff in this case—was a citizen of the Virgin Islands. He alleged that Crown Bay admitted to being a citizen of Florida, which would have given the parties diversity. Crown Bay denied the allegation and asserted that it also was a citizen of the Virgin Islands. Mala offered only his allegation and did not provide any evidence that Crown Bay was anything other than a citizen of the Virgin Islands. There was thus no basis for the court to be "left with the definite and firm conviction that Crown Bay was in fact a citizen of Florida."

4. *How did the court's conclusion affect the outcome?* The court's conclusion determined the outcome in this case. Mala sought a jury trial on his claim of Crown Bay's negligence, but he did not have a right to a jury trial unless the parties had diversity of citizenship. Because the court concluded that the parties did not have diversity of citizenship, Mala was determined not to have a jury-trial right.

The outcome very likely would have been different if the court had concluded otherwise. The lower court had empaneled an advisory jury, which recommended a verdict in Mala's favor. This verdict was rejected, however, and a judgment issued in favor of Crown Bay. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the lower court's judgment.

ADDITIONAL BACKGROUND—

Diversity of Citizenship

Under Article III, Section 2 of the United States Constitution, diversity of citizenship is one of the bases for federal jurisdiction. Congress further limits the number of suits that federal courts might otherwise hear by setting a minimum to the amount of money that must be involved before a federal district court can exercise jurisdiction.

The following is the statute in which Congress sets out the requirements for diversity jurisdiction, including the amount in controversy.

UNITED STATES CODE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 85—DISTRICT COURTS; JURISDICTION

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefore is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—
(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word “States”, as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, §§ 201 to 203, 102 Stat. 4646 ; Oct. 19, 1996, Pub.L. 104-317, Title II, § 205(a), 110 Stat. 3850.)

4. Exclusive v. Concurrent Jurisdiction

When a case can be heard only in federal courts or only in state courts, exclusive jurisdiction exists. Federal courts have exclusive jurisdiction in cases involving federal crimes, bankruptcy, patents, and copyrights; in suits against the United States; and in some areas of admiralty law. States have exclusive jurisdiction in certain subject matters—for example, divorce and adoptions. When both state and federal courts have the power to hear a case, concurrent jurisdiction exists. Factors for choosing one forum over another include—

- Availability of different remedies.
- Distance to the courthouse.

- Experience or reputation of the judge.
- The court's bias for or against the law, the parties, or the facts in the case.

B. JURISDICTION IN CYBERSPACE

The basic question in this context is whether there are sufficient minimum contacts in a jurisdiction if the only connection to it is an ad on the Web originating from a remote location.

1. The "Sliding-Scale" Standard

One approach is the sliding scale, according to which—

- Doing substantial business online is a sufficient basis for jurisdiction.
- Some Internet interactivity may support jurisdiction.
- A passive ad is not enough on which to base jurisdiction.

2. International Jurisdictional Issues

The minimum-contact standard can apply in an international context. As in cyberspace, a firm should attempt to comply with the laws of any jurisdiction in which it targets customers.

CASE SYNOPSIS—

Case 2.2: *Gucci America, Inc. v. Wang Huoqing*

Gucci America, Inc., a New York corporation, makes footwear, belts, sunglasses, handbags, and wallets. Gucci uses twenty-one trademarks associated with its goods. Wang Huoqing, a resident of the People's Republic of China, offered for sale through his Web sites counterfeit Gucci goods. Gucci hired a private investigator in California to buy goods from the sites. Gucci then filed a suit against Huoqing in a federal district court, seeking damages and an injunction preventing further trademark infringement. The court first had to determine whether it had jurisdiction.

The court held that it had personal jurisdiction over Wang Huoqing. The U.S. Constitution's due process clause allows a federal court to exercise jurisdiction over a defendant who has had sufficient minimum contacts with the court's forum. Huoqing's fully interactive Web sites met this standard. Gucci also showed that within the forum Huoqing had made at least one sale—to Gucci's investigator. The court granted Gucci an injunction.

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Notes and Questions

What do the circumstances and the holding in this case suggest to a business firm that actively attempts to attract customers in a variety of jurisdictions? This situation and the ruling in this case indicate that a business firm actively attempting to solicit business in a jurisdiction should be prepared to appear in its courts. This principle likely covers any jurisdiction and reaches any business conducted in any manner.

ANSWER TO "WHAT IF THE FACTS WERE DIFFERENT?" QUESTION IN CASE 2.2

Suppose Gucci had not presented evidence that the defendant made one actual sale through his Web site to a resident of the court's district (the private investigator). Would the court still have found that it had personal jurisdiction over Huoqing? Why or why not? The single sale to a resident of the district, Gucci's private investigator, helped the plaintiff establish that the defendant 's Web site was interactive and that the defendant used the Web site to sell goods to residents in the court's district. It is possible that without proof of such a sale, the court would not have found that it had personal jurisdiction over the foreign defendant. The reason is that courts cannot exercise jurisdiction over foreign defendants unless they can show the defendants had minimum contacts with the forum, such as by selling goods within the forum.

ANSWER TO "THE LEGAL ENVIRONMENT DIMENSION" QUESTION IN CASE 2.2

Is it relevant to the analysis of jurisdiction that Gucci America's principal place of business is in New York rather than California? Explain. The fact that Gucci's headquarters is in New York state was not relevant to the court's analysis here because Gucci was the plaintiff. Courts look only at the defendant's location or contacts with the forum in determining whether to exercise personal jurisdiction. The plaintiff's location is irrelevant to this determination.

C. VENUE

A court that has jurisdiction may not have venue. Venue refers to the most appropriate location for a trial. Essentially, the court that tries a case should be in the geographic area in which the incident occurred or the parties reside.

D. STANDING TO SUE

Before a person can bring a lawsuit before a court, the party must have standing.

- The party must have suffered a harm, or been threatened a harm, by the action about which he or she is complaining. The controversy at issue must also be real and substantial, as opposed to hypothetical or academic.
- There must be a causal connection between the injury and the conduct complained of.
- It must be likely, as opposed to speculative, that a favorable court decision will remedy, or make up for, the injury suffered.

III. The State and Federal Court Systems

A. THE STATE COURT SYSTEM

Many state court systems have a level of trial courts and two levels of appellate courts.

ANSWERS TO BUSINESS QUESTIONS IN THE FEATURE— MANAGERIAL STRATEGY

1. ***What are some of the costs of increased litigation delays caused by court budget cuts?*** Most attorneys require a retaining fee. The longer this fee is held by the attorney, the higher the present value cost of the litigation. In addition, the opportunity cost of all of the company employees who work on the litigation must be included, too. Also, if there is any negative press during the litigation, that will have an impact on the company's revenues. Uncertainty about the results of the litigation may cause investors to back away. Uncertainty about the outcome of the litigation may also cause managers to forestall new projects.

2. ***In response to budget cuts, many states have increased their filing fees. Is this fair? Why or why not?*** Some argue that those businesses that avail themselves of the court system should pay a higher percentage of the actual costs of that court system. Others point out that the higher the costs imposed by the states to those businesses that wish to litigate, the less litigation there will be. And some of that reduced litigation may be meritorious.

1. Trial Courts

a. General Jurisdiction
Trial courts with general jurisdiction include county, district, and superior courts.

b. Limited Jurisdiction
Trial courts with limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts.

2. Appellate. or Reviewing, Courts
In most states, after a case is tried, there is a right to at least one appeal. Few cases are retried on appeal. An appellate court examines the record of a case, looking at questions of law and procedure for errors by the court below. In about half of the states, there is an intermediate level of appellate courts.

3. Highest State Courts
In all states, there is a higher court, usually called the state supreme court. The decisions of this highest court on all questions of state law are final. If a federal constitutional issue is involved in the state supreme court's decision, the decision may be appealed to the United States Supreme Court.

B. THE FEDERAL COURT SYSTEM
The federal court system is also three-tiered with a level of trial courts and two levels of appellate courts, including the United States Supreme Court.

1. U.S. District Courts
Federal trial courts of general jurisdiction are called district courts. (A district may consist of an entire state or part of a state. A district court has geographical jurisdiction corresponding to the territory of its district. Congress determines the number of districts.) Trial courts of limited jurisdiction include U.S. Tax Courts and U.S. Bankruptcy Courts.

2. U.S. Courts of Appeals

U.S. courts of appeal hear appeals from the decisions of the district courts located within their respective circuits. (The U.S. and its territories are divided into twelve judicial circuits. The jurisdiction of a thirteenth circuit—the federal circuit—is national but limited to certain subject matter.) The decision of each court of appeals is binding on federal courts only in that circuit.

3. The United States Supreme Court

The court at the top of the federal system is the United States Supreme Court to which further appeal is not mandatory but may be possible.

a. Appeals to the Supreme Court

A party may ask the Court to issue a writ of *certiorari*, but the Court may deny the petition. Denying a petition is not a decision on the merits of the case. Most petitions are denied.

b. Petitions Granted by the Court

Typically, the Court grants petitions only in cases that at least four of the justices view as involving important constitutional questions.

IV. Alternative Dispute Resolution

The advantage of alternative dispute resolution (ADR) is its flexibility. Normally, the parties themselves can control how the dispute will be settled, what procedures will be used, and whether the decision reached (either by themselves or by a neutral third party) will be legally binding or nonbinding. Approximately 95 percent of cases are settled before trial through some form of ADR.

A. Negotiation

In a negotiation, the parties attempt to settle their dispute informally, with or without attorneys. They try to reach a resolution without the involvement of a third party acting as mediator.

B. Mediation

In mediation, the parties attempt to come to an agreement with the assistance of a neutral third party, a mediator. Mediation is essentially a form of "assisted negotiation." The mediator does not make a decision on the matter being disputed.

C. Arbitration

A more formal method of ADR is arbitration, in which a neutral third party or a panel of experts hears a dispute and renders a decision. The decision can be legally binding. Formal arbitration resembles a trial. The parties may appeal, but a court's review of an arbitration proceeding is more restricted than a review of a lower court's proceeding.

1. The Arbitration Decision

An arbitrator's award will be set aside only if—

- The arbitrator's conduct or "bad faith" substantially prejudiced the rights of a party.
- The award violates public policy.
- The arbitrator exceeded his or her powers.

2. Arbitration Clauses

Virtually any commercial matter can be submitted to arbitration. Often, parties include an arbitration clause in a contract. Parties can also agree to arbitrate a dispute after it arises.

3. Arbitration Statutes
Most states have statutes (often based on the Uniform Arbitration Act of 1955) under which arbitration clauses are enforced, and some state statutes compel arbitration of certain types of disputes. At the federal level, the Federal Arbitration Act (FAA), enacted in 1925, enforces arbitration clauses in contracts involving maritime activity and interstate commerce.

CASE SYNOPSIS—

Case 2.3: *Cleveland Construction, Inc. v. Levco Construction, Inc.*

Cleveland Construction, Inc. (CCI), was the general contractor on a project to build a grocery store in Houston, Texas. CCI hired Levco Construction, Inc., as a subcontractor to perform excavation and grading. The contract provided that any dispute would be resolved by arbitration in Ohio. When a dispute arose, Levco filed a suit against CCI in a Texas state court. CCI sought to compel arbitration in Ohio under the Federal Arbitration Act (FAA). Because a Texas statute allows a party to void a contract provision that requires arbitration outside Texas, the court denied CCI's request. CCI appealed.

A state intermediate appellate court reversed. The parties had a valid arbitration agreement. If the court applied the Texas statute, it would void the agreement. This, the court decided, "would undermine the declared federal policy of rigorous enforcement of arbitration agreements." And the FAA, as a federal law, preempted the Texas statute under the supremacy clause.

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Notes and Questions

Considering the relative bargaining power of the parties, was it fair to enforce the arbitration clause in this contract? Yes, because either party could have refused to agree to the contract when it contained the arbitration clause. Of course, such clauses are likely to be ruled fair and enforceable when the parties are of equal bargaining strength.

Why do you think that Levco did not want its claim decided by arbitration? A party is typically reluctant to enter into a proceeding that he or she (or it) believes will have an unfavorable result. Levco might have had a less complex claim that could have been resolved more favorably in a court, or its claim might have lent itself to a legal, adversarial argument, which would have held less weight in arbitration Arbitration's disadvantages include the unpredictability of results, the lack of required written opinions, the difficulty of appeal, and the possible unfairness of the procedural rules. Levco might have wanted to avoid arbitration for any or all of these reasons. Also, arbitration can be nearly as expensive as litigation, particularly when, as here, its venue is a distant location. Levco may have been simply trying to reduce the duration of the dispute and its cost.

ANSWER TO "THE LEGAL ENVIRONMENT DIMENSION" QUESTION IN CASE 2.3

How would business be affected if each state could pass a statute, like the one in Texas, allowing parties to void out-of-state arbitrations? If all states could pass statutes like the one in Texas, many

parties would probably be less inclined to transact business. An arbitration provision allows a party to limit the burden and expense of settling any disputes. If another party could freely void such an agreement, there would be a greater risk of arbitration in an inconvenient forum, costly formal litigation, or both. That risk increases the perceived costs of doing business, making the business opportunity less attractive. Thus, many parties may decline to enter contracts without enforceable arbitration provisions.

ANSWER TO "THE SOCIAL DIMENSION" QUESTION IN CASE 2.3

Considering the relative bargaining power of the parties, was it fair to enforce the arbitration clause in this contract? Why or why not? Yes, because either party could have refused to agree to the contract when it contained the arbitration clause. Of course, such clauses are likely to be ruled fair and enforceable when, as in this case, the parties are of relatively equal bargaining strength.

ADDITIONAL CASES ADDRESSING THIS ISSUE —

Recent cases examining **the validity of arbitration agreements** include the following.

- *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002) (an arbitration clause is not unconscionable, and thus it is enforceable, when it contains a provision that grants an employee a meaningful opportunity to opt out of binding arbitration).

- *McCaskill v. SCI Management Corp.,* 285 F.3d 623 (7th Cir. 2002) (an arbitration clause invoked to compel the arbitration of claims of sexual harassment and other employment discrimination is invalid, and thus unenforceable, when it requires that the employee pay all fees).

- *Cash in a Flash Check Advance of Arkansas, L.L.C. v. Spencer,* 348 Ark. 459, 74 S.W.3d 600 (2002) (in a customer's suit against a check-cashing company, alleging that its fees were usurious, an agreement containing an arbitration clause was not legally enforceable due to a lack of mutuality).

4. The Issue of Arbitrability
A court can consider whether the parties to an arbitration clause agreed to submit a particular dispute to arbitration. The court may also consider whether the rules and procedures that the parties agreed to are fair.

5. Mandatory Arbitration in the Employment Context
Generally, mandatory arbitration clauses in employment contracts are enforceable.

ADDITIONAL BACKGROUND—

ADR and the Courts

States in which one or more local **state** court has—		States in which one or more **federal** court has—	
Arbitration	**Mediation**	**Arbitration**	**Mediation**
Alabama	Alabama	Alabama	California
Alaska	Alaska	Arizona	Delaware
Arizona	Arizona	California	Florida
California	California	Connecticut	Indiana
Delaware	Connecticut	Florida	Kansas
Florida	Delaware	Georgia	Kentucky
Georgia	Florida	Idaho	Louisiana
Hawaii	Georgia	Michigan	Minnesota
Illinois	Hawaii	Missouri	Missouri
Michigan	Indiana	New Jersey	Nebraska
Minnesota	Illinois	New York	New Jersey
Missouri	Iowa	Ohio	New York
Nevada	Kansas	Oklahoma	North Carolina
New Hampshire	Kentucky	Pennsylvania	Ohio
New Jersey	Louisiana	Rhode Island	Oklahoma
New Mexico	Maine	Texas	Oregon
New York	Michigan	Utah	Pennsylvania
North Carolina	Minnesota	Washington	Rhode Island
Ohio	Missouri		South Carolina
Oregon	Montana		Tennessee
Pennsylvania	Nebraska		Texas
Rhode Island	Nevada		Utah
Texas	New Hampshire		Virginia
Washington	New Jersey		West Virginia
	New Mexico		Washington
	New York		Wisconsin
	North Carolina		
	Ohio		
	Oklahoma		
	Oregon		
	Pennsylvania		
	Rhode Island		
	South Carolina		
	South Dakota		
	Tennessee		
	Texas		
	Utah		
	Vermont		
	Virginia		
	Washington		
	West Virginia		
	Wisconsin		

Source: Richard Reuben, "The Lawyer Turns Peacemaker," *ABA Journal* (August 1996), p. 56.

D. Other Types of ADR

New types of ADR have emerged.

- In early neutral case evaluation, the parties select a neutral third party (generally an expert in the subject of the dispute) to evaluate their positions. This forms the basis for negotiations.
- In a mini-trial**,** each party's attorney argues the party's case. Typically, a neutral third party (often an expert in the disputed subject) acts as an adviser. If the parties fail to reach an agreement, the adviser renders an opinion as to how a court would likely decide the issue.
- The federal system uses the summary jury trial (SJT). The litigants present their arguments and evidence, and a jury renders a nonbinding verdict. Mandatory negotiations follow.

E. Providers of ADR Services

A major provider of ADR services is the American Arbitration Association (AAA). Most of the largest law firms in the nation are members of this nonprofit association, which settles nearly sixty thousand disputes a year. Hundreds of for-profit firms around the country also provide dispute-resolution services.

F. Online Dispute Resolution

When outside help is needed to resolve a dispute, there are a number of Web sites that offer online dispute resolution (ODR). ODR may be best for resolving small- to medium-sized business liability claims, which may not be worth the expense of litigation or traditional ADR.

V. International Dispute Resolution

A. Forum-Selection and Choice-of-Law Clauses

Parties to international contracts may include forum-selection and choice-of-law clauses to protect themselves if disputes arise.

B. Arbitration Clauses

Parties to international contracts may include arbitration clauses to be applied if disputes arise.

C. International Treaties and Arbitration

International treaties sometimes stipulate arbitration for resolving disputes.

TEACHING SUGGESTIONS

1. Divide students into small groups and assign one of the text chapter's end-of- chapter problems to each group. Have each group determine whether or not the assigned problem is one that would lend itself to alternative dispute resolution. ***If not, why not? If so, which form of alternative dispute resolution would the group recommend?***

2. Obtain a standard arbitration agreement form from a national arbitration organization such as the American Arbitration Association. Ask students to discuss specific features of these agreements and the factors that might make them hesitant to submit a dispute to arbitration.

3. Some students may find it enlightening to be reminded the law corresponds to the many ways in which people organize the world. That is, the law includes customs, traditions, rules, and objectives that people

have held in different circumstances at different times. While it often seems that the law creates meaningless distinctions, it is in fact the real needs of real people that create them.

4. In the courtroom, changes are being wrought by television. There is an increasing reliance on video testimony. Children who allege physical or sexual abuse, for example, may give video testimony outside a courtroom to be shown during trial proceedings. Lawyers who represent accident victims often commission videos to visually show the court the impact of accident-related injuries on the daily lives of their clients. In criminal trials, judges have allowed juries to see filmed reenactments of crimes. To further blur the line between simulation and reality is the increasing number of cameras that videotape the commission of alleged crimes and other wrongs. ***What effect are these uses of television having on the judicial system? Could jurors watch trials on their televisions at home and reach a verdict by interactive cable? Through a familiarity with movies and TV shows, could jurors come to expect more excitement than is generated in the usual courtroom when at least some of the proceeding is on video? Will lawyers argue their cases to appeal to home audiences? And what effect might all of this have on the U.S. judicial system's impartiality and fairness?***

Cyberlaw Link

Ask your students to what extent those who send e-mail over the Internet should be liable for the content of their messages in states other than their own (or nations other than the United States). ***Is the existence of a Web site a sufficient basis to exercise jurisdiction?***

DISCUSSION QUESTIONS

1. ***If a corporation is incorporated in Delaware, has its main office in New York, and does business in California, but its president lives in Connecticut, in which state(s) can it be sued?*** Delaware, New York, and California—a corporation is subject to the jurisdiction of the courts in any state in which it is incorporated, in which it has its main office, or in which it does business.

2. ***What is the difference between a court of general jurisdiction and a court of limited jurisdiction?*** A court with general jurisdiction can hear virtually any type of case, except a case that is appropriate for a court with limited jurisdiction. Trial courts with general jurisdiction include county, district, and superior courts. Trial courts with limited jurisdiction include local municipal courts (which handle mainly traffic cases), small claims courts, and domestic relations courts. Thus, for example, small claims disputes are typically assigned to courts that hear only small claims disputes.

3. ***What is the role of a court with appellate jurisdiction?*** Courts of appellate jurisdiction are reviewing courts—they review cases brought on appeal from trial courts, which are courts of original jurisdiction. In most states, after a case is tried, there is a right to at least one appeal. An appellate court examines the record of a case, looking at questions of law and procedure for errors by the court below.

4. ***When may a federal court hear a case?*** Federal courts have jurisdiction in cases in which federal questions arise, in cases in which there is diversity of citizenship, and in some other cases. When a suit involves a question arising under the Constitution, a treaty, or a federal law, a federal question arises. When a suit involves citizens of different states, a foreign country and an American citizen, or a foreign citizen and an American citizen, diversity of citizenship exists. In diversity suits, there is an additional requirement—the amount in controversy must

be more than $50,000. Federal courts have exclusive jurisdiction in cases involving federal crimes, bankruptcy, patents, and copyrights; in suits against the United States; and in some areas of admiralty law.

5. ***When may the United States Supreme Court hear a case?*** The United States Supreme Court has original in only a few situations. The Supreme Court can review any case decided by a federal court of appeals and any case decided by a state's highest court in which a federal constitutional issue is involved.

6. ***When may a court exercise jurisdiction over a party whose only connection to the jurisdiction is via the Internet?*** One way to phrase the issue is when, under a set of circumstances, there are *sufficient minimum contacts* to give a court jurisdiction over a remote party. If the only contact is an ad on the Web originating from a remote location, the outcome to date has generally been that a court cannot exercise jurisdiction. Doing considerable business online, however, generally supports jurisdiction. The "hard" cases are those in which the contact is more than an ad but less than a lot of activity.

7. ***How does the process of negotiation work?*** In the process of negotiation, the parties come together informally, with or without attorneys to represent them. Within this informal setting the parties air their differences and try to reach a settlement or resolution without the involvement of independent third parties. Because no third parties are involved and because of the informal setting, negotiation is the simplest form of alternative dispute resolution.

8. ***What is the principal difference between negotiation and mediation?*** The major difference between negotiation and mediation is that mediation involves the presence of a third party called a mediator. The mediator assists the parties in reaching a mutually acceptable agreement. The mediator talks face to face with the parties and allows them to discuss their disagreement in an informal environment. The mediator's role, however, is limited to assisting the parties. The mediator does not decide a controversy; he or she only aids the process by helping the parties more quickly find common ground on which they can begin to reach an agreement for themselves.

9. ***What is arbitration?*** The process of arbitration involves the settling of a dispute by an impartial third party (other than a court) who renders a *legally binding* decision. The third party who renders the decision is called an arbitrator. Arbitration combines the advantages of third-party decision making—as provided by judges and juries in formal litigation—with the speed and flexibility of rules of procedure and evidence less rigid than those governing courtroom litigation.

10. ***What kinds of disputes may be subject to arbitration?*** The FAA requires that courts give deference to all voluntary arbitration agreements in cases governed by federal law. Virtually any dispute can be the subject of arbitration. A voluntary agreement to arbitrate a dispute normally will be enforced by the courts if the agreement does not compel an illegal act or contravene public policy.

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Have students prepare a chart showing the relationships between the various courts having jurisdiction in your state. (There is a digest of each state's courts in *Martindale-Hubbell Law Directory*, which might be placed on reserve in the library.) Assign a few jurisdiction hypotheticals. ***For example—Through which of these courts could a divorce decree be appealed? Which court(s) would have original jurisdiction in a truck accident involving out-of-state residents (does the dollar amount of injuries and damage make a difference)? Which court(s) would have jurisdiction to render a judgment in a case arising from food poisoning at a local cheeseburger stand that is part of a nationwide corporate chain? In which court(s) could you file a suit alleging discrimination, and if you lost, to which court could you appeal the decision?***

2. Ask the class to research the reasons behind the earlier hostility of the courts towards arbitration procedures. ***Were they concerned solely with parties being divested of their rights or did they see arbitration as a challenge to their own authority?***

3. Have students investigate the dispute resolution services discussed in this chapter by going online and reading some the disputes submitted for resolution or the results in individual cases (on the ICANN Web site, for example).

EXPLANATION OF SELECTED FOOTNOTES IN THE TEXT

Footnote 5: In ***International Shoe Co. v. State of Washington,*** 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), the state of Washington sought unemployment contributions from the International Shoe Company based on commissions paid to its sales representatives who lived in the state. International Shoe claimed that its activities within the state were not sufficient to manifest its "presence." It argued that (1) it had no office in Washington; (2) it employed sales representatives to market its product in Washington, but no sales or purchase contracts were made in the state; and (3) it maintained no inventory in Washington. The company claimed that it was a denial of due process for the state to subject it to suit. The Supreme Court of Washington ruled in favor of the state, and International Shoe appealed to the United States Supreme Court.

The United States Supreme Court affirmed the Washington Supreme Court's decision—International Shoe had sufficient contacts with the state to allow the state to exercise jurisdiction constitutionally over it. The Court found that the activities of the Washington sales representatives were "systematic and continuous," resulting in a large volume of business for International Shoe. By conducting its business within the state, the company received the benefits and protections of the state laws and was entitled to have its rights enforced in state courts. Thus, International Shoe's operations established "sufficient contacts or ties with the state . . . to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligation" that the company incurred there.

Footnote 10: In ***Zippo Manufacturing Co. v. Zippo Dot.Com, Inc.,*** 952 F.Supp. 1119 (W.D.Pa. 1997), a federal district court proposed three categories for classifying the types of Internet business contact: (1) substantial business conducted online, (2) some interactivity through a Web site, and (3) passive advertising. Jurisdiction is proper for the first category, improper for the third, and may or may not be appropriate for the second. Zippo Manufacturing Co. (ZMC) makes, among other things, "Zippo" lighters. ZMC is based in Pennsylvania. Zippo Dot Com, Inc. (ZDC), operates a Web page and an Internet subscription news service. ZDC has the exclusive right the domain names "zippo.com," "zippo.net," and "zipponews.com." ZDC is based in California, and its contacts with Pennsylvania have occurred almost exclusively over the Internet. Two per cent of its subscribers (3,000 of 140,000) are Pennsylvania residents who contracted over the Internet to receive its service. ZDC has agreements with seven ISPs in Pennsylvania to permit their subscribers to access the service. ZMC filed a suit in against ZDC, alleging trademark infringement and other claims, based on ZDC's use of the word "Zippo." ZDC filed a motion to dismiss for lack of personal jurisdiction. Holding that ZDC's connections to the state fell into the first category, the court denied the motion.

REVIEWING—

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

Stan Garner resides in Illinois and promotes boxing matches for SuperSports, Inc., an Illinois corporation. Garner created the concept of "Ages" promotion—a three-fight series of boxing matches pitting an older fighter against a younger fighter. The concept had titles for each of the three fights, including "Battle of the Ages." Garner contacted George Foreman and his manager, who both reside in Texas, to sell the idea, and they arranged a meeting in Las Vegas, Nevada. During negotiations, Foreman's manager signed a nondisclosure agreement prohibiting him from disclosing Garner's promotional concepts unless the parties signed a contract. Nevertheless, after negotiations fell through, Foreman used Garner's "Battle of the Ages" concept to promote a subsequent fight. Garner filed suit against Foreman and his manager in a federal district court located in Illinois, alleging breach of contract. Ask your students to answer the following questions, using the information presented in the chapter.

1. ***On what basis might the federal district court in Illinois exercise jurisdiction in this case?*** The federal district court exercises jurisdiction because the case involves diversity of citizenship. Diversity jurisdiction requires that the plaintiff and defendant be from different jurisdictions and that the dollar amount of the controversy exceed $75,000. Here, Garner resides in Illinois, and Foreman and his manager live in Texas. Because the dispute involved the promotion of boxing matches with George Foreman, the amount in controversy exceeded $75,000.

2. ***Does the federal district court have original or appellate jurisdiction?*** Original jurisdiction, because the case was initiated in that court and that is where the trial will take place. Courts having original jurisdiction are courts of the first instance, or trial courts—that is courts in which lawsuits begin and trials take place. In the federal court system, the district courts are the trial courts, so the federal district court has original jurisdiction.

3. ***Suppose that Garner had filed his action in an Illinois state court. Could an Illinois state court exercise personal jurisdiction over Foreman or his manager? Why or why not?*** No, because the defendants lacked minimum contacts with the state of Illinois. Because the defendants were from another state, the court would have to determine if they had sufficient contacts with the state for the Illinois court to exercise jurisdiction based on a long arm statute. Here, the defendants never went to Illinois, and the contract was not formed in Illinois. Thus, it is unlikely that an Illinois state court would find sufficient minimum contacts to exercise jurisdiction.

4. ***Assume that Garner had filed his action in a Nevada state court. Would that court have personal jurisdiction over Foreman or his manager? Explain.*** Yes, because the defendants met with Garner and formed a contract in the state of Nevada. A state can exercise jurisdiction over out-of-state defendants under a long arm statute if defendants had sufficient contacts with the state. Because the parties met Garner and negotiated the contract in Nevada, a court would likely hold these activities were sufficient to justify a Nevada court's exercising personal jurisdiction.

DEBATE THIS:

In this age of the Internet, when people communicate via e-mail, texts, tweets, Facebook, and Skype, is the concept of jurisdiction losing its meaning? Many believe that yes, the idea of determining jurisdiction based on individuals' and companies' physical locations no longer has much meaning. Increasingly, contracts are formed via online communications. Does it matter where one of the parties has a physical presence? Does it matter where the e-mail server or Web page server is

located? Probably not.

In contrast, in one sense, jurisdiction still has to be decided when conflicts arise. Slowly, but ever so surely, courts are developing rules to determine where jurisdiction lies when one or both parties used online systems to sell or buy goods or services. In the final analysis, a specific court in a specific physical location has to try each case.

EXAMPREP—

ISSUE SPOTTERS

1. ***Sue uses her smartphone to purchase a video security system for her architectural firm from Tipton, Inc., a company that is located in a different state. The system arrives a month after the projected delivery date, is of poor quality, and does not function as advertised. Sue files a suit against Tipton in a state court. Does the court in Sue's state have jurisdiction over Tipton? What factors will the court consider?*** Yes, the court in Sue's state has jurisdiction over Tipton on the basis of the company's minimum contacts with the state.

Courts look at the following factors in determining whether minimum contacts exist: the quantity of the contacts, the nature and quality of the contacts, the source and connection of the cause of action to the contacts, the interest of the forum state, and the convenience of the parties. Attempting to exercise jurisdiction without sufficient minimum contacts would violate the due process clause. Generally, courts have found that jurisdiction is proper when there is substantial business conducted online (with contracts, sales, and so on). Even when there is only some interactivity through a Web site, courts have sometimes held that jurisdiction is proper. Jurisdiction is not proper when there is merely passive advertising.

Here, examining all of these factors, particularly the sale of the security system to a resident of the state and the relative inconvenience of the plaintiff to litigate in the defendant's state, the defendant had sufficient minimum contacts with the state to justify the exercise of jurisdiction over the defendant without violating the due process clause.

2. ***The state in which Sue resides requires that her dispute with Tipton be submitted to mediation or nonbinding arbitration. If the dispute is not resolved, or if either party disagrees with the decision of the mediator or arbitrator, will a court hear the case? Explain.*** Yes, if the dispute is not resolved, or if either party disagrees with the decision of the mediator or arbitrator, a court will hear the case. It is required that the dispute be submitted to mediation or arbitration, but this outcome is not binding.

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, 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] 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] *See* Appellee's Br. at 21–22.

> FN1. 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. 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.

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) (requiring the other side's consent or the court's leave).[FN3]

> FN3. 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]

> FN4. The District Court had admiralty jurisdiction under 28 U.S.C. § 1333(1). Mala argues that the court also had diversity jurisdiction under 28 U.S.C. § 1332. 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.

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) ("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); *Faretta v. California,* 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

[1][2] 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), 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. 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.* (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)) (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) ("[N]o case has ever held that a *pro se* litigant should be given actual notice of a statute of limitations.").

[3] 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 ("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); *see also* Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants,* 55 U. Chi. L.Rev. 659, 671 (1988) ("[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 (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) ("[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) ("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). 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). 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). In *Haines,* 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; *see* *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007).

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) ("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) (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) ("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][5] 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). And they still must serve process on the correct defendants. *See* *Franklin v. Murphy,* 745 F.2d 1221, 1234–35 (9th Cir.1984). 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 ("[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).

[6] 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). In particular, courts must tell pro se

prisoners about the effects of not filing any opposing affidavits. *Id.; see also* *Somerville v. Hall,* 2 F.3d 1563, 1564 (11th Cir.1993); *Neal v. Kelly,* 963 F.2d 453, 457 (D.C.Cir.1992); *Klingele v. Eikenberry,* 849 F.2d 409, 411 (9th Cir.1988) (concluding that the rule applies only to pro se prisoners). *But see* *Williams v. Browman,* 981 F.2d 901, 903–04 (6th Cir.1992) (holding that such notice is unnecessary); *Martin v. Harrison Cnty. Jail,* 975 F.2d 192, 193 (5th Cir.1992) (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. *See* *Castro v. United States,* 540 U.S. 375, 383, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003). 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,* notice is the exception. Nonassistance is the rule. *See* *Pliler,* 542 U.S. at 231, 233–34, 124 S.Ct. 2441.

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) ("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][8] 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 ("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 ("[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) (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). The District Court's failure to provide Mala with a pro se litigation manual was not an abuse of discretion.[FN5]

FN5. 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] 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). Contrary to Mala's suggestion, the court accommodated his status as a prisoner.

III

[10] 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) (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][12][13][14] 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), the plaintiff does not have a jury-trial right. *Complaint of Consolidation Coal Co.,* 123 F.3d 126, 132 (3d Cir.1997) (citing *Waring v. Clarke,* 46 U.S. (5 How.) 441, 458–60, 12 L.Ed. 226 (1847)). But the saving-to-suitors clause in § 1333(1) preserves state common-law remedies. *U.S. Express Lines Ltd. v. Higgins,* 281 F.3d 383, 390 (3d Cir.2002). This clause allows plaintiffs to pursue state claims in admiralty cases as long as the district court also has diversity jurisdiction. *Id.* In such cases, § 1333(1) preserves whatever jury-trial right exists with respect to the underlying state claims. *Gorman v. Cerasia,* 2 F.3d 519, 526 (3d Cir.1993) (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).

[15] 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) (explaining the two-part test for admiralty jurisdiction under § 1333(1)).

[16][17] The grounds for diversity jurisdiction are less certain. District courts have jurisdiction under 28 U.S.C. § 1332 only if the parties are completely diverse. *Barefoot Architect, Inc. v. Bunge,* 632 F.3d 822, 836 (3d Cir.2011). This means that no plaintiff may have the same state or territorial citizenship as any defendant. *Id.* 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); *Smith v. Cummings,* 445 F.3d 1254, 1260 (10th Cir.2006); *Sullivan v. Freeman,* 944 F.2d 334, 337 (7th Cir.1991). No one challenges that presumption here.

[18] 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] Even so, Mala's claim must fail.

> FN6. 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). 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] 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) ("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]

> FN7. 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 (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. 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.* (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][21] 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) (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]

> FN8. 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, 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, such jurisdiction exists only when there is no independent basis for federal jurisdiction. *See* 28 U.S.C. § 1367(a) (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][23] Mala also claims that the District Court erred by rejecting the advisory jury's verdict. Federal Rule of Civil Procedure 39(c) 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) (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). 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) ("[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) and to grant a new trial under Rules 50(b) and 59. These motions contained several overlapping arguments.[FN9] 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. 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] 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) (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, Kenneth E. Keller, Krieg Keller Sloan Reilley & Roman LLP, San Francisco, CA, Stephen Michael Gaffigan, 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, United States Magistrate Judge.
I. INTRODUCTION[FN1]

> FN1. 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]

> FN2. Plaintiffs request the Court take judicial notice of their United States trademark registrations. Under Federal Rule of Evidence 201, "[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. 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] 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. 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, and (2) false designation of origin under 15 U.S.C. § 1125(a).

Plaintiffs filed an Application for Order Authorizing Alternate Service of Process on Defendants Pursuant to Federal Rule of Civil Procedure 4(f)(3) 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) 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) ("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]

FN4. 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 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]

> FN5. 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] 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. 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) (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). Under California's

long-arm statute, Cal.Code Civ. Proc. § 410.10, 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) (citing Cal.Code Civ. Proc. § 410.10). 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). 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) (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]

> FN7. 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). 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). 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). 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 (*citing Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) (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) (citing *Boschetto v. Hansing,* 539 F.3d 1011, 1018 (9th Cir.2008)). "[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) (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.,* 952 F.Supp. 1119, 1124 (W.D.Pa.1997)). 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) (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) (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 (quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). 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. This requires a showing of "but for" causation. *Id.* at 1322 ("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). 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) ("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 ("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) (quoting Sinatra v. Nat'l Enquirer, 854 F.2d 1191, 1199 (9th Cir.1988)). 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, the court may enter a default judgment where the clerk, under Rule 55(a), has previously entered the party's default based upon failure to plead or otherwise defend the action. Fed.R.Civ.P. 55(b). 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); *see also* Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir.1977) (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).

"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) (quoting *Elektra Entertainment Group Inc. v. Bryant,* No. CV 03–6381 GAF (JTLx), 2004 WL 783123, at *1 (C.D.Cal. Feb.13, 2004)). 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).

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). 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; *see also Danning v. Lavine,* 572 F.2d 1386, 1388 (9th Cir.1978) (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); *Century 21 Real Estate Corp. v. Sanlin,* 846 F.2d 1175, 1178 (9th Cir.1988). 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) (quoting *Brother Records, Inc. v. Jardine,* 318 F.3d 900, 908 (9th Cir.2003)) (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). 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).

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) (citing *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1046–47 n. 8 (9th Cir.1999)).

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.

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. 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). 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. The existence of Rule 55(b) though, indicates, that this preference towards disposing of cases on the merits is not absolute. *Pepsico,* 238 F.Supp.2d at 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. "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. 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). 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]

> FN8. 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] and/or any other website or business, as being sponsored by, authorized by, endorsed by, or in any way associated with Plaintiffs;

> FN9. 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

FN10. 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) (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 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). 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) (citing *Price v. City of Stockton,* 390 F.3d 1105, 1117 (9th Cir.2004)).

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) (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) ("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, 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); *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). 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). 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). 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). 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). 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). 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). Although Section 1117(c) 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) (quoting *John Wiley & Sons, Inc., et al. v. Kanzin Rukiz Entertainment and Promotions et al*, No. 06 Civ. 12949, 2007 WL 1695124, 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) ("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); 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) (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] *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. 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] 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] 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] This award represents 74.6% of the Plaintiffs' original request of $606,000.[FN15]

FN12. 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. Trademark registration number 3,344,631 appears substantially similar to registration number 3,044,207.

FN14. 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. 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) is entitled to costs. 15 U.S.C. §

1117(a). Plaintiffs have prevailed on their false designation of origin claim under § 1125(a) 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), assuming the court has found intentional use of a mark or designation as defined in section 1116(d) 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] 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).

> FN16. 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] Plaintiffs should be awarded $13,117.16 in prejudgment interest.[FN18] The prejudgment interest should be apportioned as follows: for Gucci, $12,768.92 [FN19]; for Bottega, $116.08 [FN20]; and for Balenciaga, $232.16.[FN21]

> FN17. 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. 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. 9.97260274 x 10^{-5} x $440,000.00 = $12,768.92
>
> FN20. 9.97260274 x 10^{-5} x $4,000.00 = $116.08
>
> FN21. 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

Tex.App.–Houston [1 Dist.],2012.
Cleveland Const., Inc. v. Levco Const., Inc.
359 S.W.3d 843
Court of Appeals of Texas,
Houston (1st Dist.).
CLEVELAND CONSTRUCTION, INC., Appellant,
v.
LEVCO CONSTRUCTION, INC., Appellee.

No. 01–11–00530–CV.
Jan. 26, 2012.

OPINION

EVELYN V. KEYES, Justice.

Appellant, Cleveland Construction, Inc. ("CCI"), appeals the trial court's denial of its motion to compel arbitration. In two issues, CCI argues that the trial court erroneously denied its motion to compel arbitration because (1) the Federal Arbitration Act ("FAA") applies, the arbitration provision is valid, and the claim is within the scope of the arbitration provision, and (2) the law favors arbitration and the FAA preempts conflicting state law.

We reverse and remand.

Background

Whole Foods Market, Inc. ("Whole Foods") hired CCI to serve as general contractor to construct a store in Houston, Texas ("the Project"). The contract between Whole Foods and CCI ("the Whole Foods Contract") allowed CCI to hire subcontractors.

CCI contracted with appellee, Levco Construction, Inc. ("Levco"), as a subcontractor, to perform certain tasks related to the construction, including excavating, grading, digging for laying utilities, paving, and preparing the foundation ("the Construction Contract"). The Construction Contract contained the following arbitration provision:

> *Article 30. DISPUTE RESOLUTION*
>
> ....
>
> 30.3 Any controversy or claims of CCI against Subcontractor [Levco] or Subcontractor against CCI shall, at the option of CCI, be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made. Any such arbitration shall be held in Lake County, Ohio. Any award arising out of such arbitration may be entered by any court having jurisdiction....

Levco also obtained a surety bond ("the Bond") from Intervener, Insurors Indemnity Company ("the Surety"). Both the Whole Foods Contract and the Bond issued by the Surety provided that disputes were to be resolved in a court in the county in which the Project was built, Harris County, Texas. Specifically, the Bond provided, in part:

> § 4 When the Owner [CCI] has satisfied the conditions of Section 3 [requiring notice of Contractor Default and other conditions precedent triggering the Surety's obligations under the Bond], the Surety shall promptly and at the Surety's expense take one of the following actions:
>
> § 4.1 Arrange for the Contractor [Levco], with consent of the Owner, to perform and complete the Construction Contract; or
>
> § 4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or
>
> § 4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract ... and to pay to the Owner the amount of damages as described in Section 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default; or

§ 4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor with reasonable promptness under the circumstance....

....

§ 6 After the Owner has terminated the Contractor's right to complete the Construction Contract, and if the Surety elects to act under Section 4.1, 4.2, or 4.3 above, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract....

....

§ 9 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first....

After Levco had partially performed under the Construction Contract, disputes arose between CCI and Levco concerning the Project, and on, January 17, 2011, CCI sent a letter to Levco informing it that "CCI elects to terminate its Agreement with Levco Construction." The work was subsequently completed by Levco under the provisions of the Bond.

On April 14, 2011, Levco filed suit against CCI and Whole Foods in Texas state court. According to its pleadings, Levco discovered upon beginning the work that CCI and Whole Foods had failed to obtain all necessary construction permits and that the building design and plans were not complete, so Levco was required to make numerous changes. Levco made multiple requests to change the scope of the contracted-for work to include the new work, including requests for additional time and compensation. Levco alleges that CCI and Whole Foods refused to consent to the changes Levco sought. Levco also alleges that CCI maintained unreasonable deadlines, interfered with Levco's work under the Construction Contract, failed to pay Levco for work it had completed from July 2010 to April 2011, and wrongfully terminated the contract in January 2011. Thus, Levco was unable to pay its subcontractors, resulting in liens being filed against the Project.

Levco alleges that CCI eventually reinstated Levco as a subcontractor pursuant to section 4.1 of the Bond, but CCI "continued to refuse to reinstate the [Construction Contract] itself." Levco claims that because CCI refused to reinstate the Construction Contract between them it was left in the position of "working essentially as a subcontractor for the [S]urety" under the terms of the Bond. Specifically, Levco alleges that, in its role as the issuer of the Bond, the Surety mandated that Levco be allowed to continue to work on the Project, as provided in section 4.1 of the Bond, and made an agreement with CCI regarding payment of Levco and Levco's subcontractors, as provided in section 6 of the Bond. Levco alleges that the Surety and CCI agreed that the Surety would pay Levco's subcontractors money owed them in exchange for CCI releasing the corresponding payments it owed Levco once the subcontractors released their liens on the Project. Levco states that the Surety complied with this agreement and paid Levco's subcontractors, but that CCI did not comply and release the money it owed Levco or Levco's subcontractors. Nor did CCI reinstate the Construction Contract it had terminated. Levco contends that CCI and Whole Foods are "now improperly withholding more than $500,000 in funds owed to Levco."

Levco claims that CCI breached its agreement with Levco; that CCI and Whole Foods breached their duties to perform with care in accordance with the terms of the Construction Contract (as provided in both the Construction Contract and section 6 of the Bond) and the Whole Foods Contract and to cooperate in performance of the contracts; that CCI and Whole Foods owe it damages under theories of quantum meruit, unjust enrichment, and promissory

estoppel; that CCI and Whole Foods violated Property Code section 28.001; and that CCI misapplied trust funds received from Whole Foods for payment of obligations under the Construction Contract and the Bond.

In addition, Levco sought a declaratory judgment that the arbitration clause in the Construction Contract is invalid and does not require arbitration because it is illusory, or, alternatively, that the provision in the Construction Contract requiring arbitration in Ohio is void because it contravenes Texas law in that "it purports to require a subcontractor to a contract involving the improvement or real property in Texas to submit to arbitration in a state other than Texas." Finally, Levco sought attorney's fees pursuant to Civil Practice and Remedies Code section 37.009 and chapter 38 and Property Code section 28.005, and it sought a temporary restraining order or temporary injunction prohibiting CCI and Whole Foods from releasing any funds related to the Project.

On April 14, the trial court granted Levco's temporary restraining order until April 29, 2011, and it set a hearing on Levco's request for a temporary injunction for April 29.

CCI filed an arbitration demand with the American Arbitration Association, alleging, under "nature of the dispute,"

> Respondent [Levco] is a subcontractor to Claimant [CCI] on the construction of a Whole Foods Market located in Houston, Texas ("Project"). Levco breached the subcontract and was terminated by CCI. Levco was bonded on the Project and the surety, Insurer's Indemnity Company utilized its option to have Levco complete the work on the Project; however, further breaches have occurred [and] CCI has been damaged by Levco's breach in [an] amount not yet fully determined but in [an] amount that CCI does not anticipate will exceed $150,000.

CCI requested that Lake County, Ohio be the arbitration locale.

On April 26, 2011, Levco filed an emergency motion to stay the arbitration proceeding.

On May 11, 2011, CCI answered Levco's suit with a general denial and asserted the affirmative defenses that a valid contract precluded Levco's quantum meruit claims, that CCI had paid Levco under the Construction Contract, that Levco failed to meet all conditions precedent to payment under the Construction Contract, that CCI was entitled to the defenses of "excuse" and "justification," and that Levco lacked standing to assert its claims against CCI, had failed to state a claim for which relief can be granted, and was the first to breach the Construction Contract.

CCI alleged that Levco defaulted under the Construction Contract within a month after beginning the Project and that CCI issued notices of default on multiple dates following. CCI attached several of these notices to its answer. It also alleged that "Levco was upside down on the Project from the beginning and failed to pay its vendors and suppliers in a timely manner" and that "Levco's financial mismanagement caused numerous, unnecessary liens on the Project." CCI also attached several notices from "lower tier" subcontractors claiming they had not been paid by Levco. This led CCI to terminate Levco from the Project in January 2011 and to notify the Surety of Levco's breach.

CCI alleged that the Surety elected its option under the terms of the Bond to arrange "for Levco to perform and complete its obligations under the Contract." CCI argues that "[b]y selecting this option, [the Surety] undertook Levco's obligations under the Contract and CCI was to reciprocally perform its obligations directly to [the Surety] ... and, as required by the Performance Bond, any money currently owed by CCI must be paid to [the Surety], not Levco." CCI also alleged that it agreed to 26 of the 31 change orders submitted by Levco and that it offered to pay the Surety the outstanding pay applications if Levco would execute a release, which Levco refused to do.

CCI also responded to Levco's application for a temporary injunction and moved to compel arbitration and to stay the trial court proceedings, or alternatively, to dismiss the trial court proceedings.

In its motion to compel arbitration, also filed on May 11, CCI argued that the arbitration clause between it and Levco was valid, that it was not illusory or in contravention of Texas state law, and that the dispute at issue fell within the scope of the agreement. CCI also argued that the FAA preempts Levco's claim based on Business and Commerce Code section 272.001. Levco responded that the arbitration clause was invalid and illusory and that it failed to survive termination of the Construction Contract.

On May 26, 2011, the Surety filed a plea in intervention, arguing that "mandatory jurisdiction and venue with respect to the claims and causes of action asserted by Intervenor against [CCI] herein properly lie in this Court pursuant to the express provisions of § 9" of the Bond. It likewise alleged that, after CCI terminated the Contract between itself and Levco, CCI called upon it, as Surety, to complete Levco's obligations pursuant to the Bond. The Surety alleged that it elected to utilize Levco to continue performance of the subcontract work with the Surety itself advancing Levco's payroll and certain of its overhead expenses, as provided in section 4.1 of the Bond. In exchange, CCI agreed to pay to the Surety "all remaining monies due and owing or to become due and owing under the Levco Subcontract Agreement," in accordance with section 6 of the Bond.

The Surety alleged that CCI subsequently breached this agreement by failing to make those payments. It alleged that it had expended $983,790.49 and that "under the express provisions of Levco's General Indemnity Agreement and pursuant to [its] common law rights to indemnity and equitable subrogation, [the Surety] has a superior lien upon and is entitled to payment directly from CCI on any and all contract sums or compensatory damages adjudged by this Court to be due and owing ... to Levco and/or [the Surety]."

On May 27, 2011, the trial court granted Levco's emergency motion to stay the arbitration proceeding initiated by CCI. This appeal followed.

Analysis

CCI argues that the trial court erred in denying its motion to compel arbitration because the FAA applies, the arbitration provision in the Construction Contract is valid, and the claims in the case are within the scope of the arbitration provision. It also argues that the FAA preempts any conflicting state law. Levco, however, argues that the arbitration provision in the Construction Contract is illusory and, therefore, unenforceable as a matter of law; that the Construction Contract was terminated and the arbitration provision does not contain a survival clause that would allow it to survive termination of the contract; and that Business and Commerce Code section 272.001 is not preempted by the FAA because it restricts venue, rather than restricting a party's right to arbitrate.

A. Jurisdiction

We first address our jurisdiction to review the trial court's order staying the arbitration proceedings. Civil Practice and Remedies Code section 51.016 provides:

> In a matter subject to the Federal Arbitration Act (9 U.S.C. Section 1 et seq.), a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16.

TEX. CIV. PRAC. & REM.CODE ANN. § 51.016 (Vernon Supp. 2011). Section 16 of the FAA, "Appeals," provides:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title [stay of trial proceedings where issue therein is

referable to arbitration],

(B) denying a petition under section 4 of this title to order arbitration to proceed, [or]

(C) denying an application under section 206 of this title to compel arbitration....

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (2006).

[1] Thus, an interlocutory appeal is permitted in this case only if it would be permitted under the same circumstances under section 16 of the FAA in federal court. *See CMH Homes v. Perez,* 340 S.W.3d 444, 448–49 (Tex.2011). The United States Supreme Court has held that the FAA "generally permits immediate appeal of orders hostile to arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 86, 121 S.Ct. 513, 519, 148 L.Ed.2d 373 (2000). Several circuit courts have held that the FAA permits interlocutory review of an order staying arbitration. *Arciniaga v. Gen. Motors Corp.,* 460 F.3d 231, 234 (2nd Cir.2006) (holding FAA subsection 16(a)(2) permits interlocutory review of stay of arbitration); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.,* 184 F.3d 42, 47 (1st Cir.1999) (holding that order staying pending arbitration was immediately appealable as injunction under both 28 U.S.C. § 1292(a)(1) and FAA section 16(a)(2)); *Se. Res. Recovery Facility Auth. v. Montenay Int'l Corp.,* 973 F.2d 711, 712 (9th Cir.1992) (holding it had jurisdiction over district court's order staying arbitration pursuant to section 16(a)(2) allowing appeal from an order enjoining arbitration). Furthermore, the Fifth Circuit has held that an order granting a stay of arbitration is appealable pursuant to 28 U.S.C. § 1292(a)(1), governing appeals of interlocutory orders involving injunctions generally. *See Tai Ping Ins. Co. v. M/V Warschau,* 731 F.2d 1141, 1143 (5th Cir.1984).

B. Standard of Review

Prior to September 1, 2009, an order denying a motion to compel arbitration under the FAA was reviewed in a mandamus proceeding using an abuse of discretion standard. *In re Merrill Lynch & Co.,* 315 S.W.3d 888, 890–91 & n. 3 (Tex.2010) (orig. proceeding); *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272–73 (Tex.1992) (orig. proceeding). The Texas Supreme Court held that the abuse of discretion standard, as applied to such orders, required reviewing courts to defer to the trial court's factual determinations if they are supported by the evidence and to review the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.,* 279 S.W.3d 640, 643 (Tex.2009) (orig. proceeding). This is the same standard by which we review interlocutory appeals of orders denying motions to compel arbitration under the Texas Arbitration Act ("TAA"). *See McReynolds v. Elston,* 222 S.W.3d 731, 739 (Tex.App.-Houston [14th Dist.] 2007, no pet.) (holding, under TAA, "we review factual conclusions under a legal sufficiency or

'no evidence' standard and legal conclusions de novo"); *see also* *In re Trammell,* 246 S.W.3d 815, 820 (Tex.App.-Dallas 2008, no pet.) (orig. proceeding) (holding same).

Civil Practice and Remedies Code section 51.016 now permits an order denying a motion to compel arbitration under the FAA to be reviewed via interlocutory appeal. TEX. CIV. PRAC. & REM.CODE ANN. § 51.016. Neither this Court nor the Texas Supreme Court has addressed the appropriate standard of review for such interlocutory appeals. However, various courts of appeals have considered this issue and held that interlocutory appeals of orders denying motions to compel arbitration should be reviewed under the abuse of discretion standard, in which we defer to the trial court's factual determinations and review questions of law de novo. *See* *Garcia v. Huerta,* 340 S.W.3d 864, 868–69 (Tex.App.-San Antonio 2011, pet. filed); *SEB, Inc. v. Campbell,* No. 03–10–00375–CV, 2011 WL 749292, at *2 (Tex.App.-Austin Mar. 2, 2011, no pet.) (mem. op.); *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.,* 327 S.W.3d 859, 862–63 (Tex.App.-Dallas 2010, no pet.); *see also* *Torster v. Panda Energy Mgmt., LP,* No. 07–10–0442–CV, 2011 WL 780522, at *2 (Tex.App.-Amarillo Mar. 7, 2011, pet. filed) (mem. op) (citing *Sidley, Austin, Brown & Wood* in holding that whether trial court erred in denying motion to compel arbitration "depends on whether it abused its discretion").

[2] Thus, in reviewing an order denying a motion to compel arbitration under the FAA, we give deference to the trial court's factual determinations that are supported by evidence and we review de novo its legal conclusions.

[3][4] A party seeking to compel arbitration under the FAA must establish that there is a valid arbitration agreement and that the claims raised fall within that agreement's scope. *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 737 (Tex.2005) (orig. proceeding); *J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex.2003). If the trial court finds a valid agreement, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcing arbitration. *J.M. Davidson,* 128 S.W.3d at 227. The trial court's determination as to the validity of an arbitration agreement is a legal determination that we review de novo. *Id.*

[5][6][7] Under the FAA, ordinary principles of state contract law determine whether there is a valid agreement to arbitrate. *Kellogg Brown & Root,* 166 S.W.3d at 738. Although there is a strong presumption favoring arbitration, that presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *J.M. Davidson,* 128 S.W.3d at 227. Because arbitration is contractual in nature, the FAA generally does not require parties to arbitrate when they have not agreed to do so. *Kellogg Brown & Root,* 166 S.W.3d at 738 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 478–79, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989)).

C. Determination of Existence of Valid Agreement to Arbitrate

CCI argues that the arbitration clause in the Construction Contract is a valid and binding agreement to arbitrate. Levco, however, argues that it is illusory and unenforceable as a matter of law. Levco also argues that, even if the agreement to arbitrate in the Construction Contract is not illusory, the arbitration agreement in the Construction Contract does not contain a survival clause that would allow it to survive termination of the contract.[FN1]

> FN1. Levco's appellate brief mentions in passing that the dispute resolution provision in the Bond conflicts with the terms of the Construction Contract. However, it cites no authority and provides no legal analysis on this issue. Therefore, to the extent Levco is attempting to argue that the terms of the Bond prevent arbitration of its dispute with CCI over the claims arising from the Construction Contract, that issue is waived for lack of briefing. *See* TEX.R.APP. P. 38.1(i) (requiring that appellate "brief must contain a clear and concise argument for the contention made, with appropriate citations to authorities" for party to assert issue on appeal); *Brown v. Hearthwood II Owners Ass'n.,* 201 S.W.3d 153, 161 (Tex.App.-Houston [14th Dist.] 2006, pet. denied) (holding argument can be waived for failure to adequately brief).

> Levco also argues that the Surety is a necessary party to any arbitration proceeding. However, the Surety is not before this Court as a party to the appeal, nor was it a party to the motion to stay arbitration in the trial court. Thus, we are not called upon to consider the Surety's obligations or rights regarding arbitration.

[8][9][10] In determining the validity of agreements to arbitrate that are subject to the FAA, we generally apply ordinary state contract law principles. *In re Palm Harbor Homes, Inc.,* 195 S.W.3d 672, 676 (Tex.2006) (orig. proceeding). The elements of a valid contract are (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Prime Prods., Inc. v. S.S.I. Plastics, Inc.,* 97 S.W.3d 631, 636 (Tex.App.-Houston [1st Dist.] 2002, pet. denied). "Under generally accepted principles of contract interpretation, all writings that pertain to the same transaction will be considered together, even if they were executed at different times and do not expressly refer to one another." *DeWitt Cnty. Elec. Coop., Inc. v. Parks,* 1 S.W.3d 96, 102 (Tex.1999); *IP Petroleum Co. v. Wevanco Energy, L.L.C.,* 116 S.W.3d 888, 889 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) ("Instruments pertaining to the same transaction may be read together to ascertain the parties' intent, even if the parties executed the instruments at different times.") (citing *Fort Worth Indep. Sch. Dist. v. City of Fort Worth,* 22 S.W.3d 831, 840 (Tex.2000)); *see also DeClaire v. G & B McIntosh Family Ltd. P'Ship,* 260 S.W.3d 34, 44 (Tex.App.-Houston [1st Dist.] 2008, no pet.) (holding that contract can be effective if signed by only one party if other party accepts by his acts, conduct, or acquiescence in the terms of the contract).

CCI presented the Construction Contract, which provides, in part:

> Any controversy or claims of CCI against Subcontractor [Levco] or Subcontractor against CCI shall, at the option of CCI, be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made. Any such arbitration shall be held in Lake County, Ohio.

CCI argues that this is a valid arbitration agreement. However, Levco argues, both here and in the trial court, that the arbitration agreement in the Construction Contract is not valid because it is illusory.[FN2]

> FN2. CCI argues that we cannot consider Levco's arguments concerning termination of the agreement and subsequent performance under the terms of the Bond because it was not expressly presented to the trial court. This argument is unpersuasive. When, as here, no findings of fact and conclusions of law are filed by the trial court, we must affirm the trial court's order if any legal theory supports it. *Rachal v. Reitz,* 347 S.W.3d 305, 308 (Tex.App.-Dallas 2011, pet. filed). Levco, CCI, and the Surety all informed the trial court of the January 2011 termination by CCI and of the subsequent arrangements under the terms of the Bond, so the trial court was aware of this information.

D. Analysis of Levco's Claims that Abritration Provision is Illusory

[11][12][13] "A promise is illusory if it does not bind the promisor, such as when the promisor retains the option to discontinue performance." *In re 24R, Inc.,* 324 S.W.3d 564, 567 (Tex.2010) (orig. proceeding) (per curiam); *see also J.M. Davidson,* 128 S.W.3d at 235 (Schneider, J., dissenting) ("[I]f the terms of a promise make performance optional, the promise is illusory and cannot constitute valid consideration."). Arbitration agreements must be supported by consideration, or mutuality of obligation, to be enforceable. *Palm Harbor Homes,* 195 S.W.3d at 676; *Dorfman v. Max Int'l, LLC,* No. 05–10–00776–CV, 2011 WL 1680070, at *2 (Tex.App.-Dallas May 5, 2011, no pet.) (mem. op.).

[14] In the context of stand-alone arbitration agreements, binding promises are required on both sides as they are the only consideration rendered to create a contract. *In re AdvancePCS Health L.P.,* 172 S.W.3d 603, 607 (Tex.2005) (orig. proceeding) (per curiam); *Dorfman,* 2011 WL 1680070, at *2. When, however, an arbitration clause is part of an underlying contract, the rest of the parties' agreement provides the consideration. *AdvancePCS Health,* 172 S.W.3d

at 607; *see* *Palm Harbor Homes,* 195 S.W.3d at 676–77.

Here, the plain language of the arbitration provision does not mutually bind the parties because arbitration is "at the option of CCI." However, this arbitration provision does not stand alone—it is part of an underlying contract. Thus, consideration, or the presence of mutual obligation, is provided by the underlying contract. *See* *AdvancePCS Health,* 172 S.W.3d at 607.

Levco seems to argue that the underlying contract does not provide any consideration for the arbitration provision because it, too, permits CCI to terminate, suspend, or modify its terms at its sole discretion, without notice. Levco's reliance on those provisions of the Construction Contract is misplaced. The modification provision's plain language does not state that CCI is the only party that can modify the agreement—it provides only that any modifications must be signed by CCI's representative to be effective. Furthermore, while the Construction Contract provides that termination or suspension will be "at the sole option and convenience to CCI," the contract also provides that CCI must pay for work and materials already purchased at the time it gives notice of such termination or suspension. Thus, the parties are bound by mutual obligations and the agreement is not illusory.

E. Analysis of Levco's Termination and Savings Clause Argument

Levco also argues that CCI is complaining of work primarily completed after CCI terminated the Construction Contract and that the dispute resolution clause in the Construction Contract cannot survive the termination because it did not contain a savings clause.

[15] "[A]n arbitration agreement contained within a contract survives the termination or repudiation of the contract as a whole." *Henry v. Gonzalez,* 18 S.W.3d 684, 690 (Tex.App.-San Antonio 2000, pet. dism'd) (relying, in context of TAA, on line of reasoning that agreement to arbitrate contained in written contract is separable from entire contract); *see also* *In re Koch Indus., Inc.,* 49 S.W.3d 439, 445 (Tex.App.-San Antonio 2001, orig. proceeding) (holding same in context of FAA). Thus, a savings clause was not required for the arbitration provision in the Construction Contract to survive any termination by CCI.

[16] To the extent that Levco is attempting to argue that the dispute between the parties does not fall within the scope of the arbitration provision in the Construction Contract because some of the dispute between itself and CCI arose from work that was completed after CCI terminated the Construction Contract, this is also unavailing. The terms of the Bond expressly incorporate the terms of the Construction Contract. Section 4.1, the provision invoked by the Surety, allows it to "[a]rrange from the Contractor [Levco] ... to perform and complete the Construction Contract." Section 6 of the Bond further states that if the Surety elects to act under section 4.1, "the responsibilities of the Surety to the Owner [CCI] shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract." Thus, the terms of the Bond expressly provided for Levco to complete the work under the terms of the Construction Contract even after CCI's termination of the contract.

We conclude that CCI proved, as a matter of law, the existence of a valid arbitration agreement and that the claims between it and Levco fall within the scope of that agreement. Thus, CCI is entitled to arbitrate these claims, and the trial court abused its discretion in refusing to enforce the arbitration proceedings. *See, e.g.,* *Jack B. Anglin Co.,* 842 S.W.2d at 272–73 (recognizing, prior to enactment of Civil Practice and Remedies Code section 51.016, appropriateness of mandamus relief "[w]hen a Texas court enforces or refuses to enforce an arbitration agreement pursuant to the [FAA]" because that party "would be deprived of the benefits of the arbitration clause it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated"); *see also* *In re Bruce Terminix Co.,* 988 S.W.2d 702, 704 (Tex.1998) (orig. proceeding) (holding there is no adequate remedy by appeal for denial of right to arbitration "because the very purpose of arbitration is to avoid the time and expense of a trial and appeal").

FAA Preemption of State Law Venue Provision

Finally, Levco argues that we should "affirm the trial court's denial of [CCI's] Motion to Compel because the Texas Business and Commerce Code section 272.001 prohibits compelling Levco to arbitration in Lake County, Ohio and is not preempted by the [FAA]." It argues that the arbitration must take place in Harris County.

Business and Commerce Code section 272.001 provides:

> If a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by the party obligated by the contract to perform the construction or repair.

TEX. BUS. & COM.CODE ANN. § 272.001(b) (Vernon 2006). Levco argues in its appellate brief that it "exercised its option to void the requirement in the Contract to arbitrate in Lake County, Ohio" and, "[a]s a result, the trial court properly denied [CCI's] motion to compel arbitration in Lake County, Ohio." It further argues that if this Court narrowly construes the word "provision" to mean only the choice of venue rather than the arbitration clause as a whole, this statute would not fall under the FAA's preemption provision.

[17][18][19] The FAA preempts all otherwise applicable inconsistent state laws, including any inconsistent provisions of the TAA, under the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI; *see Allied–Bruce Terminix Co. v. Dobson,* 513 U.S. 265, 272, 115 S.Ct. 834, 838, 130 L.Ed.2d 753 (1995). The FAA declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006); *OPE Int'l LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 446 (5th Cir.2001). "In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *OPE Int'l,* 258 F.3d at 446 (quoting *Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.")).

In *OPE International,* the Fifth Circuit held that a Louisiana provision invalidating arbitration of certain disputes out-of-state was preempted by the FAA, on the ground that the statute "condition[ed] the enforceability of arbitration agreements on selection of a Louisiana forum; a requirement not applicable to contracts generally." *Id.* at 447; *see also Commerce Park at DFW Freeport v. Mardian Constr. Co.,* 729 F.2d 334, 337 (5th Cir.1984) (holding that FAA preempted provisions in Texas Deceptive Trade Practices Act that required parties to submit to judicial forum).

We hold that the same reasoning applies here. Applying section 272.001 as Levco asks us to do here would prevent us from enforcing a term of the parties' arbitration agreement—the venue—on a ground that is not recognized by the FAA or by general state-law contract principles. *See OPE Int'l,* 258 F.3d at 447; *see also KKW Enters., Inc.,* 184 F.3d at 50 ("The venue in which arbitration is to take place is a 'term' of the parties' arbitration agreement."). We hold that the FAA preempts application of this provision under the facts of this case.

Levco argues that this case is distinguishable from *OPE International* because the Louisiana provision in *OPE International* "declare [d] null and void and unenforceable" any non-Louisiana venue provision, while section 272.001 declares such provisions only "voidable." However, by allowing a party to subsequently declare void a previously bargained-for provision, application of section 272.001 would undermine the declared federal policy of rigorous enforcement of arbitration agreements. *See Perry v. Thomas,* 482 U.S. 483, 490, 107 S.Ct. 2520, 2526, 96 L.Ed.2d 426 (1987) (analyzing section 2 and holding that it embodies Congress' intent to provide for enforcement of arbitration agreements within full reach of the Commerce Clause" and that "[i]t's general applicability reflects that the preeminent

concern of Congress ... was to enforce private agreements into which parties had entered").

Conclusion

We reverse the order of the trial court and remand the case for further proceedings consistent with this opinion.

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, 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] 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] *See* Appellee's Br. at 21–22.

> FN1. 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. 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.

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) (requiring the other side's consent or the court's leave).[FN3]

> FN3. 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]

> FN4. The District Court had admiralty jurisdiction under 28 U.S.C. § 1333(1). Mala argues that the court also had diversity jurisdiction under 28 U.S.C. § 1332. 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.

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) ("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); *Faretta v. California,* 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

[1][2] 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), 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. 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.* (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)) (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) ("[N]o case has ever held that a *pro se* litigant should be given actual notice of a statute of limitations.").

[3] 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 ("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); *see also* Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants,* 55 U. Chi. L.Rev. 659, 671 (1988) ("[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 (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) ("[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) ("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). 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). 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). In *Haines,* 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; *see* *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007).

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) ("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) (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) ("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][5] 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). And they still must serve process on the correct defendants. *See* *Franklin v. Murphy,* 745 F.2d 1221, 1234–35 (9th Cir.1984). 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 ("[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).

[6] 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). In particular, courts must tell pro se

prisoners about the effects of not filing any opposing affidavits. *Id.; see also* *Somerville v. Hall,* 2 F.3d 1563, 1564 (11th Cir.1993); *Neal v. Kelly,* 963 F.2d 453, 457 (D.C.Cir.1992); *Klingele v. Eikenberry,* 849 F.2d 409, 411 (9th Cir.1988) (concluding that the rule applies only to pro se prisoners). *But see* *Williams v. Browman,* 981 F.2d 901, 903–04 (6th Cir.1992) (holding that such notice is unnecessary); *Martin v. Harrison Cnty. Jail,* 975 F.2d 192, 193 (5th Cir.1992) (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. *See* *Castro v. United States,* 540 U.S. 375, 383, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003). 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,* notice is the exception. Nonassistance is the rule. *See* *Pliler,* 542 U.S. at 231, 233–34, 124 S.Ct. 2441.

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) ("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][8] 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 ("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 ("[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) (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). The District Court's failure to provide Mala with a pro se litigation manual was not an abuse of discretion.[FN5]

FN5. 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] 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). Contrary to Mala's suggestion, the court accommodated his status as a prisoner.

III

[10] 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) (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][12][13][14] 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), the plaintiff does not have a jury-trial right. *Complaint of Consolidation Coal Co.,* 123 F.3d 126, 132 (3d Cir.1997) (citing *Waring v. Clarke,* 46 U.S. (5 How.) 441, 458–60, 12 L.Ed. 226 (1847)). But the saving-to-suitors clause in § 1333(1) preserves state common-law remedies. *U.S. Express Lines Ltd. v. Higgins,* 281 F.3d 383, 390 (3d Cir.2002). This clause allows plaintiffs to pursue state claims in admiralty cases as long as the district court also has diversity jurisdiction. *Id.* In such cases, § 1333(1) preserves whatever jury-trial right exists with respect to the underlying state claims. *Gorman v. Cerasia,* 2 F.3d 519, 526 (3d Cir.1993) (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).

[15] 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) (explaining the two-part test for admiralty jurisdiction under § 1333(1)).

[16][17] The grounds for diversity jurisdiction are less certain. District courts have jurisdiction under 28 U.S.C. § 1332 only if the parties are completely diverse. *Barefoot Architect, Inc. v. Bunge,* 632 F.3d 822, 836 (3d Cir.2011). This means that no plaintiff may have the same state or territorial citizenship as any defendant. *Id.* 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); *Smith v. Cummings,* 445 F.3d 1254, 1260 (10th Cir.2006); *Sullivan v. Freeman,* 944 F.2d 334, 337 (7th Cir.1991). No one challenges that presumption here.

[18] 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] Even so, Mala's claim must fail.

> FN6. 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). 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] 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) ("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]

> FN7. 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 (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. 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.* (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][21] 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) (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]

> FN8. 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, 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, such jurisdiction exists only when there is no independent basis for federal jurisdiction. *See* 28 U.S.C. § 1367(a) (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][23] Mala also claims that the District Court erred by rejecting the advisory jury's verdict. Federal Rule of Civil Procedure 39(c) 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) (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). 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) ("[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) and to grant a new trial under Rules 50(b) and 59. These motions contained several overlapping arguments.[FN9] 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. 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] 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) (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, Kenneth E. Keller, Krieg Keller Sloan Reilley & Roman LLP, San Francisco, CA, Stephen Michael Gaffigan, 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, United States Magistrate Judge.
I. INTRODUCTION[FN1]

> FN1. 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]

> FN2. Plaintiffs request the Court take judicial notice of their United States trademark registrations. Under Federal Rule of Evidence 201, "[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. 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] 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. 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, and (2) false designation of origin under 15 U.S.C. § 1125(a).

Plaintiffs filed an Application for Order Authorizing Alternate Service of Process on Defendants Pursuant to Federal Rule of Civil Procedure 4(f)(3) 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) 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) ("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]

FN4. 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 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]

> FN5. 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] 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. 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) (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). Under California's

long-arm statute, Cal.Code Civ. Proc. § 410.10, 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) (citing Cal.Code Civ. Proc. § 410.10). 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). 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) (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]

> FN7. 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). 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). 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). 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 (*citing Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984) (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) (citing *Boschetto v. Hansing,* 539 F.3d 1011, 1018 (9th Cir.2008)). "[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) (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.,* 952 F.Supp. 1119, 1124 (W.D.Pa.1997)). 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) (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) (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 (quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). 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. This requires a showing of "but for" causation. *Id.* at 1322 ("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). 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) ("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 ("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) (quoting Sinatra v. Nat'l Enquirer, 854 F.2d 1191, 1199 (9th Cir.1988)). 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, the court may enter a default judgment where the clerk, under Rule 55(a), has previously entered the party's default based upon failure to plead or otherwise defend the action. Fed.R.Civ.P. 55(b). 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); *see also* Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir.1977) (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).

"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) (quoting *Elektra Entertainment Group Inc. v. Bryant,* No. CV 03–6381 GAF (JTLx), 2004 WL 783123, at *1 (C.D.Cal. Feb.13, 2004)). 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).

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). 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; *see also Danning v. Lavine,* 572 F.2d 1386, 1388 (9th Cir.1978) (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); *Century 21 Real Estate Corp. v. Sanlin,* 846 F.2d 1175, 1178 (9th Cir.1988). 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) (quoting *Brother Records, Inc. v. Jardine,* 318 F.3d 900, 908 (9th Cir.2003)) (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). 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).

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) (citing *Brookfield Commc'ns, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1046–47 n. 8 (9th Cir.1999)).

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.

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. 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). 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. The existence of Rule 55(b) though, indicates, that this preference towards disposing of cases on the merits is not absolute. *Pepsico,* 238 F.Supp.2d at 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. "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. 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). 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]

> FN8. 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] and/or any other website or business, as being sponsored by, authorized by, endorsed by, or in any way associated with Plaintiffs;

> FN9. 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

FN10. 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) (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 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). 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) (citing *Price v. City of Stockton,* 390 F.3d 1105, 1117 (9th Cir.2004)).

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) (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) ("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, 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); *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). 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). 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). 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). 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). 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). 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). Although Section 1117(c) 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) (quoting *John Wiley & Sons, Inc., et al. v. Kanzin Rukiz Entertainment and Promotions et al*, No. 06 Civ. 12949, 2007 WL 1695124, 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) ("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); 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) (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] *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. 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] 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] 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] This award represents 74.6% of the Plaintiffs' original request of $606,000.[FN15]

FN12. 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. Trademark registration number 3,344,631 appears substantially similar to registration number 3,044,207.

FN14. 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. 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) is entitled to costs. 15 U.S.C. §

1117(a). Plaintiffs have prevailed on their false designation of origin claim under § 1125(a) 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), assuming the court has found intentional use of a mark or designation as defined in section 1116(d) 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] 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).

> FN16. 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] Plaintiffs should be awarded $13,117.16 in prejudgment interest.[FN18] The prejudgment interest should be apportioned as follows: for Gucci, $12,768.92 [FN19]; for Bottega, $116.08 [FN20]; and for Balenciaga, $232.16.[FN21]

> FN17. 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. 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. 9.97260274 x 10^{-5} x $440,000.00 = $12,768.92
>
> FN20. 9.97260274 x 10^{-5} x $4,000.00 = $116.08
>
> FN21. 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

Tex.App.–Houston [1 Dist.],2012.
Cleveland Const., Inc. v. Levco Const., Inc.
359 S.W.3d 843
Court of Appeals of Texas,
Houston (1st Dist.).
CLEVELAND CONSTRUCTION, INC., Appellant,
v.
LEVCO CONSTRUCTION, INC., Appellee.

No. 01–11–00530–CV.
Jan. 26, 2012.

OPINION

EVELYN V. KEYES, Justice.

Appellant, Cleveland Construction, Inc. ("CCI"), appeals the trial court's denial of its motion to compel arbitration. In two issues, CCI argues that the trial court erroneously denied its motion to compel arbitration because (1) the Federal Arbitration Act ("FAA") applies, the arbitration provision is valid, and the claim is within the scope of the arbitration provision, and (2) the law favors arbitration and the FAA preempts conflicting state law.

We reverse and remand.

Background

Whole Foods Market, Inc. ("Whole Foods") hired CCI to serve as general contractor to construct a store in Houston, Texas ("the Project"). The contract between Whole Foods and CCI ("the Whole Foods Contract") allowed CCI to hire subcontractors.

CCI contracted with appellee, Levco Construction, Inc. ("Levco"), as a subcontractor, to perform certain tasks related to the construction, including excavating, grading, digging for laying utilities, paving, and preparing the foundation ("the Construction Contract"). The Construction Contract contained the following arbitration provision:

> *Article 30. DISPUTE RESOLUTION*
>
> ....
>
> 30.3 Any controversy or claims of CCI against Subcontractor [Levco] or Subcontractor against CCI shall, at the option of CCI, be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made. Any such arbitration shall be held in Lake County, Ohio. Any award arising out of such arbitration may be entered by any court having jurisdiction....

Levco also obtained a surety bond ("the Bond") from Intervener, Insurors Indemnity Company ("the Surety"). Both the Whole Foods Contract and the Bond issued by the Surety provided that disputes were to be resolved in a court in the county in which the Project was built, Harris County, Texas. Specifically, the Bond provided, in part:

> § 4 When the Owner [CCI] has satisfied the conditions of Section 3 [requiring notice of Contractor Default and other conditions precedent triggering the Surety's obligations under the Bond], the Surety shall promptly and at the Surety's expense take one of the following actions:
>
> § 4.1 Arrange for the Contractor [Levco], with consent of the Owner, to perform and complete the Construction Contract; or
>
> § 4.2 Undertake to perform and complete the Construction Contract itself, through its agents or through independent contractors; or
>
> § 4.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract ... and to pay to the Owner the amount of damages as described in Section 6 in excess of the Balance of the Contract Price incurred by the Owner resulting from the Contractor's default; or

§ 4.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor with reasonable promptness under the circumstance....

....

§ 6 After the Owner has terminated the Contractor's right to complete the Construction Contract, and if the Surety elects to act under Section 4.1, 4.2, or 4.3 above, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract....

....

§ 9 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first....

After Levco had partially performed under the Construction Contract, disputes arose between CCI and Levco concerning the Project, and on, January 17, 2011, CCI sent a letter to Levco informing it that "CCI elects to terminate its Agreement with Levco Construction." The work was subsequently completed by Levco under the provisions of the Bond.

On April 14, 2011, Levco filed suit against CCI and Whole Foods in Texas state court. According to its pleadings, Levco discovered upon beginning the work that CCI and Whole Foods had failed to obtain all necessary construction permits and that the building design and plans were not complete, so Levco was required to make numerous changes. Levco made multiple requests to change the scope of the contracted-for work to include the new work, including requests for additional time and compensation. Levco alleges that CCI and Whole Foods refused to consent to the changes Levco sought. Levco also alleges that CCI maintained unreasonable deadlines, interfered with Levco's work under the Construction Contract, failed to pay Levco for work it had completed from July 2010 to April 2011, and wrongfully terminated the contract in January 2011. Thus, Levco was unable to pay its subcontractors, resulting in liens being filed against the Project.

Levco alleges that CCI eventually reinstated Levco as a subcontractor pursuant to section 4.1 of the Bond, but CCI "continued to refuse to reinstate the [Construction Contract] itself." Levco claims that because CCI refused to reinstate the Construction Contract between them it was left in the position of "working essentially as a subcontractor for the [S]urety" under the terms of the Bond. Specifically, Levco alleges that, in its role as the issuer of the Bond, the Surety mandated that Levco be allowed to continue to work on the Project, as provided in section 4.1 of the Bond, and made an agreement with CCI regarding payment of Levco and Levco's subcontractors, as provided in section 6 of the Bond. Levco alleges that the Surety and CCI agreed that the Surety would pay Levco's subcontractors money owed them in exchange for CCI releasing the corresponding payments it owed Levco once the subcontractors released their liens on the Project. Levco states that the Surety complied with this agreement and paid Levco's subcontractors, but that CCI did not comply and release the money it owed Levco or Levco's subcontractors. Nor did CCI reinstate the Construction Contract it had terminated. Levco contends that CCI and Whole Foods are "now improperly withholding more than $500,000 in funds owed to Levco."

Levco claims that CCI breached its agreement with Levco; that CCI and Whole Foods breached their duties to perform with care in accordance with the terms of the Construction Contract (as provided in both the Construction Contract and section 6 of the Bond) and the Whole Foods Contract and to cooperate in performance of the contracts; that CCI and Whole Foods owe it damages under theories of quantum meruit, unjust enrichment, and promissory

estoppel; that CCI and Whole Foods violated Property Code section 28.001; and that CCI misapplied trust funds received from Whole Foods for payment of obligations under the Construction Contract and the Bond.

In addition, Levco sought a declaratory judgment that the arbitration clause in the Construction Contract is invalid and does not require arbitration because it is illusory, or, alternatively, that the provision in the Construction Contract requiring arbitration in Ohio is void because it contravenes Texas law in that "it purports to require a subcontractor to a contract involving the improvement or real property in Texas to submit to arbitration in a state other than Texas." Finally, Levco sought attorney's fees pursuant to Civil Practice and Remedies Code section 37.009 and chapter 38 and Property Code section 28.005, and it sought a temporary restraining order or temporary injunction prohibiting CCI and Whole Foods from releasing any funds related to the Project.

On April 14, the trial court granted Levco's temporary restraining order until April 29, 2011, and it set a hearing on Levco's request for a temporary injunction for April 29.

CCI filed an arbitration demand with the American Arbitration Association, alleging, under "nature of the dispute,"

> Respondent [Levco] is a subcontractor to Claimant [CCI] on the construction of a Whole Foods Market located in Houston, Texas ("Project"). Levco breached the subcontract and was terminated by CCI. Levco was bonded on the Project and the surety, Insurer's Indemnity Company utilized its option to have Levco complete the work on the Project; however, further breaches have occurred [and] CCI has been damaged by Levco's breach in [an] amount not yet fully determined but in [an] amount that CCI does not anticipate will exceed $150,000.

CCI requested that Lake County, Ohio be the arbitration locale.

On April 26, 2011, Levco filed an emergency motion to stay the arbitration proceeding.

On May 11, 2011, CCI answered Levco's suit with a general denial and asserted the affirmative defenses that a valid contract precluded Levco's quantum meruit claims, that CCI had paid Levco under the Construction Contract, that Levco failed to meet all conditions precedent to payment under the Construction Contract, that CCI was entitled to the defenses of "excuse" and "justification," and that Levco lacked standing to assert its claims against CCI, had failed to state a claim for which relief can be granted, and was the first to breach the Construction Contract.

CCI alleged that Levco defaulted under the Construction Contract within a month after beginning the Project and that CCI issued notices of default on multiple dates following. CCI attached several of these notices to its answer. It also alleged that "Levco was upside down on the Project from the beginning and failed to pay its vendors and suppliers in a timely manner" and that "Levco's financial mismanagement caused numerous, unnecessary liens on the Project." CCI also attached several notices from "lower tier" subcontractors claiming they had not been paid by Levco. This led CCI to terminate Levco from the Project in January 2011 and to notify the Surety of Levco's breach.

CCI alleged that the Surety elected its option under the terms of the Bond to arrange "for Levco to perform and complete its obligations under the Contract." CCI argues that "[b]y selecting this option, [the Surety] undertook Levco's obligations under the Contract and CCI was to reciprocally perform its obligations directly to [the Surety] ... and, as required by the Performance Bond, any money currently owed by CCI must be paid to [the Surety], not Levco." CCI also alleged that it agreed to 26 of the 31 change orders submitted by Levco and that it offered to pay the Surety the outstanding pay applications if Levco would execute a release, which Levco refused to do.

CCI also responded to Levco's application for a temporary injunction and moved to compel arbitration and to stay the trial court proceedings, or alternatively, to dismiss the trial court proceedings.

In its motion to compel arbitration, also filed on May 11, CCI argued that the arbitration clause between it and Levco was valid, that it was not illusory or in contravention of Texas state law, and that the dispute at issue fell within the scope of the agreement. CCI also argued that the FAA preempts Levco's claim based on Business and Commerce Code section 272.001. Levco responded that the arbitration clause was invalid and illusory and that it failed to survive termination of the Construction Contract.

On May 26, 2011, the Surety filed a plea in intervention, arguing that "mandatory jurisdiction and venue with respect to the claims and causes of action asserted by Intervenor against [CCI] herein properly lie in this Court pursuant to the express provisions of § 9" of the Bond. It likewise alleged that, after CCI terminated the Contract between itself and Levco, CCI called upon it, as Surety, to complete Levco's obligations pursuant to the Bond. The Surety alleged that it elected to utilize Levco to continue performance of the subcontract work with the Surety itself advancing Levco's payroll and certain of its overhead expenses, as provided in section 4.1 of the Bond. In exchange, CCI agreed to pay to the Surety "all remaining monies due and owing or to become due and owing under the Levco Subcontract Agreement," in accordance with section 6 of the Bond.

The Surety alleged that CCI subsequently breached this agreement by failing to make those payments. It alleged that it had expended $983,790.49 and that "under the express provisions of Levco's General Indemnity Agreement and pursuant to [its] common law rights to indemnity and equitable subrogation, [the Surety] has a superior lien upon and is entitled to payment directly from CCI on any and all contract sums or compensatory damages adjudged by this Court to be due and owing ... to Levco and/or [the Surety]."

On May 27, 2011, the trial court granted Levco's emergency motion to stay the arbitration proceeding initiated by CCI. This appeal followed.

Analysis

CCI argues that the trial court erred in denying its motion to compel arbitration because the FAA applies, the arbitration provision in the Construction Contract is valid, and the claims in the case are within the scope of the arbitration provision. It also argues that the FAA preempts any conflicting state law. Levco, however, argues that the arbitration provision in the Construction Contract is illusory and, therefore, unenforceable as a matter of law; that the Construction Contract was terminated and the arbitration provision does not contain a survival clause that would allow it to survive termination of the contract; and that Business and Commerce Code section 272.001 is not preempted by the FAA because it restricts venue, rather than restricting a party's right to arbitrate.

A. Jurisdiction

We first address our jurisdiction to review the trial court's order staying the arbitration proceedings. Civil Practice and Remedies Code section 51.016 provides:

> In a matter subject to the Federal Arbitration Act (9 U.S.C. Section 1 et seq.), a person may take an appeal or writ of error to the court of appeals from the judgment or interlocutory order of a district court, county court at law, or county court under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16.

TEX. CIV. PRAC. & REM.CODE ANN. § 51.016 (Vernon Supp. 2011). Section 16 of the FAA, "Appeals," provides:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title [stay of trial proceedings where issue therein is

referable to arbitration],

(B) denying a petition under section 4 of this title to order arbitration to proceed, [or]

(C) denying an application under section 206 of this title to compel arbitration....

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (2006).

[1] Thus, an interlocutory appeal is permitted in this case only if it would be permitted under the same circumstances under section 16 of the FAA in federal court. *See CMH Homes v. Perez,* 340 S.W.3d 444, 448–49 (Tex.2011). The United States Supreme Court has held that the FAA "generally permits immediate appeal of orders hostile to arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 86, 121 S.Ct. 513, 519, 148 L.Ed.2d 373 (2000). Several circuit courts have held that the FAA permits interlocutory review of an order staying arbitration. *Arciniaga v. Gen. Motors Corp.,* 460 F.3d 231, 234 (2nd Cir.2006) (holding FAA subsection 16(a)(2) permits interlocutory review of stay of arbitration); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.,* 184 F.3d 42, 47 (1st Cir.1999) (holding that order staying pending arbitration was immediately appealable as injunction under both 28 U.S.C. § 1292(a)(1) and FAA section 16(a)(2)); *Se. Res. Recovery Facility Auth. v. Montenay Int'l Corp.,* 973 F.2d 711, 712 (9th Cir.1992) (holding it had jurisdiction over district court's order staying arbitration pursuant to section 16(a)(2) allowing appeal from an order enjoining arbitration). Furthermore, the Fifth Circuit has held that an order granting a stay of arbitration is appealable pursuant to 28 U.S.C. § 1292(a)(1), governing appeals of interlocutory orders involving injunctions generally. *See Tai Ping Ins. Co. v. M/V Warschau,* 731 F.2d 1141, 1143 (5th Cir.1984).

B. Standard of Review

Prior to September 1, 2009, an order denying a motion to compel arbitration under the FAA was reviewed in a mandamus proceeding using an abuse of discretion standard. *In re Merrill Lynch & Co.,* 315 S.W.3d 888, 890–91 & n. 3 (Tex.2010) (orig. proceeding); *Jack B. Anglin Co. v. Tipps,* 842 S.W.2d 266, 272–73 (Tex.1992) (orig. proceeding). The Texas Supreme Court held that the abuse of discretion standard, as applied to such orders, required reviewing courts to defer to the trial court's factual determinations if they are supported by the evidence and to review the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.,* 279 S.W.3d 640, 643 (Tex.2009) (orig. proceeding). This is the same standard by which we review interlocutory appeals of orders denying motions to compel arbitration under the Texas Arbitration Act ("TAA"). *See McReynolds v. Elston,* 222 S.W.3d 731, 739 (Tex.App.-Houston [14th Dist.] 2007, no pet.) (holding, under TAA, "we review factual conclusions under a legal sufficiency or

'no evidence' standard and legal conclusions de novo"); *see also* *In re Trammell,* 246 S.W.3d 815, 820 (Tex.App.-Dallas 2008, no pet.) (orig. proceeding) (holding same).

Civil Practice and Remedies Code section 51.016 now permits an order denying a motion to compel arbitration under the FAA to be reviewed via interlocutory appeal. TEX. CIV. PRAC. & REM.CODE ANN. § 51.016. Neither this Court nor the Texas Supreme Court has addressed the appropriate standard of review for such interlocutory appeals. However, various courts of appeals have considered this issue and held that interlocutory appeals of orders denying motions to compel arbitration should be reviewed under the abuse of discretion standard, in which we defer to the trial court's factual determinations and review questions of law de novo. *See* *Garcia v. Huerta,* 340 S.W.3d 864, 868–69 (Tex.App.-San Antonio 2011, pet. filed); *SEB, Inc. v. Campbell,* No. 03–10–00375–CV, 2011 WL 749292, at *2 (Tex.App.-Austin Mar. 2, 2011, no pet.) (mem. op.); *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.,* 327 S.W.3d 859, 862–63 (Tex.App.-Dallas 2010, no pet.); *see also* *Torster v. Panda Energy Mgmt., LP,* No. 07–10–0442–CV, 2011 WL 780522, at *2 (Tex.App.-Amarillo Mar. 7, 2011, pet. filed) (mem. op) (citing *Sidley, Austin, Brown & Wood* in holding that whether trial court erred in denying motion to compel arbitration "depends on whether it abused its discretion").

[2] Thus, in reviewing an order denying a motion to compel arbitration under the FAA, we give deference to the trial court's factual determinations that are supported by evidence and we review de novo its legal conclusions.

[3][4] A party seeking to compel arbitration under the FAA must establish that there is a valid arbitration agreement and that the claims raised fall within that agreement's scope. *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 737 (Tex.2005) (orig. proceeding); *J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex.2003). If the trial court finds a valid agreement, the burden shifts to the party opposing arbitration to raise an affirmative defense to enforcing arbitration. *J.M. Davidson,* 128 S.W.3d at 227. The trial court's determination as to the validity of an arbitration agreement is a legal determination that we review de novo. *Id.*

[5][6][7] Under the FAA, ordinary principles of state contract law determine whether there is a valid agreement to arbitrate. *Kellogg Brown & Root,* 166 S.W.3d at 738. Although there is a strong presumption favoring arbitration, that presumption arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *J.M. Davidson,* 128 S.W.3d at 227. Because arbitration is contractual in nature, the FAA generally does not require parties to arbitrate when they have not agreed to do so. *Kellogg Brown & Root,* 166 S.W.3d at 738 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.,* 489 U.S. 468, 478–79, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488 (1989)).

C. Determination of Existence of Valid Agreement to Arbitrate

CCI argues that the arbitration clause in the Construction Contract is a valid and binding agreement to arbitrate. Levco, however, argues that it is illusory and unenforceable as a matter of law. Levco also argues that, even if the agreement to arbitrate in the Construction Contract is not illusory, the arbitration agreement in the Construction Contract does not contain a survival clause that would allow it to survive termination of the contract.[FN1]

> FN1. Levco's appellate brief mentions in passing that the dispute resolution provision in the Bond conflicts with the terms of the Construction Contract. However, it cites no authority and provides no legal analysis on this issue. Therefore, to the extent Levco is attempting to argue that the terms of the Bond prevent arbitration of its dispute with CCI over the claims arising from the Construction Contract, that issue is waived for lack of briefing. *See* TEX.R.APP. P. 38.1(i) (requiring that appellate "brief must contain a clear and concise argument for the contention made, with appropriate citations to authorities" for party to assert issue on appeal); *Brown v. Hearthwood II Owners Ass'n.,* 201 S.W.3d 153, 161 (Tex.App.-Houston [14th Dist.] 2006, pet. denied) (holding argument can be waived for failure to adequately brief).

> Levco also argues that the Surety is a necessary party to any arbitration proceeding. However, the Surety is not before this Court as a party to the appeal, nor was it a party to the motion to stay arbitration in the trial court. Thus, we are not called upon to consider the Surety's obligations or rights regarding arbitration.

[8][9][10] In determining the validity of agreements to arbitrate that are subject to the FAA, we generally apply ordinary state contract law principles. *In re Palm Harbor Homes, Inc.,* 195 S.W.3d 672, 676 (Tex.2006) (orig. proceeding). The elements of a valid contract are (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Prime Prods., Inc. v. S.S.I. Plastics, Inc.,* 97 S.W.3d 631, 636 (Tex.App.-Houston [1st Dist.] 2002, pet. denied). "Under generally accepted principles of contract interpretation, all writings that pertain to the same transaction will be considered together, even if they were executed at different times and do not expressly refer to one another." *DeWitt Cnty. Elec. Coop., Inc. v. Parks,* 1 S.W.3d 96, 102 (Tex.1999); *IP Petroleum Co. v. Wevanco Energy, L.L.C.,* 116 S.W.3d 888, 889 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) ("Instruments pertaining to the same transaction may be read together to ascertain the parties' intent, even if the parties executed the instruments at different times.") (citing *Fort Worth Indep. Sch. Dist. v. City of Fort Worth,* 22 S.W.3d 831, 840 (Tex.2000)); *see also DeClaire v. G & B McIntosh Family Ltd. P'Ship,* 260 S.W.3d 34, 44 (Tex.App.-Houston [1st Dist.] 2008, no pet.) (holding that contract can be effective if signed by only one party if other party accepts by his acts, conduct, or acquiescence in the terms of the contract).

CCI presented the Construction Contract, which provides, in part:

> Any controversy or claims of CCI against Subcontractor [Levco] or Subcontractor against CCI shall, at the option of CCI, be resolved by arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association in effect on the date on which the demand for arbitration is made. Any such arbitration shall be held in Lake County, Ohio.

CCI argues that this is a valid arbitration agreement. However, Levco argues, both here and in the trial court, that the arbitration agreement in the Construction Contract is not valid because it is illusory.[FN2]

> FN2. CCI argues that we cannot consider Levco's arguments concerning termination of the agreement and subsequent performance under the terms of the Bond because it was not expressly presented to the trial court. This argument is unpersuasive. When, as here, no findings of fact and conclusions of law are filed by the trial court, we must affirm the trial court's order if any legal theory supports it. *Rachal v. Reitz,* 347 S.W.3d 305, 308 (Tex.App.-Dallas 2011, pet. filed). Levco, CCI, and the Surety all informed the trial court of the January 2011 termination by CCI and of the subsequent arrangements under the terms of the Bond, so the trial court was aware of this information.

D. Analysis of Levco's Claims that Abritration Provision is Illusory

[11][12][13] "A promise is illusory if it does not bind the promisor, such as when the promisor retains the option to discontinue performance." *In re 24R, Inc.,* 324 S.W.3d 564, 567 (Tex.2010) (orig. proceeding) (per curiam); *see also J.M. Davidson,* 128 S.W.3d at 235 (Schneider, J., dissenting) ("[I]f the terms of a promise make performance optional, the promise is illusory and cannot constitute valid consideration."). Arbitration agreements must be supported by consideration, or mutuality of obligation, to be enforceable. *Palm Harbor Homes,* 195 S.W.3d at 676; *Dorfman v. Max Int'l, LLC,* No. 05–10–00776–CV, 2011 WL 1680070, at *2 (Tex.App.-Dallas May 5, 2011, no pet.) (mem. op.).

[14] In the context of stand-alone arbitration agreements, binding promises are required on both sides as they are the only consideration rendered to create a contract. *In re AdvancePCS Health L.P.,* 172 S.W.3d 603, 607 (Tex.2005) (orig. proceeding) (per curiam); *Dorfman,* 2011 WL 1680070, at *2. When, however, an arbitration clause is part of an underlying contract, the rest of the parties' agreement provides the consideration. *AdvancePCS Health,* 172 S.W.3d

at 607; *see* *Palm Harbor Homes,* 195 S.W.3d at 676–77.

Here, the plain language of the arbitration provision does not mutually bind the parties because arbitration is "at the option of CCI." However, this arbitration provision does not stand alone—it is part of an underlying contract. Thus, consideration, or the presence of mutual obligation, is provided by the underlying contract. *See* *AdvancePCS Health,* 172 S.W.3d at 607.

Levco seems to argue that the underlying contract does not provide any consideration for the arbitration provision because it, too, permits CCI to terminate, suspend, or modify its terms at its sole discretion, without notice. Levco's reliance on those provisions of the Construction Contract is misplaced. The modification provision's plain language does not state that CCI is the only party that can modify the agreement—it provides only that any modifications must be signed by CCI's representative to be effective. Furthermore, while the Construction Contract provides that termination or suspension will be "at the sole option and convenience to CCI," the contract also provides that CCI must pay for work and materials already purchased at the time it gives notice of such termination or suspension. Thus, the parties are bound by mutual obligations and the agreement is not illusory.

E. Analysis of Levco's Termination and Savings Clause Argument

Levco also argues that CCI is complaining of work primarily completed after CCI terminated the Construction Contract and that the dispute resolution clause in the Construction Contract cannot survive the termination because it did not contain a savings clause.

[15] "[A]n arbitration agreement contained within a contract survives the termination or repudiation of the contract as a whole." *Henry v. Gonzalez,* 18 S.W.3d 684, 690 (Tex.App.-San Antonio 2000, pet. dism'd) (relying, in context of TAA, on line of reasoning that agreement to arbitrate contained in written contract is separable from entire contract); *see also* *In re Koch Indus., Inc.,* 49 S.W.3d 439, 445 (Tex.App.-San Antonio 2001, orig. proceeding) (holding same in context of FAA). Thus, a savings clause was not required for the arbitration provision in the Construction Contract to survive any termination by CCI.

[16] To the extent that Levco is attempting to argue that the dispute between the parties does not fall within the scope of the arbitration provision in the Construction Contract because some of the dispute between itself and CCI arose from work that was completed after CCI terminated the Construction Contract, this is also unavailing. The terms of the Bond expressly incorporate the terms of the Construction Contract. Section 4.1, the provision invoked by the Surety, allows it to "[a]rrange from the Contractor [Levco] ... to perform and complete the Construction Contract." Section 6 of the Bond further states that if the Surety elects to act under section 4.1, "the responsibilities of the Surety to the Owner [CCI] shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract." Thus, the terms of the Bond expressly provided for Levco to complete the work under the terms of the Construction Contract even after CCI's termination of the contract.

We conclude that CCI proved, as a matter of law, the existence of a valid arbitration agreement and that the claims between it and Levco fall within the scope of that agreement. Thus, CCI is entitled to arbitrate these claims, and the trial court abused its discretion in refusing to enforce the arbitration proceedings. *See, e.g.,* *Jack B. Anglin Co.,* 842 S.W.2d at 272–73 (recognizing, prior to enactment of Civil Practice and Remedies Code section 51.016, appropriateness of mandamus relief "[w]hen a Texas court enforces or refuses to enforce an arbitration agreement pursuant to the [FAA]" because that party "would be deprived of the benefits of the arbitration clause it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated"); *see also* *In re Bruce Terminix Co.,* 988 S.W.2d 702, 704 (Tex.1998) (orig. proceeding) (holding there is no adequate remedy by appeal for denial of right to arbitration "because the very purpose of arbitration is to avoid the time and expense of a trial and appeal").

FAA Preemption of State Law Venue Provision

Finally, Levco argues that we should "affirm the trial court's denial of [CCI's] Motion to Compel because the Texas Business and Commerce Code section 272.001 prohibits compelling Levco to arbitration in Lake County, Ohio and is not preempted by the [FAA]." It argues that the arbitration must take place in Harris County.

Business and Commerce Code section 272.001 provides:

> If a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by the party obligated by the contract to perform the construction or repair.

TEX. BUS. & COM.CODE ANN. § 272.001(b) (Vernon 2006). Levco argues in its appellate brief that it "exercised its option to void the requirement in the Contract to arbitrate in Lake County, Ohio" and, "[a]s a result, the trial court properly denied [CCI's] motion to compel arbitration in Lake County, Ohio." It further argues that if this Court narrowly construes the word "provision" to mean only the choice of venue rather than the arbitration clause as a whole, this statute would not fall under the FAA's preemption provision.

[17][18][19] The FAA preempts all otherwise applicable inconsistent state laws, including any inconsistent provisions of the TAA, under the Supremacy Clause of the United States Constitution. U.S. CONST. art. VI; *see Allied–Bruce Terminix Co. v. Dobson,* 513 U.S. 265, 272, 115 S.Ct. 834, 838, 130 L.Ed.2d 753 (1995). The FAA declares written provisions for arbitration "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2006); *OPE Int'l LP v. Chet Morrison Contractors, Inc.,* 258 F.3d 443, 446 (5th Cir.2001). "In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *OPE Int'l,* 258 F.3d at 446 (quoting *Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.")).

In *OPE International,* the Fifth Circuit held that a Louisiana provision invalidating arbitration of certain disputes out-of-state was preempted by the FAA, on the ground that the statute "condition[ed] the enforceability of arbitration agreements on selection of a Louisiana forum; a requirement not applicable to contracts generally." *Id.* at 447; *see also Commerce Park at DFW Freeport v. Mardian Constr. Co.,* 729 F.2d 334, 337 (5th Cir.1984) (holding that FAA preempted provisions in Texas Deceptive Trade Practices Act that required parties to submit to judicial forum).

We hold that the same reasoning applies here. Applying section 272.001 as Levco asks us to do here would prevent us from enforcing a term of the parties' arbitration agreement—the venue—on a ground that is not recognized by the FAA or by general state-law contract principles. *See OPE Int'l,* 258 F.3d at 447; *see also KKW Enters., Inc.,* 184 F.3d at 50 ("The venue in which arbitration is to take place is a 'term' of the parties' arbitration agreement."). We hold that the FAA preempts application of this provision under the facts of this case.

Levco argues that this case is distinguishable from *OPE International* because the Louisiana provision in *OPE International* "declare [d] null and void and unenforceable" any non-Louisiana venue provision, while section 272.001 declares such provisions only "voidable." However, by allowing a party to subsequently declare void a previously bargained-for provision, application of section 272.001 would undermine the declared federal policy of rigorous enforcement of arbitration agreements. *See Perry v. Thomas,* 482 U.S. 483, 490, 107 S.Ct. 2520, 2526, 96 L.Ed.2d 426 (1987) (analyzing section 2 and holding that it embodies Congress' intent to provide for enforcement of arbitration agreements within full reach of the Commerce Clause" and that "[i]t's general applicability reflects that the preeminent

concern of Congress ... was to enforce private agreements into which parties had entered").

Conclusion

We reverse the order of the trial court and remand the case for further proceedings consistent with this opinion.

United States Court of Appeals,
Ninth Circuit.
DOE 1, Doe 2, and Kasadore Ramkissoon, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,
v.
AOL LLC, Defendant-Appellee.

No. 07-15323.
Argued and Submitted Dec. 6, 2007.
Filed Jan. 16, 2009.

Background: Members of internet company brought an action, on behalf of themselves and a putative nationwide class of members, alleging violations of federal electronic privacy law and California law. The United States District Court for the Northern District of California, Saundra B. Armstrong, J., internet company's motion to dismiss for improper venue. Members appealed.

Holdings: The Court of Appeals held that:
(1) designation of "the courts of Virginia" in forum selection clause of internet company's member agreement meant the state courts of Virginia, and
(2) forum selection clause was unenforceable.

Reversed and remanded.

D.W. Nelson, Senior Circuit Judge, and Reinhardt, Circuit Judge, filed a concurring opinion.

Bea, Circuit Judge, filed a concurring opinion.

West Headnotes

[1] Federal Courts 170B 818

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk818 k. Dismissal. Most Cited Cases

An appellate court reviews a district court's order enforcing a contractual forum selection clause and dismissing a case for improper venue for abuse of discretion.

[2] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Where the interpretation of contractual language in a forum selection clause does not turn on the credibility of

extrinsic evidence but on an application of the principles of contract interpretation, an appellate court reviews a district court's interpretation de novo.

[3] Federal Courts 170B 95

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk95 k. Objections, Waiver and Consent. Most Cited Cases

Federal Courts 170B 96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases

A motion to enforce a forum selection clause is treated as a motion to dismiss for improper venue; pleadings need not be accepted as true, and facts outside the pleadings may be considered. Fed.Rules Civ.Proc.Rule 12(b)(3), 28 U.S.C.A.

[4] Contracts 95 206

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k206 k. Legal Remedies and Proceedings. Most Cited Cases

Designation of "the courts of Virginia" in forum selection clause of internet company's member agreement meant the state courts of Virginia, and did not include federal courts located in Virginia; courts "of" Virginia referred to courts proceeding from, with their origin in, Virginia.

[5] Federal Courts 170B 412.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk412 Contracts; Sales
170Bk412.1 k. In General. Most Cited Cases

A federal court applies federal law to the interpretation of a forum selection clause.

[6] Contracts 95 147(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) k. Language of Contract. Most Cited Cases

Contracts 95 152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases

Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself; whenever possible, the plain language of the contract should be considered first.

[7] Contracts 95 143.5

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a Whole. Most Cited Cases

Under federal law, a court reads a written contract as a whole, and interprets each part with reference to the whole.

[8] Contracts 95 143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases

That the parties dispute a contract's meaning does not render the contract ambiguous; a contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation.

[9] Contracts 95 127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

Forum selection clause in internet company's member agreement designating Virginia state courts was unenforceable as to California resident plaintiffs bringing class action claims under California consumer law; class action relief for consumer claims was unavailable in Virginia state court, and California state court had previously found a California public policy against consumer class action waivers and waivers of consumer rights under California consumer law.

[10] Federal Courts 170B 412.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk412 Contracts; Sales
170Bk412.1 k. In General. Most Cited Cases

A federal court applies federal law to determine the enforceability of a forum selection clause.

[11] Contracts 95 141(1)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k141 Evidence
95k141(1) k. Presumptions and Burden of Proof. Most Cited Cases

A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a heavy burden to establish a ground upon which a court will conclude the clause is unenforceable.

[12] Contracts 95 127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

A forum selection clause is unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

Joseph J. Tabacco, Jr., Christopher T. Heffelfinger, Berman DeValerio Pease Tabacco Burt & Pucillo, San Francisco, CA; C. Oliver Burt, III, Berman DeValerio Pease Tabacco Burt & Pucillo, West Palm Beach, FL; Richard R. Wiebe, Law Office of Richard R. Wiebe, San Francisco, CA; and James K. Green, James K. Green, P.A., West Palm Beach, FL, for the plaintiffs-appellants.

Patrick J. Carome, Samir C. Jain, D. Hien Tran, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., for the defendant-appellee.

Appeal from the United States District Court for the Northern District of California; Saundra B. Armstrong, District Judge, Presiding. D.C. No. CV-06-05866-SBA.

Before: D.W. NELSON, STEPHEN REINHARDT, and CARLOS T. BEA, Circuit Judges.

Per Curiam Opinion; Concurrence by Judge D.W. NELSON; Concurrence by Judge BEA.

PER CURIAM:

On July 31, 2006, AOL LLC (formerly America Online, Inc.) made publicly available the internet search records of more than 650,000 of its members. The records contained personal and sometimes embarrassing information

about the members. Plaintiffs, members of AOL, brought an action in federal district court in California on behalf of themselves and a putative nationwide class of AOL members, alleging violations of federal electronic privacy law, 18 U.S.C. § 2702(a). A subclass of AOL members who are California residents also alleged various violations of California law, including the California Consumers Legal Remedies Act, California Civil Code § 1770.

Under the AOL Member Agreement, all plaintiffs agreed to a forum selection clause that designates the "courts of Virginia" as the fora for disputes between AOL and its members. The Member Agreement also contains a choice of law clause designating Virginia law to govern disputes.

AOL moved to dismiss the action for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), on the basis of the parties' forum selection clause. AOL contends the clause permits plaintiffs to refile their consumer class action in state *or* federal court in Virginia. Plaintiffs contend the forum selection clause limits them to Virginia state court, where a class action remedy would be unavailable to them; this, they contend, violates California public policy favoring consumer class actions and renders the forum selection clause unenforceable.

The district court granted AOL's motion and dismissed the action without prejudice to plaintiffs refiling it in a state or federal court in Virginia. We hold the district court erred when it interpreted the forum selection clause to permit actions in either state or federal court in Virginia; the plain language of the clause-courts "of" Virginia-demonstrates the parties chose Virginia state courts as the only fora for any disputes. We reverse and remand for further proceedings.

I.

A. The Complaint

Plaintiffs Kasadore Ramkissoon and Doe 1 and Doe 2,[FN1] members of AOL, filed a class action complaint in the District Court for the Northern District of California against AOL on behalf of themselves and a nationwide putative class of AOL members. The complaint alleges Ramkissoon currently is a resident of New York, while Doe 1 and Doe 2 currently are residents of California. The complaint does not state when Doe 1 and Doe 2 became residents of California, where they resided when they entered into the Member Agreement with AOL, or where they resided when they used AOL's services.

> FN1. Plaintiffs and AOL filed a joint stipulation and proposed order to allow Doe 1 and Doe 2 to proceed anonymously, because of the sensitive nature of the personal information Doe 1 and Doe 2 claim AOL publicly disclosed about them. The district court granted the motion, which ruling is not at issue on appeal.

AOL provides its members with access to the Internet and a variety of related features, including search tools and security features. The complaint alleges that on July 31, 2006, "roughly twenty million AOL Internet search records were packaged into a database" and made publicly available for download for a period of approximately ten days. The data consisted of the records of which internet sites were visited by nearly 658,000 AOL members who conducted such visits from approximately March 2006 through May 2006. AOL does not contest this occurrence.

The complaint alleges the data contained the addresses, phone numbers, credit card numbers, social security numbers, passwords and other personal information of AOL members. Plaintiffs also allege the searches reveal members' "personal struggles with various highly personal issues, including sexuality, mental illness, recovery from alcoholism, and victimization from incest, physical abuse, domestic violence, adultery, and rape," by revealing their Internet searches for information on these issues. Although AOL admitted it made a "mistake" and took down the data, "mirror" websites appeared on the internet that reproduced the data. Some of these websites present the data in a searchable form and others "invite the public to openly criticize and pass judgment on AOL members based on their searches."

Plaintiffs' complaint alleges seven causes of action. Two of the causes of action-violation of the federal Elec-

tronic Communications Privacy Act, 18 U.S.C. § 2702(a),[FN2] and unjust enrichment under federal common law-are brought on behalf of all plaintiffs and the putative nationwide class.

> FN2. 18 U.S.C. § 2702(a) prohibits an entity that provides an electronic communications service or remote computing service from knowingly divulging, except in certain circumstances, the contents of an electronic communication or a record or other information about a subscriber.

The other five causes of action are brought under California statutory and common law. Doe 1 and Doe 2 bring these claims on behalf of the putative sub-class of AOL members who are California residents. They allege AOL violated the following California statutes: (1) the California Consumers Legal Remedies Act (CLRA),[FN3] which prohibits unfair methods of competition and unfair or deceptive acts or practices resulting in the sale of goods or services; (2) the California Customer Records Act,[FN4] which requires businesses to destroy customers' records that are no longer to be maintained, and requires businesses to maintain security procedures to protect customers' personal information; (3) California False Advertising law; [FN5] and (4) California Unfair Competition law,[FN6] which prohibits unfair, unlawful, and fraudulent business practices. These California plaintiffs also allege AOL committed the tort of public disclosure of private facts under California common law.

> FN3. Cal. Civ.Code § 1770.
>
> FN4. Cal. Civ.Code § 1798.81.
>
> FN5. Cal. Bus. & Prof.Code § 17500 *et seq.*
>
> FN6. Cal. Bus. & Prof.Code § 17200 *et seq.*

B. The Forum Selection and Choice of Law Clause

AOL's headquarters are located in Dulles, Virginia. All members of AOL's online service, including all plaintiffs and putative class members, must agree to the AOL Member Agreement as a prerequisite to register for AOL service. Each member must click on a box that states the member has agreed to the terms of the Member Agreement before he can complete his registration.

The Member Agreement contains a choice of law clause that designates Virginia law, excluding its conflict-of-law rules. It also contains a forum selection clause that designates the "courts of Virginia" as the fora for disputes between AOL and its members. The choice of law and forum selection clause of the Member Agreement in effect during the time period relevant to the complaint-January 1, 2004 through September 22, 2006-states in its entirety:

> The laws of the Commonwealth of Virginia, excluding its conflicts-of-law rules, govern this Member Agreement and your membership. You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of the AOL Services resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute including any claim involving AOL or AOL Services. The foregoing provision may not apply to you depending on the laws of your jurisdiction. This Agreement shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods.

C. District Court Order

Based on the forum selection clause, AOL moved to dismiss the action for improper venue under Federal Rule of Civil Procedure 12(b)(3) ("Rule 12(b)(3)"), or, alternatively, to transfer venue to the District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1406(a).[FN7] The district court granted AOL's Rule 12(b)(3) motion to dismiss and adopted AOL's proposed order in its entirety. The district court held the forum selection clause "expressly requires that this controversy be adjudicated in a court in Virginia" and that "[p]laintiffs agreed the courts of

Virginia have 'exclusive jurisdiction' over any claims or disputes with AOL, and venue in the Northern District of California is improper." The order dismissed plaintiffs' complaint "without prejudice to the refiling of their claims in a state or federal court in Virginia."

> FN7. 28 U.S.C. § 1406(a) states: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

II.

[1][2] We review a district court's order enforcing a contractual forum selection clause and dismissing a case for improper venue for abuse of discretion. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 323 (9th Cir.1996). Where the interpretation of contractual language in a forum selection clause does not turn on the credibility of extrinsic evidence but on an application of the principles of contract interpretation, we review the district court's interpretation *de novo*. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir.1987).

[3] A motion to enforce a forum selection clause is treated as a motion to dismiss pursuant to Rule 12(b)(3); pleadings need not be accepted as true, and facts outside the pleadings may be considered. *Argueta*, 87 F.3d at 324.

III.

[4] As a threshold matter, the parties dispute the meaning of the forum selection clause, specifically the phrase "exclusive jurisdiction ... resides *in the courts of Virginia*." AOL claims the phrase "courts of Virginia" refers to state and federal courts in Virginia, while plaintiffs claim it refers to Virginia state courts only. We agree with plaintiffs' interpretation.

[5] We apply federal law to the interpretation of the forum selection clause. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir.1988). When we interpret a contract under federal law, we look for guidance "to general principles for interpreting contracts." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir.1999).

[6][7][8] "Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first." *Id.* (internal citation omitted). We apply the "primary rule of interpretation ... that the common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it." *Hunt Wesson Foods, Inc.*, 817 F.2d at 77 (internal quotation marks and alteration omitted). We read a written contract as a whole, and interpret each part with reference to the whole. *Klamath Water Users Protective Ass'n*, 204 F.3d at 1210. That the parties dispute a contract's meaning does not render the contract ambiguous; a contract is ambiguous "if reasonable people could find its terms susceptible to more than one interpretation." *Id.*

The district court, without discussion, interpreted the forum selection clause to refer to state *and* federal courts of Virginia. We determine the meaning of the phrase "courts of Virginia" *de novo*, *Hunt Wesson Foods, Inc.*, 817 F.2d at 77, and look first to its plain meaning. We have not previously addressed the meaning of a forum selection clause designating the courts "of," rather than "in," a state. We hold that the forum selection clause at issue here-designating the courts of Virginia-means the state courts of Virginia only; it does not also refer to federal courts in Virginia.

The clause's use of the preposition "of"-rather than "in"-is determinative. Black's Law Dictionary defines "of" as a term "denoting that from which anything proceeds; indicating origin, source, descent, and the like...." FN8 *Black's Law Dictionary* 1080 (6th ed.1990). Thus, courts "of" Virginia refers to courts proceeding from, with their origin in, Virginia-i.e., the state courts of Virginia. Federal district courts, in contrast, proceed from, and find their

origin in, the federal government.[FN9]

> FN8. In contrast, the proposition "in" "express[es] relation of presence, existence, situation, inclusion, action, etc.; inclosed or surrounded by limits, as in a room; also meaning for, in and about, on, within etc. ...." *Black's Law Dictionary* 758 (6th ed.1990).

> FN9. Reading the forum selection and choice of law clause as a whole further supports this reasonable interpretation. *See Klamath Water Users Protective Ass'n*, 204 F.3d at 1210. The clause contains both a forum selection provision by which the parties agreed to the "courts of Virginia" as the fora for their disputes, *and* a choice of law provision by which the parties agreed to apply the "laws of the Commonwealth of Virginia." The *state* courts of Virginia are the ultimate determiners of the "laws of the Commonwealth of Virginia"; a federal court in Virginia merely follows Virginia law.

Our interpretation finds support among opinions by our sister circuits who have addressed the meaning of forum selection clauses designating the "courts of" a state-all of whom have interpreted such clauses to refer to the state courts of the designated state, and not also to the federal courts in the designated state. *See Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F.3d 921, 926 (10th Cir.2005) (interpreting "Courts of the State of Colorado" to mean Colorado state courts; the clause "refers to sovereignty rather than geography"); *Dixon v. TSE Int'l Inc.*, 330 F.3d 396, 398 (5th Cir.2003) (interpreting "Courts of Texas, U.S.A." to mean Texas state courts; "[f]ederal district courts may be *in* Texas, but they are not *of* Texas"); *LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.*, 739 F.2d 4, 7 (1st Cir.1984) (interpreting forum selection and choice of law clause stating the contract shall be interpreted according to "the law, and in the courts, of the Commonwealth of Massachusetts" to designate the state courts of Massachusetts; "the word 'of' as it appears in the phrase in question must have been intended to restrict the meaning of both 'law' and 'courts' to those that trace their origin to the state.").

Accordingly, we hold the plain meaning of the forum selection clause's designation of the "courts of Virginia" is the state courts of Virginia; it does not include federal district courts located in Virginia.[FN10]

> FN10. We find no ambiguity in the forum selection clause. Even if we did find the phrase ambiguous, we would interpret it in plaintiffs' favor. The parties produced no other evidence of their expressed intent. Accordingly, we would construe the contract against AOL as the drafter and adopt plaintiffs' reasonable interpretation of the phrase to mean the state courts of Virginia. *See InterPetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992, 998 (9th Cir.1984).

IV.

[9] Having interpreted the AOL forum selection clause to designate Virginia state courts, we turn to the enforceability of the clause.

Plaintiffs contend the forum selection clause so construed is unenforceable as a matter of federal law, because it violates California public policy against waivers of class action remedies and rights under the California Consumers Legal Remedies Act. AOL, however, steadfastly has asserted the forum selection clause permits plaintiffs to maintain an action in federal court in Virginia, where plaintiffs could pursue their consumer class action remedies. AOL has raised no contention that the forum selection clause, construed to mean only Virginia state courts, nevertheless is enforceable and does not violate California public policy.

[10][11][12] We apply federal law to determine the enforceability of the forum selection clause. *Manetti-Farrow*, 858 F.2d at 513. A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a "heavy burden" to establish a ground upon which we will conclude the clause is unenforceable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Under the directives of the Supreme Court in *Bremen*, we will determine a forum selection clause is unenforceable "if enforcement would

contravene a strong public policy of the forum in which suit is brought, whether declared by statute *or by judicial decision.*" *Id.* at 15, 92 S.Ct. 1907 (emphasis added).

California has declared "by judicial decision" the same AOL forum selection clause at issue here contravenes a strong public policy of California-as applied to California residents who brought claims under California statutory consumer law in California state court. In *America Online, Inc. v. Superior Court of Alameda County (Mendoza)*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (2001), Mendoza, a California resident and member of AOL, brought a putative class action on behalf of AOL members in California state court, alleging violations of California state law, to wit: the California Consumers Legal Remedies Act, the California Unfair Business Practices Act, and common law conversion and fraud. *Mendoza*, 108 Cal.Rptr.2d at 702.

AOL moved to dismiss Mendoza's action based on its forum selection clause designating the "courts of Virginia." *Id.* at 701-02. The state trial court denied AOL's motion, holding the forum selection clause was unenforceable because it "diminished" the rights of California consumers, and remedies available in Virginia were not "comparable" to those in California.[FN11] *Id.* at 703.

> FN11. The trial court also denied AOL's motion on the basis the forum selection clause was unconscionable under California law because the clause was not negotiated, was contained in a standard form contract, and "was in a format that was not readily identifiable by Mendoza." *Id.* at 703. The Court of Appeal did not reach the trial court's unconscionability ruling, because it affirmed on other grounds. *Id.* at 713 n. 17.

AOL filed a petition for writ of mandamus. The California Court of Appeal denied the writ, thereby leaving in place the trial court's denial of AOL's motion to dismiss. Relevant to the instant appeal, the California Court of Appeal held the AOL forum selection clause was unenforceable, because the clause violated California public policy on two grounds: (1) enforcement of the forum selection clause violated California public policy that strongly favors consumer class actions, because consumer class actions are not available in Virginia state courts, *id.* at 712; [FN12] and (2) enforcement of the forum selection clause violates the anti-waiver provision of the Consumer Legal Remedies Act (CLRA), *id.* at 710, which states "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Cal. Civ.Code § 1751. The state Court of Appeal held the forum selection clause, together with the choice of law provision, effect a waiver of statutory remedies provided by the CLRA in violation of the anti-waiver provision, as well as California's "strong public policy" to "protect consumers against unfair and deceptive business practices." [FN13] *Mendoza*, 108 Cal.Rptr.2d at 710.

> FN12. The California Court of Appeal expressed "the importance class action consumer litigation has come to play" in California and noted California courts have "extolled" "the right to seek class action relief in consumer cases." *Mendoza*, 108 Cal.Rptr.2d at 712. In Virginia state court, in contrast, class action relief for consumer claims is unavailable. *Id.*; Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 3.11 (4th ed. 2003) (Virginia "does *not* have a statute or rule authorizing a 'class action' comparable to such proceedings under Rule 23 of the Federal Rules of Civil Procedure or the statutes and rules of most sister states.") (emphasis in original).

> FN13. The California Court of Appeal noted its conclusion on this point was "reinforced by a statutory comparison of California and Virginia consumer protection laws, which reveals Virginia's law provides significantly less consumer protection to its citizens than California law provides for our own." *Id.* at 710. Specifically, the court noted Virginia consumer protection law has a shorter statute of limitations, has a lower required minimum recovery amount, and does not provide the enhanced remedies for disabled and senior citizens which the CLRA provides. *Id.*

We agree with plaintiffs that *Mendoza* is the kind of declaration "by judicial decision" contemplated by *Bremen*. *Mendoza* found a California public policy against consumer class action waivers and waivers of consumer

rights under the CLRA that California public policy applies to California residents bringing class action claims under California consumer law. As to such California resident plaintiffs, *Mendoza* holds California public policy is violated by forcing such plaintiffs to waive their rights to a class action and remedies under California consumer law.

Accordingly, the forum selection clause in the instant member agreement is unenforceable as to California resident plaintiffs bringing class action claims under California consumer law.[FN14]

FN14. The members of this panel, however, disagree as to whether the plaintiffs in the instant case have established the AOL forum selection clause is unenforceable as to them, or whether further development of the record is necessary on remand.

REVERSED and REMANDED.[FN15]

FN15. Plaintiffs' requests for judicial notice of an AOL memorandum of law in an unrelated litigation and an AOL press release stating AOL will move its headquarters to New York are denied as moot.

D.W. NELSON, Senior Circuit Judge, and REINHARDT, Circuit Judge, concurring:

Plaintiffs Doe 1 and 2 have alleged sufficient facts to invoke California's public policy. California courts have made clear that they will "refuse to defer to the selected forum if to do so would substantially diminish the rights of California *residents* in a way that violates our state's public policy." *Mendoza*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 707 (2001) (emphasis added). In this case, plaintiffs, who allege that they were California *residents* at the time of the filing of the complaint, are bringing claims under California's consumer protection statutes, while the defendant seeks to enforce the same AOL contract by relying on the exact contract provisions that *Mendoza* refused to apply. Nothing in California law suggests that a plaintiff must have been a resident for any period of time before invoking California's public policy. To the contrary, being a resident at the time the complaint is filed is sufficient. *See id.* at 708, 709 (evaluating the effect of the forum selection clause on the rights of "California residents").

As the per curiam opinion recognizes, California's Consumer Legal Remedies Act states that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Cal. Civ.Code § 1751. California public policy is offended by *any* clause that would require the plaintiffs, being California *residents*, to pursue their claims in a forum that does not permit class actions. This is true regardless of whether plaintiffs' rights are waived directly by a forum selection clause or indirectly, as our colleague proposes, through conflicts of law analysis. As *Mendoza* made clear, "Enforcement of the contractual forum selection *and choice of law clauses* would be the functional equivalent of a contractual waiver of the consumer protections under the CLRA and, thus, is prohibited under California law." *Mendoza*, 108 Cal.Rptr.2d at 702 (emphasis added). As a result, no further pleadings are necessary. Any purported waiver of the rights of a California consumer is unenforceable.

Our colleague has created a pleading requirement premised on a supposed distinction between California "consumers" and California "residents." However, *Mendoza* treats California consumers and California residents as interchangeable, making it clear that, at least for the purposes of the California Consumers Legal Remedies Act, no such distinction exists under California law. This is not surprising given that it is difficult, if not impossible, to reside somewhere without also consuming there. Every California resident is a California consumer. Moreover, the California courts have never applied a pleading requirement such as that proposed by our colleague. If California wishes to adopt such a requirement, its courts are free to do so. However, as a federal court sitting in diversity jurisdiction, we apply, but do not create, state law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Thus, we may not do so here.

We would add that we do not share our colleague's fear that there will be a rush by out-of-staters to establish California residency in order to file consumer class actions-that we face a new "Gold Rush." No such rush has oc-

curred in the past despite the state's policy designed to protect California consumers' right to file class actions in cases of fraud or "unfair and deceptive business practices." *Mendoza*, 108 Cal.Rptr.2d at 710.[FN1] The chain of horrors tactic is not a credible one as urged in this case. There are far better reasons to move to the Golden State than are conjured up here by our imaginative and creative colleague.

> FN1. Judge Bea's reliance on the example of Seymour Lazar is entirely out of place. Mr. Lazar was a Californian from childhood. *See* Rhonda L. Rundle, "Legal Setback: A Career in Courts Leads to Trouble For Seymour Lazar," Wall St. J., Jan. 19, 2006, at A1.

BEA, Circuit Judge, concurring:

I concur in the court's judgment reversing the district court's dismissal order and remanding for further proceedings. However, I would remand to allow the plaintiffs an opportunity to plead and prove facts to establish California law and public policy apply to their action and that, therefore, California public policy is violated by enforcement of the AOL contractual forum selection clause.

California has a public policy against the waiver of the class action procedural mechanism by California consumers, as well as the waiver of consumer rights under the California Consumer Legal Remedies Act (CLRA). But that public policy applies to *California consumers* bringing class action claims under *California consumer law*. It is not a foregone conclusion that the AOL forum selection clause (or, for that matter, the choice of law clause) is unenforceable as to plaintiffs. For the forum selection and the choice of law clauses to be unenforceable, plaintiffs must establish they are protected by California law and public policy.

As the California Supreme Court has explained, a consumer class action waiver violates California public policy if it is unconscionable because it operates as an exculpatory clause, exempting a defendant from liability-to the extent the obligation at issue is governed by California law. *See Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1109 (2005) ("Such one-sided, exculpatory contracts in a contract of adhesion, *at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law*, are generally unconscionable." (emphasis added)). Where, however, liability is not controlled by California law-for example because a valid choice of law provision or conflict of laws principles dictate the application of the laws of another state or country-California's public policy against consumer class action waivers is not implicated. *See id.*

Moreover, enforcement of the AOL forum selection and choice of law clause violates the CLRA statutory anti-waiver provision, California Civil Code § 1751, only if plaintiffs are California consumers who otherwise would be protected by California law. *See* Cal. Civ.Code § 1751 ("Any waiver by a *consumer* of the provisions of this title is contrary to public policy and shall be unenforceable and void."). If plaintiffs have no contacts with California and are not covered by the CLRA, they have no protection under the California law "which would otherwise govern"; hence, they have nothing to waive. *See Am. Online Inc. v. Mendoza*, 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 706, 708-09 (1st Dist.2001).

Based on the allegations in plaintiffs' complaint, however, it is not clear whether they are California consumers protected by California law.[FN1] Plaintiffs' complaint, as it currently stands, is devoid of factual allegations that would support a conclusion that California law would apply, notwithstanding the Virginia choice of law provision. Plaintiffs' complaint alleges Doe 1 and Doe 2 "currently"-as of the time they filed their complaint-are residents of California. It further alleges the "California subclass" of plaintiffs is comprised of "AOL members in the State of California." The complaint is silent as to the place of the contracting, the place where the contract was negotiated, the place where the contract was performed, the location of the subject matter of the contract, or the residency of the AOL members at the time of their injuries. *Cf. Klussman v. Cross Country Bank*, 134 Cal.App.4th 1283, 36 Cal.Rptr.3d 728, 740-41 (1st. Dist.2005) (noting that California had a materially greater interest than Delaware in the application of its own law where the consumer contracts were formed in California, the allegedly illegal conduct took place at the plaintiffs' homes in California, and the plaintiffs were residents of California at the time of injury).

The sole relevant allegation is that, as of the time of filing the complaint, Doe 1 and Doe 2 were residents of California. That alone is simply insufficient to establish California law would govern plaintiffs' action. Even in the absence of a choice of law or forum selection clause, residency is but one factor to be considered in determining whether California law applies. "California, despite its interest in securing recovery for its residents, will not apply its law to conduct in other jurisdictions resulting in injury in those jurisdictions." *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1425 (9th Cir.1989).

> FN1. To determine whether California or Virginia law would apply, we would apply federal conflict of law rules, as set forth in the Restatement (Second) of Conflicts of Laws. *See Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir.2006). Under the Restatement, the parties' chosen law of Virginia will apply unless either (a) Virginia has no substantial relationship to the parties or transaction and there is no other reasonable basis for the parties' choice of law, or (b) application of Virginia law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of [Restatement (Second) of Conflict of Laws] § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement (Second) of Conflict of Laws § 187 (1971). Plaintiffs do not claim Virginia has no substantial relation to the transaction; after all, Virginia is where AOL has its principal place of business. *See Discover Bank v. Superior Court*, 134 Cal.App.4th 886, 36 Cal.Rptr.3d 456, 458-59 (2005) (holding Delaware had a substantial relation to transaction where defendant Discover Bank was domiciled in that state).
>
> To determine whether California "has a materially greater interest" than Virginia and would be the state of the applicable law in the absence of an effective choice of law by the parties, § 188 directs us to take into account the following contacts to determine the applicable law: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. Restatement (Second) of Conflict of Laws § 188 (1971). Here, plaintiffs' voluminous complaint is curiously silent as to any and all of the determinative contacts mentioned in the Restatement.

There is no "declar[ation] by statute or by judicial decision," *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), that California public policy against consumer rights waivers could possibly be offended by enforcing a contractual class action waiver against a party whose sole connection to California is residency at the time he filed a consumer class action in a California court.[FN2] My colleagues' suggestion otherwise would permit a citizen of another state to move to California for the sole purpose of serving as a class representative and clothing himself with the protections of consumer-friendly California public policy. This would magnetize California courts to pull in out-of-state contracts, actions or omissions. I see nothing in California consumer-protection statutes or cases that would invite such a new Gold Rush.

> FN2. The majority cites *Mendoza* for the proposition that mere residency at the time of filing a complaint is sufficient to invoke California public policy. *Mendoza* neither said nor held any such thing. In *Mendoza*, there was no dispute whether the plaintiffs were California *consumers entitled to invoke the protection of California consumer law*, not merely California residents. *See Mendoza*, 108 Cal.Rptr.2d at 706, 707, 708 (discussing "California consumers" and "this state's consumers"). What *Mendoza* did was use the phrase "California residents" twice. *See id.* at 708, 709. And in each case, the court explained California courts would not enforce contract provisions that would diminish the rights of California residents in a way that would violate California public policy. *Id.* at 708, 709. These statements assume, but do not put, analyze, nor determine, the ultimate question: whether the forum selection and choice of law clauses violate California public policy.
>
> The majority's logical syllogism-all California residents are California consumers-says nothing about whether the plaintiffs are California consumers of AOL products entitled to invoke the protection of California public policy in the instant litigation.

I am admittedly not as sanguine as my colleagues as to the non-litigation attractions which bring class action plaintiffs to the Golden State. They mention, but do not describe, “far better reasons” for class action representative plaintiffs moving to California than simply to become class action plaintiffs. I am reminded of Mr. Lazar, of Palm Springs, California, recipient of Mel Weiss's kickbacks to become a class action representative plaintiff in several cases.[FN3] With thanks to my colleagues for their encomium, it doesn't really require one to be “imaginative and creative” to suspect the class representatives may not have become California residents for reasons other than class action litigation status and are not really California consumers entitled to California consumer protection.

> FN3. *See* The Wall Street Journal Law Blog, http:// blogs. wsj. com/ law/? s= seymour+ lazar (last visited August 20, 2008).

My concurrence merely requires the plaintiff class representatives plead and prove they really are California *consumers* by stating facts which make California substantive law applicable to them, pursuant to the well-known rules of federal choice of law, set forth in the Restatement. This point seems to be brushed away by the majority as an unnecessary technicality by a misreading of *Mendoza.*

Accordingly, I would remand for plaintiffs to be permitted to file an amended complaint to allege facts-if they can so allege-that would demonstrate contacts with California sufficient to establish their causes of action are controlled by California law.

C.A.9 (Cal.),2009.
Doe 1 v. AOL LLC
552 F.3d 1077, 09 Cal. Daily Op. Serv. 636, 2009 Daily Journal D.A.R. 756

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United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, Plaintiff–Appellee,
v.
Charles YI, AKA Jang Ho Yi, Defendant–Appellant.

No. 11–50234.
Argued and Submitted Nov. 6, 2012.
Filed Jan. 2, 2013.

Background: Defendant was convicted in the United States District Court for the Central District of California, Percy Anderson, J., of conspiracy to violate the Clean Air Act. Defendant appealed.

Holdings: The Court of Appeals, Goodwin, Circuit Judge, held that:
(1) testimony supported inference that defendant was aware of high probability that ceilings in building contained asbestos;
(2) jury could have inferred that defendant had engaged in deliberate pattern of failing to read documents that might have clarified whether asbestos was in fact present;
(3) instructing jury that it could not find knowledge where defendant was "simply" careless did not leave door open for some other level of carelessness;
(4) application of nine-level increase for offense resulting in substantial likelihood of death or serious bodily injury was supported by clear and convincing evidence;
(5) district court had discretion to discount expert's medical opinions as to toxicity and likelihood of harm through chrysotile form of asbestos; and
(6) district court did not clearly err in finding by preponderance of evidence that defendant was organizer or leader.

Affirmed.

West Headnotes

[1] Criminal Law 110 1152.21(1)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1152 Conduct of Trial in General
110k1152.21 Instructions
110k1152.21(1) k. In general. Most Cited Cases

A district court's decision to give a particular jury instruction is reviewed for abuse of discretion.

[2] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases

The substance of a jury instruction is reviewed de novo.

[3] Criminal Law 110 769

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k769 k. Duty of judge in general. Most Cited Cases

Criminal Law 110 1144.14

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.14 k. Instructions. Most Cited Cases

A jury instruction is appropriate if it is supported by law and has foundation in the evidence; as such, the district court must view the evidence in the light most favorable to the party requesting it.

[4] Criminal Law 110 829(1)

110 Criminal Law
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(1) k. In general. Most Cited Cases

If a party requests alternative instructions, the district court considers them separately to determine if the evidence could support a verdict on either ground.

[5] Criminal Law 110 20

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k20 k. In general. Most Cited Cases

Criminal Law 110 772(5)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k772 Elements and Incidents of Offense, and Defenses in General
110k772(5) k. Intent, motive, and malice. Most Cited Cases

Willful blindness is inconsistent with actual knowledge, and thus a deliberate ignorance instruction is appropriate only where the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge.

[6] Criminal Law 110 20

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k20 k. In general. Most Cited Cases

Deliberate ignorance contains two prongs: (1) a subjective belief that there is a high probability a fact exists; and (2) deliberate actions taken to avoid learning the truth.

[7] Criminal Law 110 814(6)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(6) k. Intent and motive. Most Cited Cases

Testimony supported inference that defendant was aware of high probability that ceilings in building contained asbestos, and thus that inference favored giving deliberate ignorance instruction to jury in defendant's trial on charge of conspiracy to violate Clean Air Act; although negative test conducted by insurance company supposedly allayed defendant's suspicions that ceilings contained asbestos due to age of building and ceiling's physical appearance, there was testimony that defendant had commented during initial walk-through on likelihood that ceilings contained asbestos and defendant had 16 years of experience in property management.

[8] Conspiracy 91 48.2(2)

91 Conspiracy
91II Criminal Responsibility
91II(B) Prosecution
91k48 Trial
91k48.2 Instructions
91k48.2(2) k. Particular conspiracies. Most Cited Cases

Criminal Law 110 772(5)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k772 Elements and Incidents of Offense, and Defenses in General
110k772(5) k. Intent, motive, and malice. Most Cited Cases

Jury could have inferred that defendant had engaged in deliberate pattern of failing to read documents that might have clarified whether asbestos was in fact present, and thus inference satisfied one factor for giving deliberate ignorance instruction to jury in defendant's trial on charge of conspiracy to violate Clean Air Act; although defendant had argued that he was very busy, he trusted all of his subordinates to read everything for him, and he had been told insurance company's test had come back "negative" for asbestos, defendant had 16–year experience in property management and he had pattern of not reading documents common to real estate transactions.

[9] Conspiracy 91 48.2(2)

91 Conspiracy
91II Criminal Responsibility
91II(B) Prosecution
91k48 Trial
91k48.2 Instructions
91k48.2(2) k. Particular conspiracies. Most Cited Cases

Instructing jury that it could not find knowledge where defendant was "simply" careless did not leave door open for some other level of carelessness, such as recklessness or negligence, as to which they were not instructed, into their deliberations into whether defendant had conspired to violate Clean Air Act through deliberate ignorance.

[10] Criminal Law 110 1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In general. Most Cited Cases

A district court's interpretation of the United States Sentencing Guidelines (USSGs) is reviewed de novo.

[11] Criminal Law 110 1156.3

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1156.1 Sentencing
110k1156.3 k. Application of guidelines. Most Cited Cases

Criminal Law 110 1158.34

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.34 k. Sentencing. Most Cited Cases

Factual determinations at sentencing are reviewed for clear error, and the application of the United States Sentencing Guidelines (USSGs) to the facts is reviewed for abuse of discretion.

[12] Criminal Law 110 1158.1

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.1 k. In general. Most Cited Cases

Clear error is not demonstrated by pointing to conflicting evidence in the record; instead, a finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.

[13] Sentencing and Punishment 350H 724

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(B) Offense Levels
350HIV(B)3 Factors Applicable to Several Offenses
350Hk724 k. Risk of death or bodily injury. Most Cited Cases

Sentencing and Punishment 350H 973.5

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)2 Evidence
350Hk973 Degree of Proof
350Hk973.5 k. Factors enhancing sentence. Most Cited Cases

Sentencing and Punishment 350H 975

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)2 Evidence
350Hk974 Sufficiency
350Hk975 k. In general. Most Cited Cases

Application of nine-level increase for offense resulting in substantial likelihood of death or serious bodily injury was supported by clear and convincing evidence, after defendant had been convicted of conspiracy to violate Clean Air Act, based on combined evidence of potential harm from inhaling any form of asbestos and removal crew's on-site conduct of not wearing proper respirators even though they were exposed to dry ceiling material and on-site dust far exceeded industry-recommended levels for asbestos; government was not required to provide expert to establish foundation for enhancement. U.S.S.G. § 2Q1.2(b)(2), 18 U.S.C.A.

[14] Criminal Law 110 560

110 Criminal Law
110XVII Evidence
110XVII(V) Weight and Sufficiency
110k560 k. Degree of proof. Most Cited Cases

Clear and convincing evidence creates a conviction that the factual contention is highly probable.

[15] Criminal Law 110 741(1)

110 Criminal Law

110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k741 Weight and Sufficiency of Evidence in General
110k741(1) k. In general. Most Cited Cases

Generally, the trier of fact is entrusted with discretion in weighing evidence.

[16] Sentencing and Punishment 350H 975

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)2 Evidence
350Hk974 Sufficiency
350Hk975 k. In general. Most Cited Cases

District court had discretion to discount expert's medical opinions as to toxicity and likelihood of harm through chrysotile form of asbestos, in application of nine-level increase for offense resulting in substantial likelihood of death or serious bodily injury after defendant had been convicted of conspiracy to violate Clean Air Act through asbestos removal, where expert lacked medical or molecular biology training.

[17] Sentencing and Punishment 350H 752

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(C) Adjustments
350HIV(C)2 Factors Increasing Offense Level
350Hk752 k. Organizers, leaders, managerial role. Most Cited Cases

Sentencing and Punishment 350H 973.5

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)2 Evidence
350Hk973 Degree of Proof
350Hk973.5 k. Factors enhancing sentence. Most Cited Cases

After defendant had been convicted of conspiracy to violate Clean Air Act, district court did not clearly err in finding by preponderance of evidence that defendant was organizer or leader, calling for four-level sentencing enhancement, where facts supported permissible inference that defendant had directed scraping of ceilings that contained asbestos, approving both expenditure and work itself, rather than simply placing his signature on check made out to contractor. U.S.S.G. § 3B1.1(a), 18 U.S.C.A.

[18] Sentencing and Punishment 350H 752

350H Sentencing and Punishment
350HIV Sentencing Guidelines

350HIV(C) Adjustments
350HIV(C)2 Factors Increasing Offense Level
350Hk752 k. Organizers, leaders, managerial role. Most Cited Cases

A sentencing enhancement finding that a defendant fits the role of an organizer or leader, calling for a four-level increase, requires evidence that the defendant exercised some control over other persons involved in the commission of the offense or was responsible for organizing other persons for the purpose of carrying out the crime. U.S.S.G. § 3B1.1(a), 18 U.S.C.A.

[19] Criminal Law 110 1158.34

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.34 k. Sentencing. Most Cited Cases

Sentencing and Punishment 350H 973.5

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)2 Evidence
350Hk973 Degree of Proof
350Hk973.5 k. Factors enhancing sentence. Most Cited Cases

A sentencing enhancement finding that a defendant fits the role of an organizer or leader must be supported by a preponderance of the evidence, and that finding is reviewed for clear error. U.S.S.G. § 3B1.1(a), 18 U.S.C.A.

[20] Criminal Law 110 20

110 Criminal Law
110I Nature and Elements of Crime
110k19 Criminal Intent and Malice
110k20 k. In general. Most Cited Cases

A finding of guilt under a deliberate ignorance theory is legally equivalent to a finding of knowledge.

Marilyn Bednarski, Kaye, McLane & Bednarski LLP, Pasadena, CA, for Defendant–Appellant.

John E. Arbab, United States Department of Justice, Environmental & Natural Resources Division, Washington, D.C., for Plaintiff–Appellee.

Appeal from the United States District Court for the Central District of California, Percy Anderson, District Judge, Presiding. D.C. No. 2:10–cr–00793–PA–1.

Before: ALFRED T. GOODWIN and DIARMUID F. O'SCANNLAIN, Circuit Judges, and JACK ZOUHARY, District Judge.[FN*]

FN* The Honorable Jack Zouhary, District Judge for the U.S. District Court for the Northern District of

Ohio, sitting by designation.

OPINION

GOODWIN, Circuit Judge:

Charles Yi appeals his conviction and sentence, assigning error to a jury instruction, and to his custodial sentence for conspiracy to violate the Clean Air Act. The judgment is affirmed.

I. FACTS

Yi was the CEO of Millennium Pacific Icon Group, a real estate development company. In April 2004, Millennium purchased Forest Glen, a 204–unit condominium complex, after Yi and some of his Millennium associates did a walk-through of the property.

Joseph Yoon, Millennium's Forest Glen project manager, testified that Yi commented during the walk-through that he was certain the ceilings contained asbestos because of the age of the building. Yi's sister, Sheri Yi Hill, was also present at the walk-through. Hill testified that she discussed the ceilings with Yi and the two decided not to touch the ceilings because they assumed the ceilings contained asbestos, which would be costly to remove.

Yi signed a purchase offer for Forest Glen that included a due diligence clause allowing time to review environmental materials and to conduct an environmental review. The seller provided a due diligence binder that included two Phase I environmental reports and an "Operations and Maintenance Plan for Asbestos–Containing Materials" ("The O & M Plan"). The reports contained test results showing the presence of asbestos in the ceilings. The O & M Plan incorporated the test results and stated that it was developed to minimize exposure to the release of asbestos fibers. Yoon testified that he presented the due diligence binder to Yi and identified its contents. Yoon also testified that Yi asked another employee to assess the diligence materials with respect to the building's physical condition, including the environmental aspects. The employee prepared a handwritten summary. Yoon testified that he typed the summary into a one-page document and handed it to Yi.

According to Yoon, Yi subsequently instructed him to secure a bid for removing the asbestos from the Forest Glen ceilings. Yoon contacted Sky Blue Environmental in June 2004, and ultimately received a $437,000 proposal for asbestos abatement. Yoon testified that Yi indicated he would not pursue the abatement because he felt it was unnecessary for selling the units. Yoon also testified that Yi rejected a later bid to install drywall over the ceilings, which would have cost anywhere from $1,800 to $2,800 per unit. Millennium employee Timothy Yu testified that Yi said asbestos abatement would be too expensive.

After Millennium purchased Forest Glen, an agent for Millennium's insurance carrier visited the property, observed ceiling material on the ground, and took a sample to test for asbestos. The agent later emailed Millennium employee Andrew Lavaux, stating that the test showed 1% asbestos. Yi testified that he was told the sample came back "negative," but Lavaux testified that he never told Yi the sample was asbestos-free. Lavaux also testified that he never heard anyone else tell Yi that the sample was asbestos-free.

In September 2005, unit sales at Forest Glen began to slow and evidence showed Yi became concerned about the slowdown in November 2005. Yoon testified that Yi instructed him to draw up a contract to have the condominium ceilings scraped and refinished, and on January 16, 2006, Millennium contracted to have the ceilings scraped. The agreed-upon price broke down to $1,500 per unit for the first ten—less per unit than either the previously rejected bid for asbestos abatement or for installing drywall over the ceilings. The contractor, Rudys Palacios, testified that no one informed him that the ceilings contained asbestos. Palacios hired four or five men to do the scraping. They wore no special clothing to protect against asbestos exposure and only "white masks." He also stated that powdery ceiling material was simply placed into bags and wheelbarrows before being thrown into dumpsters.

A state inspector, Larry Israel, testified that the work site was one of the worst he had ever seen and that ceiling

material was blowing everywhere: public walkways, sidewalks, driveways, and around the dumpsters.

Yi testified that he did not remember being shown the due diligence binder; he never read either environmental report; and he did not believe Forest Glen's ceilings contained asbestos because one of the Millennium managers had told him that the insurance agent's asbestos test "came [back] negative" for asbestos. According to Yi, he was not shown the actual test results; he simply trusted the manager. As to the abatement work, Yi testified that he was not involved in choosing the ceiling-scraping crew, and did not know who made the choice or how it was made.

Yi also offered testimony about the closing documents, claiming he did not read the due diligence paragraph and its reference to environmental review. According to Yi, he read and complied with the "Good Faith Deposit" provision of KeyBank's conditional letter of interest, but specifically did not read the immediately preceding "Environmental" provision which called for an environmental report. He also said he did not read any portion of the ultimate loan agreement with KeyBank despite signing it. Yi then denied reading an email sent to him containing items needed prior to closing the loan—specifically denying that he read the email's reference to the requirement of a Phase I environmental report. He also denied reading an email sent to him the day of closing in which KeyBank stated it needed the O & M Plan to be in place to close the loan.

II. THE DELIBERATE IGNORANCE INSTRUCTION

[1][2][3][4] Yi argues that the district court erred in giving a jury instruction on deliberate ignorance, asserting that it was not warranted because the facts shown at trial did not support a finding of deliberate ignorance. The district court instructed the jury using the Ninth Circuit model instruction:

> You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant:
>
> 1. was aware of a high probability that there was asbestos in the ceilings at Forest Glen Condominiums, and
>
> 2. deliberately avoided learning the truth.
>
> You may not find such knowledge, however, if you find that the defendant actually believed that there was no asbestos in the ceilings at the Forest Glen Condominiums, or if you find that the defendant was simply careless.

A district court's decision to give a particular jury instruction is reviewed for abuse of discretion. *United States v. Heredia*, 483 F.3d 913, 921 (9th Cir.2007) (en banc). An instruction's substance is reviewed de novo. *Id.* An instruction is appropriate if it is "supported by law and has foundation in the evidence." *Id.* at 922. As such, "the district court must view the evidence in the light most favorable to the party requesting it." *Id.* If a party requests alternative instructions, the district court considers them separately to "determine if the evidence could support a verdict on either ground." *Id.*

[5][6] Willful blindness is inconsistent with actual knowledge, and thus a deliberate ignorance instruction is appropriate only where "the jury could rationally find willful blindness even though it has rejected the government's evidence of actual knowledge." *Id.* Deliberate ignorance contains two prongs: (1) a subjective belief that there is a high probability a fact exists; and (2) deliberate actions taken to avoid learning the truth. *Global–Tech Appliances, Inc. v. SEB S.A.*, ___ U.S. ____, 131 S.Ct. 2060, 2070, 179 L.Ed.2d 1167 (2011).

[7] Regarding the first *Global–Tech* prong, testimony from Hill, Yoon, and Yi himself supports an inference that Yi was aware of a high probability that the Forest Glen ceilings contained asbestos. Both Hill and Yoon testified that Yi commented on the likelihood that the Forest Glen ceilings contained asbestos during their initial walk-through. Yi's 16–year experience in property management bolsters the evidence that he suspected the ceilings contained asbestos, as the age of the Forest Glen building and the ceiling's physical appearance would, according to both Hill and Yi's own testimony, have put a person experienced in property management on notice of the likelihood

that it contained asbestos. While he argues that the insurance company's supposedly negative test allayed his suspicions, that inference need not be drawn when viewing the evidence in the government's favor. Thus, there was sufficient evidentiary support for the first *Global–Tech* prong.

[8] Turning to the second *Global–Tech* prong, if the jury could infer that Yi was aware of a high probability that the ceilings contained asbestos, it also could infer that Yi engaged in a deliberate pattern of failing to read documents that might clarify whether asbestos was in fact present. The jury would not be required to believe Yi's argument that he was very busy, that he trusted all of his subordinates to read everything for him, or even that he was told the insurance company's test had come back "negative" for asbestos. The evidence regarding Yi's real estate experience and pattern of failing to read documents common to real estate transactions supports a finding that Yi deliberately avoided learning the truth about whether the Forest Glen ceilings contained asbestos.

Yi attempts to analogize this case with some that have found the evidence could not support finding deliberate ignorance. *See, e.g.*, *United States v. Baron*, 94 F.3d 1312 (9th Cir.1996), *overruled by* *Heredia*, 483 F.3d 913. But those cases are factually distinguishable, with records very different from the record here.

[9] Yi also argues that the instruction itself was legally flawed. He primarily takes issue with the term "simply careless." Yi argues that instructing a jury that it may not find knowledge where a defendant is "simply" careless leaves the door open for some other level of carelessness. But *Heredia* makes clear that the Ninth Circuit model instruction is appropriate "and there is little reason to suspect that juries will import [recklessness or negligence] concepts, as to which they are not instructed, into their deliberations." 483 F.3d at 924. The district court did not err in giving or formulating the deliberate ignorance instruction.

III. THE GUIDELINE SENTENCE

[10][11][12] We review de novo the district court's interpretation of the Sentencing Guidelines. *United States v. Holt*, 510 F.3d 1007, 1010 (9th Cir.2007). Factual determinations at sentencing are reviewed for clear error, and the application of the Guidelines to the facts is reviewed for abuse of discretion. *Id.* "Clear error is not demonstrated by pointing to conflicting evidence in the record." *United States v. Frank*, 956 F.2d 872, 875 (9th Cir.1991). Instead, "[a] finding of fact is 'clearly erroneous' when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Harries v. United States*, 350 F.2d 231, 235 (9th Cir.1965).

Here, the district court calculated Yi's total offense level as 31 under the Guidelines. In reaching that level, the court applied, and Yi now challenges, two enhancements: a nine-level enhancement for committing an environmental offense that "resulted in a substantial likelihood of death or serious bodily injury," § 2Q1.2(b)(2); and a four-level enhancement for being "an organizer or leader of a criminal activity that involved five or more participants," § 3B1.1(a). The enhancements resulted in a sentencing range of 108–135 months. However, the court granted several downward departures, resulting in a final sentencing range of 51–63 months. Ultimately, the court sentenced Yi to 48 months.

A. Substantial Likelihood of Death or Serious Bodily Injury

[13][14] We look to whether the district court's application of a nine-level increase for an offense resulting in a substantial likelihood of death or serious bodily injury was supported by clear and convincing evidence. *See* *United States v. Staten*, 466 F.3d 708, 720 (9th Cir.2006). Clear and convincing evidence creates a conviction that the factual contention is "highly probable." *Colorado v. New Mexico*, 467 U.S. 310, 316, 104 S.Ct. 2433, 81 L.Ed.2d 247 (1984).

Evidence presented at trial showed that the work crew removing the Forest Glen ceilings did not wear proper respirators, were exposed to dry ceiling material, and that on-site dust far exceeded industry-recommended levels of asbestos. The evidence at sentencing, aside from the actual on-site conduct, came primarily from an EPA letter dis-

cussing chrysotile—the form of asbestos present at Forest Glen. The letter supports finding that chrysotile is carcinogenic. Contrary to the defense expert's report, the EPA letter noted a lack of evidence to support using different toxicity factors for different types of asbestos. Even if the evidence did support this approach, it would not disturb the EPA's baseline conclusion that chrysotile is a carcinogen. Moreover, studies cited in the letter support finding increased risk of lung cancer, mesothelioma, asbestosis, and cancer of the pleura from exposure to the chrysotile form of asbestos.

In addition to the EPA letter, the district court also appeared to rely on *United States v. Pearson*, 274 F.3d 1225 (9th Cir.2001), where this court wrote:

> The federal government has recognized asbestos as a health hazard and it is generally accepted that exposure to asbestos can cause mesothelioma, asbestosis, lung cancer; and cancers of the esophagus, stomach, colon, and rectum. Pearson's noncompliance with the work practice standards created a substantial likelihood that workers would be exposed to life-threatening asbestos fibers.

Id. at 1235 (citation omitted). Yi argues that Pearson involved a different type of asbestos and is therefore inapplicable. However, the opinion makes no such legal distinction. In sum, the combined evidence of the removal crew's on-site conduct and the potential harm from inhaling any form of asbestos places the district court's finding outside the realm of clear error.

Yi's arguments to the contrary are unpersuasive. First, he contends the government failed to provide an expert to establish the foundation for the enhancement. But there is no such requirement. Second, Yi contends the district court improperly rejected his own expert's testimony. But the district court both considered and permissibly gave little or no weight to the defense expert's opinion. Yi attempts to compare this case to *United States v. Altman*, 901 F.2d 1161, 1165 (9th Cir.1990), but there the district court refused to hear the proffered expert testimony. The record here clearly reflects that the district court considered the expert report.

[15] Yi's more forceful contention is that the district court should have given his expert's opinion more weight. Generally, the trier of fact is entrusted with discretion in weighing evidence. *See In re Rains*, 428 F.3d 893, 902 (9th Cir.2005). There is no reason to believe the district court abused its discretion, even assuming it largely discounted the expert opinion. The expert report can be summed up as stating: (1) chrysotile is different in form from other types of asbestos; (2) chrysotile is less “toxic”; (3) the Forest Glen work crew wetted down ceiling materials while working; (4) the work crew wore respirators; (5) the ceilings contained less than 10% chrysotile; and (6) the work crew's low level of exposure combined with the supposed lower toxicity of chrysotile resulted in an insufficient likelihood of death or serious bodily injury. However, the contrary evidence detailed above entitled the district court to weigh all the facts and reject the expert's opinion.

[16] Yi also complains that the district court improperly discounted the report based upon the expert's lack of medical or molecular biology training. But the district court's inquiry into training merely created a basis for discounting the expert's *medical* opinions as to toxicity and likelihood of harm. This was well within the district court's discretion. The only seemingly uncontroverted statement in the expert report, that chrysotile is different in form from other types of asbestos, did not require the district court to adopt the expert's opinion as to likelihood of harm. The district court's failure to give the expert opinion more weight was not an abuse of discretion and the ultimate finding was not clear error.

B. Organizer or Leader Role

[17][18][19] The district court also found that Yi fit the role of an organizer or leader calling for a four-level increase. That finding requires evidence “that the defendant exercised some control over others involved in the commission of the offense or was responsible for organizing others for the purpose of carrying out the crime.” *United States v. Ingham*, 486 F.3d 1068, 1074 (9th Cir.2007) (emphasis omitted) (citing *United States v. Avila*, 95 F.3d 887,

889 (9th Cir.1996)). It must be supported by a preponderance of the evidence. *Avila*, 95 F.3d at 889. This finding is also reviewed for clear error. *United States v. Ponce*, 51 F.3d 820, 826 (9th Cir.1995).

[20] Numerous facts support the role enhancement. Yi's conviction plus substantial evidence at trial support the conclusion that he knew the ceilings contained asbestos.[FN1] Testimony showed that Yi was heavily involved in decision-making with regard to Forest Glen, particularly given the inexperience of Millennium project managers and Yoon in particular. Evidence showed: Yi earlier instructed Yoon to seek bids for asbestos abatement; Yi rejected abatement bids; Millennium employees awaited Yi's ultimate approval prior to removal; and Yi instructed Yoon to draw up the contract for ceiling scraping. These facts support a permissible inference that Yi directed the ceilings be scraped, approving both the expenditure and the work itself, rather than simply placing his signature on a check made out to the contractor. The district court did not clearly err in finding by a preponderance of the evidence that Yi was an organizer or leader.

> FN1. Even if the jury only found Yi guilty under a deliberate ignorance theory, that finding is legally equivalent to knowledge. *United States v. Jewell*, 532 F.2d 697, 702–03 (9th Cir.1976).

Yi paints the district court's finding as the result of an improper "but for" test. It would be improper to find that Yi organized or led a criminal activity merely because the activity could not have been completed but for his knowledge and participation. *United States v. Lopez–Sandoval*, 146 F.3d 712, 717 (9th Cir.1998); *United States v. Harper*, 33 F.3d 1143, 1151 (9th Cir.1994). At the sentencing hearing, defense counsel explained that Yi was required to approve expenditures over a few thousand dollars, at which point the district judge asked, "[m]y question is if [Yi] doesn't okay it, we're [not] here today. There's nobody else that made this decision. He was the final arbiter; correct?" Defense counsel agreed.

This colloquy shows the enhancement was not based on the necessity of Yi's *involvement* as the check signer, but rather on Yi's *direction or control.* The district court did not apply an incorrect legal test, and the application of the role enhancement was proper.

AFFIRMED.

C.A.9 (Cal.),2013.
U.S. v. Yi
704 F.3d 800, 13 Cal. Daily Op. Serv. 67, 2012 Daily Journal D.A.R. 69

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512 F.3d 1213, 08 Cal. Daily Op. Serv. 899, 2008 Daily Journal D.A.R. 1023, 43 Communications Reg. (P&F) 912
United States Court of Appeals,
Ninth Circuit.
Kathleen LOWDEN and John Mahowald, individually and on behalf of all the members of the class of persons similarly situated, Plaintiffs-Appellees,
v.
T-MOBILE USA, INC., a foreign corporation, Defendant-Appellant.
No. 06-35395.
Argued and Submitted Nov. 7, 2007.
Filed Jan. 22, 2008.
GOULD, Circuit Judge:
I
The issues on appeal are whether the arbitration provisions in Defendant T-Mobile's service agreements with two of its customers are enforceable under Washington state law and, if not, whether the state law is preempted by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. After two consumers of T-Mobile's cellular phone service brought a class action against T-Mobile in state court for breach of contract and violation of the Washington Consumer Protection Act (the "CPA"), Wash. Rev.Code § 19.86.010-19.86.920, T-Mobile removed the case to federal district court and moved to compel arbitration per its service agreements. The district court denied T-Mobile's motion to compel arbitration, holding that the arbitration agreements were tainted by substantive unconscionability and thus were unenforceable. We conclude that the Washington State *1215 Supreme Court's decision in Scott v. Cingular Wireless, 160 Wash.2d 843, 161 P.3d 1000 (2007), establishes that T-Mobile's arbitration provision is substantively unconscionable and unenforceable under Washington state law, and that there is no federal preemption in light of our decision in Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976 (9th Cir.2007). We therefore affirm.
II
The two named Plaintiffs, Kathleen Lowden and John Mahowald, are or were T-Mobile customers whose service agreements contained mandatory arbitration provisions with slightly varying terms. Plaintiffs sued T-Mobile, alleging that the service provider had improperly charged them for certain fees beyond the advertised price of service, charged them for calls during a billing period other than that in which the calls were made, and charged them for roaming and other services

that should have been free. T-Mobile moved to compel arbitration in accord with the arbitration provisions in Lowden's and Mahowald's service agreements.

[1] Headnote Citing References In Lowden's service agreement,FN1 immediately above the signature line, the following provision appeared: "Disputes are subject to mandatory arbitration pursuant to paragraph 19. See Reverse." Paragraph 19 stated:

FN1. We must assure ourselves that the constitutional standing requirements are satisfied before proceeding to the merits. United States v. Hays, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995); Casey v. Lewis, 4 F.3d 1516, 1524 (9th Cir.1993). Although the district court and T-Mobile suggest that Lowden may not have standing to pursue her claims, we need not reach this issue. In a class action, standing is satisfied if at least one named plaintiff meets the requirements. See Armstrong v. Davis, 275 F.3d 849, 860 (9th Cir.2001). Here, the parties do not dispute that Mahowald has standing from his alleged injury in fact that is both traceable to T-Mobile's alleged conduct and likely to be redressed by the damages that Mahowald seeks. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (discussing Article III standing requirements).

Mandatory Arbitration. Any controversy, claim or dispute between you and Company arising under this Agreement, excluding actions by Company to collect unpaid charges, shall be submitted to final, binding arbitration under the auspices of the American Arbitration Association ("AAA") pursuant to its published Wireless Industry Arbitration Rules, incorporated herein by this reference and available by calling the AAA at 800-778-7879 or visiting its web site at http:// www. adr. org. Notice of an arbitration commenced by you shall be served on Company's registered agent. All claims shall be arbitrated individually and you agree that no person shall bring a punitive [sic] or certified class action to arbitration or seek to consolidate or bring previously consolidated claims in arbitration. The arbitrator shall have no authority to award punitive damages. YOU ACKNOWLEDGE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO A JURY TRIAL.

Those provisions were also in the Terms & Conditions that accompanied the phone delivered to Lowden and that stated that, "By activating Service with Company, you acknowledge that you have read and agree to the terms of this Agreement." T-Mobile asserts that, had

Lowden or her then-husband disagreed with those terms, they could have canceled service and thereby avoided arbitration.
The service agreement in effect when Mahowald signed up with T-Mobile was slightly different in substance. While containing an almost identical provision above *1216 the signature line, the provision on the reverse stated:
Mandatory Arbitration; Dispute Resolution. ANY CLAIM OR DISPUTE BETWEEN YOU AND U.S. ARISING UNDER OR IN ANY WAY RELATED TO OR CONCERNING THE AGREEMENT, AND/OR OUR PROVISION TO YOU OF GOODS, SERVICE, OR UNITS, SHALL BE SUBMITTED TO FINAL, BINDING ARBITRATION WITH THE AMERICAN ARBITRATION ASSOCIATION ("AAA") PURSUANT TO ITS PUBLISHED WIRELESS INDUSTRY ASSOCIATION RULES, INCORPORATED HEREIN BY THIS REFERENCE AND AVAILABLE BY CALLING THE AAA AT 800-778-7879 OR VISITING ITS WEBSITE AT http:// www. adr. org. Any arbitration proceeding shall be subject to the choice of law provision in Paragraph 22. Notice of an arbitration commenced by you must be served on our registered agent. No party may act as a representative of other claimants or potential claimants in any dispute, and two or more individuals' disputes may not be consolidated or otherwise determined in one proceeding.
An arbitrator may not award relief in excess of or inconsistent with the provisions of the Agreement, order consolidation or arbitration on a class wide basis, or award lost profits, punitive, incidental, or consequential damages or any other damages other than the prevailing party's direct damages, except that the arbitrator may order injunctive or declaratory relief pursuant to applicable law. All administrative expenses of an arbitration will be equally divided between you and Us, except that if the claim is less that $1,000, you will be obligated to pay only $25. If the claim is less than $25, We will pay all administrative expenses. Each party agrees to pay the fees and costs of its own counsel, experts, and witnesses at arbitration. Subject to the foregoing limitations on consolidated or classwide proceedings, you agree, however, that if you fail to timely pay amounts due, We may assign your account for collection and the collection agency may pursue such claims in court limited strictly to the collection of the past due debt and any interest or cost of collection permitted by law or the Agreement.
YOU ACKNOWLEDGE AND AGREE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO LOST PROFITS, PUNITIVE, SPECIAL, INDIRECT, INCIDENTAL,

CONSEQUENTIAL OR TREBLE DAMAGES ("DISCLAIMED DAMAGES"), A JURY TRIAL, OR PARTICIPATION AS A PLAINTIFF OR AS A CLASS MEMBER IN A CLASS ACTION. IF FOR ANY REASON THIS ARBITRATION CLAUSE IS DEEMED INAPPLICABLE OR INVALID, YOU AND WE BOTH WAIVE ANY CLAIMS TO RECOVER DISCLAIMED DAMAGES AND ANY RIGHT TO PURSUE, OR PARTICIPATE AS A PLAINTIFF OR A CLASS MEMBER IN, CLAIMS ON A CLASSWIDE, CONSOLIDATED, OR REPRESENTATIVE BASIS.

As in Lowden's case, the Terms & Conditions accompanying the phones delivered to Mahowald contained the same arbitration provision, along with a similar warning that service activation constituted an agreement to be bound thereby.

Relying on those arbitration provisions, T-Mobile brought its motion to compel individual arbitration. The district court denied the motion, holding that T-Mobile's arbitration provisions were tainted by substantive unconscionability and were therefore unenforceable.

*1217 The district court first determined that each named Plaintiff had an agreement. Then, after dismissing Plaintiffs' argument that the agreements as a whole were procedurally unconscionable, the court assessed the agreements for substantive unconscionability. The court preliminarily noted that the Washington State Supreme Court was considering Scott, 160 Wash.2d 843, 161 P.3d 1000, which, the court stated, "places squarely at issue the question of whether class action prohibitions contained in arbitration agreements are unconscionable under Washington law and therefore unenforceable." However, at the urging of the parties to decide the issue nonetheless, the district court declined to stay its ruling pending Scott. The district court next turned to the unconscionability of each contested provision within the two arbitration agreements.

The district court held that the prohibition on class relief and the limitation on punitive damages, found in both agreements, were each substantively unconscionable. The district court also concluded that Mahowald's attorney fees provision was substantively unconscionable. Although the court rejected the arguments that the remaining provisions were invalid, it nonetheless declared both arbitration agreements to be unenforceable, despite the severability provisions, because they were "tainted with substantive unconscionability." The district court denied T-Mobile's motion to compel arbitration and entered a stay so that T-Mobile could bring the present interlocutory

appeal. We have jurisdiction of this appeal pursuant to 9 U.S.C. § 16(a)(1)(A) and (B).
III
[2] Headnote Citing References[3] Headnote Citing References[4] Headnote Citing References We review de novo the denial of a motion to compel arbitration. Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 936 (9th Cir.2001). We also review de novo the district court's interpretation of the validity and scope of the arbitration clause. Id. We review for clear error the district court's findings of fact. Bradley v. Harris Research, Inc., 275 F.3d 884, 888 (9th Cir.2001).
IV
[5] Headnote Citing References[6] Headnote Citing References T-Mobile urges us to compel Plaintiffs to arbitrate in accord with the terms of the agreement. T-Mobile argues that the service agreements' terms and the Federal Arbitration Act mandate this result. Congress enacted the FAA more than eighty years ago to advance the federal policy favoring arbitration agreements. Section 2 states that arbitration agreements made as part of contracts "evidencing a transaction involving [interstate] commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Where, as here, a party attempts to litigate claims covered by a commercial contract containing an arbitration agreement subject to the FAA, the court must determine "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir.2000). We apply state-law principles that govern the formation of contracts to determine whether a valid arbitration agreement exists. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).
A
[7] Headnote Citing References We first address whether, under Washington state contract law, a valid agreement to arbitrate exists. This requires us to consider what is unconscionable and unenforceable under Washington state law. After the district court denied T-Mobile's motion to compel arbitration, *1218 the Washington State Supreme Court decided Scott v. Cingular Wireless, 160 Wash.2d 843, 161 P.3d 1000. In that case, the Washington State Supreme Court considered the enforceability of an arbitration provision within a service agreement binding Cingular Wireless customers, and held that the agreement was unconscionable and unenforceable under Washington

law. Id. at 1002-03. As in T-Mobile's case, Cingular's arbitration provision contained a clause barring class action litigation or arbitration.FN2 Id. at 1003.

FN2. The remaining Cingular provisions differed slightly from T-Mobile's provisions. For instance, Cingular's agreement provided that Cingular would "pay the filing, administrator, and arbitration fees unless the customer's claim was found to be frivolous; that Cingular would reimburse the customer for reasonable attorney fees and expenses incurred for the arbitration (provided that the customer recovered at least the demand amount); and that the arbitration would take place in the county of the customer's billing address." Scott, 161 P.3d at 1003. The agreement had also initially limited punitive damages, but Cingular subsequently removed that limitation. Id.

The Washington State Supreme Court initially noted that the plaintiffs had submitted a declaration from the former division chief for consumer protection in the Washington State Attorney General's office, declaring that that office "did not have sufficient resources to respond to many individual cases and often 'relied on ... private class action to correct the deceptive or unfair industry practice and to reimburse consumers for their losses.' " Id. at 1004. The court also acknowledged the clear split of authority on the enforceability of class action waivers in arbitration clauses. Id.

Turning to the class action waiver's enforceability, the court first observed that "[a]n agreement that violates public policy may be void and unenforceable." Id. at 1005 (citing Restatement (Second) of Contracts § 178 (1981)). The court then discussed Washington's "state policy favoring aggregation of small claims for purposes of efficiency, deterrence, and access to justice." Id. It noted that "when consumer claims are small but numerous, a class-based remedy is the only effective method to vindicate the public's rights." Id.

The court held that Cingular's particular class action waiver was unconscionable. The court discussed the public policies that class actions advance, declaring that, "without class actions, consumers would have far less ability to vindicate the CPA." Id. at 1006. It also stated that the class action waiver clause was "an unconscionable violation of [Washington's] policy to protect the public and foster fair and honest competition because it drastically forestall[ed] attempts to vindicate consumer rights" and was, therefore, "substantively unconscionable." Id. (internal quotation marks and citation omitted). The court then noted that the agreement was additionally unconscionable because it "in effect ... exculpate[d] Cingular from legal

liability for any wrong where the cost of pursuit outweighs the potential amount of recovery." Id. at 1007. It asserted that the availability of a class action mechanism would "transform [ ] a merely theoretically possible remedy into a real one." Id. The court reasoned that merely shifting the cost of arbitration to Cingular did not seem likely to "make it worth the time, energy, and stress to pursue such individually small claims," especially when attorney fees would be awarded only if the plaintiffs recovered at least the full amount of their demand. Id.

The court reasoned that, because the clause barred any class action, in or outside arbitration, it functioned to "exculpate the drafter from liability for a broad range of undefined wrongful conduct, including *1219 potentially intentional wrongful conduct, and that such exculpation clauses are substantively unconscionable." Id. at 1008. The court concluded: "A clause that unilaterally and severely limits the remedies of only one side is substantively unconscionable under Washington law for denying any meaningful remedy." Id.

The Cingular class action waiver provision that Scott declares to be unenforceable is indistinguishable in all material respects from T-Mobile's class action waiver. The Washington State Supreme Court's holding in Scott requires us to determine that T-Mobile's class action waiver is substantively unconscionable, and unenforceable, under Washington law. T-Mobile's class action waiver, like Cingular's, bars class actions in both litigation and arbitration, and the Washington State Supreme Court's unconscionability analysis in Scott applies as forcefully to T-Mobile's agreement.

We need not reach whether T-Mobile's remaining provisions are unconscionable. T-Mobile has expressly stated that it does not consent to class action arbitration and that, as a result, if we deem the class action waiver clause unconscionable under Washington law, the entire arbitration provision should be rendered unenforceable. Having determined that the (nonseverable) class action waiver is invalid under Washington law, we hold that T-Mobile's arbitration agreement is unenforceable under Washington law.

B

[8] Headnote Citing References We next consider T-Mobile's argument that the Federal Arbitration Act preempts Washington law from thus rendering T-Mobile's class action waiver unconscionable, and thereby rendering unenforceable its arbitration agreement. The FAA provides that contractual arbitration agreements "shall be valid, irrevocable,

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added).
The United States Supreme Court has interpreted this statute to require that any state legal principle attempting to invalidate an arbitration agreement must be a principle that applies to contracts generally. In Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), for example, the Supreme Court stated:
"[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' "
Id. at 687, 116 S.Ct. 1652 (citations omitted). See also Southland Corp. v. Keating, 465 U.S. 1, 16 n. 11, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).
T-Mobile argues that the FAA preempts Washington's determination that its class action waiver is unconscionable. T-Mobile asserts that the Washington State Supreme Court's holding in Scott that Cingular's class action waiver is unconscionable is not a contractual rule of general applicability under the FAA.
We recently decided Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976. In Shroyer, we considered the enforceability of another Cingular arbitration agreement containing a class action waiver. We determined not only that the agreement was unconscionable under California law, but also that the FAA did not preempt California law on this issue. Id. at 987. We first surveyed California law *1220 on unconscionability, and in particular the test the California Supreme Court set forth in Discover Bank v. Superior Court of Los Angeles, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), requiring a finding of both procedural and substantive unconscionability to render a provision invalid. Shroyer, 498 F.3d at 981-82 (citing Discover Bank, 30 Cal.Rptr.3d 76, 113 P.3d at 1108). We quoted Discover Bank's reasoning:
"We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of

individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced."
Id. at 983, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (alteration in Shroyer) (quoting Discover Bank, 30 Cal.Rptr.3d 76, 113 P.3d at 1100).
Applying Discover Bank's test, we concluded that Cingular's class action waiver was unconscionable under California law because the agreement was of the type that Discover Bank foreclosed-a contract of adhesion in a setting involving disputes between contracting parties that predictably concerned only small amounts of damages and where, according to the Shroyer plaintiffs, the party with the superior bargaining power (i.e., the wireless provider) had carried out a fraudulent scheme deliberately to cheat large numbers of consumers out of individually small sums of money. Id. at 983-84. We observed that in Discover Bank the California Supreme Court had been concerned "that when the potential for individual gain is small, very few plaintiffs, if any, will pursue individual arbitration or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers." Id. at 986, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (emphasis omitted). As in T-Mobile's present case, the invalidating of Cingular's class action waiver rendered the entire arbitration agreement unenforceable. Id. at 986-87, 30 Cal.Rptr.3d 76, 113 P.3d 1100.
Having decided that the agreement was unenforceable under California law, we next considered Cingular's argument that the FAA preempted California law. Cingular had argued that Discover Bank's unconscionability provisions subjected arbitration agreements to special scrutiny. Id. at 987, 30 Cal.Rptr.3d 76, 113 P.3d 1100. The United States Supreme Court had previously observed that " '[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with th[e] requirement of § 2' and is preempted." Id. (first alteration in original) (quoting Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)). We held, however, that such a principle was not at issue in Shroyer; rather, the California principle of unconscionability was a generally applicable contract defense, which could be applied to invalidate an arbitration agreement without contravening the FAA. Id. at 987-88. We further commented that we had previously rejected

Cingular's argument that California's unconscionability doctrine was preempted by the FAA and that Discover Bank's statement that the doctrine applied to contracts generally, not only to arbitration agreements, affirmed that California *1221 law on this point did not contravene the FAA. Id. at 988.

We rejected Cingular's argument that application of California's unconscionability principles would obstruct Congress's purposes in enacting the FAA. Congress's primary purpose behind the FAA requires that we enforce the terms of arbitration agreements like other contracts, not more so. Id. at 989. We reasoned: "To hold that California unconscionability law may be applied only to invalidate a class action waiver, but not a class arbitration waiver, would place arbitration agreements on a different footing than other contracts, in direct contravention of th[e] principal purpose of the [FAA]." Id. at 990 (citing Scott, 161 P.3d at 1008 ("Congress simply requires us to put arbitration clauses on the same footing as other contracts, not make them the special favorites of the law.")).

We also rejected Cingular's suggestions that the FAA implicitly exalted individual arbitration but disfavored class arbitration, id. at 990, 161 P.3d 1000, and that class arbitration would reduce arbitration's alleged general efficiency, id. at 990-92, 161 P.3d 1000. We concluded that the FAA did not preempt California unconscionability principles from invalidating Cingular's class action waiver and therefore its arbitration agreement. Id. at 993, 161 P.3d 1000.

The invalid class action waiver in Shroyer is, in all material respects, identical to T-Mobile's waiver. As in Shroyer, T-Mobile's class action waiver lies within a contract of adhesion governing claims likely to concern only small sums of money that the defendant is alleged to have fraudulently obtained from the plaintiffs. Most significantly, the Washington State Supreme Court grounded its unconscionability determination in Scott in concerns almost identical to those underpinning California's unconscionability determination in Discover Bank. Thus Shroyer's conclusion with respect to California unconscionability law applies equally here: Just as the FAA does not preempt California's unconscionability law, it does not preempt Washington's unconscionability law. As we explained in Shroyer, the California Supreme Court sought in Discover Bank to remedy its concern that, when the potential for individual gain is small, few if any plaintiffs will pursue either individual arbitration or litigation, thereby greatly reducing the aggregate liability a company faces when it has

exacted small sums from millions. Those are the same concerns that underlie the Washington State Supreme Court's holding in Scott.
We reject T-Mobile's argument that Scott's unconscionability principles do not apply in all contracts-in other words, that they treat arbitration agreements differently than other contracts. In Shroyer, we rejected Cingular's analogous argument, notwithstanding the California Supreme Court's recognition in Discover Bank that it was not holding that all class action waivers are necessarily unconscionable, but rather only those in certain circumstances. As Shroyer's holding suggests, Scott's unconscionability principles embody grounds to revoke any contract, not just arbitration agreements. The Scott principles apply equally to a contract that permits only individual, not aggregate, litigation in court. Stated another way, the Scott holding targets not the arbitration context, but rather the class action waiver, which the Washington State Supreme Court has determined would deprive Washington consumers of a right generally applicable to arbitration and litigation contracts alike and which only happens to be within an arbitration agreement in this case.FN3
FN3. We also decline T-Mobile's invitation to follow the Third Circuit's holding in Gay v. CreditInform, 511 F.3d 369 (3d Cir.2007). Unlike the Third Circuit's conclusion as to the applicable state law in Gay, we determine that the Washington Supreme Court in Scott does not hold "that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate." Id. at 395.
*1222 [9] Headnote Citing References Finally, T-Mobile's claim, in essence, that the FAA requires a state to enforce a class action waiver merely because it lies within an arbitration agreement-whereas a state would be free to find the same waiver to be invalid in the litigation context-contravenes the FAA's mandate of an "equal footing" between arbitration and other forms of dispute resolution. See Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) ("Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts...."). The FAA proscribes states from giving arbitration special treatment, whether it be positive or negative.
AFFIRMED.

677 F.Supp.2d 1134
(Cite as: 677 F.Supp.2d 1134)

United States District Court,
D. Minnesota.
Brandy AUSTIN, individually and as mother and natural guardian of Christa B. Austin, Plaintiff,
v.
NESTLE USA, INC., Defendant.

Civ. No. 09-2675 (RHK/JSM).
Dec. 28, 2009.

Background: Mother brought action in state court against powdered infant formula manufacturer on behalf of herself and her daughter, alleging that daughter suffered severe brain damage after ingesting contaminated formula. Defendant removed action to federal court and moved to transfer action to District of South Carolina.

Holding: The District Court, Richard H. Kyle, J., held that transfer of venue was warranted.

Motion granted.

West Headnotes

[1] Federal Courts 170B 103

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk103 k. Discretion of court. Most Cited Cases

A district court enjoys much discretion when deciding whether to grant a motion to transfer venue. 28 U.S.C.A. § 1404(a).

[2] Federal Courts 170B 144

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)4 Proceedings and Effect of Change
170Bk144 k. Presumptions and burden of proof. Most Cited Cases

A heavy burden rests with the movant to demonstrate why a case should be transferred; to satisfy that heavy burden, the movant must demonstrate that the relevant factors weigh strongly in its favor. 28 U.S.C.A. § 1404(a).

[3] Federal Courts 170B 113

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk113 k. Torts in general. Most Cited Cases

Convenience of parties factor was neutral, for purposes of infant formula manufacturer's motion to transfer to South Carolina action brought by mother of child allegedly injured by ingesting contaminated formula; although mother was South Carolina resident and manufacturer was headquartered in California, manufacture of formula occurred in Wisconsin and manufacturer had several offices in state of Minnesota. 28 U.S.C.A. § 1404(a).

[4] Federal Courts 170B 113

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk113 k. Torts in general. Most Cited Cases

Key non-party witnesses to mother's action against infant formula manufacturer, seeking damages for brain injuries daughter allegedly suffered after ingesting contaminated formula, were located in or near South Carolina, and thus convenience-of-witnesses factor strongly favored transfer of action to South Carolina; child's treating physicians, who were likely to have information relevant to causation, were in South Carolina. 28 U.S.C.A. § 1404(a).

[5] Federal Courts 170B 113

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk106 Determination in Particular Transferable Actions
170Bk113 k. Torts in general. Most Cited Cases

Interests of justice strongly favored transfer to South Carolina of mother's action against infant formula manufacturer, seeking damages for brain injuries child allegedly sustained after ingesting contaminated formula, although mother chose Minnesota as forum for action; South Carolina law governed claims, South Carolina had strong interest in case as mother's and child's state of residence, manufacturer could not join treating physicians located in South Carolina in Minnesota court, and purposes behind venue statute would be best served by transfer. 28 U.S.C.A. §§ 1391, 1404(a).

[6] Federal Courts 170B 101

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk101 k. In general; convenience and interest of justice. Most Cited Cases

Federal Courts 170B 104

170B Federal Courts
170BII Venue
170BII(B) Change of Venue

170BII(B)1 In General; Venue Laid in Proper Forum
170Bk104 k. Matters considered. Most Cited Cases

Federal Courts 170B 105

170B Federal Courts
170BII Venue
170BII(B) Change of Venue
170BII(B)1 In General; Venue Laid in Proper Forum
170Bk105 k. Plaintiff's choice of forum; forum shopping. Most Cited Cases

When analyzing interests of justice factor on motion to transfer venue, courts consider, among other things, judicial economy, the plaintiff's choice of forum, docket congestion, each party's ability to enforce a judgment, obstacles to a fair trial, conflict-of-law issues, and each court's relative familiarity with the applicable law. 28 U.S.C.A. § 1404(a).

[7] Evidence 157 506

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k506 k. Matters directly in issue. Most Cited Cases

Expert testimony on legal matters is not admissible.

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MEMORANDUM OPINION AND ORDER

RICHARD H. KYLE, District Judge.

INTRODUCTION

This action arises out of the ingestion of powdered infant formula by Plaintiff Brandy Austin's daughter, Christa, shortly after her birth. [FN1] On behalf of herself and Christa, she sued Defendant Nestle USA, Inc. ("Nestle"), the formula's manufacturer, alleging that Christa suffered severe brain damage because the formula was contaminated with *Enterobacter sakazakii* bacteria. Nestle now moves to transfer this action to the United States District Court for the District of South Carolina. For the reasons set forth below, the Court will grant the Motion.

FN1. The Court uses the singular "Plaintiff" because Brandy is the only party-plaintiff in this case, having sued in two different *capacities*. *See* Fed.R.Civ.P. 17(a)(1), (c)(1).

BACKGROUND

Plaintiff, a South Carolina resident, gave birth to Christa on September 19, 2006, at Spartanburg Regional Medical Center in Spartanburg, South Carolina. (Am. Compl. ¶¶ 1, 4.) Plaintiff and Christa were discharged from the hospital two days later; at that time, the hospital gave Plaintiff an unsolicited gift bag containing a can of Nestle Good Start Supreme powdered infant formula. (*Id.* ¶ 5.) According to Plaintiff, the formula was contaminated with *Enterobacter sakazakii* bacteria. (*Id.* ¶ 16.) [FN2]

> FN2. *Enterobacter sakazakii* can cause bloodstream and central-nervous-system infections and is often associated with meningitis, or inflammation of the tissue surrounding the brain or spinal cord, in newborns. *See* Anna B. Bowen & Christopher R. Braden, Centers for Disease Control and Prevention, *Invasive Enterobacter Sakazakii Disease in Infants*, Emerging Infectious Diseases vol. 12 no. 8 (Aug. 2006), available at http:// www. cdc. gov/ Ncidod/ EID/ vol 12 no 08/ 05- 1509. htm.

Following their discharge, Plaintiff exclusively fed Christa the powdered infant formula she had been given. (*Id.* ¶ 7.) Three days later, Christa began to exhibit symptoms of a possible infection. (*Id.* ¶ 8.) She was then taken to the emergency room at Wallace Thomson Hospital in Union, South Carolina, for treatment. (*Id.* ¶ 8.) The Complaint does not specify precisely what occurred there, noting only that she was "evaluated and discharged." (*Id.*)

The following morning, September 25, 2006, Christa remained ill. As a result, Plaintiff took her to Spartanburg Regional Medical Center. (*Id.* ¶ 9.) There, she was diagnosed with *Enterobacter sakazakii* meningitis and was transferred to Greenville Hospital System University Medical Center in Greenville, South Carolina. (*Id.*) According to Plaintiff, the meningitis resulted in severe brain damage that will prevent Christa from ever living independently. (*Id.* ¶¶ 9, 72.)

Plaintiff later commenced the instant action against Nestle in Hennepin County District Court, alleging various tort and warranty claims. Nestle timely removed it to this Court and now moves to transfer it to the District of South Carolina.

STANDARD OF REVIEW

28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." A court faced with a motion to transfer, therefore, must undertake a two-part inquiry. "The initial question ... is whether the action might have been brought in the proposed transferee district. If so, the Court must [then] consider the convenience and interest of justice factors." *Totilo v. Herbert*, 538 F.Supp.2d 638, 639-40 (S.D.N.Y.2008).

[1] As the text of Section 1404(a) makes clear, three general factors inform whether a district court should grant a motion to transfer: (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice. *See also Terra Int'l. Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 691 (8th Cir.1997). A district court may also consider any other factors it finds relevant when deciding whether transfer is warranted. *Id.* There is no precise mathematical formula to be employed when balancing these factors. As one court has noted, " '[w]eighing' and 'balancing' are words embodying metaphors which, if one is not careful, tend to induce a fatuous belief that some sort of scales or weighing machinery is available. Of course it is not. At best, the judge must guess, and we should accept his guess unless it is too wild." *Ford Motor Co. v. Ryan*, 182 F.2d 329, 331-32 (2d Cir.1950). Hence, a district court enjoys "much discretion" when deciding whether to grant a motion to transfer. *Terra Int'l*, 119 F.3d at 697.

[2] Courts must be cognizant, however, that transfer motions "should not be freely granted." *In re Nine Mile Ltd.*, 692 F.2d 56, 61 (8th Cir.1982), *abrogated on other grounds by Mo. Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306 (8th Cir.1990). A "heavy" burden rests with the movant to demonstrate why a case should be transferred. *E.g.*, *Integrated Molding Concepts, Inc. v. Stopol Auctions L.L.C.*, Civ. No. 06-5015, 2007 WL 2263927, at *5 (D.Minn. Aug. 6, 2007) (Schiltz, J., adopting Report & Recommendation of Erickson, M.J.); *Radisson Hotels Int'l. Inc. v. Westin Hotel Co.*, 931 F.Supp. 638, 641 (D.Minn.1996) (Kyle, J.). To satisfy that "heavy" burden, the movant must demonstrate that the relevant factors weigh "strongly" in its favor. *Id.*

ANALYSIS

The first question in the transfer analysis-whether this action "might have been brought" in the District of South Carolina-is not in dispute. Hence, the Court proceeds directly to the second (and final) question: do the convenience

of the parties, the convenience of the witnesses, and the interests of justice, taken collectively, weigh "heavily" in favor of transfer? The Court concludes that this question should be answered in the affirmative.

I. Convenience of parties

[3] The first factor, the convenience of the parties, is neutral. On one hand, there cannot be any serious dispute that South Carolina is a more convenient forum than Minnesota for Plaintiff, a South Carolina resident. *See Hughes v. Wheeler*, 364 F.3d 920, 924-25 (8th Cir.2004) ("There is no doubt some inconvenience in litigating a case far from home.").[FN3] This is particularly true given Christa's alleged medical condition; obviously, Plaintiff cannot attend to her daughter's serious medical needs if she is compelled to travel halfway across the country for a deposition or trial. [FN4] On the other hand, Nestle will be inconvenienced regardless of where this case is venued-it is headquartered in California; Nestle Nutrition, the Nestle subsidiary that manufactured the formula in question, is headquartered in New Jersey; and the Nestle laboratory that tested the formula is located in Ohio. At first blush, therefore, it would seem that the convenience-of-parties factor favors transfer.[FN5]

FN3. As Plaintiff herself recognizes, it is of no moment that Plaintiff's counsel is located in Minnesota. *E.g.*, *Nelson v. Soo Line R.R. Co.*, 58 F.Supp.2d 1023, 1027 (D.Minn.1999) (Doty, J.) ("[I]t is axiomatic that convenience to plaintiff's counsel is not a factor to be considered in deciding the propriety of transfer.") (internal quotation marks and citation omitted).

FN4. Plaintiff argues that because she opted to file suit here, Nestle has "no right" to assert that South Carolina is a more convenient forum. (Mem. in Opp'n at 9.) The Court disagrees. At most, Plaintiff's decision to file suit here indicates that she considers Minnesota a convenient forum, *e.g.*, *Caddy Prods., Inc. v. Greystone Int'l. Inc.*, Civ. No. 05-301, 2005 WL 3216689, at *3 (D.Minn. Nov. 29, 2005) (Tunheim, J.); it does *not* mean that Nestle should be precluded from arguing that South Carolina is *more* convenient for Plaintiff. Indeed, to hold otherwise would be to ignore reality-in most instances, it is self-evident that litigating at home (and, hence, having discovery conducted there) would be more convenient for an individual plaintiff than litigating elsewhere. For this reason, numerous cases "have been transferred to the [state of the] plaintiff's residence, even though he or she would have preferred to have the case lodged elsewhere." 15 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 3849 at 177 (3d ed. 2007).

FN5. Insofar as documents will be produced electronically in this case, the Court agrees with the parties (*see* Mem. in Opp'n at 13; Reply Mem. at 3) that the location of their documents is of little consequence to the transfer analysis. *See, e.g.*, *Abbott v. Lockheed Martin Corp.*, No. 06-cv-701, 2007 WL 844903, at *4 (S.D.Ill. Mar. 20, 2007); *A Slice of Pie Prods., LLC v. Wayans Bros. Entm't*, 392 F.Supp.2d 297, 308 (D.Conn.2005).

Yet, Plaintiff correctly notes that the subject formula was manufactured at a Nestle Nutrition plant in Eau Claire, Wisconsin, approximately 70 miles from St. Paul. Nestle employees with pertinent information may be located there, and litigating in Minnesota rather than South Carolina will be far more convenient for such individuals.[FN6] Moreover, Nestle has several offices in this state, lessening the inconvenience for out-of-state employees traveling here for depositions or for trial.[FN7]

FN6. Nestle asserts that "Paul Caseletto, who is knowledgeable about quality control and assurance at the Eau Claire plant at the time the formula in question was manufactured, currently maintains his office in Florham Park, New Jersey, and resides in Basking Ridge, New Jersey." (*See* Besman Aff. ¶ 6.) But Nestle nowhere argues that Caseletto is the *only* person with such knowledge, or even that he is the *most* knowledgeable. Indeed, in another case against Nestle concerning *Enterobacter sakazakii* contamination in infant formula pending in the Western District of Tennessee, Nestle recently submitted an affidavit from John Younger, the plant manager at the Eau Claire facility. (*See* Rathke Aff. Ex. 6.)

> FN7. Plaintiff asserts that witnesses relevant to this case may be located in these Minnesota offices (*see* Mem. in Opp'n at 11), but none of the offices is involved in the manufacture, sale, or distribution of infant formula. (*See* Besman Aff. ¶¶ 3-4.)

Because there are facts pressing on both sides of the convenience-of-parties scale, the Court concludes that this factor favors neither Minnesota nor South Carolina.

II. Convenience of Witnesses

[4] Regarding the convenience of witnesses-which is often considered the most important factor in the transfer analysis, 15 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 3849 at 199 (3d ed.2007)-the Court focuses on non-parties because "it is generally assumed that witnesses within the control of the party calling them, such as employees, will appear voluntarily in a foreign forum." *FUL Inc. v. Unified Sch. Dist. No. 204*, 839 F.Supp. 1307, 1311 (N.D.Ill.1993): *accord Continental Airlines, Inc. v. Am. Airlines, Inc.*, 805 F.Supp. 1392, 1397 (S.D.Tex.1992). Here, the key non-party witnesses are located in or near South Carolina.

For example, Christa's treating physicians-those treating her currently and those treating her when she first fell ill-will provide important information regarding her medical condition and her prognosis. Plaintiff concedes that these individuals are located in South Carolina but attempts to deflect the importance of their testimony, arguing that "Christa's condition is what it is" and that her physicians will "have little to say concerning the central issue in this case," namely, whether the formula was contaminated. (Mem. in Opp'n at 10-11.) Yet, the physicians are likely to have information relevant to causation-for instance, whether the symptoms Christa exhibited as a newborn were consistent with bacterial meningitis-and may be particularly relevant for any third-party claims Nestle might later assert (as discussed in more detail below). They will also provide information regarding the extent of Christa's injuries, which is critical to any assessment of damages, *see, e.g.*, *Foley v. United States*, No. 09-cv-239, 2009 WL 3400997, at *3 (D.Me. Oct. 19, 2009) (testimony by friends and medical providers regarding plaintiff's damages relevant to convenience of witnesses analysis), particularly in a case involving life-long injuries suffered by a newborn.

Moreover, each of these witnesses is beyond the subpoena power of this Court and, hence, could not be compelled to testify at trial if this case were to remain here. While the parties could preserve these witnesses' testimony for trial by videotaping their depositions, the Court believes that "[t]rial by videotape is simply not preferable to live examination in front of a jury." *In re Aredia & Zometa Prods. Liab. Litig.*, No. 3:06-MD-1760, 2008 WL 686213, at *3 (M.D.Tenn. Mar. 6, 2008); *accord, e.g., Kay v. Nat'l City Mortgage Co.*, 494 F.Supp.2d 845, 853 (S.D.Ohio 2007); *Hoppe v. G.D. Searle & Co.*, 683 F.Supp. 1271, 1276 (D.Minn.1988) (Renner, J.) ("Forcing the defendant to conduct its case by deposition, even videotape deposition, is simply unjustified.").

Plaintiff argues that the convenience-of-witnesses factor favors Minnesota because FDA employees working here are likely to testify. In support, she relies on an FDA "Consumer Complaint/Injury Report" submitted by a physician at Spartanburg Regional Medical Center. Her reliance is misplaced, as the report supports the conclusion that South Carolina, not Minnesota, is the most appropriate forum.

Although the report states that Nestle's Eau Claire manufacturing plant is located within the jurisdiction of the FDA's Minneapolis office (referred to on the form as "MIN-DO"), the report actually was received by the FDA's *Atlanta* office ("ATL-DO"), and it indicates that investigatory activities were "accomplished" by that office. (*See* Rathke Aff. Ex. 1; O'Brien Aff. ¶¶ 2-3.) Plaintiff's counsel asserted at oral argument that the FDA's Minneapolis office "played a major role" in the investigation, but there is simply nothing in the record to support that assertion. Rather, it appears that FDA employees in Atlanta, not Minneapolis, are the ones most likely to have information pertinent to this case, and South Carolina-a short distance from Atlanta-would be far more convenient for such employees than Minnesota.

All told, no non-party witnesses located in (or near) Minnesota have been identified by the parties, but several such witnesses are located in or near South Carolina. Accordingly, the convenience-of-witnesses factor strongly favors transfer.

III. Interests of justice

[5][6] Finally, the interests of justice also strongly favor transfer. When analyzing this factor, courts consider, among other things, judicial economy, the plaintiff's choice of forum, docket congestion, each party's ability to enforce a judgment, obstacles to a fair trial, conflict-of-law issues, and each court's relative familiarity with the applicable law. *E.g.*, *Terra Int'l*, 119 F.3d at 696; *Prod. Fabricators, Inc. v. CIT Commc'ns Fin. Corp.*, Civ. No. 06-537, 2006 WL 2085413, at *3 (D.Minn. July 25, 2006) (Kyle, J.). While some of these items (such as docket congestion and the ability to enforce a judgment) are irrelevant in the present case, several militate strongly in favor of transfer.

Controlling law. There does not appear to be any serious dispute between the parties that South Carolina law will govern this action. As the Supreme Court has recognized, "[t]here is an appropriateness ... in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle ... law foreign to itself." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) (discussing *forum non conveniens*). While this Court is routinely called upon to apply the law of other states and is equipped to do so, *see, e.g.*, *Advanced Logistics Consulting, Inc. v. C. Enyeart LLC*, Civ. No. 09-720, 2009 WL 1684428, at *6 (D.Minn. June 16, 2009) (Kyle, J.), the District of South Carolina remains "better suited to apply and interpret its state substantive law." *Adkins v. United States*, No. 8:05-CV-1851, 2006 WL 398400, at *2 (M.D.Fla. Feb. 16, 2006); *accord, e.g.*, *Netwig v. Ga.-Pac. Corp.*, Civ. No. 01-1253, 2002 WL 391354, at *3 (D.Minn. Mar. 11, 2002) (Frank, J.) (although this Court "is certainly capable of fairly and aptly applying the law of [Kansas], a Kansas court is undoubtedly more familiar with the relevant law and its proper application").

South Carolina's interest. The nexus between Minnesota and this action is non-existent or, at best, extremely tenuous. South Carolina, on the other hand, is the state of Plaintiff's and Christa's residence; the place where Christa was injured; and the state where she received, and continues to receive, treatment. South Carolina, therefore, has a strong interest in hearing this case far outweighing Minnesota's interest. *E.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (a state "generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors") (citation omitted); *Netwig*, 2002 WL 391354, at *4 ("Kansas has an obvious interest in protecting the rights of its citizenry and resolving local controversies in its own courts."). And that interest is heightened where, as here, the law of the proposed transferee forum will apply. *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1096 (10th Cir.1998).

Judicial economy and obstacles to a fair trial. Nestle avers that it may assert third-party claims against Wallace Thompson Hospital and certain of its doctors, who evaluated Christa when she first showed signs of an infection but ultimately discharged her without diagnosing *Enterobacter sakazakii* meningitis. (*See* Def. Mem. at 7-10; Reply Mem. at 7-9,) The hospital and the doctors, however, indisputably are not subject to personal jurisdiction in Minnesota and cannot be joined as parties if this case were to remain here. Were Nestle to assert such claims, the end result would be piecemeal litigation-in fact, that is precisely the road Plaintiff claims Nestle should take. (*See* Mem. in Opp'n at 19 (asserting that Nestle's third-party claims should be "vindicate[d] by contribution after it compensates Christa for causing her devastating injury and disability").)

But the avoidance of piecemeal litigation is a factor given "great weight" by courts analyzing the interests of justice. 15 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 3854 at 250 (3d ed. 2007). "Thus with great frequency, ... cases have been transferred to a forum in which ... it would be possible to join an additional defendant or bring in a third-party defendant who is not subject to service of process in the original forum." *Id.* at 252-63; *accord, e.g.*, *GMAC/Residential Funding Corp. v. Platinum Co. of Real Estate & Fin. Servs., Inc.*, Civ. No. 02-1224, 2003 WL 1572007, at *3 (D.Minn. Mar. 13, 2003) (Kyle, J.) ("The avoidance of duplicative or piecemeal litigation is a factor that weighs in favor of transferring an action to a district in which all parties can be

joined in a single action."); *Bolles v. K Mart Corp.*, No. Civ. A. 01-1118, 2001 WL 767605, at *3 (E.D.Pa. July 9, 2001) ("[A]bility to implead a third party defendant in the proposed transferee forum is an important consideration favoring transfer of an action.") (citation omitted).[FN8]

> FN8. Plaintiff relies heavily upon *Burks v. Abbott Laboratories*, Civ. No. 08-3414, 2008 WL 4838720 (D.Minn. Nov. 5, 2008) (Tunheim, J.), a case with facts similar to the instant action. There, as here, an infant suffered meningitis after ingesting powdered formula allegedly contaminated by *Enterobacter sakazakii*-notably, counsel for the plaintiffs in *Burks* represents Plaintiff here. Although the plaintiffs lived in Louisiana and the formula in question was ingested there, the defendant's motion to transfer was denied. But nowhere in *Burks* was it suggested that the defendant-manufacturer intended to implead the infant's treating physicians, a key factor here regarding the fairness and adequacy of litigating in Minnesota. In any event, the undersigned is not bound by *Burks* and, to the extent it cannot be reconciled with the decision reached herein, the undersigned respectfully declines to follow it.

In a similar vein, Nestle's inability to implead (potential) third-party defendants would hamper its prospects of obtaining a fair trial here. In the Court's view, a jury is less likely to accept the argument that third parties were responsible for Christa's injuries, at least in part, if those third parties are not before the jury-out of sight, out of mind, as the old saying goes. Furthermore, under South Carolina law, it appears that a jury *cannot* apportion comparative fault to a non-party. S.C.Code Ann. § 15-38-15(C)(3) (2008). Under these circumstances, it is unlikely that Nestle could obtain a fair trial in Minnesota without the third-parties' participation, which simply cannot be obtained.

[7] Relying on an "expert" opinion submitted by her own counsel, Plaintiff argues that Nestle's third-party-defendant arguments are "entirely contrived" (Mem. in Opp'n at 19), because "nothing in [Christa's] medical records suggests any negligence whatsoever on the part of Wallace Thompson Hospital." (Rathke Aff. ¶ 6.) The Court rejects out of hand this self-serving "opinion." "[E]xpert testimony on legal matters is not admissible." *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir.2003). Similarly, "the expert testimony of an attorney as to ... the legal significance of facts is inadmissible." *Motown Prods., Inc. v. Cacomm, Inc.*, 668 F.Supp. 285, 288 (S.D.N.Y.1987), *rev'd on other grounds*, 849 F.2d 781 (2d Cir.1988); *accord, e.g.*, *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1328 (10th Cir.1998) ("[A]n expert may not ... state legal conclusions drawn by applying the law to the facts."). Whether the facts suggest negligence on the part of Christa's treating physicians or Wallace Thompson Hospital is an issue for the factfinder to decide, if Nestle asserts such claims.

Plaintiff also argues that Nestle cannot assert third-party claims against Christa's medical providers because, under South Carolina law, a tortfeasor is responsible for "any injury caused by subsequent medical malpractice." (Mem. in Opp'n at 18 (citing *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984)).) But as Nestle correctly notes in its Reply, *Graham* held that a tortfeasor is responsible only for *reasonably foreseeable* actions of subsequent tortfeasors. 321 S.E.2d at 44. Although generally "the negligence of an attending physician is reasonably foreseeable," *id.*, that is not true in all circumstances. *See generally* V. Woerner, Annotation, *Civil Liability of one Causing Personal Injury for Consequences of Negligence, Mistake, or Lack of Skill of Physician or Surgeon*, 100 A.L.R.2d 808 (1965) (cited with approval in *Graham*). Without development of the record, the Court cannot say that Nestle's potential third-party claims have no possible validity.

Statutory venue considerations. The purposes behind the venue statute, 28 U.S.C. § 1391, also would be best served by transfer. "One of the central purposes of statutory venue is to ensure that a defendant is not 'haled into a remote district, having no real relationship to the dispute.' " *Richards v. Aramark Servs., Inc.*, 108 F.3d 925, 928 (8th Cir.1997) (citation omitted). As discussed above, this action has no substantial connection to Minnesota. Permitting it to remain here, therefore, would undermine the purposes behind Section 1391.

Plaintiff's choice of forum. Plaintiff cites a plethora of cases for the proposition that her choice of forum is entitled to significant deference. (*See* Mem. in Opp'n at 7-8.) As this Court has previously recognized, however, the enactment of Section 1404(a) in 1948 abrogated the long-held rule, developed under the doctrine of *forum non conven-*

iens, that a plaintiff's choice of forum is entitled to substantial weight in the transfer analysis. *See* *Ahlstrom v. Clarent Corp.*, Civ. No. 02-780, 2002 WL 31856386, at *3 n. 9 (D.Minn. Dec. 19, 2002) (Kyle, J.). Instead, the plaintiff's choice is simply "one factor to be considered." *Id.* Furthermore, whatever weight a plaintiff's choice of forum obtains is diminished where (1) she does not reside in the chosen forum or (2) the underlying events did not occur there. *E.g., Burnett v. Wyeth Pharm., Inc.*, Civ. No. 06-4923, 2008 WL 732425, at * 1 (D.Minn. Mar. 17, 2008) (Frank, J.); *Ahlstrom*, 2002 WL 31856386, at *4 ("significantly less deference"). Both are true here. Plaintiff's choice of forum, therefore, does not alter the interests-of-justice calculus.

For all of these reasons, the Court concludes that the interests-of-justice factor weighs heavily in favor of transfer.

CONCLUSION

Having considered the relevant factors, the Court concludes that the balance weighs strongly in favor of transferring this action. Looked at through the lens of practicality-which is, after all, what Section 1404(a) is all about-Nestle's Motion can really be distilled to a simple question: does it make sense to compel litigation in Minnesota when this state bears no relationship to the parties or the underlying events? The answer is, "No." Courts routinely transfer product-liability actions such as this one to the district in which "the allegedly defective product was used and [the plaintiff's] injury occurred." *Coppola v. Ferrellgas, Inc.*, 250 F.R.D. 195, 198 (E.D.Pa.2008) (collecting cases). Plaintiff resides in South Carolina, her daughter's injuries occurred there, and all of her medical treatment has been provided (and continues to be provided) in that state. South Carolina, therefore, is the appropriate place for this litigation to proceed. This Court simply "should not be required to expend [its] resources" on cases such as this one "that have little relationship to this district." *Varnado v. Danek Med., Inc.*, No. Civ. A. 95-1802, 1998 WL 524896, at *3 (E.D.La. Aug. 19, 1998).

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that Defendant's Motion to Transfer (Doc. No. 8) is **GRANTED** and this case is **TRANSFERRED** to the United States District Court for the District of South Carolina. The Clerk of this Court is directed to take all steps necessary to effectuate the transfer in an expeditious fashion.

D.Minn.,2009.
Austin v. Nestle USA, Inc.
677 F.Supp.2d 1134

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592 F.3d 830
(Cite as: 592 F.3d 830)

C.A.8 (Ark.),2010.
PRM Energy Systems, Inc. v. Primenergy, L.L.C.
592 F.3d 830
United States Court of Appeals,
Eighth Circuit.
PRM ENERGY SYSTEMS, INC., an Arkansas Corporation, Plaintiff-Appellant, Energy Process Technologies, Inc., Plaintiff,
v.
PRIMENERGY, L.L.C., an Oklahoma Limited Liability Company; Don R. Mellot; W.N. Scott, also known as Bill Scott, Defendants,
Kobe Steel, Ltd., Defendant-Appellee.
No. 08-1987.

Submitted: Oct. 15, 2008.
Filed: Jan. 8, 2010.

Background: After a series of disputes between licensor of certain gasification technology patents and licensee licensed to use the gasification technology and enter into sublicense agreements in a number of countries, licensor brought claims against a potential licensee for tortious interference with, and inducement to breach the agreements between licensor and licensee and for conspiring with licensee to convert licensor's intellectual property for their own use. The United States District Court for the Western District of Arkansas, Jimm Larry Hendren, J., granted potential licensee's motion to compel arbitration. Licensor appealed.

Holdings: The Court of Appeals, Melloy, Circuit Judge, held that:
(1) potential licensee, as a nonsignatory, could compel arbitration pursuant to licensor and licensee's arbitration agreement, and
(2) licensor's claims against potential licensee were covered by the arbitration clause in the licensor and licensee's agreement.

Affirmed.

Beam, Circuit Judge, filed a dissenting opinion.

West Headnotes

[1] Alternative Dispute Resolution 25T 179

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk179 k. Persons entitled to enforce. Most Cited Cases
In action brought by licensor of certain gasification technology patents against potential licensee for tortious interference with, and inducement to breach agreements between licensor and licensee licensed to use the gasification technology and enter into sublicense agreements in a number of countries, and for conspiring with licensee to convert licensor's intellectual property for their own use, concerted-misconduct theory of alternative estoppel applied to allow potential licensee, as a nonsignatory, to compel arbitration pursuant to terms of arbitration agreement between licensor and licensee, where licensor specifically alleged coordinated behavior between a signatory and a nonsignatory, the agreements between licensor and licensee anticipated that an entity such as potential licensee might enter into a licensing relationship with licensee, and the agreements attempted to govern that expected relationship.

[2] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) k. Scope and standards of review. Most Cited Cases

The court of appeals reviews de novo a district court's grant of a motion to compel arbitration.

[3] Alternative Dispute Resolution 25T 179

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk179 k. Persons entitled to enforce. Most Cited Cases

A nonsignatory may compel a signatory to arbitrate claims under a valid arbitration agreement in limited circumstances.

[4] Alternative Dispute Resolution 25T 179

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk177 Right to Enforcement and Defenses in General
25Tk179 k. Persons entitled to enforce. Most Cited Cases

A nonsignatory may compel arbitration pursuant to a valid arbitration agreement when, as a result of the nonsignatory's close relationship with a signatory, a failure to do so would eviscerate the arbitration agreement.

[5] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases

In action brought by licensor of certain gasification technology patents against potential licensee for tortious interference with, and inducement to breach agreements between licensor and licensee licensed to use the gasification technology and enter into sublicense agreements in a number of countries, and for conspiring with licensee to convert licensor's intellectual property for their own use, licensor’s claims against potential licensee were “disputes arising under” the licensor and licensee’s agreement, such that they were covered by the agreement’s arbitration clause, in light of the interpretive preference for arbitration.

[6] Alternative Dispute Resolution 25T 139

25T Alternative Dispute Resolution
25TII Arbitration

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(Cite as: 592 F.3d 830)

25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 k. Construction in favor of arbitration. Most Cited Cases

Alternative Dispute Resolution 25T 210

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 k. Evidence. Most Cited Cases
Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, including the construction of the contract language itself.

[7] Alternative Dispute Resolution 25T 143

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 k. In general. Most Cited Cases
Arbitration may be compelled under a broad arbitration clause as long as the underlying factual allegations simply touch matters covered by the arbitration provision; it generally does not matter that claims sound in tort, rather than contract.

Danny Ray Crabtree, Jr., argued, Little Rock, AR (Timothy O. Dudley, on the brief), for Appellant.

John B. Nalbandian, argued, Cincinnati, OH (Theresa Heitz Vella, Phoenix, AZ, on the brief), for Appellee.

Before MELLOY, BEAM, and GRUENDER, Circuit Judges.

MELLOY, Circuit Judge.

PRM Energy Systems, Inc. (“PRM”), licensed certain gasification technology patents to Primenergy, L.L.C. (“Primenergy”). Through a network of agreements (the “1999 Agreements”), PRM licensed Primenergy to use the gasification technology and enter into sublicense agreements in a number of countries. After a series of disputes between PRM and Primenergy, PRM brought claims against Kobe Steel, Ltd. (“Kobe Steel”), a potential licensee, for tortious interference with, and inducement to breach, the 1999 Agreements and for conspiring with Primenergy to convert PRM's intellectual property for their own use.

Kobe Steel moved to compel arbitration of PRM's claims pursuant to arbitration provisions in the 1999 Agreements, and the district court [FN1] granted Kobe Steel's motion. PRM now appeals, arguing that Kobe Steel, as a nonsignatory to the 1999 Agreements, should not be permitted to enforce the arbitration provisions from those Agreements. We affirm.

FN1. The Honorable Jimm Larry Hendren, Chief Judge, United States District Court for the Western District of Arkansas.

I.

To give context to this dispute, we set forth the facts as alleged in PRM's complaint.

In the 1999 Agreements, PRM licensed Primenergy to use PRM's gasification technology in a number of countries, including the United States but not including Japan. Although Primenergy's license did not extend to Japan, Primenergy maintains that the 1999 Agreements gave it a right of first refusal for a license in Japan. In 2001, a U.S. subsidiary of Kobe Steel (a Japanese company) contacted PRM and expressed its interest in licensing the technology in the United States. PRM referred the subsidiary to Primenergy. In 2002, Kobe Steel began discussing licensing in Japan with PRM, but Kobe Steel declined to sign a confidentiality agreement, and the discussions stalled. At the same time, Kobe Steel was allegedly negotiating with Primenergy, inducing Primenergy to breach the 1999 Agreements by sublicensing the technology to Kobe Steel and planning joint projects in Japan. In 2003, Kobe Steel and Primenergy reached a collaboration agreement in violation of the territorial restrictions in the 1999 Agreements. Neither Primenergy nor Kobe Steel disclosed this agreement to PRM.

Unaware of the collaboration between Primenergy and Kobe Steel, PRM executed an option granting an unrelated company a license for the technology in Japan. In 2004, Primenergy filed a demand for arbitration seeking to force PRM to terminate the option, citing Primenergy's purported right of first refusal. Primenergy also sought to invalidate certain royalty provisions of the 1999 Agreements because the underlying patents had expired. PRM asserted several cross-claims in the arbitration, including a claim that Primenergy breached the 1999 Agreements by having undisclosed dealings with Kobe Steel. In a final ruling on April 22, 2005, an arbitrator found that the royalty provisions were unenforceable and that both parties had breached the 1999 Agreements in regard to obligations concerning the territory of Japan. The arbitrator enjoined Primenergy from further discussions with Kobe Steel for a period of two years, but it did not award damages because PRM had not shown any.

In 2004, while the arbitration between PRM and Primenergy was pending, PRM filed a complaint in the district court against Primenergy and its officers alleging breach of contract, fraud, conspiracy, misappropriation of trade secrets, unfair competition, and tortious interference. On March 24, 2005, PRM filed a complaint in a separate action against Kobe Steel asserting tortious interference and conspiracy. On May 18, 2005, PRM filed an amended complaint in its lawsuit against Primenergy that included specific allegations concerning the interactions between Primenergy and Kobe Steel. On November 15, 2005, the district court granted PRM's motion to consolidate the two actions, but it dismissed the claims against Primenergy, concluding that the claims were subject to arbitration.

On November 18, 2005, PRM filed an amended complaint against Kobe Steel, asserting the existence of a confidentiality agreement and several exclusive collaboration agreements between Primenergy and Kobe Steel. PRM further alleged that Primenergy and Kobe Steel conspired to hide their dealings from PRM and that Primenergy and Kobe Steel, through their concerted actions, were attempting to negotiate lower royalty premiums and broader territorial rights for the licensing of PRM's technology.

On March 21, 2006, the district court confirmed an April 2005 arbitration decision from the arbitration between PRM and Primenergy. Kobe Steel and PRM then filed cross-motions for judgment on the pleadings as to PRM's claims against Kobe Steel. On June 19, 2006, the district court granted Kobe Steel's motion in part, allowing Kobe Steel to compel arbitration. The district court also entered a stay of the proceedings. The district court held that Kobe Steel could enforce the arbitration provisions of the 1999 Agreements on an estoppel theory because “all of PRM’s claims either make reference to or presume the existence of the 1999 Agreements, and allege substantially interdependent and concerted misconduct by both the nonsignatory [Kobe Steel] and one or more of the signatories [Primenergy] to the contract.” An arbitrator subsequently dismissed the claims against Kobe Steel. The district court later confirmed the arbitrator's dismissal of the claims, and PRM now appeals the June 19, 2006 order compelling the arbitration.[FN2]

> FN2. The district court's interlocutory order directing arbitration and staying the proceedings was not an immediately appealable “final decision.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 87 n. 2, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). It became “final” within the meaning of 9 U.S.C. § 16(a)(3), and thus

appealable, upon the later dismissal of the claims. *See* *Randolph*, 531 U.S. at 88-89, 121 S.Ct. 513.

II.

[1][2] "This court reviews de novo a district court's grant of a motion to compel arbitration." *Donaldson Co., Inc. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 730 (8th Cir.2009) (internal quotation omitted). The first question before us is whether a nonsignatory defendant may compel a signatory plaintiff to arbitrate claims under a valid arbitration agreement where the relationship between the parties is based on the concerted misconduct of the defendant and a different signatory. As we recognized in *Donaldson*, the Supreme Court has held that "state contract law governs the ability of nonsignatories to enforce arbitration provisions." *Id.* at 732; *Arthur Andersen LLP v. Carlisle*, --- U.S. ----, 129 S.Ct. 1896, 1902, 173 L.Ed.2d 832 (2009) (" 'State law,' therefore, is applicable to determine which contracts are binding under § 2 [of the Federal Arbitration Act] and enforceable under § 3 '*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.' " (*quoting* *Perry v. Thomas*, 482 U.S. 483, 493 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987))).

The Supreme Court issued *Arthur Andersen*, and our court issued *Donaldson*, however, long after the district court ordered and subsequently confirmed arbitration in the present case and after the parties briefed and argued this matter to our court. Below, the district court applied federal law to address Kobe Steel's ability to invoke the arbitration provisions of the contract between PRM and Primenergy. In its brief on appeal, PRM argues that federal law applies, and Kobe Steel cites only federal law in its brief as to this issue. Accordingly, we rely primarily upon the federal law as discussed by the parties on appeal, and by the district court below, regarding the ability of a nonsignatory to compel arbitration.[FN3]

FN3. Kobe Steel cited *Arthur Andersen* and an Arkansas case, *American Insurance Company v. Cazort*, 316 Ark. 314, 871 S.W.2d 575, 579-80 (1994), in a letter to our court in accordance with Eighth Circuit Rule of Appellate Procedure 28(j). PRM did not respond to this letter. Kobe Steel asserts that *Cazort* would permit a nonsignatory to compel arbitration under Arkansas law. In light of *Arthur Andersen* and *Donaldson*, and notwithstanding the history of this case, we conducted an independent review of Arkansas law (the only state's law arguably applicable to the present agreement). We determined that Arkansas law was consistent with our analysis as set forth herein and would lead to the same result. *See* *Cazort*, 871 S.W.2d at 579-80 (holding that an insurer-nonsignatory could compel arbitration pursuant to an arbitration agreement between an insured-broker and one of the broker's clients, stating, " 'In short, [plaintiff] cannot have it both ways. It cannot rely on the contract when it works to its advantage and ignore it when it works to its disadvantage.' " (*quoting* *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688, 692 (S.D.N.Y.1966))). In fact, in *Cazort*, the Arkansas Supreme Court cited with approval *Hughes Masonry Co. v. Greater Clark County School Building Corporation*, 659 F.2d 836, 838-41 (7th Cir.1981), and the federal cases we cite herein rely, in part, on *Hughes Masonry* and the reasoning of the Seventh Circuit in that case.

[3] As a starting point, we note that a nonsignatory may compel a signatory to arbitrate claims in limited circumstances. *See, e.g.*, *Finnie v. H & R Block Fin. Advisors, Inc.*, 307 Fed.Appx. 19, 21 (8th Cir.2009) (unpublished per curiam) (compelling arbitration based on a close relationship between signatories and nonsignatories); *CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798-99 (8th Cir.2005) (discussed *infra*); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947-48 (11th Cir.1999) (same); *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir.1995) (applying an estoppel theory based on a close relationship of parties and claims that were intertwined with contract rights and duties); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir.1993) (applying a "traditional agency theory" regarding a nonsignatory employee of a signatory); *see also* *Am. Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575, 579-80 (1994).

[4] In *CD Partners*, we recognized two such circumstances. *See* *CD Partners*, 424 F.3d at 798. The first relies on agency and related principles to allow a nonsignatory to compel arbitration when, as a result of the nonsignatory's close relationship with a signatory, a failure to do so would eviscerate the arbitration agreement. *Id.*; *see also* *Ness-*

lage v. York Secs., Inc., 823 F.2d 231, 233 (8th Cir.1987) (permitting a nonsignatory to compel arbitration where it was the "disclosed agent" of a signatory). The second relies loosely on principles of equitable estoppel, broadly encompasses more than one test for its application, and has been termed "alternative estoppel." *CD Partners*, 424 F.3d at 799 ("A willing nonsignatory seeking to arbitrate with a signatory that is unwilling may do so under what has been called an alternative estoppel theory *which takes into consideration the relationships of persons, wrongs, and issues ....*' ") (quoting *Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir.2003)) (alteration omitted, emphasis added). Alternative estoppel typically relies, at least in part, on the claims being so intertwined with the agreement containing the arbitration clause that it would be unfair to allow the signatory to rely on the agreement in formulating its claims but to disavow availability of the arbitration clause of that same agreement. *See Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993) (citing with approval and adopting the reasoning of *Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 838 (7th Cir.1981)).

The specific theory or test for application of alternative estoppel that formed the basis of the district court's decision in the present case relies on the interdependent and concerted misconduct of a nonsignatory and a signatory. Kobe Steel argues that the district court was correct in applying this test. In addition, Kobe Steel argues that other theories of alternative estoppel apply and that the close relationship or agency theory recognized in *CD Partners* provides an independent basis for compelling arbitration in the present case. Because we conclude that the district court correctly relied upon the theory of concerted misconduct, we confine our discussion to concerted misconduct.

In *CD Partners*, we relied upon *MS Dealer* in which the Eleventh Circuit set forth the theory of concerted misconduct as a basis to compel arbitration when there is no agency or other close relationship between the signatory plaintiff and nonsignatory defendant. *MS Dealer*, 177 F.3d at 947 ("[A]pplication of equitable estoppel is warranted ... when the signatory to the contract containing the arbitration clause raises allegations of ... substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.") (alteration and quotation omitted). The district court in the instant case, turning to *MS Dealer* as persuasive authority, imported the Eleventh Circuit's "concerted misconduct" basis for applying alternative estoppel.

Subsequently, in *Donaldson*, we discussed concerted misconduct at some length, described the type of claims and allegations that would be necessary to invoke this theory, but found the theory inapplicable on the facts of that case. 581 F.3d at 733-35. We said that to warrant the benefit of alternative estoppel based on concerted misconduct, at a minimum, "the plaintiff must specifically allege coordinated behavior between a signatory and a nonsignatory." *Id.* at 734. We did not "suggest that a claim against a co-conspirator ... will always be intertwined to a degree sufficient to work an estoppel." *Ross v. Am. Express Co.*, 547 F.3d 137, 148 (2d Cir.2008) (quotation omitted). Rather, we stated, "The concerted-misconduct test requires allegations of 'pre-arranged, collusive behavior' demonstrating that the claims are 'intimately founded in and intertwined with' the agreement at issue." *Donaldson*, 581 F.3d at 734-35 (quoting *MS Dealer*, 177 F.3d at 948). Ultimately, we found on the facts of *Donaldson* that there was no allegation of "pre-arranged collusive behavior" as "required by the case law" of other circuits. *Id.* at 734 ("Although [the] cross-claim made common allegations against [the signatory and nonsignatory], it did not make any allegations suggesting that [they] knowingly acted in concert, improperly cooperated, or worked hand-in-hand." (internal quotations omitted)). As such, although we have recognized and described the theory of concerted misconduct, we have not yet expressly applied it to compel a party to arbitration.

Here, we believe that the nature of the alleged misconduct and its connection to the contract demonstrates the requisite relationships between persons, wrongs, and issues necessary to compel arbitration. PRM "specifically allege[d] coordinated behavior between a signatory and a nonsignatory." *Id.* The 1999 Agreements anticipated that an entity such as Kobe Steel might enter into a licensing relationship with Primenergy, and the 1999 Agreements attempted to govern that expected relationship. This is not a situation, then, where the nonsignatory co-conspirator "is a complete stranger to the plaintiffs' ... agreements[,] ... did not sign them, ... is not mentioned in them, and ... performs no function whatsoever relating to their operation." *Ross*, 547 F.3d at 148.

Collusive conduct between Kobe Steel and Primenergy allegedly arose from this potential relationship. PRM alleges that Kobe Steel and Primenergy concealed their actions from PRM, conspired to violate the terms of the 1999 Agreements, and attempted to undermine the 1999 Agreements' contemplated authority over licensee and sub-licensee relationships. The alleged collusive actions not only arose out of and targeted the 1999 Agreements, they were "intimately founded in and intertwined with" Primenergy's underlying contract obligations. *Donaldson*, 581 F.3d at 735 (quoting *MS Dealer*, 177 F.3d at 947). As such, we agree with the district court's conclusion that "PRM's claims either make reference to or presume the existence of the 1999 Agreements, and allege substantially interdependent and concerted misconduct by both the nonsignatory [Kobe Steel] and one or more of the signatories [Primenergy] to the contract." Accordingly, the district court did not err in its reliance on a concerted-misconduct theory of alternative estoppel to grant nonsignatory Kobe Steel's motion to compel arbitration.

III.

[5][6] PRM further contends that even if Kobe Steel can compel arbitration, PRM's claims against Kobe Steel are outside of the scope of the arbitration clause of the 1999 Agreements. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including "the construction of the contract language itself." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); *see also Telectronics Pacing Sys., Inc. v. Guidant Corp.*, 143 F.3d 428, 430-31 (8th Cir.1998) ("[A]ny doubts raised in construing contract language on arbitrability should be resolved in favor of arbitration." (internal quotations and alterations omitted)).[FN4] In determining whether the scope of the arbitration clause is broad enough to cover the claims at issue, we do not consider the fact that the defendant is not party to the agreement containing the clause. *CD Partners*, 424 F.3d at 801 n. 3.

> FN4. In determining the arbitrability of a dispute, we generally apply these principles as matters of "federal substantive law," *Moses H. Cone*, 460 U.S. at 24, 103 S.Ct. 927, informed by " 'traditional principles' " of relevant state law, *Arthur Andersen*, 129 S.Ct. at 1902 (quoting 21 R. Lord, Williston on Contracts § 57:19, p. 183 (4th ed.2001)). *See also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Here, neither party contends that any particular state's law applies.

The arbitration clause here covers "all disputes arising under" the agreement, and PRM argues this language is substantially narrower than the corresponding language at issue in *CD Partners.* The *CD Partners* arbitration clause included "any claim, controversy or dispute arising out of or relating to" the agreement. *Id.* at 797, 800. While PRM asserts that the language at issue here is narrower than that in *CD Partners*, *see Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128-29 (2d Cir.2001) (discussing "related to" as broader than "arising out of" where contract provision uses both terms), we note that in *CD Partners* we did not rely solely on the broader "related to" portion of the arbitration clause. Rather, we held that the claims "had their genesis in, arose out of, *and* related to" the operations under the contracts. *CD Partners*, 424 F.3d at 801 (emphasis added). And even though the clause here may be somewhat narrower, it includes no limiting language and is generally broad in scope. *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 n. 3 (4th Cir.2000) (recognizing "[a]ny dispute arising out of the Contract" as "broad"); *United Food and Commercial Workers Union, Local 400 v. Shoppers Food Warehouse Corp.*, 35 F.3d 958, 960 (4th Cir.1994) (stating that "arises under" is "relatively broad"); *cf. Heckler v. Ringer*, 466 U.S. 602, 615, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984) (broadly construing "arising under" in statutory language).

[7] Arbitration may be compelled under "a broad arbitration clause ... as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision." *3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1199 (8th Cir.2008) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n. 13, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)). It generally does not matter that claims sound in tort, rather than contract. *Hudson v. ConAgra Poultry Co.*, 484 F.3d 496, 499-500 (8th Cir.2007) ("Under the Federal Arbitration Act, we generally construe broad language in a contractual arbitration provision to include tort claims arising from the contractual relationship, and we compel arbitration of such claims."); *CD Partners*, 424 F.3d at 800 ("Broadly worded arbitration

clauses ... are generally construed to cover tort suits arising from the same set of operative facts covered by a contract between the parties to the agreement."). In light of the interpretive preference for arbitration, we have no trouble concluding that PRM's tort claims are "disputes arising under" the 1999 Agreements and are therefore within the scope of the broad arbitration clause.

IV.

For the foregoing reasons, we affirm the judgment of the district court.

BEAM, Circuit Judge, dissenting.
I disagree with the court's conclusion that the nature of PRM's claims are connected to the contract and demonstrate the requisite relationships between persons, wrongs, and issues necessary to compel arbitration. The arbitration clause tangentially at issue here purports to cover "all disputes arising under" a technology licensing agreement between PRM and Primenergy.

The problem is, insofar as this appeal is concerned, that PRM asserts only a garden variety tort claim against Kobe Steel that does not directly touch either the subject matter or the geographic reach of the PRM/Primenergy contract itself. Indeed, according to PRM, the tortious activities of Kobe Steel deal with transactions beyond the scope, and purposefully outside of, the licensing authority granted Primenergy. To be sure, it is axiomatic that in order for Kobe Steel to have engaged in the alleged misconduct it must have had knowledge of the 1999 Agreements but that is the extent of the allegations' involvement with those agreements.

This is clearly not the situation discussed in *Ross v. American Express Co.*, 547 F.3d 137, 148 (2d Cir.2008), one of the principal cases relied upon by the court. Nor does PRM allege the sort of interdependent and concerted misconduct discussed in *Donaldson* sufficient to place the claims within the scope of the arbitration clause. *Donaldson Co., Inc. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 733-34 (8th Cir.2009) (discussing the application of the concerted misconduct test in *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 945, 948 (11th Cir.1999), wherein the plaintiff alleged that a non-signatory worked hand-in-hand with the signatory in a fraudulent scheme intertwined with and involving the obligations imposed by the contract containing the arbitration clause). Certainly, because of Kobe Steel's allegedly surreptitious negotiations with Primenergy seeking to circuitously obtain the benefits of PRM's technology for use in Japan, Kobe Steel is not "a complete stranger to the plaintiffs' ... agreements." *Ross*, 547 F.3d at 148. But, Kobe Steel is virtually so. The PRM/Primenergy agreements do not mention Kobe Steel and perform no function whatsoever relating to the supposed Kobe Steel/Primenergy "exclusive collaboration" agreement. And, Kobe Steel was never a participant in the PRM/Primenergy deal.

Thus, the concerted misconduct requirements of *Donaldson*, the case that mainly drives the court's analysis in this appeal, are almost totally absent. 581 F.3d at 733-34. Accordingly, as in *Donaldson*, this litigation, too, lacks sufficient allegations of pre-arranged collusive behavior, and Kobe Steel's arbitration demand should be rejected. *Id.* at 735.

I dissent.

C.A.8 (Ark.),2010.
PRM Energy Systems, Inc. v. Primenergy, L.L.C.
592 F.3d 830

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Slip Copy, 2011 WL 31068 (S.D.Cal.)
(Cite as: 2011 WL 31068 (S.D.Cal.))

United States District Court,
S.D. California.
NATIONAL FOOTBALL LEAGUE Players Association, on its own behalf and on behalf of Bruce Matthews, Plaintiff,
v.
NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, and Tennessee Titans, Defendants.

No. 10CV1671 JLS (WMC).
Jan. 5, 2011.

Matthew M. Walsh, Maya Dharwarkar, Dewey & Leboeuf LLP, Los Angeles, CA, Adam J. Kaiser, Jeffrey L. Kessler, Jeffrey H. Newhouse, Dewey & Leboeuf LLP, New York, NY, for Plaintiff.

Daniel L. Nash, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, Rex S. Heinke, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, CA, for Defendants.

ORDER (1) GRANTING DEFENDANTS' MOTION TO CONFIRM ARBITRATION AWARD AND (2) DENYING PLAINTIFF'S MOTION TO VACATE ARBITRATION AWARD

JANIS L. SAMMARTINO, District Judge.

On August 5, 2010, an arbitrator ruled that Bruce Matthews could pursue a workers' compensation claim in California but that the claim must proceed under Tennessee law, if at all. In response, the National Football League Players Association (NFLPA or Plaintiff) brought suit on behalf of itself and Matthews to vacate the arbitration award. Presently before the Court is Defendants National Football League Management Council (NLFMC) and Tennessee Titans' (collectively Defendants) motion to confirm arbitration award (Doc. 23 (Mot. to Confirm) and Plaintiff's motion to vacate arbitration award. (Doc. 24 (Mot. to Vacate).) After consideration, the Court finds that the arbitrator did not manifestly disregard the law and the award is not contrary to public policy. Thus, the Court **GRANTS** Defendants' motion to confirm arbitration award and **DENIES** Plaintiff's motion to vacate arbitration award. The arbitration award granted on August 5, 2010, is **CONFIRMED.**

BACKGROUND

Bruce Matthews played football in the National Football League (NFL) from 1983 to 2002. (Compl.¶ 12.) As a member of the NFL, Matthews was bound by a collective bargaining agreement (CBA) negotiated between the NFLMC, on behalf of the teams, and the NFLPA, on behalf of all NFL players. (Compl.¶ 19.) The CBA provides that all disputes involving the CBA or the player contract be submitted to final and binding arbitration. (*See* Compl. ¶ 18; Mot. to Confirm, Declaration of Daniel Nash, Ex. A at Art. IX, Sec. 1.)

During his NFL career, Matthews was employed by the Houston Oilers and its successor in interest, the Tennessee Titans. (Doc. 9 at 9-10.) Matthews' contract with the Titans stated that "all issues of law, issues of fact, and matters related to workers compensation benefits shall be exclusively determined by and exclusively decided in accordance with the internal laws of the State of Tennessee without resort to choice of law rules." (*Id.* at 10.)

Approximately five years after he left the NFL, Matthews filed a workers' compensation claim in California. (*Id.*) This ran contrary to the CBA and Matthews' contract with the Titans, and the Titans and the NFLMC filed a grievance against Matthews for "improper[ly] filing and pursuing claims ... in violation of [Matthews'] NFL Player Contract." (Compl., Ex. A at 2.)

The grievance was arbitrated. At issue was whether Matthews violated his player contract with the Titans by "filing a claim for workers' compensation benefits in California and requesting that the claim be processed under California law." (*Id.*) On August 5, 2010, the arbitrator found that Matthews violated his player contract. The arbi-

trator issued an arbitration award forcing Matthews to proceed under Tennessee law:

> [Matthews] is not precluded under Paragraph 26D from filing his workers compensation claim in California. However, [Matthews] is required to proceed under Tennessee law, and accordingly shall cease and desist from attempting to persuade the California tribunals to apply California law in violation of Paragraph 26D of the Player's Contract. Further, under this order [Matthews] is required to withdraw from the California proceeding, should the California tribunals ultimately deny the application of Tennessee law.

(*Id.* at 18.)

Unsatisfied with the arbitration award, Plaintiff filed suit, requesting the Court vacate the arbitration award pursuant to § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. After the relevant pleadings had been filed (Docs. 9 & 19), the parties filed the dueling motions at hand. Defendants' motion argues that the arbitration award should be upheld. And like clockwork, Plaintiff's argues the opposite.

JURISDICTION AND LEGAL STANDARD

"Section 301 of the Labor Management Relations Act authorizes the district courts to enforce or vacate an arbitration award entered pursuant to a collective bargaining agreement." *Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus., Inc., of Ariz.*, 84 F.3d 1186, 1190 (9th Cir.1996). The review is limited and deferential, however. *Id.* at 1190. In reviewing an award, this Court does not sit to hear claims of factual or legal error. *S. Cal. Gas Co. v. Utility Workers Union of Am., Local 132*, 265 F.3d 787, 792 (9th Cir.2001). Instead, the Court's task is "to review the procedural soundness of the arbitral decision." *Haw. Teamsters and Allied Workers Union, Local 996 v. United Parcel Serv.*, 241 F.3d 1177, 1180-81 (9th Cir.2001).

Nonetheless, in a narrow set of situations, the Court may vacate an arbitration award. "Vacatur of an arbitration award under § 301 of the LMRA is warranted: (1) when the award does not draw its essence from the collective bargaining agreement and the arbitrator is dispensing his own brand of industrial justice; (2) where the arbitrator exceeds the boundaries of the issues submitted to him; (3) when the award is contrary to public policy; or (4) when the award is procured by fraud." *S. Cal. Gas Co.*, 265 F.3d at 792-93.

An arbitration award may also be vacated because of the arbitrator's "manifest disregard of the law." *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1289 (9th Cir.2009). The Court notes, however, it is not clear this basis for vacatur is available in § 301 reviews. The "manifest disregard ground for vacatur is shorthand for a statutory ground under the [Federal Arbitration Act], specifically 9 U.S.C. § 10(a)(4)." *Id.* at 1290. And the Ninth Circuit has not resolved the issue whether the Federal Arbitration Act (FAA) speaks to suits brought under § 301. *See New United Motor Mfg., Inc. v. United Auto Workers Local 2244*, 617 F.Supp.2d 948, 954 n. 6 (N.D.Cal.2008). Nonetheless, the FAA is often used as a guide when forming the federal common law of labor arbitration under § 301. *Id.* Thus, this Court will assume, without deciding, that the "manifest disregard of the law" basis for vacatur is available in § 301 actions.

ANALYSIS

The August 5 arbitration award allowed Matthews to file a workers compensation claim in California. But it required that the claim be adjudicated under Tennessee law, if at all. The question before the Court is whether the award should be vacated. Procedurally, the Court is faced with a motion to vacate and a motion to confirm. But given the Court's posture on review, the null result is confirmation of the award. The onus rests on Plaintiff to establish a basis for vacatur. *United Food & Commercial Workers Int'l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir.1995).

Plaintiff makes three arguments for overturning the arbitration award. First, Plaintiff argues that the award is contrary to California law and public policy. (Mot. to Vacate at 6.) Second, Plaintiff argues that the award is contra-

ry to federal labor law. (*Id.* at 9.) And finally, Plaintiff argues that the award violates the Full Faith and Credit Clause. (*Id.* at 12.)

Given Plaintiff's arguments and the legal framework for reviewing arbitration awards, there are two bases for possibly vacating the August 5 award: because the arbitrator manifestly disregarded the law and because the award is contrary to public policy. The Court will consider vacatur under these two banners.

1. Manifest Disregard of the Law

Plaintiff argues that the arbitrator manifestly disregarded the Full Faith and Credit Clause of the United States Constitution when rendering its arbitration award. (Mot. to Vacate at 12.) The argument is problematic in light of the legal standard.

"The manifest disregard exception requires something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law." *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir.2007) (internal quotations omitted). Thus, the Court may not vacate an arbitration award even in the face of an erroneous interpretation of the law. *Id.* To vacate on this basis, the moving party must "show the arbitrator understood and correctly stated the law, but proceeded to disregard the same." *Id.* (internal citations and formatting omitted). Moreover, the "governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable." *Id.*

The parties and the Court agree that the arbitrator did not consider the Full Faith and Credit Clause when rendering its decision. (*See* Mot. to Vacate, Ex. A.) Plaintiff takes it a step further and argues that the failure to consider is a manifest disregard of the law and warrants vacatur. (Mot. to Vacate at 12.) But this argument is flawed; while it references the legal standard, it ignores the actual law. It is not clear from the record "that the arbitrator [ ] recognized the applicable law and then ignored it." *Comedy Club, Inc.*, 553 F.3d at 1290. Thus, the Court cannot vacate the arbitration award on this basis.

The Court recognizes, nonetheless, that an arbitration award violating the Full Faith and Credit Clause is problematic. But that possibility is better considered under the "violates public policy" rubric. The Court will, therefore, consider the Full Faith and Credit argument in the next section.

2. Public Policy

In this section, the Court considers whether the August 5 arbitration award is contrary to public policy and should be vacated.

A. Legal Standard

The "contrary to public policy" analysis has two main parts. *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1212 (9th Cir.1989). The Court must first delineate a public policy that is "explicit, well-defined, and dominant." *S. Cal. Gas Co.*, 265 F.3d at 794-95 (internal quotations omitted). Such delineation must be made from "reference to the laws and legal precedents and not from general considerations of proposed public interest." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). Second, the public policy must be "one that specifically militates against the relief ordered by the arbitrator." *Stead Motors*, 886 F.2d at 1212-13. Moreover, "[w]here more than one public policy is germane to an arbitration award, [the Court] must engage in balancing of the relevant policies to determine whether to apply the public policy exception to vacate the arbitral award." *Va. Mason Hosp. v. Wash. St. Nurses Ass'n*, 511 F.3d 908, 917 (9th Cir.2007). The party seeking vacatur bears the burden of showing that the award violates public policy. *Foster Poultry Farms*, 74 F.3d at 174.

B. Discussion

The parties raise several policies germane to an arbitration award denying recovery under California law. Plain-

tiff argues that California policy prevents contractual waivers of its workers' compensation protections and that federal policy prevents unions and employees from agreeing to violate minimum labor standards. (Mot. to Vacate at 10.) Also relevant is the policy evinced by the Full Faith and Credit Clause. In response, Defendants raise two countervailing policy considerations. Defendants argue that there is a policy favoring collective bargaining and arbitration and that California favors enforcing choice-of-law agreements. (Mot. to Confirm at 1.) The Court considers the applicability of each policy and balances them against each other.

(1) California Public Policy

The Court begins with California labor law and cases interpreting it. California Labor Code § 5000 states that "[n]o contract, rule, or regulation shall exempt the employer from liability for the compensation fixed by this division." Cal. Lab.Code § 5000. Based on § 5000 and case law, Plaintiff argues there is a policy that "an employment agreement purporting to waive the employee's rights under California's workers' compensation statute is void as a matter of law." (Mot. to Vacate at 7.) And because the August 5 arbitration award "holds that the NFLPA and NFLMC contractually waived the right of Matthews to seek workers' compensation benefits under California Labor Code § 3600," the award "cannot be squared with California's public policy" and must be vacated (*Id.* at 8-9.)

The predecessor statute to § 5000, containing the same language, was interpreted in *Alaska Packers Ass'n v. Industrial Accident Commission of California*, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044 (1935). And the Court begins with *Alaska Packers* in its search for an explicit, well-defined, and dominant public policy.

Alaska Packers involved three things, an employee, an employer, and a California workers' compensation award. The employee had signed a contract in California and agreed "to be bound by the Alaska Workmen's Compensation Law." *Alaska Packers*, 294 U.S. at 538. A short time later, the employee applied for and received California workers' compensation. *Id.* The employer disagreed with the award and fought it up to the United States Supreme Court. The employer argued that Labor Code § 5000 [FN1] was "invalid under the due process and the full faith and credit clauses of the Federal Constitution." *Id.* at 539.

> FN1. To benefit comprehension, the Court refers to the statute as § 5000 even though the Supreme Court considered the predecessor statute.

The employer's due process argument is relevant here.[FN2] The *Alaska Packers* employer argued that § 5000 violated due process because the statute "denies validity to the agreement that the parties should be bound by the Alaska Workmen's Compensation Act." *Id.* The Supreme Court disagreed. It noted that due process prevents a state from restricting or controlling the obligation of contracts executed and performed without the state. *Id* at 540. But because the contract was "entered into within [California], ... its terms, its obligation, and its sanctions are subject, in some measure to the legislative control of the state." *Id.* at 540-41. Moreover, the facts indicated that without workers' compensation in California, the employee and similarly situated parties would be without remedy. *Id.* at 541. And thus, the Court held that California "had a legitimate public interest in controlling and regulating this employer-employee relationship" and it would not violate due process to apply § 5000's ban on contracts waiving California workers' compensation. *Id.* at 522.

> FN2. This Court discusses the full faith and credit issue below.

Alaska Packers was favorably cited more than seventy years later, when a contract stood between an employee and California workers' compensation. *See Bowen v. Workers' Comp. Appeals Bd.*, 73 Cal.App.4th 15, 86 Cal.Rptr.2d 95 (Cal.Ct.App.1999). The Bowen court held that "an employer ... cannot, simply by adding a contract clause ..., deny an employee ... California wokers' compensation benefits where the employee accepts an offer of employment in California." *Id.* at 26, 86 Cal.Rptr.2d 95. "Such a contract clause ... would violate section 5000 prohibiting contracts exempting employers from liability under the California Workers' Compensation Act and frustrate California's interests in protecting employees hired in California and injured elsewhere." *Id.* at 27, 86 Cal.Rptr.2d

95.

After considering *Alaska Packers* and *Bowen*, this Court draws a public policy different from Plaintiff's. California law does not provide an explicit, well-defined, and dominant public policy barring all contractual waivers of California workers' compensation. It has, instead, evinced a nuanced analysis in which courts considered the extent of California's interest in providing workers' compensation. *Alaska Packers* explicitly noted that the employee entered into the contract in California and had little chance of remedy elsewhere. *Alaska Packers*, 294 U.S. at 542. The case also indicated that it was unnecessary to consider what effect should be given to § 5000 if the parties' relationship to California gave California "a lesser interest in protecting the employee." *Id.* at 543.

Indeed, even Plaintiff's briefing indicates that the policy is not so explicit, well-defined, or dominant. Plaintiff argues that "the bible of workers' compensation law explained that ... *Alaska Packers* began to develop the general test which inquires whether any incidents of the injury that are important and relevant to workers' compensation fall within the local state." (Doc. 36 at 5 (internal quotations and formatting omitted).) If there were an explicit, well-defined, and dominant policy against waiving of California workers' compensation, considerations of California's interest in protecting the employee would be unnecessary.

Certainly, there are situations in which California Labor Code § 5000 rightfully overrides a contract agreeing to workers' compensation based on another state's laws. But the Court is not in a position to determine whether this is one of those situations. The Court is charged with determining only whether there is a explicit, well-defined, dominant public policy militating against the arbitration award. And through this lens, the fact that California's policy is limited to certain situations belies the existence of a blanket policy. Thus, the Court finds that existing law does not provide an explicit, well-defined, and dominant public policy explicitly militating against an arbitration award preventing Matthews from obtaining relief under California law.

(2) Full Faith and Credit Clause

Plaintiff's Full Faith and Credit Clause argument is that the arbitration award "impos[es] the law of Tennessee upon the state of California," and the imposition violates the Full Faith and Credit Clause. (Mot. to Vacate at 12.) The question facing the Court is whether the Full Faith and Credit Clause evinces an explicit, well-defined, and dominant public policy specifically militating against the relief ordered by the arbitrator.

The Full Faith and Credit Clause provides, in relevant part, that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. A corollary to this rule concerns the extent one state must defer to another. This issue was addressed in two cases, both of which were discussed by the parties, and both of which the Court will consider here: *Alaska Packers* and *Pacific Employers Insurance Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940 (1939).

As noted before, the employee in *Alaska Packers* was contractually "bound by the Alaska Workmen's Compensation Law." *Alaska Packers*, 294 U.S. at 538. But a short time later, the employee applied for and received California workers' compensation. *Id.* A full faith and credit issue arose because the Alaska and California workers' compensation statutes were in direct conflict regarding the employee's workers' compensation remedy. At the Supreme Court, the employer argued that the Alaska worker's compensation statute provided remedy for an injury occurring in Alaska, and "that California courts denied full faith and credit to the Alaska statute by refusing to recognize it as a defense to the application of an award under the California statute." *Alaska Packers*, 294 U.S. at 539. The *Alaska Packers* Court indicated that the proper resolution of this conflict under the Full Faith and Credit Clause would be to "appra[ise] the governmental interests of each jurisdiction, and turn[ ] the scale of decision according to their weight." *Alaska Packers*, 294 U.S. at 548. And after appraising and turning, the Court found that Alaska's interests were not superior to that of California's. Thus, California "had the right to enforce its own laws in its own courts." *Id.* at 550.

Pacific Employers provided a similar situation. The employee was employed in Massachusetts and was sent to California, temporarily, for business. While in California, the employee suffered a work related injury. The employee instituted a workers' compensation claim under California law and succeeded.

The insurance carrier, in charge of paying the employee, argued that California, "in applying the California [workers' compensation act] and in refusing to recognize the Massachusetts [workers' compensation act] as a defense, had denied [Massachusetts]" the full faith and credit of its laws. *Pacific Employers*, 306 U.S. at 497. In the face of this argument, the Supreme Court turned to *Alaska Packers.* And it came to the same conclusion. The Court held that "[f]ew matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power." *Id.* at 503. Thus, the Full Faith and Credit Clause did not prevent California from exerting its own workers' compensation law.

Plaintiff draws, from these cases, the argument that "it is unconstitutional for [a] state to try to project its laws across state lines." (Mot. to Vacate at 13.) Moreover, Plaintiff argues that the arbitrator's award "seeks to expressly project Tennessee law across state lines by requiring that Tennessee law apply to Matthews's California workers' compensation claim." (*Id.*) Thus, according to Plaintiff, the August 5 award is contrary to the policy set forth by the Full Faith and Credit Clause and accompanying case law.

This Court disagrees. Plaintiff's argument is that the award projects Tennessee law into California, forcing California to apply Tennessee law. But the Full Faith and Credit Clause does not always prevent this. Both *Alaska Packers* and *Pacific Employers* indicated the importance of determining each states' interest in the matter before determining whether one state should apply the law of another. *See* *Alaska Packers*, 294 U.S. at 548; *Pacific Employers*, 306 U.S. at 503. Thus, the Full Faith and Credit Clause and the case law do not evince an explicit, well-defined, and dominant public policy specifically militating against an award requiring Matthews to pursue his workers' compensation claim under Tennessee law, if at all.

(3) Federal Law

Plaintiff's final argument is that the arbitration award is contrary to federal law. Plaintiff begins by arguing that federal law prevents collective bargaining agreements from undercutting a state's workers' compensation benefits. (Mot. to Vacate at 11.) Plaintiff then argues that "an arbitration award that requires an employee to forfeit rights he would otherwise be permitted to exercise under state workers' compensation laws is contrary to law, illegal, and must be vacated." (*Id.* at 11-12.)

Based on Plaintiff's arguments, the Court is faced with two issues: one concerning the validity of a collective bargaining agreement and the other with an arbitration award. The first argument can be resolved summarily. The Court is not reviewing the collective bargaining agreement, and there is no indication that the collective bargaining agreement itself undercuts any state's workers' compensation benefits.

As for the second argument-that an arbitration award must be vacated if it requires an employee to forfeit rights otherwise exercisable under state workers' compensation law-the Court finds that it does not apply. First, neither case Plaintiff cited stands for the proffered proposition. (*See* Mot. to Vacate at 11-12.) And second, to the extent the policy exists, it does not specifically militate against the arbitration award; Plaintiff falsely assumes Matthews has a right to receive California workers' compensation. That is to say, a policy preventing Matthews from waiving California workers' compensation if he is eligible for it does not apply if he is ineligible for it. The Court is not in a position to make findings regarding Matthews' eligibility for California workers' compensation. But the Court can determine that federal law does not evince a policy specifically militating against this arbitration award. And it does so here. Federal public policy is not a basis for vacating the arbitration award.

(4) Conclusion

What is apparent in this analysis is the Court's extremely limited review. The Court can determine only whether there exists an explicit, well-defined, and dominant public policy specifically militating against the arbitrator's award. Plaintiff provided the Court with three bases for deriving public policy: California law, the Full Faith and Credit Clause of the Constitution, and federal law. And after considering those bases, the Court concludes there is not an explicit, well-defined, and dominant public policy specifically militating against the arbitrator's award.[FN3]

FN3. Consequently, the Court will not discuss Defendants' countervailing policy considerations.

CONCLUSION

Plaintiff argues that the arbitration award granted on August 5, 2010, should be vacated because the arbitrator showed a manifest disregard of the law and because the arbitration award is contrary to public policy. The Court finds both of these bases for vacatur unavailing. Thus, the Court **GRANTS** Defendants' motion to confirm the arbitration award and **DENIES** Plaintiff's motion to vacate the arbitration award. The August 5, 2010 arbitration award is **CONFIRMED.**

IT IS SO ORDERED.

S.D.Cal.,2011.
National Football League Players Ass'n v. National Football League Management Council
Slip Copy, 2011 WL 31068 (S.D.Cal.)

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--- S.E.2d ----, 2012 WL 375446 (N.C.App.)
(Cite as: 2012 WL 375446 (N.C.App.))

Court of Appeals of North Carolina.
SEAL POLYMER INDUSTRIES–BHD, Plaintiff,
v.
MED–EXPRESS, INC., USA, Defendant.

No. COA11–1101.
Feb. 7, 2012.

Background: Seller filed notice of filing a foreign judgment, seeking to satisfy Illinois judgment against buyer on debt related to sale of two freight containers of latex gloves. Buyer filed motion for relief from foreign judgment and notice of defense. The Superior Court, Buncombe County, Alan Z. Thornburg, J., denied buyer's motion and found the judgment enforceable, and buyer appealed.

Holdings: The Court of Appeals, Martin, C.J., held that:
(1) buyer's statement in motion for relief was insufficient to establish lack of personal jurisdiction and rebut presumption that Illinois judgment was entitled to full faith and credit, and
(2) lack of findings of fact did not preclude enforcement.

Affirmed.

West Headnotes

[1] Judgment 228 815

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k815 k. Adjudications Operative in Other States. Most Cited Cases

Buyer's statement in motion for relief that it was incorporated under North Carolina law, had its principal place of business in North Carolina, and that it had “no minimum contacts with the State of Illinois” was insufficient to establish lack of personal jurisdiction in Illinois and rebut presumption that Illinois judgment in favor of seller was entitled to full faith and credit. West's N.C.G.S.A. § 1C–1705(a).

[2] Judgment 228 815

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k815 k. Adjudications Operative in Other States. Most Cited Cases

In a proceeding for enforcement of a foreign judgment, the introduction into evidence of an authenticated copy of the judgment establishes a presumption that it is entitled to full faith and credit. West's N.C.G.S.A. § 1C–1705(b).

[3] Judgment 228 815

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts

228k815 k. Adjudications Operative in Other States. Most Cited Cases

The judgment debtor may rebut the presumption that a foreign judgment established by an authenticated copy is entitled to full faith and credit upon a showing that the rendering court did not have jurisdiction over the parties. West's N.C.G.S.A. § 1C–1705(b).

[4] Judgment 228 823

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k823 k. Enforcement in Other States. Most Cited Cases

The judgment creditor seeking to enforce a foreign judgment is not required to bring forth any evidence to show that no defenses available to the debtor are valid. West's N.C.G.S.A. § 1C–1705(b).

[5] Judgment 228 818(4)

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k818 Want of Jurisdiction
228k818(4) k. Presumptions as to Jurisdiction. Most Cited Cases

When a judgment of a court of another state is challenged on the grounds of jurisdiction, there is a presumption the court had jurisdiction until the contrary is shown. West's N.C.G.S.A. § 1C–1705(a).

[6] Judgment 228 823

228 Judgment
228XVII Foreign Judgments
228k814 Judgments of State Courts
228k823 k. Enforcement in Other States. Most Cited Cases

Lack of findings of fact in both Illinois foreign judgment and in North Carolina order enforcing the judgment did not render the judgment unenforceable. West's N.C.G.S.A. § 1C–1705(a).

[7] Judgment 228 219

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General
228k219 k. Contents in General. Most Cited Cases

Judgment 228 222

228 Judgment
228VI On Trial of Issues
228VI(A) Rendition, Form, and Requisites in General

228k221 Designation of Amount
228k222 k. In General. Most Cited Cases

Judgment 228 244

228 Judgment
228VI On Trial of Issues
228VI(B) Parties
228k244 k. Designation of Parties. Most Cited Cases

Illinois judgments are valid if they state the name of the defendant and amount of the judgment; they do not need to contain findings of fact to be enforceable.

[8] Trial 388 392(1)

388 Trial
388X Trial by Court
388X(B) Findings of Fact and Conclusions of Law
388k392 Requests for Findings
388k392(1) k. Necessity for Request. Most Cited Cases

In North Carolina, either party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required.

[9] Appeal and Error 30 846(5)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k844 Review Dependent on Mode of Trial in Lower Court
30k846 Trial by Court in General
30k846(5) k. Necessity of Finding Facts. Most Cited Cases

Where no written findings are made, proper findings are presumed, and therefore, the Court's role on appeal is to review the record for competent evidence to support the presumed findings.

Appeal by defendant from order entered 21 June 2011 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 23 January 2012.

Robert J. Deutsch, P.A., by Tikkun A.S. Gottschalk, for plaintiff-appellee.

Stephen Barnwell, for defendant-appellant.

MARTIN, Chief Judge.

Defendant Med–Express, Inc., USA appeals from an order denying its motion for relief from a foreign judgment and enforcing a 14 March 2011 judgment from an Illinois court. For the following reasons, we affirm the order of the trial court.

On 11 December 2009, plaintiff, Seal Polymer Industries–BHD, filed a complaint in the Circuit Court of Cook

County, Illinois, to collect a debt in the amount of $104,000.00, plus interest and costs, from defendant related to the sale of two freight containers of latex gloves. Defendant informed plaintiff that, rather than filing an answer, it would not make an appearance based on its belief that it had no contacts with Illinois and would attack the judgment based on personal jurisdiction in the event that plaintiff thereafter tried to enforce the judgment in North Carolina. Defendant also sent a letter to this effect to the Clerk of Cook County, Illinois, and to the trial court judge, the Honorable Judge Ronald Bartkowicz. Judge Bartkowicz ultimately entered an order, which contained no written findings of fact, awarding $104,040.00 to plaintiff on 14 March 2011.

Plaintiff filed a Notice of Filing Foreign Judgment and a copy of the Illinois judgment in Buncombe County Superior Court on 3 May 2011 pursuant to N.C.G.S. § 1C–1704, along with an affidavit from its attorney affirming that the judgment is final and unsatisfied. Defendant filed a Motion for Relief from Foreign Judgment and Notice of Defense. After a hearing, the superior court denied defendant's motion for relief and ruled that the Illinois judgment is enforceable under N.C.G.S. §§ 1C1701 through 1C–1705. Defendant appeals.

___

The sole issue on appeal is whether the trial court erred in denying defendant's Motion for Relief from Foreign Judgment and Notice of Defense and concluding that the Illinois judgment is enforceable in North Carolina.

[1] Defendant first contends its Motion for Relief contained evidence which rebutted the presumption that the foreign judgment was enforceable, and consequently, the trial court erred in enforcing the foreign judgment. We disagree.

[2][3][4][5] Under N.C.G.S. § 1C–1705 (a), a "judgment debtor may file a motion for relief from, or notice of defense to, [a] foreign judgment ... on [any ground] for which relief from a judgment of this State would be allowed." N.C. Gen.Stat. § 1C–1705(a) (2011). The judgment creditor has the burden of proving that the foreign judgment is entitled to full faith and credit in North Carolina. N.C. Gen.Stat. § 1C–1705(b) (2011). In a proceeding for enforcement of a foreign judgment, the introduction into evidence of an authenticated copy of the judgment establishes a presumption that it is entitled to full faith and credit. *Lust v. Fountain of Life, Inc.*, 110 N.C.App. 298, 301, 429 S.E.2d 435, 437 (1993). The judgment debtor may rebut this presumption "upon a showing that the rendering court did not have ... jurisdiction over the parties." *Id.* The judgment creditor, however, is not required to bring forth any evidence to show that no defenses available to the debtor are valid. *Id.* at 302, 429 S.E.2d at 437. "[W]hen a judgment of a court of another state is challenged on the grounds of jurisdiction ... there is a presumption the court had jurisdiction until the contrary is shown." *Thrasher v. Thrasher*, 4 N.C.App. 534, 540, 167 S.E.2d 549, 553 (1969).

In the instant case, plaintiff had the burden of proving that the foreign judgment is entitled to full faith and credit. Plaintiff met this burden by attaching an authenticated copy of the Illinois judgment to its Notice of Filing Foreign Judgment. Thus, defendant needed to present evidence to rebut the presumption that the judgment is enforceable by asserting a defense under N.C.G.S. § 1C–1705 (a). In its Motion for Relief from Foreign Judgment and Notice of Defense, defendant failed to present any evidence or assert any factual allegations which would support a finding that the Illinois court lacked personal jurisdiction. Rather, defendant merely stated that it was incorporated under North Carolina law, had its principal place of business in North Carolina, and that it had "no minimum contacts with the State of Illinois." This conclusory statement alone is insufficient to establish the affirmative defense of lack of personal jurisdiction. *See Ft. Recovery Indus., Inc. v. Perry*, 57 N.C.App. 354, 356–57, 291 S.E.2d 329, 331 (1982). Therefore, defendant has failed to rebut the presumption that the Illinois judgment is entitled to full faith and credit.

[6] Defendant next contends the foreign judgment is not enforceable because neither the Illinois order, nor the North Carolina order enforcing it, include findings of fact. We disagree.

[7][8][9] Illinois judgments are valid if they state the name of the defendant and amount of the judgment; they do not need to contain findings of fact to be enforceable. *See* *Bell Discount Corp. v. Pete Weck's Auto Serv., Inc.*, 4 Ill.App.2d 397, 124 N.E.2d 674, 675 (Ill.App.Ct. 1st Dist.1954). In North Carolina, "[e]ither party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required." *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C.App. 612, 615, 532 S.E.2d 215, 217, *appeal dismissed and disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). "Where no [written] findings are made, proper findings are presumed," and therefore, "our role on appeal is to review the record for competent evidence to support these presumed findings." *Id.* at 615, 532 S.E.2d 215, 532 S.E.2d at 217–18. The admission of an authenticated copy of the Illinois judgment established a presumption that there was no defect in personal jurisdiction, which defendant was then required to rebut. As discussed above, defendant failed to introduce factual evidence that the Illinois trial court lacked personal jurisdiction over it because it merely recited that it was a North Carolina corporation that did not have "minimum contacts" with Illinois. Therefore, because defendant has not rebutted the presumption that there was personal jurisdiction in the instant case, we hold that the trial court did not err in enforcing the Illinois judgment.

Affirmed.

Judges McGEE and CALABRIA concur.

N.C.App.,2012.
Seal Polymer Industries-BHD v. Med-Exp., Inc., USA
--- S.E.2d ----, 2012 WL 375446 (N.C.App.)

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United States Court of Appeals,
Fifth Circuit.
HORTON AUTOMATICS, Plaintiff–Appellee,
v.
The INDUSTRIAL DIVISION OF the COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO; Local 86122, Defendants–Appellants.

No. 12–40576
Summary Calendar.
Jan. 4, 2013.

James Alan Mills, Denlinger, Rosenthal & Greenberg, Cincinnati, OH, Ralph F. Meyer, Brian Charles Miller, Royston, Rayzor, Vickery & Williams, L.L.P., Corpus Christi, TX, for Plaintiff–Appellee.

David A. Van Os, Esq., Austin, TX, for Defendants–Appellants.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 2:11–CV–381.

Before SMITH, PRADO, and HIGGINSON, Circuit Judges.

JERRY E. SMITH, Circuit Judge: [FN*]

FN* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Horton Automatics ("Horton") sued The Industrial Division of the Communication Workers of America, AFL–CIO, and Local 86122 ("the union"), seeking to vacate an arbitration award. The district court granted summary judgment to Horton, vacating the affirmative relief granted by the award. The union appeals, and we affirm.

I.

Horton and the union were parties to a collective bargaining agreement ("CBA"), Article 13 of which provided for arbitration of grievances concerning discipline but limited the arbitrator's role:

> In determining whether the Company had cause to impose the aggrieved disciplinary action, the Arbitrator shall be limited to deciding whether a published rule or regulation which formed the basis for the discipline was in fact reasonable and violated by the employee.... [A]ny departure or deviation by the arbitrator from the expressed terms, or requirements, set forth in this Article shall render the Arbitrators award null and void and of no effect.

The CBA granted Horton the exclusive right to "discharge employees for just cause, subject to contractual provisions," and removed seniority from any employee "discharged for just cause subject to contractual provisions."

Ruben de la Garza, a Horton employee, operated a tapper, an electric drill that scores threads into holes so that a bolt can later be fitted into the threaded hole. Horton equipped the tapper with an adjustable guard, which employees

were required to have in place whenever the tapper was turned on. The tapper had to be lubricated frequently either by using a spray bottle or by holding a small container of lubricant under the tap so that the tap was submerged. The latter method required the tapper to be turned off, because the operator had to reach past the safety guard to put a hand near the tap.

In 2010, Horton's facilities maintenance manager asked de la Garza to demonstrate how the tapper operated. De la Garza secured a piece of metal in the machine's vice, reached past the guard, held a small cup of lubricant under the tap, and turned on the machine. During a subsequent investigation, de la Garza admitted that he had operated the tapper in that manner for about eighteen months.

For most work-rule violations, Horton had established a five-step process, beginning with a documented reminder and culminating in an investigatory suspension that could lead to termination. For more serious violations, such as a "[s]afety violation that causes serious injury or could have caused serious injury," Horton could skip the warning steps. Horton determined that de la Garza's repeated unsafe operation of the tapper was a serious violation, so it decided to skip a step, as it did whenever an employee tampered with or bypassed a safety guard. Because de la Garza was already at step three, Horton skipped a final written warning and discharged him.

The union appealed the discharge to arbitration, and the parties agreed to frame the issue as whether "the Employer ha[d] just cause to discharge Ruben DeLaGarza ... in accordance with the provisions of the [CBA]? If not, what is the appropriate remedy?" The arbitrator found that the "serious injury" safety rule was reasonable and that de la Garza had violated the rule.

Nonetheless, the arbitrator found "that a question exists as to whether or not [Horton] is applying discipline consistently to similarly situated employees." Although he acknowledged that Horton had consistently skipped a warning step for guard violations, he noted that Horton did not always skip a step for other serious safety violations. Because he was "not totally convinced" that Horton should treat guard violations more seriously than other violations, he found that Horton did not have just cause to terminate de la Garza, whom he reinstated.

Horton asked the district court to vacate the arbitration award, arguing that the arbitrator had exceeded his power as defined in the CBA. The Union argued that the arbitrator was entrusted with interpreting the entire CBA, including "aspirational goals of harmonious relations between the company and its employees" and the "just cause" references. The court granted Horton's motion for summary judgment and denied the Union's motion because of the "plain and unambiguous import" of the limitations contained in Article 13 of the CBA. The court vacated "any affirmative relief awarded" to de la Garza in the arbitration award.

II.

In a suit to vacate an arbitration award, we review a summary judgment *de novo*. *Weber Aircraft Inc. v. Gen. Warehousemen & Helpers Union Local 767*, 253 F.3d 821, 824 (5th Cir.2001). Judicial review of arbitration awards is "extremely limited," but judicial deference ends "where the arbitrator exceeds the express limitations of his contractual mandate." FN1

FN1. *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n, AFL–CIO*, 889 F.2d 599, 602 (5th Cir.1989); *see also* 9 U .S.C. § 10(a)(4) (stating that a district court may vacate award "where the arbitrators exceeded their powers").

III.

A.

"Arbitration is a matter of contract." *Rain CII Carbon, LLC v. ConocoPhillips Co.*, 674 F.3d 469, 472 (5th Cir.2012). If a contract sets forth a "limitation on the authority of an arbitrator, we will vacate an award that ignores the limitation." *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397, 401 (5th Cir.2007). "[L]imitations

must be plain and unambiguous and ... we resolve all doubts in favor of arbitration." *Id.* at 404.

The language of the CBA is plain and unambiguous. To determine whether Horton had cause to discharge de la Garza, the arbitrator was expressly limited to answering two questions: (1) whether the serious-injury rule was reasonable and (2) whether de la Garza violated the rule. Having answered both questions in the affirmative, the arbitrator was bound by the CBA to decide that Horton had cause. In asking and answering a third question—whether Horton had applied discipline consistently in similar situations—the arbitrator exceeded his authority under the CBA.

The union does not argue that Article 13 allows an arbitrator, in deciding whether Horton had cause, to consider more than whether the employee had violated a reasonable rule. Instead, the union maintains that Article 13's "cause" is meaningfully distinct from "just cause," used elsewhere in the CBA and not defined. The union contends that an arbitrator could rationally conclude that cause and just cause are not the same thing and that some meaning should be given to just cause beyond the two questions of Article 13.

Furthermore, the union contends, the issue actually submitted by the parties gave the arbitrator broad authority to determine just cause as defined by the CBA as a whole, not just by Article 13. The union notes that an arbitrator's authority is granted both by the parties' agreement to arbitrate and by their submission agreement.[FN2]

> FN2. *See* *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir.1980).

The problem with the union's position is that cause and just cause are synonymous in the context of labor arbitration, despite the latter's modifier. [FN3] In *Container Products, Inc. v. United Steelworkers of America*, 873 F.2d 818, 818–20 (5th Cir.1989), for example, the contract required a showing of "proper cause," the parties submitted the issue of whether the company had "just cause," and the arbitrator found evidence of "cause" and implicitly of "just cause." This court treated all three terms interchangeably and held that an implicit finding of "just cause" bound the arbitrator under the contract. *Id.* at 820.

> FN3. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 932 (6th ed. 2003) ("[I]t is common to include the right to suspend and discharge for 'just cause,' 'justifiable cause,' 'proper cause,' 'obvious cause,' or quite commonly simply for 'cause.' There is no significant difference between these terms.").

There is no discrepancy, therefore, between Article 13's cause and just cause, as used elsewhere in the CBA. The arbitrator was not granted authority by the modifier "just" to consider a broad range of issues. Similarly, the submitted issue referred to just cause "in accordance with the provisions of the [CBA]." Just cause was not defined in the CBA, but its synonym, cause, was—in Article 13. Neither the CBA nor the submitted issue granted the arbitrator authority to answer any question beyond the express limitations contained in Article 13. The arbitrator's decision to ask and answer an additional question, therefore, exceeded his authority under the CBA and must be vacated.

B.

The Union asserts that we ought to remand to the arbitrator for further proceedings, should we decide to vacate the award. We disagree.

In certain instances, remand for further arbitration proceedings is appropriate, and this court "must not foreclose further proceedings by settling the merits according to [our] own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the [CBA]." *United Paperworkers Int'l Union, AFL–CIO v. Misco, Inc.*, 484 U.S. 29, 40 n. 10 (1987). In this case, however, the merits have already been decided, implicitly, by the arbitrator himself.

Article 13 of the CBA prescribes that the arbitrator must determine whether Horton had cause by deciding whether the rule in question was reasonable and was actually violated by the disciplined employee. The arbitrator has already found that Horton's serious-injury rule was reasonable and that de la Garza actually violated it. Because the CBA defines cause to exist where those questions are answered affirmatively, and the arbitrator answered them affirmatively, the arbitrator, implicitly, found that Horton had cause to discharge de la Garza.[FN4] Under the CBA—which limits the arbitrator to deciding whether Horton had cause—and under the submitted issue—which asked the arbitrator to determine a proper remedy only if Horton lacked just cause—the arbitrator has nothing more to do. There is therefore no reason to remand.

> FN4. *See* *Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 343 F.3d 401, 409 (5th Cir.2003) ("In this circuit, we have long recognized that where an arbitrator implicitly finds that just cause exists, it need not recite the operative phrase 'just cause.' ... [I]mplicit findings of just cause for termination warrant the same significance and carry the same force as explicit findings." ") (internal citations omitted).

The judgment, which vacates the arbitrator's award with respect to any affirmative relief to the union, is AFFIRMED.

--- So.2d ----, 2008 WL 306008 (Miss.App.)
Only the Westlaw citation is currently available.

Court of Appeals of Mississippi.
COVENANT HEALTH & REHABILITATION OF PICAYUNE, LP and Covenant Dove, Inc., Appellants
v.
Nellie LUMPKIN, by and through Fred Lumpkin, Next Friend, Appellee.
No. 2007-CA-00449-COA.
Feb. 5, 2008.
Before KING, C.J., BARNES and ISHEE, JJ.
ISHEE, J., for the Court.
*1 ¶ 1. Nellie Lumpkin, through her husband and next friend Fred Lumpkin, filed suit against Covenant Health and Rehabilitation of Picayune (Covenant Health) seeking damages for personal injuries that allegedly occurred during her stay at its facility. Covenant Health subsequently moved to compel arbitration of the case based on the arbitration clause found in its standard admissions agreement. The trial court refused to compel arbitration, finding the admissions agreement substantively unconscionable and void as a matter of law. Aggrieved, Covenant Health appeals, seeking enforcement of the arbitration provision. Lumpkin asks us to affirm the decision of the trial court, and find that either (1) no arbitration agreement was ever created, because Lumpkin's daughter lacked capacity to bind Lumpkin to arbitration or, in the alternative, that the arbitration clause fails for lack of consideration; or (2) the arbitration clause is void due to fraud in the inducement and substantive unconscionability.
¶ 2. Finding that Lumpkin's daughter possessed the capacity to bind her mother to arbitration, that there existed sufficient consideration to support the creation of the arbitration clause, that Lumpkin's daughter was not fraudulently induced into signing the admissions agreement, and that the admissions agreement and the arbitration clause are substantively conscionable, we reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion.
FACTS AND PROCEDURAL HISTORY
¶ 3. On April 11, 2003, Lumpkin was admitted to the Picayune Convalescent Center (owned and operated by Covenant Health). She was accompanied by her daughter, Beverly McDaniel. Due to several illnesses, including Parkinson's disease, psychosis, and dementia, that prevented Lumpkin from fully participating in the admissions process, McDaniel filled out all the admissions paperwork and signed the admissions agreement. That agreement contained, among other things, an arbitration clause

requiring both parties to submit to arbitration in the event any dispute arose between them.

¶ 4. Lumpkin left the Picayune Convalescent Center on December 23, 2004. In November 2006, she filed suit against Covenant Health, alleging negligent treatment and malpractice during her stay at the center. On December 11, 2006, Covenant Health filed its motion to compel arbitration, based on the arbitration clause contained in the admissions agreement used at the time Lumpkin was admitted to the Picayune Center. In March 2007, the trial court denied Covenant Health's motion to compel arbitration, and it is from this ruling that Covenant Health now appeals.

DISCUSSION AND ANALYSIS

[1] Headnote Citing References[2] Headnote Citing References ¶ 5. This Court reviews orders denying motions to compel arbitration de novo. Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507, 513(¶ 9) (Miss.2005). Although not directly raised by either party in this case, as a threshold issue this Court must determine whether the Federal Arbitration Act (FAA) controls the arbitration agreement presented here. Our supreme court has previously held that "singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce." Id. at 515(¶ 16). In this case, as in Vicksburg Partners, "since the arbitration clause is a part of a contract (the nursing home admissions agreement) evidencing in the aggregate economic activity affecting interstate commerce, the Federal Arbitration Act is applicable...." Id. at 515-16(¶ 18).

*2 ¶ 6. Having made the determination that the arbitration agreement in this case is governed by the FAA, we must next determine if that arbitration agreement is valid. Again we are guided by the supreme court, which has stated that "[i]n determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement." East Ford, Inc. v. Taylor, 826 So.2d 709, 713(¶ 9) (Miss.2002). The second prong involves an inquiry into "whether legal constraints external to the parties' agreement foreclosed arbitration of those claims." Id. at 713(¶ 10) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

[3] Headnote Citing References ¶ 7. With respect to the first prong of the analysis outlined above, "[t]o determine whether the parties agreed to arbitration, we simply apply contract law." Terminix Int'l, Inc. v. Rice, 904 So.2d 1051, 1055(¶ 9) (Miss.2004). Regarding this prong of our inquiry, Lumpkin asserts that her daughter, McDaniel, lacked the capacity to consent to arbitration as her health-care surrogate and, in the alternative,

that the arbitration clause is void because it lacked sufficient consideration. We address each of these issues below.

1. Beverly McDaniel possessed the capacity to bind her mother to arbitration.

¶ 8. Lumpkin asserts that her daughter, Beverly McDaniel, did not have the capacity to bind her to arbitration while acting as her health-care surrogate under the Uniform Health-Care Decisions Act. Miss.Code Ann. §§ 41-41-201 to 41-41-229 (Supp.2006). Lumpkin does not dispute that McDaniel was, in fact, acting as her health-care surrogate for the purposes of that section when she was admitted to the Picayune Convalescent Center.

¶ 9. Our supreme court recently addressed this very issue in Covenant Health Rehab of Picayune, L.P. v. Brown, 949 So.2d 732 (Miss.2007). In Brown, the plaintiffs, as administrators of the estate of their deceased mother, filed a wrongful death suit against the nursing home in which their mother resided prior to death. Id. at 735(¶ 1). An adult daughter of the deceased signed the admissions agreement as the "responsible party" for her mother upon admission to the facility. Id. The defendants filed a motion to compel arbitration based on the admissions agreement, and the trial court denied that motion. On appeal, the supreme court held that the adult daughter of the patient, acting as a health-care surrogate, had the authority to contractually bind her mother in health-care matters under our Uniform Health-Care Decisions Act. Id. at (¶ 3).

[4] Headnote Citing References ¶ 10. In reversing the trial court's denial of the motion to compel arbitration in Brown, the supreme court implicitly held that the surrogate's authority to bind the patient extended to the arbitration clause in the admissions agreement. In this case, because Lumpkin does not dispute that her daughter was acting as her health-care surrogate for the purposes of the Uniform Health-Care Decisions Act, we see no reason to depart from the supreme court's holding in Brown. Therefore, we find that a health-care surrogate, acting under the provisions of the Uniform Health-Care Decisions Act, is capable of binding his or her patient to arbitration. Accordingly, we find that Lumpkin's argument on this issue is without merit.

2. The arbitration clause does not fail for lack of consideration.

*3 ¶ 11. Lumpkin also asserts that the arbitration clause should fail for lack of consideration. She relies solely on the affidavit of Keri Ladner, the facility administrator for Covenant Health, in making this argument. Lumpkin points to Ladner's statement that Lumpkin would not have been refused admission to the facility had she objected to the arbitration agreement as evidence that the arbitration clause lacked consideration, and that therefore the arbitration clause should be stricken from the admissions agreement.

[5] Headnote Citing References[6] Headnote Citing References ¶ 12. We first note that Ladner's statements are irrelevant to the issue of consideration. The only thing her statements represent is an admission that, in retrospect, Lumpkin's daughter could have entered into a more beneficial contract for her mother had she bargained for it. Simply because one party to a contract later admits that the other party could have successfully bargained for more beneficial terms at the time the contract was formed does not mean that the element of the contract not bargained for is void for lack of consideration. In any contract, "[a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration." Theobald v. Nosser, 752 So.2d 1036, 1040(¶ 15) (Miss.1999).

[7] Headnote Citing References[8] Headnote Citing References ¶ 13. Second, even if Ladner's statements were relevant to this issue, this Court would be prevented from considering them by the parol evidence rule. It is a well-settled principle of contract law that "a written contract cannot be varied by prior oral agreements. Moreover, as an evidentiary matter, parol evidence to vary the terms of a written contract is inadmissible." Carter v. Citigroup, Inc., 938 So.2d 809, 818(¶ 41) (Miss.2006) (quoting Stephens v. Equitable Life Assurance Soc'y of the United States, 850 So.2d 78, 83(¶ 14) (Miss.2003)). Although parol evidence is sometimes admissible when there has been, among other things, a showing that a contract contains ambiguous language, here there has been no such showing. Neither party has even suggested that there is any ambiguity in the agreement.

¶ 14. Without such a showing, we must look to the agreement of the parties in order to determine whether there was sufficient consideration. Again, in any contract, "[a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration." Theobald, 752 So.2d at 1040(¶ 15).

[9] Headnote Citing References ¶ 15. Here, there is quite clearly sufficient consideration to support the arbitration agreement. Both parties undertook duties towards one another under the admissions agreement. Covenant Health promised to provide care and assistance to Lumpkin. Lumpkin promised to pay it for its service. The arbitration clause was one portion of that exchange, and it obligated both parties to arbitrate any dispute between them. The mutuality of exchange found throughout the admissions agreement provides ample evidence that there was sufficient consideration to support the arbitration clause; therefore, we find that the arbitration clause does not fail for lack of consideration.

3. The dispute is within the scope of the arbitration clause.
*4 [10] Headnote Citing References[11] Headnote Citing References ¶ 16. Although not directly addressed by either party in this appeal, under our standard of review in this case, this Court must determine that the dispute between the parties falls within the scope of the arbitration agreement in order to compel arbitration. To do so, we look to the language of the arbitration clause itself. In this case, that language is very clear. The arbitration clause states that "[t]he Resident and Responsible Party agree that any and all claims, disputes, and/or controversies between them and the Facility or its Owners, officers, directors, or employees shall be resolved by binding arbitration...." Clearly, the arbitration clause was meant to apply to any dispute, regardless of its nature, that arose between the facility and Lumpkin, including her current claims of negligence and malpractice. Consequently, we find that the dispute between Lumpkin and Covenant Health falls within the scope of the arbitration clause.
4. The arbitration clause does not violate any external legal constraints.
¶ 17. Having determined that a valid arbitration agreement exists, and that the current dispute falls within the scope of that agreement, we now turn to the second prong of the test set out in East Ford, which involves an inquiry into "whether legal constraints external to the parties' agreement foreclose arbitration of those claims." East Ford, 826 So.2d at 713(¶ 10) (quoting Mitsubishi Motors Corp., 473 U.S. at 626, 105 S.Ct. 3346). The supreme court has stated that, under the second prong of the East Ford test, "applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act." Id.
¶ 18. Lumpkin specifically asserts two of the defenses listed above, fraud and substantive unconscionability, in her argument to sustain the ruling of the trial court and void the arbitration clause.
A. McDaniel was not fraudulently induced into signing the admissions agreement.
[12] Headnote Citing References[13] Headnote Citing References ¶ 19. Lumpkin argues that her daughter, McDaniel, was fraudulently induced into signing the admissions agreement. She again relies on the affidavit of Ladner, the facility administrator, and the fact that Ladner stated that acceptance of the arbitration clause was not a necessary precondition to her admittance to the facility. This statement does not give rise to a defense of fraud. As a contract defense, "[f]raud in the inducement arises when a party to a contract makes a fraudulent misrepresentation, i.e., by asserting information he knows to be untrue, for the purpose of inducing the innocent party to enter into a contract." Lacy v. Morrison, 906 So.2d 126, 129(¶ 6) (Miss.Ct.App.2004).

[14] Headnote Citing References ¶ 20. The defense of fraud in the inducement would be appropriately raised if, for instance, Ladner had made material misrepresentations to McDaniel when she signed the admissions agreement, and those misrepresentations had been meant to, and did, induce McDaniel to sign the agreement. However, the facts indicate that this is not what happened. As we noted above, all that Ladner's statements demonstrate is that McDaniel could have potentially bargained for a better deal from the facility, i.e. one that did not include the arbitration clause. However, the admissions agreement itself did not contain any false information, it simply contained terms that could have been altered had McDaniel attempted to do so. The fact that she failed to bargain for those terms does not constitute fraud any more than it constitutes a lack of consideration, and therefore McDaniel was not fraudulently induced into signing the admissions agreement.

B. The arbitration clause is substantively conscionable.

*5 ¶ 21. We come now to the final issue raised in this appeal. Lumpkin asserts that the admissions agreement contains several provisions that have previously been found unconscionable by our supreme court and, as a consequence, this Court should void the entire admissions agreement. In the alternative, Lumpkin argues that the terms of the arbitration clause itself are unconscionable and that we should strike the arbitration clause from the admissions agreement. Although this Court has serious misgivings about the language included in the admissions agreement, we are compelled to confirm the substantive conscionability of the admissions agreement and the arbitration clause.

[15] Headnote Citing References ¶ 22. Lumpkin correctly points out that the admissions agreement her daughter signed contains several clauses that have exactly the same language as clauses in other nursing home admissions agreements that our supreme court has explicitly held are unconscionable. In fact, the admissions agreement in this case appears to be identical to the one at issue in Brown, discussed above. FN1 Specifically, (1) the language in section C5 requiring forfeiture by the resident for all claims except those for willful acts, (2) the language in section C8 waiving liability for the criminal acts of individuals, (3) the "grievance resolution process" set out in sections E5 and E6, (4) the language limiting the recovery of actual damages in section E7, (5) the language limiting the recovery of punitive damages in section E8, (6) the language in section E12 requiring the resident to pay all costs if the resident attempts to avoid or challenge the grievance resolution process, and (7) the language of section E16 that purports to change the statute of limitations were all held to be unconscionable in Brown. Moreover, the last line of the arbitration clause itself contains language identical to language the supreme court struck from the arbitration clause that was at issue in

Brown. Seeing no reason to depart from the supreme court's findings in Brown, we agree with Lumpkin's assertion that these clauses in her admissions agreement contain unconscionable language as well. We therefore strike the offending language of clauses C5, C8, E5, E6, E7, E8, E12, and E16, as well as the last line of the arbitration clause from the admissions agreement.

¶ 23. We cannot, however, agree with the remainder of Lumpkin's argument, that because of these unconscionable provisions we must void the entire contract, or that the arbitration clause as a whole should be voided. In Brown, when faced with exactly the same unconscionable language, the supreme court chose to merely sever the unconscionable portions of the admissions agreement and the offending portion of the arbitration clause, and enforce the remaining sections, including compelling the parties to arbitrate. Given the striking similarity of these two cases, including the fact that they involve substantially identical admissions agreements, we are compelled to do the same here as the supreme court did in Brown. Accordingly, we find that the admissions agreement, absent the offending language, is substantively conscionable and the parties are bound by it, including its arbitration clause.

*6 ¶ 24. THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

NATURAL LAW AND POSITIVE LAW

- **Law:** A body of enforceable rules governing relationships among individuals and between individuals and their society.

  - **Natural Law:** A system of universal moral and ethical principles that are inherent in human nature and that people can discover by using their natural intelligence (*e.g.*, murder is wrong; parents are responsible for the acts of their minor children).

  - **Positive Law:** The conventional, or written, law of a particular society at a particular point in time (*e.g.*, the U.S. Constitution, the Texas Securities Act, the Internal Revenue Code, and published judicial decisions).

PRIMARY SOURCES OF AMERICAN LAW

- U.S. law primarily takes the form of

  (1) **constitutions** setting forth the fundamental rights of the people living within the United States or a given state, describing and empowering the various branches of government, and prescribing limitations on that power;

  (2) legislatively-enacted **statutes** and local **ordinances**;

  - A given state statute may be based on a **uniform law** (*e.g.*, the Uniform Commercial Code) or on a **model act** (*e.g.*, the Model Business Corporations Act). However, each state is free to depart from the uniform law or model act as it sees fit.

  (3) **administrative rules and regulations** promulgated by federal, state, and local regulatory agencies; and

  (4) **common law**, which is the body of judicial decisions that interpret and enforce any of the foregoing as well as those relationships among individuals or between individuals and their society which are not subject to constitutional, statutory, or administrative law.

HIERARCHY AMONG PRIMARY SOURCES OF AMERICAN LAW

- Laws emanating from the various primary sources of American law are enforced according to the following hierarchy:

  (1) The **United States Constitution** takes precedence over

  (2) **federal statutory law**, which takes precedence over

  (3) a **state constitution**, which takes precedence over

  (4) **state statutory law**, which takes precedence over

  (5) a **local ordinance**, which takes precedence over

  (6) **administrative regulations and rulings**, which take precedence over

  (7) **common law**.

LAW VS. EQUITY

- From their origin in the late-Eleventh Century, common-law courts were typically classified as either "courts of law" or "courts of equity."

  - **Courts of Law** were empowered only to award wronged parties money or other valuable compensation for their injuries or other losses.

  - **Courts of Equity**, by contrast, were empowered to award any manner of non-monetary relief, such as ordering a person to do something (a.k.a. "specific performance") or to cease doing something (a.k.a. "injunction").

- In most of the United States the courts of law and equity have ***merged***. Nonetheless, American courts still recognize **legal remedies** and **equitable remedies**.

  - **Remedy:** The means given to a party to enforce a right or to compensate for another's violation of a right.

EQUITABLE MAXIMS

- A party's right to receive equitable relief and a court's power to grant it depends upon the following:
  - Whoever seeks equity must **do equity**;
  - Where the **equities favor both parties equally**, law must decide the dispute;
  - Whoever seeks equity must come to the court with **"clean hands"**;
  - Equitable relief will be awarded only when there is **no adequate remedy at law**;
  - Equity favors **substance over form**; and
  - Whoever seeks equity must **pursue the vindication of their rights vigilantly** or risk having their claims barred.

STARE DECISIS

- ***Stare Decisis*:** The doctrine that obliges judges to follow established precedent within a particular jurisdiction.

- **Binding Authority:** Any source of law a court must follow when deciding a dispute, including constitutional provisions, statutes, treaties, regulations, or ordinances that govern the issue being decided, as well as prior court decisions that constitute controlling precedent in the court's jurisdiction.

- **Persuasive Authority:** Any primary or secondary source of law which a court may, but which the court is not bound to, rely upon for guidance in resolving a dispute.

- **Precedent:** The authority afforded to a prior judicial decision by judges deciding subsequent disputes involving the same or similar facts and the same jurisdiction's substantive law.

    - A prior judicial decision is *binding* precedent only when the subsequent court is applying the same law as the prior court; otherwise, the prior decision is only *persuasive* authority.

- **Departing from Precedent:** The highest court in a jurisdiction may depart from precedent it considers wrongly decided, contrary to ***public policy***, or outdated due to changes in **technology**, **social norms**, or **business practices**.

LEGAL REASONING

- **Legal Reasoning:** The process judges (and lawyers) use to decide what law applies to a given dispute and then apply that law to the facts or circumstances of the dispute.

  - **Deductive Reasoning:** Reasoning that uses the device of ***syllogism***, involving a major premise, a minor premise, and a conclusion.

  - **Linear Reasoning:** Reasoning that proceeds from one point to another, ultimately reaching a conclusion which "ties" those points together.

  - **Reasoning by Analogy:** Comparing the facts of the case at hand to the facts in other, previously-decided cases and, to the extent that the fact patterns are similar, applying the same rule(s) of law to the dispute at hand as was applied in the prior cases.

JURISPRUDENCE

- **Jurisprudence:** The study of different schools of legal philosophy and how each can affect judicial decisionmaking.
  - **Natural Law Theory** presupposes that positive law derives its legitimacy from natural law and holds that, to the extent that natural law and positive law differ, natural law must prevail.
  - **Legal Positivism** holds that there is no higher law than that created by legitimate governments and that such laws must be obeyed, even if they appear unjust or otherwise at odds with natural law.
  - The **Historical School** emphasizes the evolutionary process of law by concentrating on the origin and history of a legal system and holds that law derives its legitimacy and authority through the test of time.
  - **Legal Realism** contends that positive law cannot be applied in the abstract; rather, judges should take into account the specific circumstances of each case, as well as economic and social realities.
  - The **Sociological School** views law as a tool for promoting social justice.

CLASSIFICATIONS OF LAW

- **Substantive vs. Procedural Law**
  - **Substantive law** consists of all laws that define, describe, regulate, and create legal rights and obligations.
  - **Procedural law** consists of all laws that establish and regulate the manner of enforcing or vindicating the rights established by substantive law.
- **Civil vs. Criminal Law**
  - **Civil law** defines and enforces the duties or obligations of persons to one another.
  - **Criminal law**, by contrast, defines and enforces the obligations of persons to society as a whole.
- **Cyberlaw:** A growing body of law that deals specifically with issues raised by cyberspace transactions.

FINDING STATUTORY LAW

- **Uncodified Statutes:** Shortly after a law is passed either by Congress or by a state legislature, it is reported in the form in which it passed. These uncodified statutes are typically reported in the order in which they are passed by the relevant legislative body, regardless of subject matter.
  - Uncodified statutes passed by Congress are reported in *United States Statutes at Large*.
  - Uncodified statutes passed by a state legislature are typically reported in a "session law" reporter (*e.g.*, *Texas Session Laws*).
- **Codified Statutes:** Statutes are also typically collected and reported by subject matter.
  - Codified statutes passed by Congress are reported in the *United States Code*, which has a number of "Titles," roughly corresponding to major subject matter areas (*e.g.*, the Internal Revenue Code).
  - Codified statutes passed by a state legislature are typically reported by subject in that state's code (*e.g.*, *California Commercial Code*).

FINDING ADMINISTRATIVE LAW

- **Federal Administrative Law**

  - Rules and regulations adopted by federal agencies appear first in the *Federal Register*, which is published daily (except for weekends and holidays). Items appear in the *Register* as they are promulgated, and are only sorted as to the contents of a single issue of the *Register*.

  - These newly-issued or revised rules and regulations are collected annually, along with all rules and regulations that remain unchanged and in effect, into the *Code of Federal Regulations*, which is arranged topically.

- **State Administrative Law:** The manner in which state administrative law is reported varies from state to state. Consult with your local law librarian or government documents reference librarian for help with a particular state's administrative law.

FINDING CASE LAW: STATE

- **Official Reporters:** Every state other than Alaska at one time published the decisions of its highest court – and, in many cases, its intermediate appellate court(s) and even trial courts – in one or more official reporters (*e.g.*, *Connecticut Reports*, *Illinois Appellate Court Reports*, *New York Miscellaneous Reports*). Official reporters are published for each state that uses them and counsel may be required to cite them in papers filed in the courts of a particular state.

- **Unofficial Reporters:** The most widely-used unofficial reporters – and, in many states, the only reporters currently being published – are the regional reporters that are part of West's *National Reporter System*.

    - These regional reporters contain the published decisions of the highest appellate court(s) of each state, as well as, in many cases, the published opinions of each state's intermediate court(s) of appeals.

FINDING CASE LAW: FEDERAL

- **U.S. Supreme Court:** All opinions of the U.S. Supreme Court are published in *United States Reports* ("U.S."), the Court's official reporter. In addition, unofficial reports of Supreme Court decisions can be found in the *Supreme Court Reporter* ("S. Ct.") and the *United States Reports: Lawyers Edition* ("L. Ed." & "L. Ed. 2d"). The latter two sources, while "unofficial," are more current and provide useful research and analysis aids not found in *United States Reports.*

- **U.S. Courts of Appeals:** Published opinions of the federal courts of appeals can be found in *Federal Cases* ("F. Cas."), the *Federal Reporter* ("F.", "F.2d" & "F.3d").

- **U.S. District Courts:** Published opinions of U.S. district courts in the 50 states, the District of Columbia, and certain U.S. possessions and territories can be found primarily in the *Federal Supplement* ("F. Supp." & "F. Supp. 2d"). Old U.S. district court opinions also appear in *Federal Cases* ("F. Cas.") and the first series of the *Federal Reporter* ("F.").

- ***Bankruptcy Reporter*** ("B.R."): Reports bankruptcy decisions from all federal courts.

- ***Federal Rules Decisions*** ("F.R.D."): Reports federal trial and appellate decisions on matters of civil and criminal procedure.

CASE TERMINOLOGY: PARTIES

- **Plaintiff/Petitioner:** The party who filed a court action or who seeks higher court review of a lower court's ruling by means of a ***writ of mandamus***.

- **Defendant/Respondent:** The party against whom the plaintiff filed its action or who is opposing the plaintiff's mandamus petition.

- **Appellant/Petitioner:** The party challenging the trial court's disposition of the action.

- **Appellee/Respondent:** The other party to a disposition that has been appealed.

CASE TERMINOLOGY: OPINIONS

- **Judgment:** The court's disposition of an action.
- **Opinion:** The court's reasons for its judgment.
  - **Unanimous Opinion:** An opinion joined by all of the judges who heard a case.
    - ***Per Curiam* Opinion:** A unanimous opinion that does not indicate which judge wrote it.
  - **Majority Opinion:** An opinion joined by the majority (but not necessarily all) of the judges who heard a case.
  - **Plurality Opinion:** An opinion joined by the largest number (but less than a majority) of the judges who heard a case.
  - **Concurring Opinion:** An opinion by one or more judges who agree with the majority's judgment, but not necessarily with its reasoning.
  - **Dissenting Opinion:** An opinion by one or more judges who disagree with the judgment of the majority.

JUDICIAL REVIEW

- **Judicial Review:** The process by which a court decides the constitutionality of legislative enactments and actions by the executive branch.

  - While the U.S. Constitution makes no mention of the power of judicial review, Alexander Hamilton and James Madison (two of the three authors of the influential *Federalist Papers*) both advocated the concept of judicial review as a necessary part of the checks and balances that characterize our federal government.

  - In ***Marbury v. Madison*** **(1803)**, arguably the most significant case in American constitutional law, the U.S. Supreme Court opined:

    > It is emphatically the province and duty of the [courts] to say what the law is…. So if the law be in opposition to the Constitution … [t]he Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

JURISDICTION

- **Jurisdiction:** The authority of a court to hear and decide a specific action. Jurisdiction has many dimensions, including:

  - **Personal Jurisdiction:** The authority of a court to hear and decide a dispute involving ***the particular parties*** before it.

  - **Subject Matter Jurisdiction:** The authority of a court to hear and decide ***the particular dispute*** before it.

  - **Original Jurisdiction:** The authority of a court to hear and decide a dispute in the first instance. Generally speaking, *trial courts* are courts of original jurisdiction, although the Supreme Court of the United States and the highest courts of many of the states have original jurisdiction over a few types of disputes.

  - **Appellate Jurisdiction:** The authority of a court to review a prior decision in the same case made by another court.

PERSONAL JURISDICTION

- Personal jurisdiction is generally a **geographic** concept.
  - ***In Personam* Jurisdiction:** Courts have jurisdiction over **persons or entities residing or doing business** within a particular county, district, state, or in some cases, anywhere within the United States.
    - All states, as well as the United States, have one or more **long-arm statutes** which dictate under what terms a nonresident person or entity, who would otherwise not be subject to the court's jurisdiction, may nonetheless be required to appear before the court.
    - The key to whether a nonresident will be subject to a court's jurisdiction is the quantity and nature of the nonresident's **contacts** with the state within which the court sits.
  - ***In Rem Jurisdiction*:** Courts also have personal jurisdiction over disputed **property located within** the county, district, or state.

SUBJECT MATTER JURISDICTION

- The constitution or statute creating a court usually defines a court's subject matter jurisdiction. In both the federal and state court systems, a trial court's subject matter jurisdiction may be limited by:

  (1) the **amount** in controversy,

  (2) the **nature** of the controversy,

  (3) the basis for the **relief sought**, or

  (4) in a criminal case, whether the crime alleged is a **felony** or a **misdemeanor** and the nature of the proceeding before the court (*e.g.*, arraignment vs. trial).

- **Limited vs. General:** A court whose jurisdiction one or more of these factors limits has ***limited jurisdiction***; otherwise, a court has ***general jurisdiction***.

- **Concurrent vs. Exclusive:** When two or more courts have subject matter jurisdiction over the same dispute, those courts are said to have ***concurrent jurisdiction***. When a case may be tried only in state court or only in federal court, then the court in which jurisdiction lies is said to have ***exclusive jurisdiction***.

SPECIALIZED COURTS

- In many U.S. court systems, particular kinds of disputes are referred to courts with **specialized subject matter jurisdiction**, including:
  - **Municipal Courts:** State courts that handle traffic and other offenses for which the typical penalty is a fine, the loss of a state-granted privilege, or both;
  - **Small Claims Courts:** State courts that handle civil disputes where the amount in controversy is less than a prescribed ceiling and in which the parties typically (or, in some jurisdictions, exclusively) represent themselves;
  - **Domestic Relations/Family Courts:** State courts that handle divorces, custodial disputes, juvenile status offenses, and, in some jurisdictions, juvenile crimes;
  - **Probate Courts:** State courts that handle matters relating to the transfer of a person's assets and obligations after her death, as well as, in some jurisdictions, the affairs of minors and of persons lacking legally sufficient mental capacity; and
  - **Bankruptcy Courts:** Federal courts that hear and decide matters relating to a person's or entity's bankruptcy.

FEDERAL COURT JURISDICTION

- **Federal Question** jurisdiction arises if a case involves an alleged violation of the U.S. Constitution, federal statute or regulation, or a treaty between the U.S. and one or more foreign countries.

- **Diversity** jurisdiction arises if:

  (1) the amount in controversy **exceeds $75,000**; and

  (2) the lawsuit is between

    (a) citizens of **different states**,

      - For purposes of diversity jurisdiction, a corporation is a citizen of both: (1) its state of incorporation, and (2) the state of its principal place of business, if the two are not the same.

    (b) a **foreign country** and citizens of one or more states, or

    (c) citizens of a state and citizens or subjects of a foreign country.

JURISDICTION IN CYBERSPACE

- Personal jurisdiction is traditionally a function of geography – where one or more party resides or where the alleged wrong occurred. The Internet makes geographic distinctions difficult and potentially meaningless.

  - **Competing Views**

    - Even though a defendant is a resident of State Y, has never physically visited State X, and did not direct its Web site specifically to persons in State X, the defendant should be subject to suit anywhere its site can be accessed, including State X.

    - Because a defendant cannot create a web site that is unavailable to residents of State X, it is unfair to subject the defendant to jurisdiction in State X without it having other "minimum contacts" there.

  - An increasing number of courts are resolving personal jurisdiction issues by applying a **"sliding scale"** that makes it more likely that a court will exercise jurisdiction over a distant defendant the more business that defendant conducts over the Internet.

VENUE AND STANDING

- **Venue:** Within a particular jurisdiction, the most appropriate location for a trial to be held and from which a jury will be selected.

- **Standing to Sue:** An individual or entity must have a **sufficient stake** in the controversy before he, she, or it may bring suit.

    - Whether standing exists, in turn, will depend in part on whether there is a ***justiciable controversy*** – that is, a **real and substantial** controversy, not one that is moot, hypothetical, or academic.

STATE COURT SYSTEMS

- **Trial Courts:** Trial courts are where all litigation (other than that conducted through administrative agencies) begins. Trial courts have either **general jurisdiction** or **limited jurisdiction**.

- **Appellate Courts:** Every state has at least one appellate court, to which a litigant who was unsuccessful at the trial court may appeal for relief. Most states have ***intermediate appellate courts*** (akin to the U.S. Courts of Appeals) which are subject to review by the state's supreme court or "court of last resort." Other states have only a supreme court.

  - Appellate courts (intermediate and supreme) typically limit their review to ***questions of law***, rather than ***questions of fact***, although this is not always the case.

  - Most state supreme courts, like the U.S. Supreme Court, exercise ***discretionary review*** (*i.e.*, they decide whether or not to consider the merits of a particular case); most state intermediate appellate courts, like the U.S. Courts of Appeals, do not have discretion whether to entertain cases appealed to them.

THE FEDERAL COURT SYSTEM

- **U.S. District Courts:** Trial courts of general jurisdiction, each state (as well as the District of Columbia and certain other U.S. territories and possessions) has at least one "district," and some states have as many as four, with each district divided administratively among one to several judges.

- **U.S. Courts of Appeals:** Appellate courts to which litigants in the U.S. District Courts have an automatic right to appeal (*i.e.*, the court of appeal must consider each appeal on its merits). These courts also hear appeals from U.S. Bankruptcy Courts and other specialized courts and, in the case of the D.C. Circuit, from federal administrative agency decisions. These courts cover twelve geographic regions, with a thirteenth court, the Federal Circuit, empowered to hear appeals from any district court involving patent law, cases in which the United States is a defendant, and other specified types of cases.

- **U.S. Supreme Court:** The "highest court in the land," the U.S. Supreme Court exercises discretionary review over all federal appellate courts, as well as, in some circumstances, state supreme and appellate courts.

    - Most cases reach the U.S. Supreme Court on **writ of certiorari**, which requires that at least four justices agree the case merits the Court's review.

NEGOTIATION AND MEDIATION

- **Negotiation:** Informal settlement talks between the parties, with or without counsel.

- **Mediation:** Non-binding procedure utilizing the services of a neutral third party to assist negotiations and recommend a resolution of the parties' dispute. Mediation is non-adversarial and tends to reduce antagonism.

ARBITRATION

- **Arbitration:** Dispute resolution utilizing a neutral third party or a panel of three persons chosen by the court, agreed to by the parties, or both, who will read and hear the parties' arguments and evidence and then render an **award** (decision).

  - Arbitration can be either ***binding*** – in which case the arbitrator's decision is legally binding – or ***nonbinding*** – in which case the arbitrator's decision is merely advisory and one or both parties may appeal the award to a court of competent jurisdiction.

  - Many contracts include an ***arbitration clause***, which provides that any dispute arising out the contract will be submitted first (in the case of nonbinding arbitration) or finally (in the case of binding arbitration) to arbitration, rather than to a court.

  - **Arbitrability:** Despite the fact that a contract contains an arbitration clause, a party to the contract may claim that he is not bound by the arbitration clause, in which case a court will be asked to decide

    - whether the clause is **enforceable**; and, if so,

    - whether the dispute falls within the clause's **scope**.

OTHER FORMS OF ADR

- **Neutral Case Evaluation:** A third party upon whom the parties agree evaluates each side's position and informs the parties of their strengths and weaknesses.

- **Mini-Trial:** A short-form trial presented to a "judge" whose decision is not legally binding, but may assist the parties in evaluating their claims or defenses.

- **Summary Jury Trial:** A short-form trial presented to a "jury" whose decision is not legally binding, but may assist the parties in evaluating their claims or defenses.

- **Conciliation:** Settlement discussions moderated by a neutral third party.

- **Online Dispute Resolution:** An increasing number of companies and organizations offer dispute-resolution services online.

INTERNATIONAL DISPUTE RESOLUTION

- **Clauses:** Parties to international transactions often include forum-selection and choice of law clauses in their contracts.

- **Arbitration:** International treaties sometimes also stipulate arbitration for resolving disputes- a tactic that has been used to increase foreign investment. The International Chamber of Commerce often acts as an international arbitrator.

CHAPTER 1

INTRODUCTION TO LAW AND LEGAL REASONING

ANSWERS TO QUESTIONS IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

1A. ***Parties***

The automobile manufacturers are the plaintiffs, and the state of California is the defendant.

2A. ***Remedy***

The plaintiffs are seeking an injunction, an equitable remedy, to prevent the state of California from enforcing its statute restricting carbon dioxide emissions.

3A. ***Source of law***

This case involves a law passed by the California legislature and a federal statute; thus the primary source of law is statutory law.

4A. ***Finding the law***

Federal statutes are found in the *United States Code,* and California statutes are published in the *California Code*. You would look in these sources to find the relevant state and federal statutes.

ANSWER TO DEBATE THIS QUESTION IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

Under the doctrine of* stare decisis*, courts are obligated to follow the precedents established in their jurisdictions unless there is a compelling reason not to. Should U.S. courts continue to adhere to this common law principle, given that our government now regulates so many areas by statute? Both England and the U.S. legal systems were

constructed on the common law system. The doctrine of *stare decisis* has always been a major part of this system—courts should follow precedents when they are clearly established, excepted under compelling reasons. Even though more common law is being turned into statutory law, the doctrine of *stare decisis* is still valid. After all, even statutes have to be interpreted by courts. What better basis for judges to render their decisions than by basing them on precedents related to the subject at hand?

In contrast, some students may argue that the doctrine of *stare decisis* is passé. There is certainly less common law governing, say, environmental law than there was 100 years ago. Given that federal and state governments increasingly are regulating more aspects of commercial transactions between merchants and consumers, perhaps the courts should simply stick to statutory language when disputes arise.

ANSWERS TO ISSUE SPOTTERS IN THE EXAMPREP FEATURE AT THE END OF THE CHAPTER

1A. ***Under what circumstances might a judge rely on case law to determine the intent and purpose of a statute?*** Case law includes courts' interpretations of statutes, as well as constitutional provisions and administrative rules. Statutes often codify common law rules. For these reasons, a judge might rely on the common law as a guide to the intent and purpose of a statute.

2A. ***After World War II, several Nazis were convicted of "crimes against humanity" by an international court. Assuming that these convicted war criminals had not disobeyed any law of their country and had merely been following their government's orders, what law had they violated? Explain.*** At the time of the Nuremberg trials, "crimes against humanity" were new international crimes. The laws criminalized such acts as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population. These international laws derived their legitimacy from "natural law." Natural law, which is the oldest and one of the most significant schools of jurisprudence, holds that governments and legal systems should reflect the moral and ethical ideals that are inherent in human nature. Because natural law is universal and discoverable by reason, its adherents believe that all other law is derived from natural law. Natural law therefore supersedes laws created by humans (national, or "positive," law), and in a conflict between the two, national or positive law loses its legitimacy. The Nuremberg defendants asserted that they had been acting in accordance with German law. The judges dismissed these claims, reasoning that the defendants' acts were commonly regarded as crimes and that the accused must have known that the acts would be considered criminal. The judges clearly believed the tenets of natural law and expected that the defendants, too, should have been able to realize that their acts ran afoul of it. The fact that the "positivist law" of Germany at the time required them to commit these acts is irrelevant. Under natural law theory, the international court was justified in finding the defendants guilty of crimes against humanity.

ANSWERS TO BUSINESS SCENARIOS AND BUSINESS CASE PROBLEMS AT THE END OF THE CHAPTER

1–1A. ***Binding v. persuasive authority***
(Chapter 1—Page 8)

A decision of a court is binding on all inferior courts. Because no state's court is inferior to any other state's court, no state's court is obligated to follow the decision of another state's court on an issue. The decision may be persuasive, however, depending on the nature of the case and the particular judge hearing it. A decision of the United States Supreme Court on an issue is binding, like the decision of any court, on all inferior courts. The United States Supreme Court is the nation's highest court, however, and thus, its decisions are binding on all courts, including state courts.

1-2A. ***Sources of law***
(Chapter 1—Page 3)

(a) The U.S. Constitution—The U.S. Constitution is the supreme law of the land. A law in violation of the Constitution, no matter what its source, will be declared unconstitutional and will not be enforced.

(b) The federal statute—Under the U.S. Constitution, when there is a conflict between a federal law and a state law, the state law is rendered invalid.

(c) The state statute—State statutes are enacted by state legislatures. Areas not covered by state statutory law are governed by state case law.

(d) The U.S. Constitution—State constitutions are supreme within their respective borders unless they conflict with the U.S. Constitution, which is the supreme law of the land.

1-3A. **Stare decisis**
(Chapter 1—Page 8)

Stare decisis is a Latin phrase meaning "to stand on decided cases." In the King's Courts of medieval England, it became customary for judges to refer to past decisions (precedents) in deciding cases involving similar issues. Over time, because of application of the doctrine of *stare decisis* to issues that came before the courts, a body of jurisprudence was formed that came to be known as the "common law"—because it was common to the English realm. Common law was applied in the American colonies prior to the War of Independence and was adopted by the American states following the Revolution. Common law continues to be applied today in all cases except those falling under specific state or federal statutory law. The doctrine of *stare decisis* is fundamental to the development of our legal tradition because without the acceptance and application of this doctrine, the evolution of any objective legal concepts—and thus a legal "tradition"—would have been impossible.

1-4A. *Remedies*

(Chapter 1—Page 6)

(a) In a suit by Arthur Rabe against Xavier Sanchez, Rabe is the plaintiff and Sanchez is the defendant.

(b) Specific performance is the remedy that includes an order to a party to perform a contract as promised.

(c) Rescission is a remedy that includes an order to cancel a contract.

(d) In both cases, these remedies are remedies in equity.

(e) If Sanchez appeals your decision, Sanchez would be the appellant (or petitioner) and Rabe would be the appellee (or respondent).

1–5A. SPOTLIGHT ON AOL—*Common law*

The doctrine of *stare decisis* is the process of deciding case with reference to former decisions, or precedents. Under this doctrine, judges are obligated to follow the precedents established within their jurisdiction.

In this problem, the enforceability of a forum selection clause is at issue. There are two precedents mentioned in the facts that the court can apply The United States Supreme Court has held that a forum selection clause is unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought." And California has declared in other cases that the AOL clause contravenes a strong public policy. If the court applies the doctrine of *stare decisis*, it will dismiss the suit.

In the actual case on which this problem is based, the court determined that the clause is not enforceable under those precedents.

1-6A. BUSINESS CASE PROBLEM WITH SAMPLE ANSWER—*Reading Citations*

The court's opinion in this case—*United States v. Yi*, 70 F.3d 800 (9th Cir. 2013)—can be found in volume 70 of *Federal Reporter, Third Series* on page 800. The United States Court of Appeals for the Ninth Circuit issued this opinion in 2013.

1-7A. A QUESTION OF ETHICS—*The common law tradition*

(a) Your answer to these questions and the reasons for those answers will likely follow one of the three schools of jurisprudential thought discussed in Chapter 1. In other words, your reasoning would indicate how you personally view the nature of ethics and the law. If your sentiments are similar to those of the positivist school, you would have little difficulty. Your answers would include that regardless of the necessity, or even the ethicality, of the men's actions, the criminal law of their nation should be applied. In contrast, if you hold that there is a higher, "natural" law with legal and ethical principles to which all human beings are subject, you might have concluded that, given their circumstances, the men should be subject to that higher law, not any nation's particular laws. If you reached this conclusion, then you would have to further decide whether those principles would sanction the killing of another human being for the sake of necessity—survival in these circumstances—or absolutely prohibit the taking of another's life under any circumstances. This is both a legal and an ethical question that you would ultimately answer on the basis of your personal ethical, religious, or philosophical

leanings. Approaching the question from a legal realist's perspective, you would probably attempt to balance your personal, subjective view of the men's actions against the views held by the others—how do most people feel about the issue? How would they respond to whatever your decision might be? As a judge, do you have an obligation to be responsive to society's ethical standards? If so, to what extent should this obligation be a determining factor in your decision, and how do you balance this obligation against your duty to uphold the law?

(b) The legal realists believed that, just as each judge is influenced by the beliefs and attitudes unique to his or her personality, so, too, is each case attended by a unique set of circumstances. According to the legal realist school of thought, judges should tailor their decisions to take account of the specific circumstances of each case, rather than rely on an abstract rule that may not relate to those circumstances. Legal realists also believe that judges should consider extra-legal sources, such as economic and sociological data, in making decisions, to the extent that those sources illuminate the circumstances and issues involved in specific cases. A counterargument can be derived from the positivist school: the law is the law, and there is no need to look beyond it to apply it. In fact, a legal positivist might argue that looking at extra-legal sources would be acting contrary to the law.

1–8A. LEGAL REASONING GROUP ACTIVITY—*Court opinions*

(a) A majority opinion is a written opinion outlining the views of the majority of the judges or justices deciding a particular case. A concurring opinion is a written opinion by a judge or justice who agrees with the conclusion reached by the majority of the court but not necessarily with the legal reasoning that led the conclusion.

(b) A concurring opinion will voice alternative or additional reasons as to why the conclusion is warranted or clarify certain legal points concerning the issue. A dissenting opinion is a written opinion in which a judge or justice, who does not agree with the conclusion reached by the majority of the court, expounds his or her views on the case.

(c) Obviously, a concurring or dissenting opinion will not affect the case involved—because it has already been decided by majority vote—but such opinions may be used by another court later to support its position on a similar issue.

CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

ANSWERS TO CRITICAL ANALYSIS QUESTIONS IN THE FEATURE

MANAGERIAL STRATEGY—BUSINESS QUESTIONS (PAGE 38)

1A. ***What are some of the costs of increased litigation delays caused by court budget cuts?*** Most attorneys require a retaining fee. The longer this fee is held by the attorney, the higher the present value cost of the litigation. In addition, the opportunity cost of all of the company employees who work on the litigation must be included, too. Also, if there is any negative press during the litigation, that will have an impact on the company's revenues. Uncertainty about the results of the litigation may cause investors to back away. Uncertainty about the outcome of the litigation may also cause managers to forestall new projects.

2A. ***In response to budget cuts, many states have increased their filing fees. Is this fair? Why or why not?*** Some argue that those businesses that avail themselves of the court system should pay a higher percentage of the actual costs of that court system. Others point out that the higher the costs imposed by the states to those businesses that wish to litigate, the less litigation there will be. And some of that reduced litigation may be meritorious.

ANSWERS TO QUESTIONS AT THE ENDS OF THE CASES

CASE 2.1—LEGAL REASONING QUESTIONS (PAGE 32)

1A. ***What is "diversity of citizenship?*** Diversity of citizenship exists when the plaintiff and defendant to a suit are residents of different states (or similar independent political subdivisions, such as territories). When a suit involves multiple parties, they must be completely diverse—no plaintiff may have the same state or territorial citizenship as any defendant. For purposes of

diversity, a corporation is a citizen of both the state in which it is incorporated and the state in which its principal place of business is located.

2A. ***How does the presence—or lack—of diversity of citizenship affect a lawsuit?*** A federal district court can exercise original jurisdiction over a case involving diversity of citizenship. There is a second requirement to exercise diversity jurisdiction—the dollar amount in controversy must be more than $75,000. In a case based on diversity, a federal court will apply the relevant state law, which is often the law of the state in which the court sits.

3A. ***What did the court conclude with respect to the parties' "diversity of citizenship" in this case?*** In the *Mala* case, the court concluded that the parties did not have diversity of citizenship. A plaintiff who seeks to bring a suit in a federal district court based on diversity of citizenship has the burden to prove that diversity exists. Mala—the plaintiff in this case—was a citizen of the Virgin Islands. He alleged that Crown Bay admitted to being a citizen of Florida, which would have given the parties diversity. Crown Bay denied the allegation and asserted that it also was a citizen of the Virgin Islands. Mala offered only his allegation and did not provide any evidence that Crown Bay was anything other than a citizen of the Virgin Islands. There was thus no basis for the court to be "left with the definite and firm conviction that Crown Bay was in fact a citizen of Florida."

4A. ***How did the court's conclusion affect the outcome?*** The court's conclusion determined the outcome in this case. Mala sought a jury trial on his claim of Crown Bay's negligence, but he did not have a right to a jury trial unless the parties had diversity of citizenship. Because the court concluded that the parties did not have diversity of citizenship, Mala was determined not to have a jury-trial right.

The outcome very likely would have been different if the court had concluded otherwise. The lower court had empaneled an advisory jury, which recommended a verdict in Mala's favor. This verdict was rejected, however, and a judgment issued in favor of Crown Bay. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the lower court's judgment.

CASE 2.2—QUESTIONS (PAGE 36)

WHAT IF THE FACTS WERE DIFFERENT?

Suppose that Gucci had not presented evidence that Wang Huoqing had made one actual sale through his Web site to a resident (the private investigator) of the court's district. Would the court still have found that it had personal jurisdiction over Wang Huoqing? Why or why not? The single sale to a resident of the district, Gucci's private investigator, helped the plaintiff establish that the defendant 's Web site was interactive and that the defendant used the Web site to sell goods to residents in the court's district. It is possible that without proof of such a sale, the court would not have found that it had personal jurisdiction over the foreign defendant. The reason is that courts cannot exercise jurisdiction over foreign defendants unless they can show the defendants had minimum contacts with the forum, such as by selling goods within the forum.

THE LEGAL ENVIRONMENT DIMENSION

Is it relevant to the analysis of jurisdiction that Gucci America's principal place of business is in New York state rather than California? Explain. The fact that Gucci's headquarters is in New York state was not relevant to the court's analysis here because Gucci was the plaintiff. Courts look only at the defendant's location or contacts with the forum in determining whether to exercise personal jurisdiction. The plaintiff's location is irrelevant to this determination.

CASE 2.3—QUESTIONS (PAGE 44)

THE LEGAL ENVIRONMENT DIMENSION

How would business be affected if each state could pass a statute, like the one in Texas, allowing parties to void out-of-state arbitrations? If all states could pass statutes like the one in Texas, many parties would probably be less inclined to transact business. An arbitration provision allows a party to limit the burden and expense of settling any disputes. If another party could freely void such an agreement, there would be a greater risk of arbitration in an inconvenient forum, costly formal litigation, or both. That risk increases the perceived costs of doing business, making the business opportunity less attractive. Thus, many parties may decline to enter contracts without enforceable arbitration provisions.

THE SOCIAL DIMENSION

Considering the relative bargaining power of the parties, was it fair to enforce the arbitration clause in this contract? Why or why not? Yes, because either party could have refused to agree to the contract when it contained the arbitration clause. Of course, such clauses are likely to be ruled fair and enforceable when, as in this case, the parties are of relatively equal bargaining strength.

ANSWERS TO QUESTIONS IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

1A. ***Federal jurisdiction***

The federal district court exercises jurisdiction because the case involves diversity of citizenship. Diversity jurisdiction requires that the plaintiff and defendant be from different jurisdictions and that the dollar amount of the controversy exceed $75,000. Here, Garner resides in Illinois, and Foreman and his manager live in Texas. Because the dispute involved the promotion of boxing matches with George Foreman, the amount in controversy exceeded $75,000.

2A. ***Original or appellate jurisdiction***

Original jurisdiction, because the case was initiated in that court and that is where the trial will take place. Courts having original jurisdiction are courts of the first instance, or trial courts—that

is courts in which lawsuits begin and trials take place. In the federal court system, the district courts are the trial courts, so the federal district court has original jurisdiction.

3A. ***Jurisdiction in Illinois***

No, because the defendants lacked minimum contacts with the state of Illinois. Because the defendants were from another state, the court would have to determine if they had sufficient contacts with the state for the Illinois court to exercise jurisdiction based on a long arm statute. Here, the defendants never went to Illinois, and the contract was not formed in Illinois. Thus, it is unlikely that an Illinois state court would find sufficient minimum contacts to exercise jurisdiction.

4A. ***Jurisdiction in Nevada***

Yes, because the defendants met with Garner and formed a contract in the state of Nevada. A state can exercise jurisdiction over out-of-state defendants under a long arm statute if defendants had sufficient contacts with the state. Because the parties met Garner and negotiated the contract in Nevada, a court would likely hold these activities were sufficient to justify a Nevada court's exercising personal jurisdiction.

ANSWER TO DEBATE THIS QUESTION IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

In this age of the Internet, when people communicate via e-mail, texts, tweets, Facebook, and Skype, is the concept of jurisdiction losing its meaning? Many believe that yes, the idea of determining jurisdiction based on individuals' and companies' physical locations no longer has much meaning. Increasingly, contracts are formed via online communications. Does it matter where one of the parties has a physical presence? Does it matter where the e-mail server or Web page server is located? Probably not.

In contrast, in one sense, jurisdiction still has to be decided when conflicts arise. Slowly, but ever so surely, courts are developing rules to determine where jurisdiction lies when one or both parties used online systems to sell or buy goods or services. In the final analysis, a specific court in a specific physical location has to try each case.

ANSWERS TO ISSUE SPOTTERS IN THE EXAMPREP FEATURE AT THE END OF THE CHAPTER

1A. ***Sue uses her smartphone to purchase a video security system for her architectural firm from Tipton, Inc., a company that is located in a different state. The system arrives a month after the projected delivery date, is of poor quality, and does not function as advertised. Sue files a suit against Tipton in a state court. Does the court in Sue's state have jurisdiction over Tipton? What factors will the court consider?*** Yes, the court in

Sue's state has jurisdiction over Tipton on the basis of the company's minimum contacts with the state.

Courts look at the following factors in determining whether minimum contacts exist: the quantity of the contacts, the nature and quality of the contacts, the source and connection of the cause of action to the contacts, the interest of the forum state, and the convenience of the parties. Attempting to exercise jurisdiction without sufficient minimum contacts would violate the due process clause. Generally, courts have found that jurisdiction is proper when there is substantial business conducted online (with contracts, sales, and so on). Even when there is only some interactivity through a Web site, courts have sometimes held that jurisdiction is proper. Jurisdiction is not proper when there is merely passive advertising.

Here, examining all of these factors, particularly the sale of the security system to a resident of the state and the relative inconvenience of the plaintiff to litigate in the defendant's state, the defendant had sufficient minimum contacts with the state to justify the exercise of jurisdiction over the defendant without violating the due process clause.

2A. ***The state in which Sue resides requires that her dispute with Tipton be submitted to mediation or nonbinding arbitration. If the dispute is not resolved, or if either party disagrees with the decision of the mediator or arbitrator, will a court hear the case? Explain.*** Yes, if the dispute is not resolved, or if either party disagrees with the decision of the mediator or arbitrator, a court will hear the case. It is required that the dispute be submitted to mediation or arbitration, but this outcome is not binding.

ANSWERS TO BUSINESS SCENARIOS AND BUSINESS CASE PROBLEMS AT THE END OF THE CHAPTER

2–1A. *Standing*

(Chapter 2—Page 36)

This problem concerns standing to sue. As you read in the chapter, to have standing to sue, a party must have a legally protected, tangible interest at stake. The party must show that he or she has been injured, or is likely to be injured, by the actions of the party that he or she seeks to sue. In this problem, the issue is whether the Turtons had been injured, or were likely to be injured, by the county's landfill operations. Clearly, one could argue that the injuries that the Turtons complained of directly resulted from the county's violations of environmental laws while operating the landfill. The Turtons lived directly across from the landfill, and they were experiencing the specific types of harms (fires, scavenger problems, groundwater contamination) that those laws were enacted to address. Thus, the Turtons would have standing to bring their suit.

2–2A. *Jurisdiction*

(Chapter 2—Page 29)

Marya can bring suit in all three courts. The trucking firm did business in Florida, and the accident occurred there. Thus, the state of Florida would have jurisdiction over the defendant.

Because the firm was headquartered in Georgia and had its principal place of business in that state, Marya could also sue in a Georgia court. Finally, because the amount in controversy exceeds $75,000, the suit could be brought in federal court on the basis of diversity of citizenship.

2–3A. BUSINESS CASE PROBLEM WITH SAMPLE ANSWER—*Arbitration clause*

Based on a recent holding by the Washington state supreme court, the federal appeals court held that the arbitration provision was invalid as unconscionable. Because it was invalid, the restriction on class action suits was also invalid. The state court held that for consumers to be offered a contract that class action restrictions placed in arbitrations agreements improperly stripped consumers of rights they would normally have to attack certain industry practices. Such suits are often brought in cases of deceptive or unfair industry practices when the losses suffered by the individual consumer are too small to warrant a consumer bringing suit. That is, the supposed added cell phone fees are small, so no one consumer would be likely to litigate or arbitrate the matter due to the expenses involved. Eliminating that cause of action by the arbitration agreement violates public policy and is void and unenforceable.

2–4A. *Venue*

(Chapter 2—Page 36)

The purpose behind most venue statutes is to ensure that a defendant is not "hailed into a remote district, having no real relationship to the dispute." The events in dispute have no connection to Minnesota. The Court stated: "Looked at through the lens of practicality—which is, after all, what [the venue statute] is all about—Nestlé's motion can really be distilled to a simple question: does it make sense to compel litigation in Minnesota when this state bears no relationship to the parties or the underlying events?" The court answered no to this simple question. The plaintiff resides in South Carolina, her daughter's injuries occurred there, and all of her medical treatment was provided (and continues to be provided) in that state. South Carolina is the appropriate venue for this litigation against Nestlé to proceed.

2–5A. *Arbitration*

(Chapter 2—Page 42)

In many circumstances, a party that has not signed an arbitration agreement (Kobe in this case) cannot compel arbitration. There are exceptions, however. According to the court, "The first relies on agency and related principles to allow a nonsignatory (Kobe) to compel arbitration when, as a result of the nonsignatory's close relationship with a signatory (Primenergy), a failure to do so would eviscerate [gut] the arbitration agreement." That applies here. Kobe and Primenergy claimed to have entered into a licensing agreement under the terms of the agreement between PRM and Primenergy. The license agreement is central to the resolution of the dispute, so Kobe can compel arbitration. Similarly, all claims PRM has against Primenergy go to arbitration because the arbitration clause covers "all disputes." That would include allegations of fraud and theft. Such matters can be resolved by arbitration. "Arbitration may be compelled under 'a broad arbitration clause … as long as the underlying factual allegations simply "touch matters covered by" the arbitration provision.' It generally does not matter that

claims sound in tort, rather than in contract." The reviewing court affirmed the trial court's decision.

2–6A. SPOTLIGHT ON NATIONAL FOOTBALL LEAGUE—*Arbitration*

An arbitrator's award generally is the final word on the matter. A court's review of an arbitrator's decision is extremely limited in scope, unlike an appellate court's review of a lower court's decision. A court will set aside an award only if the arbitrator's conduct or "bad faith" substantially prejudiced the rights of one of the parties, if the award violates an established public policy, or if the arbitrator exceeded her or his powers.

In this problem, and in the actual case on which this problem is based, the NFLPA argued that the award was contrary to public policy because it required Matthews to forfeit the right to seek workers' compensation under California law. The court rejected this argument, because under the arbitrator's award Matthews could still seek workers' compensation under Tennessee law. Thus, the arbitration award was not clearly contrary to public policy.

2–7A. *Minimum contacts*

(Chapter 2—Page 29)

No. This statement alone was insufficient to establish that Illinois did not have jurisdiction over the defendant. The court ruled that Med-Express failed to introduce factual evidence proving that the Illinois trial court lacked personal jurisdiction over Med-Express. Med-Express had merely recited that it was a North Carolina corporation and did not have minimum contacts with Illinois. Med-Express sent a letter to this effect to the clerk of Cook County, Illinois, and to the trial court judge. But that was not enough. When a judgment of a court from another state is challenged on the grounds of personal jurisdiction, there is a presumption that the court issuing the judgment had jurisdiction until the contrary is shown. It was not.

2–8A. *Arbitration*

(Chapter 2—Page 42)

Yes, a court can set aside this order. The parties to an arbitration proceeding can appeal an arbitrator's decision, but court's review of the decision may be more restricted in scope than an appellate court's review of a trial court's decision. In fact, the arbitrator's decision is usually the final word on a matter. A court will set aside an award if the arbitrator exceeded her or his powers—that is, arbitrated issues that the parties did not agree to submit to arbitration.

In this problem, Horton discharged its employee de la Garza, whose union appealed the discharge to arbitration. Under the parties' arbitration agreement, the arbitrator was limited to determining whether the rule was reasonable and whether the employee violated it. The arbitrator found that de la Garza had violated a reasonable safety rule, but "was not totally convinced" that the employer should have treated the violation more seriously than other rule violations and ordered de la Garza reinstated. This order exceeded the arbitrator's authority under the parties' agreement. This was a ground for setting aside the order.

In the actual case on which this problem is based, on the reasoning stated here, the U.S. Court of Appeals for the Fifth Circuit reached the same conclusion.

2–9A. A QUESTION OF ETHICS—*Agreement to arbitrate*

(a) This is very common, as many hospitals and other health-care provides have arbitration agreements in their contracts for services. There was a valid contract here. It is presumed in valid contracts that arbitration clauses will be upheld unless there is a violation of public policy. The provision of medical care is much like the provision of other services in this regard. There was not evidence of fraud or pressure in the inclusion of the arbitration agreement. Of course there is concern about mistreatment of patients, but there is no reason to believe that arbitration will not provide a professional review of the evidence of what transpired in this situation. Arbitration is a less of a lottery that litigation can be, as there are very few gigantic arbitration awards, but there is no evidence of systematic discrimination against plaintiffs in arbitration compared to litigation, so there may not be a major ethical issue.

(b) McDaniel had the legal capacity to sign on behalf of her mother. Someone had to do that because she lacked mental capacity. So long as in such situations the contracts do not contain terms that place the patient at a greater disadvantage than would be the case if the patient had mental capacity, there is not particular reason to treat the matter any differently.

2–10A. LEGAL REASONING GROUP ACTIVITY—*Access to courts*

(a) The statute violates litigants' rights of access to the courts and to a jury trial because the imposition of arbitration costs on those who improve their positions by less than 10 percent on an appeal is an unreasonable burden. And the statute forces parties to arbitrate before they litigate—an added step in the process of dispute resolution. The limits on the rights of the parties to appeal the results of their arbitration to a court further impede their rights of access. The arbitration procedures mandated by the statute are not reasonably related to the legitimate governmental interest of attaining less costly resolutions of disputes.

(b) The statute does not violate litigants' constitutional right of access to the courts because it provides the parties with an opportunity for a court trial in the event either party is dissatisfied with an arbitrator's decision. The burdens on a person's access to the courts are reasonable. The state judicial system can avoid the expense of a trial in many cases. And parties who cannot improve their positions by more than 10 percent on appeal are arguably wasting everyone's time. The assessment of the costs of the arbitration on such parties may discourage appeals in some cases, which allows the courts to further avoid the expense of a trial. The arbitration procedures mandated by the statute are reasonably related to the legitimate governmental interest of attaining speedier and less costly resolution of disputes.

(c) The determination on rights of access could be different if the statute was part of a pilot program and affected only a few judicial districts in the state because only parties who fell under the jurisdiction of those districts would be subject to the limits. Opponents might argue that the program violates the due process of the Fifth Amendment because it is not applied fairly throughout the state. Proponents might counter that parties who object to an arbitrator's decision have an opportunity to appeal it to a court. Opponents might argue that the program exceeds what the state legislature can impose because it does not reasonably relate to a legitimate governmental objective—it arbitrarily requires only litigants who reside in a few jurisdictions to submit to arbitration. Proponents might counter that this is aimed at the reduction of court costs—that the statute rationally relates to a legitimate governmental end. An equal protection challenge would most likely be subject to a similar rational basis test. Under these

and other arguments, the reduction of court costs would be a difficult objective to successfully argue against.

ALTERNATE CASE PROBLEM ANSWERS

CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

2-1A. ***Jurisdiction***

(Chapter 2—Pages 29–30)

A court can exercise personal jurisdiction over nonresidents under the authority of a long arm statute. Under a long arm statute, it must be shown that the nonresident had sufficient contacts with the state to justify the jurisdiction. In regard to business firms, this requirement is usually met if the firm does business within the state. In this case, the parties to the sponsorship agreement contemplated that substantial activities to further their joint venture would take place in Florida. Sutton lived in Florida, and he was expected to and did play in tour events in Florida. Sutton was to be provided health care insurance in Florida. All earnings from Sutton's golf-related activities in Florida and elsewhere were to be paid by the Professional Golfing Association from its headquarters and bank account in Florida to the ARS & Associates account in Michigan; the partnership was to disburse funds from the account to Sutton's account in Florida to enable him to perform golf-related activities and participate in tour events for the benefit of the joint venture. After ARS failed to fund health insurance for Sutton, it instructed Sutton to obtain medical care in return for providing golf lessons to a physician in Florida. These facts—the provision of health care insurance in Florida, the exchange of funds to and from Florida, the instruction to Sutton to perform certain work in Florida—showed that the members of the joint venture were operating, conducting, engaging in, or carrying on their business venture in Florida. When an agreement for a joint venture made outside a state contemplates and results in performance in substantial part within the state, the nonresident members of the venture exercise sufficient minimum contacts within the state to support the state's exercise of personal jurisdiction over them. Thus, ARS could be subjected to the Florida court's exercise of jurisdiction and could be required to appear to defend itself in that state.

2-2A. ***Arbitration***

(Chapter 2—Pages 42–45)

The public policy that the court weighed in making its decision included the policy of "not tolerating the knowing misappropriation of state funds by state officials or employees," as well

as "[t]he public policy of discouraging fraud," which is "firmly rooted in our common law." The defendant asserted the public policy of discouraging discrimination against the mentally ill. The court considered this policy, but "did not find that Beaudry's discharge was motivated by an intent to discriminate against the mentally ill." In this case, "the policy of minimizing discrimination against the mentally ill did not outweigh the damaging consequences to the concomitant policy goal of refusing to countenance the knowing misappropriation of state moneys." The court vacated the award, the union appealed, and a state appellate court affirmed the trial court's decision.

2-3A. ***Arbitration***

(Chapter 2—Pages 42–45)

The U.S. Court of Appeals for the Third Circuit held that the arbitration award, requiring Exxon to reinstate Fris, should be vacated as contrary to public policy. The court reasoned that the award "violates a public policy that is both well defined and dominant," that is "that owners and operators of oil tankers should be permitted to discharge crew members who are found to be intoxicated while on duty." The court explained, "An intoxicated crew member on such a vessel can cause loss of life and catastrophic environmental and economic injury. Some of this injury may not be reparable by money damages." The court offered, as an example, harm caused by oil spills. "Moreover," added the court, "it is entirely possible that much of the cost resulting from a major oil spill may fall on taxpayers and those who are injured by the accident."

2-4A. ***Jurisdiction***

(Chapter 2—Pages 29–30)

The North Carolina state court held that it had personal jurisdiction over the Florida defendants. On appeal, the North Carolina Court of Appeals agreed. The appellate court initially pointed out that a court can assert "personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. When a corporation purposefully avails itself of the privilege of conducting activities in this State, it is not unreasonable to subject it to suit here." The court pointed out that Health Care advertised Cal-Ban in North Carolina. "Health Care sold the Cal-Ban 3000 capsules to its distributor, defendant CKI Industries, who in turn advertised and sold the drug to defendant Prescott's Pharmacies." The court concluded, "[a]ccordingly," that the defendants "injected Cal-Ban 3000 into the stream of commerce of this State with the expectation that the drug would be purchased by consumers here. The trial court properly exercised personal jurisdiction over defendants."

2-5A. ***Standing to sue***

(Chapter 2—Pages 36–37)

The court held that the Blues had standing and denied the tobacco companies' motion to dismiss the case. The defendants argued in part that any injury to the plaintiffs was indirect and too remote to permit them to recover, and that it would be too difficult to determine whether the plaintiffs' injuries were due to the defendants' conduct or to intervening third causes. The court reasoned that the damages claimed in this case were separate from the damages suffered by smokers. The plaintiffs "seek recovery only for the economic burden of those medical claims

and procedures which they directly paid as a result of tobacco use." The Blues had paid for the smokers' health care, and thus only the Blues could recover those amounts. As to whether the injuries were too remote, the court said that if "as alleged, the defendants conducted a decades long scheme to deceive the American public and its health providers concerning the addictive characteristics and health hazards of their tobacco products, and if they conspired to deprive smokers of safer or less addictive tobacco products, then their actions can properly be characterized as illegal and deliberate criminal fraud." If so, the plaintiffs' injuries would have been foreseeable and direct. The court also noted that the plaintiffs might have reliable statistical and expert evidence to show the percentage of damage caused by the defendants' actions.

Note: The Blues filed suits in three federal district courts. Two of the courts refused to dismiss the suits, applying the reasoning set out above. The third court agreed with the defendants, however. See *Regence Blueshield v. Philip Morris, Inc.,* 40 F.Supp.2d 1179 (W.D.Wash.1999). In that case, the court concluded that the Blues' injuries were "derivative" of personal injuries to smokers because it would be impossible to separate the smokers' injuries from those of the insurers and there would thus be a possibility of "duplicative recovery."

2-6A. ***E-Jurisdiction***

(Chapter 2—Pages 33–34)

The court denied Boyer's motion to dismiss the complaint for lack of personal jurisdiction. "[T]he likelihood that personal jurisdiction can be constitutionally exercised [in the context of Internet activities] is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." Boyer "posted Internet messages on the Yahoo bulletin board, which included negative information regarding ABFI." He "also sent an e-mail to ABFI's independent auditors, accusing ABFI of 'fraudulent accounting practices' and 'borderline criminal conduct' . . . with the understanding that the independent auditors were situated in Pennsylvania." Also, the court held that the e-mail fell under the state's long-arm statute, which, like other states' long-arm statutes, permits the exercise of jurisdiction "where an act or omission outside the Commonwealth [Pennsylvania] causes harm or tortious injury inside the Commonwealth." Finally, the court reasoned that "its exercise of jurisdiction over Defendant Boyer would not necessarily violate traditional notions of fair play and substantial justice. It is true that as a non-resident individual, Boyer will be burdened in being forced to defend himself in Pennsylvania. However, his conduct appears to be directed towards Pennsylvania where Plaintiff is located and where Plaintiff's auditors are located. Plaintiff's interest in adjudicating its dispute and vindicating its reputation in Pennsylvania appears to be self-evident. . . . In addition, it does seem reasonable and fair to require Boyer to conduct his defense in Pennsylvania since that is where he sent the negative e-mail."

2-7A. ***Arbitration***

(Chapter 2— Pages 42–45)

The court denied Auto Stiegler's motion. A state intermediate appellate court reversed this ruling, and Little appealed to the California Supreme Court, which held that the appeal provision was unenforceable but which also held that the provision could be cut from the agreement and the agreement could then be enforced. Auto Stiegler argued in part that the "provision applied

evenhandedly to both parties." The court stated, "[I]f that is the case, [the defendant fails] to explain adequately the reasons for the $50,000 award threshold. From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants. Given the fact that Auto Stiegler was the party imposing the arbitration agreement and the $50,000 threshold, it is reasonable to conclude it imposed the threshold with the knowledge or belief that it would generally be the defendant." The court acknowledged that "parties may justify an asymmetrical arbitration agreement when there is a legitimate commercial need," but added that the "need must be other than the employer's desire to maximize its advantage in the arbitration process. There is no such justification for the $50,000 threshold. The explanation for the threshold . . . that an award in which there is less than that amount in controversy would not be worth going through the extra step of appellate arbitral review . . . makes sense only from a defendant's standpoint and cannot withstand scrutiny."

2-8A. ***Jurisdiction***

(Chapter 2— Pages 29–30)

The court denied Sharman's motion to dismiss. The court explained that "fairness consists principally of ensuring that jurisdiction over a person is not exercised absent fair warning that a particular activity may subject that person to the jurisdiction of a foreign sovereign." Thus, "the touchstone constitutional inquiry is whether the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." In this case, "Sharman provides its KMD software to millions of users every week . . . . Sharman has not denied and cannot deny that a substantial number of its users are California residents, and thus that it is, at a minimum, constructively aware of continuous and substantial commercial interaction with residents of this forum. Further, Sharman is well aware that California is the heart of the entertainment industry, and that the brunt of the injuries described . . . is likely to be felt here. It is hard to imagine on these bases alone that Sharman would not reasonably anticipate being haled into court in California. However, jurisdiction is reasonable for an important added reason: Sharman's effective predecessor, Kazaa BV, was engaged in this very litigation when Sharman was formed. . . . Because Sharman has succeeded Kazaa BV in virtually every aspect of its business, Sharman reasonably should have anticipated being required to succeed Kazaa BV in this litigation as well. If Sharman wished to structure its primary conduct with some minimum assurance that it would not be haled into court in this forum, it simply could have avoided taking over the business of a company already enmeshed in litigation here."

2-9A. ***Standing to sue***

(Chapter 2— Pages 36–37)

This problem concerns standing to sue. As you read in the chapter, to have standing to sue, a party must have a legally protected, tangible interest at stake. The party must show that he or

she has been injured, or is likely to be injured, by the actions of the party that he or she seeks to sue. In this case, the issue is whether the Covingtons had been injured, or were likely to be injured, by the county's landfill operations. Clearly, one could argue that the injuries that the Covingtons complained of directly resulted from the county's violations of environmental laws while operating the landfill. The Covingtons lived directly across from the landfill, and they were experiencing the specific types of harms (fires, scavenger problems, groundwater contamination) that those laws were enacted to address. Indeed, this was the conclusion reached by the appellate court in this case. While the trial court found that the Covingtons lacked standing to sue, when the plaintiffs appealed to U.S. Court of Appeals for the Ninth Circuit, that court found that the Covingtons did have standing to assert their claims. The appellate court remanded (sent back) the case to the lower court for a trial.

2–10A. A QUESTION OF ETHICS

1. A court can generally exercise personal jurisdiction over a defendant that has had minimum contacts with the forum "necessary to have reasonably anticipated being haled into court there." After minimum contacts have been established, a court can consider whether the exercise of personal jurisdiction comports with "traditional conceptions of fair play."

In this case, the court held that "Rosedale's representations—which were made as part of a national campaign to induce persons, including Bragg, to visit Second Life and purchase virtual property—constitute sufficient contacts" to support the exercise of personal jurisdiction. The court compared these efforts to an advertising campaign that, for example, urges viewers to call a toll-free phone number to place orders. "This inducement destroys any semblance of . . . passive advertising," which might consist of generalized product promotion that would not support an assertion of jurisdiction.

It was the interactive nature of the marketing scheme, not the Web site, on which the court based its holding. "Rosedale's personal role was to bait the hook for potential customers to make more interactive contact with Linden by visiting Second Life's website. Rosedale's activity was designed to generate additional traffic inside Second Life. He was the hawker sitting outside Second Life's circus tent, singing the marvels of what was contained inside to entice customers to enter. Once inside Second Life, participants could view virtual property, read additional materials about purchasing virtual property, interact with other avatars who owned virtual property, and, ultimately, purchase virtual property themselves. Significantly, participants could even interact with Rosedale's avatar on Second Life during town hall meetings that he held on the topic of virtual property."

As for fairness, the court focused chiefly on the burden that would be imposed on Rosedale to make an appearance. Rosedale did not claim that he could not afford to appear "or that he would otherwise be irreparably prejudiced by litigating" in Pennsylvania. Rosedale had lawyers "on both coasts." Weighed against Rosedale's burden was Pennsylvania's interest in protecting its residents from "allegedly misleading representations that induce them to purchase virtual property" and in vindicating their rights.

2. Under the Federal Arbitration Act (FAA), a court must compel the arbitration of a dispute if there is a valid agreement to arbitrate that covers the dispute. In this case, the court focused primarily on the validity of the agreement.

A critical factor was the manner in which Linden presented the "Terms of Service" (TOS). A participant was effectively told to "take it or leave it"—one who declined could not gain access to Second Life. There was no opportunity for negotiation so that even a participant like Bragg, who was an experienced attorney, could not use his or her skills to negotiate different terms. And there was no reasonable market alternative—Second Life was the only virtual world to recognize its participants' rights in virtual property.

As for the specific TOS, including the arbitration provision, the court emphasized that Linden allowed itself a range of remedies to resolve disputes while limiting Bragg and other participants to the sole remedy of arbitration. In the circumstances of this case, Linden froze Bragg's account, kept the funds that Linden determined were subject to dispute, and told Bragg that he could resolve the dispute only by arbitration, subject to whatever "asymmetrical" amendment Linden might choose to impose. Also, limiting venue to "Linden's backyard appears to be yet one more means by which the arbitration clause serves to shield Linden from liability instead of providing a neutral forum in which to [resolve] disputes." Altogether, these terms were one-sided and thus unfair.

ALTERNATE CASE PROBLEMS

CHAPTER 2

COURTS AND ALTERNATIVE DISPUTE RESOLUTION

2-1. Jurisdiction. Alex Sutton, a professional golfer living in Middleburg, Florida, entered into a sponsorship agreement with ARS & Associates, a Michigan partnership. Among other things, the agreement provided that (1) ARS would sponsor Sutton on a Professional Golfing Association (PGA) tour, (2) ARS would pay all of Sutton's expenses, (3) ARS and Sutton would split the proceeds (whatever remained after ARS had been reimbursed for expenses) fifty-fifty, and (4) ARS would provide health insurance for Sutton. Preliminary negotiations were carried out mostly over the phone. ARS drew up the agreement in Michigan and sent it to Sutton in Florida; Sutton signed and returned the contract to ARS. ARS then signed the agreement and sent a copy of it to Sutton. Sutton subsequently participated in several senior PGA events, including two tournaments in Florida. While playing golf in a senior PGA tournament in Palm Springs, California, Sutton suffered a heart attack and, as a result, later incurred costs of more than $100,000 for open-heart surgery and related medical expenses. Because ARS had not obtained health-insurance coverage for Sutton, Sutton sued ARS in a Florida state court for breach of the agreement. ARS moved to dismiss the action for lack of personal jurisdiction. Can the Florida court, under its long arm statute, exercise personal jurisdiction over the Michigan defendant in this case? Discuss. [*Sutton v. Smith,* 603 So.2d 693 (Fla.App. 1992)]

2-2. Arbitration. Phillip Beaudry, who suffered from mental illness, worked in the Department of Income Maintenance for the state of Connecticut. Beaudry was fired from his job when it was learned that he had misappropriated approximately $1,640 in state funds. Beaudry filed a complaint with his union, Council 4 of the American Federation of State, County, and Municipal Employees (AFSCME), and eventually the dispute was submitted to an arbitrator. The arbitrator concluded that Beaudry had been dismissed without "just cause," because Beaudry's acts were caused by his mental illness and were not "within his capacity to control." Because Beaudry had a disability, the employer was required, under state law, to transfer him to a position that he was competent to hold. The arbitrator awarded Beaudry reinstatement, back pay, seniority, and other benefits. The state appealed the decision to a court. What public policies must the court weigh

in making its decision? How should the court rule? [*State v. Council 4, AFSCME,* 27 Conn.App. 635, 608 A.2d 718 (1992)]

2-3. Arbitration. Randall Fris worked as a seaman on an Exxon Shipping Co. oil tanker for eight years without incident. One night, he boarded the ship for duty while intoxicated, in violation of company policy. This policy also allowed Exxon to discharge employees who were intoxicated and thus unfit for work. Exxon discharged Fris. Under a contract with Fris's union, the discharge was submitted to arbitration. The arbitrators ordered Exxon to reinstate Fris on an oil tanker. Exxon filed a suit against the union, challenging the award as contrary to public policy, which opposes having intoxicated persons operate seagoing vessels. Can a court set aside an arbitration award on the ground (legal basis) that the award violates public policy? Should the court set aside the award in this case? Explain. [*Exxon Shipping Co. v. Exxon Seamen's Union,* 11 F.3d 1189 (3d Cir. 1993)]

2-4. Jurisdiction. Cal-Ban 3000 is a weight loss drug made by Health Care Products, Inc., a Florida corporation, and marketed through CKI Industries, another Florida corporation. Enticed by North Carolina newspaper ads for Cal-Ban, the wife of Douglas Tart bought the drug at Prescott's Pharmacies, Inc., in North Carolina for her husband. Within a week, Tart suffered a ruptured colon. Alleging that the injury was caused by Cal-Ban, Tart sued Prescott's Pharmacies, CKI, the officers and directors of Health Care, and others in a North Carolina state court. CKI and the Health Care officers and directors argued that North Carolina did not have personal jurisdiction over them because CKI and Health Care were Florida corporations. How will the court rule? Why? [*Tart v. Prescott's Pharmacies, Inc.,* 118 N.C.App. 516, 456 S.E.2d 121 (1995)]

2–5. Standing to Sue. Blue Cross and Blue Shield insurance companies (the Blues) provide 68 million Americans with health-care financing. The Blues have paid billions of dollars for care attributable to illnesses related to tobacco use. In an attempt to recover some of this amount, the Blues filed a suit in a federal district court against tobacco companies and others, alleging fraud, among other things. The Blues claimed that beginning in 1953, the defendants conspired to addict millions of Americans, including members of Blue Cross plans, to cigarettes and other tobacco products. The conspiracy involved misrepresentation about the safety of nicotine and its addictive properties, marketing efforts targeting children, and agreements not to produce or market safer cigarettes. The defendants' success caused lung, throat, and other cancers, as well as heart disease, stroke, emphysema, and other illnesses. The defendants asked the court to dismiss the case on the ground that the plaintiffs did not have standing to sue. Do the Blues have standing in this case? Why or why not? [*Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.,* 36 F.Supp.2d 560 (E.D.N.Y. 1999)]

2–6. E-Jurisdiction. American Business Financial Services, Inc. (ABFI), a Pennsylvania firm, sells and services loans to businesses and consumers. First Union National Bank, with its principal place of business in North Carolina, provides banking services. Alan Boyer, an employee of First Union, lives in North Carolina and has never been to Pennsylvania. In the

course of his employment, Boyer learned that the bank was going to extend a $150 million line of credit to ABFI. Boyer then attempted to manipulate the stock price of ABFI for personal gain by sending disparaging e-mails to ABFI's independent auditors in Pennsylvania. Boyer also posted negative statements about ABFI and its management on a Yahoo bulletin board. ABFI filed a suit in a Pennsylvania state court against Boyer, First Union, and others, alleging wrongful interference with a contractual relationship, among other things. Boyer filed a motion to dismiss the complaint for lack of personal jurisdiction. Could the court exercise jurisdiction over Boyer? Explain. [*American Business Financial Services, Inc. v. First Union National Bank,* __ A.2d ___(Pa.Comm.Pl. 2002)]

2–7. Arbitration. Alexander Little worked for Auto Stiegler, Inc., an automobile dealership in Los Angeles County, California, eventually becoming the service manager. While employed, Little signed an arbitration agreement that required the submission of all employment-related disputes to arbitration. The agreement also provided that any award over $50,000 could be appealed to a second arbitrator. Little was later demoted and terminated. Alleging that these actions were in retaliation for investigating and reporting warranty fraud and thus were in violation of public policy, Little filed a suit in a California state court against Auto Stiegler. The defendant filed a motion with the court to compel arbitration. Little responded that the arbitration agreement should not be enforced in part because the appeal provision was unfairly one sided. Is this provision enforceable? Should the court grant Auto Stiegler's motion? Why or why not? [*Little v. Auto Stiegler, Inc.,* 29 Cal.4th 1064, 63 P.3d 979, 130 Cal.Rptr.2d 892 (2003)]

2–8. Jurisdiction. KaZaA BV was a company formed under the laws of the Netherlands. KaZaA distributed KaZaA Media Desktop (KMD) software, which enabled users to exchange, via a peer-to-peer transfer network, digital media, including movies and music. KaZaA also operated the KaZaA.com Web site, through which it distributed the KMD software to millions of California residents and other users. Metro-Goldwyn-Mayer Studios, Inc., and other parties in the entertainment industries based in California filed a suit in a federal district court against KaZaA and others, alleging copyright infringement. KaZaA filed a counterclaim, but while legal action was pending, the firm passed its assets and its Web site to Sharman Networks, Ltd., a company organized under the laws of Vanuatu (an island republic east of Australia) and doing business principally in Australia. Sharman explicitly disclaimed the assumption of any of KaZaA's liabilities. When the plaintiffs added Sharman as a defendant, Sharman filed a motion to dismiss on the ground that the court did not have jurisdiction. Would it be fair to subject Sharman to suit in this case? Explain. [*Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.,* 243 F.Supp.2d.1073 (C.D.Cal. 2003)]

2–9. Standing to Sue. Michael and Karla Covington live in Jefferson County, Idaho. When they bought their home, a gravel pit was across the street. In 1995, the county converted the pit to a landfill. Under the county's operation, the landfill accepted major appliances, household garbage, spilled grain, grass clippings, straw, manure, animal carcasses, containers with hazardous content warnings, leaking car batteries, and waste oil, among other things. The deposits were often left uncovered, attracting insects and other scavengers and contaminating

the groundwater. Fires broke out, including at least one started by an intruder who entered the property through an unlocked gate. The Covingtons complained to the state, which inspected the landfill, but no changes were made to address their concerns. Finally, the Covingtons filed a suit in a federal district court against the county and the state, charging violations of federal environmental laws. Those laws were designed to minimize the risks of injuries from fires, scavengers, groundwater contamination, and other pollution dangers. Did the Covingtons have standing to sue? What principles apply? Explain. [*Covington v. Jefferson County,* 358 F.3d 626 (9th Cir. 2004)]

2–10. A QUESTION OF ETHICS

Linden Research, Inc., operates a multiplayer role-playing game in the virtual world known as "Second Life" at **secondlife.com**. Participants create avatars to represent themselves on the site. In 2003, Second Life became the only virtual world to recognize participants' rights to buy, own, and sell digital content—virtual property, including "land." Linden's chief executive officer, Philip Rosedale, joined efforts to publicize this recognition and these rights in the real world media. Rosedale also created an avatar to tout the rights in Second Life town meetings. March Bragg, an experienced Pennsylvania attorney, was a Second Life participant whose avatar attended the meetings, after which Bragg began to invest in Second Life's virtual property. In April 2006, Bragg bought "Taessot," a parcel of virtual land. Linden decided that the purchase was improper, however, and took Taessot from Bragg. Linden also froze Bragg's account, effectively confiscating all of his virtual property and currency. Bragg filed a suit against Linden and Rosedale, claiming that the defendants acted unlawfully. [*Bragg v. Linden Research, Inc.,* __ F.Supp.2d __ (E.D.Pa. 2007)]

1. In the federal district court in Pennsylvania that was hearing the suit, Rosedale, who lives in California, filed a motion to dismiss the claim against him for lack of personal jurisdiction. On what basis could the court deny this motion and assert jurisdiction? Is it fair to require Rosedale to appear in a court in a distant location? Explain.

2. To access Second Life, a participant must accept its "Terms of Service" (TOS) by clicking an "accept" button. Under the TOS, Linden has the right "at any time for any reason or no reason to suspend or terminate your Account," to refuse to return a participant's money, and to amend the terms at its discretion. The TOS also stipulate that any dispute be resolved by binding arbitration in California. Is there anything unfair about the TOS? Should the court compel Bragg to arbitrate this dispute? Discuss.

Chapter 1

Law and Legal Reasoning

INTRODUCTION

The first chapters in Unit 1 provide the background for the entire course. Chapter 1 sets the stage. At this point, it is important to establish goals and objectives. For your students to benefit from this course, they must understand that (1) the law is a set of general rules, (2) that, in applying these general rules, a judge cannot always fit a case to suit a rule, so must fit (or find) a rule to suit the case, (3) that, in fitting (or finding) a rule, a judge must also supply reasons for the decision.

The tension in the law between the need for stability, predictability, and continuity, and the need for change is one of the major concepts introduced in this chapter. The answer to the question, "What is the law?," includes how jurists have answered it, how common law courts originated, and the rationale for the doctrine of *stare decisis*.

Another major concept in the chapter involves the distinctions among today's sources of law and a distinction in its different classifications. The sources include the federal constitution and federal laws, state constitutions and statutes (including the UCC), local ordinances, administrative agency regulations, and case law. The classification is the distinction between civil and criminal law. These sources and categories give students a framework on which to hang the mass of principles known as the law.

CHAPTER OUTLINE

I. Business Activities and the Legal Environment

A. MANY DIFFERENT LAWS MAY AFFECT A SINGLE BUSINESS DECISION

Panels of experts and scholars create uniform laws that any state's legislature can adopt.

1. Lessons from Facebook

The text presents and illustrates an example of how various areas of the law can affect different aspects of a business (Facebook).

2. Points to Consider

A businessperson should know enough about the law to know when to ask for advice.

B. ETHICS AND BUSINESS DECISION MAKING

Ethics can influence business decisions.

II. Sources of American Law

A. CONSTITUTIONAL LAW

The federal constitution is a general document that distributes power among the branches of the government. It is the supreme law of the land. Any law that conflicts with it is invalid. The states also have constitutions, but the federal constitution prevails if their provisions conflict.

B. STATUTORY LAW

Statutes and ordinances are enacted by Congress, state legislatures, and local legislative bodies. Much of the work of courts is interpreting what lawmakers meant when a law was passed and applying that law to a set of facts (a case).

1. Uniform Laws

Panels of experts and scholars create uniform laws that any state's legislature can adopt.

2. The Uniform Commercial Code

The Uniform Commercial Code (UCC) provides a uniform flexible set of rules that govern most commercial transactions. The UCC has been adopted by all the states (only in part in Louisiana), the District of Columbia, and the Virgin Islands.

ADDITIONAL BACKGROUND—

National Conference of Commissioners on Uniform State Laws, Co-sponsor of the Uniform Commercial Code

As explained in the text, the Uniform Commercial Code (UCC) is an ambitious codification of commercial common law principles. The UCC has been the most widely adopted, and thus the most successful, of the many uniform and model acts that have been drafted. The **National Conference of Commissioners on Uniform State Laws** is responsible for many of these acts. The National Conference of Commissioners on

Uniform State Laws is an organization of state commissioners appointed by the governor of each state, the District of Columbia, and Puerto Rico. Their goal is to promote uniformity in state law where uniformity is desirable. The purpose is to alleviate problems that arise in an increasingly interdependent society in which a single transaction may cross many states. Financial support comes from state grants. The members meet annually to consider drafts of proposed legislation. The American Law Institute works with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws.

C. ADMINISTRATIVE LAW

Administrative law consists of the rules, orders, and decisions of administrative agencies.

1. Federal Agencies

Executive agencies within the cabinet departments of the executive branch are subject to the power of the president to appoint and remove their officers. The officers of independent agencies serve fixed terms and cannot be removed without just cause.

2. State and Local Agencies

These agencies are often parallel federal agencies in areas of expertise and subjects of regulation. Federal rules that conflict with state rules take precedence.

D. CASE LAW AND COMMON LAW DOCTRINES

Another basic source of American law consists of the rules of law announced in court decisions. These rules include judicial interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies.

III. The Common Law Tradition

American law is based on the English common law legal system. Knowledge of this tradition is necessary to students' understanding of the nature of our legal system.

A. EARLY ENGLISH COURTS

The English system unified its local courts in 1066. This unified system, based on the decisions judges make in cases, is the common law system.

1. Courts of Law and Remedies at Law

A court of law is limited to awarding payments of money or property as compensation.

2. Courts of Equity

Equity is a branch of unwritten law, which was founded in justice and fair dealing, and seeks to supply a fairer and more adequate remedy than a remedy at law.

3. Remedies in Equity

A court of equity can order specific performance, an injunction, or rescission of a contract (Chapter 19).

4. Equitable Maxims

These guide the application of equitable remedies.

B. LEGAL AND EQUITABLE REMEDIES TODAY

Today, in most states, a plaintiff may request both legal and equitable remedies in the same action, and the trial court judge may grant either form—or both forms—of relief.

C. THE DOCTRINE OF *STARE DECISIS*

1. Case Precedents and Case Reporters

The common law system involves the application, in current cases, of principles applied in earlier cases with similar facts.

2. *Stare Decisis* and the Common Law Tradition

The use of precedent forms the basis for the doctrine of *stare decisis*.

3. Controlling Precedents

A court's application of a specific principle to a certain set of facts is binding on that court and lower courts, which must then apply it in future cases. A controlling precedent is binding authority. Other binding authorities include constitutions, statutes, and rules.

ENHANCING YOUR LECTURE—

👎 9 IS AN 1875 CASE PRECEDENT STILL BINDING? 88 👎

In a suit against the U.S. government for breach of contract, Boris Korczak sought compensation for services that he had allegedly performed for the Central Intelligence Agency (CIA) from 1973 to 1980. Korczak claimed that the government had failed to pay him an annuity and other compensation required by a secret *oral* agreement he had made with the CIA. The federal trial court dismissed Korczak's claim, and Korczak appealed the decision to the U.S. Court of Appeals for the Federal Circuit.

At issue on appeal was whether a Supreme Court case decided in 1875, *Totten v. United States*,[a] remained the controlling precedent in this area. In *Totten,* the plaintiff alleged that he had formed a secret contract with President Lincoln to collect information on the Confederate army during the Civil War. When the plaintiff sued the government for compensation for his services, the Supreme Court held that the agreement was unenforceable. According to the Court, to enforce such agreements could result in the disclosure of information that "might compromise or embarrass our government" or cause other "serious detriment" to the public. In Korczak's case, the federal appellate court held that the *Totten* case precedent was still "good law," and therefore Korczak, like the plaintiff in *Totten,* could not recover compensation for his services. Said the court, "*Totten,* despite its age, is the last pronouncement on this issue by the Supreme Court. . . . We are duty bound to follow the law given us by the Supreme Court unless and until it is changed."[b]

THE BOTTOM LINE

Supreme Court precedents, no matter how old, remain controlling until they are overruled by a subsequent decision of the Supreme Court, by a constitutional amendment, or by congressional legislation.

a. 92 U.S. 105 (1875).
b. *Korczak v. United States,* 124 F.3d 227 (Fed.Cir. 1997).

4. *Stare Decisis* and Legal Stability
This doctrine permits a predictable, quick, and fair resolution of cases, which makes the application of law more stable.

5. Departures from Precedent
A judge may decide that a precedent is incorrect, however, if there may have been changes in technology, for example, business practices, or society's attitudes.

6. When There Is No Precedent
When determining which rules and policies to apply in a given case, and in applying them, a judge may examine: prior case law, the principles and policies behind the decisions, and their historical setting; statutes and the policies behind a legislature's passing a specific statute; society's values and custom; and data and principles from other disciplines.

D. *STARE DECISIS* AND LEGAL REASONING

1. Basic Steps in Legal Reasoning
Legal reasoning is briefly defined, and the "issue-rule-apply-conclude" format is outlined.

E. THERE IS NO ONE "RIGHT" ANSWER

Of course, there is no one "right" answer to every legal question.

F. THE COMMON LAW TODAY

1. Courts Interpret Statutes
Through the courts, the common law governs all areas *not* covered by statutory or administrative law, as well as interpretations of the application of statutes and rules.

2. *Restatements of the Law* Clarify and Illustrate the Common Law
The common law principles are summarized in the American Law Institute's *Restatements of the Law*, which do not have the force of law but are an important secondary source on which judges often rely.

ADDITIONAL BACKGROUND—

Restatement (Second) of Contracts

The American Law Institute (ALI), a group of American legal scholars, is responsible for the *Restatements*. These scholars also work with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws. Members include law educators, judges, and attorneys. Their goal is to promote uniformity in state law to encourage the fair administration of justice.

The ALI publishes summaries of common law rules on selected topics. Intended to clarify the rules, the

summaries are published as the *Restatements*. Each *Restatement* is further divided into chapters and sections. Accompanying the sections are explanatory comments, examples illustrating the principles, relevant case citations, and other materials. The following is ***Restatement (Second) of Contracts***, Section 1 (that is, Section 1 of the second edition of the *Restatement of Contracts*) with excerpts from the Introductory Note to Chapter 1 and Comments accompanying the section.

Chapter 1
MEANING OF TERMS

* * * *

Introductory Note: A persistent source of difficulty in the law of contracts is the fact that words often have different meanings to the speaker and to the hearer. Most words are commonly used in more than one sense, and the words used in this *Restatement* are no exception. It is arguable that the difficulty is increased rather than diminished by an attempt to give a word a single definition and to use it only as defined. But where usage varies widely, definition makes it possible to avoid circumlocution in the statement of rules and to hold ambiguity to a minimum.

In the *Restatement*, an effort has been made to use only words with connotations familiar to the legal profession, and not to use two or more words to express the same legal concept. Where a word frequently used has a variety of distinct meanings, one meaning has been selected and indicated by definition. But it is obviously impossible to capture in a definition an entire complex institution such as "contract" or "promise." The operative facts necessary or sufficient to create legal relations and the legal relations created by those facts will appear with greater fullness in the succeeding chapters.

§ 1. Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Comment:

* * * *

c. Set of promises. A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making promises to one or more persons. To constitute a "set," promises need not be made simultaneously; it is enough that several promises are regarded by the parties as constituting a single contract, or are so related in subject matter and performance that they may be considered and enforced together by a court.

IV. Schools of Legal Thought

A. THE NATURAL LAW SCHOOL

Adherents of the *natural law* school believe that government and the legal system should reflect universal moral and ethical principles that are inherent in the nature of human life.

B. THE POSITIVIST SCHOOL

Followers of the *legal positivism* believe that there can be no higher law than a nation's positive law (the law created by a particular society at a particular point in time).

C. THE HISTORICAL SCHOOL

Those of the *historical school* emphasize legal principles that were applied in the past.

D. LEGAL REALISM

Legal realists believe that judges are influenced by their unique individual beliefs and attitudes, that the application of precedent should be tempered by each case's specific circumstances, and that extra-legal sources should be considered in making decisions. This influenced the sociological school of jurisprudence, which views law as a tool to promote social justice.

V. Classifications of Law

Substantive law defines, describes, regulates, and creates rights and duties. *Procedural law* includes rules for enforcing those rights. Other classifications include splitting law into federal and state divisions or private and public categories. One of the broadest classification systems divides law into national law and international law.

A. CIVIL LAW AND CRIMINAL LAW

Civil law regulates relationships between persons and between persons and their governments, and the relief available when their rights are violated. *Criminal law* regulates relationships between individuals and society, and prescribes punishment for proscribed acts.

B. CYBERLAW

Cyberlaw is an informal term that describes the body of case and statutory law dealing specifically with issues raised in the context of the Internet.

VI. How to Find Primary Sources of Law

A brief introduction to case reporting systems and legal citations is included in the text. Also discussed are publications collecting statutes and administrative regulations.

A. FINDING STATUTORY AND ADMINISTRATIVE LAW

Publications collecting statutes and administrative regulations are discussed in the text.

B. FINDING CASE LAW

A brief introduction to case reporting systems and legal citations is also included.

VII. How to Read and Understand Case Law

To assist students in reading and analyzing the court opinions digested in the text, the format is dissected, terms are defined, and a sample case is annotated.

ADDITIONAL BACKGROUND—

West's *Federal Reporter*

West Publishing Company publishes federal court decisions unofficially in a variety of publications. West organizes these reports by court level and issues them chronologically. Opinions from the United States Court of Appeals, for example, are reported in **West's *Federal Reporter***. West publishes these decisions with headnotes condensing important legal points in the cases. The headnotes are assigned key numbers that cross-reference the points to similar points in cases reported in other West publications. The following are excerpts from *Ferguson v. Commissioner of Internal Revenue*, as published with headnotes in West's *Federal Reporter*.

Betty Ann FERGUSON, Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 90-4430

Summary Calendar.
United States Court of Appeals,
Fifth Circuit.

Jan. 22, 1991.

Taxpayer filed petition. The United States Tax Court, Korner, J., dismissed for lack of prosecution, and appeal was taken. The Court of Appeals held that court abused its discretion in refusing testimony of taxpayer, who refused, on religious grounds, to swear or affirm.

Reversed and remanded.

1. Constitutional Law 92K84(2)

Protection of free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. U.S.C.A. Const. Amend. 1. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

2. Witnesses 410K227

Court abused its discretion in refusing testimony of witness who refused, on religious grounds, to swear or affirm, and who instead offered to testify accurately and completely and to be subject to penalties for perjury. U.S.C.A. Const. Amend. 1; Fed.Rules Evid.Rule 603, 28 U.S.C.A. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

Betty Ann Ferguson, Metairie, La., pro se.

Peter K. Scott, Acting Chief Counsel, I.R.S., Gary R. Allen, David I. Pincus, William S. Rose, Jr., Asst. Attys. Gen., Dept. of Justice, Tax Div., Washington, D.C., for respondent-appellee.

Appeal from a Decision of the United States Tax Court.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:

Betty Ann Ferguson appeals the Tax Court's dismissal of her petition for lack of prosecution after she refused to swear or affirm at a hearing. We find the Tax Court's failure to accommodate her objections inconsistent with both Fed.R.Evid. 603 and the First Amendment and reverse.

I.

This First Amendment case ironically arose out of a hearing in Tax Court. Although the government's brief is replete with references to income, exemptions, and taxable years, the only real issue is Betty Ann Ferguson's refusal to "swear" or "affirm" before testifying at the hearing. Her objection to oaths and affirmations is rooted in two Biblical passages, Matthew 5:33-37 and James 5:12. * * *

Ms. Ferguson, proceeding pro se, requested that Judge Korner consider the following statement set forth by the Supreme Court of Louisiana in *Staton v. Fought*, 486 So.2d 745 (La.1986), as an alternative to an oath or affirmation:

> I, [Betty Ann Ferguson], do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete.

Judge Korner abruptly denied her request, commenting that "[a]sking you to affirm that you will give true testimony does not violate any religious conviction that I have ever heard anybody had" and that he did not think affirming "violates any recognizable religious scruple." Because Ms. Ferguson could only introduce the relevant evidence through her own testimony, Judge Korner then dismissed her petition for lack of prosecution. She now appeals to this court.

II.

[1] The right to free exercise of religion, guaranteed by the First Amendment to the Constitution, is one of our most protected constitutional rights. The Supreme Court has stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). Accord *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); and *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). The protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); and *United States v. Ballard*, 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-887, 88 L.Ed. 1148 (1944). Fed.R.Evid. 603, applicable in Tax Court under the Internal Revenue Code, 26 U.S.C. § 7453, requires only that a witness "declare that [she] will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." As evidenced in the advisory committee notes accompanying Rule 603, Congress clearly intended to minimize any intrusion on the free exercise of religion:

> The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. Accord Wright and Gold, *Federal Practice and Procedure* § 6044 (West 1990).

The courts that have considered oath and affirmation issues have similarly attempted to accommodate free exercise objections. In *Moore v. United States*, 348 U.S. 966, 75 S.Ct. 530, 99 L.Ed. 753 (1955) (per curiam), for example, the Supreme Court held that a trial judge erred in refusing the testimony of witnesses who would not use the word "solemnly" in their affirmations for religious reasons.

* * * *

[2] The government offers only two justifications for Judge Korner's refusal to consider the *Staton* statement. First, the government contends that the Tax Court was not bound by a Louisiana decision. This argument misses the point entirely; Ms. Ferguson offered *Staton* as an alternative to an oath or affirmation and not as a precedent.

The government also claims that the *Staton* statement is insufficient because it does not acknowledge that the government may prosecute false statements for perjury. The federal perjury statute, 18 U.S.C. § 1621, makes the taking of "an oath" an element of the crime of perjury. *Accord Smith v. United States*, 363 F.2d 143 (5th Cir.1966). However, Ms. Ferguson has expressed her willingness to add a sentence to the *Staton* statement acknowledging that she is subject to penalties for perjury. The government has cited a number of cases invalidating perjury convictions where no oath was given, but none of the cases suggest that Ms. Ferguson's proposal would not suffice as "an oath" for purposes of § 1621. See *Gordon*, 778 F.2d at 1401 n. 3 (statement by defendant that he understands he must accurately state the facts combined with acknowledgment that he is testifying under penalty of perjury would satisfy Fed.R.Civ.P. 43(d)).

The parties' briefs to this court suggest that the disagreement between Ms. Ferguson and Judge Korner might have been nothing more than an unfortunate misunderstanding. The relevant portion of their dialogue was as follows:

> MS. FERGUSON: I have religious objections to taking an oath.
> THE COURT: All right. You may affirm. Then in lieu of taking an oath, you may affirm.
> MS. FERGUSON: Sir, may I present this to you? I do not—
> THE COURT: Just a minute. The Clerk will ask you.
> THE CLERK: You are going to have to stand up and raise your right hand.
> MS. FERGUSON: I do not affirm either. I have with me a certified copy of a case from the Louisiana Supreme Court.
> THE COURT: I don't care about a case from the Louisiana Supreme Court, Ms. Ferguson. You will either swear or you will affirm under penalties of perjury that the testimony you are about to give is true and correct, to the best of your knowledge.
> MS. FERGUSON: In that case, Your Honor, please let the record show that I was willing to go under what has been acceptable by the State of Louisiana Supreme Court, the State versus—
> THE COURT: We are not in the state of Louisiana, Ms. Ferguson. You are in a Federal court and you will do as I have instructed, or you will not testify.
> MS. FERGUSON: Then let the record show that because of my religious objections, I will not be allowed to testify.

Ms. Ferguson contends that Judge Korner insisted that she use either the word "swear" or the word "affirm"; the government suggests instead that Judge Korner only required an affirmation which the government defines as "an alternative that encompasses all remaining forms of truth assertion that would satisfy [Rule 603]." Even Ms. Ferguson's proposed alternative would be an "affirmation" under the government's definition.

If Judge Korner had attempted to accommodate Ms. Ferguson by inquiring into her objections and considering her proposed alternative, the entire matter might have been resolved without an appeal to this court. Instead, however, Judge Korner erred not only in evaluating Ms. Ferguson's religious belief, and concluding that it did not violate any "recognizable religious scruple," but also in conditioning her right to testify and present evidence on what she perceived as a violation of that belief. His error is all the more

apparent in light of the fact that Ms. Ferguson was proceeding pro se at the hearing.

We therefore REVERSE the decision of the Tax Court and REMAND this case for further proceedings not inconsistent with this opinion.

ADDITIONAL BACKGROUND—

Corpus Juris Secundum

Because the body of American case law is huge, finding relevant precedents would be nearly impracticable were it not for case digests, legal encyclopedias, and similar publications that classify decisions by subject. Like case digests, legal encyclopedias present topics alphabetically, but encyclopedias provide more detail. The legal encyclopedia **Corpus Juris Secundum** (or C.J.S.) covers the entire field of law. It has been cited or directly quoted more than 50,000 times in federal and state appellate court opinions. The following is an excerpt from C.J.S.—Section 47 of the category "Theaters & Shows" (86 C.J.S. *Theaters & Shows* § 47).

f. Assumption of Risk

A patron assumes the ordinary and natural risks of the character of the premises, devices, and form of amusement of which he has actual or imputed knowledge; but he does not assume the risk of injury from the negligence of the proprietor or third persons.

While it has been said that, strictly speaking, the doctrine of assumed risk is applicable only to the relationship of master and servant,[3] patrons of places of public amusement assume all natural and inherent risks pertaining to the character of the structure,[4] or to the devices located therein,[5] or to the form of amusement,[6] which are open and visible. Patrons of places of public amusement assume such risks as are incident to their going without compulsion to some part of the premises to which patrons are not invited and where they are not expected to be, and which risks

3. Cal.—Potts v. Crafts, 42 P.2d 87, 5 Cal.App.2d 83.

4. Mo.—King v. Ringling, 130 S.W. 482, 145 Mo.App. 285. 62 C.J. p 877 note 62.

Darkened motion picture theater

Ky.—Columbia Amusement Co. v. Rye, 155 S.W.2d 727, 288 Ky. 179.

N.J.—Falk v. Stanley Fabian Corporation of Delaware, 178 A. 740, 115 N.J.Law 141.

Tenn.—Smith v. Crescent Amusement Co., 184 S.W.2d 179, 27 Tenn.App. 632.

5. Cal.—Chardon v. Alameda Park Co., 36 P.2d 136, 1 Cal.App.2d 18.

Fla.—Payne v. City of Clearwater, 19 So.2d 406, 155 Fla. 9.

Mass.—Beaulieu v. Lincoln Rides, Inc., 104 N.E.2d 417, 328 Mass. 427.

Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.

Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700.

Ohio.—Pierce v. Gooding Amusement Co., App., 90 N.E.2d 585.

Tex.—Vance v. Obadal, Civ.App., 256 S.W.2d 139.

62 C.J. p 877 note 63

Particular amusement devices

(1) "Dodge Em" cars.—Connolly v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—Frazier v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—62 C.J. p 877 note 63 [b].

(2) Loop the loop.—Kemp v. Coney Island, Ohio App., 31 N.E.2d 93.

(3) Roller coaster.—Wray v. Fair-ield Amusement Co., 10 A.2d 600, 126 Conn. 221—62 C.J. p 877 note 63 [e].

6. Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.

Mo.—Page v. Unterreiner, App.,106 S.W.2d 528.

N.J.—Griffin v. De Geeter, 40 A.2d 579, 132 N.J.Law 381—Thurber v. Skouras Theatres Corporation, 170 A. 863, 112 N.J.Law 385.

N.Y.—Levy v. Cascades Operating Corpora-tion, 32 N.Y.S.2d 341, 263 App.Div. 882 —Saari v. State, 119 N.Y.S.2d 507, 203 Misc. 859—Schmidt v. State, 100 N.Y.S.2d 504, 198 Misc. 802.

Vt.—Dusckiewicz v. Carter, 52 A.2d 788, 115 Vt. 122.

62 C.J. p 877 note 63.

Other statements of rule

(1) A spectator at game assumes risk of such dangers incident to playing of game as are known to him or should be obvious to reasonable and prudent person in exercise of due care under circumstances.

Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.

Neb.—Klause v. Nebraska State Board of Agriculture, 35 N.W.2d 104, 150 Neb. 466—Tite v. Omaha Coliseum Corporation, 12 N.W.2d 90, 144 Neb. 22.

(2) One participating in a race assumes the risk of injury from natural hazards necessarily incident to, or which inhere in, such a race, under maxim "volenti non fit injuria," which means that to which a person assents is not esteemed in law an injury.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.

(3) Patrons of a place of amusement assume the risk of ordinary dangers normally attendant thereon and also the risks ensuing from conditions of which they now or of which, in the particular circumstances, they are charged with knowledge, and which inhere therein.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.

Liability of proprietor of sports arena

Generally, the proprietor of an establishment where contests of baseball, hockey, etc., are conducted, is not liable for injuries to its patrons.—Zeitz v. Cooperstown Baseball Cen-tennial, 29 N.Y.S.2d 56.

Risks of particular sports or entertainment

(1) Baseball.

Cal.—Quinn v. Recreation Park Ass'n, 46 P.2d 141, 3 Cal.2d 725—Brown v. San Francisco Ball Club, 222 P.2d 19, 99 Cal.App.2d 484—Ratcliff v. San Diego Baseball Club of Pacific Coast League, 81 P.2d 625, 27 Cal.App.2d 733.

Ind.—Emhardt v. Perry Stadium, 46 N.E.2d 704, 113 Ind.App. 197.

La.—Jones v. Alexandria Baseball Ass'n, App., 50 So.2d 93.

Mo.—Hudson v. Kansas City Baseball Club, 164 S.W.2d 318, 349 Mo. 1215—Grimes v. American League Baseball Co., App., 78 S.W.2d

N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S. 505, 245 App.Div.137—Jones v. Kane & Roach, 43 N.Y.S.2d 140, 187 Misc. 37—Blackball v. Albany Baseball & Amusement Co., 285 N.Y.S.2d 695, 157 Misc. 801—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.

N.C.—Cates v. Cincinnati Exhibition Co., 1 S.E.2d 131, 215 N.C. 64.

Ohio.—Hummel v. Columbus Baseball Club, 49 N.E.2d 773, 71 Ohio App. 321—Ivory v. Cincinnati Baseball Club Co., 24 N.e.2d 837, 62 Ohio App. 514.

Okl.—Hull v. Oklahoma City Baseball Co., 163 P.2d 982, 196 Okl. 40.

Tex.—Williams v. Houston Baseball Ass'n, Civ.App., 154 S.W.2d 874—Keys v. Alamo City Baseball Co., Civ.App., 150 S.W.2d 368.

Utah.—Hamilton v. Salt Lake City Corp., 237 P.2d 841.

62 C.J. p 877 note 63 [a].

(2) Basketball.—Paine v. Young Men's Christian Ass'n, 13 A.2d 820, 91 N.H. 78.

(3) Golf. Mass.—Katz v. Gow, 75 N.E.2d 438, 321 Mass. 666.

N.J.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.

(4) Diving.—Hill v. Merrick, 31 P.2d 663, 147 Or. 244.

(5) Hockey.

Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.

N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S.2d 505, 245 App.Div. 137—Hammel v. Madison Square Garden Corporation, 279 N.Y.S. 815, 156 Misc. 311.

(6) Horse racing.

Nev.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.

N.Y.—Futterer v. Saratoga Ass'n for Improvement of Breed of Horses, 31 N.Y.S.2d 108, 262 App.Div. 675.

(7) Ice skating.

Neb.—McCullough v. Omaha Coliseum Corporation, 12 N.W.2d 639, 144 Neb. 92.

N.D.—Filler v. Stenvick, 56 N.W.2d 798.

Pa.—Oberheim v. Pennsylvania Sports & Enterprises, 55 A.2d 766, 358 Pa. 62.

(8) Square dancing.—Gough v. Wadhams Mills Grange No. 1015, P. of H., 109 N.Y.S.2d 374.

ADDITIONAL BACKGROUND—

United States Code

Until 1926, federal statutes were published in one volume of the Revised Statutes of 1875 and in each subsequent volume of the Statutes at Large. In 1926, these laws were rearranged into fifty subject areas and republished as the **United States Code**. In the United States Code, all federal laws of a public and permanent nature are compiled according to subject. Subjects are assigned titles and title numbers. Within each title, subjects are further subdivided, and each statute is given a section number. The following is the text of Section 1 of Title 15 of the United States Code (15 U.S.C. § 1).

TITLE 15. COMMERCE AND TRADE
CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

ADDITIONAL BACKGROUND—

State Codes:

Pennsylvania Consolidated Statutes

State codes may have any of several names—Codes, General Statutes, Revisions, and so on—depending on the preference of the states. Also arranged by subject, some codes indicate subjects by numbers. Others assign names. The following is the text of one of the state statutes whose citations are explained in the textbook—Section 1101 of Title 13 of the **Pennsylvania Consolidated Statutes** (13 Pa. C.S. § 1101).

PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED
DIVISION 1. GENERAL PROVISIONS
CHAPTER 11. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF TITLE

§ 1101. Short title of title

This title shall be known and may be cited as the "Uniform Commercial Code."

1984 Main Volume Credit(s)

1979, Nov. 1, P.L. 255, No. 86, § 1, effective Jan. 1, 1980.

California Commercial Code

The text of another of the state statutes whose citations are explained in the textbook follows—Section 1101 of the **California Commercial Code** (Cal. Com. Code § 1101).

WEST'S ANNOTATED CALIFORNIA CODES
COMMERCIAL CODE
DIVISION 1. GENERAL PROVISIONS
CHAPTER 1. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE CODE

§ 1101. Short Title

This code shall be known and may be cited as Uniform Commercial Code.

1964 Main Volume Credit(s)

(Stats.1963, c. 819, § 1101.)

ADDITIONAL BACKGROUND—

Code of Federal Regulations

Created by Congress in 1937, the **Code of Federal Regulations** is a set of softcover volumes that contain the regulations of federal agencies currently in effect. Items are selected from those published in the Federal Register and arranged in a scheme of fifty titles, some of which are the same as those organizing the statutes in the United States Code (discussed above). Each title is divided into chapters, parts, and sections. The Code of Federal Regulations is completely revised every year. The following is the text of Section 230.504 of Title 17 of the Code of Federal Regulations (17 C.F.R. § 230.504).

TITLE 17—COMMODITY AND SECURITIES EXCHANGE
Chapter II—Securities and Exchange Commission
Part 230—General Rules and Regulations, Securities Act of 1933
REGULATION B—EXEMPTION RELATING TO FRACTIONAL UNDIVIDED INTERESTS IN OIL OR GAS RIGHTS
Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933

§ 230.504 Exemption for Limited Offerings and Sales of Securities Not Exceeding $1,000,000.

(a) Exemption.

Offers and sales of securities that satisfy the conditions in paragraph (b) of this Section by an issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) Conditions to be met—

(b)(1) General Conditions. To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502, except that the provisions of § 230.502(c) and (d) shall not apply to offers and sales of securities under this § 230.504 that are made:

(b)(1)(i) Exclusively in one or more states each of which provides for the registration of the securities and requires the delivery of a disclosure document before sale and that are made in accordance with those state provisions; or

(b)(1)(ii) In one or more states which have no provision for the registration of the securities and the delivery of a disclosure document before sale, if the securities have been registered in at least one state which provides for such registration and delivery before sale, offers and sales are made in the state of registration in accordance with such state provisions, and such document is in fact delivered to all purchasers in the states which have no such procedure before the sale of the securities.

(b)(2) Specific condition—

(b)(2)(i) Limitation on aggregate offering price. The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504 in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act, provided that no more than $500,000 of such aggregate offering price is attributable to offers and sales of securities without registration under a state's securities laws.

Note 1.—The calculation of the aggregate offering price is illustrated as follows:

Example 1. If an issuer sells $500,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504, it would be able to sell an additional $500,000 worth of securities either pursuant to state registration or without state registration during the ensuing twelve-month period, pursuant to this § 230.504.

Example 2. If an issuer sold $900,000 pursuant to state registration on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months.

Note 2.—If a transaction under this § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

Note 3.—In addition to the aggregation principles, issuers should be aware of the applicability of the integration principles set forth in § 230.502(a).

(b)(2)(ii) Advice about the limitations on resale. Except where the provision does not apply by virtue of paragraph (b)(1) of this section, the issuer, at a reasonable time prior to the sale of securities, shall advise each purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of § 230.502.

[53 FR 7869, March 10, 1988; 54 FR 11372, March 20, 1989]

AUTHORITY: Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; Sec. 308(a)(2), 90 Stat. 57; Secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat. 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498-1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37.

Source: Sections 230.490 to 230.494 contained in Regulation C, 12 FR 4076, June 24, 1947, unless otherwise noted.

Note.—In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the respective rule number in Regulation C, under the Securities Act of 1933.

ADDITIONAL BACKGROUND—

United States Code Annotated

Published by West Publishing Company, the **United States Code Annotated** contains the complete text of laws enacted by Congress that are included in the United States Code (discussed above), together with case notes (known as annotations) of judicial decisions that interpret and apply specific sections of the statutes. Also included are the text of presidential proclamations and executive orders, specially prepared research aids, historical notes, and library references. The following are excerpts from the materials found at Section 1 of Title 15 of the United States Code Annotated (15 U.S.C.A. § 1), including the historical notes and selected references.

TITLE 15. COMMERCE AND TRADE
CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation,

or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1975 Amendment. Section 4 of Pub.L. 94-145 provided that: "The amendments made by sections 2 and 3 of this Act [to this section and section 45(a) of this title] shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act [Dec. 12, 1975]."

Short Title of 1984 Amendment. Pub.L. 98-544, § 1, Oct. 24, 1984, 98 Stat. 2750, provided: "That this Act [enacting sections 34 to 36 of this title and provisions set out as a note under section 34 of this title] may be cited as the 'Local Government Antitrust Act of 1984'."

Short Title of 1982 Amendment. Pub.L. 97-290, Title IV, § 401, Oct. 8, 1982, 96 Stat. 1246, provided that "This title [enacting section 6a of this title and section 45(a) (3) of this title] may be cited as the 'Foreign Trade Antitrust Improvements Act of 1982'."

Short Title of 1980 Amendment. Pub.L. 96-493, § 1, Dec. 2, 1980, 94 Stat. 2568, provided: "That this Act [enacting section 26a of this title] may be cited as the 'Gasohol Competition Act of 1980'."

Short Title of 1975 Amendment. Section 1 of Pub.L. 94-145 provided: "That this Act [which amended this section and section 45(a) of this title and enacted provisions set out as a note under this section] may be cited as the 'Consumer Goods Pricing Act of 1975'."

Short Title of 1974 Amendment. Section 1 of Pub.L. 93-528 provided: "That this Act [amending this section, and sections 2, 3, 16, 28, and 29 of this title, and section 401 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and enacting provisions set out as notes under sections 1 and 29 of this title] may be cited as the 'Antitrust Procedures and Penalties Act'."

Short Title. Pub.L. 94-435, Title III, § 305(a), Sept. 30, 1976, 90 Stat. 1397, inserted immediately after the enacting clause of Act July 2, 1890, c. 647, the following: "That this Act [sections 1 to 7 of this title] may be cited as the 'Sherman Act'."

Legislative History. For legislative history and purpose of Act July 7, 1955, see 1955 U.S. Code Cong. and Adm.News, p. 2322.

For legislative history and purpose of Pub.L. 93-528, see 1974 U.S. Code Cong. and Adm. News, p. 6535. See, also, Pub.L. 94-145, 1975 U.S. Code Cong. and Adm. News, p. 1569.

REFERENCES

CROSS REFERENCES

Antitrust laws inapplicable to labor organizations, see § 17 of this title.

Carriers relieved from operation of antitrust laws, see § 5(11) of Title 49, Transportation.

Combinations in restraint of import trade, see § 8 of this title.

Conspiracy to commit offense or to defraud United States, see § 371 of Title 18, Crimes and Criminal Procedure.

Discrimination in price, services or facilities, see § 13 of this title.

Fishing industry, restraints of trade in, see § 522 of this title.

Misdemeanor defined, see § 1 of Title 18, Crimes and Criminal Procedure.

Monopolies prohibited, see § 2 of this title.

Trusts in territories or District of Columbia prohibited, see § 3 of this title.

FEDERAL PRACTICE AND PROCEDURE

1990 Pocket Part Federal Practice and Procedure

Adding new parties, see Wright & Miller: Civil § 1504.

Adequacy of representation of members in class actions instituted under sections 1 to 7 of this title, see Wright, Miller & Kane: Civil 2d § 1765.

Answers to interrogatories with respect to justification for unlawful activity, see Wright & Miller: Civil § 2167.

Applicability of rule relating to summary judgment, see Wright, Miller & Kane: Civil 2d § 2730.

Applicability of standards developed by federal courts under sections 1 to 7 of this title to certain intrastate transactions, see Wright, Miller, Cooper & Gressman: Jurisdiction § 4031.

Authority of district court to award injunctive relief in actions to restrain antitrust violations, see Wright & Miller: Civil § 2942.

Capacity of unincorporated association to sue and be sued, see Wright & Miller: Civil § 1564.

Discretion of court in taxing costs, see Wright, Miller & Kane: Civil 2d § 2668.

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126.

Joinder of claims, see Wright & Miller: Civil § 1587.

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CODE OF FEDERAL REGULATIONS

1973 Main Volume Code of Federal Regulations

Advisory opinions and rulings of particular trade practices, see 16 CFR 15.1 et seq.

Common sales agency, see 16 CFR 15.46.

Compliance with state milk marketing orders, see 16 CFR 15.154.

Guides and trade practice rules for particular industries, see 16 CFR subd. B, parts 17 to 254.

LAW REVIEW COMMENTARIES

Abolishing the act of state doctrine. Michael J. Bazyler, 134 U.Pa.L.Rev. 325 (1986).

Affecting commerce test: The aftermath of McLain. Richard A. Mann, 24

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ANNOTATIONS

1. Common law

Congress did not intend text of sections 1 to 7 of this title to delineate their full meaning or their application in concrete situations, but, rather, Congress expected courts to give shape to their broad mandate by drawing on common-law tradition. National Society of Professional Engineers v. U.S., U.S.Dist.Col.1978, 98 S.Ct. 1355, 435 U.S. 679, 55 L.Ed.2d 637.

This section has a broader application to price fixing agreements than the common law prohibitions or sanctions. U.S. v. Socony-Vacuum Oil Co., Wis.1940, 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, rehearing denied 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421.

Effect of §§ 1 to 7 of this title was to make contracts in restraint of trade, void at common law, unlawful in positive sense and created civil action for damages in favor of injured party. Denison Mattress Factory v. Spring-Air Co., C.A.Tex.1962, 308 F.2d 403.

Combinations in restraint of trade or tending to create or maintain monopoly gave rise to actions at common law. Rogers v. Douglas Tobacco Bd. of Trade, Inc., C.A.Ga.1957, 244 F.2d 471.

Federal statutory law on monopolies did not supplant common law but incorporated it. Mans v. Sunray DX Oil Co., D.C.Okl.1971, 352 F.Supp. 1095.

Common-law principle that manufacturer can deal with one retailer in a community or area and refuse to sell to any other has not been modified by §§ 1 to 7 of this title or any other act of Congress. U.S. v. Arnold, Schwinn & Co., D.C.Ill.1965, 237 F.Supp. 323, reversed on other grounds 87 S.Ct. 1856, 388 U.S. 365, 18 L.Ed.2d 1249, on remand 291 F.Supp. 564, 567.

This section is but an exposition of common law doctrines in restraint of trade and is to be interpreted in the light of common law. U.S. v. Greater Kansas City Chapter Nat. Elec. Contractors Ass'n, D.C.Mo.1949, 82 F.Supp. 147.

CASE SYNOPSIS—

A Sample Case: *Apple Inc. v. Amazon.com Inc.*

Apple products (iPads, iPhones, iPods) use the term APP STORE. Amazon.com launched an Appstore for viewing and downloading applications to Android devices (such as the Kindle Fire). Apple claimed that Amazon's use of the word "Appstore" constituted false advertising and trademark infringement—that Amazon's use of "Appstore" misled the public into thinking that Amazon's Appstore is affiliated with Apple and offers the same content.

A federal district court determined that consumers were not deceived by the two vendors' use of the same term. There was no evidence that consumers understood "app store" to include specific qualities, characteristics, or attributes or were otherwise misled by the use of the term.

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Notes and Questions

What is required to establish that an ad, or the use of a certain term, as in this case, constitutes false advertising? A false advertising claim requires either a false statement of fact in an ad or evidence showing exactly what message was conveyed that was sufficient to constitute false advertising. In this case, the court was asked to consider, in light of a false advertising claim, whether Amazon could use the term "Appstore" to designate a site for buying apps. Apple made this assertion without representing that the nature, characteristics, or quality of the site is the same as that of Apple's "APP STORE." This did not meet the standard for establishing false advertising.

Amazon filed a motion for summary judgment. Summary judgment is appropriate when there is no genuine dispute as to any material fact. What is a material fact? What indicates that a dispute over a material fact is genuine? Material facts are those that might affect the outcome of the case. A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the party against whom the motion is filed.

TEACHING SUGGESTIONS

1. Emphasize that the law is not simple—there are no simple solutions to complex problems. Legal principles are presented in this course as "black letter law"—that is, in the form of basic principles generally accepted by the courts or expressed in statutes. In fact, the law is not so concrete and static. One of the purposes of this course is to acquaint students with legal problems and issues that occur in society in general and in business in particular. The limits of time and space do not allow all of the principles to be presented

against the background of their development and the reasoning in their application. By the end of the course, students should be able to recognize legal problems ("spot the issues") when they arise. In the real world, this may be enough to seek professional legal assistance. In this course, students should also be able to recognize the competing interests involved in an issue and reason through opposing points of view to a decision.

2. Point out that the law assumes everyone knows it, or, as it's often phrased, "Ignorance of the law is no excuse." Of course, the volume and expanding proliferation of statutes, rules, and court decisions is beyond the ability of anyone to know it all. But pointing out the law's presumption might encourage students to study. Also, knowing the law allows business people to make better business decisions.

3. As Oliver Wendell Holmes noted, "The life of the law has not been logic"—that is, the law does not respond to an internal logic. It responds to social change. Emphasize that laws (and legal systems) are man-made, that they can, and do, change over time as society changes. ***To what specific social forces does law respond? Are the changes always improvements?*** (These questions can also be discussed in connection with Chapter 5.)

4. One method of introducing the subject matter of each class is to give students a hypothetical at the beginning of the class. The hypothetical should illustrate the competing interests involved in some part of the law in the assigned reading. Students should be asked to make a decision about the case and to explain the reasons behind their decision. Once the law has been discussed, the same hypothetical can be considered from an ethical perspective.

5. You might want to remind your students that the facts in a case should be accepted as given. For example, under some circumstances, an oral contract may be enforceable. If there is a statement in a case about the existence of oral contract, it should be accepted that there was an oral contract. Arguing with the statement ("How could you prove that there was an *oral* contract?" for instance) will only undercut their learning. Once they have learned the principle for which a case is presented, then they can ask, "What if the facts were different?"

Cyberlaw Link

Ask your students, at this early stage in their study of business law, what they feel are the chief legal issues in developing a Web site or doing business online. ***What are the legal risks involved in transacting business over the Internet?*** As their knowledge of the law increases over the next few weeks, this question can be reconsidered.

DISCUSSION QUESTIONS

1. ***If justice is defined as the fair, impartial consideration of opposing interests, are law and justice the same thing?*** No. There can be law without justice—as happened in Nazi-occupied Europe, for example. There cannot be justice without law.

2. ***Which of the schools of legal thought matches the U.S. system?*** None of the approaches mentioned in these sections is an exact model of the American legal system. They represent frameworks that can be used in evaluating the moral and ethical considerations that are an integral part of the law.

3. ***What is the common law?*** Students may most usefully understand common law to be case law—that is, the body of law derived from judicial decisions. The body of common law originated in England. The term common law is sometimes used to refer to the entire common law system to distinguish it from the civil law system.

4. ***What is the supreme law of the land?*** The federal constitution is the supreme law of the land. ***What are statutes?*** Laws enacted by Congress or a state legislative body. ***What are ordinances?*** Laws enacted by local legislative bodies. ***What are administrative rules?*** Laws issued by administrative agencies under the authority given to them in statutes.

5. ***What is the Uniform Commercial Code?*** A uniform law drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, governing commercial transactions (sales of goods, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, investment securities, and secured transactions). Uniform laws are often adopted in whole or in substantial part by the states. The UCC has been adopted by all states (except Louisiana which has not adopted Article 2).

6. ***Discuss the differences within the classification of law as civil law and criminal law.*** Civil law concerns rights and duties of individuals between themselves; criminal law concerns offenses against society as a whole. (Civil law is a term that is also used to refer to a legal system based on a code rather than on case law.)

7. ***Discuss the differences between remedies at law and in equity.*** Remedies at law were once limited to payments of money or property (including land) as damages. Remedies in equity were available only when there was no adequate remedy at law. Today, in most states, either or both may be granted in the same action. Remedies in equity are still discretionary, guided by equitable principles and maxims. Remedies at law still include payments of money or property as damages. Today, the major practical difference between actions at law and actions in equity is the right to demand a jury trial in an action at law.

8. ***Identify and describe remedies available in equity.*** Three are discussed briefly in the text Specific performance is available only when a dispute involves a contract. The court may order a party to perform what was promised. An injunction orders a person to do or refrain from doing a particular act. Rescission undoes an agreement, and the parties are returned to the positions they were in before the agreement.

9. ***What is the primary function of law?*** The primary function of law is to simultaneously maintain stability and permit change. The law does this by providing for dispute resolution, the preservation of political, economic, and social institutions, and the protection of property.

10. ***What is* stare decisis*? Why is it important?*** *Stare decisis* is a doctrine that prescribes following earlier judicial decisions in deciding a current case if the facts and questions are similar. Courts attempt to be consistent with their own prior decisions and with the decisions of courts superior to them. *Stare decisis* is important because part of the function of law is to maintain stability. If the application of the law was unpredictable, there would be no consistent rules to follow and no stability.

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Have students research the laws of other common law jurisdictions (England, India, Canada), other legal systems (civil law systems, contemporary China, Moslem nations), and ancient civilizations (the Hebrews, the Babylonians, the Romans), and compare the laws to those of the United States. In looking at other legal systems, have students consider how international law might develop, given the differences in legal systems, laws, traditions, and customs.

2. Assign specific cases and statutes for students to find. If legal materials are not easily available, assign a list of citations for students to decipher.

3. Ask students to read newspapers and magazines, listen to radio news, watch television news, and surf the World Wide Web for developments in the law—new laws passed by Congress or signed by the president, laws interpreted by the courts, proposals for changes in the law. The omnipresent effect of law on society should be easy to see.

EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 5: In ***Brown v. Board of Education of Topeka***, the United States Supreme Court unanimously held that the separate but equal concept had no place in education. The case involved four consolidated cases focusing on the permissibility of local governments conducting school systems that segregated students by race. In each case blacks sought admission to public schools on a nonsegregated basis, and in each case the lower court based its decision on the separate but equal doctrine. The Court interpreted the principles of the U.S> Constitution's Fourteenth Amendment as they should apply to modern society and looked at the effects of segregation. The justices found that segregation of children in public schools solely on the basis of race deprives the children of the minority group of equal educational opportunities. To separate black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Footnote 6: In ***Plessy v. Ferguson***, the United States Supreme Court adopted the doctrine of separate but equal. A Louisiana state statute required that all railway companies provide separate but equal accommodations for black and white passengers, imposing criminal sanctions for violations. Plessy, who alleged his ancestry was seven-eighths Caucasian and one-eighth African, attempted to use the coach for whites. The Court said that the U.S. Constitution's Thirteenth and Fourteenth Amendments (the Civil War Amendments) "could not have been intended to abolish distinctions based on color, or to enforce social . . . equality, or a commingling of the two races upon terms unsatisfactory to either." According to the Court, laws requiring racial separation did not necessarily imply the inferiority of either race. In a lone dissent, Justice Harlan expressed the opinion that the Civil War Amendments had removed "the race line from our governmental systems," and the Constitution was thus "color-blind."

REVIEWING—

LAW AND LEGAL REASONING

Suppose that the California legislature passes a law that severely restricts carbon dioxide emissions from automobiles in that state. A group of automobile manufacturers file suit against the state of California to prevent the enforcement of the law. The automakers claim that a federal law already sets fuel economy standards nationwide, and that fuel economy standards are essentially the same as carbon dioxide emission standards. According to the automobile manufacturers, it is unfair to allow California to pass more stringent regulations than those set by the federal law. Ask your students to answer the following questions, using the information presented in the chapter.

1. ***Who are the parties (the plaintiffs and the defendant) in this lawsuit?*** The automobile manufacturers are the plaintiffs, and the state of California is the defendant.

2. ***Are the plaintiffs seeking a legal remedy or an equitable remedy? Why?*** The plaintiffs are seeking an injunction, an equitable remedy, to prevent the state of California from enforcing its statute restricting carbon dioxide emissions.

3. ***What is the primary source of the law that is at issue here?*** This case involves a law passed by the California legislature and a federal statute; thus the primary source of law is statutory law.

4. ***Where would you look to find the relevant California and federal laws?*** Federal statutes are found in the *United States Code,* and California statutes are published in the *California Code*. You would look in these sources to find the relevant state and federal statutes.

DEBATE THIS:

Under the doctrine of* stare decisis*, courts are obligated to follow the precedents established in their jurisdictions unless there is a compelling reason not to. Should U.S. courts continue to adhere to this common law principle, given that our government now regulates so many areas by statute? Both England and the U.S. legal systems were constructed on the common law system. The doctrine of *stare decisis* has always been a major part of this system—courts should follow precedents when they are clearly established, excepted under compelling reasons. Even though more common law is being turned into statutory law, the doctrine of *stare decisis* is still valid. After all, even statutes have to be interpreted by courts. What better basis for judges to render their decisions than by basing them on precedents related to the subject at hand?

In contrast, some students may argue that the doctrine of *stare decisis* is passé. There is certainly less common law governing, say, environmental law than there was 100 years ago. Given that federal and state governments increasingly are regulating more aspects of commercial transactions between merchants and consumers, perhaps the courts should simply stick to statutory language when disputes arise.

EXAMPREP—

ISSUE SPOTTERS

1. ***Under what circumstances might a judge rely on case law to determine the intent and purpose of a statute?*** Case law includes courts' interpretations of statutes, as well as constitutional provisions and administrative rules. Statutes often codify common law rules. For these reasons, a judge might rely on the common law as a guide to the intent and purpose of a statute.

2. ***After World War II, several Nazis were convicted of "crimes against humanity" by an international court. Assuming that these convicted war criminals had not disobeyed any law of their country and had merely been following their government's orders, what law had they violated? Explain.*** At the time of the Nuremberg trials, "crimes against humanity" were new international crimes. The laws criminalized such acts as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population. These international laws derived their legitimacy from "natural law." Natural law, which is the oldest and one of the most significant schools of jurisprudence, holds that governments and legal systems should reflect the moral and ethical ideals that are inherent in human nature. Because natural law is universal and discoverable by reason, its adherents believe that all other law is derived from natural law. Natural law therefore supersedes laws created by humans (national, or "positive," law), and in a conflict between the two, national or positive law loses its legitimacy. The Nuremberg defendants asserted that they had been acting in accordance with German law. The judges dismissed these claims, reasoning that the defendants' acts were commonly regarded as crimes and that the accused must have known that the acts would be considered criminal. The judges clearly believed the tenets of natural law and expected that the defendants, too, should have been able to realize that their acts ran afoul of it. The fact that the "positivist law" of Germany at the time required them to commit these acts is irrelevant. Under natural law theory, the international court was justified in finding the defendants guilty of crimes against humanity.