*Chapter 2*

Courts and Alternative Dispute Resolution

***Case 2.1***

2011 WL 30972

United States District Court, N.D. California.

**GUCCI AMERICA, Plaintiff,**

**v.**

**WANG HUOQING, Defendant.**

No. C 09-05969 CRB.

Jan. 5, 2011.

ORDER ADOPTING REPORT AND RECOMMENDATION, GRANTING DEFAULT JUDGMENT AGAINST DEFENDANT, AND ENTERING PERMANENT INJUNCTION

CHARLES R. BREYER, District Judge.

The Court has reviewed Magistrate Judge Spero's Report and Recommendation. The Court finds the Report correct, well-reasoned, and thorough, and ADOPTS it in every respect. Accordingly, the Court GRANTS default judgment against Defendant Wang Huoqing on Plaintiffs' trademark infringement and false designation of origin claims. The Court awards statutory damages to each Plaintiff in the following amounts: for Gucci America, Inc. $440,000; for Bottega Veneta International S.A.R.L. $4,000; and for Balenciaga S.A. $8,000. The Court awards prejudgment interest to each Plaintiff in the following amounts: for Gucci America, Inc. $12,768.92; for Bottega Veneta International S.A.R.L. $116.08; and for Balenciaga S.A. $232.16. Additionally, the Court awards $233.33 in costs to each Plaintiff on the basis of Defendant's trademark infringement.

Further, a permanent injunction is hereby ENTERED against the Defendant as follows:

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

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

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

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

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

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

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

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

(h) offering such goods in commerce;

(i) otherwise unfairly competing with Plaintiffs;

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

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

Finally, the Court orders as follows:

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

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

IT IS SO ORDERED.

***Case 2.2***

533 S.W.3d 395

Court of Appeals of Texas, Houston (14th Dist.).

**Jennifer JOHNSON, Appellant**

**v.**

**OXY USA, INC. and Texas Workforce Commission, Appellees**

NO. 14–14–00831–CV

Opinion filed January 7, 2016

Rehearing Denied February 5, 2016

**OPINION**

[Ken Wise](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0104115601&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), Justice

Appellant, Jennifer Johnson, appeals the trial court's order granting appellees Oxy USA, Inc. (“Oxy”) and the Texas Workforce Commission's (“the TWC”) Joint Motion for Summary Judgment and Partial Plea to the Jurisdiction. We affirm in part and reverse and remand in part.

**Background**

Oxy employed Johnson as a finance analyst from 2002 to 2013. According to Johnson, Oxy notified her in 2011 that the requirements of her position had changed. As a result, Johnson enrolled in courses to obtain a CPA license. Oxy reimbursed Johnson for the cost of the courses. After Johnson voluntarily left her position at Oxy in February 2013, Oxy withheld the cost of the CPA courses from Johnson's final paycheck. Johnson subsequently filed a claim for unpaid wages with the TWC.

Both Oxy and Johnson admit that the parties signed an agreement regarding reimbursement from Oxy to Johnson for the cost of the courses. Oxy argues that pursuant to the agreement, it was entitled to withhold the cost of the courses from Johnson's final check because she worked less than one year from the date of reimbursement. Johnson contends that the agreement does not apply because the funds should have been classified as a business expense, which did not have to be repaid upon resignation under Oxy's Educational Assistance Policy.

The TWC issued a Preliminary Wage Determination Order on June 3, 2013, concluding that Johnson was not entitled to unpaid wages or unpaid vacation pay because “the withheld wages were authorized by the claimant in writing.” Johnson appealed the preliminary determination on June 17, 2013, but the TWC denied her appeal in a “Texas Payday Law Decision” mailed on July 26, 2013. The Payday Law Decision clearly stated: “The attached decision \*398 will become final **fourteen (14)** calendar days after the date mailed shown above, unless within that time a party to the appeal files a written request for reopening or a written appeal to the Commission.” Johnson attempted to appeal the decision, but her appeal was received late.[1](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_footnote_B00012037964897) As a result, on October 18, the TWC dismissed Johnson's appeal as untimely. Johnson filed a Motion for Rehearing with the TWC, but that motion was also denied. Johnson then filed this lawsuit against Oxy and the TWC on February 7, 2014.

Johnson's original petition named Oxy and the TWC as defendants and included four causes of action: (1) “Oxy's Violation of the Texas Payday Law;” (2) “Review of TWC's Application of the Texas Payday Law;” (3) breach of contract; and (4) declaratory judgment. In her petition, Johnson demanded payment of $4,542.78 from the defendants, plus costs and attorney's fees. After answering Johnson's suit separately, Oxy and the TWC filed “Defendants' Joint Special Exception, Partial Plea to the Jurisdiction, and Motion for Summary Judgment.”

The trial court issued an order granting Oxy and the TWC's partial plea to the jurisdiction and motion for summary judgment. In its order, the trial court concluded that res judicata barred Counts One, Three, and Four of Johnson's petition. The trial court also concluded that its jurisdiction was limited to whether Johnson's appeal to the TWC was timely and affirmed the TWC's decision in that regard. Johnson appeals.

**Issues and Analysis**

On appeal, Johnson alleges the following: (1) the trial court erred in granting summary judgment based on res judicata; and (2) the trial court erred in granting the partial plea to the jurisdiction based on the finding that its jurisdiction was limited to a consideration of whether Johnson's appeal was timely. Before turning to the res judicata issue, we must first determine whether the trial court correctly granted the partial plea to the jurisdiction. See [Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443 (Tex.1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993060903&pubNum=0000713&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_713_443&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_713_443); [Hull v. Davis, 211 S.W.3d 461, 463 (Tex.App.–Houston [14th Dist.] 2006, no pet.)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010965585&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_463&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_463).

**I. Defendants' Partial Plea to the Jurisdiction**

[1](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F12037964897)[2](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F22037964897)[3](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F32037964897)[4](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F42037964897)[5](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F52037964897)A party may challenge a trial court's subject-matter jurisdiction by a plea to the jurisdiction. [Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 637 (Tex.1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999265124&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_637&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_637) (per curiam). Whether a trial court has subject-matter jurisdiction is a question of law; therefore, we review the trial court's order de novo. [Tex. Natural Res. Conservation Comm'n v. IT–Davy, 74 S.W.3d 849, 855 (Tex.2002)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002237903&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_855&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_855). In deciding a plea to the jurisdiction, we look to whether the plaintiff has alleged facts in her pleadings that affirmatively demonstrate the trial court's jurisdiction to hear the cause. [Tex. Dep't of Parks and Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex.2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004293997&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_226&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_226). We consider only the plaintiff's pleadings and the evidence pertinent to the judicial inquiry, and we do not consider the claim's merits. [County of Cameron v. Brown, 80 S.W.3d 549, 555 (Tex.2002)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002323472&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_555&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_555).

Oxy and the TWC argue that this court's jurisdiction is limited to a review of “whether Plaintiff timely appealed a previous decision to the Commission.” To support their contention, Oxy and the TWC rely on our decision in \*399 [Tex. Workforce Comm'n v. City of Houston, No. 14–07–00407–CV, 2009 WL 396208 (Tex.App.–Houston [14th Dist.] Feb. 19, 2009, no pet.)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (mem.op.). In that case, the TWC hearing examiner determined that the city's protest to a former employee's wage claim was filed late. [Id. at \*1](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The examiner's decision only concerned the timeliness issue and whether the city had been given an extension to the deadline as it claimed. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The examiner's decision was subsequently affirmed by the appeals tribunal and the commission. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The city then appealed the commission's decision to the district court. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) After the district court reversed the commission, the commission appealed to this court. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) On appeal, we agreed with the commission that we could only address the timeliness issue:

The courts have subject-matter jurisdiction to review only a final decision by the commission. See [Tex. Lab.Code § 212.201 (Vernon 2006)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1003633&cite=TXLBS212.201&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The examiner determined on February 21 that the city filed its protest one day late and therefore waived its rights to appeal the decision on the protest. The February 21 decision did not address whether the employee was eligible to receive unemployment benefits. Because timeliness was the only issue addressed in the February 21 decision, that was the only issue properly before the appeals tribunal when it affirmed the February 21 decision on April 11, and it was likewise the only issue before the commission when it affirmed the April 11 tribunal decision on June 2. The case before us now concerns only the city's appeal of the commission's decision on June 2. The scope of this court's jurisdiction only extends as far as the language of the decision being appealed. Therefore, we have subject-matter jurisdiction only over the June 2 decision regarding the timeliness of the city's protest, and not over the April 11 decision by the commission on the city's motion to rehear Adams's unemployment-benefits claim.

[Id. at \*2](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). We conclude that [City of Houston](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) is controlling in this case. Like in [City of Houston,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) the October 18 decision here only addressed the timeliness of Johnson's appeal. The decision stated in relevant part:

[Section 61.061 of the Texas Labor code](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1003633&cite=TXLBS61.061&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) provides that a decision of the Wage Claim Appeal Tribunal shall be final unless an appeal is filed within fourteen (14) days from the date of mailing such decision.

The statutory period in which an appeal could be filed expired August 9, 2013. This appeal was filed August 13, 2013, and is therefore late. The Commission is without jurisdiction to hear the appeal, and it is dismissed.

[6](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F62037964897)Therefore, because the decision only focused on the timeliness issue, our jurisdiction is likewise limited. [City of Houston, 2009 WL 396208 at \*2](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Contrary to Johnson's argument, we are unable to review the Wage Claim Appeal Tribunal's decision dated July 26, 2013. As we noted in [City of Houston,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) in order for this court to have jurisdiction to review a commission decision, the party claiming to be aggrieved by a final decision of the commission must first have exhausted the available administrative remedies. [City of Houston, 2009 WL 396208 at \*2](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018166534&pubNum=0000999&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); see also [Tex. Lab.Code § 212.203(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1003633&cite=TXLBS212.203&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_8b3b0000958a4). Here, Johnson failed to exhaust her administrative remedies with regard to the July 26 decision because she filed her appeal late. See [Hull, 211 S.W.2d at 465](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010965585&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_465&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_465) (concluding that claimant failed to exhaust administrative remedies under Payday Law when he failed to seek a hearing on Preliminary Wage Determination Order within 21 days as required by § 61.054). As a result, we are unable to review the July 26 decision. However, we can review the October 18 \*400 decision because Johnson did exhaust her administrative remedies by timely appealing that decision. We hold that the trial court correctly found its jurisdiction was limited to the timeliness consideration, and we overrule Johnson's first issue.

**II. Defendants' Motion for Summary Judgment**

In her second issue, Johnson argues that the trial court erred in granting the defendants' joint motion for summary judgment. In its order, the trial court first determined that the TWC's October 18 decision regarding the timeliness issue was supported by substantial evidence.[2](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_footnote_B00022037964897) The court then held that res judicata barred Johnson's three remaining claims. We first review the trial court's ruling on the October 18 decision and then turn to the res judicata question.

A. Count Two—Review of TWC's Application of the Texas Payday Law

[7](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F72037964897)[8](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F82037964897)[9](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F92037964897)In the October 18 decision, the TWC concluded that Johnson's appeal was filed late. We review a TWC decision de novo to determine whether substantial evidence supports the ruling. See [Tex. Lab.Code § 212.202(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1003633&cite=TXLBS212.202&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_8b3b0000958a4); [McCrory v. Henderson, 431 S.W.3d 140, 142 (Tex.App.–Houston [ 14th Dist.] 2013, no pet.)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031607257&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_142&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_142). The TWC's action is presumed valid, and the party seeking to set aside the decision has the burden to show that it was not supported by substantial evidence. [McCrory, 431 S.W.3d at 142](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031607257&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_142&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_142). Whether there is substantial evidence to support an administrative decision is a question of law. [Tex. Dep't of Pub. Safety v. Alford, 209 S.W.3d 101, 103 (Tex.2006)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010764112&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_103&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_103). “Substantial evidence is not proof beyond a reasonable doubt or even a preponderance of the evidence; it need only be more than a scintilla.” [Garza v. Tex. Alcoholic Beverage Comm'n, 138 S.W.3d 609, 613 (Tex.App.–Houston [14th Dist.] 2004, no pet.)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004623365&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_613&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_613).

We review the trial court's judgment by comparing the TWC's decision with the evidence presented to the trial court and the governing law. [McCro ry, 431 S.W.3d at 142](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031607257&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_142&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_142). We determine whether the summary judgment evidence established as a matter of law that substantial evidence existed to support the TWC's decision. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031607257&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));see also [Alford, 209 S.W.3d at 103](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010764112&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_103&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_103).

Applying this standard of review, we begin by summarizing the evidence supporting the TWC's decision. Pursuant to [Section 61.061(c) of the Texas Labor Code](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1003633&cite=TXLBS61.061&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_4b24000003ba5), an order from the wage claim appeal tribunal becomes final 14 days after the day it is mailed. [Tex. Lab.Code § 61.061(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1003633&cite=TXLBS61.061&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_4b24000003ba5). Here, the Payday Law Decision was mailed on July 26, 2013; thus, Johnson had until August 9 to timely appeal. Her appeal acknowledges that she received the Payday Law Decision on July 31, several days before the deadline expired. However, Johnson did not send her appeal to the TWC until August 12. She admits the same in her motion for rehearing. Johnson has not offered any evidence to controvert the TWC's finding that her appeal was late. Furthermore, Johnson states in her brief that she “does not appeal the trial court's decision regarding the TWC” and “does not take issue with the determination that her appeal was untimely.” For these reasons, we conclude that the summary judgment record shows as a matter of law that substantial evidence supports the TWC's decision. We therefore affirm the trial court's grant of summary judgment with regard to Count Two.

\*401 B. Counts One, Three, and Four—Oxy's Violation of the Texas Payday Law, Breach of Contract, and Declaratory Judgment

[10](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F102037964897)[11](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F112037964897)[12](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F122037964897)[13](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F132037964897)We next consider whether the trial court correctly held that Johnson's remaining claims were barred by res judicata. In a court of law, a claimant typically cannot pursue one remedy to an unfavorable outcome and then seek the same remedy in another proceeding before the same or a different tribunal. “Res judicata bars the relitigation of claims that have been finally adjudicated or that could have been litigated in the prior action.” [Igal v. Brightstar Info. Tech. Grp., Inc., 250 S.W.3d 78, 86 (Tex.2008)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_86&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_86), superseded by statute on other grounds, Act of Apr. 28, 2009, 81st Leg., R.S., ch. 21, §§ 1–2, 2009, Tex. Gen. Laws 40, 40 (codified at [Tex. Lab.Code § 61.052(b-l)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1003633&cite=TXLBS61.052&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and as an amendment to [Tex. Lab.Code § 61.051(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1003633&cite=TXLBS61.051&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_4b24000003ba5)), as recognized in [Prairie View A & M Univ. v. Chatha, 381 S.W.3d 500, 512 n. 17 (Tex.2012)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028528334&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_512&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_512). To obtain summary judgment on the ground that the plaintiff's claims are barred by res judicata, a defendant must establish that: (1) a court of competent jurisdiction previously rendered a final judgment on the merits, (2) the prior action involved the same parties or those in privity with them; and (3) the claims now raised are the same as those litigated or that could have been litigated in the first action. [Igal, 250 S.W.3d at 86](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_86&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_86).

Johnson argues that res judicata does not apply here because the TWC did not render a final judgment on the merits of her claim that Oxy misinterpreted its Educational Assistance Policy. Specifically, Johnson claims she was “denied the right of full adjudication of her claims because the TWC refused to consider her arguments at the administrative level as beyond its jurisdiction.” To support this contention, Johnson points to the following excerpt from the Payday Law Decision:

As explained during the hearing, the TWC does not interpret contracts between employers and employee but only enforces the Texas Payday Law ... The question of whether the employer properly interpreted their policy on reimbursed educational expenses versus a business expense is a question for a different forum.

According to Johnson, this language shows that the TWC refused to consider the merits of the issues she raised as “beyond its reach.” In contrast, the defendants contend that Johnson's claims are barred by res judicata because they are based on claims previously decided by the TWC. The defendants argue that Johnson's position “fails to properly consider the evidence, argument [,] and findings made by the TWC.” Oxy and the TWC maintain that [Igal](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) is controlling in Johnson's case.

In [Igal,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) the claimant filed a wage claim with the TWC, arguing that his employer breached their employment agreement and owed him unpaid wages, bonuses, and benefits. [Id. at 81](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_81&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_81). The TWC dismissed Igal's claim in a preliminary wage determination order. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) Igal then requested a hearing, and the TWC issued its decision, finding that his claim failed on the merits and that the TWC lacked jurisdiction because Igal filed his claim more than 180 days after his wages were due. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

Instead of filing a motion for rehearing or seeking judicial review of the TWC's decision, Igal sued his employer in district court for breach of contract and declaratory judgment. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The employer argued that Igal's common law claims were barred by res judicata, and the district court, court of appeals, and Texas Supreme Court all agreed. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The supreme court first examined the language of the TWC decision at issue, and then concluded that the order should be considered final for purposes of res judicata. [Id. at 89](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_89&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_89). In \*402 reaching this determination, the court focused on the fact that the TWC's order “plainly resolved disputed facts and determined that Igal's claim for unpaid wages was without merit.” [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The court noted that the TWC “decided the key questions of fact in dispute in Igal's payday claim: when Igal's employment contract expired, that he had sufficient notice that the contract was not being renewed, that he was not terminated without cause, and that he was not entitled to any additional compensation.” [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

In Johnson's case, however, the TWC did not decide the key question of fact in dispute—whether Oxy violated its own Educational Assistance Policy when it withheld Johnson's final wages as reimbursement for the CPA courses. In fact, the TWC explicitly refused to do so, stating that the agency “does not interpret contracts between employers and employee.” As Johnson has repeatedly pointed out, the TWC advised her that “[t]he question of whether the employer properly interpreted their policy on reimbursed educational expenses versus a business expense is a question for a different forum.” Because this question goes to the heart of Johnson's breach of contract and declaratory judgment claims, we hold that res judicata does not bar those claims, and we remand the case for a consideration of the merits of both causes of action.

The defendants argue that because Johnson seeks to recover the same wages in this suit as she did in her claim with the TWC, res judicata must bar her common law causes of action. See [Igal, 250 S.W.3d at 81](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_81&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_81) (holding that “when a claimant pursues a wage claim to a final adjudication before TWC, res judicata bars the claimant from later filing a lawsuit for the same damages in a Texas court of law”). However, the [Igal](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) court made an important qualification—res judicata would only bar a claim “if TWC's order is considered final for the purposes of res judicata.” [Igal, 250 S.W.3d at 89](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_89&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_89) (emphasis added). The defendants ignore the subsequent portion of the court's opinion analyzing the preclusive effect of the TWC order in Igal's case. As mentioned above, the [Igal](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) court first determined that the order “plainly resolved disputed facts” before concluding res judicata barred Igal's common law claims. Here, the order in Johnson's case made no such findings with regard to the Educational Assistance Policy. The order expressly declined to address that issue. Therefore, [Igal](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) is distinguishable, and res judicata will not bar Johnson's breach of contract and declaratory judgment claims.

[14](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_anchor_F142037964897)However, the TWC hearing officer did resolve the disputed facts with respect to Count One of Johnson's petition, “Oxy's Violation of the Texas Payday Law.” First, the hearing officer outlined the portion of the Payday Law relevant to the withholding of wages. The officer noted that pursuant to Section 61.018 of the Payday Law, an employer can withhold wages if he “has written authorization from the employee to deduct part of the wages for a lawful purpose.” The officer then concluded: “I find that the employer properly deducted the tuition reimbursement. The employer had a written authorization from the claimant that complies with the Texas Payday Law.” Therefore, because Count One of Johnson's petition has already been “finally adjudicated by a competent tribunal,” we conclude that res judicata effectively bars that claim. See [Igal, 250 S.W.3d at 86](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015947799&pubNum=0004644&originatingDoc=Ied411980b5db11e593d3f989482fc037&refType=RP&fi=co_pp_sp_4644_86&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_86). We thus affirm the trial court's grant of summary judgment with respect to Count One.

**Conclusion**

We overrule Johnson's first issue and hold that with respect to Count Two of Johnson's petition, our jurisdiction is limited to a review of whether her appeal to the TWC was timely filed. We thus affirm the \*403 trial court's grant of defendants' partial plea to the jurisdiction. Applying the substantial evidence standard of review, we determine that Johnson's appeal was filed late. Therefore, we affirm the trial court's grant of summary judgment with respect to Count Two of Johnson's Petition. As a result, no claims remain against the TWC.[3](https://1.next.westlaw.com/Document/Ied411980b5db11e593d3f989482fc037/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=533+S.W.3d+395#co_footnote_B00032037964897)

As for Johnson's second issue, we affirm the trial court's grant of summary judgment in part and reverse in part. We hold that the trial court correctly granted summary judgment based on res judicata with respect to Count One of Johnson's petition. However, we hold that summary judgment was improperly granted as to Counts Three and Four of Johnson's petition, because the TWC did not consider the merits of those claims. We therefore reverse the trial court's grant of summary judgment on Johnson's breach of contract and declaratory judgment claims and remand the case for a new trial on the merits.

***Case 2.3***

880 F.3d 620

United States Court of Appeals, Second Circuit.

**KLIPSCH GROUP, INC., Plaintiff–Appellee–Cross–Appellant, ABC, Plaintiff,**

**v.**

[**EPRO E-COMMERCE LIMITED**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5052535308)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, DBA DealExtreme, DBA Dealextreme.com, DBA DX, DBA Dx.com, Defendant–Appellant–Cross–Appellee, Def; Big Box Store Limited, DBA Bigboxstore.com, DBA Bigboxsave.com; Zhongren Cao, DBA United Pacific Connections Company, DBA Atechport.com, DBA Wirelessspycamera.biz; Dandan Wu, DBA Pandawill.com; D201.Com, AKA PhoneII.com, AKA SinoPro.com; Shang Tao, DBA Pingu International Limited, DBA Airaccent.com; Shiming Zhang, DBA Best Discount Store; Kingspec SSD, DBA EEEPCSSD.com; EZU Energy Limited, DBA Beebond Co., DBA Beebond.com, DBA James Collen, DBA Beebond.co.UK; Mag Simon, DBA Bulkordering.com; McBub.com, AKA Sinadeal.com; Li Jin, DBA Kan72D7GB; Alex Chaow, DBA Advanced Plus Int'l Share Ltd., DBA Superluckymart.com; Yaoyao Mai, DBA Shenzhen Taobaodao Technology Co., Ltd.; Eachgame International (HK) Stock Co., Ltd., DBA Eachgame.com;** [**Technoplus International Co., Limited**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5036546263)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, DBA Sertec, DBA SZSertec.com, DBA Dealingsmart.com; Yuedajie888999; Escalongtb, AKA Guderianygm; GH6G8YUH6; Zhaohua Luo, AKA Xu Yong Luo, DBA wholesalewill.com; XYZ Companies, 1–10; John Does 1–10; Jane Does 1–10, Defendants.**[**\***](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00012043670884)

Docket Nos. 16-3637-cv, 16-3726-cv

August Term, 2017

Argued: October 26, 2017

Decided: January 25, 2018

## Opinion

[Gerard E. Lynch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0151601501&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), Circuit Judge:

In the course of defending against claims that it sold counterfeit products, defendant-appellant ePRO E-Commerce Limited (“ePRO”) engaged in persistent discovery misconduct: it failed to timely disclose the majority of the responsive documents in its possession, restricted a discovery vendor's access to its electronic data, and failed to impose an adequate litigation hold even after the court directed it to do so, which omission allowed custodians of relevant electronic data to delete thousands of documents and significant quantities of data, sometimes permanently. As a result, the United States District Court for the Southern District of New York (Vernon S. Broderick, J.) concluded that ePRO had willfully engaged in spoliation. It accordingly granted in substantial part plaintiff-appellee Klipsch Group, Inc.'s (“Klipsch”) motion for discovery sanctions, including a $2.7 million monetary sanction to compensate Klipsch for its corrective discovery efforts and a corresponding asset restraint in that amount, permissive and mandatory jury instructions, and an additional $2.3 million bond to preserve Klipsch's ability to recover damages and fees at the end of the case. ePRO now brings this interlocutory appeal, raising various challenges to the evidentiary rulings and factual findings undergirding those sanctions. It also contends that the resulting sanctions are impermissibly punitive, primarily because they are disproportionate to the likely value of the case. Klipsch, on cross-appeal, argues that the district court erred by failing to infer that ePRO destroyed relevant sales data from the fact that it failed to retain backup copies of its live sales database.

We find no error in the district court's factual findings, and we conclude that the monetary sanctions it awarded properly compensated Klipsch for the corrective discovery efforts it undertook with court permission in response to ePRO's misconduct. In particular, we emphasize that discovery sanctions should be commensurate with the costs unnecessarily created by the sanctionable behavior. A monetary sanction in the amount of the cost of discovery efforts that appeared to be reasonable to undertake ex ante does not become impermissibly punitive simply because those efforts did not ultimately uncover more significant spoliation and fraud, or increase the likely damages in the underlying case. The district court's orders imposing sanctions \*624 are accordingly AFFIRMED in all respects.

**BACKGROUND**

The facts presented below are drawn principally from the district court's findings of fact.

**I. Initial Steps in the Litigation**

In August 2012, Klipsch, a manufacturer of sound equipment including headphones, sued DealExtreme.com, a subsidiary of ePRO, a Chinese corporation, alleging that it was selling counterfeit Klipsch headphones. ePRO does not dispute that some infringing sales occurred; however, throughout the proceedings, the parties have insisted on vastly different estimates of the extent of such sales. Klipsch alleged that ePRO sold at least $5 million in counterfeit or otherwise infringing Klipsch products. ePRO, on the other hand, has consistently presented evidence that the sales of the relevant products amounted to less than $8,000 worldwide. The district court initially found ePRO's evidence persuasive and did not substantially revise its view of the case's value even after Klipsch's investigators uncovered two other counterfeit Klipsch products being sold on ePRO's sites a few months into the litigation.

As the case proceeded, however, ePRO's failure to comply with its discovery obligations began to cast doubt on the reliability of its representations. By March 2013, as Klipsch was preparing to take depositions of ePRO's employees in Hong Kong, ePRO had produced fewer than 500 documents. ePRO insisted that it did not possess any original sales documents, and instead turned over spreadsheets created specifically for this litigation that purported to list all relevant sales. In support of its contention that those sales records were complete, ePRO points out that each of the undercover purchases made by Klipsch's investigators was accounted for therein, even though ePRO would have had no a priori means of identifying those transactions.

During a deposition of ePRO's CEO, Daniel Chow, it became clear that ePRO had not placed a litigation hold on a substantial portion of its electronic data, including any emails or faxes. Around the same time, ePRO also admitted that it did possess transactional sales documents that should have been disclosed. In order to remedy those problems, ePRO agreed to retain a discovery vendor, FTI Consulting, to conduct a keyword search of its electronic documents. FTI's search resulted in the production of an additional 40,000 documents, including 1,236 original sales documents. Some of the documents that were produced contradicted Chow's testimony, suggesting that ePRO had misidentified the suppliers of the counterfeit products. And although the new production was voluminous, there were also indications that ePRO had artificially limited FTI's investigation into its electronic records. In light of the new discovery, the magistrate judge supervising discovery (Michael H. Dolinger, M.J.) deemed it necessary for Klipsch to re-depose ePRO's employees.[1](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00032043670884) At Chow's second deposition in November 2013, it became clear that, despite the magistrate judge's clear directive, ePRO still had not imposed an adequate litigation hold. It is not contested that ePRO's counsel had advised compliance and warned that noncompliance would bring consequences.

\*625 **II. The Motion for Discovery Sanctions**

In December 2013, Klipsch moved for discovery sanctions, asserting that as a result of ePRO's failure to initiate a proper litigation hold or to promptly disclose documents, large quantities of relevant documents that would have reflected a larger volume of infringing sales had been lost. The magistrate judge agreed in large part, observing that ePRO's “trail of false and misleading representations” throughout the discovery process had created “evident uncertainty about the plausibility, as well as the accuracy, of the defendants' current factual assertions about the scope of infringing sales and resultant profits.” Joint App. at 1184. But although the magistrate judge determined that ePRO had “substantially failed to meet [its] obligation to preserve, search for and timely produce documents,” id. at 1182, he declined to impose sanctions against ePRO at that time. Instead, he authorized Klipsch to undertake an independent forensic examination of ePRO's computer systems. The magistrate judge instructed that Klipsch would pay for the examination in the first instance, and could apply for the apportionment or reallocation of those costs after obtaining the results.

Klipsch hired iDiscovery Services (“iDS”), led by Daniel Regard, to conduct its investigation. Regard's initial report determined that ePRO employees who were custodians of responsive information had deleted files, emails, and other potentially relevant data. With respect to the actual sales data and documents, which the parties refer to as “Structured ESI,”[2](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00042043670884) Regard concluded that ePRO's live sales databases showed evidence of editing and omissions and therefore offered unreliable evidence of historical sales data. Because ePRO had not preserved the backup copies of its databases that it routinely generated for disaster recovery purposes, Regard concluded that no reliable record of historical data was available.

With respect to the information stored on employees' computers and email accounts, which the parties refer to as “Unstructured ESI,” Regard found that the custodians had engaged in various forms of spoliation, including manually deleting thousands of files and emails, using data-wiping software shortly before iDS's forensic examination was scheduled to begin, and updating their operating systems during the litigation period, which had the result of clearing out data regarding their program usage. Regard and his team were also denied access to several custodians' email and private messenger accounts, despite ePRO's admission that those accounts were sometimes used for business purposes.

After the search was completed, Klipsch filed an ex parte motion along with Regard's initial report, asking the court to increase the hold on ePRO's assets and enter a default judgment in Klipsch's favor. Klipsch's briefing suggested that Regard's report showed evidence that ePRO had engaged in massive amounts of data-deletion and tampering. The district court increased the hold on ePRO's assets from $20,000 to $5 million and ordered ePRO to show cause why a default judgment should not be entered against it.

In opposition, ePRO submitted expert reports from Michael Jelen, an expert in Structured ESI forensics, and Erik Hammerquist, an expert in Unstructured ESI. Klipsch then submitted an additional declaration from Regard that modified some \*626 of his conclusions in response to ePRO's experts' critiques. The district court held a four-day evidentiary hearing on Klipsch's motion in January 2015, following which the parties submitted proposed findings of fact and conclusions of law as well as further declarations from Regard and Hammerquist. The district court considered the final Regard report but excluded Hammerquist's proposed sur-rebuttal.

**III. The District Court's Sanctions Rulings**

In November 2015, the district court issued an order granting in part and denying in part Klipsch's motion. In summary, it found that Klipsch failed to demonstrate that ePRO had destroyed or tampered with its sales documents. The court accordingly denied Klipsch's motion for default judgment and reduced the asset restraining order to $25,000, reflecting its view of the likely valuation of actual damages in the case.

The court concluded that Klipsch had shown that ePRO had willfully spoliated relevant Unstructured ESI. Although many of the improperly deleted documents were recovered and no smoking gun was found among them, the district court emphasized that spoliation had resulted in some permanently unrecoverable files and data, and inferred from ePRO's willful misconduct that the missing documents were relevant and that their absence prejudiced Klipsch. As a result, it imposed the following sanctions: (1) an instruction requiring the jury to find that ePRO had destroyed relevant Unstructured ESI after its duty to preserve those documents had been triggered; (2) an instruction permitting the jury to presume that the destroyed evidence would have been favorable to Klipsch; and (3) reasonable costs and fees associated with the discovery motion, beginning with Klipsch's second round of depositions in Hong Kong.

Both parties moved for reconsideration. Other than a small revision to one aspect of its Unstructured ESI findings, however, the district court's ruling remained unchanged. After a careful examination of Klipsch's fee submissions, the court awarded Klipsch a total of $2.68 million as compensation for the additional discovery efforts occasioned by ePRO's misconduct.[3](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00052043670884) The court rejected ePRO's arguments that the amount was excessive either as compared to the small amount of actual compensatory damages likely at issue in the case, or as a result of Klipsch's failure to uncover evidence of any additional infringing sales or spoliation of sales records.

The court deemed ePRO to be a dissipation risk in light of its persistent failure to comply with court orders or discovery protocols. It accordingly imposed a restraint on ePRO's assets in the amount of the monetary sanctions. It also imposed an additional $2.3 million restraint, which amount it determined would be appropriate to secure Klipsch's likely recovery of treble damages and attorney's fees at the conclusion of the case. At ePRO's request, the court permitted the parties to determine whether the resulting $5 million in total restraints would be held in a restraint, a separate bond, or some combination thereof.

The parties now appeal those rulings.

**DISCUSSION**

[1](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F12043670884)As a preliminary matter, we note that the restraint on ePRO's assets is a form of injunctive relief that provides the basis for our jurisdiction to hear this interlocutory \*627 appeal. [28 U.S.C. § 1292(a)(1)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS1292&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_7b9b000044381). Because the remainder of the parties' arguments concern matters that are inextricably bound up with the validity of that injunction, we also have jurisdiction to resolve those disputes. See [Amador v. Andrews, 655 F.3d 89, 95 (2d Cir. 2011)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025904914&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_506_95&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_95).

[2](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F22043670884)[3](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F32043670884)We review each of the issues raised in these cross-appeals for abuse of discretion. See [West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999054582&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_506_779&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_779) (discovery sanctions); [United States v. Fabian, 312 F.3d 550, 557 (2d Cir. 2002)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002763052&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_506_557&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_557), abrogated on other grounds by [United States v. Parkes, 497 F.3d 220 (2d Cir. 2007)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012920211&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (evidentiary determinations); [EEOC v. KarenKim, Inc., 698 F.3d 92, 99 (2d Cir. 2012)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028919693&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_506_99&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_99) (grant of injunctive relief). “A district court abuses its discretion if it (1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions.” [KarenKim, 698 F.3d at 99–100](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028919693&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_506_99&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_99) (internal quotation marks omitted).

We determine that the district court did not err in its careful factual findings, nor did it base any aspect of its decision on an incorrect legal standard. The primary engine of ePRO's appeal appears to be the fact that the district court imposed $2.7 million in sanctions in a case that it agreed will likely result in about $20,000 in damages. We hold that the district court's award properly reflects the additional costs ePRO imposed on its opponent by refusing to comply with its discovery obligations. Because we conclude that the remainder of the parties' arguments are also without merit, we affirm the district court's rulings.

**I. Evidentiary and Factual Arguments**

The parties raise an assortment of evidentiary and factual challenges to the district court's rulings. We assume the parties' familiarity with the issues and we commend the district court for its cogent explanation of the highly technical factual details underpinning these debates.

A. Evidence Considered by the District Court

ePRO argues that the district court abused its discretion by admitting Regard's supplemental reports and declarations, and by relying on any of his reports for the truth of the matter asserted therein. None of those evidentiary challenges has merit.

First, ePRO argues that some of Klipsch's evidence should not have been considered because it was not timely submitted. The materials ePRO contends should have been excluded, however, were provided to ePRO before the January 2015 hearing. Although it is unclear from the record before us whether ePRO has adequately preserved its objection to the admission of that evidence, the district court was aware of ePRO's concerns about the timing of the disclosures, and, indeed, granted ePRO's motion to strike (other) evidence that was submitted only days before the hearing. We see no abuse of discretion in those rulings.

[4](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F42043670884)Next, ePRO argues that the district court abused its discretion when it considered Klipsch's post-hearing supplemental expert report, but rejected ePRO's response. It is not an abuse of discretion to give one party the last word, particularly after the court has already permitted the parties to exchange multiple expert reports and to cross-examine witnesses during a multi-day evidentiary hearing. In any event, striking the portions of the district \*628 court's factual findings that relied solely on Regard's final report would have no impact on the validity of its overall ruling.

Finally, ePRO argues that Regard's reports should not have been relied on for the truth of the matters asserted therein because the district court allegedly sustained ePRO's objection to the admission of his initial report for that purpose. But ePRO did not object to the acceptance of Regard as an expert, and his reports simply provided the factual details supporting his expert opinions. Thus, we conclude that challenge, too, lacks merit.

B. Spoliation of Unstructured ESI

ePRO argues that the district court erred when it found that ePRO had willfully spoliated Unstructured ESI. The district court found evidence of five methods of spoliation: (1) 4,596 responsive files or emails were manually deleted, although all of these documents were eventually recovered;[4](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00062043670884) (2) seven employees used data-wiping programs shortly before the forensic examination began, resulting in 31 permanently unrecoverable files; (3) eighteen employees ran operating systems upgrades during the litigation hold period, which resulted in the loss of their program usage data; (4) ePRO failed to provide access to the email accounts of seven employees who had worked on its email direct marketing homepage but were no longer employed with the company, and deleted or failed to provide access to the email accounts of twelve other custodians of discoverable data; and (5) 32 out of 36 identified custodians, including ePRO's CFO and the employee coordinating Regard's access to ePRO's data for his examination, refused to permit access to their accounts on a private messaging system, which, although primarily used for personal communication, were listed on their corporate email signatures.

[5](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F52043670884)The party seeking discovery sanctions on the basis of spoliation must show by a preponderance of the evidence: “(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” [Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 162 (2d Cir. 2012)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028171041&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_506_162&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_162) (internal quotation marks omitted).

[6](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F62043670884)The district court did not clearly err in determining that each of those elements had been met here. ePRO's arguments to the contrary with respect to the manually deleted emails and the operating system reinstallations fail to recognize that the district court did not find that each instance of spoliation was equally probative of willfulness, nor that every method resulted in the permanent destruction of presumptively relevant data. Instead, the district court inferred relevance and prejudice only from the unrecoverable data, and viewed the various means of deleting data as cumulative proof that ePRO's spoliation was willful.

ePRO also spends significant effort trying to undermine the district court's factual \*629 findings regarding exactly which employee used which data-wiping program at which time. But ePRO does not contest that the district court properly made the following findings: multiple custodians of discoverable data had data-wiping software on their devices during the litigation hold period; at least some of those programs were last used at a time very close to the initiation of Klipsch's forensic examination; and the use of those programs resulted in the permanent deletion of 31 files. Those facts are sufficient to support the district court's finding of willful spoliation, and ePRO's expert's opinion that some of the specific data had been commingled and therefore could not reliably be attributed to any particular individual does not change that conclusion. Moreover, ePRO's evidence on commingling was contested and to some extent incomplete because ePRO's expert testified that commingling was only one possible explanation for the duplicative data. Accordingly, the district court did not clearly err when it declined to adopt ePRO's view of the evidence.

Finally, ePRO contends that its inability to provide access to certain email and messaging accounts should not have been construed as evidence of willful spoliation because those accounts were primarily for private use. But the district court determined that ePRO was required to provide access to all of those accounts because they were also sanctioned for business use. As the district court noted, it was undisputed that ePRO's employees included their private messaging addresses in their work email signatures, installed the messaging software on their work computers, and sometimes used the specified private email accounts for business reasons. That ePRO did not have a software usage policy in place requiring its employees to segregate personal and business accounts or to otherwise ensure that professional communications sent through personal accounts could be preserved by the company for litigation purposes was the company's own error. ePRO cannot use that oversight as an excuse to avoid discovery, nor can it complain because the resulting and wholly foreseeable deletion of material that could well have contained relevant evidence gave rise to sanctions.

Thus, we find no clear error in the district court's factual findings regarding the spoliation of Unstructured ESI.[5](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00072043670884)

C. Lack of Spoliation of Structured ESI

In what has been styled a cross-appeal but might be better understood as advocating an additional or alternative ground on which to affirm the sanctions, Klipsch argues that the district court erred when it declined to find that ePRO had willfully spoliated direct evidence of sales, which the parties refer to as “Structured ESI.” Klipsch concedes that its examination did not uncover any direct evidence that ePRO's sales data had actually been tampered with, nor that ePRO was otherwise concealing a greater volume of infringing sales. Instead, Klipsch argues that ePRO's \*630 failure to preserve static backup copies of its sales databases deprived Klipsch of a crucial means of verifying the historical accuracy of its live sales data.

ePRO maintains a live sales database that extracts and cross-references data from separate modules tracking inventory, orders, and shipments. Regard observed that the sales records in the live database were consistent with what had previously been produced, but because he found evidence that the database had been subject to editing, he nevertheless concluded that the sales records were unreliable. Jelen, ePRO's Structured ESI expert, agreed that it was possible to edit the live database and noted that some such edits would be expected in the normal course of business; however, he opined that it would be extremely difficult to completely remove evidence of a transaction from all three modules, and noted there was no evidence of such an effort nor of any inconsistency across the modules.

In addition to the live database, ePRO's policies also require it to generate backup copies of the sales database for disaster recovery purposes on a regular basis as well as every time the system undergoes a specified “major event.” Those copies presumably would not have been subject to editing in the normal course, and therefore could have been used as references against which to check the accuracy of the live data. Klipsch asserts that ePRO had an obligation to preserve the backup copies of its sales databases as unique sources of historical sales data.

[7](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F72043670884)[8](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F82043670884)But even where a party has shown that its opponent had an obligation to preserve certain evidence and willfully failed to do so, sanctions need not automatically follow; instead, we have simply held that such conduct may provide sufficient circumstantial evidence that relevant and prejudicial data was lost. See, e.g., [Fujitsu Ltd. v. Fed. Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001325026&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_506_436&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_436) (“Once a court has concluded that a party was under an obligation to preserve the evidence that it destroyed, it must then consider whether the evidence was intentionally destroyed, and the likely contents of that evidence. The determination of an appropriate sanction for spoliation, if any, is confined to the discretion of the trial judge[.]”) (internal citations omitted). That is to say, the district court retains its discretion to impose discovery sanctions—or not—so long as that determination is not based on a legal or factual error. See [id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001325026&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) We conclude that the district court did not abuse its discretion here when it chose not to infer that the lost backups would have included information that was relevant or that its unavailability prejudiced Klipsch. Jelen's testimony provided adequate support for a determination that the otherwise undetectable destruction of sales data was unlikely, and, as the district court pointed out, even Klipsch's own expert was unwilling to affirmatively endorse the theory that such conduct had actually occurred.

In sum, we find no clear error with respect to the district court's factual findings, nor any abuse of discretion with respect to its evidentiary rulings.

**II. Amount of Monetary Sanction**

[9](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F92043670884)ePRO argues that the monetary sanctions imposed against it are so out of proportion to the value of the evidence uncovered by Klipsch's efforts or to the likely ultimate value of the case as to be impermissibly punitive and a violation of due process. That position, although superficially sympathetic given the amount of the sanction, overlooks the fact that ePRO caused Klipsch to accrue those costs by failing to comply with its discovery obligations. Such compliance is not optional or negotiable; rather, the integrity of our civil \*631 litigation process requires that the parties before us, although adversarial to one another, carry out their duties to maintain and disclose the relevant information in their possession in good faith.

The extremely broad discovery permitted by the Federal Rules depends on the parties' voluntary participation. The system functions because, in the vast majority of cases, we can rely on each side to preserve evidence and to disclose relevant information when asked (and sometimes even before then) without being forced to proceed at the point of a court order. See [Cine Forty–Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979113952&pubNum=0000350&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_350_1068&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_1068) (observing that “embroil[ing] trial judges in day-to-day supervision of discovery” is “a result directly contrary to the overall scheme of the federal discovery rules”). The courts are ill-equipped to address parties that do not voluntarily comply: we do not have our own investigatory powers, and even if we did, the spoliation of evidence would frequently be extremely difficult for any outsider to detect.

[10](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F102043670884)Moreover, noncompliance vastly increases the cost of litigation by drawing out deadlines and necessitating motion practice. But “[a]n undertaking on the scale of the large contemporary suit brooks none of the dilation, posturing, and harassment once expected in litigation.” [Id. at 1067–68](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979113952&pubNum=0000350&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_350_1067&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_1067). Accordingly, we have held that discovery sanctions are proper even against parties who have belatedly complied with their obligations, because an alternative rule “would encourage dilatory tactics, and compliance with discovery orders would come only when the backs of counsel and the litigants were against the wall.” [Id. at 1068](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979113952&pubNum=0000350&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_350_1068&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_1068); see also [S. New Eng. Tel. Co. v. Glob. NAPs Inc., 624 F.3d 123, 149 (2d Cir. 2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022836302&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_506_149&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_149). When, as a result of an opponent's persistently uncooperative behavior, it appears reasonable ex ante to conduct expensive corrective discovery efforts, we see no reason why the party required to undertake those efforts should not be compensated simply because it eventually turned out that the obstructive conduct had hidden nothing of real value to the case. Those costs must be placed on the uncooperative opponent in order to deter recalcitrant parties from the cavalier destruction or concealment of materials that the law requires them to retain and disclose.

[11](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F112043670884)When we apply those principles to the case at hand, it is clear that the district court did not abuse its discretion by imposing monetary sanctions calculated to make Klipsch whole for the extra cost and efforts it reasonably undertook in response to ePRO's recalcitrance. Even accepting the district court's conclusion that Klipsch's forensic review failed to uncover proof that evidence of additional infringing sales had been destroyed, neither Klipsch nor the magistrate judge was in any position to know that such would prove to be the case before Klipsch undertook its review. On the contrary, ePRO's persistent refusal to comply with the discovery process provided ample grounds to suspect that the degree of its obstructive conduct would be commensurate with the value of the evidence it was hiding from its adversary and the court.

ePRO's principal objections to that conclusion fall into two buckets: first, it invokes [Rule 37 of the Federal Rules of Civil Procedure](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR37&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to suggest that the district court has rewarded Klipsch for engaging in unnecessary and excessive discovery; and second, it argues that the sanctions are disproportionate either to the degree of success Klipsch achieved on its motion or to the ultimate value of the case. We find both arguments unconvincing.

\*632 A. [*Rule 37*](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR37&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))'s Limitations on Unnecessary Discovery Sanctions

ePRO challenges the fee amount as failing to adhere to the principles provided by [Rule 37(e) of the Federal Rules of Civil Procedure](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR37&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), which governs when a court may impose sanctions for the spoliation of electronically stored information. The district court did not, in fact, rely on [Rule 37](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR37&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) as the grounds for the monetary sanctions; instead, the sanctions were imposed under the court's inherent power to manage its own affairs.[6](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00082043670884) Nevertheless, ePRO argues that the monetary sanctions were inappropriate under either source of authority. It argues that the monetary sanctions imposed here improperly reward Klipsch for excessive discovery efforts, suggesting Klipsch was not justified in taking such expensive measures to obtain the documents to which it was entitled because it should have known that the ultimate recovery on the merits would remain small in any event. Alternatively, ePRO argues that Klipsch should not be compensated for these efforts because it would have undertaken them regardless of ePRO's conduct. Neither of those arguments finds support in the record before us.

First, we note that there is no special rule requiring parties to suffer an opponent's open and notorious discovery misconduct in small value cases. Moreover, it is important to recognize the context in which Klipsch undertook its forensic examination of ePRO's files. At that point, the magistrate judge supervising discovery observed that ePRO's evasive conduct had created “evident uncertainty” about the accuracy of its representations regarding the likely value of the case. Joint App. at 1184. Klipsch had every reason to suspect that the documents its search would uncover were likely to be even more damaging than the ones ePRO had already grudgingly disclosed, which suggested that ePRO had misled Klipsch and the court about the provenance of the infringing products and the nature of its business.

Second, the history of the case makes clear that the sanctions and fees awarded in this case were carefully limited to costs Klipsch incurred in direct response to ePRO's misconduct. Klipsch obtained approval from the magistrate judge prior to each of its substantive efforts, and in each case, that approval was given only after ePRO had already squandered an opportunity to correct its own errors. For example, ePRO's failure to implement a litigation hold was first discovered in March 2013, during Klipsch's first round of depositions with ePRO employees, but ePRO was not sanctioned at that time, nor was Klipsch given carte blanche to explore ePRO's files. Instead, ePRO was permitted to hire its own discovery expert to correct the error, which resulted in the production of substantial additional discovery. Klipsch then spent approximately $550,000 on a second round of depositions occasioned by that late production. It is evident that the district court did not detect any abusive conduct on the part of Klipsch, such as the piling on of discovery demands and investigatory initiatives in order to burden its \*633 adversary with wasteful expenses, motions practice, and sanctions. ePRO does not appear to contest the reasonableness of permitting Klipsch to take those remedial depositions, nor can it plausibly assert that Klipsch would have insisted on doing so even if ePRO's initial production had been complete or timely. And only in March 2014, after ePRO had repeatedly shown itself to be an untrustworthy participant in the discovery process, did the magistrate judge determine that Klipsch was “fully justified” in seeking to undertake an independent forensic examination. Joint App. at 1187.

[12](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F122043670884)Because the costs for which Klipsch is being compensated were reasonably incurred in direct response to ePRO's misconduct, we cannot conclude that the district court abused its discretion by requiring ePRO to pay monetary sanctions in that amount.[7](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00092043670884)

B. Proportionality

Even assuming that Klipsch reasonably undertook these efforts, ePRO contends that the monetary sanctions should nevertheless be reduced on the basis of a principle of proportionality putatively borrowed from fee-shifting cases in the civil rights context.

[13](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F132043670884)ePRO first argues that Klipsch should not be completely compensated for its efforts because it did not achieve complete success on its motion. The district court did, however, grant Klipsch substantial relief: it upheld Klipsch's contention that ePRO willfully failed to fulfill its discovery obligations after several court warnings, and it determined that ePRO's spoliation of its Unstructured ESI was sufficiently serious to warrant adverse jury instructions. See [Metrokane, Inc. v. Built NY, Inc., No. 06 CIV. 14447(LAK)(MHD), 2009 WL 637111, at \*4 n.3 (S.D.N.Y. Mar. 6, 2009)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018334710&pubNum=0000999&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (determining a discovery sanctions motion to be substantially successful where “the court upheld the movant's contention that Metrokane had failed to fulfill its discovery obligations in the very manner suggested by Built N.Y. and awarded a full range of appropriate relief”). That the district court chose not to view Klipsch's failure to demonstrate willful spoliation of Structured ESI as a lack of success sufficient to justify a proportional reduction of the monetary sanctions was a decision soundly within its discretion.

ePRO also takes various tacks to assert that the sanction should be reduced in light of the small amount of money likely at issue on the merits. But it has not identified any authority limiting a district court's discretion to award a compensatory discovery sanction on the basis of the ultimate damages award. Instead, because discovery sanctions are typically decided independently from the ultimate outcome of the case, it appears that courts routinely award such sanctions without any discussion of the ultimate merits recovery. See, e.g., \*634 [E. I. DuPont de Nemours & Co. v. Kolon Indus., Inc., No. 3:09-CV-058, 2013 WL 458532, at \*3 & n.2 (E.D. Va. Feb. 6, 2013)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2029805093&pubNum=0000999&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (observing that there was no need to consider the amount in controversy as a factor in setting a proper discovery sanction); [Qualcomm Inc. v. Broadcom Corp., No. 05-CV-1958-B (BLM), 2008 WL 66932, at \*17 (S.D. Cal. Jan. 7, 2008)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2014626312&pubNum=0000999&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), vacated in part on other grounds, [No. 05-CV-1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015455347&pubNum=0000999&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (making no reference to the ultimate recovery in the case). And in the present circumstance, the discovery motion at issue was decided before the case has concluded; accordingly, tethering monetary sanctions to the ultimate amount in controversy would restrict the court's discretion to a number that remains speculative and indeterminate.

It is hardly clear, in any event, that the civil rights cases provide an appropriate analogy for discovery sanctions.[8](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00102043670884) Congress has provided for fee-shifting in that context in order to provide an incentive to qualified counsel to undertake representation of impecunious plaintiffs with meritorious cases. See [Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 552, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021800383&pubNum=0000708&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). But that provision was also intended to avoid “windfalls to attorneys” that would result from granting them fees no sane, paying client would expend in pursuit of the same relief. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021800383&pubNum=0000780&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) Accordingly, courts have sometimes held that claims seeking large fees for minuscule success should be reduced or denied. See, e.g., [Farrar v. Hobby, 506 U.S. 103, 115, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992213087&pubNum=0000708&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (observing that a nominal damages award usually will not support any accompanying attorney's fee award); [Husain v. Springer, 579 Fed.Appx. 3, 5 (2d Cir. 2014)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034239721&pubNum=0006538&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_6538_5&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_6538_5) (reducing fee award in light of the plaintiffs' limited success and recovery).

Discovery sanctions are different. As we have emphasized above, a party that disregards its obligations may create a reasonable suspicion that further investigation is warranted, and thereby imposes costs on its adversary that would never have been incurred had the party complied with its obligations in the first instance. In that situation, the offended adversary's counsel is not being rewarded for its success in the litigation; rather, the adversary is simply being compensated for costs it should not have had to bear.

Moreover, to whatever extent that civil rights fee-shifting cases might provide a useful comparison, they do not provide unequivocal support for ePRO's proportionality arguments. Because success in some meritorious civil rights cases will reasonably require attorney's fees in excess of the plaintiff's ultimate recovery, we have stated in that context that “[a] presumptively correct ‘lodestar’ figure should not be reduced simply because a plaintiff recovered a low damage award.” [Cowan v. Prudential Ins. Co. of Am., 935 F.2d 522, 526 (2d Cir. 1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991107089&pubNum=0000350&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_350_526&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_350_526). And we have recognized that the conduct of the opposing party \*635 commonly justifies the award of such “disproportionate” fees. In [Kassim v. City of Schenectady, 415 F.3d 246 (2d Cir. 2005)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006961021&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), we explained:

[I]n litigating a matter, an attorney is in part reacting to forces beyond the attorney's control, particularly the conduct of opposing counsel and of the court. If the attorney is compelled to defend against frivolous motions and to make motions to compel compliance with routine discovery demands, or to respond to unreasonable demands of the court for briefing or for wasteful, time-consuming court appearances, the hours required to litigate even a simple matter can expand enormously. It is therefore difficult to generalize about the appropriate size of the fee in relation to the amount in controversy.

[Id. at 252](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006961021&pubNum=0000506&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_506_252&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_252); see also [Serin v. N. Leasing Sys., Inc., 501 Fed.Appx. 39, 41 (2d Cir. 2012)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028992213&pubNum=0006538&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&fi=co_pp_sp_6538_41&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_6538_41) (same).

In sum, we see nothing in ePRO's proportionality arguments compelling us to conclude that the district court abused its discretion by awarding full compensation for efforts that were ex ante a reasonable response to ePRO's own evasive conduct.[9](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_footnote_B00112043670884) The proportionality that matters here is that the amount of the sanctions was plainly proportionate—indeed, it was exactly equivalent—to the costs ePRO inflicted on Klipsch in its reasonable efforts to remedy ePRO's misconduct.

**III. Amount of Asset Restraints**

[14](https://1.next.westlaw.com/Document/I0dce373001ef11e8a964c4b0adba4447/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=880+F.3d+620#co_anchor_F142043670884)The district court concluded that ePRO, a foreign company with few ties to the United States, had shown itself to be a dissipation risk by repeatedly failing to comply with court orders or its own attorneys' instructions. It therefore imposed two mechanisms to ensure Klipsch's full recovery: first, it restrained $2.7 million of ePRO's assets to cover the amount of the monetary sanctions; and second, it required ePRO to post a bond for $2.3 million, a sum representing what the court deemed to be Klipsch's likely recovery on the merits as well as its remaining attorney's fees, which would be recoverable under the Lanham Act. At ePRO's request, however, it permitted ePRO to hold the full $5 million in either an asset restraint, a bond, or some combination thereof.

ePRO now contends that the district court's rulings are contradictory because the court determined that the infringing sales were unlikely to exceed $8,000, but nevertheless imposed a $5 million asset restraint. That argument simply ignores the district court's explanation that the total sum is intended to cover the monetary sanctions and remaining attorney's fees in the case in addition to the merits award, and, as the court pointed out, there is ample precedent for requiring the posting of a bond in these circumstances. See [Johnson v. Kassovitz, No. 97 CIV. 5789 DLC, 1998 WL 655534, at \*1 (S.D.N.Y. Sept. 24, 1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998197532&pubNum=0000999&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (in the context of the Lanham Act, observing that security of attorney's fees may be included in a bond for costs under S.D.N.Y. Local Rule 54.2) (collecting cases).

\* \* \*

Nothing that we say in this opinion should be taken as condoning excessive and disproportionate discovery demands, countenancing the tactical use of discovery sanction motions to inflict gratuitous costs on adversaries, or derogating from the responsibility \*636 of district courts to ensure that litigation proceeds in a responsible and cost-efficient manner. See [Fed. R. Civ. P. 1](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR1&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (directing that the Rules of Civil Procedure “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action”) (emphasis added); [Fed. R. Civ. P. 26(b)(1)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR26&originatingDoc=I0dce373001ef11e8a964c4b0adba4447&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (scope of discovery should be “proportional to the needs of the case, considering [inter alia] the amount in controversy”). If it turns out, as the district court has estimated, that the amount of actual damages in this case is modest in relation to the costs spent on the litigation, that would be a highly regrettable outcome.

But the question before the district court, and before us, is which party should be held responsible for those costs. ePRO does not ever contend that Klipsch's initial discovery demands were unreasonable or disproportionate to the merits of the case. Nor does it seriously argue that the magistrate judge erred in allowing Klipsch to take the steps it took to remedy ePRO's refusal to comply with those demands. The district court reasonably concluded, after a full and fair hearing, that it was ePRO's noncompliance with its legal obligations that occasioned the excessive costs in this case, and we find no reason why ePRO should not therefore be required to pay them.

**CONCLUSION**

We have considered ePRO's remaining arguments and found them unpersuasive. For the reasons stated above, the judgment of the district court is AFFIRMED.

**Supplemental Case Printout for: *Business Web Log***

845 F.3d 1279

United States Court of Appeals, Ninth Circuit.

**Daniel NORCIA, on his own behalf and on behalf of all others similarly situated, Plaintiff–Appellee,**

**v.**

**SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a New York Corporation; Samsung Electronics America, Inc., a New Jersey corporation, Defendants–Appellants.**

No. 14–16994

Argued and Submitted October 17, 2016 San Francisco, California

Filed January 19, 2017

**OPINION**

[IKUTA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0229586101&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), Circuit Judge:

Daniel Norcia filed a class action complaint against Samsung Telecommunications America, LLC, and Samsung Electronics America, Inc., (collectively, “Samsung”), alleging that Samsung made misrepresentations as to the performance of the Galaxy S4 phone. Samsung moved to compel arbitration of the dispute on the ground that an arbitration provision, which was contained in a warranty brochure included in the Galaxy S4 box, was binding on Norcia. We affirm the district court’s denial of Samsung’s motion.

\*1282 I

On May 23, 2013, Norcia entered a Verizon Wireless store in San Francisco, California, to purchase a Samsung Galaxy S4 phone. Norcia paid for the phone at the register, and a Verizon Wireless employee provided a receipt entitled “Customer Agreement” followed by the name and address of the Verizon Wireless store. The receipt stated the order location, Norcia’s mobile number, the product identification number, and the contract end date. Under the heading “Items,” the receipt stated “WAR6002 1 YR. MFG. WARRANTY.” Under the heading “Agreement,” the receipt included three provisions, including a statement (in all capital letters):

I agree to the current Verizon Wireless Customer Agreement, including the calling plan, (with extended limited warranty/service contract, if applicable), and other terms and conditions for services and selected features I have agreed to purchase as reflected on the receipt, and which have been presented to me by the sales representative and which I had the opportunity to review.

The receipt also stated (in all capital letters): “I understand that I am agreeing to ... settlement of disputes by arbitration and other means instead of jury trials, and other important terms in the Customer Agreement.” The Customer Agreement did not reference Samsung or any other party. Norcia signed the Customer Agreement, and Verizon Wireless emailed him a copy.

After signing the Customer Agreement, Norcia and a Verizon Wireless employee took the Galaxy S4 phone, still in its sealed Samsung box, to a table. The front of the product box stated “Samsung Galaxy S4.” The back of the box stated: “Package Contains ... Product Safety & Warranty Brochure.” The Verizon Wireless employee opened the box, unpacked the phone and materials, and helped Norcia transfer his contacts from his old phone to the new phone. Norcia took the phone, the phone charger, and the headphones with him as he left the store, but he declined the offer by the Verizon Wireless employee to take the box and the rest of its contents.

The Samsung Galaxy S4 box contained, among other things, a “Product Safety & Warranty Information” brochure. The 101–page brochure consisted of two sections. Section 1 contained a wide range of health and safety information, while Section 2 contained Samsung’s “Standard Limited Warranty” and “End User License Agreement for Software.” The Standard Limited Warranty section explained the scope of Samsung’s express warranty. In addition to explaining Samsung’s obligations, the procedure for obtaining warranty service, and the limits of Samsung’s liability, the warranty section included the following (in all capital letters):

All disputes with Samsung arising in any way from this limited warranty or the sale, condition or performance of the products shall be resolved exclusively through final and binding arbitration, and not by a court or jury.

Later in the section, a paragraph explained the procedures for arbitration and stated that purchasers could opt out of the arbitration agreement by providing notice to Samsung within 30 calendar days of purchase, either through email or by calling a toll-free telephone number. It also stated that opting out “will not affect the coverage of the Limited Warranty in any way, and you will continue to enjoy the benefits of the Limited Warranty.” Norcia did not take any steps to opt out.

In February 2014, Norcia filed a class action complaint against Samsung, alleging that Samsung misrepresented the Galaxy S4’s storage capacity and rigged the phone to operate at a higher speed when it was \*1283 being tested. The complaint alleged that these deceptive acts constituted common law fraud and violated California’s Consumers Legal Remedies Act ([Cal. Civ. Code §§ 1750](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS1750&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))–[1784](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS1784&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))), California’s Unfair Competition Law ([Cal. Bus. & Prof. Code §§ 17200](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000199&cite=CABPS17200&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))–[17210](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000199&cite=CABPS17210&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))), and California’s False Advertising Law ([Cal. Bus. & Prof. Code §§ 17500](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000199&cite=CABPS17500&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))–[17509](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000199&cite=CABPS17509&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))). The complaint sought certification of the case as a class action for all purchasers of the Galaxy S4 phone in California. Norcia did not bring any claims for breach of warranty.

Instead of filing an answer to the complaint, Samsung moved to compel arbitration by invoking the arbitration provision in the Product Safety & Warranty Information brochure. The district court denied Samsung’s motion. It held that even though Norcia should be deemed to have received the Galaxy S4 box, including the Product Safety & Warranty Information brochure, the receipt of the brochure did not form an agreement to arbitrate non-warranty claims. Samsung timely appealed the district court’s order.

[1](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F12040794803)[2](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F22040794803)The district court had jurisdiction under [28 U.S.C. § 1332(d)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS1332&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_4be3000003be5), because the parties satisfied minimal diversity and the amount in controversy exceeded $5 million. We have jurisdiction under the Federal Arbitration Act, [9 U.S.C. § 16](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=9USCAS16&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). “We review the district court’s decision to deny the motion to compel arbitration de novo.” [*Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1091 (9th Cir. 2014)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033643856&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1091&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1091). “Factual findings are reviewed for clear error, but where no facts are in dispute our entire review is de novo.” [*Id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033643856&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (internal citation omitted).

II

[3](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F32040794803)“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” [*AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986117815&pubNum=0000708&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (quoting [*United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960122546&pubNum=0000708&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))). Therefore, to evaluate the district court’s denial of Samsung’s motion to compel arbitration, we must first determine “whether a valid agreement to arbitrate exists.” [*Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000085307&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1130&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1130); *see also* [*Kilgore v. KeyBank, Nat’l Ass’n*, 718 F.3d 1052, 1058 (9th Cir. 2013)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030337533&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1058&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1058) (en banc). As the party seeking to compel arbitration, Samsung bears “the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence.” [*Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_565&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_565) (citing [*Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal.4th 394, 413, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996272340&pubNum=0000661&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))).

Samsung raises two theories of contract formation to support its argument that Norcia entered into a binding contract with Samsung to arbitrate his claims. First, Samsung claims that the inclusion of the arbitration provision in the Product Safety & Warranty Information brochure created a valid contract between Samsung and Norcia to arbitrate all claims related to the Galaxy S4 phone. Second, Samsung contends that the Customer Agreement signed by Norcia incorporated the terms of its Product Safety & Warranty Information brochure by reference and created a binding contract between Norcia and Samsung.

[4](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F42040794803)[5](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F52040794803)In analyzing these arguments, we “apply ordinary state-law principles that govern the formation of contracts” to decide whether an agreement to arbitrate exists. [*First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995112780&pubNum=0000708&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Here, the parties \*1284 agree that California law governs the issue of contract formation. In discerning California law, we are bound by the decisions of the California Supreme Court, “including reasoned dicta.” [*Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 219 (9th Cir. 2013)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032199203&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_219&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_219). If the California Supreme Court has not directly addressed the question before us, we must predict how it would decide the issue. *See* [*Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1154 (9th Cir. 2003)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003736196&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1154&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1154) (internal quotation marks omitted). We generally will “follow a published intermediate state court decision regarding California law unless we are convinced that the California Supreme Court would reject it.” [*Muniz*, 738 F.3d at 219](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032199203&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_219&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_219). Applying California law, we address each of Samsung’s theories in turn.

A

[6](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F62040794803)We first evaluate whether the Product Safety & Warranty Information brochure in the Galaxy S4 box created a binding contract between Norcia and Samsung to arbitrate the claims in Norcia’s complaint. Although the brochure is in the form of an express consumer warranty from Samsung to Norcia, the arbitration provision states that arbitration is required not only for “[a]ll disputes with Samsung arising in any way from this limited warranty” but also for all disputes arising from “the sale, condition or performance of the products.” Norcia’s complaint involves a non-warranty dispute. Thus, our analysis is governed by contract law—not warranty law.

[7](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F72040794803)[8](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F82040794803)We begin with the basic principles of California contract law. Generally, under California law, “the essential elements for a contract are (1) ‘[p]arties capable of contracting;’ (2) ‘[t]heir consent;’ (3) ‘[a] lawful object;’ and (4) ‘[s]ufficient cause or consideration.’ ” [*United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999237618&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_462&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_462) (alterations in original) (quoting [Cal. Civ. Code § 1550](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS1550&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))). A party who is bound by a contract is bound by all its terms, whether or not the party was aware of them. “A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.” [*Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.*, 89 Cal.App.4th 1042, 1049, 107 Cal.Rptr.2d 645 (2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001500416&pubNum=0003484&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

[9](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F92040794803)“A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” [Cal. Com. Code § 2204(1)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2204&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_f1c50000821b0). “Courts must determine whether the outward manifestations of consent would lead a reasonable person to believe the offeree has assented to the agreement.” [*Knutson*, 771 F.3d at 565](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_565&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_565) (citing [*Meyer v. Benko*, 55 Cal.App.3d 937, 942–43, 127 Cal.Rptr. 846 (1976)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976102080&pubNum=0000227&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))).

[10](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F102040794803)As a general rule, “silence or inaction does not constitute acceptance of an offer.” [*Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal.App.4th 1372, 1385, 25 Cal.Rptr.2d 242 (1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993231965&pubNum=0003484&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); *see also* [*Sorg v. Fred Weisz & Assocs.*, 14 Cal.App.3d 78, 81, 91 Cal.Rptr. 918 (1970)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970112309&pubNum=0000227&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). California courts have long held that “[a]n offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance.” [*Leslie v. Brown Bros. Inc.*, 208 Cal. 606, 621, 283 P. 936 (1929)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930118969&pubNum=0000660&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); *see also* [1 Witkin, Summary of California Law, Contracts § 193 (10th ed. 2005)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0289833615&pubNum=0155622&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=TS&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (collecting California cases).

[11](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F112040794803)There are exceptions to this rule, however. An offeree’s silence may be deemed to be consent to a contract when \*1285 the offeree has a duty to respond to an offer and fails to act in the face of this duty. [*Golden Eagle*, 20 Cal.App.4th at 1386, 25 Cal.Rptr.2d 242](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993231965&pubNum=0003484&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); *see also* [*Beatty Safway Scaffold, Inc. v. Skrable*, 180 Cal.App.2d 650, 655, 4 Cal.Rptr. 543 (1960)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960108176&pubNum=0000227&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). For example, in [*Gentry v. Superior Court*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013082678&pubNum=0004040&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), an employee signed an “easily readable, one-page form” acknowledging that he would be required to arbitrate all employment-related legal disputes unless he opted out. [42 Cal.4th 443, 468, 64 Cal.Rptr.3d 773, 165 P.3d 556 (2007)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013082678&pubNum=0004645&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), *abrogated on other grounds by* [*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025172541&pubNum=0000708&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). By signing this agreement, the employee “manifested his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement.” [*Id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013082678&pubNum=0004040&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) Therefore, the California Supreme Court held that the employee’s failure to act constituted acceptance of the agreement. [*Id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013082678&pubNum=0004040&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

[12](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F122040794803)An offeree’s silence may also be treated as consent to a contract when the party retains the benefit offered. *See* [*Golden Eagle*, 20 Cal.App.4th at 1386, 25 Cal.Rptr.2d 242](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993231965&pubNum=0003484&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); *see also* [Cal. Civ. Code § 1589](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS1589&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (“A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting.”). In [*Golden Eagle*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993231965&pubNum=0004041&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), a couple received a renewal certificate from their insurance company, and retained the benefit of the renewed insurance policy without paying the premium. [20 Cal.App.4th at 1386, 25 Cal.Rptr.2d 242](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993231965&pubNum=0003484&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The court held that in light of the existing relationship between the couple and the insurance company, the couple’s retention of the renewal certification was “sufficient evidence of acceptance of the renewal policy” under California law. [*Id.* at 1386–87, 25 Cal.Rptr.2d 242](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993231965&pubNum=0003484&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

Even if there is an applicable exception to the general rule that silence does not constitute acceptance, courts have rejected the argument that an offeree’s silence constitutes consent to a contract when the offeree reasonably did not know that an offer had been made. *See* [*Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal.App.3d 987, 993, 101 Cal.Rptr. 347 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972102970&pubNum=0000227&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). In [*Windsor Mills*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972102970&pubNum=0000226&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), a buyer ordered yarn from a supplier, and the supplier acknowledged the order on a printed form which stated “in small print” on the reverse side of the form, “15. Arbitration: Any controversy arising out of or relating to this contract shall be settled by arbitration in the City of New York....” [*Id.* at 989–90, 101 Cal.Rptr. 347](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972102970&pubNum=0000227&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The court concluded that the buyer was not bound by this provision because “an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious.” [*Id.* at 993, 101 Cal.Rptr. 347](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972102970&pubNum=0000227&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); *see also* [*Marin Storage*, 89 Cal.App.4th at 1049–50, 107 Cal.Rptr.2d 645](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001500416&pubNum=0003484&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (noting that a party is not bound by a document that “does not appear to be a contract and the terms are not called to the attention of the recipient”).

[13](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F132040794803)We now apply these principles of California law to determine whether Norcia engaged in any conduct sufficient to show that he agreed to be bound by the arbitration agreement in the Product Safety & Warranty Information brochure. There is no dispute that Norcia did not expressly assent to any agreement in the brochure. Nor did Norcia sign the brochure or otherwise act in a manner that would show “his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement.” [*Gentry*, 42 Cal.4th at 468, 64 Cal.Rptr.3d 773, 165 P.3d 556](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013082678&pubNum=0004645&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Under California law, an offeree’s \*1286 inaction after receipt of an offer is generally insufficient to form a contract. [*Leslie*, 208 Cal. at 621, 283 P. 936](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930118969&pubNum=0000660&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Therefore, Samsung’s offer to arbitrate all disputes with Norcia “cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent,” [*id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930118969&pubNum=0000220&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) unless an exception to this general rule applies.

Samsung fails to demonstrate the applicability of any exception to the general California rule that an offeree’s silence does not constitute consent. Samsung has not pointed to any principle of California law that imposed a duty on Norcia to act in response to receiving the Product Safety & Warranty Information brochure. [*Gentry*, 42 Cal.4th at 468, 64 Cal.Rptr.3d 773, 165 P.3d 556](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013082678&pubNum=0004645&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Nor was there any previous course of dealing between the parties that might impose a duty on Norcia to act. *See* [*Beatty Safway Scaffold*, 180 Cal.App.2d at 655, 4 Cal.Rptr. 543](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960108176&pubNum=0000227&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Moreover, Samsung has not alleged that Norcia retained any benefit by failing to act. *See* [Cal. Civ. Code § 1589](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS1589&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Indeed, the brochure states that Norcia was entitled to “the benefits of the Limited Warranty” regardless whether Norcia opted out of the arbitration agreement.

In the absence of an applicable exception, California’s general rule for contract formation applies. Because Norcia did not give any “outward manifestations of consent [that] would lead a reasonable person to believe the offeree has assented to the agreement,” [*Knutson*, 771 F.3d at 565](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_565&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_565), no contract was formed between Norcia and Samsung, and Norcia is not bound by the arbitration provision contained in the brochure.

To counter this conclusion, Samsung argues that Norcia was bound by the terms set forth in the brochure because the brochure is analogous to a shrink-wrap license, which we held was enforceable in California, *see* [*Wall Data Inc. v. L.A. Cty. Sheriff’s Dep’t*, 447 F.3d 769, 782 (9th Cir. 2006)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009170406&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_782&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_782), or is analogous to terms included in a box sent to the consumer (referred to here as an “in-the-box” contract), which the Seventh Circuit has held to be enforceable, *see* [*Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1148&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1148). We consider each of these arguments in turn.

In [*Wall Data*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009170406&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), we considered a software manufacturer’s claim that a sheriff’s department had violated the terms of its shrink-wrap license, click-through license, and volume license booklets, and infringed the manufacturer’s copyright, by installing software on 6,007 computers when the department was licensed to install the software on only 3,663 computers. [447 F.3d at 773–75](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009170406&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_773&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_773). We defined a “shrink-wrap license” as “a form on the packing or on the outside of the CD–ROM containing the software which states that by opening the packaging or CD–ROM wrapper, the user agrees to the terms of the license.” [*Id.* at 775 n.4](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009170406&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_775&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_775). In connection with upholding an evidentiary ruling by the district court, we stated that such licenses are enforceable in [California, *id.* at 782](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0289833615&pubNum=0155622&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=TS&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), citing [*Lozano v. AT&T Wireless*, 216 F.Supp.2d 1071, 1073 (C.D. Cal. 2002)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002540156&pubNum=0004637&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_4637_1073&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4637_1073).[1](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_footnote_B00022040794803) We did not address the question whether the license created a contract; rather, we held that the sole issue to be resolved at trial was whether the sheriff’s department violated the terms of the \*1287 software licenses, and therefore the district court did not err in declining to provide an instruction on contract formation. [*Wall Data*, 447 F.3d at 786](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009170406&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_786&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_786).

In light of this limited analysis, [*Wall Data*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009170406&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) at most stands for the proposition that a shrink-wrap license of intellectual property is enforceable in California. This prediction of how California courts would rule is not untenable: Where a notice on a package states that the user agrees to certain terms by opening the package, a court could reasonably conclude, consistent with California contract law, that the user has a duty to act in order to negate the conclusion that the consumer had accepted the terms in the notice. This principle does not help Samsung, however. Even if a license to copy software could be analogized to a brochure that contains contractual terms, the outside of the Galaxy S4 box did not notify the consumer that opening the box would be considered agreement to the terms set forth in the brochure. *Cf.* [*id.* at 775 n.4](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009170406&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_775&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_775). Under these circumstances, California’s general rule that silence or inaction does not constitute acceptance is binding. Accordingly, [*Wall Data*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009170406&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) does not support Samsung’s argument that Norcia was bound by the brochure contained in the Galaxy S4 box.

[14](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F142040794803)We next consider Samsung’s argument that the Product Safety & Warranty Information brochure is enforceable as an in-the-box contract, as the Seventh Circuit held in [*Hill*, 105 F.3d 1147](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). In [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), consumers ordered a computer over the phone. [*Id.* at 1148](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1148&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1148). When the box arrived, it contained the computer and “a list of terms, said to govern unless the customer return[ed] the computer within 30 days.” [*Id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The terms included an arbitration provision. [*Id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The Seventh Circuit stated that “[p]ractical considerations support allowing vendors to enclose the full legal terms with their products,” [*id.* at 1149](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1149&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1149), and concluded that “[b]y keeping the computer beyond 30 days, the [buyers] accepted [the seller’s] offer, including the arbitration clause,” [*id.* at 1150](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1150&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1150).[2](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_footnote_B00032040794803)

Samsung claims that California courts have adopted the reasoning expressed in [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), citing [*Weinstat v. Dentsply International Inc.*, 180 Cal.App.4th 1213, 103 Cal.Rptr.3d 614 (2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0007047&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). In [*Weinstat*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0004041&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), dentists brought an action for breach of express warranty (among other claims) against the manufacturer of a tooth-cleaning device. [180 Cal.App.4th at 1217–18, 103 Cal.Rptr.3d 614](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0007047&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The warranties at issue were contained in an instruction booklet sealed in the box containing the device. [*Id.* at 1228, 103 Cal.Rptr.3d 614](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0007047&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The manufacturer argued that such statements were not express warranties because the dentists were not aware of them before they bought the product. [*Id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0004041&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) The court rejected that argument, holding that absent proof to the contrary, any affirmation made by the manufacturer before the delivery of the product to a consumer, including statements contained in the product box, constituted an express warranty. [*Id.* at 1229, 103 Cal.Rptr.3d 614](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0007047&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Although [section 2313 of the California Commercial Code](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2313&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) provides that express warranties are comprised of affirmations by the manufacturer that become “part of the basis of the bargain,” the court stated that the parties’ bargain “is distinguishable from the ‘contract’ ” so a manufacturer’s affirmations could become “part of the basis of the bargain” for purposes of warranty law even after a contract was formed. [*Id.* at 1230, 103 Cal.Rptr.3d 614](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0007047&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Therefore, the dentists could state a cause of action for breach of the \*1288 express warranties contained in the instruction booklet. [*Id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0004041&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))

Samsung argues that [*Weinstat*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0004041&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), read in light of [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), stands for the proposition that terms and conditions included in a brochure in a product box constitute a binding contract between the manufacturer and the consumer. Therefore, Samsung claims, Norcia accepted Samsung’s offer contained in the Product Safety & Warranty Information brochure, including the arbitration clause, which became a binding agreement between Norcia and Samsung.

[15](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F152040794803)[16](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F162040794803)[17](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F172040794803)[18](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F182040794803)We disagree. Samsung’s reliance on [*Weinstat*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0004041&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) is misplaced, because it is based on a misunderstanding of the difference between California warranty law and contract law, which are governed by different sets of rules. *Compare* [Cal. Com. Code §§ 2201](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2201&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))–[2210](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2210&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (governing contract formation), *with* [Cal. Com. Code §§ 2313](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2313&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))–[2317](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2317&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) *and* [Cal. Civ. Code §§ 1790](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS1790&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))–[1795.8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS1795.8&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (governing the formation of express and implied warranties). A seller is bound by any express warranties given to the buyer, including statements in written warranty agreements, advertisements, oral representations, or presentations of samples or models. *See* [*Keith v. Buchanan*, 173 Cal.App.3d 13, 20, 220 Cal.Rptr. 392 (1985)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985158430&pubNum=0000227&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); *see also* [4 Witkin, Summary of California Law, Sales §§ 56](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0305870151&pubNum=0155630&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=TS&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))–[62 (10th ed. 2005)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0305870157&pubNum=0155630&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=TS&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Language in a written warranty agreement is “contractual” in the sense that it creates binding, legal obligations on the seller, *see* [*Daugherty v. Am. Honda Motor Co.*, 144 Cal.App.4th 824, 830, 51 Cal.Rptr.3d 118 (2006)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010555853&pubNum=0007047&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), but a warranty does not impose binding obligations on the buyer. Rather, warranty law “focuses on *the seller’s* behavior and obligation—his or her affirmations, promises, and descriptions of the goods—all of which help define what the seller in essence agreed to sell.” [*Weinstat*, 180 Cal.App.4th at 1228, 103 Cal.Rptr.3d 614](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0007047&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (internal quotation marks omitted); *see also* [Cal. Com. Code § 2313](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2313&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). A buyer may have to fulfill certain statutory conditions to obtain the benefit of a warranty. *See, e.g.*, [Cal. Civ. Code § 1793.02(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000200&cite=CACIS1793.02&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_4b24000003ba5) (stating that “[i]f the buyer returns the [assistive device for an individual with a disability] *within the period specified in the written warranty*,” the seller must adjust or replace the device (emphasis added)). But a warranty generally does not impose any independent obligation on the buyer outside of the context of enforcing the seller’s promises. [*Weinstat*, 180 Cal.App.4th at 1228, 103 Cal.Rptr.3d 614](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0007047&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (“[T]he whole purpose of warranty law is to determine what it is that the seller has in essence agreed to sell....” (internal quotation marks omitted)); [Cal. Com. Code § 2313(1)(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2313&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_9f800000f2221) (stating that an express warranty is a “promise made by the seller to the buyer which relates to the goods”). A condition that must be satisfied before a consumer can enforce a warranty is not equivalent to a freestanding obligation that limits a buyer’s rights outside of the scope of warranty itself.

[*Weinstat*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0004041&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) focused on warranty formation under [section 2313 of the California Commercial Code](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2313&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), not on contract formation. Accordingly, [*Weinstat*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021056892&pubNum=0004041&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) did not adopt the rule stated in [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), that statements in a brochure enclosed in a product box create a contract between the seller and consumer that can limit the consumer’s rights to bring legal actions against the manufacturer for claims not involving an express warranty.[3](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_footnote_B00042040794803)

\*1289 Samsung also relies on a Second Circuit case, [*Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), to support its argument that California courts have adopted the reasoning in [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) for enforcing in-the-box contracts. In [*Schnabel*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), the Second Circuit considered a complaint involving defendants who encouraged website visitors to enroll for a free trial period of an entertainment service, and then continued to bill those customers each month if they failed to cancel the service. [697 F.3d at 114–17](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_114&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_114). The defendants moved to compel arbitration of the complaint. [*Id.* at 117](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_117&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_117). They argued that they had presented an arbitration provision to the customers through a hyperlink on their website, as well as by sending the customers a follow-up email. [*Id.* at 113](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_113&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_113). By failing to cancel the service, the defendants argued, the customers had agreed to be bound by the arbitration provision. [*Id.* at 121](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_121&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_121). In responding to this argument, [*Schnabel*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) noted that some recent cases had held that licenses included in a product box may “become enforceable contracts upon the customer’s purchase and receipt of the package and the failure to return the product after reading, or at least having a realistic opportunity to read, the terms and conditions of the contract included with the product.” [*Id.* at 122](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_122&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_122) (citing [*Hill*, 105 F.3d at 1150](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1150&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1150)). But even cases applying these principles, [*Schnabel*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) noted, “do not nullify the requirement that a consumer be on notice of the existence of a term before he or she can be legally held to have assented to it.” [*Id.* at 124](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_124&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_124). Because the information provided to the customers did not give them inquiry notice of the arbitration provision included in the email, [*Schnabel*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) rejected the defendants’ arguments as a matter of both California and Connecticut contract law (without resolving the dispute as to which state’s law was applicable). [*Id.* at 128](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_128&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_128).

We used similar reasoning in [*Knutson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). *See* [771 F.3d at 566–67](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_566&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_566). This case raised the question whether a plaintiff who bought a Toyota vehicle that included a 90–day trial subscription to a satellite radio service was bound by a customer agreement in a “Welcome Kit” that he received a month later from the radio service. [*Id.* at 561–62](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_561&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_561). Applying California law, we held that the plaintiff was not bound because a reasonable person in the plaintiff’s position would not understand that receiving the Welcome Kit and failing to cancel the trial subscription to the radio service constituted assent to the arbitration provision. [*Id*. at 565](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_565&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_565). We rejected the defendant’s argument that its customer agreement was a valid shrink-wrap agreement, holding that while “a party cannot avoid the terms of a contract by failing to read them before signing,” [*id.* at 567](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_567&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_567), no contract is formed “when the writing does not appear to be a contract and the terms are not called to the attention of the recipient,” [*id.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (quoting [*Marin Storage*, 89 Cal.App.4th at 1049–50, 107 Cal.Rptr.2d 645](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001500416&pubNum=0003484&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))).

Neither [*Schnabel*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028567970&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) nor [*Knutson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034755631&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) held that California courts enforce in-the-box contracts. Rather, they concluded that even if a customer may be bound by an in-the-box contract under certain circumstances, such a contract is ineffective where the customer does not receive adequate notice of its existence. Even under this analytic approach, Samsung’s arguments would fail. In this case, Samsung gave a brochure entitled “Product Safety & Warranty Information.” Such a brochure indicates that it contains safety information and the seller’s warranty, which constitutes the seller’s “affirmation of fact[s] or promise” relating to the Galaxy S4 phone. [Cal. Com. Code § 2313(1)(a)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000202&cite=CACLS2313&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_9f800000f2221). A reasonable person in Norcia’s position would not be on notice that the brochure contained a freestanding obligation outside the scope of the warranty. \*1290 Nor would a reasonable person understand that receiving the seller’s warranty and failing to opt out of an arbitration provision contained within the warranty constituted assent to a provision requiring arbitration of all claims against the seller, including claims not involving the warranty. Because “an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious,” [*Windsor Mills, Inc*., 25 Cal.App.3d at 993, 101 Cal.Rptr. 347](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972102970&pubNum=0000227&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), Norcia was not bound by the arbitration provision even if the in-the-box contract were otherwise enforceable under California law.[4](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_footnote_B00052040794803)

In the absence of support from California courts, Samsung urges us to conclude, as the Seventh Circuit did in [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), that the practicalities of consumer transactions require the enforcement of in-the-box contracts and that consumers expect that products will come with additional terms. We decline this request. Even if we were persuaded by Samsung’s argument, “the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state.” [*Green v. Ralee Eng’g Co.*, 19 Cal.4th 66, 71, 78 Cal.Rptr.2d 16, 960 P.2d 1046 (1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998181825&pubNum=0000661&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). If the California Legislature believes that its current commercial code fails to strike an appropriate balance between consumer expectations and the burden on commerce, it can amend the law.

Because California courts have not adopted the principle set forth in [*Hill*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997025630&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), but have made clear that silence alone does not constitute assent, *see* [*Golden Eagle*, 20 Cal.App.4th at 1385, 25 Cal.Rptr.2d 242](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993231965&pubNum=0003484&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), we reject Samsung’s argument that Norcia reasonably assented to the arbitration provision because he failed to opt out of the arbitration provision contained in the product box. Under the circumstances in this case, we conclude that Samsung’s inclusion of a brochure in the Galaxy S4 box, and Norcia’s failure to opt out, does not make the arbitration provision enforceable against Norcia.

B

[19](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F192040794803)We next turn to Samsung’s second argument, that Norcia agreed to arbitrate his claims by signing the Customer Agreement with Verizon Wireless. This argument is meritless.

The Customer Agreement is an agreement between Verizon Wireless and its customer. Samsung is not a signatory. While the agreement itself includes a number of terms governing the relationship between Norcia and Verizon Wireless, including an arbitration provision, nothing in the agreement references Samsung or any other party.

[20](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F202040794803)Samsung argues that it may enforce the arbitration agreement because it is a third-party beneficiary of the agreement between Verizon Wireless and Norcia. Under California law, “[t]he mere fact that a contract results in benefits to a third party does not render that party a ‘third party beneficiary’ ”; rather, the parties to the contract must have intended the third party to benefit. \*1291 [*Matthau v. Superior Court*, 151 Cal.App.4th 593, 602, 60 Cal.Rptr.3d 93 (2007)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2012353958&pubNum=0007047&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); *see also* [*Hess v. Ford Motor Co.*, 27 Cal.4th 516, 524, 117 Cal.Rptr.2d 220, 41 P.3d 46 (2002)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002149198&pubNum=0004645&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); [1 Witkin, Summary of California Law, Contracts § 689 (10th ed. 2005)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0289835090&pubNum=0155622&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=TS&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). In this case, Samsung does not point to any evidence in the record indicating that Norcia and Verizon Wireless intended the Customer Agreement to benefit Samsung. Therefore, we conclude that Samsung fails to bear its burden of establishing that it was a third-party beneficiary.

III

[21](https://1.next.westlaw.com/Document/I42bfdc30deac11e6ac07a76176915fee/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=845+F.3d+1279#co_anchor_F212040794803)The Federal Arbitration Act “embodies the national policy favoring arbitration.” [*Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008492124&pubNum=0000708&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). But the “liberal federal policy regarding the scope of arbitrable issues is inapposite” when the question is “whether a particular party is bound by the arbitration agreement.” [*Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008327327&pubNum=0000506&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&fi=co_pp_sp_506_1104&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1104) (emphasis omitted); *see also* [*Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989032283&pubNum=0000708&originatingDoc=I42bfdc30deac11e6ac07a76176915fee&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) (“[T]he FAA does not require parties to arbitrate when they have not agreed to do so....”). Because Samsung failed to carry its burden of proving the existence of a contract with Norcia to arbitrate as a matter of California law, the district court did not err in denying Samsung’s motion to compel arbitration.

AFFIRMED.

**Supplemental Case Printout for: *Landmark in the Law***

1 Cranch 137, 5 U.S. 137, 1803 WL 893 (U.S.Dist.Col.), 2 L.Ed. 60

Supreme Court of the United States

**William MARBURY**

**v.**

**James MADISON, Secretary of State of the United States.**

Feb. 1803.

MARSHALL.

**\*\*1** **\*138** The supreme court of the U. States has not power to issue a mandamus to a secretary of state of the U. States, it being an exercise of *original* jurisdiction not warranted by the constitution. Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution. An act of congress repugnant to the constitution cannot become a law. The courts of the U. States are bound to take notice of the constitution. A commission is not necessary to the appointment of an officer by the executive-Semb. A commission is only *evidence* of an appointment.

Delivery is not necessary to the validity of letters patent. The President cannot authorize a secretary of state to omit the performance**\*139** of those duties which are enjoined by law.

A justice of peace in the district of Columbia is not removable at the will of the President. When a commission for an officer not holding his office at the will of the President, is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable; the appointment is complete. A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which the party is entitled.

**\*137** At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general of the United States, severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to shew cause on the 4th day of this term. This rule having been duly served,

Mr. Lee, in support of the rule, observed that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office not held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate praying them to suffer their secretary to give extracts from their executive journals respecting the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have therefore been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31 January, 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state and not bound to disclose any facts relating to the business or transactions in the office.

**\*\*2** Mr. Lee observed, that to shew the propriety of examining these witnesses, he would make a few remarks on the nature of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the President. In the first his duty is to the United States or its citizens; in the other his duty is to the President; in the one he is an independent, and an accountable officer; in the other he is dependent upon the President, is his agent, and accountable to him alone. In the former capacity he is compellable by mandamus to do his duty; in the latter he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July, 1789, vol. 1. p. 359, entitled “an act for establishing an executive department, to be denominated the department of foreign affairs.”The first section ascertains the duties of the secretary so far as he is considered as a mere executive agent. It is in these words, “Be it enacted, &c. that there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall from time to time be enjoined on, or intrusted to him by the President of the United States, agreeable to the constitution, relative to correspondencies, commissions**\*140** or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct.”

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken which is simply, “well and faithfully to execute the trust committed to him;” and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given and the duties imposed by this act, no mandamus will lie. The secretary is responsible only to the President. The other act of congress respecting this department was passed at the same session on the 15th September 1789, vol. 1, p. 41, c. 14, and is entitled “An act to provide for the safe keeping of the acts, records, and seal of the United States, and for other purposes.”The first section changes the name of the department and of the secretary, calling the one the department and the other the secretary of state. The second section assigns new duties to the secretary, in the performance of which it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which he is not more responsible to the president than to any other citizen of the United States. It provides that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they **\*141** shall have been signed by the President. The fifth section provides for a seal of office, and that all copies of records and papers in his office, authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The President has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office the President cannot take from his custody the seal of the United States, nor prevent him from recording, and affixing the seal to civil commissions of such officers as hold not their offices at the will of the President, after he has signed them and delivered them to the secretary for that purpose. By other laws he is to make out and record in his office patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the President; and if he neglects or refuses to perform them, he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States. The President is no party to this case. The secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are entrusted, and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are undoubtedly facts, which may come to their knowledge by means of their connection with the secretary of state, respecting which **\*142** they cannot be bound to answer. Such are the facts concerning foreign correspondencies, and confidential communications between the head of the department and the President. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose I claim title to land under a patent from the United States. I demand a copy of it from the secretary of state. He refuses. Surely he may be compelled by mandamus to give it. But in order to obtain a mandamus, I must shew that the patent is recorded in his office. My case would be hard indeed if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit. It becomes necessary for me to have the use of that act in a court of law. I apply for a copy. I am refused. Shall I not be permitted, on a motion for a mandamus, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely it cannot be contended that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

**\*\*3** The court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

**\*\*4** Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them justices of the peace. That Mr. Marbury and Mr. Ramsay called on the secretary of state respecting their commissions. That the secretary referred them to him; he took them into another room and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question “who gave him that information;” and the court decided that he was not bound to answer it, because it was not pertinent to this cause. He further testified that some of the commissions of the justices, but he believed not all, were recorded. He did not know whether the commissions of the applicants were **\*143** recorded, as he had not had recourse to the book for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace signed by Mr. Adams; but believed, and was almost certain, that Mr. Marbury's and col. Hooe's commissions were made out, and that Mr. Ramsay's was not; that he made out the list of names by which the clerk who filled up the commissions was guided; he believed that the name of Mr. Ramsay was pretermitted by mistake, but to the best of his knowledge it contained the names of the other two; he believed none of the commissions for justices of the peace signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams for his signature. After being signed he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.

Mr. Lincoln, attorney general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.

**\*\*5** **\*144** 1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and

2d. He ought not to be compelled to answer any thing which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objection of Mr. Wagner and Mr. Brent. He stated that the duties of a secretary of state were two-fold. In discharging one part of those duties he acted as a public ministerial officer of the United States, totally independent of the President, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector, or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the President, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose any thing which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every secretary of state should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

The court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it **\*145** is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last which he did not think himself obliged to answer fully. The question was, what had been done with the commissions. He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause, what had been done with them by others.

**\*\*6** To the other questions he answered that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect whether any of them constituted Mr. Marbury, col. Hooe, or col. Ramsay, justices of the peace; there were when he went into the office several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.

**\*146** Mr. Lee then read the affidavit of James Marshall, who had been also summoned as a witness. It stated that on the 4th of March 1801, having been informed by some person from Alexandria that there was reason to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as many as 12, as he believed, commissions of justices for that county were delivered to him for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for colonel Hooe, and one for William Harper.

Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule to three questions;

1st. Whether the supreme court can award the writ of mandamus in any case.

2d. Whether it will lie to a secretary of state in any case whatever.

3d. Whether in the present case the court may award a mandamus to James Madison, secretary of state.

The argument upon the 1st question is derived not only from the principles and practice of that country, from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States.

This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and a ministerial officer. From this principle alone the court of king's bench in England derives the power of issuing the writs of mandamus and prohibition. 3. Inst. 70, 71. **\*147** Shall it be said that the court of king's bench has this power in consequence of its being the supreme court of judicature, and shall we deny it to this court which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied where there is another *adequate, specific, legal remedy.*

The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction) with such exceptions, and under such regulations as congress shall make. The term “appellate jurisdiction” is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals.

**\*\*7** Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. com. 109. There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must then be a jurisdiction some where competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says that a writ of mandamus is “a command issuing in the king's name from the court of king's bench, and directed to any *person,* corporation or inferior court, requiring them to do some particular thing therein specified, *which appertains to their office and duty,* and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, *and has no other specific means of compelling its performance.”*

In the Federalist, vol. 2, p. 239, it is said, that the word “appellate” is not to be taken in its technical sense, as used in reference to appeals in the course of the *civil* law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review the proceedings**\*148** of another, either as to law or fact, or both. The writ of mandamus is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a mandamus to be one. But the power does not depend upon implication alone. It has been recognized by legislative provision as well as in judicial decisions in this court.

Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1, p. 58, sec. 13, have expressly given the supreme court the power of issuing writs of mandamus. The words are, “The supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or *persons holding office,* under the authority of the United States.”

Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dal. Rep. 298.

**\*\*8** This court has entertained jurisdiction on a mandamus in one case, and on a prohibition in another. In the case of the United States v. judge Lawrence, 3. Dal. Rep. 42, a mandamus was moved for by the attorney general at the instance of the French minister, to compel judge Lawrence to issue a warrant against captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case the power of the court to issue writs of mandamus, was taken for granted in the arguments of counsel on both sides, and seems to have been so considered by the court. The mandamus was refused, because the case in which it was required, was not a proper one to support the motion. In the case of the United States v. judge Peters a writ of prohibition was granted, 3. Dal. Rep. 121, 129. This was the celebrated case of the French **\*149** corvette the Cassius, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th Feb. 1794, a motion was made to the supreme court in behalf of one John Chandler, a citizen of Connecticut, for a mandamus to the *secretary at war,* commanding him to place Chandler on the invalid pension list. After argument, the court refused the mandamus, because the two acts of congress respecting invalids, did not support the case on which the applicant grounded his motion. The case of the United States v. Hopkins, at February term, 1794, was a motion for a mandamus to Hopkins, loan officer for the district of Virginia, to command him to admit a person to subscribe to the United States loan. Upon argument the mandamus was refused because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a mandamus ever denied. Hence it appears there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2d. The second point is, can a mandamus go to a secretary of state in any case? It certainly cannot in *all* cases; nor to the President in *any* case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a mandamus to a secretary of state is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the President, he is not liable to a mandamus; but as a recorder of the laws of the United States; as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws. It is true he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, **\*150** should be above the compulsion of law in the exercise of those duties. As a ministerial officer he is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of mandamus. If a mandamus can be awarded by this court in any case, it may issue to a secretary of state; for the act of congress expressly gives the power to award it, “in cases warranted by the principles and usages of law, *to any person holding offices under the authority of the United States.”*

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress, vol. 1, p. 43, copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose the secretary refuses to give a copy, ought he not to be compelled? Suppose I am entitled to a patent for lands purchased of the United States; it is made out and signed by the President who gives a warrant to the secretary to affix the great seal to the patent; he refuses to do it; shall I not have a mandamus to compel him? Suppose the seal is affixed, but the secretary refuses to record it; shall he not be compelled? Suppose it recorded, and he refuses to deliver it; shall I have no remedy?

**\*\*9** In this respect there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge Patterson inquired of Mr. Lee whether he understood it to be the duty of the secretary to deliver a commission, unless ordered so to do by the President.

Mr. Lee replied, that after the President has signed a commission for an office not held at his will, and it comes to the secretary to be sealed, the President has done with it, and nothing remains, but that the secretary perform those ministerial acts which the law imposes upon him. It immediately becomes his duty to seal, record, and deliver**\*151** it on demand. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

3d. The third point is, whether in the present case a writ of mandamus ought to be awarded to James Madison, secretary of state.

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of Congress passed the 27th of Feb. 1801, entitled “An act concerning the district of Columbia,” ch. 86, sec. 11 and 14; page 271, 273. They are authorized to hold courts and have cognizance of personal demands of the value of 20 dollars. The act of May 3d, 1802, ch. 52, sec. 4, considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the President. The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.

These justices exercise part of the judicial power of the United States. They ought therefore to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district that the justices should be independent; almost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state. **\*152** This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited by every stretch of power by a person so high in office as the secretary of state.

**\*\*10** It only remains now to consider whether a mandamus to compel the delivery of a commission by a public ministerial officer, is one of “the cases warranted by the principles and usages of law.”

It is the general principle of law that a mandamus lies, if there be no other *adequate, specific, legal* remedy; 3 *Burrow,* 1067, *King v. Barker, and al.* This seems to be the result of a view of all the cases on the subject.

The case of Rex.v. Borough of Midhurst, 1. Wils. 283, was a mandamus to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of Rex v. Dr. Hay, 1. W.Bl.Rep. 640, a mandamus issued to admit one to administer an estate.

A mandamus gives no right, but only puts the party in a way to try his right. Sid. 286.

It lies to compel a ministerial act which concerns the public. 1. Wilson, 283, 1. Bl.Rep. 640-although there be a more tedious remedy, Str. 1082, 4 Bur. 2188, 2 Bur. 1045; So if there be a legal right, and a remedy in equity, 3. Term Rep. 652. A mandamus lies to obtain admission into a trading company.Rex v. Turkey Company, 2 Bur. 1000.Carthew 448. 5 Mod. 402; So it lies to put the corporate seal to an instrument. 4. Term.Rep. 699; to commissioners of the excise to grant a permit, 2 Term.Rep. 381; to admit to an office, 3 Term.Rep. 575; to deliver papers which concern the public, 2 Sid. 31. A mandamus will sometimes lie in a **\*153** doubtful case, 1 Levinz 123, to be further considered on the return, 2 Levinz, 14. 1 Sidersin, 169.

It lies to be admitted a member of a church, 3. Bur. 1265, 1043.

**\*\*11** The process is as ancient as the time of Ed.2d. 1 Levinz 23.

The first writ of mandamus is not peremptory, it only commands the officer to do the thing or shew cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding, if not, a peremptory mandamus is then awarded.

It is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man.

On a subsequent day, and before the court had given an opinion, Mr. Lee read the affidavit of Hazen Kimball, who had been a clerk in the office of the Secretary of State, and had been to a distant part of the United States, but whose return was not known to the applicant till after the argument of the case.

It stated that on the third of March, 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the district of Columbia.

Afterwards, on the 24th of February the following opinion of the court was delivered by the chief justice.

*Opinion of the court.*

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus **\*154** should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shewn, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is,

1st. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February 1801, concerning the district of Columbia.

After dividing the district into two counties, the 11th section of this law, enacts, “that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.

**\*155** It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

**\*\*12** In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution, declares, that, “the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for.”

The third section declares, that “he shall commission all the officers of the United States.”

An act of congress directs the secretary of state to keep the seal of the United States, “to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States.”

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

1st. The nomination. This is the sole act of the President, and is completely voluntary.

2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.

**\*156** 3d. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. “He shall,” says that instrument, “commission all the officers of the United States.”

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress “to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments;” thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the constitution which requires the President to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer, who has been appointed, remains the same as if in practice the President had commissioned officers appointed by an authority other than his own.

**\*\*13** It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

**\*157** This is an appointment made by the President, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the President, must be completely evidenced, when it is shewn that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed, converting the department **\*158** of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, “and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the President:”“Provided that the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the President therefore.”

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

**\*\*14** It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and **\*159** the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

This idea is founded on the supposition that the commission is not merely *evidence* of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle, claimed for its support, is established.

The appointment being, under the constitution, to be made by the President *personally,* the delivery of the deed of appointment, if necessary to its completion, must be made by the President also. It is not necessary that the livery should be made personally to the grantee of the office: It never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission *after* it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences **\*160** of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President, and the seal of the United States, are those solemnities. This objection therefore does not touch the case.

**\*\*15** It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission, is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to enquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but, not that the original had been transmitted. If indeed it should appear that **\*161** the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees, to be paid by a person requiring a copy, are ascertained by law. Can a keeper of a public record, erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

**\*\*16** Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one, nor the other, is capable of rendering the appointment a non-entity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who **\*162** has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of this country afford him a remedy?

**\*\*17** **\*163** The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

“In all other cases,” he says, “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”

And afterwards, p. 109, of the same vol. he says, “I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behoves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself, is, whether this can be arranged **\*164** with that class of cases which come under the description of *damnum absque injuria* -a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

**\*\*18** By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained.**\*165** No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3. p. 255, says, “ but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.”

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (vol.3d. p. 299) the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state, the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the President is invested with certain important political powers, in the **\*166** exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

**\*\*19** But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us enquire how it applies to the case under the consideration of the court.

**\*167** The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

**\*\*20** That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice **\*168** of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for, and,

2dly. The power of this court.

1st. The nature of the writ.

Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, “a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.”

Lord Mansfield, in 3d Burrows 1266, in the case of the *King v. Baker, et al.* states with much precision and explicitness the cases in which this writ may be used.

“Whenever,” says that very able judge, “there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit) and a person is kept out of possession, or dispossessed of such right, and **\*169** has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.”In the same case he says, “this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.”

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, “to do a particular thing therein specified, which appertains to his office and duty and which the court has previously determined, or at least supposes, to be consonant to right and justice.”Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

**\*\*21** These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered **\*170** by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is **\*171** again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

**\*\*22** But where he is the head of a good department is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now, for the first time, to be taken up in this country.

It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February, 1793, making it the duty of the secretary of war, in conjunction with the attorney general, to take such measures, as might be necessary to obtain an adjudication of the supreme court of the United **\*172** States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case-the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

**\*\*23** The judgment in that case, is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced, is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable, at the will of the executive; and being so **\*173** appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.

It was at first doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, *or* its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court “to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present **\*174** case; because the right claimed is given by a law of the United States.

**\*\*24** In the distribution of this power it is declared that “the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.”

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

**\*175** If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

**\*\*25** It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to **\*176** appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited**\*177** and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

**\*\*26** If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

**\*178** So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions-a written constitution-would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

**\*\*27** The judicial power of the United States is extended to all cases arising under the constitution.

**\*179** Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that “no tax or duty shall be laid on articles exported from any state.” Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that “no bill of attainder or *ex post facto* law shall be passed.”

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out of* court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution**\*180** contemplated that instrument, as a rule for the government of *courts,* as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, “I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to *the constitution,* and laws of the United States.”

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

**\*\*28** If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument.

The rule must be discharged.

**Supplemental Case Printout for: *Adapting the Law to the Online Environment***

2016 WL 5725002

United States District Court, N.D. California,

San Francisco Division.

[**ST. FRANCIS ASSISI**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5031226274)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Plaintiff,**

**v.**

[**KUWAIT FINANCE HOUSE**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(4295882783)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**;** [**Kuveyt- Turk Participation Bank Inc.**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(4296163906)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Hajjaj Al Ajmi; and Does 1 to 200, Defendants.**

Case No. 3:16-cv-3240-LB

Signed 09/30/2016

[LAUREL BEELER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0430111501&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), United States Magistrate Judge

**INTRODUCTION**

\*1 The plaintiff, St. Francis Assisi (a non-profit corporation), sued the defendants, Kuwait Finance House, Kuveyt-Turk Participation Bank Inc., and Hajjaj al-Ajmi (an individual) for damages and equitable relief arising from the defendants' financing of the terrorist organization known as the Islamic State of Iraq and Syria (ISIS), which resulted in the targeted murder of Assyrian Christians in Iraq and Syria. (*See* Compl., ECF No. 1.)

St. Francis has not been successful in serving process on al-Ajmi. (*See* ECF No. 10.) Al-Ajmi is a Kuwaiti national and efforts to locate him have been unsuccessful. (*Id.*) St. Francis now asks to serve al-Ajmi by alternative means under [Federal Rule of Civil Procedure 4(f)(3)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR4&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) via the social-media platform, Twitter. (*Id.*) The court grants St. Francis's request because service via Twitter is reasonably calculated to give notice and is not prohibited by international agreement.

**STATEMENT**

On June 13, 2016, St. Francis filed the complaint. (*See* Compl., ECF No. 1.) The summons too was issued on June 13, 2016. (*See* Summons, ECF No. 6.) Service has not been effected on al-Ajmi. (*See* ECF No. 10.) St. Francis attempted to locate al-Ajmi through a skip trace; however, St. Francis was unable to determine al-Ajmi's whereabouts. (*Id.*) Kuwait is not a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; previous attempts to serve defendant Kuwait Finance House through Kuwait's Central Authority (Kuwait's specified means of international service) were unsuccessful, as Kuwait's Central Authority refused to accept the summons and complaint. (*Id.*)

Al-Ajmi has a large following on Twitter and has used the social-media platform to fundraise large sums of money for terrorist organizations by providing bank-account numbers to make donations. (*Id.*) Al-Ajmi frequently travels from Kuwait to deliver money to Al-Nusrah Front (another terrorist group) in Syria. U.S. Dep't of Treasury, *Treasury Designates Three Key Supporters of Terrorists in Syria and Iraq* (2014). On August 6, 2014, the U.S. Treasury Department sanctioned al-Ajmi as a key supporter of terrorists in Syria by freezing his U.S. assets and banning American entities from doing business with him. *Id.*

**ANALYSIS**

[Federal Rule of Civil Procedure 4(f)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR4&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) establishes three mechanisms for serving an individual in a foreign country: 1) by an internationally agreed means of service that is reasonably calculated to give notice, such as those provided by the Hague Convention; 2) if there is no international means or no means specified then by means reasonably calculated to give notice; or 3) by other means not prohibited by international agreement, as the court orders. *See* [Fed. R. Civ. P. 4(f)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR4&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

Courts have applied [Rule 4(f)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR4&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to allow the order of any means of service as long as it comports with due process and: 1) it provides “notice reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action and afford[s] them an opportunity to present their objections”; and 2) it is not prohibited by international agreement. [*Rio Props., Inc v. Rio Int'l Interlink*, 284 F.3d 1007, 1014, 1016 (9th Cir. 2002)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002196447&pubNum=0000506&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=RP&fi=co_pp_sp_506_1014&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1014) (quoting [*Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1950118311&pubNum=0000780&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=RP&fi=co_pp_sp_780_314&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_780_314)).

\*2 Courts have authorized service by social media in similar cases. For example, in *WhosHere, Inc. v. Gokhan Orun*, the district court authorized service on a defendant residing in and having his principal place of business in Turkey by email and the social-media platforms, Facebook and LinkedIn. [2014 WL 670817 (E.D. Va. Feb. 20, 2014)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032767563&pubNum=0000999&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Defendant did business under the trade names “WhoNear” and “whonearme” in violation of the plaintiff's trademarked name, “WhosHere.” *Id.* at 1. Plaintiff Orun attempted to serve process through Turkey's Ministry of Justice in accordance with [Rule 4(f)(1)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR4&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and the Hague Convention; however, the summons and complaint were returned because the defendant could not be located with the address on record. *Id.* at 1-2. The court granted service by email, Facebook, and LinkedIn because notice through these accounts was reasonably calculated to notify the defendant of the pendency of the action and was not prohibited by international agreement. *Id.* at 3-4. The three accounts were under defendant Orun's name and contained information about his “WhoNear” business. *Id.* at 4.

In *Federal Trade Commission v. PCCare Inc.*, the court also authorized service by email and Facebook to defendants located in India. [2013 WL 841037 (S.D.N.Y. March 7, 2013)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2029999371&pubNum=0000999&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). According to the FTC, the five defendants employed a scheme tricking American consumers into spending money to fix alleged problems with their computers. *Id.* at 1. The FTC attempted to serve the defendants through the Indian Central Authority in accordance with [Rule 4(f)(1)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000600&cite=USFRCPR4&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and the Hague Convention. *Id.* The Indian Central Authority did not serve the defendants and did not respond to the FTC's status inquiries. *Id.* The court granted service by email and Facebook because these channels were reasonably calculated to notify the defendants and were not prohibited by international agreement. *Id.* at 3-4. The email addresses and Facebook accounts were registered under the defendants' names and used frequently for communication. *Id.*at 4.

As in *WhosHere* and *PCCare*, service by the social-media platform, Twitter, is reasonably calculated to give notice to and is the “method of service most likely to reach” al-Ajmi. *See* [*Rio Properties,* 284 F.3d at 1017](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002196447&pubNum=0000506&originatingDoc=Ia6a014108a5911e69e6ceb9009bbadab&refType=RP&fi=co_pp_sp_506_1017&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_506_1017). Al-Ajmi has an active Twitter account and continues to use it to communicate with his audience. Service by Twitter is not prohibited by international agreement with Kuwait.

**CONCLUSION**

The court grants St. Francis's motion to serve of process by Twitter. St. Francis may use Twitter to serve process on al-Ajmi.

**IT IS SO ORDERED.**