

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 21-61332-CIV-RUIZ**

CHANEL, INC.,

Plaintiff,

vs.

ANALUXURYFASHION, *et al.*,

Defendants.

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’
RULE 60(B) MOTION TO SET ASIDE FINAL DEFAULT JUDGMENT**

Plaintiff Chanel, Inc. (“Chanel”) files this brief in opposition to the Rule 60(b) Motion to Set Aside Final Default Judgment filed by Defendants Shenzhen Xinsu Network Technology Co., Ltd. (Def. #45) (“Shenzhen”) and Foshan Jiyanmei Electronic Commerce Co., Ltd. (Def. #42 and #48) (“Foshan”) (collectively “Defendants”)¹ and states as follows.

SUMMARY

As an initial matter, in their motion, Defendants admit to trafficking in goods bearing counterfeits of Chanel’s registered trademarks that are materially different from authentic Chanel goods. Because a meritorious defense is a precondition to any relief under Rule 60(b), Defendants’ motion fails on this basis alone and should be denied. Moreover, in the entirety, neither the facts nor the relevant law supports the relief requested by Defendants. As such, the only tool left in their arsenal is the attempted misdirection of this Court. Defendants offer no explanation for their failure

¹ Plaintiff notes an inconsistency with Defendants’ counsel’s identification of the Defendant Numbers and corresponding names. Specifically, in all e-mail communications Plaintiff’s counsel received from Attorney Ricco Washburn, Attorney Ni Xue, and Attorney Edward Chen, defense counsel has identified the Defendants as Shenzhen Xinsu Network Technology Co., Ltd. (Defendant #45) and Foshan Jiyanmei Electronic Commerce Co., Ltd. (Defendants #42 and #48). However, in Defendants’ Motion to Set Aside Final Default Judgment, defense counsel now identifies the Defendants as Shenzhen Xinsu Import and Export Co., Ltd. (Defendants #45 and #48) and Foshan Jiyanmei Electronic Commerce Co., Ltd. (Defendant #42). *See* Declaration of Stephen M. Gaffigan in Support of Plaintiff’s Opposition (“Gaffigan Decl.”) at ¶¶ 2-3, nn.1-2, filed herewith.

to answer Plaintiff's Amended Complaint in July of 2021, which resulted in the default judgment they seek to vacate. Rather, Defendants attempt to focus this Court's attention on alleged inadequate representation in appellate proceedings *subsequent to* the entry of the judgment at issue and their alleged naivete as foreign defendants. In truth, although not disclosed to this Court or the Eleventh Circuit, at the time their answer was due, Defendants were already represented by highly competent counsel who was communicating in writing with Plaintiff's counsel regarding potential settlement terms.

Having failed to demonstrate excusable neglect and a meritorious defense, Defendants are not entitled to any relief under Rule 60(b)(1). Separately, Defendants are legally precluded from using a Rule 60(b)(6) motion as a means of circumventing the appeals process, relitigating the instant action, or otherwise addressing any alleged "mistake" that is encompassed under Rule 60(b)(1). Rule 60(b) relief is unwarranted here because: (1) Defendants' request is untimely; (2) no excusable neglect exists; (3) Defendants do not have a meritorious defense to the underlying lawsuit; (4) Defendants improperly seek to use Rule 60(b) as a substitute for the appeal that they voluntarily dismissed; and (5) the balance of equities weighs heavily against the requested relief.

FACTUAL AND PROCEDURAL BACKGROUND

1. Plaintiff filed its Amended Complaint for Damages and Injunctive Relief against Defendants on July 27, 2021 [ECF No. 16] and, pursuant to the Court's Order granting Chanel's Motion for Alternate Service, served Defendants Shenzhen and Foshan via email and website posting on July 27 and 28, 2021. [ECF No. 31, Proof of Service]. Defendants do not dispute proper service. [ECF No. 64-2 at ¶3 and 64-3 at ¶3].

2. On August 4, 2021, just days after service on Defendants, Plaintiff's counsel received email communications from Thomas Cai of the Getech Law firm, confirming his firm's representation of Defendants and inquiring about potential settlement of the claims asserted in this lawsuit. *See* Gaffigan Decl., attached hereto as Exhibit A, at ¶¶2 and 3. Attorney Cai exchanged numerous emails with Plaintiff's counsel over the course of the next weeks and conveyed to Plaintiff's counsel counteroffers of settlement from the Defendants. *Id.* at ¶¶2-3. Attorney Cai is an attorney licensed in The People's Republic of China and works at Getech Law firm which has

a specialty in intellectual property and e-commerce claims of the type asserted by Chanel in this action. *Id.* at ¶4.

3. Defendants' answers to Plaintiff's Amended Complaint were due on or before August 17 and 18, 2021, respectively. *Id.* at ¶5. Defendants did not file any responsive pleadings to the Amended Complaint or otherwise request an enlargement of time to respond to the Amended Complaint. [Gaffigan Decl. in Support of FDJ"] ¶¶6-7).

4. On September 9, 2021, and September 10, 2021, Chanel filed and served its Requests for Clerk's Entry of Default [ECF Nos. 32 and 34, respectively]. The Clerk subsequently entered default against all Defendants on September 10, 2021, and September 13, 2021, for failure to appear, answer, or otherwise plead to the Amended Complaint filed herein within the time required [ECF Nos. 33, 35, respectively]. On September 28, 2021, this Court issued an Order for the Clerk to file an Entry of Default against Defendants and requiring Chanel to move for Default Final Judgment [ECF No. 36].

5. Chanel filed and served its Motion for Entry of Final Default Judgment Against Defendants on October 8, 2021 [ECF No. 37]. The Final Default Judgment and Permanent Injunction was entered by this Court against Defendants on October 13, 2021 [ECF No. 39], awarding injunctive relief, transfer of the domain names which were the subject of this lawsuit and other equitable relief, as well as an award of statutory damages against each Defendant in the amount of \$2,000,000.00 pursuant to 15 U.S.C. §1117(c), among other relief. Defendants did not oppose the Final Default Judgment and Permanent Injunction.

6. On November 11, 2021, attorney Ricco Washburn entered an appearance for Defendants in the instant action [ECF Nos. 40, 41, 42] and filed Notices of Appeal on behalf of Defendants [ECF No. 43, 44, 45] challenging this Court's grant of a Final Default Judgment. Attorney Washburn is an attorney licensed to practice in the United States since 2017 and is a Member of Good Standing of the Florida State Bar. According to his own profile with the Florida State Bar, Attorney Washburn specializes in international business and trademark law and speaks six languages, including Chinese. (Ex. A: Gaffigan Decl. at ¶6.) Previously, Attorney Washburn

worked in Shenzhen, China for the Long'an Law Firm in its e-commerce litigation department. (See <https://www.riccowashburnesqpllc.com/people>) (last visited October 26, 2022).

7. Attorney Washburn represented Defendants in the Eleventh Circuit Court of Appeals through August 2022. And although the appeal was twice dismissed by the Clerk due to Defendants' failure to timely file or otherwise comply with applicable procedural rules of the Eleventh Circuit, each time the Eleventh Circuit reinstated the appeal, such that the dismissals constituted harmless error. [ECF No. 64-1, pp. 4-5].

8. During this same time, Defendants were also represented by two additional members of the Florida Bar, attorneys Ni Xue and Valerie L. Raphael. Attorney Xue is licensed in both the United States and in China. She resides in Shanghai, China where she is an attorney with Landing Law Offices, a self-proclaimed "Chinese-led global law firm" with offices in both China and the U.S. (Ex. A: Gaffigan Decl. at ¶7.) Like Attorney Washburn, Attorney Xue also speaks both English and Chinese languages.

9. Ultimately, with the benefit of a legal dream team in the field of U.S./China e-commerce counterfeiting defense litigation at their side, in an intentional and strategic move aimed at potential settlement of Chanel's claims in this action and others, Defendants voluntarily dismissed the appeal on August 12, 2022. [ECF No. 64-1, p. 6; ECF No. 64-2 at ¶6; ECF No. 64-3 at ¶6].

10. Almost two months later, on October 10, 2022, Defendants engaged separate counsel to file the Rule 60(b) motion at 11:57 p.m. on October 13, 2022—minutes shy of the one-year anniversary of the Final Default Judgment Defendants seek to set aside [ECF No. 64 at p. 2].

11. As of the date of this filing, Defendants continue to be represented by Attorneys Washburn, Xue, and Raphael as counsel of record in litigation with Chanel and other plaintiffs, including in this case, 21-cv-61332-RAR, as well as in 21-cv-62335-WPD and 22-cv-61541-WPD, all pending in the Southern District of Florida (Ex. A: Gaffigan Decl. at ¶8).

12. Defendants have significant experience with the legal process in the United States, having been named as Defendants in at least the following actions:

For Defendant Shenzhen:

- *Chanel, Inc. v. The Individuals, et al.*, Cause No. 21-cv-61332-RAR;
- *Luxottica Group, S.p.A. v. The Individuals, et al.*, Cause No. 21-cv-62127-DPG;
- *Chanel, Inc. v. The Individuals, et al.*, Cause No. 21-cv-62335-WPD;
- *Fendi, S.r.l. v. The Individuals, et al.*, Cause No. 22-cv-60392-KMM.

For Defendant Foshan:

- *Chanel, Inc. v. The Individuals, et al.*, Cause No. 21-cv-61332-RAR;
- *Luxottica Group, S.p.A. v. The Individuals, et al.*, Cause No. 22-cv-60121-KMM;
- *Chanel, Inc. v. The Individuals, et al.*, Cause No. 22-cv-61082-AHS;
- *Tiffany (NJ) LLC v. The Individuals, et al.*, Cause No. 22-cv-61297-WPD; and
- *Chanel, Inc. v. The Individuals, et al.*, Cause No. 22-cv-61541-WPD.

In all of these cases (except for the last one), Defendants are also represented by Attorneys Washburn, Xue, and Raphael. *Id.* at ¶¶8 and 12).

LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) is the procedural means by which a party may seek relief from a final judgment. “By its very nature, the rule seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the court’s conscience that justice be done in light of all the facts.” *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 741 F.3d 1349, 1355 (11th Cir. 2014); *see also Waddell v. Hemerson*, 329 F.3d 1300, 1309 n. 11 (11th Cir. 2003) (“It is for the public good that there be an end of litigation”). Relief under Rule 60(b) is at the expense of the finality of judgments and is, therefore, considered an “extraordinary” remedy. *See Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005); *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993) (“[t]his Court has demonstrated its wariness of grants of Rule 60(b)(1) relief for excusable neglect based on claims of attorney error”).

Rule 60(b)(1) through (5) provide limited, specific circumstances for vacating a final judgment, including mistake by the trial court, fraud, or newly discovered evidence. Rule 60(b)(6) is a catchall, authorizing the court to grant relief from a judgment “for any other reason that justifies

relief.” FED. R. CIV. P. 60(b)(6). Because this remedy is intended only for extraordinary circumstances, “[a] movant must do more than show that a grant of its motion might have been warranted”; instead, movant must “demonstrate a justification for relief so compelling that the district court [is] *required* to grant [the] motion.” *Olmstead v. Humana, Inc.*, 154 Fed. App’x. 800, 805 (11th Cir. 2005) (emphasis in original). “Even then, whether to grant [a] requested [Rule 60(b)] relief is . . . a matter for the district court’s sound discretion.” *Aldana*, 741 F.3d at 1355, *quoting* *Cano v. Baker*, 435 F.3d 1337,1342 (11th Cir. 1993). Moreover, “the law is clear that Rule 60(b) may not be used to challenge mistakes of law [that] could have been raised on direct appeal.” *Olmstead*, 154 Fed. App’x. at 805, *quoting* *American Bankers Ins. Co. of Fla. v. Northwestern Nat. Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir. 1999).

ARGUMENT AND AUTHORITIES

Defendants seek to set aside the default final judgment entered by this Court on October 13, 2021, pursuant to Rule 60(b)(1) pertaining to “excusable neglect,” and Rule 60(b)(6) on the grounds that insufficient evidence exists to support this Court’s award of damages. “In the default judgment context, [the Eleventh Circuit has] held that a defaulting party must show that: (1) [he] had a meritorious defense that might have affected the outcome; and (2) granting the motion would not result in prejudice to the non-defaulting party.” *Grant v. Pottinger-Gibson*, 725 Fed. App’x. 772, 775 (11th Cir. 2018), *quoting* *Valdez v. Feltman (In re Worldwide Web Sys. Inc.)*, 328 F.3d 1291, 1295 (11th Cir. 2003). Defendants have failed to carry their burden under either subsection of the rule and are not entitled to the requested relief.

I. Defendants Are Not Entitled to Relief Under Rule 60(b)(1).

Rule 60(b)(1) provides that “on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect.” FED. R. CIV. P. 60(b)(1). Under Rule 60(b)(1), the Court has discretion to grant relief due to attorney error, but that discretion is limited. *Jacobs v. Elec. Data Sys. Corp.*, 240 F.R.D. 595, 600 (M.D. Ala. 2007). “Generally, excusable neglect under Rule 60(b)(1) is an equitable inquiry turning on all relevant circumstances” including “the danger of prejudice to the other party, the length of delay and its potential impact on judicial proceedings,

the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Grant*, 725 Fed. App’x. at 775, *quoting Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996); *see also Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).

A. Defendants’ Request for Relief Under Rule 60(b)(1) is Untimely.

“A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.” FED. R. CIV. P. 60(c)(1); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 393 (1993). Defendants, without explanation or legal support, presume that their Rule 60(b) motion, filed only three minutes prior to the one-year deadline, is somehow reasonable. [ECF No. 64 at p. 3]. This is not the law. *See Bohannon v. PHH Mort. Corp.*, NO. 1:12-CV-02477-RWS, 2015 U.S. Dist. LEXIS 30742, at *8 (N.D. Ga. Mar. 12, 2015) (denying Rule 60(b) motion filed “the last possible day” under Rule 60(b)).

Defendants’ apparently strategic decisions combined with their failure to offer any explanation for their inexplicable delay in seeking to set aside the Final Default Judgment only reinforces that the instant motion is both unreasonable and untimely and should be denied. *Bohannon v. PHH Mort. Corp.*, NO. 1:12-CV-02477-RWS, 2015 U.S. Dist. LEXIS 30742, at *8 (N.D. Ga. Mar. 12, 2015) (10 month delay held “substantial and weigh[ing] heavily against granting relief”).

B. There is No Excusable Neglect.

Defendants vaguely assert that the Default Final Judgment should be set aside “because Defendants’ failure to appear was due solely to acts of prior counsel which constitute excusable neglect and because Defendants have acted diligently....” [ECF No. 64 at pp. 3-4]. More specifically, Defendants identify instances of alleged “excusable negligence” of their counsel in their appeal to the Eleventh Circuit and maintain that because of the “astounding[]” differences between the United States and China, particularly as to the rule of law, and an “obvious language barrier and difference in time zones,” they were diligent and should not be punished for their attorney’s actions. [ECF No. 64 at pp. 6-7].

1. Defendants’ representations are intentionally incomplete.

Even without consideration of the *Pioneer* factors for “excusable neglect,” Defendants’ motion is without merit. To begin with, the alleged misconduct of Defendants’ attorney in the subsequent appeal of this matter does not explain or even address why Defendants failed to answer Chanel’s Amended Complaint in the first place or why Defendants waited almost two months after voluntarily dismissing the appeal before filing this motion. No explanation for the Defendants’ delay equates to no excusable neglect. *See Valdez v. Feltman (In re Worldwide Web Sys.)*, 328 F.3d 1291, 1297-1298 (11th Cir. 2003); *Kupersmith v. McCutcheon (In re McCutcheon)*, 629 B. R. 311, 319 (M.D. Ga. 2021). Moreover, no conduct of their counsel prevented Defendants from prosecuting the appeal—Defendants were able to proceed in the Eleventh Circuit all the way up to their decision to voluntarily dismiss the appeal.² Defendants’ use of Rule 60(b) to relitigate the underlying lawsuit or bring claims that could have been handled on appeal is improper and should be denied. *Olmstead v. Humana, Inc.*, 154 Fed. App’x. 800, 805 (11th Cir. 2005), *citing American Bankers Ins. Co. of Fla. V. Northwestern Nat. Ins. Co.*, 198 F.3d 1332, 1338 (11th Cir. 1999).

Separately, Defendants’ assertion that they are naive foreign defendants facing a language barrier and incompetent counsel is disingenuous. Attorney Washburn is only one of no fewer than five attorneys who have represented Defendants in this matter (many of them simultaneously), even before Defendants’ answer was due. *See* [ECF No. 64-2 at ¶¶3-4 and 64-3 at ¶¶3-4]. Additionally, Attorney Washburn also is not “prior counsel” but continues to represent Defendants in other ongoing litigations, including several with Chanel. *See* Ex. A: Gaffigan Decl. at ¶8. Four of Defendants’ counsel are licensed in the United States with at least two licensed *and* located in China (Mr. Cai and Ms. Xue). *Id.* at ¶¶4, 6-7. At least three of the attorneys representing Defendants are known to speak both English and Chinese languages, including Attorneys Cai, Washburn, and Xue. Defendants’ attorneys all have experience litigating intellectual property, e-commerce and/or international business matters. *Id.*

² As noted above, any error by Defendants’ counsel in the appeal was harmless, as the appeal was reinstated, and Defendants were able to prosecute the appeal all the way up the date of their voluntary dismissal. *See* [ECF No. 64-1].

Defendants also claim they do business “primarily in China” and infer a lack of knowledge or experience with the rule of law in the United States. [ECF No. 64 at p. 7]. Once again, this is inaccurate. While Defendants may ship products from China, they do business primarily overseas (including in the United States) through English-language websites. (Ex. A: Gaffigan Decl. at ¶13). Similarly, Defendants are not unfamiliar with the legal process and rule of law in the United States, having been named as defendants in numerous lawsuits brought in the United States. *Id.* at ¶12.

Perhaps more importantly, Defendants fail to disclose to this Court that in addition to retaining Attorney Washburn “shortly after” service of the lawsuit, they were also represented by attorney Thomas Cai at least as early as August 4, 2021. *Id.* at ¶¶2-3. Mr. Cai is licensed in China, speaks English and Chinese, and works for the U.S. law firm Getech Law Firm which is based out of Chicago, Illinois. That firm is headed by partner Linda Lei, who also has extensive experience litigating these types of cases on behalf of foreign Defendants against many various plaintiffs, including Chanel. *Id.* at ¶¶2-4. Attorney Lei also speaks both languages.

Defendants’ factual assertions are unsubstantiated, at best, and intentionally incomplete and misleading, at worst. And while the Court is well within its discretion to deny Defendants the requested relief on these grounds, alone, proper evaluation of the *Pioneer* factors further demonstrates that Defendants are not in any way entitled to the relief that they seek.

2. Chanel will be Prejudiced if Defendants’ motion is granted.

In this context, Defendants must demonstrate the absence of any prejudice to the non-defaulting party. *See Grant v. Pottinger-Gibson*, 725 Fed. App’x. 772, 775 (11th Cir. 2018). Here, the existing and ongoing prejudice to Chanel further balances the scale of equities against Defendants’ requested relief. To begin with, Defendants’ unexplained and unreasonable delays in bringing this motion have caused Chanel to incur (and continue to incur) litigation expenses, including the costs associated with enduring the ongoing uncertainties of litigation. *Bohannon v. PHH Mort. Corp.*, No. 1:12-cv-02477, 2015 U.S. Dist. LEXIS 30742, at *8 (N.D. Ga. Mar. 12, 2015) (holding defendant’s “inexcusable inattention to the case ... does not justify putting the adversary to the continued expense and uncertainty of litigation”), *quoting U.S. v. Golden Elev. Inc.*, 27 F.3d 301, 303 (7th Cir. 1994). Chanel has also incurred the substantial expense of defending

against an appeal—which Defendants have admitted was improper—that never should have been filed. [ECF No. 64 at p. 8]. If the Court were to grant Defendants relief and set aside the Final Default Judgment, trial of this matter would start at square one more than 17 months after Chanel filed its Original Complaint. Under these circumstances, it cannot be said that the scale tips in favor of granting Defendants relief. *See Valdez v. Feltman (In re Worldwide Web Sys. Co.*, 328 F.3d 1291, 1297 (11th Cir. 2003).

Importantly, Defendants’ unreasonable delay in this matter has already resulted in the destruction of at least some key evidence in this case. Specifically, Defendants’ domain names and associated ecommerce websites at issue in this action have already been taken offline and removed from the World Wide Web pursuant to the terms of the Final Default Judgement. *See Ex. A: Gaffigan Decl.* at ¶9. However, even before the domain transfers occurred, the Defendants themselves had already deleted or redirected the domains during the pendency of the action. Thus, not only now no longer subject to examination in discovery, but they were also not available at the time of the initial case proceedings due to Defendants own spoliation efforts. *Id.* While Chanel was able to secure some screen shots of Defendants’ websites confirming the sale of other infringing products besides just hats as alleged by the Defendants, the complete removal of the websites eliminates all parties’ ability to conduct a full examination of Defendants’ infringement or otherwise quantify the offers to sell and sales of a variety of infringing products by Defendants. *Id.* at ¶¶9-11.

Moreover, at least one of the online stores, Spitfice.com (Def. #48), was registered through GoDaddy. Pursuant to GoDaddy’s document and information retention policy, any records associated with a domain are destroyed 30 days after that online store (domain) is closed. Because Spitfice.com was disabled approximately one year ago (October 13, 2021) all records pertinent to that domain have long since been destroyed. *Id.* at ¶9. Finally, as reflected in the subject line of Attorney Cai’s emails to Plaintiff’s counsel, all of Defendants’ domain names at issue were built on and hosted the ecommerce platform Shopify. Most of Shopify’s relevant records will also have been destroyed and unavailable for inspection at this point due to Shopify’s document retention policy *Id.* at ¶10. Both GoDaddy and Shopify would have originally had documents relevant to the

ownership, operation, and payment for the registration and hosting of the domain names and websites in suit.

As discussed in greater detail below, Defendants do not identify any meritorious defense to Chanel's claims but state only that "the parties" must "engage in the discovery process to obtain a factual resolution." [ECF No. 64 at p. 5]. Defendants' inexcusable delays have severely limited the discoverability of key records, resulting in prejudice to Chanel. *See In re Worldwide Web Sys. Co.*, 2015 U.S. Dist. Lexis 30742 at *8 (holding that granting relief would negate the non-movant's efforts while rewarding the willful misconduct of movant's counsel). The prejudice to Chanel because of Defendants' unreasonable and unexplained delays—including the permanent destruction of evidence—weighs heavily against granting Defendants' requested relief.

3. Defendants' delay in bringing this motion is unreasonable.

Despite receiving service of this lawsuit in July 2021 and retaining counsel "shortly thereafter," Defendants offer no explanation for their filing of this motion one year after entry of the Final Default Judgment. Instead, Defendants claim they retained counsel and thought he was protecting their interests and that they should not be punished for the acts of their counsel because they are foreign defendants unfamiliar with the U.S. legal process. The Eleventh Circuit has considered, and rejected, this very argument from a foreign defendant.

In *Sloss Indus. Corp. v. Eurisol*, Sloss filed suit against a French company, Eurisol. Despite receiving service of process through the Hague Convention, Eurisol did not timely appear or respond to Sloss's complaint, ultimately resulting in a final default judgment against Eurisol. More than one month after entry of the final judgment, Eurisol moved to set aside the judgment pursuant to Rule 60(b)(1) claiming the "excusable neglect" of its attorney. 488 F.3d 924-935 (11th Cir. 2007). The district court denied Eurisol's motion and Eurisol appealed to the Eleventh Circuit. *Id.*

On appeal, the Eleventh Circuit considered affidavits submitted by Eurisol's representatives in support of the Rule 60(b)(1) motion, stating that they hired outside counsel in France within a few days of service and instructed him to retain U.S. counsel to represent them. *Id.* at 934-935. Eurisol's French counsel eventually retained counsel in the U.S. (after two prior firms rejected the representation due to a conflict of interest), but by that time a default judgment

had already been entered. *Id.* In their affidavits, Eurisol’s representatives claimed they believed counsel was representing them and had no knowledge of the default judgment until it was entered. *Id.* at 935. Finding that “Eurisol [could] not simply shift the blame to ... its French attorney ... and thereby obtain relief from the default judgment,” the Eleventh Circuit affirmed the district court’s denial of Eurisol’s Rule 60(b)(1) motion. *Id.*

Indeed the U.S. Supreme Court has emphasized that, “in weighing the[] ‘excusable neglect’ factors], the court must hold clients accountable for the errors of their attorneys” and there is “no merit to the contention that dismissal of petitioner’s claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client.” *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. Pship*, 507 U.S. 380, 396 (1993). To the contrary, Defendants “voluntarily chose [their] attorney[s] as [their] representative[s] in the action, and [] cannot now avoid the consequences of the acts or omissions of [these] freely selected agent[s].” *Link v. Wabash R. Co.*, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962). To conclude otherwise “would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all facts, notice of which can be charged upon the attorney.’” *Id.*, at 633-634 (quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L. Ed. 955 (1880); see also *Jacobs v. Elec. Data Sys. Corp.*, 240 F.R.D. 595, 600 (M.D. Ala. 2007), citing *Pioneer*, 507 U.S. at 396 (clients are held accountable for the mistakes of their attorneys, such that motions for relief focus on whether the attorney’s mistake was excusable as if the party had made the error, not whether the attorney acted against the wishes of his client). Thus, in determining whether any neglect was excusable, “the focus of the court’s inquiry must be on whether the attorney’s error was excusable not on whether the client was diligent in selecting, monitoring, and cooperating with counsel.” *Jacobs v. Elec. Data Sys. Corp.*, 240 F.R.D. 595, 600 (M.D. Ala. 2007), citing *Pioneer*, 507 U.S. 397.

Apart from claiming that they relied on their attorney and should not be punished for his alleged misconduct, an argument expressly rejected by the Eleventh Circuit, Defendants offer no reasonable explanation for their one-year delay in bringing this motion and, as such, are not entitled to relief under Rule 60(b)(1).

4. No good reason exists for Defendants' failure to answer.

“Time matters when one seeks to set aside a default, and in analyzing whether a defaulting defendant has shown good reason for failing to timely respond, it is important to know exactly when certain actions were taken and what delays existed before or after those actions.” *Sloss*, 488 F.3d at 935. In *Sloss*, the Eleventh Circuit held that “[t]he longer a defendant—even a foreign defendant—delays in responding to a complaint, the more compelling the reason it must provide for its inaction when it seeks to set aside a default judgment.” *Id.*, citing *In re Worldwide Web Sys.*, 328 F.3d 1291, 1297-1298 (11th Cir. 2003) (denying Rule 60(b) motion filed almost two months after default was entered); see also *SEC v. Simmons*, 241 Fed. App’x. 660 (11th Cir. 2007) (denying Rule 60(b) motion filed four months after notice of default).

The *Sloss* Court further relied on the fact that its “Rule 60(b)(1) cases have consistently held that where internal procedural safeguards are missing, a defendant does not have a ‘good reason’ for failing to respond to a complaint.” *Id.*, citing *Gibbs v. Air Canada*, 810 F.2d 1529, 1531, 1537-38 (11th Cir. 1987) (defendant's manager left message for solicitor in legal department and sent copy of complaint to him, message was not returned, complaint was not received, default judgment was entered eight months later, and defendant moved to set aside judgment two months afterwards); and citing *Davis v. Safeway Stores, Inc.*, 532 F.2d 489, 490 (5th Cir. 1975) (per curiam) (defendant promptly sent copy of complaint to insurer, insurer did not retain counsel or respond to complaint, there were no communications between defendant and insurer for about three weeks, and default judgment was entered just four weeks after answer was due). This principle “extend[s] ... to situations where a defendant, knowing that an action has been filed against him, fails to act diligently in ensuring that his attorney is adequately protecting his interests.” *Id.*, citing *Florida Physician's Ins. Co., Inc. v. Ehlers*, 8 F.3d 780, 784 (11th Cir. 1993) (per curiam).

Accordingly, because the affidavits offered in *Sloss* failed to identify “whether anyone, at any time, checked the docket sheet in the Alabama district court to find out what (if anything) was going on with the lawsuit” and “sa[id] nothing about when Eurisol or its counsel learned about the initial default judgment on liability or the final default judgment,” the Court determined that

Eurisol had failed to identify any good reason for its failure to respond to the underlying Complaint. *Id.*

The application of the facts of the case to this law renders the same result. Defendants' affidavits provide no information from the date of their service in July 2021 until months later when their attorney filed Notices of Appearance and Notices of Appeal in November 2021. [ECF No. 64-2 at ¶¶3-5 and 64-3 at ¶¶3-5]. Defendants' lack of any internal procedure to ensure a response to Chanel's Amended Complaint was filed on their behalf is inexcusable and offers no good reason for the failure to do so. *Id.*

5. Defendants have not acted in good faith.

Apart from general assertions that they are foreign defendants unfamiliar with the U.S. legal system who have "communicated as best they can" with their counsel, Defendants offer no good faith basis for their failure to respond to Chanel's Amended Complaint. Likewise, Defendants offer no explanation for their unreasonable delay in bringing this motion—just three minutes shy of one year after the Final Default Judgment was entered. As noted above, Defendants' Rule 60(b) motion and supporting affidavits are incomplete at best, and intentionally misleading at worst. Since the service of this lawsuit in July 2021, Defendants have been represented, often simultaneously, by at least four highly qualified attorneys licensed in both the U.S. and in China, several of whom speak both English and Chinese. (Ex. A: Gaffigan Decl. at ¶¶4, 6-7). Having failed to provide any explanation whatsoever for the failure of those *four* attorneys to respond to Chanel's Amended Complaint, Defendants cannot be said to have acted in good faith in the filing of this motion. Rather, Defendants impermissibly seek to use Rule 60(b) as a substitute for the direct appeal that Defendants voluntarily dismissed in a conscious effort to obtain settlements in connection with other litigations with Chanel. *Olmstead v. Humana, Inc.*, 154 Fed. App'x. 800, 805 (11th Cir. 2005). This factor weighs against the relief requested by Defendants.

C. Defendants Have Not Demonstrated a Meritorious Defense

Under Rule 60(b), a "precondition of relief . . . is that the movant show that he or she has a meritorious claim or defense." *Jacobs v. Elec. Data Sys. Corp.*, 240 F.R.D. 595, 600 (M.D. Ala. 2007), *citing* 12 James Wm. Moore, *Moore's Federal Practice* § 60.64 (3d ed. 2006). "In order to

establish a meritorious defense, the moving party must make an affirmative showing of a defense that is likely to be successful.” *Id.* at 775, citing *In re Worldwide Web Sys.*, 328 F.3d at 1296. Asserting a general denial—or its practical equivalent—is insufficient. *In re Worldwide Web Sys.*, 328 F.3d 1291, 1296 (11th Cir. 2003), citing *Solaroll Shade & Shutter Corp. v. Bio-Energy Sys.*, 803 F.2d 1130, 1133 (11th Cir. 1986) (holding defendant could not satisfy burden of meritorious defense by asserting a general denial or by showing that the opposing party would not suffer unfair prejudice if the judgment were vacated, but must make an affirmative showing of a defense that is likely to be successful).

In response to Chanel’s claims, Defendants allege that Chanel failed to make a requisite showing in support of its claims and that Defendants “maintain a position which is entirely opposite to Plaintiff and which would require that the parties engage in the discovery process to obtain a factual resolution.”³ [ECF No. 64 at pp. 5-6]. Having offered the practical equivalent of a general denial, Defendants have not made an “affirmative showing of a defense that is likely to be successful.” *In re Worldwide Web Sys.*, 328 F. 3d at 1296.

Remarkably, Defendants do not deny their unauthorized use of Chanel’s trademarks on products but admit their infringement by claiming Defendants’ products are of “equal or better quality” than Chanel’s. [ECF No. 64 at p. 6]; *see also Apollo Endosurgery, inc. v. Kafka*, No. 15-23757-Civ-Cooke/Torres, 2015 U.S. Dist. LEXIS 190684 at *10 (S.D. Fla. Oct. 24, 2015) (holding a violation of the Lanham Act occurs where “an alleged infringer sells trademarked goods that are materially different than those sold by the trademark owner”), citing *Davidoff & Cie, S.A. v. PLD Int’l Corp.*, 263 F.3d 1297, 1301 (11th Cir. 2001). Nevertheless, they claim no harm because “consumers who are shopping for the alleged counterfeit products are well-aware of the products that they are purchasing.” [ECF No. 64 at p. 6].

³ Without any evidentiary basis or other explanation, Defendants cite to *Maurer Rides USA, Inc. v. Beijing Shibaolai Amusement Equip. Co.*, No. 6:10-cv-1718-Orl-37KRS, at *12-13 (M.D. Fla. July 23, 2014) for the proposition that the Court should revisit its award of statutory damages in this case. As *Maurer* dealt with extra-territorial sales not subject to the Lanham Act, it is entirely inapposite and unapplicable to the facts here and fails to offer any support for Defendants’ claims.

Even if buyers are aware of the bogus nature of Defendants' goods, other consumers viewing Defendants' goods in a post-sale setting will obviously be confused, because they are viewing goods bearing and/or using the Chanel Marks, which undeniably creates the impression they are viewing genuine goods sold or authorized by Chanel. [ECF No. 6, 6-1]. Because the likelihood of confusion analysis is not limited to "point-of-sale" confusion but may occur in the context of post-sale confusion by the general public, rather than the initial purchaser, Defendants' assertion does not constitute a meritorious defense. *See U.S. v. Hon*, 904 F.2d 803, 14 U.S.P.Q.2d 1959 (2d Cir. 1990), *cert. denied*, 498 U.S. 1069, 111 S. Ct. 789, 112 L. Ed. 2d 851, (1991) (the "likely to confuse" standard is not limited to purchasers and potential purchasers, but includes the general public); *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1289 (11th Cir. 2018) (same), *citing Custom Mfg. & Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 1282, 1301 n.32 (11th Cir. 2007) (recognizing post-sale confusion as a viable basis for cause of action).

The affirmative demonstration of a meritorious defense that is likely to succeed is an absolute precondition to the entry of a Rule 60(b) motion. Apart from all other considerations, Defendants' failure to present such a defense is fatal to their requested relief and Defendants' motion should be denied. *In re Worldwide Web Sys.*, 328 F. 3d at 1296; *Grant v. Pottinger-Gibson*, 725 Fed. App'x. 772, 775 (11th Cir. 2018); *see also Jacobs*, 240 F.R.D. at 602 ("even if [movant] received such woefully inadequate legal representation that the court would consider a motion to vacate on that basis, the court declines to do so here because [movant's] case, on the merits, is so weak").

II. Defendants Are Not Entitled to Relief Under Rule 60(b)(6)

As an alternative to their Rule 60(b)(1) claim, Defendants seek relief under the "catchall" provision of Rule 60(b)(6). In support, Defendants challenge this Court's application of the law to the facts, alleging that Chanel's evidence was insufficient to support the Court's finding of willful infringement and that the Court's award of statutory damages in the amount of \$2,000,000.00 per defendant is unjust because other courts have awarded less. [ECF No. 64 at pp. 9-10]. Because these allegations of mistake on the part of the Court are encompassed by Rule 60(b)(1), relief cannot be granted under Rule 60(b)(6) as sought. Moreover, Defendants are legally

precluded from using Rule 60(b)(6) to relitigate the underlying cause or as a replacement for the direct appeal that they dismissed voluntarily. Defendants have not shown any “exceptional circumstances” warranting the extraordinary relief of Rule 60(b)(6). Their motion must be denied.

A. Relief Cannot Be Granted Under Rule 60(b)(6).

In addition to “excusable neglect,” Rule 60(b)(1) provides relief for mistake, inadvertence, or surprise. FED. R. CIV. P. 60(b)(1). This includes a court’s alleged misapplication of the law. *See Lumbermen’s Mut. Cas. Co. v. Dadeland Cove Section One Homeowner’s Ass’n*, 2008 U.S. Dist. LEXIS 27476 at *4 (S.D. Fla. Mar. 27, 2008). Thus, Defendants’ request for relief from the alleged misapplication of the law to the facts (namely, the alleged insufficiency of the evidence to support the Court’s finding of willful infringement and award of maximum statutory damages) should have been brought under Rule 60(b)(1). As shown above, Defendants are not entitled to relief under Rule 60(b)(1) at least in part due to the absence of a meritorious defense. Because “relief cannot be granted under Rule 60(b)(6) if it could have been obtained under Rule 60(b)(1),” Defendants’ request for relief under Rule 60(b)(6) is precluded by law. *Olmstead v. Humana, Inc.*, 154 Fed. App’x. 800, 805 (11th Cir. 2005), *citing Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1020 n. 39 (11th Cir. 1982).

B. Defendants Cannot Use Rule 60(b)(6) to Relitigate the Underlying Action or Challenge Mistakes that Could Have Been Raised on Direct Appeal.

Defendants’ specific allegations regarding the sufficiency of the evidence or the Court’s alleged misapplication of the facts to the statutory damages provision of the Lanham Act impermissibly seek to relitigate the underlying lawsuit (which the Defendants could have and should have answered) and raise issues that could have been asserted on direct appeal, prior to Defendants’ voluntary dismissal of the appeal. *Olmstead*, 154 Fed. App’x. at 805; *see also Mahone v. Ray*, 326 F.3d 1176, 1180 (11th Cir. 2003) (while an appeal is pending, district court could (1) deny the motion or (2) notify the Court that intends to grant the relief requested and ask for a remand for that purpose). “Rule 60(b)(6) does not reward a party that seeks to avoid the consequences of its own ‘free, calculated, deliberate choices.’” *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 741 F.3d 1349, 1355 (11th Cir. 2014), *citing Ackermann v. U.S.*, 340 U.S. 193,

198, 71 S. Ct. 209, 95 L. Ed. 207 (1950). In other words, “[t]he Rule 60(b)(6) emergency valve does not offer its extraordinary relief to a party that ties itself in knots in order to plead confinement.” *Id.* at 1357-1358. Defendants have at all pertinent times been represented by numerous, competent counsel who are well-versed in exactly this type of litigation on behalf of foreign defendants. Having tied themselves in knots due to their own strategic decisions and their own inattention to the underlying lawsuit, Defendants cannot now claim confinement. Defendants’ request for relief under Rule 60(b)(6) is improper and should be denied.

C. Defendants Have Not Shown Extraordinary Circumstances.

“To be entitled to relief under Rule 60(b)(6), the movant must demonstrate a justification for relief so compelling that the district court was *required* to grant the motion.” *Aldana*, 154 Fed. App’x. at 805-806 (emphasis in original). Defendants’ unsubstantiated allegations and incomplete (if not misleading) representations do not demonstrate “extraordinary circumstances” sufficient to warrant the relief sought. *Id.* For example, Defendants maintain that this Court’s award of statutory damages should be set aside because “[c]ourts in this very district have refused to award [Chanel] the maximum amount of statutory damages....” [ECF No. 64 at p. 10]. In support of this statement, Defendants reference a couple of lawsuits filed by Chanel against unrelated defendants in 2012 and 2014. Those actions are factually distinguishable from this matter and neither Defendants’ motion, nor the supporting affidavits, offer any factual explanation or other reason for this Court to make an apples-to-apples comparison of the prior lawsuits to the instant action. Rather, the Court’s analysis of liability and damages must necessarily be focused on the facts of the instant case, and the application of those facts to the law.

Here, by “defaulting, Defendants admit the plaintiff’s well-pleaded allegations of fact.” *PetMed Express, Inc. v. MedPets.com, Inc.*, 336 F. Supp. 2d 1213, 1217 (S.D. Fla. 2004), *quoting Buchanan v. Bowman*, 820 F.2d 359 (11th Cir. 1987). Still further, “the Court may infer willfulness from Defendants’ default.” *Arista Records, Inc. v. Beker Enters.*, 298 F. Supp. 2d 1310, 1312 (S.D. Fla. 2003). And once liability is determined (through default or otherwise), this Court has broad discretion to award statutory damages under the Lanham Act. *See PetMed Express, Inc. v. MedPets.com, Inc.*, 336 F. Supp. 2d 1213, 1219 (S.D. Fla. 2004), *citing Cable/Home Comm’n*

Corp. v. Network Prod., Inc., 902 F.2d 829, 852 (11th Cir. 1990). Statutory damages are appropriate even where actual damages are nominal, non-existence, or cannot be proven. *Yeti Coolers, LLC v. Individuals*, No. 21-cv-62008-BLOOM/Valle, 2021 U.S. Dist. LEXIS 247615 at *17 (S.D. Fla. December 28, 2021), *citing* S. REP. NO. 104-177, pt. V(7) (1995) (noting Congress enacted a statutory damages remedy in trademark counterfeiting cases because evidence of a defendant's profits in such cases is almost impossible to ascertain). Such damages are “especially appropriate in default judgment cases due to infringer nondisclosure.” *Id.* Moreover, “[s]tatutory damages under § 1117(c) are intended not just for compensation for losses, but also to deter wrongful conduct.” *Petmed*, 336 F. Supp. 2d at 1220.

Regardless of what Chanel may have sought or been awarded against unrelated defendants in the past, this Court determined that the maximum award of statutory damages was necessary in this case, particularly considering Defendants’ default. [ECF Nos. 38, 39]. That Defendants have been named by Chanel in multiple lawsuits after this action confirms that even the maximum award of statutory damages in this Final Default Judgment has not been effective in deterring Defendants from continuing to traffic in counterfeit goods; awarding a lesser amount certainly will not accomplish that purpose here. *See* Ex. A: Gaffigan Decl. at ¶12.

Defendants’ brief rests on conclusory statements—i.e., they sell only one type of counterfeit product, they primarily do business in China, they were diligent in securing counsel, and their actions were not willful [ECF No. 64 at pp. 2,7-11]. Yet their affidavits are devoid of any evidence supporting these statements. Defendants’ representatives do not provide sales data or other evidence determining the types of products sold or where those products are primarily sold, and do not identify any specific actions taken by Defendants, themselves, between the date they were served with the Complaint and the date the Final Default Judgment was entered. Defendants’ affidavits likewise fail to offer any evidence negating this Court’s finding of willful infringement. Having failed to present any evidence, much less evidence of extraordinary circumstances, Defendants are not entitled to any relief under Rule 60(b)(6), and their motion should be denied.

CONCLUSION

Defendants had ample opportunity to challenge Chanel's claims and chose not to. There is no "redo button," and Defendants cannot circumvent their decision to dismiss the appeal by way of a Rule 60(b) motion. Accordingly, Chanel respectfully requests Defendants' motion be denied.

DATED: October 27, 2022.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF, CHANEL, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served this 27th day of October, 2022, via transmissions of Notice of Electronic Filing generated by CM/ECF to Defendant Numbers 42, 45, and 48's counsel of record in this matter, and by posting a copy of the same on Plaintiff's designated service notice website appearing at the URL <https://servingnotice.com/cp05e/index.html>.

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