

**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF NEW YORK**

OMEGA SA,

Plaintiff,

v.

XIE ZHENMIN, *et al.*,

Defendants.

Civil Action No.: 12-cv-9338 (SAS)

**MOTION FOR DEFAULT JUDGMENT AS TO LIABILITY,**  
**FOR DAMAGES DISCOVERY, AND EXPANDED ASSET FREEZE**

Plaintiff Omega SA (“Plaintiff” or “Omega”) submits this Motion and Memorandum of Law for Default Judgment as to liability against all Defendants and for an Order extending the asset freeze to certain additional bank accounts and to compel production of documents related to those accounts.

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**I. PRELIMINARY STATEMENT**

This action is for trademark infringement and counterfeiting, false designation of origin, false advertising and unfair competition. Defendants are in default, and the prerequisites for a default judgment have been met. Plaintiff now seeks default judgment, finding Defendants liable on all counts of Plaintiff's Complaint. Plaintiff prays such judgment include the entry of a permanent injunction. Plaintiff also requests the Court transfer the Internet domain names at issue in this lawsuit to Plaintiff in order to ensure the associated websites may no longer be used as a means for selling counterfeit products.

Finally, in order to support its claim for an award of damages, Plaintiff requests that the Court compel production of documents related to specific bank accounts tied to the Counterfeit Websites and expand the asset freeze. The Preliminary Injunction entered by this Court has already frozen assets held by PayPal, Inc., and compelled production of the relevant documents from PayPal and other payment processors. The proposed order: (1) extends the asset freeze to 27 specific bank accounts held by Industrial and Commercial Bank of China Ltd., China Construction Bank Corporation and China Merchant's Bank Co. Ltd. as well as three merchant accounts held by Bank of Communications Co. Ltd. and Agricultural Bank of China Ltd. ("the Banks") that have been linked to the Counterfeit Websites; and (2) compels production of documents from the Banks that are specifically related to these accounts. This relief will allow Plaintiff to compile an accounting of Defendants' profits, and evaluate whether to elect statutory damages, and preserve relevant funds to satisfy the entry of a damages judgment in this action.

Following receipt of the requested discovery, Plaintiff will then be positioned to move the Court for entry of Final Judgment, including a specific demand for fair and equitable damages.




## II. STATEMENT OF FACTS


### A. Plaintiff's Rights

Plaintiff Omega SA manufactures watches which it sells in the U.S. and worldwide. Omega's registered trademarks have been advertised and promoted and otherwise used in commerce throughout the United States, including this District, since at least as early as 1894. *See* D.E. 11, Decl. of Colleen Hurley at ¶ 5. Omega has become widely known as the source of exclusive, fashionable, high quality precision watches. Omega has invested millions of dollars in advertising and promoting its OMEGA watches, making OMEGA one of the world's most recognized brands. *Id.*

Omega authorizes sale and distribution of its OMEGA watches exclusively through authorized dealers properly trained in the workings of the watch and which promote an image consistent with the company's enormous investment in an extensive marketing campaign to support the type required for a luxury goods product of its kind. *Id.* at ¶ 6. Omega and its dealers do not sell OMEGA watches on the Internet. *Id.* at ¶¶ 6 and 13.

Omega is the owner of the entire right, title, and interest in federal trademark registrations for goods and services including, among others, the following famous, valid, subsisting, and un-cancelled US trademark registrations, most of which are incontestable ("OMEGA Marks"):

Trademark	Registration No.	Registration Date	Class(es)/Goods
 OMEGA	25,036	May 23, 1894	IC 014: Watch movements and watch cases
	566,370	November 4, 1952	IC 014: Watches and parts thereof
	734,891	July 14, 1962	IC 014: Timepieces and parts thereof

	3,757,932	March 9, 2010	IC 014: jewelry and precious stones; horological and chronometric instruments.
SEAMASTER	556,602	March 25, 1952	IC 014: Watches, watch parts and watch movements
SPEEDMASTER	672,487	January 13, 1959	IC 014: Watches and clocks
CONSTELLATION	1,223,349	January 11, 1983	IC 014: Watches and parts thereof
DE VILLE	1,309,929	December 18, 1984	IC 014: Watches, Wrist Watches, Portfolio Watches, Pendant Watches, and Miniature Clocks; and Parts Thereof
HOUR VISION	3,681,927	September 15, 2009	IC 014: Horological and chronometric instruments
PLANET OCEAN	3,085,659	April 25, 2006	IC 014: Watches and watch parts
BROAD ARROW	3,418,186	April 29, 2008	IC 014: Watches, watch straps, watch bracelets and parts thereof; chronometers, chronographs, watches made of precious metals, watches partly or entirely set with precious stones

True and correct copies of US Federal Registrations for the above-referenced marks are attached to the Complaint as Ex. A.



## B. Defendants' Infringing Acts

As alleged by Plaintiff, admitted by default, and established by the evidence of record in this action, Defendants operate the following fully interactive commercial Internet websites ("Counterfeit Websites"):

- |  |  |
|--|--|
| (1) <a href="http://www.watches-vogue.com">http://www.watches-vogue.com</a>                | (16) <a href="http://www.sinohorloge.com">http://www.sinohorloge.com</a>     |
| (2) <a href="http://www.watchdear.com">http://www.watchdear.com</a>                        | (17) <a href="http://www.salesswiss.com">http://www.salesswiss.com</a>       |
| (3) <a href="http://www.queenofwatches.com">http://www.queenofwatches.com</a>              | (18) <a href="http://watchesyes.net">http://watchesyes.net</a>               |
| (4) <a href="http://www.replicaup.com">http://www.replicaup.com</a>                        | (19) <a href="http://replicavip.org">http://replicavip.org</a>               |
| (5) <a href="http://www.watchmimic.com">http://www.watchmimic.com</a>                      | (20) <a href="http://www.watchc.com">http://www.watchc.com</a>               |
| (6) <a href="http://www.watchkind.com">http://www.watchkind.com</a>                        | (21) <a href="http://www.watchespay.net">http://www.watchespay.net</a>       |
| (7) <a href="http://www.myfavomega.com">http://www.myfavomega.com</a>                      | (22) <a href="http://www.replicabuy.net">http://www.replicabuy.net</a>       |
| (8) <a href="http://www.omegaonlineoutlet.com">http://www.omegaonlineoutlet.com</a>        | (23) <a href="http://www.watch7750.com">http://www.watch7750.com</a>         |
| (9) <a href="http://www.omegaonlineoutlet.biz">http://www.omegaonlineoutlet.biz</a>        | (24) <a href="http://www.swissale.net">http://www.swissale.net</a>           |
| (10) <a href="http://www.omegaonlineoutlet.net">http://www.omegaonlineoutlet.net</a>       | (25) <a href="http://www.replicafind.net">http://www.replicafind.net</a>     |
| (11) <a href="http://www.qualityreplica.biz">http://www.qualityreplica.biz</a>             | (26) <a href="http://www.salesreplicas.com">http://www.salesreplicas.com</a> |
| (12) <a href="http://www.qualityreplica.info">http://www.qualityreplica.info</a>           | (27) <a href="http://www.replicawalker.com">http://www.replicawalker.com</a> |
| (13) <a href="http://www.qualityreplica.us">http://www.qualityreplica.us</a>               | (28) <a href="http://replicaprice.com">http://replicaprice.com</a>           |
| (14) <a href="http://www.bestreplicawatchesok.com">http://www.bestreplicawatchesok.com</a> | (29) <a href="http://www.watchesfull.com">http://www.watchesfull.com</a>     |
| (15) <a href="http://www.swisskiss.net">http://www.swisskiss.net</a>                       |  |

As such, Defendants are the active, conscious, and dominant forces behind the sale and offering for sale of watches bearing counterfeit and infringing trademarks which are exact copies of the OMEGA Marks. Further, as admitted by Defendants through default, at all times relevant, Defendants have had full knowledge of Plaintiff's ownership of the OMEGA marks, including their exclusive rights to use and license such intellectual property and the goodwill associated therewith. *See* Complaint at ¶ 14. Defendants do not have, nor have they ever had, the right or authority to use the OMEGA Marks for any purpose. *Id.* at ¶ 15. However, despite their known lack of authority to do so, Defendants are engaged in the activity of promoting and otherwise advertising, selling, offering for sale, and distributing the counterfeit watches via the Counterfeit Websites. *Id.*

### **III. PROCEDURAL BACKGROUND**

On December 21, 2012, Plaintiff filed the Complaint and an *Ex Parte* Application for Entry of Temporary Restraining Order and Preliminary Injunction. On that same day, the Court entered an Order granting Plaintiff's *Ex Parte* Application for Entry of a Temporary Restraining Order. Pursuant to the Court's Order permitting service by email and publication, Plaintiff served each Defendant with its respective Summons and copies of the Complaint, Motion for TRO and all other initiating documents via e-mail and via publication on January 8, 2013. Plaintiff filed the Proof of Service as to Defendants on March 15, 2013.<sup>1</sup>

The Court conducted a hearing on January 18, 2013 and during the hearing entered an Order granting Plaintiff's Application for a Preliminary Injunction.

The time allowed for Defendants to respond to the Complaint expired on February 1, 2013. None of the Defendants have been granted an extension of time to respond, nor have they served or filed Answers or any other response. No Defendant has indicated any intention to respond to the Complaint or make an appearance in this lawsuit.

On March 22, 2013, Plaintiff filed its Request for Entry of Clerk's Default against Defendants. The Clerk entered default against Defendants on May 3, 2013. A copy of the Certificate of Default is attached to the Lindenbaum Declaration as Ex. B. Plaintiff now moves the Court to grant Default Judgment as to liability and a Permanent Injunction against Defendants.

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<sup>1</sup> A paper copy of the Proof of Service was filed under seal with the Seal's Clerk on January 18, 2013. An electronic copy of the Proof of Service was filed via ECF on March 15, 2013.

#### **IV. ARGUMENT**

##### **A. Default Judgment Should be Entered Against Defendants**

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338. This Court has personal jurisdiction over Defendants in that they conduct and transact business in this judicial district by directing their activities toward consumers in the State of New York and this district through their fully interactive Counterfeit Websites. Venue in this Judicial District is proper under 28 U.S.C. § 1391 since Defendants have advertised and/or made sales into this judicial district, and engaged in infringing activities and caused harm within this judicial district.

##### **1. Default Judgment is Proper**

A court may order a default judgment pursuant to Federal Rule of Civil Procedure 55(b)(2) following the entry of default by the court clerk under Rule 55(a). *See* Fed. R. Civ. P. 55. Upon entry of default, the well-pled factual allegations of a plaintiff's complaint, other than those related to damages, will be taken as true. *Garcia v. Giorgio's Brick Oven & Wine Bar*, 2012 U.S. Dist. LEXIS 118393, \*2 (S.D.N.Y. 2012) (citing *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992)). In this case, the Complaint and the declarations filed in this action clearly demonstrate that default judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure should be entered against each Defendant.

##### **2. Factual Allegations Establish Defendants' Liability**

A counterfeit mark is defined in the Lanham Act as a "spurious mark which is identical with, or substantially indistinguishable from, a registered mark" on the Principal Register of the

United States Patent and Trademark Office used by an unauthorized producer. *See* 15 U.S.C. §§ 1116(d) and 1127. Omega has established that: (1) the marks used by Defendants on the Counterfeit Products are identical to or substantially indistinguishable from the OMEGA Marks which Omega is using in commerce on its genuine Omega Products; and (2) Defendants' use of the OMEGA Marks on the Counterfeit Products is not authorized by Omega. To prevail on its trademark counterfeiting claims, Omega must prove: (1) the OMEGA Marks are entitled to protection; and (2) there is a likelihood of confusion between Defendants' Counterfeit Products and genuine Omega Products bearing the OMEGA Marks. *See, e.g., Otokoyama Co. Ltd. v. Wine of Japan Import, Inc.*, 175 F.3d 266, 270 (2d Cir. 1999); *Banff, Ltd. v. Federated Dept. Stores Inc.*, 841 F.2d 486, 489-90 (2d Cir. 1988); *Lorillard Tobacco Co. v. Jamelis Grocery, Inc.*, 378 F. Supp. 2d 448, 455 (S.D.N.Y. 2005).

a. The OMEGA Marks are Valid and Protectable

Through its pleadings, Omega has established that it is the owner of all right, title and interest in and to the OMEGA Marks in connection with the same types of goods and services being counterfeited by Defendants, namely watches. Omega has also demonstrated that its marks are the subject of multiple federal trademark registrations. D.E. 1 at ¶ 9 and Ex. A. These registrations are prima facie evidence of the validity of the OMEGA Marks, as well as Omega's exclusive right to use its marks in commerce and in connection with the goods or services specified in the registrations. *See* 15 U.S.C. § 1057(b). Omega has shown that its OMEGA Marks are valid and protectable.

b. Consumers Are Likely to Be Confused as to the Source of Defendants' Counterfeit Products

In the Second Circuit, likelihood of confusion is assessed by the factors enunciated in *Polaroid Corp. v. Polarad Elecs. Corp.* 287 F.2d 492, 495-96 (2d Cir. 1961), *cert. denied*, 368 U.S. 820 (1961); *see also Banff, Ltd.*, 841 F.2d at 489-90. Here, each of the eight *Polaroid* factors used to analyze whether there is likelihood of confusion favor Omega. In any event, this Court has held that, "where counterfeit marks are involved, it is not necessary to perform the step by step examination of each *Polaroid* factor because counterfeit marks are inherently confusing." *Lorillard Tobacco*, 378 F. Supp. 2d at 455.

To prevail on a claim of false designation of origin under Section 43(a) of the Lanham Act, Plaintiff must prove that Defendants used in commerce, in connection with any goods or services, any word, term, name, symbol or device, or any combination thereof, or any false designation of origin, which is likely to deceive as to the affiliation, connection, or association of Defendants with Plaintiff, or as to the origin, sponsorship, or approval, of Defendants' goods by Plaintiff. 15 U.S.C. § 1125(a)(1). As with trademark infringement claims, the test for liability for false designation of origin under Section 43(a) is also "whether the public is likely to be deceived or confused by the similarity of the marks at issue." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 780, 112 S.Ct. 2753, 2763 (1992).

Section 43(a) of the Lanham Act prohibits false representations in advertising concerning the qualities of goods and services. *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 196-97 (2d Cir. 2001); 15 U.S.C. § 1125(a)(1)(B). To establish a false advertising claim under Section 43(a), "a plaintiff must prove the following elements: 1) the defendant has made a false or misleading statement; 2) the false or misleading statement has actually deceived or has the

capacity to deceive a substantial portion of the intended audience; 3) the deception is material in that it is likely to influence purchasing decisions; 4) there is a likelihood of injury to plaintiff, such as declining sales or loss of goodwill; and 5) the goods traveled in interstate commerce.” *Johnson & Johnson Vision Care, Inc. v. Ciba Vision Corp.*, 348 F. Supp. 2d 165, 177-78 (S.D.N.Y. 2004); *Conte v. Newsday, Inc.*, 2013 U.S. Dist. LEXIS 35676, 36-37 (E.D.N.Y. Mar. 13, 2013).

The well-pled factual allegations of Plaintiff’s Complaint, including specifically those pled in Paragraphs 8-40, properly allege the elements for each of the above claims. D.E. 1 ¶ 8-40. Moreover, the factual allegations in Plaintiff’s Complaint, substantiated by evidence submitted in support of Plaintiff’s Motion for TRO, conclusively establish Defendants’ liability under each of the claims asserted in the Complaint. *Id.* and D.E. 11 and 13.

Accordingly, Default Judgment pursuant to Rule 55 of the Federal Rules of Civil Procedure should be entered against each Defendant.

**B. The Court Should Compel Disclosure of Relevant Bank Records and Extend the Asset Freeze to Include the Identified Bank Accounts**

This Court has already found that Plaintiff is entitled to freeze certain assets, and entitled to production of documents related to the Counterfeit Websites. Plaintiff now requests that this relief be expanded to include 27 specific bank accounts and three merchant accounts that Plaintiff discovered, during the course of this lawsuit, are related to the Counterfeit Websites.

Under the Lanham Act, a plaintiff may be entitled to damages for a trademark violation including “(1) defendant’s profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.” *Castro v. CLD Consulting Inc.*, 2012 U.S. Dist. LEXIS 138486, 2-3 (S.D.N.Y.

2012); 15 U.S.C. § 1117(a). When a default judgment is entered, the defendant is deemed to have admitted all well-pleaded allegations in the complaint pertaining to liability. *See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992). However, the plaintiff must still prove damages. *Ortho Sleep Prods., LLC v. Dreamy Mattress Corp.*, 2012 U.S. Dist. LEXIS 183253, 21-22 (E.D.N.Y. Aug. 29, 2012). Alternatively, a plaintiff may elect statutory damages in lieu of actual damages for a violation involving use of a counterfeit registered mark. 15 U.S.C. § 1117(c); *Telebrands Corp. v. HM Imp. USA Corp.*, 2012 U.S. Dist. LEXIS 128484 (E.D.N.Y. 2012).

To make an accounting of Plaintiff's damages, including an accounting of profits, and to allow Plaintiff to analyze whether to elect statutory damages, along with ensuring that assets relevant to the counterfeiting activity are secured, Plaintiff seeks an Order compelling the Banks to: (1) disclose relevant records of the bank accounts associated with the Defendants' Counterfeit Websites; and (2) freeze the assets in those accounts.

On December 27, 2012, Plaintiff served the Temporary Restraining Order ("TRO") entered by this Court on, among others, third parties PayPal, Inc. and Visa, Inc. In response to the TRO, PayPal and Visa have provided financial records related to the Counterfeit Websites. These records reveal documents linking the PayPal accounts used by the Defendants and accounts held with certain banks located in China. The PayPal records reveal the following bank accounts:

<b>Bank</b>	<b>Account No.</b>
Industrial and Commercial Bank of China	#*****7462
Industrial and Commercial Bank of China	#*****1636

Industrial and Commercial Bank of China	#*****0228
Industrial and Commercial Bank of China	#*****0205
Industrial and Commercial Bank of China	#*****7936
Industrial and Commercial Bank of China	#*****1886
Industrial and Commercial Bank of China	#*****3418
Industrial and Commercial Bank of China	#*****3121
Industrial and Commercial Bank of China	#*****6729
Industrial and Commercial Bank of China	#*****6721
China Construction Bank	#*****0014
China Construction Bank	#*****5908
China Construction Bank	#*****0622
China Construction Bank	#*****0978
China Construction Bank	#*****9639
China Construction Bank	#*****5164
China Construction Bank	#*****1172
China Construction Bank	#*****1570
China Construction Bank	#*****2693
China Construction Bank	#*****6937
China Merchant's Bank	#*****1236
China Merchant's Bank	#*****8821



China Merchant's Bank	#*****6199
China Merchant's Bank	#*****3927
China Merchant's Bank	#*****4121
China Merchant's Bank	#*****1888
China Merchant's Bank	#*****7146

A copy of the PayPal records linking the above bank accounts to the Counterfeit Websites are attached to the Lindenbaum Declaration as Ex. C. Additionally, documents provided by Visa (attached as Ex. D to the Lindenbaum Declaration) identify the following merchant accounts linked to Visa credit card transactions from the Counterfeit Websites:

<b>Acquiring Bank</b>	<b>Merchant Account</b>
Bank of Communications	BTF E COMMERCE INC BESTPL
Bank of Communications	WUHAN NORTH POLE WORLD TR
Agricultural Bank of China	PES*17074001035UNITECH

**1. This Court Has The Authority to Order the Banks to Produce Records of Counterfeiters' Accounts**

Since this Court has personal jurisdiction over a foreign bank, and the bank has control of the materials sought, this Court can order the foreign bank to produce documents, even if the documents are kept outside of a New York branch. *See, e.g., Dietrich v. Bauer*, 2000 U.S. Dist. LEXIS 11729, 11 (S.D.N.Y. 2000). Plaintiff intends to serve each of the Banks at their New York offices, which are the same corporate entities as those that have control over the relevant documents. Accordingly, this Court has the authority to issue an order compelling the Banks to

produce the requested documents. *See Milliken & Co. v. Bank of China*, 758 F. Supp. 2d 238, 246 (S.D.N.Y. 2010) (noting that Chinese bank “over which this Court has jurisdiction due to the presence of branches in this district, has effective control over documents and information maintained by its branches and could be compelled to make production”).

a. The Relevant Factors Weigh in Favor of Compelling Production From The Banks

The request for production of documents from a Chinese bank related to litigation before this Court (including actions regarding counterfeit websites) is not new. *See, e.g., Gucci America, Inc. v. Li*, 2011 U.S. Dist. LEXIS 97814 (S.D.N.Y. 2011);<sup>2</sup> *Wultz v. Bank of China*, 2013 U.S. Dist. LEXIS 62567 (S.D.N.Y. 2013). In these earlier cases, the Chinese banks have unsuccessfully objected to the production, arguing that compliance could subject the banks to liability under Chinese law. However, it is well-settled that even where the production of documents might conflict with foreign law, “such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.” *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist.*, 482 U.S. 522, 544 n.29 (U.S. 1987); *U.S. v. First Nat’l City Bank*, 396 F.2d 897, 900-01 (2d Cir. 1968).

In determining whether to order discovery of documents and information located abroad, courts in this Circuit consider the following factors: (1) the importance to the investigation or litigation of the documents or other information requested; (2) the degree of specificity of the

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<sup>2</sup> *Gucci v. Li* is presently on appeal before the Second Circuit (Appeal No. 12-4557, consolidated with Appeal No. 11-3934).

request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine the important interests of the state where the information is located. *Gucci v. Li*, 2011 U.S. Dist. LEXIS 97814, at 15-16. In addition, “courts in the Second Circuit may also consider ‘the hardship of compliance on the party or witness from whom discovery is sought [and] the good faith of the party resisting discovery.’” *Id.* (quoting *Minpeco S.A. v. Conticommodity Servs. Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y. 1987) (alterations in original)).

Application of these elements to the facts of this case demonstrates Plaintiff is entitled to the requested relief.

i. The Information is Critical to Investigating Defendants’ Counterfeit Activities and to Enable Plaintiff to Recover Damages

The documents Plaintiff seeks are critical to its ability to investigate Defendants’ counterfeiting operations and enforce Plaintiff’s rights under the Lanham Act. Defendants have elected to default rather than appear and contest the claims against them. Defendants, moreover, have obscured their true identities and other information about their illegal activities. The Defendants’ bank records “are likely to provide the most fruitful avenue for discovering the identity of additional infringers” and “information related to Defendants’ bank accounts is likely to provide the most effective measure of the revenues generated by Defendants in contravention of United States trademark laws.” *Gucci v. Li*, 2011 U.S. Dist. LEXIS 97814, at 17.

ii. The Requests at Issue Are Narrowly Tailored

The proposed Order requires the Banks to provide records only concerning certain, specific accounts, which are identified by their account numbers or by the registered merchant names. Requests tailored to specific accounts are “sufficiently specific and discrete to weigh in favor of Plaintiffs.” *Gucci v. Li*, 2011 U.S. Dist. LEXIS 97814, at \*18 (citing *Milliken*, 758 F. Supp. 2d at 247). Moreover, the proposed order here only compels transactional records related to the specific accounts and documents sufficient to identify the owners of the accounts (and any related accounts). The order expressly excludes the types of records that this Court has previously found may be entitled to heightened protection under Chinese law. *See Wultz v. Bank of China*, 2013 U.S. Dist. LEXIS 62567, \*14 (S.D.N.Y. May 1, 2013).

iii. Information Is Available and Originated in the United States

The information Plaintiff is seeking concerns proceeds of Defendants’ counterfeiting operations, which in many cases originated not in China, but in the U.S. These records include information and transactions exchanged with U.S.-based PayPal, Inc. So while certain information undoubtedly originates in China, there is also information that originated in the United States.

Moreover, all of the Banks provide online banking access, meaning that their customers—the counterfeiters—can access their account information over the internet (including even through mobile applications on their smart phones) anywhere in the world. For example, in describing its iPhone banking application, one bank states:

[U]sers can log in to CMB iPhone Mobile Banking with their bank card number and pin to check account balances and transaction details, transfer money, and change passwords. You can apply for the online payment function, pay your phone bills and other bills, buy treasury bonds and

apply for personal loans through Personal Banking.” Lindenbaum Decl. at Ex. F.

The counterfeiters’ accounts can literally be accessed by any computer (or even phone) in the United States. Funds in these accounts arise from sales of counterfeit watches in the U.S., and through transfer of funds from U.S.-based PayPal. It cannot, therefore, be said that the account records exist or originated only overseas.

iv. There Is No Reasonable Alternative

Without document production directly from the Banks, Plaintiff will be unable to secure this information. In other cases, certain Chinese banks have argued that the Hague Convention can provide a reasonable alternative. But in those cases, the Banks could not meet their burden to demonstrate the necessity and effectiveness of using Hague Convention procedures rather than simple discovery under the Federal Rules. *See Aerospatiale*, 482 U.S. at 547 (courts should provide “the foreign litigant a full and fair opportunity to demonstrate appropriate reasons for employing Convention procedures”); *In re Vivendi Universal, S.A. Sec. Litig.*, 2006 U.S. Dist. LEXIS 85211 (S.D.N.Y. Nov. 13, 2006) (“The party seeking to displace the Federal Rules of Civil Procedure in favor of the Hague Convention bears the burden of demonstrating that it is more appropriate for the Court to follow the Hague Convention.”).

The Hague Convention does not provide a meaningful avenue to discovery where, as here, the process is likely to be “unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules.” *Aerospatiale*, 482 U.S. at 542. This factor only weighs in favor of the party resisting discovery if the information sought can be “easily obtained” through means other than the Federal Rules. *Gucci America, Inc. v. Curveal*

*Fashion*, 2010 U.S. Dist. LEXIS 20834, \*9 (S.D.N.Y. 2010) (“[I]f the information cannot be *easily obtained* through alternative means, this factor is said to counterbalance the previous factor—the location of the documents and information—and weighs in favor of disclosure.”).

In evaluating whether there are alternative methods for plaintiffs to obtain the requested documents, this Court, in similar matters, has recognized that “‘if the information cannot be *easily obtained* through alternative means, this factor . . . weighs in favor of disclosure.’” *Gucci v. Li*, at \*20 (quoting *2010 U.S. Dist. LEXIS 20834* at \*9). Further, there is no “rule of law that would require first resort to Convention procedures whenever discovery is sought from a foreign litigant.” *Aerospatiale*, 482 U.S. at 542; *see also First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 23 (2d Cir. 1998) (“We decline PW-UK’s invitation to adopt a rule mandating primary resort to the Hague Convention as the means of obtaining discovery from a foreign non-party witness.”).

In *Gucci v. Li*, this Court found that China typically takes six-to-twelve months to process Hague Convention requests, and that only about “50% of such requests are granted.” 2011 U.S. Dist. LEXIS 97814 at \*21. This Court in *Li* found as to the delays and effectiveness of requests submitted to China under the Hague Convention, that plaintiffs presented evidence “sufficient to demonstrate that a Hague Convention request in this case would be ‘unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules.’” *Id.* at \*25 (quoting *Aerospatiale*, 482 U.S. at 542); *see also Wultz v. Bank of China Ltd.*, 2012 U.S. Dist. LEXIS 159764 (S.D.N.Y. 2012) (“Hague Convention requests in circumstances similar to those presented here are not a viable alternative method of securing the information Plaintiffs seek”).

Finally, it is not yet determined whether the accounts identified above are in China or a branch in one of dozens of other countries throughout the world in which the Banks operate. Accordingly, after going through the process of submitting a Hague Request to China, Plaintiff could learn that the relevant accounts were maintained in a separate country. Even assuming, however, that the accounts are in fact in China, submission of a Hague Convention request risks both unreasonable delay and a high probability of inaction.

v. United States Interests Outweigh Any Contrary Chinese Interest

It is a well-settled principle of comity that “courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States.” *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997) (citing *Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 522 (2d Cir. 1985)).

This Court has recognized that the U.S. “has a powerful interest in enforcing the acts of Congress, especially those, such as the Lanham Act, that are designed to protect intellectual property rights and prevent customer confusion.” *Gucci v. Li*, 2011 U.S. Dist. LEXIS 97814 at \*31 (citing *Hermes Int’l v. Lederer de Paris Fifth Ave., Inc.*, 219 F. 3d 104, 107-08 (2d Cir. 2000)). In enacting the Trademark Counterfeiting Act of 1984, the House Report noted that counterfeits not only presented “grave risks to the health and safety of consumers of these articles,” but has a “dire effect on the economy” as well. S. Rep. No. 104-177, at 2 (1995).<sup>3</sup>

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<sup>3</sup> See also S. Rep. No. 104-177, at 1, 3 (“[C]ounterfeit products cost American businesses an estimated \$200 billion a year. Counterfeiting is a drain on the American economy, on the Federal treasury, and costs American jobs. . . . [A]ccording to the U.S. Customs Service, it results in a loss of up to an estimated 750,000 jobs.”).

Erasing any doubt, Congress has enacted a specific statute which demonstrates that U.S. interests favor allowing U.S. trademark owners immediate access to the “records documenting the manufacture, sale, or receipt of things involved in” counterfeiting. 15 U.S.C. § 1116(d)(1)(A). Congress has empowered courts to issue *ex parte* orders allowing the seizure of the counterfeiters’ business records. *Id.* As “counterfeiters’ records are frequently nonexistent, inadequate or deceptively kept in order to willfully deflate the level of counterfeiting activity actually engaged in,” obtaining these documents immediately is essential. *See* S. Rep. No. 104-177 at 10.

Here, the counterfeiters’ records will likely identify others involved in their illegal operation. *See, e.g.*, H.R. Rep. No. 110-617 at 30 (2008) (“Experts point out that counterfeiters have developed a ‘long value chain’ in their operations, thus limiting the risk of each party being caught and the possible penalties if they are apprehended.”).

Courts in this District have repeatedly found that “the United States interest in fully and fairly adjudicating matters before its courts, including the enforcement of judgments, outweighs [a foreign country’s] interest in protecting the confidentiality of its banking customers’ records.” *Curveal Fashion*, 2010 U.S. Dist. LEXIS 20834 at \*9; *see also Milliken*, 758 F. Supp. 2d at 247 (“[C]ourts consistently recognize that the United States has a substantial interest in fully and fairly adjudicating matters before its courts. . . . The documented interests of the People’s Republic of China . . . are less compelling here.”). In *Aerospatiale*, the Supreme Court recognized that courts should not force litigants to resort to the Hague Convention where such a requirement would “be inconsistent with the overriding interest in the ‘just, speedy, and inexpensive determination’ of litigation in our courts.” 482 U.S. at 542-43 (quoting Fed. R. Civ. P. 1).



In contrast, no significant Chinese interests would be undermined by requiring the Banks to freeze and divulge the whereabouts of the proceeds from Defendants' unlawful counterfeiting operation. Indeed, "the Second Circuit has found [it] to be 'of considerable significance,'" if the foreign law that purportedly prevents a disclosure of evidence "provides for an absolute waiver of its protections by the customer," as this would "undermin[e] the importance of the [foreign] interest." *Curveal Fashion*, 2010 U.S. Dist. LEXIS 20834 at \* 15 (quoting *First Nat'l City Bank*, 396 F.2d at 902); see also *Gucci v. Li*, 2011 U.S. Dist. LEXIS 97814 at \*28 ("bank secrecy laws are entitled to less deference when their protections amount to simply a privilege that can be waived by a customer."). This Court has found that evidence "strongly suggests that China's bank secrecy laws merely confer an individual privilege on customers rather than reflect a national policy entitled to substantial deference." *Gucci v. Li*, 2011 U.S. Dist. LEXIS 97814 at \*29. Here, the Defendants have waived any privileges afforded by Chinese law by failing to object to the issuance of the Preliminary Injunction Order and by defaulting in this lawsuit.

Finally, this Court has held in similar circumstances that:

China's limited national interest in this case is further highlighted by the fact that the Bank has purposely chosen to do business in New York and has availed itself of the myriad benefits that come with establishing a presence in the United States' premier financial center. Having made such a determination, and reaped the rewards that flow therefrom, the Bank can hardly hide behind Chinese bank secrecy laws as a shield against the requirements faced by other United States-based financial institutions. This is particularly true where the bank secrecy laws at issue have been used to facilitate serious violations of United States law.

*Id.* at \*30.

vi. The Hardship of Compliance Is Speculative

In the past, certain Chinese banks have argued that compliance with discovery demands may subject the banks to penalties. This Court has aptly noted that no such sanctions have ever been issued. In *Gucci v. Li*, this Court concluded that the bank “has cited no specific instance in which a Chinese financial institution was punished for complying with a foreign court order directing the production of documents. To the contrary, Plaintiffs cite at least one case in which Bank of China produced, pursuant to a court order, documents similar to those that Plaintiffs seek here.” *Id.* at \*34. Likewise, in *Wultz v. Bank of China*, this Court stated that the bank “has produced no evidence that it has been meaningfully sanctioned by the Chinese government for complying with the two previous U.S. court orders to produce documents in contravention of China’s bank secrecy laws.” *Wultz v. Bank of China*, 2012 U.S. Dist. LEXIS 159764, \*28 (S.D.N.Y. 2012).

The Bank’s New York locations are branches of the same corporate entities as their counterparts in China. There “is a presumption that a corporation is in the possession and control of its own books and records and clear proof of lack of possession and control is necessary to rebut the presumption.” *Id.*

vii. Good Faith of Party Resisting Discovery

At this time, the banks have had no opportunity to proceed in good or bad faith. Accordingly, this factor does not weigh for, or against, the discovery request, as they may pertain to objections from the Banks. However, the Plaintiff has been deprived of any discovery in this lawsuit from the Defendants. This factor supports Plaintiff’s position.

viii. Balance of Factors Strongly Favors Plaintiff

For the forgoing reasons, the Banks should be required to produce the account documents demanded in the attached proposed order.

**2. Asset Freeze of Defendant's Accounts With Chinese Banks**

a. This Court Has The Authority To Order The Restraint of Defendants' Accounts

The Lanham Act entitles a plaintiff “who establishes a violation of his rights in connection with a registered trademark, ‘subject to the principles of equity to recover defendant’s profits.’” *Gucci v. Li*, 2011 US Dist. LEXIS 97814 at \*7 (quoting 15 U.S.C. § 1117(a)). A “district court, therefore, ‘has authority to freeze a defendant’s assets insofar as they could be used to satisfy an award of profits pursuant to Plaintiffs’ Lanham Act Claims.’” *Id.* (quoting *Balenciaga Am., Inc. v. Dollinger*, 2010 Dist. LEXIS 107733 (S.D.N.Y. 2010)). This Court has already found that an asset freeze, with regard to Defendants’ PayPal accounts was appropriate. This motion requests that the Court now extend this relief to the specific Chinese bank accounts that have been linked to Defendants’ Counterfeit Websites.

Here, Plaintiff is entitled to equitable relief—an accounting and the return of Defendants’ illicit profits—and the order that restrains Defendants’ assets is authorized by a specific federal statute, the Lanham Act. *See, e.g., George Basch Co., Inc. v. Blue Coral, Inc.*, 968 F.2d 1532, 1537-38 (2d Cir. 1992) (“The infringer is required in equity to account for and yield up his gains to the true owner [of the mark], upon a principle analogous to that which charges a trustee with

the profits acquired by the wrongful use of the property. . . .”) (quoting *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 259 (1916)).

When “plaintiffs seek both equitable and legal relief in relation to *specific* funds, a court retains its equitable power to freeze assets.” *Gucci v. Li*, 2011 U.S. Dist. LEXIS 97814 at 10 (quoting *Quantum Corp. Funding, Ltd. v. Assist You Home Health Servs. of Va.*, 144 F. Supp. 2d 241, 250 n.9 (S.D.N.Y. 2001)). Here, it is the Defendants’ burden to demonstrate that funds are not the proceeds of illegal activity. *See N. Face Apparel Corp. v. TC Fashions, Inc.*, 2006 U.S. Dist. LEXIS 14226, 11 (S.D.N.Y. 2006) (“The burden is on the party seeking relief [from an asset freeze] to present documentary proof that particular assets [are] not the proceeds of counterfeiting activities” (quotation and citation omitted); 15 U.S.C. § 1117(a) (“defendant must prove all elements of cost or deduction claimed”).

Accordingly, this Court has the authority to extend the asset freeze to the additional banks accounts that have been disclosed by PayPal and Visa.

b. The Extraterritorial Reach of the Lanham Act is Well-Established

It “is well-established that United States courts have jurisdiction to apply the Lanham Act to allegedly infringing conduct occurring outside the United States when necessary to prevent harm to United States commerce.” *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, 126 F. Supp. 2d 328, 336 (S.D.N.Y. 2001) (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952)); *Gucci v. Li*, 2011 U.S. Dist. LEXIS 97814 at \*12.

Here, Defendants have transacted business in the U.S. through website sales and shipment of counterfeit goods to American consumers. Accordingly, even if Defendants are citizens of China, they are subject to United States trademark law. *See A.V. by Versace*, 126 F.

Supp. 2d at 337 (foreign citizenship “cannot serve as a shield against the application of the Lanham Act”) (citations omitted); *Calvin Klein Indus., Inc. v. BFK Hong Kong, Ltd.*, 714 F. Supp. 78, 80 (S.D.N.Y. 1989) (“Although defendant Langford is not a United States citizen, . . . [he] may be treated as [a] United States citizen[] for the purpose of” liability under trademark law) (citing *A.T. Cross Co. v. Sunil Trading Corp.*, 467 F. Supp. 47, 50 n.5 (S.D.N.Y. 1979)).

This Court has held that “the fact that some of the funds subject to the Injunction are located outside of the United States does not . . . deprive the Court of authority to issue the asset restraint.” *Gucci v. Li*, 2011 US Dist. LEXIS 97814 at \*11-12. Once “personal jurisdiction of a party is obtained, the District Court has authority to order it to freeze property under the party’s control, whether the property be within or without the United States.” *Id.* (citing *United States v. First Nat. City Bank*, 379 US 378, 384 (1965)).

Since this Court has jurisdiction over the Banks (with branches located in New York) and the Defendants, “the Court’s authority to restrain defendants’ assets that are controlled by the Banks extends to wherever those assets may be located.” *Tiffany (NJ) LLC v. Forbse*, 2012 US Dist. LEXIS 72148, 38 (S.D.N.Y. May 23, 2012).

#### **IV. CONCLUSION**

Plaintiff respectfully requests the Court enter default judgment and a permanent injunction against Defendants, and endorse the attached Proposed Order which extends the asset freeze to 27 additional bank accounts and three merchant accounts, and also compels production of documents related to these accounts. Following receipt of this discovery from the Banks, Plaintiff will submit for the Court’s endorsement a request for entry of Final Judgment, including any claim for damages and attorney’s fees.

Respectfully submitted  
for Plaintiff,

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Dated: June 6, 2013

**CERTIFICATE OF FILING AND SERVICE**

I Jeffrey A. Lindenbaum certify that on June 6, 2013 I electronically filed the foregoing Motion for Default Judgment, Damages Discovery and Asset Freeze and supporting papers with the Court via ECF and also served on the Defendants via email, by sending same to the emails listed in the attached schedule A, and by posting same on the website [www.notice-lawsuit.com](http://www.notice-lawsuit.com) in accordance with the Court's December 24, 2012 Order permitting service by alternative means.

s/ Jeffrey A. Lindenbaum  
Jeffrey A. Lindenbaum

Dated: June 6, 2013

**SCHEDULE A**

<a href="http://www.watches-vogue.com">http://www.watches-vogue.com</a>	Xie Zhenmin / Zhenmin Xie	admin@watches-vogue.com service@watches-vogue.com yangb0593@gmail.com zhilinyang135@gmail.com
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