

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

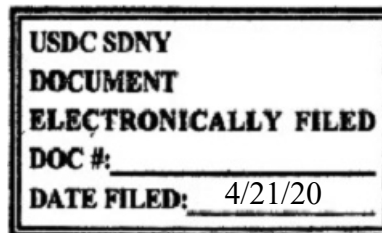
EVRIHOLDER PRODUCTS LLC,

Plaintiff,

-against-

SIMPLY LBS LTD COMPANY,

Defendant.



17-CV-4329 (RA) (BCM)

**REPORT AND RECOMMENDATION  
TO THE HON. RONNIE ABRAMS**

**BARBARA MOSES, United States Magistrate Judge.**

Evriholder Products LLC (Evriholder) is the exclusive licensee of U.S. Patent No. D524,612S1 (the '612 Patent), granting it the right to make, have made, import, offer to sell, and sell the jar opener claimed in the '612 Patent, as well as the right to sue to enforce the '612 Patent. Compl. (Dkt. No. 1) ¶¶ 1, 12-13. In this action, Evriholder alleges that defendant Simply LBS Ltd Company (Simply LBS, also known as Chef Remi) infringed the '612 Patent through its promotion and sale of the Chef Remi Jar Opener (the Infringing Product), which is "substantially indistinguishable" from the jar opener sold by Evriholder, in the United States and in this District in particular. Compl. ¶¶ 9-10, 18-21.

On April 24, 2019, the Hon. Ronnie Abrams, United States District Judge, issued an Order granting Evriholder's motion for a default judgment against Simply LBS (Dkt. No. 43) and referred the action to me for a damages inquest. (Dkt. No. 44.) Plaintiff now seeks compensatory damages in the amount of \$709,657.60, attorneys' fees in the amount of \$177,414.35, and costs and disbursements in the amount of \$202.87. *See* Proposed Findings of Fact and Conclusions of Law (Proposed Findings) (Dkt. No. 48) ¶ 74. For the reasons that follow, I respectfully recommend that plaintiff be awarded \$325,153.76 in compensatory damages, plus prejudgment interest on that sum

at the rate of 3.75% from March 15, 2017, to the date on which judgment is entered, and \$202.87 in costs. In addition, I recommend entry of a permanent injunction against Simply LBS.

## **I. BACKGROUND**

### **A. Factual Allegations**

On or about July 11, 2006, the U.S. Patent and Trademark Office issued the '612 Patent. Compl. ¶ 12, 36. *See also* Declaration of Louis C. Paul (Paul Decl.) (Dkt. No. 49) Ex. E, at ECF pages 39-42 (the '612 Patent). The '612 Patent was issued to and is owned by nonparty Mulberry Imports, Ltd. (Mulberry). Compl. ¶ 13. Mulberry granted an "exclusive license to Evriholder to make, have made, import, offer to sell, and sell the Jar Opener claimed in the '612 Patent," as well as the "right to enforce the patent, including the right to file suit to enjoin infringement thereof, and recover damages for infringement of the '612 Patent." *Id.*

Evriholder is also the owner of U.S. Trademark Registration No. 3,067,678 for the mark EASI-TWIST, which it uses in connection with various kitchen gadgets, including jar openers and other household container openers. Compl. ¶ 14. For approximately sixteen years, Evriholder has used the mark EASI-TWIST to market and sell those products throughout the United States. *Id.* ¶ 15.

Defendant Simply LBS is a "private limited company registered in Hong Kong" which imports and sells kitchen appliances into the United States – and specifically into New York – "including online through Amazon.com." Compl. ¶¶ 2, 18, 21. One of these kitchen appliances is the Infringing Product, the design of which is "identical (or substantially indistinguishable) in design" to plaintiff's jar opener. *Id.* ¶ 19. In promoting the Infringing Product, Simply LBS's marketing on Amazon Marketing Services included the keywords "Easy" and "Twist," such that upon searching these two keywords, a potential buyer would see the Infringing Product in the

Sponsored Advertising Section on Amazon. *Id.* ¶ 29. According to Evriholder: "At no time was Defendant . . . authorized to import, offer to sell or sell a jar opener as claimed in the '612 Patent." *Id.* ¶ 26. Moreover, plaintiff alleges, "Chef Remi's unauthorized use of confusingly similar variations of EASI-TWIST as keywords and in the resulting Sponsored Advertisements on Amazon.com, was and is likely to confuse, mislead, and deceive consumers as to the source of jar openers offered for sale by Evriholder and jar openers offered for sale as Chef Remi Jar Openers, that are identical in design to the Evriholder EASI-TWIST jar openers." *Id.* ¶ 31.

On March 9, 2017, before filing this action, plaintiff's counsel Louis C. Paul sent a letter to defendant regarding the Infringing Product. Compl. ¶ 23; *see also* Paul Decl. Ex. E. Defendant's Chief Executive Officer, Rhett Lewis, responded on March 15, 2017, via email, and "represented, on behalf of Chef Remi, that 27,000 Chef Remi Jar Openers had been sold and that Chef Remi had manufactured, and had in stock an additional 11,200 Chef Remi Jar Openers." *Id.* ¶ 24; *see also* Paul Decl. Ex. D. Lewis attached to his email a copy of an invoice from Huanyu (HK) Industrial Ltd. (Huanyu) to Chef Remi, "for the manufacture of a further supply of Chef Remi Jar Openers in the amount of 20,160 units," which invoice "included a photograph of a Jar Opener having the same design as claimed in the '612 Patent. *Id.* ¶ 25; *see also* Paul Decl. Ex. D, at ECF pages 30-31. Lewis proposed to pay Evriholder "50 cents per unit on the remaining stock" if Evriholder would allow defendant "to continue selling on Amazon until the patent expires in 2020." Paul Decl. Ex. D, at ECF page 30. However, Lewis also reported that he had canceled his most recent order of approximately 20,000 units, and that, if the parties were unable to reach an agreement, he would "destroy" his 11,200-unit "current stock." *Id.*

**B. Procedural History**

Plaintiff filed its complaint on June 8, 2017, naming as defendants Simply LBS, Impulseev Ltd. (Impulseev), Huanyu, and 10 John Does.<sup>1</sup> On June 13, 2018, plaintiff served Simply LBS by having the Clerk of Court send the summons and complaint to its business address in Hong Kong via Federal Express (FedEx). Aff. of Service (Dkt. No. 21) ¶ 2, Ex. A. On June 19, 2018, the FedEx package was delivered and signed for at defendant's business address. *Id.* ¶ 3, Ex. B.

On August 30, 2018, plaintiff obtained a Certificate of Default as to Simply LBS (Dkt. No. 25), and on December 20, 2018, plaintiff filed its motion for default judgment. (Dkt. No. 31.) In its motion papers, plaintiff sought damages in the amount of \$709,657.60, costs and disbursements in the amount of \$202.87, and attorneys' fees "in the amount of 25% of any judgment" (Dkt. No. 31-2 at ECF pages 5-12), as well as the issuance of a permanent injunction against future infringement by Simply LBS. (*Id.* at ECF pages 12-15.)

On December 20, 2018, Judge Abrams issued an Order to Show Cause for Default Judgment, directing Simply LBS to "show cause at a conference to be held on January 25, 2019 at 12:15 p.m. . . . why a default judgment should not be entered in favor of Plaintiff for the relief requested in the Complaint." (Dkt. No. 32.)

On January 25, 2019, Judge Abrams held a show cause hearing, at which defendant failed to appear. Tr. of January 25, 2019 Hr'g (Jan. 25 Tr.) (Dkt. No. 41) at 3:7-8. On April 24, 2019 (after plaintiff filed a supplemental brief on the issue of its standing, as a licensee, to sue to enforce

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<sup>1</sup> On December 20, 2018, plaintiff filed, and the Court so-ordered, a Notice of Voluntary Dismissal of defendants Impulseev and Huanyu. (Dkt. Nos. 30, 33.) On February 5, 2019, plaintiff filed a Notice of Voluntary Dismissal of the John Doe defendants, which the Court so-ordered on February 6, 2019. (Dkt. Nos. 37, 38.)

the patent), the Court granted plaintiff's motion for a default judgment against Simply LBS and referred the matter to me for an inquest on damages.

On April 30, 2019, I issued a Scheduling Order (Dkt. No. 45), directing plaintiff to submit proposed findings of fact and conclusions of law concerning its alleged damages. The Scheduling Order "notifie[d] the parties" that the Court might "conduct the inquest based solely upon the written submissions of the parties," unless one of the parties submitted a request for an evidentiary hearing. (*Id.* at 4-5.)

On July 10, 2019, plaintiff filed its Proposed Findings, which it served on Simply LBS along with a copy of the Court's Scheduling Order. (Dkt. No. 51.) Defendant did not file any response. Neither party requested an evidentiary hearing.

## **II. JURISDICTION AND VENUE**

I am satisfied that this Court has subject matter jurisdiction over plaintiff's claims. Because plaintiff sues under the Patent Act, 35 U.S.C. § 1, *et seq.*, subject matter jurisdiction is properly based on 28 U.S.C. §§ 1331 and 1338(a).

I am also satisfied as to personal jurisdiction over Simply LBS, which is "a necessary prerequisite to entry of a default judgment." *Reilly v. Plot Commerce*, 2016 WL 6837895, at \*2 (S.D.N.Y. Oct. 31, 2016) (Moses, M.J.) (quoting *Sheldon v. Plot Commerce*, 2016 WL 5107072, at \*6 (E.D.N.Y. Aug. 26, 2016), *report and recommendation adopted*, 2016 WL 5107058 (E.D.N.Y. Sept. 19, 2016)). For a federal district court to exercise personal jurisdiction over a defendant, three requirements must be met: "First, the plaintiff's service of process upon the defendant must have been procedurally proper." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012) (subsequent history omitted). "Second, there must be a statutory basis for personal jurisdiction that renders such service of process effective." *Id.* "Third,

the exercise of personal jurisdiction must comport with constitutional due process principles." *Id.*<sup>2</sup> It would be a "rare" case where an entity's conduct satisfied a statutory basis for the exercise of long-arm jurisdiction under New York law but did not comport with constitutional due process principles. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 170 (2d Cir. 2013).

As Judge Abrams noted, Jan. 25 Tr. at 2:23-3:3, plaintiff's service upon Simply LBS was procedurally proper. As attested by attorney Paul, plaintiff served Simply LBS by having the Clerk of Court send a copy of the summons and complaint to its business address in Hong Kong via FedEx, with a "direct signature required." Aff. of Service, Ex. B. Such service comported with Fed. R. Civ. P. 4(h)(2) (a foreign corporation may be served "at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)" and Fed. R. Civ. P. 4(f)(2)(C)(ii) (an individual may be served in a foreign country, "if there is no internationally agreed means, or if an international agreement allows but does not specify other means," by "using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt," unless prohibited by the foreign country's laws).<sup>3</sup> See also *Soc. Enter. LLC v. Sociedad Agricola Cato S.A.*, 2015 WL

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<sup>2</sup> "In patent law cases such as this, 'the existence of personal jurisdiction is, under Federal Circuit law, determined in accordance with the law of the Court of Appeals for the Federal Circuit.'" *RegenLab USA LLC v. Estar Techs. Ltd.*, 335 F. Supp. 3d 526, 535-36 (S.D.N.Y. 2018) (quoting *JetBlue Airways Corp. v. Helferich Patent Licensing, LLC*, 960 F. Supp. 2d 383, 390 (E.D.N.Y. 2013)). However, the Federal Circuit's test for personal jurisdiction mirrors that of the Second Circuit. *RegenLab*, 335 F. Supp. 3d at 535-36 (citations omitted).

<sup>3</sup> Hong Kong is a party to the Hague Service Convention, see *Judicial Assistance Country Information – Hong Kong Judicial Assistance Information*, U.S. Dep't of State – Bureau of Consular Affairs, <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/HongKong.html> (last visited April 21, 2020), and does "not make any reservations with respect to service by international registered mail or service by agent." *Id.* See also *In re Coudert Bros. LLP*, 2017 WL 1944162, at \*12 (S.D.N.Y. May 10, 2017) ("Hong Kong has not objected to Article 10(a), nor do the service rules in Hong Kong prohibit service via mail. [ ]. Accordingly, Rule 4(f)(2)(C)(ii) could serve as the basis for service via mail in this circumstance."); *Altos Hornos de Mexico, S.A.B. de C.V. v. Rock Res. Ltd.*, 2015 WL 6437384, at

13743436, at \*3 (E.D.N.Y. Oct. 6, 2015) (service via FedEx complies with Fed. R. Civ. P. 4(f)(2)(C)(ii)'s "mail" requirement); *Polargrid LLC v. Videsh Sanchar Nigam Ltd.*, 2006 WL 903184, at \*2 (S.D.N.Y. Apr. 7, 2006) (same).

There is also a statutory basis for exercising personal jurisdiction over Simply LBS. N.Y. C.P.L.R. (CPLR) § 302(a)(1) provides that a court "may exercise personal jurisdiction over any non-domiciliary . . . who . . . transacts any business within the state or contracts anywhere to supply goods or services in the state[.]" Plaintiff alleges that Simply LBS maintained a large-scale online marketplace on Amazon.com, offered the Infringing Product for sale, through that marketplace, in New York, and "shipped [the Infringing Product] into New York State and specifically into the Southern District of New York." Compl. ¶¶ 9-10, 20-21, 24-25. These allegations satisfy the requirements of CPLR § 302(a)(1). *See Leroi, Inc. v. Csc3c, Inc.*, 2016 WL 4997228, at \*5 n.7 (N.D.N.Y. Sept. 19, 2016) (collecting cases concluding that a district court could exercise personal jurisdiction where a defendant sells infringing goods to customers in New York through an interactive website or online marketplace); *Lifeguard Licensing Corp. v. Ann Arbor T-Shirt Co., LLC*, 2016 WL 3748480, at \*3 (S.D.N.Y. July 8, 2016) ("Regularly offering and selling goods via an online marketplace such as Amazon.com can provide a basis for personal jurisdiction under CPLR § 302(a)[.]" ); *EnviroCare Techs., LLC v. Simanovsky*, 2012 WL 2001443, at \*4 (E.D.N.Y. June 4, 2012) ("[T]he Court finds that Defendants' sale of the allegedly counterfeit item to Plaintiff in New York through Amazon.com amounted to transacting business in New York sufficient to establish long arm jurisdiction under C.P.L.R. 302(a)(1).").

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\*2 (S.D.N.Y. Oct. 19, 2015) ("In the instant case, the Court determines that service by postal channels at Rock Resource's registered office in Hong Kong would not be 'prohibited by international agreement.'").

I also conclude that exercising personal jurisdiction over Simply LBS will not offend due process. The due process inquiry requires the court to analyze two "related components": first, whether the defendant has sufficient "minimum contacts" with New York, and second, whether exercising personal jurisdiction is reasonable and comports with "traditional notions of fair play and substantial justice." *Multiwave Sensor Inc. v. Sunsight Instruments, LLC*, 2017 WL 1498058, at \*4 (S.D.N.Y. Apr. 26, 2017) (internal citations and quotation marks omitted). Simply LBS's contacts with New York – including its offer to ship products to New Yorkers through Amazon.com and its actual shipment of the Infringing Product into New York – meet the constitutional minimum. *Id.* at \*5 ("Plaintiff's claim for patent infringement against Sunsight Instruments directly relates to Sunsight Instruments' offer to sell the allegedly infringing product in New York State."). Because this case arises from those contacts, and in light of New York State's "interest in adjudicating potential patent infringement that occurs within this forum," *id.* at \*6, I conclude that exercising personal jurisdiction in this case is consonant with traditional notions of fair play and substantial justice.

Finally, I conclude that venue is proper in this Court. "[T]he United States Supreme Court held that the patent venue statute," 28 U.S.C. § 1400, "did not control the question of venue over an alien corporation." *Sharp Corp. v. Hisense Elec., Co.*, 2017 WL 9325873, at \*3 (S.D.N.Y. Dec. 22, 2017) (citing *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 714 (1972)). *See also In re HTC Corp.*, 889 F.3d 1349, 1357 (Fed. Cir. 2018) (reaffirming that "the patent venue statute was not intended to supplant the longstanding rule that the venue laws do not protect alien defendants"), *cert. denied sub nom. HTC Corp. v. 3G Licensing, S.A.*, 139 S. Ct. 1271 (2019). Instead, "[v]enue against an alien corporation is a function of whether the court has personal jurisdiction over that corporation." *Sharp*, 2017 WL 9325873, at \*3. *See also* 28 U.S.C.



§ 1391(b)(3) ("if there is no district in which an action may otherwise be brought as provided in this section," a civil action may be brought in "any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action."); *id.* § 1391(c)(3) ("a defendant not resident in the United States may be sued in any judicial district"). Because this Court has personal jurisdiction over Simply LBS, venue is proper here.

### III. LIABILITY

Following a default, the district court must accept as true all of the well-pleaded factual allegations in the complaint, except those relating to damages. *See Finkel v. Romanowicz*, 577 F.3d 79, 84 (2d Cir. 2009); *Cotton v. Slone*, 4 F.3d 176, 181 (2d Cir. 1993); *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992). However, before entering a default judgment, the Court is required to determine whether those factual allegations, taken as true, establish a defendant's liability as a matter of law. *Finkel*, 577 F.3d at 84.

In this case, plaintiff's complaint asserted two claims: for patent infringement under 35 U.S.C. §§ 271(a) and (b), and for unfair competition and false advertising under the Lanham Act, 15 U.S.C. § 1125(a). Compl. ¶¶ 35-47. However, in its motion for default judgment, plaintiff sought dismissal of its claim under the Lanham Act, without prejudice (*see* Dkt. No. 31 at ECF page 9; Dkt. No. 31-2 at ECF page 5), and in its Proposed Findings it seeks damages only under the Patent Act.

35 U.S.C. § 271(a) provides that a plaintiff claiming patent infringement must: "(i) allege ownership of the patent, (ii) name each defendant, (iii) cite the patent that is allegedly infringed, (iv) state the means by which the defendant allegedly infringes, and (v) point to the sections of the patent law invoked." *Bobcar Media, LLC v. Aardvark Event Logistics, Inc.*, 2017 WL 74729, at \*3 (S.D.N.Y. Jan. 4, 2017) (quoting *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1362 (Fed.

Cir. 2013)). Section 271(b), in turn, provides that "[w]hoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b).

In its complaint, plaintiff alleges that it is the exclusive licensee of the '612 Patent, with "the right to file suit to enjoin infringement thereof"; that Simply LBS infringed that patent by offering the Infringing Product for sale, selling it, and shipping it into, among other places, New York State, all without authorization from plaintiff; that by "offering for sale, selling, importing, marketing, supporting, and advertising" the Infringing Product, defendant "committed, actively induced, and contributed to the infringement of the '612 Patent"; and that this conduct violates 35 U.S.C §§ 271(a) and (b). Compl. ¶¶ 12-13, 18-21, 26, 36-41. These allegations, taken as true, establish Simply LBS's liability as a matter of law.

#### **IV. DAMAGES**

##### **A. Legal Standards**

Although the Court must accept all of the well-pleaded facts in the complaint as true when determining liability, it need not – and indeed cannot – rely on the plaintiff's unsupported allegations to establish its damages. *Greyhound Exhibitgroup*, 973 F.2d at 158. Rather, "[t]here must be an evidentiary basis for the damages sought by plaintiff, and a district court may determine there is sufficient evidence either based upon evidence presented at a hearing or upon a review of detailed affidavits and documentary evidence." *Cement & Concrete Workers Dist. Council Welfare Fund, Pension Fund, Annuity Fund, Educ. & Training Fund & Other Funds v. Metro Found. Contractors Inc.*, 699 F.3d 230, 234 (2d Cir. 2012).

Regardless of the evidence submitted, a default judgment "must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c); *see also Silge v. Merz*, 510 F.3d 157, 160 (2d Cir. 2007) ("By limiting damages to what is specified in the 'demand

for judgment,' [Rule 54(c)] ensures that a defendant who is considering default can look at the damages clause, satisfy himself that he is willing to suffer judgment in that amount, and then default without the need to hire a lawyer."); *Joint Stock Co. Channel One Russia Worldwide v. Infomir LLC*, 2018 WL 4760345, at \*1 (S.D.N.Y. Sept. 28, 2018) (Moses, M.J.) ("a plaintiff cannot recover damages against a defaulted defendant for claims never alleged in its pleading").

In its complaint, plaintiff sought "[a]n accounting for, and an award of, damages in an amount to be determined, but no less than all of Chef Remi's profit from the sale of the infringing jar openers," pursuant to 35 U.S.C. § 289, Compl. ¶ 41; *id.* at 6; attorneys' fees pursuant to 35 U.S.C. § 285, *id.* ¶ 38; *id.* at 7; as well as injunctive relief. *Id.* at 6-7. Under 35 U.S.C. § 289, "[w]hoever during the term of a patent for a design, without license of the owner, (1) applies the patented design . . . to any article of manufacture for the purpose of sale, or (2) sells or exposes for sale any article of manufacture to which such design or colorable imitation has been applied shall be liable to the owner to the extent of his total profit[.]" Under 35 U.S.C. § 285, courts may also award "reasonable attorney fees to the prevailing party," though only in "exceptional cases." In every case, "[t]he patent owner bears the burden of proving the amount of damages." *ALAN Sportartikel GmbH v. Ultra Fitness Equip., Inc.*, 2011 WL 13305254, at \*2 (E.D.N.Y. Feb. 10, 2011) (quoting *Rates Tech. Inc. v. Redfish Telemetry, Inc.*, T-2000, 2001 WL 1825854, at \*3 (E.D.N.Y. Dec. 20, 2001)), *report and recommendation adopted*, 2011 WL 13305255 (E.D.N.Y. Mar. 29, 2011).

In its Proposed Findings, plaintiff seeks the same categories of damages: (1) lost profits in the amount of \$709,657.60; (2) attorneys' fees in the amount of \$177,414.35; and (3) costs and disbursements in the amount of \$202.87. Prop. Findings ¶¶ 74(a)-(b). Plaintiff also seeks a permanent injunction against Defendant. *Id.* ¶ 74(c). I address each request in turn.

**B. Lost Profits**

Section 289 gives a plaintiff the option of recovering, instead of reasonable royalty damages, "the total profit an infringer makes from the infringement." *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429, 434 (2016). "It does so by first prohibiting the unlicensed 'appli[cation]' of a 'patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale' or the unlicensed sale or exposure to sale of 'any article of manufacture to which [a patented] design or colorable imitation has been applied.' . . . It then makes a person who violates that prohibition 'liable to the owner to the extent of his total profit, but not less than \$250.'" *Id.* (quoting 35 U.S.C. § 289) (alterations in *Samsung Elecs.*). Plaintiff has elected to seek an award of defendant's total profit under § 289.

Plaintiff has satisfied the first prong of § 289. Simply LBS both sold and arranged for the manufacture of the Infringing Product. Compl. ¶¶ 18-21; 25; Paul Decl. ¶¶ 6, 7, Exs. D, E. The '612 Patent is a valid design patent which was registered with the United States Patent and Trademark Office and licensed to plaintiff. Compl. ¶¶ 1, 12, 36; Declaration of Ivan Stein (Dkt. No. 50) ¶¶ 2-4, 7-8, Exs. A-C. Images of the Infringing Product demonstrate that the Infringing Product was "sufficiently similar" to the Jar Opener so as to be indistinguishable from the Jar Opener to an ordinary observer, satisfying the first prong of 35 U.S.C. § 289. *Compare* Stein Decl. Ex. C *with* Paul Decl. Ex. D, at ECF page 31.

Therefore, the only remaining question is the measure of Simply LBS's "total profit" under § 289. As plaintiff acknowledges, Prop. Finding ¶¶ 34-37, a patentee can only recover damages "limited to those acts of infringement that occurred *after* the patentee gave the alleged infringer 'notice of infringement.'" *Cognex Corp. v. Microscan Sys., Inc.*, 990 F. Supp. 2d 408, 416 (S.D.N.Y. 2013) (quoting *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1345 (Fed. Cir. 2001)); 35 U.S.C.

§ 287(a). "The statute permits either constructive notice, which is accomplished by marking the article with the patent number, or actual notice," *Gart*, 254 F.3d at 1345, which may be accomplished by filing suit, 35 U.S.C. § 287(a), or through a communication which "which specifically charge[s]" an infringer "with infringement and specific[s] an infringing device." *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994). According to Ivan Stein, Evriholder's CEO, Evriholder was required, under both of its agreements with licensor Mulberry, to "put the patent identification on the produc[t]s it sold or on the packaging," and "did so." Stein Decl. ¶ 5. Exhibit C to the Stein Declaration is a "true and correct copy of the artwork used on the most current packaging in which Evriholder has sold and sells the Jar Opener," which includes such a mark. *Id.* ¶ 7, Ex. C. According to Stein, "[a] Jar Opener in this packaging has been on sale at least as early as April 1, 2017 and states, 'PATENTED: Patent No. D524612.'" *Id.* ¶ 7.

Stein continues:

The Original Dieline also contained the designation "PATENTED: Patent No. D524612." I searched the records of the company but I have been unable to locate [ ] a document that expressly sets that forth. However, it is my recollection and testimony that since on or before January 2016, and as early as I have been with the company, Evriholder marked the Jar Opener with the designation "PATENTED: Patent No. D524612."

*Id.* ¶ 8. Absent evidence to the contrary, Stein's attestation establishes that Simply LBS was on constructive notice of the '612 Patent no later than January 2016.

As noted above, plaintiff seeks \$709,657.60, which it describes as "Simply LBS' profits from its infringement of the '612 Patent," Prop. Findings ¶ 74(a), in damages. Plaintiff calculates that figure by multiplying 58,360, which it describes as the number of "total number of jar openers sold, available for sale or ordered for sale by defendant Simply LBS," *id.* ¶ 28; *see also* Paul Decl. Ex. D), by \$12.14, which it describes as the "gross price per jar opener." Prop. Findings ¶ 27. Plaintiff calculates the "gross price per jar opener" by deducting \$0.79, which it describes as the

"average price" that Simply LBS paid "per jar opener of the 38,200 sold or inventoried jar openers" Prop. Findings ¶¶ 23-25, *see also* Paul Decl. Ex. E, from \$12.95, which was the "sales price for the jar opener as advertised and sold by Defendant Simply LBS on [its own website and on] Amazon.com," Prop. Findings ¶ 26; *see also* Paul Decl. Ex. E.

**1. Jar Openers Sold**

Plaintiff's figures for the number of infringing jar openers sold and defendant's cost per unit are based in large part on the March 15, 2017 email from Chef Remi CEO Lewis to plaintiff's attorneys. Paul Decl. Ex D, at ECF pages 30-34. In that email (sent in response to counsel's letter dated March 9, 2017), CEO Lewis wrote:

Hi Louis and James,

Please find enclosed details attached. I am quite limited what i can send you as I can no longer access the amazon seller central stats as the listing is currently blocked after Amazon received your letter. I've tried to provide you as much detail as possible for your client.

From our records, we have currently sold 27k jar openers.

We have spent 50k promoting these on google adwords and 35k on Amazon Marketing Services.

Our profit margin for this product after all expenses and business costs is 11%.

I have also attached the supplier details I've used since day one. The sales rep contact is Susan Zheng and her contact email is s.hymfg@gmail.com. Her english skills are very poor, hence why i like to deal with her face to face when in China.

I did forget to mention that I had the manufacturer currently creating a new order of 20k items for 2017 when I received your letter.

I have cancelled this order since receiving your letter last week and will accept the loss of the deposit on this order.

My proposal is to offer your client 50 cents per unit on the remaining stock(11,200 unit) if they kindly allow me to sell out of my current stock that I have in the USA.

I'm happy to pay that in advance (\$5,600) and I'll sign an agreement to say that I'll will not continue to sell this product when all stock is sold.

I would be interested in coming to an agreement with your client if they allowed me to continue selling on Amazon until the patent expires in 2020. We have been the No.1 best seller of this product for this product on Amazon.com since July last year.

If your client is not interested, then I'll just destroy the current stock and move on.

I do hope this information helps both parties to come to an satisfactory agreement.

Regards

Rhett Lewis

*Id.* at ECF page 30. CEO Lewis's email included an invoice from Huanyu dated February 7, 2017, for 20,160 "[j]ar opener and silicone opener," at a "unit price" of "US\$0.79." *Id.* at ECF pages 30-31. He also included (1) an excerpt from a spreadsheet reflecting past orders of "Jar Opener & Square Gripper[s]," with "quantity" totals ranging from 2880 to 9600 (totaling 38,616) and with the "total cost per unit (USA Landed)" ranging from \$0.54 to \$1.62 and averaging, on a per unit basis, approximately \$1.09; (2) a list of invoices printed from an Amazon Marketing Services webpage, dated February and March, 2017, all but the last of which – dated March 13, 2017 – were "paid in full"; and (3) a list of transactions, dated between November 2016 and March 2017. *Id.* at ECF pages 31-34.

Under 35 U.S.C. § 289, plaintiff is only entitled to damages "to the extent of [Simply LBS's] total profit." As of March 15, 2017, it appears that defendant had sold approximately 27,416 (38,616 minus 11,200) jar openers. Paul Decl. Ex. D, at ECF pages 30-31. In CEO Lewis's email, he stated that he had canceled an order for an additional approximately 20,000 units, and that if the parties did not reach an agreement, he would "destroy the current stock" of 11,200 "and move on." *Id.* Plaintiff has not submitted any evidence that Simply LBS subsequently sold the 11,200

units in its "current stock," or indeed any Infringing Product. Instead, it argues from the absence of evidence to the contrary: "No evidence has been submitted that after March 9, 2017, the 11,200 additional jar openers and the further supply of 20,160 units were not sold by Simply LBS." Prop. Findings ¶ 32.

It is plaintiff's burden to prove its damages. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009) ("The burden of proving damages falls on the patentee."); *Avid Identification Sys., Inc. v. Glob. ID Sys.*, 29 F. App'x 598, 602 (Fed. Cir. 2002) ("the burden of proving damages is on the plaintiff"). Plaintiff has submitted no admissible evidence that Simply LBS actually sold any of the "current stock" of 11,200 it promised to destroy, much less any of the 20,160 additional units that it had not yet received under an order that it said it had cancelled. Absent any such evidence, I respectfully recommend that the Court award plaintiff Simply LBS's "total profit" on the approximately 27,416 jar openers it admitted having sold.<sup>4</sup>

## 2. Profit Margin

Plaintiff proposes to multiply defendant's sales of the Infringing Product by a per-unit profit margin of \$12.14. Prop. Findings ¶¶ 25-26. Plaintiff has submitted admissible evidence that

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<sup>4</sup> Some of Simply LBS's sales of Infringing Product occurred before November 2016, when Evriholder and Mulberry entered into their License Agreement (Dkt. No. 39-1 at ECF pages 8-11), granting Evriholder the right to bring patent infringement actions concerning the '612 Patent. While the License Agreement does not explicitly address whether Evriholder was entitled to seek damages for past patent infringement, it does provide that "EVRI shall retain monetary damages or other consideration from an accused infringer resulting from a suit brought by EVRI." License Ag. § 4.7. I do not read to the License Agreement, as a whole, to prohibit Evriholder from recovering damages for infringement which took place before November 2016. Similarly, while some of Simply LBS's sales of Infringing Product may have occurred outside the United States, Simply LBS has defaulted and therefore failed to submit any evidence that its sales were predominantly or even partially made abroad; the Court therefore need not reach the question whether plaintiff may recover damages on such foreign sales. *Cf. MLC Intellectual Prop., LLC v. Micron Tech., Inc.*, 2019 WL 2437073, at \*1-3 (N.D. Cal. June 11, 2019) (summarizing recent case law on the reach of U.S. patent law to "wholly foreign sales," and concluding that a U.S. patentee may not seek damages based on such sales).



defendant charged \$12.95 per unit for the Infringing Product on its Amazon.com webpage, as well as on its own website. Paul Decl. ¶¶ 7, 9; *id.* Ex. E, at ECF pages 43-44. Plaintiff proposes that this figure be reduced by \$0.79, which it describes as the "average price per jar opener of the 38,200 sold or inventoried jar openers." Prop. Findings ¶ 25. In fact, \$0.79 was "the price per jar opener [ ] shown on the Huanyu invoice" of 20,160 units that CEO Lewis stated he had canceled in his March 15, 2017 email. Paul Decl. Ex. D, at ECF pages 30-31. As noted above, however, there is no evidence that Simply LBS actually sold (or made any profit on the sale of) those units.

In the same email, CEO Lewis provides a better estimate of Simply LBS's per-unit cost for those 38,200 units in the form of spreadsheet tracking its "cost per unit (USA Landed)" in 2016:

Jar Opener & Square Gripper	PI Date	Quantity	Total Price (Sea Shipping)	Total Cost Per Unit (USA Landed)	Price (Inventory)	Price (Shipping)	Invoice No:	Custom Fees
Susan Zheng	24th May 2016	3000		1.22	1620	2040	20160523	
s.yzmig@nsw.com	30th June	2880		1.22	1555.2	1956.4	20160704	62.54
	1st August	5280	2851.2	0.54				110.37
	21st September	2880		0.54	1555.2	1956.4	20160921	62.54
*now added square gripper	13th October	5376		1.4	4247	3283.8	20161013	
	14th November	9600		1.62	7564	7942	20161114	
	7th December	9600		0.79	7584		20161207	

Paul Decl. Ex. D, at ECF pages 31-32. The average "cost per unit" for these 38,616 units was approximately \$1.09.<sup>5</sup> While it appears that Simply LBS only sold, and thereby made profit on,

<sup>5</sup> I calculate the average per unit costs as follows:

Date	Quantity	"Total Cost Per Unit (USA Landed)"	Calculated Cost
5/24/2016	3000	\$1.22	\$3,660
6/30/2016	2880	\$1.22	\$3,513.6
8/1/2016	5280	\$0.54	\$2,851.2
9/21/2016	2880	\$0.54	\$1,555.2
10/13/2016	5376	\$1.4	\$7,526.4
11/14/2016	9600	\$1.62	\$1,5552
12/7/2016	9600	\$0.79	\$7,584
Totals	38,616	<b>\$1.093909</b> (= \$42,242.4 / 38616)	\$42,242.4

approximately 27,416 of those units, the record does not reveal which units were sold. I conclude that \$1.09 is the most reasonable estimate of defendant's per-unit cost available to the Court, and therefore that \$11.86 (\$12.95 – \$1.09) is the most reasonable gross profit per unit on which to base plaintiff's damages award.

To be sure, Simply LBS likely incurred substantial additional costs in connection with selling the Infringing Product. For example, CEO Lewis wrote that defendant had spent "50k promoting [the Infringing Product] on google adwords and 35k on Amazon Marketing Services." Paul Decl. Ex. D, at ECF page 30. He also wrote that "[o]ur profit margin for this product after all expenses and business costs is 11%." *Id.* Perhaps so. However, after a plaintiff in a patent action submits admissible evidence of an infringer's gross profit (that is, its revenue less its cost of goods sold), it is the infringer's burden to submit admissible evidence to establish that other expenses and costs should be deducted from that profit. *Apple Inc. v. Samsung Elecs. Co.*, 2017 WL 4776443, at \*15 (N.D. Cal. Oct. 22, 2017) ("[T]he defendant bears the burden of production on proving any deductible expenses from the amount of total profit proved by the plaintiff."); *Nordock, Inc. v. Sys., Inc.*, 2017 WL 5633114, at \*3 (E.D. Wis. Nov. 21, 2017) (same, and collecting cases). *See also Rocket Jewelry Box, Inc. v. Quality Int'l Packaging, Ltd.*, 250 F. Supp. 2d 333, 340-41 (S.D.N.Y. 2003) ("For design patent cases, authority on the calculation of fixed expenses is scant, thus requiring the Court to use discretion. . . . By analogy, in copyright actions, the owner must first establish the infringer's gross profits, and then the infringer has the burden of proving deductible expenses, *see* 17 U.S.C. § 504, and the courts determine what expenses should be deducted."), *vacated in part on other grounds*, 90 F. App'x 543 (Fed. Cir. 2004). Because Simply

LBS defaulted, and failed to present any evidence in support of its additional costs, I recommend no further deductions to plaintiff's proposed gross profit figure.

Since plaintiff has established Simply LBS sold 27,416 units of the Infringing Product at a profit of \$11.86 per unit, for a total of \$325,153.76, I recommend, respectfully, that damages be awarded in that amount.

### **C. Attorneys' Fees**

Plaintiff further seeks an award of attorneys' fees "in an amount equal to 25% of any award of damages." Prop. Findings ¶¶ 33, 49, 55. Plaintiff explains that "its attorneys were to be paid on a contingent basis in an amount equal to 25% of any award of damages." *Id.* ¶ 55; *see also* Paul Decl. Ex. F.

Section 285 limits the award of attorneys' fees in patent infringement litigation to "exceptional cases." As the Supreme Court recently explained:

[A]n "exceptional" case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances.

*Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014). "In making this determination, 'there is no precise rule or formula' to be followed, 'but instead equitable discretion should be exercised,'" *KX Techs., LLC v. Zuma Water Filters, Inc.*, 2018 WL 3302589, at \*2 (D. Conn. July 5, 2018) (quoting *Octane Fitness*, 572 U.S. at 554), considering all relevant factors, including "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Octane Fitness*, 572 U.S. at 554 n.6 (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994)). "[T]he determination whether a case is 'exceptional' under

§ 285 is a matter of discretion." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

Plaintiff contends that this case is "exceptional" because, "at least" as to any jar opener sold after its March 9, 2017 letter to defendant, "Simply LBS continued to infringe the '612 Patent willfully." Prop. Findings ¶ 32. I disagree. As explained above, plaintiff has not shown that Simply LBS continued to sell the Infringing Product after its receipt of plaintiff's letter. Instead, the record suggests the opposite: in his emailed response, dated March 15, 2017, CEO Lewis offered to settle plaintiff's infringement claims or, alternatively, to destroy Simply LBS's "current stock" of the Infringing Product. Paul Decl. Ex. D, at ECF page 30. Additionally, Lewis stated that he had already canceled Simply LBS's outstanding order for additional stock "and will accept the loss of the deposit on this order." *Id.*<sup>6</sup>

The cases on which plaintiff relies, *see* Prop. Findings ¶¶ 52-54, do not compel a different conclusion. In *Georgetown Rail Equip. v. Holland*, 2016 WL 3346084 (E.D. Tex. June 16, 2016), *aff'd*, 867 F.3d 1229 (Fed. Cir. 2017)) plaintiff and defendant discussed doing business together – and shared information pursuant to a nondisclosure agreement – until defendant concluded that plaintiff's technology was too expensive, terminated negotiations, and developed its own infringing technology. *Id.* at \*13-14. At trial, the jury found defendant's infringement to be willful (a "compelling" but not dispositive indication of an exceptional case); thereafter, the court found

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<sup>6</sup> The mere fact of defendant's default, without more, does not render this case exceptional. *See, e.g., Eagle Trading USA, LLC v. Crownwell, LLC*, 2019 WL 1323993, at \*3 (S.D.N.Y. Mar. 25, 2019) (concluding that the plaintiff failed to "demonstrate[] that this is an 'exceptional case' that warrants attorneys' fees under section 285 of the Patent Act," notwithstanding the defendant's default); *IPVX Patent Holdings, Inc. v. Taridium, LLC*, 2014 WL 4437294, at \*6 (E.D.N.Y. Aug. 6, 2014) ("Plaintiff has not proffered any argument, nor can the Court anticipate any reasonable argument, as to why this case should be designated an 'exceptional case' for the purposes of awarding attorney's fees."), *report and recommendation adopted*, 2014 WL 4437307 (E.D.N.Y. Sept. 9, 2014).

the case to be exceptional after noting that its "noninfringement defenses through trial were unreasonable," *id.* at \*15, and its litigation strategies "multiplied the proceedings and needlessly increased costs." *Id.* at \*24 (explaining that though "there is nothing 'exceptional' about a party resisting its discovery obligations, maintaining already rejected objections to exhibits or testimony into trial, filing weak *Daubert* requests, or even making repeated Rule 11 sanction threats" in isolation, defendant "did all of these things," thereby justifying a finding of an "exceptional" case and an award of attorneys' fees).

In *AAT Bioquest v. Tex. Fluorescence Labs*, 2015 WL 7708332 (N.D. Cal. Nov. 30, 2015), the court held that defendant – a competitor of plaintiff in the market for florescent ion indicators – willfully infringed plaintiff's patent by intentionally copying plaintiff's Fluo-8 product from a sample it had obtained from plaintiff. *Id.* at \*2 ("There is [ ] no dispute that TEFLABS intentionally copied Fluo-8 and began to manufacture and sell it."). Moreover, once in litigation, defendant violated the court's injunction against further infringement. *Id.* at \*5. Even after finding that portions of the case were "exceptional," however, the *AAT Bioquest* court exercised its discretion not to award attorneys' fees. *Id.* at \*15-16 ("A determination that portions of this case are exceptional does not automatically mean that AAT is entitled to attorneys' fees.").

In *Ultimate Combustion Co. v. Fuecotech, Inc.*, 2014 WL 12495264, at \*2 (S.D. Fla. June 4, 2014) (subsequent history omitted), "the two individual Defendants left the Plaintiffs' employ, taking with them their knowledge of the Plaintiffs' patented device, and set up a competing business." *Id.* at \*2. On these facts, the court found the case to be exceptional, explaining that it was "not a case where a party unwittingly utilizes technology which turns out to be the subject of another's patent." *Id.*

In this case, by way of contrast, it remains unclear whether defendant knowingly copied plaintiff's product or "unwittingly" sold a product "which turn[ed] out to be the subject of another's patent." *Ultimate Combustion*, 2014 WL 12495264, at \*2. As discussed above, there is no evidence that Simply LBS continued any infringing activity after it received plaintiff's March 9, 2017 letter. Paul Decl. Ex. D, at ECF page 30. Moreover, since defendant did not litigate the case at all, it cannot be accused of maintaining a frivolous or objectively unreasonable litigation position, or of violating any orders issued by this Court. I therefore conclude, applying the *Octane Fitness* factors, 572 U.S. at 554 n.6, and considering the totality of the circumstances, that this case is not "exceptional," and therefore that an award of attorneys' fees should not issue.<sup>7</sup>

#### **D. Prejudgment Interest**

Plaintiff requests that the Court award prejudgment interest on its award of damages under 35 U.S.C. § 289. Prop. Findings ¶ 74(a) (requesting interest "from March 15, 2017," the date of CEO Lewis's email). The case law applying § 289 provides "little guidance as to whether prejudgment interest is available for an award of infringer's profits," but several cases have concluded that "courts have discretion in this area." *Rocket Jewelry Box*, 250 F. Supp. 2d at 339; *Columbia Sportswear N. Am., Inc. v. Seirus Innovative Accessories, Inc.*, 2018 WL 1805102, at \*1 (S.D. Cal. Apr. 17, 2018) (collecting "cases that have applied prejudgment interest to patent infringement awards for total profit under 35 U.S.C. § 289").

In this case, plaintiff requests interest "from March 15, 2017." Prop. Findings ¶ 74(a). "Generally, prejudgment interest should be awarded from the date of infringement to the date of

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<sup>7</sup> This Report and Recommendation does not address and should not be construed to affect counsel's entitlement to fees, upon collection of any judgment, under the terms of his retainer agreement with his client.

judgment." *Nickson Indus., Inc. v. Rol Mfg. Co.*, 847 F.2d 795, 800 (Fed. Cir. 1988). Therefore, plaintiff's proposed date is conservative, and I recommend adopting it.

Plaintiff does not request interest at any specific rate. I note that "[t]he rate of prejudgment interest is [ ] left to the wide discretion of this Court, which may award interest at or above the prime rate." *Progressive Int'l Corp. v. AMGTM LLC*, 2018 WL 4091694, at \*6 (W.D. Wash. Aug. 21, 2018) (quoting *Uniroyal, Inc. v. Rudkin–Wiley Corp.*, 939 F.2d 1540, 1545 (Fed. Cir. 1991)). On March 15, 2017, the *Wall Street Journal* prime rate was 3.75%. I find that rate reasonable on the facts of this case, and therefore recommend that plaintiff be awarded simple interest, calculated at a rate of 3.75%, from March 15, 2017, to the date on which judgment is entered.

#### **E. Costs**

Plaintiff also requests an award of costs, in the amount of \$202.87, pursuant to 35 U.S.C. § 284. Prop. Findings ¶ 74(a). While plaintiff does not itemize its request for costs, I note that the amount requested is less than this Court's filing fee, which plaintiff paid on or before June 8, 2017. (Dkt. No. 1.) *See BWP Media USA Inc. v. Uropa Media, Inc.*, 2014 WL 2011775, at \*4 (S.D.N.Y. May 16, 2014) (noting that "[w]here counsel fail to proffer documentation, a court may either reduce the amount claimed or decline to award costs altogether," but taking judicial notice of the this Court's \$400 filing fee, and limiting an award of costs to that amount). I therefore recommend, respectfully, that plaintiff be awarded costs in plaintiff's requested amount of \$202.87.

#### **F. Permanent Injunction**

Finally, plaintiff requests that this Court permanently enjoin and prohibit "Simply LBS and all those in concert or affiliated with it, including its officers, directors, and managing members . . . from making, using, selling, offering for sale, marketing, supporting or advertising the sale" of

the Infringing Product "or otherwise contributing to the infringement of U.S. Design Patent No. D52[4],612." Prop. Findings ¶ 74(c).

This Court has statutory authority to issue injunctions in patent infringement actions. 35 U.S.C. § 283 ("The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."). According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The decision to grant or deny a permanent injunction is left to the discretion of the district court. *Id.*

I conclude that the *eBay* factors favor entering a permanent injunction against Simply LBS. "[B]ecause the principal value of a patent is its statutory right to exclude,' courts have concluded that monetary damages are an inadequate remedy against future infringement." *ALAN Sportartikel*, 2011 WL 13305254, at \*5 (quoting *Honeywell Int'l Inc. v. Universal Avionics Sys. Corp.*, 397 F. Supp. 2d 537, 546 (D. Del. 2005)). Because defendant is a foreign entity which has defaulted, "there is serious doubt that [Plaintiff] will be successful in collecting any monetary award" the Court does issue, rendering Plaintiff's injuries "likely irreparable." *Acticon Techs. v. Heisei Elecs. Co.*, 2008 WL 356872, at \*5 (S.D.N.Y. Aug. 1, 2007), *report and recommendation adopted*, 2008 WL 356872, at \*1 (S.D.N.Y. Feb. 5, 2008). "The only hardships involved inure in favor of" plaintiff, and "the public interest in the enforcement of intellectual property rights warrants the



issuance of injunctive relief as the only enforceable remedy." *Id. See also ALAN Sportartikel*, 2011 WL 13305254, at \*5 (recommending entry of a permanent injunction against a defaulted defendant in a patent infringement action). I therefore recommend entry of a permanent injunction against Simply LBS, together with its officers, directors, managing members, and others acting in concert with them, forbidding them from infringing or inducing the infringement of the '612 Patent, until the expiration of that patent.

## V. CONCLUSION

For the reasons set forth above, I respectfully recommend that plaintiff be awarded \$325,153.76 in compensatory damages, plus prejudgment interest on that sum at the rate of 3.75% from March 15, 2017, to the date on which judgment is entered, and \$202.87 in costs.<sup>8</sup> In addition, I recommend entry of a permanent injunction prohibiting Simply LBS Ltd Company, its officers, directors, managing members, and others acting in concert with them, from infringing or inducing the infringement of the '612 Patent until the expiration of that patent.

Dated: New York, New York  
April 21, 2020



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**BARBARA MOSES**  
**United States Magistrate Judge**

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<sup>8</sup> As of the date of this Report and Recommendation, the prejudgment interest, calculated at 3.75%, comes to \$37,815.83 ( $\$325,153.76 \times 3.75\% \times (1132 / 365)$ ). The daily rate, which I recommend that Your Honor use to calculate the total amount of the judgment should you adopt this Report and Recommendation, is \$33.41 ( $\$325,153.76 \times 3.75\% \times (1 / 365)$ ).

**NOTICE OF PROCEDURE FOR FILING OF OBJECTIONS  
TO THIS REPORT AND RECOMMENDATION**

The parties shall have fourteen days from the service of this report and recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Any such objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the Hon. Ronnie Abrams at the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, New York 10007, and to the chambers of the undersigned Magistrate Judge. Any request for an extension of time to file objections must be directed to Judge Abrams. **Failure to file timely objections will result in a waiver of such objections and will preclude appellate review.** *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Frydman v. Experian Info. Sols., Inc.*, 743 F. App'x 486, 487 (2d Cir. 2018); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010).