

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2009

4 (Argued: March 11, 2010 Final Submission: April 20, 2010

5 Decided: May 4, 2011)

6 Docket Nos. 08-4804-cv; 09-1345-cv
7 (consolidated for disposition)

8 -----
9 THE CITY OF NEW YORK,

10 Plaintiff-Appellee,

11 - v -

12 MICKALIS PAWN SHOP, LLC,

13 Defendant-Appellant,

14 A-1 JEWELRY & PAWN, INC., ADVENTURE OUTDOORS, INC., COLE'S GUN
15 SHOP, INC., DUNKELBERGER'S SPORTS OUTFITTERS, GALLERY
16 DISTRIBUTING INC., GREG L. DRIGGERS d/b/a AAA Gun & Pawn Brokers,
17 THE GUN STORE, INC., HAROLD W. BABCOCK, JR. d/b/a Webb's Sporting
18 Goods, JAMES THOMAS FARMER d/b/a Jim's Guns and Whatever, NANCY
19 DAILEY d/b/a Peddler's Post, OLD DOMINION GUNS & TACKLE, INC.,
20 PATRIOT SERVICES, INC., WELSH PAWN SHOP, INC. d/b/a Big Tom's
21 Pawn Shop, WOODROW C. HOLMAN III d/b/a Woody's Pawn Shop,
22 VIRGINIA FIREARMS & TRANSFERS, INC.,

23 Defendants.

24 -----
25 THE CITY OF NEW YORK,

26 Plaintiff-Appellee,

27 - v -

28 ADVENTURE OUTDOORS, INC.,

29 Defendant-Appellant,

1 A-1 JEWELRY & PAWN, INC., COLE'S GUN SHOP, INC., DUNKELBERGER'S
2 SPORTS OUTFITTERS, GALLERY DISTRIBUTING INC., GREG L. DRIGGERS
3 d/b/a AAA Gun & Pawn Brokers, THE GUN STORE, INC., HAROLD W.
4 BABCOCK, JR. d/b/a Webb's Sporting Goods, JAMES THOMAS FARMER
5 d/b/a Jim's Guns and Whatever, MICKALIS PAWN SHOP, LLC, NANCY
6 DAILEY d/b/a Peddler's Post, OLD DOMINION GUNS & TACKLE, INC.,
7 PATRIOT SERVICES, INC., WELSH PAWN SHOP, INC. d/b/a Big Tom's
8 Pawn Shop, WOODROW C. HOLMAN III d/b/a Woody's Pawn Shop,
9 VIRGINIA FIREARMS & TRANSFERS, INC.,

10 Defendants.*

11 -----
12 Before: SACK and WESLEY, Circuit Judges, and EATON, Judge.**

13
14 Appeal from a default judgment and permanent
15 injunctions entered by the United States District Court for the
16 Eastern District of New York (Jack B. Weinstein, Judge) in favor
17 of the plaintiff-appellee, the City of New York. The defendants-
18 appellants, Mickalis Pawn Shop, LLC, and Adventure Outdoors,
19 Inc., are retail firearms dealers located in South Carolina and
20 Georgia, respectively. The City of New York brought suit against
21 them and other firearms dealers for public nuisance on the theory
22 that they intentionally or negligently sell firearms in a manner
23 susceptible to illegal trafficking to New York City. After
24 engaging in litigation with the City for several years, each
25 defendant-appellant defaulted. Upon entry of default judgment,
26 the district court issued permanent injunctions prohibiting the
27 defendants-appellants from further violations of the law and

* The Clerk of Court is directed to amend the official captions in these actions as set forth above.

** The Honorable Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

1 requiring them to undergo supervision by a court-appointed
2 special master. They appealed, asserting that a default judgment
3 should not have been entered; that the default judgment is, in
4 any event, void for lack of personal jurisdiction over each
5 defendant; and, in the alternative, that the injunctions violate
6 Federal Rule of Civil Procedure 65(d) or are unconstitutional.
7 We conclude that the defendants-appellants' withdrawal from the
8 district court proceedings justified the entry of default,
9 followed by default judgment; that the defendants forfeited their
10 defense of lack of personal jurisdiction; and that the default
11 judgment is not void. We agree with the defendants-appellants,
12 however, that the injunctions issued by the district court
13 violate Rule 65(d). We therefore vacate the injunctions and
14 remand for further proceedings.

15 Affirmed in part, vacated and remanded in part. Judge
16 Wesley concurs in a separate opinion.

17 FREDERICK A. BRODIE (Kenneth W. Taber,
18 of counsel), Pillsbury Winthrop Shaw
19 Pittman, LLP, New York, N.Y.; ERIC
20 PROSHANSKY, Assistant Corporation
21 Counsel (Richard J. Costa, Ari Biernoff,
22 of counsel), for Michael A. Cardozo,
23 Corporation Counsel of the City of New
24 York, New York, N.Y., for Plaintiff-
25 Appellee City of New York.

26 JUSTIN S. KAHN, Kahn Law Firm,
27 Charleston, S.C., for Defendant-
28 Appellant Mickalis Pawn Shop, LLC.

29
30 JOHN F. RENZULLI (Scott C. Allan, of
31 counsel), Renzulli Law Firm, LLP, White
32 Plains, N.Y., for Defendant-Appellant
33 Adventure Outdoors, Inc.

1 SACK, Circuit Judge:

2 These appeals present what appear to be two issues of
3 first impression in this Circuit. First, whether a defendant who
4 repeatedly moves to dismiss for lack of personal jurisdiction,
5 but then withdraws from the litigation after those motions are
6 denied, is permitted to attack an ensuing default judgment on the
7 grounds that it is void for lack of personal jurisdiction.

8 Second, whether a federal district court may exercise personal
9 jurisdiction over an out-of-state firearms dealer under the New
10 York long-arm statute, N.Y. C.P.L.R. § 302, based solely on the
11 fact that the dealer's unlawful sales practices have facilitated
12 the trafficking of guns by third parties to New York State, where
13 those guns contribute to a public nuisance. Because we resolve
14 the first question in the negative, we do not reach the second.

15 The City of New York (the "City") instituted this
16 lawsuit in May 2006 against fifteen federally licensed retail
17 firearms dealers operating from stores in Georgia, Ohio,
18 Pennsylvania, South Carolina, and Virginia. The defendants-
19 appellants, Mickalis Pawn Shop, LLC ("Mickalis Pawn") and
20 Adventure Outdoors, Inc. ("Adventure Outdoors") are among those
21 dealers.¹ Mickalis Pawn and Adventure Outdoors each operates a
22 single retail store in South Carolina and Georgia, respectively.
23 Each separately moved to dismiss the City's complaint against it

¹ Although there were many defendants in the district court that are not parties to this appeal, for ease of reference we refer to these two defendants-appellants simply as the "defendants."

1 on the theory that the district court lacked personal
2 jurisdiction over it. The district court (Jack B. Weinstein,
3 Judge), denying those motions, concluded that the City had made
4 at least a prima facie showing of personal jurisdiction, but left
5 the final determination of personal jurisdiction for trial.

6 After additional rounds of motion practice and varying
7 amounts of discovery, the two defendants each moved to withdraw
8 their respective counsel and announced to the district court that
9 they would proceed no further in the litigation. The district
10 court entered a default against each of them. Eventually, after
11 proceedings before a magistrate judge, the court entered a
12 default judgment and ordered permanent injunctive relief against
13 both defendants.

14 Both defendants now appeal from the default judgment on
15 various grounds.² First, they assert that their withdrawal from
16 the litigation did not justify the district court's entry of
17 default or the issuance of a default judgment against them.
18 Second, they contend that the district court lacked personal
19 jurisdiction over them, and therefore that the default judgment
20 is void. Finally, the defendants challenge the permanent
21 injunctions as unconstitutional or as in violation of Federal
22 Rule of Civil Procedure 65(d).

² The two defendants' appeals were consolidated for argument on March 11, 2010, before the same panel of this Court.

1 revenue has been derived entirely from sales made at its
2 Summerville store to customers who visit the store in person. As
3 of 2006, Mickalis Pawn did not offer anything for sale in New
4 York, nor had it ever done so. It has never sold any merchandise
5 by mail order, by telephone, or by means of the Internet.

6 Adventure Outdoors is a Georgia corporation with its
7 principal place of business in Georgia. It operates a single
8 retail store, located in Smyrna, Georgia, from which it sells
9 sporting goods, hunting and fishing equipment, camping supplies,
10 and firearms and ammunition. Like Mickalis Pawn, its revenue is
11 derived from sales made at its retail store to customers who
12 visit the store in person. It does not ship its goods out of
13 state, nor does it sell firearms at gun shows.

14 Adventure Outdoors has, however, maintained three
15 websites through which customers may initiate the process of
16 purchasing firearms from its store. These websites allow a
17 customer from Georgia or elsewhere in the United States to place
18 a deposit on a firearm through a wholesale distributor and direct
19 the distributor to ship the firearm to Adventure Outdoors. The
20 customer must then visit Adventure Outdoors' store in person to
21 complete the sale and retrieve the firearm. Adventure Outdoors
22 concedes that this system would permit a New York resident to
23 purchase a gun from Adventure Outdoors, but only if he or she
24 traveled to Georgia to pick it up. Adventure Outdoors has sold

1 guns to residents of other states this way, but never to a New
2 York State resident.

3 Proceedings in the District Court

4 On May 15, 2006, the City brought suit against fifteen
5 federally licensed retail firearms dealers located in states
6 other than New York, including Mickalis Pawn and Adventure
7 Outdoors, alleging that they engaged in unlawful sales practices
8 that contribute to a public nuisance in the City.³ The City

³ Mayor Michael Bloomberg announced the filing of this lawsuit at a press conference held on May 15, 2006. In response to certain allegedly defamatory comments made by the mayor at that press conference, Mickalis Pawn and Adventure Outdoors each brought suit for defamation against the mayor, the City of New York, and others, in South Carolina and Georgia state courts, respectively. Following the City's unsuccessful attempt to remove each lawsuit to federal court, see Adventure Outdoors, Inc. v. Bloomberg, 552 F.3d 1290 (11th Cir. 2008) (reversing with instructions to remand to state court); Mickalis Pawn Shop, LLC v. Bloomberg, 482 F. Supp. 2d 707 (D.S.C. 2007) (remanding case to state court), both cases proceeded in state venues. Adventure Outdoors' lawsuit was ultimately dismissed for failure to comply with certain procedural requirements of Georgia law, see Adventure Outdoors, Inc. v. Bloomberg, 705 S.E.2d 241 (Ga. Ct. App. 2010) (affirming dismissal of lawsuit), while Mickalis Pawn's lawsuit survived a motion to dismiss and, after being voluntarily dismissed and then reinstated, appears to remain pending, see Mickalis Pawn Shop, LLC v. Bloomberg, No. 06-CP-08-1734 (S.C. Ct. C.P. Berkeley County, reinstated Mar. 27, 2009). Neither litigation is at issue in these appeals.

The City of New York also brought a separate but related action in December 2006 against twelve other federally licensed retail firearms dealers on similar grounds. See City of New York v. Bob Moates' Sport Shop, Inc., No. 06-CV-6504 (E.D.N.Y.) (complaint filed Dec. 7, 2006). That litigation, which was also before Judge Weinstein, ended in 2008 after all twelve defendants settled or were dismissed. See City of New York v. Bob Moates' Sport Shop, Inc., 253 F.R.D. 237 (E.D.N.Y. 2008) (approving settlement). Like the Georgia and South Carolina state-court

1 alleged in its complaint that each of the fifteen firearms
2 dealers engages in "'strawman' purchases" that facilitate the
3 acquisition of firearms by individuals who are prohibited by law
4 from buying or possessing them.⁴ Compl. ¶ 21 (May 15, 2006).
5 Many of these illegally purchased firearms, the City alleged, are
6 used to commit crimes in the City within a short time after their
7 sale by the defendants. The City's initial complaint asserted
8 five causes of action -- public nuisance, statutory nuisance,
9 negligence, negligence per se, and negligent entrustment -- and
10 sought damages, nuisance-abatement costs, and permanent
11 injunctive relief.

12 On August 8, 2006, Mickalis Pawn, Adventure Outdoors,
13 and four other defendant firearms dealers each timely moved to
14 dismiss the complaint as to it for lack of personal jurisdiction.
15 The moving defendants asserted that the requirements of the New
16 York long-arm statute, C.P.L.R. § 302, were not satisfied; that

suits, the Bob Moates' lawsuit is not at issue in these appeals.

⁴ In a "straw" purchase, one individual buys a firearm with the purpose of transferring it to another individual who is prohibited from purchasing it himself. See City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 391 (2d Cir. 2008), cert. denied, 129 S. Ct. 1579 (2009). The stand-in, rather than the true buyer, completes the official form registering the sale, ATF Form 4473, and submits to the federally mandated background check. See United States v. Robinson, 586 F.3d 540, 541 n.1 (7th Cir. 2009). A seller who knowingly participates in a straw purchase is subject to federal criminal prosecution. See, e.g., Adventure Outdoors, Inc. v. Bloomberg, 552 F.3d 1290, 1300 (11th Cir. 2008) (collecting cases).

1 the defendants lacked the constitutionally requisite minimum
2 contacts with New York; and that the defendants never purposely
3 availed themselves of interstate commerce such that they should
4 reasonably anticipate defending a lawsuit in New York. The
5 defendants argued that requiring out-of-state retailers such as
6 themselves to litigate this action in a state with which they
7 have no connection would violate both New York law and tenets of
8 due process under the Fifth and Fourteenth Amendments.

9 On August 15, 2007, following jurisdictional discovery,
10 the district court denied the motions to dismiss in what it
11 characterized as a "case of first impression" applying the New
12 York long-arm statute to public-nuisance suits against out-of-
13 state firearms dealers. A-1 Jewelry I, 501 F. Supp. 2d at 374.
14 The court stated that the City's burden at the pleading stage was
15 not to prove personal jurisdiction conclusively, but to show a
16 "substantial likelihood that all the elements of jurisdiction"
17 could be established at trial. Id. at 416. After reviewing
18 evidence of the defendants' sales of firearms and the recovery of
19 some of those firearms in New York, the court determined that the
20 City had "demonstrated, with a high degree of probability, that
21 [the] defendants' knowing parallel conduct in their individual
22 states, relying on interstate commerce, ha[s] been responsible
23 for the funneling into New York of large quantities of handguns
24 used by local criminals to terrorize significant portions of the

1 City's population." Id. at 374. The district court concluded
2 that these allegations were "sufficient to provide the minimum
3 contacts necessary for an exercise of personal jurisdiction by
4 the State of New York," id. at 428, and to satisfy the
5 requirements of that provision of New York's long-arm statute
6 permitting jurisdiction over a person who "commits a tortious act
7 without the state causing injury to person or property within the
8 state, . . . if he . . . expects or should reasonably expect the
9 act to have consequences in the state and derives substantial
10 revenue from interstate or international commerce." N.Y.
11 C.P.L.R. § 302(a)(3)(ii). See A-1 Jewelry I, 501 F. Supp. 2d at
12 424-29. The defendants sought leave to take an interlocutory
13 appeal; the district court denied that request.

14 On August 29, 2007, the City filed an amended
15 complaint. The City substituted, for the five claims in its
16 original complaint, two claims under N.Y. Penal Law §§ 240.45 and
17 400.05 -- one each for public and statutory nuisance,
18 respectively -- and sought injunctive relief only.

19 Adventure Outdoors and Mickalis Pawn, among others,
20 again moved to dismiss based on, inter alia, lack of personal
21 jurisdiction.⁵ On December 18, 2007, the district court denied

⁵ Adventure Outdoors and Mickalis Pawn also sought dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). In the alternative, they requested a stay of litigation pending appeal in City of New York v. Beretta U.S.A. Corp., 401 F. Supp. 2d 244 (E.D.N.Y. 2005), rev'd in part, 524

1 the defendants' renewed motion in its entirety. See A-1 Jewelry
2 II, 247 F.R.D. at 305. The district court ordered an expedited
3 discovery schedule and set a trial date of May 27, 2008.

4 Mickalis Pawn's Default

5 On February 13, 2008, Larry Mickalis, the principal of
6 Mickalis Pawn, was indicted by a federal grand jury in South
7 Carolina for knowingly selling a firearm and ammunition to a
8 convicted felon in violation of 18 U.S.C. §§ 922(d)(1) and
9 924(a)(2).⁶ On February 27, Mickalis Pawn again moved to stay
10 all litigation with the City pending resolution of the criminal
11 case against Mr. Mickalis; the court denied that motion in early
12 March. See City of New York v. A-1 Jewelry & Pawn, Inc., No. 06-
13 CV-2233, 2008 WL 630483, 2008 U.S. Dist. LEXIS 16708 (E.D.N.Y.
14 Mar. 4, 2008).

15 About one week later, on March 12, 2008, each of the
16 three law firms representing Mickalis Pawn simultaneously moved
17 to withdraw as counsel, citing the indictment of Mr. Mickalis and
18 his decision to concentrate his financial resources on defending
19 himself in the criminal action. Counsel asserted in their

F.3d 384 (2d Cir. 2008), cert. denied, 129 S. Ct. 1579 (2009).
The district court denied the stay application. A-1 Jewelry II,
247 F.R.D. at 355.

⁶ By agreement with the government, Mr. Mickalis ultimately
pleaded guilty to a less serious offense: failure to properly
maintain records in violation of 18 U.S.C. §§ 922(m) and
924(a)(3)(B).

1 withdrawal motions that Mickalis Pawn would continue to assert
2 its defense of lack of personal jurisdiction and did not intend
3 to waive that defense. The City opposed the motions, arguing
4 that such withdrawal of counsel would frustrate discovery and
5 substantially delay the proceedings.

6 On March 18, the district court (Cheryl L. Pollak,
7 Magistrate Judge) held a status conference to discuss, among
8 other things, the motions of counsel to withdraw. At the
9 conference, counsel for Mickalis Pawn confirmed that their client
10 consented to their withdrawal. Counsel also announced, however,
11 that "Mickalis Pawn has decided that it does not intend to
12 further defend this case." Transcript of Proceedings at 14 (Mar.
13 18, 2008). Counsel advised the court that Mr. Mickalis, acting
14 on behalf of Mickalis Pawn, "understands that [default] is an
15 obvious consequence of his decision to no longer defend" the
16 lawsuit. Id. When the City argued that Mickalis Pawn's failure
17 to defend would lead to entry of default judgment and the
18 imposition of injunctive relief, one of Mickalis Pawn's attorneys
19 stated that his client "does understand the consequences." Id.
20 at 15.

21 At the suggestion of counsel, Mr. Mickalis then joined
22 the conference before the magistrate judge by telephone. Mr.
23 Mickalis confirmed to the court that Mickalis Pawn had no
24 intention of retaining substitute counsel or of further

1 participating in the litigation. Magistrate Judge Pollak warned
2 Mr. Mickalis: "[I]f you do not have an attorney to represent
3 Mickalis Pawn, then the City is going to move for a default and
4 because corporations cannot appear in court without counsel, a
5 default will enter. . . . [T]hat means that the injunctive
6 relief that the City has requested will in all likelihood be
7 granted." Id. at 17. Mr. Mickalis indicated that he understood
8 this, but nonetheless reaffirmed his desire to withdraw from the
9 case. When Magistrate Judge Pollak suggested that she might not
10 permit all three of Mickalis Pawn's law firms to withdraw, one of
11 Mickalis Pawn's attorneys protested that "[t]here's not a whole
12 lot to defend if [Mr. Mickalis is] prepared to go into default."
13 Id. at 18.

14 Although counsel for Mickalis Pawn conceded that
15 default was the "likely" result of its decision to withdraw, id.
16 at 22, Mickalis Pawn did not expressly consent to entry of a
17 default. But in a March 18 letter to the court, counsel for
18 Mickalis Pawn confirmed that they had advised their client "that
19 if the motions to withdraw as counsel . . . are granted[,] th[e]
20 defendant will be without counsel" and "the Court will enter
21 default judgment against it." Letter to Magistrate Judge Pollak
22 from Renzulli Law Firm, LLP (Mar. 18, 2008).

23 As a result of what the City perceived to be Mickalis
24 Pawn's acquiescence to a default, the City agreed to abandon the

1 taking of a deposition of Larry Mickalis scheduled to be held
2 shortly thereafter, as well as other pending discovery. The City
3 advised Magistrate Judge Pollak that it would seek a default
4 judgment if Mickalis Pawn's counsel's motions to withdraw were
5 granted, and the City detailed the precise injunctive relief that
6 it would request.

7 On March 27, 2008, the magistrate judge granted the
8 pending motions for withdrawal of counsel. The City then
9 formally requested that a default be entered against Mickalis
10 Pawn pursuant to Federal Rule of Civil Procedure 55(a). The
11 Clerk of Court entered the default on April 2, 2008.

12 Two months later, in June 2008, the City moved for a
13 default judgment against Mickalis Pawn pursuant to Federal Rule
14 of Civil Procedure 55(b)(2). Mickalis Pawn, putatively
15 representing itself pro se, opposed the motion by submitting a
16 list of objections. After reviewing both parties' submissions,
17 the magistrate judge issued a report and recommendation
18 suggesting that the City's motion be granted and that the City's
19 proposed findings of fact and conclusions of law be adopted in
20 their entirety. On September 19, 2008, the district court (Jack
21 B. Weinstein, Judge) adopted the magistrate judge's
22 recommendation and issued the City's proposed findings of fact
23 and conclusions of law as its own. See City of New York v. A-1

1 Jewelry & Pawn, Inc., No. 06-CV-2233, 2008 WL 4298501, 2008 U.S.
2 Dist. LEXIS 87236 (E.D.N.Y. Sept. 19, 2008).⁷

3 Default judgment against Mickalis Pawn was entered on
4 March 24, 2009. The district court also entered a permanent
5 injunction against Mickalis Pawn. See City of New York v.
6 Mickalis Pawn Shop, LLC ("Mickalis Pawn Inj."), No. 06-CV-2233,
7 2009 WL 792042, at *1 (E.D.N.Y. Mar. 23, 2009).⁸ The injunction
8 provided for, among other things, the appointment of a special
9 master and the implementation of remedial measures to abate the
10 public nuisance created by Mickalis Pawn's illegal firearms
11 sales. See id.

12 Adventure Outdoors' Default

13 Unlike Mickalis Pawn, Adventure Outdoors continued to
14 participate in the lawsuit through the close of discovery. On
15 April 29, 2008, all other defendants having either settled or
16 defaulted, Adventure Outdoors moved for summary judgment seeking
17 dismissal based on, inter alia, lack of personal jurisdiction and
18 preemption by the Protection of Lawful Commerce in Arms Act, 15
19 U.S.C. §§ 7901-7903.

⁷ The magistrate judge subsequently amended her report and recommendation on January 27, 2009. See City of New York v. Adventure Outdoors, Inc., 644 F. Supp. 2d 201, 203, 218 (E.D.N.Y. 2009) (adopting magistrate judge's amended report and recommendation as to Mickalis Pawn).

⁸ Not available on Lexis.

1 While Adventure Outdoors' summary-judgment motion was
2 pending, the district court issued an order sua sponte directing
3 the parties to make submissions as to whether they were entitled
4 to a trial by jury. Following oral argument held on May 21, the
5 district court decided that neither party was so entitled. The
6 court announced that it would sit as the finder of fact with the
7 assistance of an advisory jury, as provided by Federal Rule of
8 Civil Procedure 39(c). The following day, the district court
9 denied Adventure Outdoors' motion for summary judgment. See City
10 of New York v. A-1 Jewelry & Pawn, Inc. ("A-1 Jewelry III"), 252
11 F.R.D. 130, 131 (E.D.N.Y. 2008). The court directed that the
12 trial begin on May 27, 2008, with the selection of the advisory
13 jury.

14 On June 2, in the midst of jury selection, counsel for
15 Adventure Outdoors moved to withdraw from the case. In a written
16 submission, counsel reported that Adventure Outdoors had "chosen
17 not to engage in the futile exercise of defending itself at a
18 bench trial." Motion of Renzulli Law Firm to Withdraw as Counsel
19 ("Renzulli Withdrawal Motion") at 1 (June 2, 2008). Counsel
20 asserted that if the district court sat as factfinder, the
21 ultimate outcome of the trial would be a "foregone conclusion"
22 and Adventure Outdoors would "not receive a fair trial." Id.
23 Counsel also adverted to their client's limited financial
24 resources.

1 Counsel advised the court that Adventure Outdoors
2 nonetheless intended "to appeal from any default judgment that
3 may be entered against it." Id. Attached to the motion was a
4 declaration by Jay Wallace, the president of Adventure Outdoors,
5 attesting that he had been "informed . . . of the consequences of
6 not participating in the bench trial" and affirming that
7 Adventure Outdoors consented to counsel's withdrawal. Aff. of
8 Jay Wallace ¶ 3, Ex. 1 to Renzulli Withdrawal Motion.

9 The district court, upon hearing argument from the
10 parties, denied Adventure Outdoors' motion to withdraw its
11 counsel in light of the fact that trial was already underway.
12 The court warned that if Adventure Outdoors "refuse[d] to go
13 forward with the case," that course of conduct would "constitute
14 a default" under Federal Rule of Civil Procedure 55. Transcript
15 of Proceedings at 7 (June 2, 2008). When the district court
16 asked whether the defendant "refuse[d] to go forward with [jury]
17 selection and further proceedings" in the matter, counsel
18 responded that Adventure Outdoors indeed so refused. Id. at 10-
19 12. Counsel declined, however, to consent expressly to entry of
20 default or default judgment.

21 In light of Adventure Outdoors' refusal to proceed, the
22 City consented to dismissal of the advisory jury. The district
23 court then noted Adventure Outdoors' default on the record,
24 conditionally granted the City's motion for default judgment, and

1 directed that all further proceedings in the case be held before
2 the magistrate judge.⁹

3 Thereafter, the City and Adventure Outdoors each made
4 submissions to the magistrate judge regarding the City's motion
5 for default judgment. On January 27, 2009, the magistrate judge
6 issued her report and recommendation to the effect that a default
7 judgment be granted and that the City's proposed findings of fact
8 and conclusions of law be adopted. See City of New York v.
9 Adventure Outdoors, Inc. ("A-1 Jewelry IV"), 644 F. Supp. 2d 201,
10 203-18 (E.D.N.Y. 2009) (reproducing text of magistrate judge's
11 January 27, 2009 report and recommendation). Adventure Outdoors
12 submitted detailed objections to the magistrate judge's report
13 and recommendation.

14 On March 24, 2009, the district court adopted the
15 magistrate judge's report and recommendation in its entirety and
16 entered a default judgment against Adventure Outdoors,
17 simultaneously with the entry of default judgment against
18 Mickalis Pawn. Id. at 203. The district court also issued a
19 permanent injunction against Adventure Outdoors with terms
20 substantially identical to those of the injunction entered
21 against Mickalis Pawn. See City of New York v. Adventure

⁹ During the conference, the City raised the question whether Adventure Outdoors would be permitted to appeal from the entry of default judgment. The district court properly declined to consider the issue, explaining that the question was not for it to decide.

1 Outdoors, Inc. ("Adventure Outdoors Inj."), No. 06-CV-2233, 2009
2 WL 792023 (E.D.N.Y. Mar. 23, 2009).¹⁰

3 The defendants appeal.

4 **DISCUSSION**

5 I. Subject-Matter Jurisdiction

6 Following oral argument, we solicited supplemental
7 briefing from the parties to address the effect of the Protection
8 of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 et
9 seq., on these appeals.

10 The PLCAA, enacted by Congress in 2005, provides in
11 pertinent part that "[a] qualified civil liability action may not
12 be brought in any Federal or State court." 15 U.S.C. § 7902(a).
13 A "qualified civil liability action" is defined as "a civil
14 action or proceeding . . . brought by any person against a
15 manufacturer or seller of a qualified product^[11] . . . [arising]
16 from the criminal or unlawful misuse of a qualified product by
17 the person or a third party." Id. § 7903(5)(A) (footnote added).
18 The definition is, however, subject to several statutory
19 exclusions. A lawsuit is not barred by the PLCAA, for example,
20 if it is "an action in which a manufacturer or seller of a

¹⁰ Not available on Lexis.

¹¹ The PLCAA defines the term "qualified product" as "a
firearm . . . , including any antique firearm . . . , or
ammunition . . . , or a component part of a firearm or
ammunition, that has been shipped or transported in interstate or
foreign commerce." 15 U.S.C. § 7903(4).

1 qualified product knowingly violated a State or Federal statute
2 applicable to the sale or marketing of the product, and the
3 violation was a proximate cause of the harm for which relief is
4 sought." Id. § 7903(5)(A)(iii).

5 We previously had occasion to consider this provision,
6 which has come to be known as the "predicate exception," in City
7 of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008),
8 cert. denied, 129 S. Ct. 1579 (2009). There we upheld the
9 constitutionality of the PLCAA against challenges arising under
10 the Commerce Clause, the First and Tenth Amendments, and the
11 principle of separation of powers. See id. at 393-98. We also
12 determined, over a dissent, that N.Y. Penal Law § 240.45 was not
13 a "statute applicable to the sale or marketing of firearms" for
14 the purposes of the predicate exception. Id. at 399-404. We
15 therefore concluded that dismissal of the plaintiff's public-
16 nuisance suit against various firearms manufacturers arising
17 under section 240.45 was required. Id. at 404. We did not
18 expressly consider, however, whether the PLCAA deprived the court
19 of subject-matter jurisdiction over a "qualified civil liability
20 action."

21 In the instant appeals, we solicited supplemental
22 briefing from the parties on two questions. First, we asked them
23 to address whether the PLCAA deprives a federal court of subject-
24 matter jurisdiction over a "qualified civil liability action," or

1 if instead the PLCAA provides a complete defense against such an
2 action. Second, we asked the parties to address whether the
3 predicate exception applies only when the plaintiff pleads, as
4 its cause of action, the violation of "a State or Federal statute
5 applicable to the sale or marketing of the product," or if,
6 instead, supporting factual allegations concerning a statutory
7 violation may satisfy the predicate exception even where the
8 plaintiff's cause of action is not directly premised on the
9 identified statutory violation.

10 Federal courts have an independent obligation to
11 inquire into the existence of subject-matter jurisdiction.
12 Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). "[S]ubject-
13 matter jurisdiction, because it involves a court's power to hear
14 a case, can never be forfeited or waived." Id. (internal
15 quotation marks omitted). "Our inquiry to ascertain whether we
16 have subject matter jurisdiction ordinarily precedes our analysis
17 of the merits." Jennifer Matthew Nursing & Rehab. Ctr. v. U.S.
18 Dep't of Health & Human Servs., 607 F.3d 951, 955 (2d Cir. 2010).
19 We review the question of subject-matter jurisdiction de novo.¹²

¹² Although, in the district court proceedings, various defendants asserted that the PLCAA barred suit against them, see A-1 Jewelry II, 247 F.R.D. at 349-53; A-1 Jewelry III, 252 F.R.D. at 132, the district court did not expressly consider the question whether the PLCAA affected its subject-matter jurisdiction. In a related lawsuit, however, Judge Weinstein concluded that the PLCAA did not deprive the court of subject-matter jurisdiction, and further determined that the Supreme Court's ruling in District of Columbia v. Heller, 554 U.S. 570

1 DiTolla v. Doral Dental IPA of N.Y., 469 F.3d 271, 275 (2d Cir.
2 2006).

3 Whether a court possesses subject-matter jurisdiction,
4 and whether a plaintiff can state a claim for relief, "are two
5 questions that are easily, and often, confused." Carlson v.
6 Principal Fin. Grp., 320 F.3d 301, 305-06 (2d Cir. 2003). The
7 concept of subject-matter jurisdiction, which relates solely to
8 the court's adjudicatory authority, is analytically distinct from
9 "the essential ingredients of a [plaintiff's] claim for relief."
10 Arbaugh, 546 U.S. at 503.

11 Because "[b]randing a rule as going to a court's
12 subject-matter jurisdiction alters the normal operation of our
13 adversarial system," Henderson ex rel. Henderson v. Shinseki, 131
14 S. Ct. 1197, 1202 (2011), and "[b]ecause the consequences that
15 attach to the jurisdictional label may be so drastic," id., the
16 Supreme Court has endeavored in recent years "to bring some
17 discipline to the use of this term," id. To that end, the
18 Supreme Court has developed a bright-line test to determine
19 whether a particular statutory restriction is one that deprives a
20 court of subject-matter jurisdiction.

21 If the Legislature clearly states that a
22 threshold limitation on a statute's scope
23 shall count as jurisdictional, then courts and
24 litigants will be duly instructed and will not

(2008), did not bear on the question. See Bob Moates', 253
F.R.D. at 241-42.

1 be left to wrestle with the issue. But when
2 Congress does not rank a statutory limitation
3 on coverage as jurisdictional, courts should
4 treat the restriction as nonjurisdictional in
5 character.

6 Arbaugh, 546 U.S. at 515-16 (footnote and citation omitted).

7 Arbaugh represents a "powerful statement[] that courts should be
8 reluctant to make issues jurisdictional . . . unless statutory
9 language requires it." Zhong v. U.S. Dep't of Justice, 489 F.3d
10 126, 134 (2d Cir. 2007) (Calabresi, J., concurring in denial of
11 rehearing en banc).

12 To be sure, the Supreme Court has noted since Arbaugh
13 that "Congress . . . need not use magic words in order to speak
14 clearly," Henderson, 131 S. Ct. at 1203, and that "[c]ontext,
15 including th[e] [Supreme] Court's interpretation of similar
16 provisions in many years past, is relevant," id. (quoting Reed
17 Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1248 (2010)).

18 Nonetheless, the Court has reaffirmed Arbaugh's core holding that
19 Congress must provide a "'clear' indication that [it] want[s] [a]
20 rule to be 'jurisdictional,'" id. (quoting Arbaugh, 546 U.S. at
21 515-16), before we may recognize it as being jurisdictional.

22 Indeed, even rules that are "important and mandatory . . . should
23 not be given the jurisdictional brand" unless Congress has
24 clearly indicated otherwise. Id.; see also Union Pac. R.R. Co.
25 v. Bhd. of Locomotive Eng'rs & Trainmen Gen., 130 S. Ct. 584, 596
26 (2009).

1 We conclude that the PLCAA's bar on "qualified civil
2 liability action[s]," 15 U.S.C. § 7902(a), does not deprive
3 courts of subject-matter jurisdiction. The language of the PLCAA
4 "'does not speak in jurisdictional terms or refer in any way to
5 the jurisdiction of the [district courts].'" Henderson, 131 S.
6 Ct. at 1204 (quoting Zipes v. Trans World Airlines, Inc., 455
7 U.S. 385, 394 (1982)). Instead, it provides only that "[a]
8 qualified civil liability action may not be brought in any
9 Federal or State court." 15 U.S.C. § 7902(a). Although the
10 phrase "may not be brought" suggests absence of jurisdiction, the
11 phrase is not equivalent to a clear statement of Congress's
12 intent to limit the power of the courts rather than the rights of
13 litigants. Henderson, 131 S. Ct. at 1203. In the absence of
14 such a clear statement, we must treat the PLCAA as speaking only
15 to the rights and obligations of the litigants, not to the power
16 of the court. Compare, e.g., Reed Elsevier, 130 S. Ct. at 1245
17 (concluding that Copyright Act registration requirement, 17
18 U.S.C. § 411(a), did not implicate subject-matter jurisdiction
19 because the statute did not "clearly state" that the requirement
20 was jurisdictional), with Rockwell Int'l Corp. v. United States,
21 549 U.S. 457, 463, 467-68 (2007) (determining that False Claims
22 Act, former 31 U.S.C. § 3730(e)(4)(A), was jurisdictional insofar
23 as it declared that "[n]o court shall have jurisdiction over an
24 action under this section" unless a specified condition applies),

1 superseded by statute, Patient Protection and Affordable Care
2 Act, Pub. L. No. 111-148, § 10104(j)(2) (codified as amended at
3 31 U.S.C. § 3730(e)(4)(A)). We therefore conclude that the PLCAA
4 did not divest the district court of subject-matter jurisdiction
5 over this dispute.¹³

6 Having determined that we possess subject-matter
7 jurisdiction, we would, in the ordinary course, proceed to
8 consider whether the City's lawsuit is nonetheless barred by the
9 PLCAA. In this case, however, the defendants did not fully
10 litigate their defenses under the PLCAA, but instead withdrew
11 from the litigation, defaulted, and suffered a default judgment
12 to be entered against them. We accordingly inquire not whether
13 the City's lawsuit was barred by the PLCAA, but rather, whether
14 the district court abused its discretion in entering a default
15 judgment against the defendants.

16 We have considered the parties' other arguments
17 concerning lack of subject-matter jurisdiction and conclude that
18 they are without merit.

¹³ Subject-matter jurisdiction over this litigation is founded on diversity of citizenship pursuant to 28 U.S.C. § 1332. We note that, although the parties appear to have misapprehended the test for determining the citizenship of a limited-liability company, see Handelsman v. Bedford Vill. Assocs. Ltd. P'ship, 213 F.3d 48, 51-52 (2d Cir. 2000), the record before us supports the conclusion that there is complete diversity of citizenship among the parties to these appeals.

1 II. Entry of Default Judgment

2 The procedural posture of these appeals is in some
3 respects unusual. Adventure Outdoors and Mickalis Pawn did not,
4 for example, move before the district court to vacate or set
5 aside the default judgment, as is permitted by Federal Rules of
6 Civil Procedure 55(c) and 60(b).¹⁴ Instead, they appealed
7 directly from the entry of judgment. "[I]t is possible, although
8 unusual, for defendants to skip the motion to vacate the default
9 judgment and instead directly appeal the entry of a default
10 judgment." Pecarsky v. Galaxiworld.com Ltd., 249 F.3d 167, 170-
11 71 (2d Cir. 2001); see also Swarna v. Al-Awadi, 622 F.3d 123, 140
12 (2d Cir. 2010) ("[A] default judgment, like any other judgment,
13 can be appealed to this Court."). As a technical matter,
14 therefore, we review not whether the district court abused its
15 discretion in declining to vacate the default judgment, but
16 whether it abused its discretion in granting a default judgment
17 in the first instance. See Swarna, 622 F.3d at 133; Pecarsky,
18 249 F.3d at 171; cf. Paddington Partners v. Bouchard, 34 F.3d
19 1132, 1147 (2d Cir. 1994) (collecting cases distinguishing

¹⁴ Rule 55(c) provides that "[t]he court may . . . set aside a default judgment under Rule 60(b)." Fed. R. Civ. P. 55(c). Rule 60(b), in turn, identifies six grounds for relief from a final judgment, including mistake or excusable neglect; newly discovered evidence; fraud; voidness; satisfaction of judgment; or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1)-(6).

1 appellate review of the denial of a Rule 60(b) motion from review
2 of the merits of the underlying judgment itself).

3 "Federal Rule of Civil Procedure 55 is the basic
4 procedure to be followed when there is a default in the course of
5 litigation." Vt. Teddy Bear Co. v. 1-800 Beargram Co., 373 F.3d
6 241, 246 (2d Cir. 2004). Rule 55 provides a "two-step process"
7 for the entry of judgment against a party who fails to defend:
8 first, the entry of a default, and second, the entry of a default
9 judgment. New York v. Green, 420 F.3d 99, 104 (2d Cir. 2005).

10 The first step, entry of a default, formalizes a
11 judicial recognition that a defendant has, through its failure to
12 defend the action, admitted liability to the plaintiff. The
13 entry of default is governed by Rule 55(a), which provides:

14 When a party against whom a judgment for
15 affirmative relief is sought has failed to
16 plead or otherwise defend, and that failure is
17 shown by affidavit or otherwise, the clerk
18 must enter the party's default.

19 Fed. R. Civ. P. 55(a). Although Rule 55(a) contemplates that
20 entry of default is a ministerial step to be performed by the
21 clerk of court, see Pinaud v. Cnty. of Suffolk, 52 F.3d 1139,
22 1152 n.11 (2d Cir. 1995) (describing "the entry of a default" as
23 "largely a formal matter" (internal quotation marks omitted)), a
24 district judge also possesses the inherent power to enter a
25 default, see Beller & Keller v. Tyler, 120 F.3d 21, 22 n.1 (2d
26 Cir. 1997). The entry of a default, while establishing

1 liability, "is not an admission of damages."¹⁵ Finkel v.
2 Romanowicz, 577 F.3d 79, 83 n.6 (2d Cir. 2009).

3 The second step, entry of a default judgment, converts
4 the defendant's admission of liability into a final judgment that
5 terminates the litigation and awards the plaintiff any relief to
6 which the court decides it is entitled, to the extent permitted
7 by Rule 54(c).¹⁶ Under Rule 55(b), a default judgment ordinarily
8 must be entered by the district judge, rather than by the clerk
9 of court, except in certain circumstances provided for by the
10 rule and not present here.¹⁷ A district court is empowered under
11 Rule 55(b)(2), in the exercise of its discretion, to "conduct
12 hearings or make referrals" as may be necessary, inter alia, to
13 determine the amount of damages or establish the truth of the

¹⁵ A defaulted defendant may move before the district court to be relieved of its default, and the court "may set aside an entry of default for good cause." Fed. R. Civ. P. 55(c). Because the entry of default is an "interlocutory act and, as such, a non-final order," however, "[i]t is therefore not appealable" directly. Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 95 (2d Cir. 1993).

¹⁶ Rule 54(c) provides that "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c); see Silge v. Merz, 510 F.3d 157, 161 (2d Cir. 2007).

¹⁷ Rule 55(b)(1) permits entry of judgment by the clerk of court, without involvement of a judge, in circumstances where "the plaintiff's claim is for a sum certain and the defendant has failed to appear and is not an infant or incompetent person." Green, 420 F.3d at 104. Rule 55(b)(2) governs "[i]n all other cases," id. (internal quotation marks omitted), including this one.

1 plaintiff's allegations. Fed. R. Civ. P. 55(b)(2)(B)-(C). "A
2 default judgment is a final action by the district court in the
3 litigation [and] one that may be appealed." Enron Oil Corp. v.
4 Diakuhara, 10 F.3d 90, 95 (2d Cir. 1993).

5 Because we have "a strong preference for resolving
6 disputes on the merits," and because "a default judgment is the
7 most severe sanction which the court may apply," Green, 420 F.3d
8 at 104 (internal quotation marks omitted), we have characterized
9 a district court's discretion in proceeding under Rule 55 as
10 "circumscribed." Enron Oil Corp., 10 F.3d at 95; see also State
11 St. Bank & Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d
12 158, 168 (2d Cir. 2004) ("Default judgments 'are generally
13 disfavored and are reserved for rare occasions.'" (quoting Enron
14 Oil Corp., 10 F.3d at 96)), cert. denied, 543 U.S. 1177 (2005).

15 A. Entry of Default Under Rule 55(a)

16 "In an appeal from a default judgment, the court may
17 review both the interlocutory entry of default and the final
18 [default] judgment." Enron Oil Corp., 10 F.3d at 95.

19 The defendants argue that the district court abused its
20 discretion by treating their withdrawal from the litigation as a
21 basis for entering default against them. They assert that
22 because over the course of several years they appeared in the
23 litigation, repeatedly moved to dismiss, eventually filed an
24 answer, and vigorously defended themselves in discovery, they did
25 not "fail[] to plead or otherwise defend" within the meaning of

1 Rule 55(a). They argue that Rule 55(a) therefore did not apply,
2 and that the City was required to proceed to trial and prove its
3 case, including the existence of personal jurisdiction over the
4 defendants, by a preponderance of the evidence.

5 We disagree. To be sure, the "typical Rule 55 case [is
6 one] in which a default has entered because a defendant failed to
7 file a timely answer." Brock v. Unique Racquetball & Health
8 Clubs, Inc., 786 F.2d 61, 64 (2d Cir. 1986). Nonetheless, a
9 district court is also empowered to enter a default against a
10 "defendant [that] has failed to . . . 'otherwise defend.'" Id.
11 (quoting Fed. R. Civ. P. 55(a)).

12 We have embraced a broad understanding of the phrase
13 "otherwise defend." For example, in Brock, we concluded that a
14 default was properly entered when the defendant, having
15 demonstrated a lack of diligence during pre-trial proceedings,
16 sought and received a mid-trial adjournment, but then failed to
17 appear when the trial resumed. Id. at 63-65. We observed that
18 "a trial judge, responsible for the orderly and expeditious
19 conduct of litigation, must have broad latitude to impose the
20 sanction of default for non-attendance occurring after a trial
21 has begun." Id. at 64.

22 Similarly, in Au Bon Pain Corp. v. Artect, Inc., 653
23 F.2d 61 (2d Cir. 1981), we concluded that a defendant's
24 obstructionist litigation tactics, including "failing to appear
25 for a deposition, dismissing counsel, giving vague and

1 unresponsive answers to interrogatories, and failing to appear
2 for trial[,] were sufficient to support a finding that [the
3 defendant] had 'failed to plead or otherwise defend' under
4 Federal Rule of Civil Procedure 55." Id. at 65; see also Cotton
5 v. Slone, 4 F.3d 176, 179, 181 (2d Cir. 1993) (affirming entry of
6 default judgment against an individual defendant who, following
7 discovery, withdrew his counsel and refused to comply with a
8 court order requiring submission of a pretrial memorandum).

9 And in Eagle Associates v. Bank of Montreal, 926 F.2d
10 1305 (2d Cir. 1991), we decided that because the defendant, a
11 limited partnership, had willfully disregarded the district
12 court's order that the defendant appear through counsel, the
13 court was justified in imposing default. "Such cavalier
14 disregard for a court order is a failure, under Rule 55(a), to
15 'otherwise defend as provided by these rules.'" Id. at 1310
16 (internal quotation marks omitted); see also Grace v. Bank Leumi
17 Trust Co. of N.Y., 443 F.3d 180, 192 (2d Cir. 2006) (noting that
18 a default judgment may be entered against a corporation that
19 fails to appear through counsel), cert. denied, 549 U.S. 1114
20 (2007); Dow Chem. Pac. Ltd. v. Rascator Mar. S.A., 782 F.2d 329,
21 334-36 (2d Cir. 1986) (same); SEC v. Research Automation Corp.,
22 521 F.2d 585, 589 (2d Cir. 1975) (same); Shapiro, Bernstein & Co.
23 v. Cont'l Record Co., 386 F.2d 426, 427 (2d Cir. 1967) (per
24 curiam) (same).

1 We also find persuasive the Third Circuit's analysis in
2 Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912 (3d Cir. 1992).
3 There, the district court entered a default judgment against
4 defendants who had failed to comply with discovery orders and to
5 appear for trial. On appeal, the defendants protested -- as
6 Adventure Outdoors and Mickalis Pawn do here -- that "Rule 55
7 cannot be used to impose a default against a defendant who has
8 filed an answer and actively litigated during pretrial
9 discovery." Id. at 917.

10 The Court of Appeals affirmed. It decided that the
11 plain meaning of the phrase "otherwise defend" was broad enough
12 to support entry of default even after a defendant had filed an
13 answer asserting affirmative defenses. Id. Relying upon our
14 decisions in Brock and Au Bon Pain, as well as similar decisions
15 in three other circuits, the Third Circuit concluded that "the
16 district court's power to maintain an orderly docket justifies
17 the entry of a default against a party who fails to appear at
18 trial" or to "meet other required time schedules." Id. at 918.

19 We similarly conclude that the district court did not
20 abuse its discretion in entering a Rule 55(a) default against
21 either Adventure Outdoors or Mickalis Pawn.

22 First, each defendant affirmatively signaled to the
23 district court its intention to cease participating in its own
24 defense, even after the defendant was clearly warned that a

1 default would result. The defendants' refusal to proceed to
2 trial places this case squarely within our rulings in Brock and
3 Au Bon Pain.

4 Second, in the case of Mickalis Pawn, a Rule 55(a)
5 default was also proper under Eagle Associates and like cases
6 insofar as this defendant withdrew its counsel without retaining
7 a substitute. See Lattanzio v. COMTA, 481 F.3d 137, 140 (2d Cir.
8 2007) (per curiam) ("[A] limited liability company . . . may
9 appear in federal court only through a licensed attorney.").

10 Finally, both defendants clearly indicated that they
11 were aware that their conduct likely would result in a default.

12 In arguing that the district court nonetheless erred by
13 entering a default, both Adventure Outdoors and Mickalis Pawn
14 rely on a Fifth Circuit case from 1949: Bass v. Hoagland, 172
15 F.2d 205 (5th Cir.), cert. denied, 338 U.S. 816 (1949). There, a
16 split panel of the Fifth Circuit decided that a default could not
17 be entered against a defendant who had failed to appear for
18 trial. The court concluded that "[t]he words 'otherwise defend'
19 refer to attacks on the service, or motions to dismiss, or for
20 better particulars, and the like." Id. at 210. In the court's
21 view, these words did not refer to circumstances in which a
22 defendant filed an answer and only later failed to appear in

1 court. Id. But this interpretation¹⁸ of Rule 55 has not been
2 embraced by this Court. See Brock, 786 F.2d at 64; Au Bon Pain,
3 653 F.2d at 65. Nor has it found favor in a majority of our
4 sister circuits. See, e.g., Goldman, Antonetti, Ferraiuoli,
5 Axtmayer & Hertell v. Medfit Int'l, Inc., 982 F.2d 686, 692-93
6 (1st Cir. 1993); Hoxworth, 980 F.2d at 918 (3d Cir. 1992)

¹⁸ Adventure Outdoors and Mickalis Pawn note that several leading treatises approve of Bass's logic. For example, Wright & Miller, following Bass, counsel that once a defendant has "participated throughout the pretrial process and has filed a responsive pleading," any failure by the defendant to appear thereafter should not result in a concession of liability, but rather, "the court should require plaintiff to present evidence supporting liability . . . and a judgment should be entered in plaintiff's favor only if the evidence supports it." 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2682, at 18 (3d ed. 1998). Likewise, Moore's Federal Practice, identifying a circuit split concerning whether a defendant's failure to defend after the pleadings stage can be grounds for a Rule 55(a) default, concludes that "[t]he better view is that Rule 55(a)'s 'otherwise defend' language may not be extended to justify a default once there has been an initial responsive pleading or an initial action that constitutes a defense." 10-55 James Wm. Moore et al., Moore's Federal Practice § 55.11[2][b][iii]; see also Am. Jur. 2d Judgments § 263. However, these authorities do not reflect the law of this Circuit by which we are bound.

The defendants also rely on a dictum from our more recent decision in D.H. Blair & Co. v. Gottdiener, 462 F.3d 95 (2d Cir. 2006). There, we reviewed whether it was appropriate for a district court to enter a default judgment against a party who failed to respond to a petition under the Federal Arbitration Act to confirm an arbitration award. We decided that it was not. We observed, in passing, that "Rule 55 is meant to apply to 'civil actions' where only the first step has been taken -- i.e., the filing of a complaint -- and the court thus has only allegations and no evidence before it." Id. at 107. Although this statement supports the view that Rule 55 should not apply after the pleadings stage, it is a dictum and does not -- it cannot -- overrule our existing precedent to the contrary.

1 (expressly declining to follow Bass); Home Port Rentals, Inc. v.
2 Ruben, 957 F.2d 126, 133 (4th Cir.), cert. denied, 506 U.S. 821
3 (1992); Ackra Direct Mktg. Corp. v. Fingerhut Corp., 86 F.3d 852,
4 856 (8th Cir. 1996); Ringgold Corp. v. Worrall, 880 F.2d 1138,
5 1141-42 (9th Cir. 1989) (per curiam). But see Seven Elves, Inc.
6 v. Eskenazi, 635 F.2d 396, 400 n.2 (5th Cir. 1981) ("Although
7 Bass has been criticized . . . it nevertheless remains as binding
8 precedent in this circuit." (citation omitted)); Solaroll Shade &
9 Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1134 (11th
10 Cir. 1986) ("If the defendant has answered the complaint but
11 fails to appear at trial, issue has been joined, and the court
12 cannot enter a [Rule 55] default judgment.").

13 B. Entry of Default Judgment Under Rule 55(b)(2)

14 Our review of whether the default judgment was properly
15 granted by the district court is for abuse of discretion. See
16 Swarna, 622 F.3d at 133; Pecarsky, 249 F.3d at 171. We also
17 review for abuse of discretion a district court's decision
18 concerning the extent and scope of evidentiary proceedings, if
19 any, held prior to its entry of such a judgment. Finkel, 577
20 F.3d at 87; Enron Oil Corp., 10 F.3d at 95; see Fed. R. Civ. P.
21 55(b)(2) (providing that "[t]he court may conduct hearings or
22 make referrals" prior to entering judgment).

23 The defendants argue that the district court abused its
24 discretion in entering the default judgment for three principal

1 reasons. First, Mickalis Pawn argues that the Rule 55
2 proceedings were beset by procedural irregularities. Second,
3 both defendants argue that the district court erred by failing to
4 make specific factual findings by a preponderance of the evidence
5 that personal jurisdiction existed. Third, in response to our
6 request for supplemental briefing, they assert that the
7 plaintiff's claims are barred by the PLCAA.

8 1. Procedural Irregularities and Rule 55(b)(2). "A
9 default judgment may be considered void if the judgment has been
10 entered in a manner inconsistent with due process of law." State
11 Street Bank & Trust Co., 374 F.3d at 178 (internal quotation
12 marks omitted). Even after a defendant has defaulted, the
13 defendant is nonetheless "entitled . . . to be heard concerning
14 the nature and details of the judgment to be entered." Brock,
15 786 F.2d at 65. And Rule 55(b)(2) provides that "[i]f the party
16 against whom a default judgment is sought has appeared" at any
17 point in the litigation, that party is entitled to seven days'
18 written notice of the proceeding at which default judgment may be
19 entered. Fed. R. Civ. P. 55(b)(2).

20 Mickalis Pawn contends that the Rule 55(b)(2)
21 proceedings were conducted in a manner violative of the Due
22 Process Clause because, it says, the default judgment against it
23 resulted from a "series of ex parte acts." Opening Br. of
24 Mickalis Pawn at 8. It observes that, after its three law firms

1 collectively withdrew from the case in March 2008, it no longer
2 was able to receive automatic notification through the electronic
3 case filing system of docket activity in the case. Mickalis Pawn
4 contends that all such filings by the district court or by the
5 City made after March 2008 were "ex parte" to the extent that
6 Mickalis Pawn was not simultaneously sent a copy of those filings
7 by mail, as the district court had previously ordered must be
8 done.

9 But Mickalis Pawn does not assert that it was deprived
10 of actual notice as to any of these filings. To the contrary,
11 the record reflects that both Mickalis Pawn and Adventure
12 Outdoors not only had notice of, but actively participated in,
13 each stage of the Rule 55 proceedings before the district court.
14 For example, they each filed objections to the City's proposed
15 findings of fact and to the magistrate judge's successive reports
16 recommending that the City's motions for default judgment be
17 granted.¹⁹ In Mickalis Pawn's case, the district court accepted
18 those submissions even though Mickalis Pawn -- a limited
19 liability company which cannot appear except through counsel, see
20 Lattanzio, 481 F.3d at 140 -- purported to file them in a pro se

¹⁹ Adventure Outdoors filed its own proposed findings of fact and conclusions of law in opposition to those submitted by the City. The magistrate judge considered Adventure Outdoors' submissions in preparing her report and recommendation. See A-1 Jewelry IV, 644 F. Supp. 2d at 208-09 (describing Adventure Outdoors' proposed findings and conclusions).

1 capacity. Because the alleged irregularities relied upon by
2 Mickalis Pawn did not deprive it of notice and an opportunity to
3 be heard, we conclude that the district court did not abuse its
4 discretion in entering a default judgment pursuant to Rule
5 55(b)(2), notwithstanding Mickalis Pawn's complaints concerning
6 inconsistencies in the methods of service employed.²⁰

7 2. Personal Jurisdiction and Rule 55(b)(2). The
8 defendants argue that the district court erred by failing to make
9 findings, based on a preponderance of the evidence, that the
10 court had personal jurisdiction over each defendant. Both
11 defendants contend that such findings are a procedural
12 prerequisite to entering default judgment under Rule 55(b)(2).
13 And Mickalis Pawn argues that it was "a per se abuse of
14 discretion" not to have done so. Reply Br. of Mickalis Pawn at
15 24-25. The defendants also assert that they did not intend to
16 abandon their objections to the district court's exercise of
17 personal jurisdiction upon their default. They point out that
18 they continued to press their jurisdictional defense in their

²⁰ We also reject Mickalis Pawn's contention that the proceedings were procedurally improper because the City, after having indicated to Mickalis Pawn that it would seek a default judgment under Rule 55(b)(2), instead first sought entry of default under Rule 55(a). Because Rule 55 contemplates a "two-step process" beginning with entry of default under Rule 55(a), Green, 420 F.3d at 104, the City acted properly in first seeking entry of default before moving for default judgment.

1 submissions to the district court and magistrate judge throughout
2 the Rule 55 proceedings.

3 "[B]efore a court grants a motion for default judgment,
4 it may first assure itself that it has personal jurisdiction over
5 the defendant." Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading
6 Corp., 619 F.3d 207, 213 (2d Cir. 2010). We have, however, left
7 open the question "whether a district court must investigate its
8 personal jurisdiction over defendant before entering a default
9 judgment." Id. at 213 n.7 (emphasis in original). But see
10 Credit Lyonnais Sec. (USA), Inc. v. Alcantara, 183 F.3d 151, 154
11 (2d Cir. 1999) (vacating default judgment and instructing
12 district court to determine whether the plaintiffs could "prove
13 the jurisdictional facts by a preponderance of the evidence").
14 Several of our sister circuits appear to impose such a
15 requirement. See, e.g., Mwani v. bin Laden, 417 F.3d 1, 6-7
16 (D.C. Cir. 2005); Sys. Pipe & Supply, Inc. v. M/V Viktor
17 Kurnatovskiy, 242 F.3d 322, 324 (5th Cir. 2001); In re Tuli, 172
18 F.3d 707, 712 (9th Cir. 1999); Dennis Garberg & Assocs., Inc. v.
19 Pack-Tech Int'l Corp., 115 F.3d 767, 772 (10th Cir. 1997).

20 Personal jurisdiction, unlike subject-matter
21 jurisdiction, can, however, be purposely waived or inadvertently
22 forfeited. "Because the requirement of personal jurisdiction
23 represents first of all an individual right, it can, like other
24 such rights, be waived." Ins. Corp. of Ireland v. Compagnie des

1 Bauxites de Guinee, 456 U.S. 694, 703 (1982); see also id. at 706
2 (cautioning that there is nothing "unique about the requirement
3 of personal jurisdiction, which prevents it from being
4 established or waived like other rights"); Sinoying Logistics,
5 619 F.3d at 213; "R" Best Produce, Inc. v. DiSapio, 540 F.3d 115,
6 123 (2d Cir. 2008); Transaero, Inc. v. La Fuerza Aerea Boliviana,
7 162 F.3d 724, 729 (2d Cir. 1998), cert. denied, 526 U.S. 1146
8 (1999). Therefore, "a district court should not raise personal
9 jurisdiction sua sponte when a defendant has appeared and
10 consented, voluntarily or not, to the jurisdiction of the court."
11 Sinoying Logistics, 619 F.3d at 213 (emphasis in original).

12 " [I]n determining whether waiver or forfeiture of
13 objections to personal jurisdiction has occurred, 'we consider
14 all of the relevant circumstances.'" Mattel, Inc. v. Barbie-
15 Club.com, 310 F.3d 293, 307 (2d Cir. 2002) (quoting Hamilton v.
16 Atlas Turner, Inc., 197 F.3d 58, 61 (2d Cir. 1999), cert. denied,
17 530 U.S. 1244 (2000)). It is well established that a party
18 forfeits its defense of lack of personal jurisdiction by failing
19 timely to raise the defense in its initial responsive pleading.
20 See Fed. R. Civ. P. 12(h). But there are "various [additional]
21 reasons a defendant may be estopped from raising the issue."
22 Ins. Corp. of Ireland, 456 U.S. at 704. A court will obtain,
23 through implied consent, personal jurisdiction over a defendant
24 if "[t]he actions of the defendant [during the litigation] . . .

1 amount to a legal submission to the jurisdiction of the court,
2 whether voluntary or not." Id. at 704-05; see also Peterson v.
3 Highland Music, Inc., 140 F.3d 1313, 1318 (9th Cir.) ("Most
4 defenses, including the defense of lack of personal jurisdiction,
5 may be waived as a result of the course of conduct pursued by a
6 party during litigation."), cert. denied, 525 U.S. 983 (1998).
7 For example, we have held that a defendant that asserted a
8 jurisdictional defense in its answer, but failed actively to
9 litigate that defense until four years later, forfeited the
10 defense by forgoing the opportunity to raise it sooner.
11 Hamilton, 197 F.3d at 60-62; accord Cont'l Bank, N.A. v. Meyer,
12 10 F.3d 1293, 1297 (7th Cir. 1993); Yeldell v. Tutt, 913 F.2d
13 533, 538-39 (8th Cir. 1990).

14 In addition, other circuits have held that a defendant
15 who unsuccessfully raises a jurisdictional objection at the
16 outset, but later creates the impression that he has abandoned
17 it, may not seek to renew his jurisdictional argument on appeal
18 following an adverse determination on the merits. See Rice v.
19 Nova Biomed. Corp., 38 F.3d 909, 914-15 (7th Cir. 1994), cert.
20 denied, 514 U.S. 1111 (1995); see also Peterson, 140 F.3d at 1318
21 (9th Cir.) (describing this strategy as "sandbagging").

22 We find the analysis of the Seventh Circuit in e360
23 Insight v. Spamhaus Project, 500 F.3d 594 (7th Cir. 2007),
24 helpful. There, the defendant removed the lawsuit from state

1 court and then filed an answer asserting, among other defenses,
2 lack of personal jurisdiction. One month later, at a pre-trial
3 status conference, it moved to withdraw its answer and to
4 withdraw its counsel from the litigation. It also announced,
5 through counsel, that it "want[ed] to participate in the defense
6 no further" and would "do absolutely nothing" in the litigation.
7 Id. at 596. The district court responded that the defendant
8 would "have to defend the case," otherwise it would lose by
9 default. Id. The defendant's counsel represented that his
10 client had "been fully informed of the fact that . . . default
11 judgment is a real possibility," and that it was "aware of that
12 and [was] prepared to take that risk." Id. The court, acting on
13 the understanding that counsel had informed the defendant that
14 "it was a dead-bang certainty that default [was] going to be
15 entered," granted the defendant's motions to withdraw its answer
16 and withdraw counsel. Id. at 597. The court then entered a
17 default, and upon the plaintiff's motion, granted a default
18 judgment three weeks later. Id.

19 The defendant timely moved to vacate the judgment
20 pursuant to Rule 60(b). The motion was denied. The defendant
21 then appealed, arguing that the district court had acted
22 improperly by not inquiring into the existence of personal
23 jurisdiction prior to entering judgment. Id. at 598.

1 The Seventh Circuit rejected the defendant's argument
2 and affirmed the entry of a default judgment. It "s[aw] no
3 reason to require the district court to raise sua sponte
4 affirmative defenses, which may, of course, be waived or
5 forfeited, on behalf of an appearing party who elects not to
6 pursue those defenses for itself." Id. at 599. The court
7 continued:

8 We perceive no error in the district court's
9 conclusion that [the defendant] Spamhaus
10 intentionally elected to abandon its available
11 defenses when it withdrew those defenses from
12 consideration by the court and indicated that
13 it was prepared to accept a default.
14 Spamhaus' then-counsel confirmed that it
15 wished to "participate in the defense no
16 further" and "do absolutely nothing." It was
17 not erroneous to treat this kind of voluntary
18 abandonment of defenses, raised but not
19 pursued, as a waiver. Based on its conduct
20 before the court, we have no doubt that
21 Spamhaus understood the defenses available to
22 it, consistently asserted those defenses in
23 the early stages of those proceedings and then
24 affirmatively elected to abandon those
25 defenses before the district court. We see no
26 reason to allow Spamhaus to escape the
27 consequences of that decision in the later
28 stages of this proceeding.

29 Id. at 600 (citations omitted). The court concluded that
30 "[b]ecause the jurisdictional challenges Spamhaus now seeks to
31 raise have been waived and neither the district court nor this
32 court has the duty to resurrect them, the district court did not
33 abuse its discretion in entering judgment of liability nor in
34 denying the motion for Rule 60(b) relief." Id. at 602.

1 Similarly, in this case, Adventure Outdoors and
2 Mickalis Pawn initially litigated their jurisdictional defense,
3 but later changed course, announcing to the district court that
4 they would cease defending even though a default would likely
5 result. Spamhaus Project is persuasive authority for the
6 proposition that a defendant forfeits its jurisdictional defense
7 if it appears before a district court to press that defense but
8 then willfully withdraws from the litigation and defaults, even
9 after being warned of the consequences of doing so. We, like the
10 Seventh Circuit, "see no reason to require the district court to
11 raise sua sponte" the defense of lack of personal jurisdiction on
12 behalf of parties who have "elect[ed] not to pursue those
13 defenses for [themselves]." ²¹ Id. at 599.

²¹ The defendants attempt to distinguish Spamhaus Project on two bases. First, Adventure Outdoors argues that default judgments are not disfavored in the Seventh Circuit, as they are here, citing Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc., 28 F.3d 42, 47 (7th Cir. 1994). But nothing in Spamhaus Project suggests that its reasoning concerning forfeiture depended on whether default judgments were or were not disfavored. And there is some question as to whether that attitude, if it existed in 1994, prevails today. See Sun v. Bd. of Trustees of Univ. of Ill., 473 F.3d 799, 811 (7th Cir.), cert. denied, 127 S. Ct. 2941 (2007).

Second, the defendants point out that in Spamhaus Project, the defendant withdrew its answer before defaulting, whereas in the instant case, neither defendant withdrew its answer or had it stricken by the district court. Again, nothing in Spamhaus Project suggests that the ministerial step of withdrawing the answer was relevant to the court's finding of forfeiture. Neither does anything in our own precedent suggest that a district court must "strike" a defendant's answer before declaring that defendant to be in default. Cf., e.g., Cotton, 4 F.3d at 178-79; Brock, 786 F.2d at 64; Au Bon Pain, 653 F.2d at

1 Arguing otherwise, the defendants rely on D.H. Blair &
2 Co. v. Gottdiener, 462 F.3d 95 (2d Cir. 2006). There, the
3 district court entered a Rule 55 default judgment against a group
4 of defendants who, after removing to federal court the
5 plaintiff's petition to confirm in part and vacate in part an
6 arbitral award, failed to answer the petition. We vacated the
7 judgment and remanded, instructing the district court to decide
8 whether the plaintiff was entitled to the relief it sought
9 notwithstanding the defendants' failure to answer the petition.
10 We decided that "[w]hen a court has before it [an extensive
11 evidentiary] record, rather than only the allegations of one
12 party found in complaints, the judgment the court enters should
13 be based on the record." Id. at 109.

14 The defendants argue by analogy that the district court
15 should not have granted the City's motion for default judgment
16 here without first determining that sufficient evidence existed
17 in the record to sustain a finding of personal jurisdiction by a
18 preponderance of the evidence. The analogy does not hold. D.H.
19 Blair concerned a unique, quasi-appellate proceeding: a petition
20 to confirm or vacate an arbitration award pursuant to the Federal
21 Arbitration Act. See 9 U.S.C. § 9 (permitting parties to an

65 (all upholding default judgments entered against an appearing
defendant, without noting if the defendant's answer had been
stricken prior to entry of default).

1 arbitration to "apply to the court . . . for an order confirming
2 the award"); id. § 10(a) (permitting parties to petition for
3 vacatur of an arbitral award). In considering a petition to
4 confirm or vacate an arbitral award, a district court typically
5 has at its disposal the full evidentiary record from the
6 underlying arbitration. We concluded in D.H. Blair that "default
7 judgments in confirmation/vacatur proceedings are generally
8 inappropriate," D.H. Blair, 462 F.3d at 109, and therefore held
9 that district courts should instead treat a petitioner's
10 application to confirm or vacate an arbitral award as "akin to a
11 motion for summary judgment," id. This case, unlike D.H. Blair,
12 does not concern proceedings under the Federal Arbitration Act,
13 nor does it concern a scenario in which a court is presented with
14 a complete evidentiary record from a prior proceeding.

15 Adventure Outdoors also asserts that our decision in
16 Brock demonstrates that a plaintiff seeking a default judgment
17 must prove its case -- including the existence of personal
18 jurisdiction -- by a preponderance of the evidence, even after a
19 defendant has defaulted. In Brock, the defendants failed to re-
20 appear at trial following a two-week adjournment. The district
21 court entered a default against the defendants, but then opted to
22 complete the trial record by taking testimony from the
23 plaintiff's witnesses. The court eventually entered a default
24 judgment accompanied by findings of fact and conclusions of law.
25 On appeal, we vacated and remanded for further proceedings. See

1 Brock, 786 F.2d at 63. Adventure Outdoors contends that Brock
2 should be read as requiring that a trial be held prior to entry
3 of default judgment.

4 Although Brock did result in the vacatur of a default
5 judgment on appeal, it does not support Adventure Outdoors'
6 argument. There, we remanded not for the district court to
7 adjudicate the merits of the defendants' defenses, but to permit
8 the defendants to be heard concerning the "nature and details of
9 the judgment to be entered in light of th[e] trial record" and
10 the scope of the relief requested by the plaintiff. Id. at 65.
11 Although it is true that the district court in Brock had opted to
12 continue the trial proceedings following the defendants' default,
13 nothing in our decision on appeal ratified the district court's
14 decision in that respect.²² See id.

²² Although the parties do not advert to it, we have also reviewed our decision in Credit Lyonnais Securities (USA), Inc. v. Alcantara, 183 F.3d 151 (2d Cir. 1999). In that case, the defendant failed to answer the complaint but later contested the entry of default judgment against it, and we held that the district court was bound to inquire into personal jurisdiction before entering judgment.

The defendants' appearance and withdrawal from the proceedings in this case, by contrast, forfeited their defense. Through that forfeiture, the defendants implicitly, if unwittingly, established the jurisdiction of the district court. Accordingly, the district court did not err by failing to make a final finding of jurisdiction by a preponderance of the evidence. See, e.g., Sinoying, 619 F.3d at 213 ("[A] district court should not raise personal jurisdiction sua sponte when a defendant has appeared and consented, voluntarily or not, to the jurisdiction of the court."). We therefore do not find Credit Lyonnais helpful to the defendants here.

1 3. The PLCAA. The defendants appear to argue,
2 belatedly in their supplemental briefing, that the district court
3 should not have entered a default judgment because the City's
4 claims were barred by the PLCAA.

5 It is an "ancient common law axiom" that a defendant
6 who defaults thereby admits all "well-pleaded" factual
7 allegations contained in the complaint. Vt. Teddy Bear Co., 373
8 F.3d at 246. However, it is also true that a district court
9 "need not agree that the alleged facts constitute a valid cause
10 of action." Au Bon Pain, 653 F.2d at 65. Indeed, we have
11 recently suggested that, prior to entering default judgment, a
12 district court is "required to determine whether the
13 [plaintiff's] allegations establish [the defendant's] liability
14 as a matter of law."²³ Finkel, 577 F.3d at 84.

²³ Most of our sister circuits appear to have held expressly that a district court may not enter a default judgment unless the plaintiff's complaint states a valid facial claim for relief. See, e.g., Conetta v. Nat'l Hair Care Ctrs., Inc., 236 F.3d 67, 75-76 (1st Cir. 2001); Ryan v. Homecomings Fin. Network, 253 F.3d 778, 780 (4th Cir. 2001); Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975); Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 407 (6th Cir.), cert. denied, ___ S. Ct. ___, 2011 WL 1457562 (U.S. Apr. 18, 2011); Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994); Marshall v. Baggett, 616 F.3d 849, 852 (8th Cir. 2010); DIRECTV, Inc. v. Hoa Huynh, 503 F.3d 847, 854 (9th Cir. 2007), cert. denied, 129 S. Ct. 40 (2008); Bixler v. Foster, 596 F.3d 751, 762 (10th Cir. 2010); Cotton v. Mass. Mut. Life Ins. Co., 402 F.3d 1267, 1278 (11th Cir. 2005). According to these circuits, "[e]ntry of default judgment does not preclude a party from challenging the sufficiency of the complaint on appeal." Marshall, 616 F.3d at 852; see id. (collecting cases).

1 We recognize that there is some uncertainty whether the
2 City's claims were legally sufficient, in light of their possible
3 preemption by the PLCAA. But we need not decide whether the
4 district court abused its discretion in entering a default
5 judgment, because the defendants have forfeited this defense on
6 appeal. Mickalis Pawn did not address the PLCAA in its opening
7 brief, and Adventure Outdoors raised it only by way of footnote.
8 See Opening Br. of Adventure Outdoors at 32 n.12. We ordinarily
9 deem an argument to be forfeited where it has not been
10 "sufficiently argued in the briefs," Norton v. Sam's Club, 145
11 F.3d 114, 117 (2d Cir.), cert. denied, 525 U.S. 1001 (1998), such
12 as when it is only addressed in a footnote:

13 We do not consider an argument mentioned only
14 in a footnote to be adequately raised or
15 preserved for appellate review. The enormous
16 volume of briefs and arguments pressed on each
17 panel of this court at every sitting precludes
18 our scouring through footnotes in search of
19 some possibly meritorious point that counsel
20 did not consider of sufficient importance to
21 include as part of the argument.

22 United States v. Restrepo, 986 F.2d 1462, 1463 (2d Cir.), cert.
23 denied, 510 U.S. 843 (1993).

24 To be sure, the doctrine of forfeiture is prudential
25 and may be disregarded in our discretion. See In re Nortel
26 Networks Corp. Sec. Litig., 539 F.3d 129, 133 (2d Cir. 2008). We
27 ourselves asked the parties for supplemental submissions
28 concerning the applicability of the PLCAA. But we do not think

1 that our doing so constituted a decision by the Court on any
2 issue in the case. We must be free to seek additional briefing
3 on this issue without thereby conceding that forfeiture is
4 inappropriate. Having reviewed the submissions, we conclude that
5 the unusual action by the Court of ignoring the forfeiture is
6 unwarranted here.

7 We have considered the remainder of defendants'
8 arguments concerning the City's purported failure to plead a
9 cause of action sufficient to support entry of default judgment,
10 and we conclude that those arguments are without merit.

11 III. Voidness for Lack of Personal Jurisdiction

12 The defendants contend that even if the district court
13 did not commit any procedural error in its entry of default
14 judgment during the Rule 55(b)(2) proceedings, the default
15 judgment is nonetheless "void" because the district court lacked
16 personal jurisdiction ab initio. The defendants assert that both
17 a correct application of the New York long-arm statute, C.P.L.R.
18 § 302(a)(3)(ii), and principles of constitutional due process
19 under the Fifth and Fourteenth Amendments require us to hold that
20 personal jurisdiction was absent here, even as a prima facie
21 matter, and that the district court's repeated determinations to
22 the contrary were in error. Because we conclude that the
23 defendants forfeited their jurisdictional defense, and therefore

1 the district court's assertion of personal jurisdiction over them
2 was proper, we reject the defendants' voidness argument.

3 A. Governing Law

4 A default judgment is "void" if it is rendered by a
5 court that lacks jurisdiction over the parties. See "R" Best
6 Produce, 540 F.3d at 123 (citing In re Texlon Corp., 596 F.2d
7 1092, 1099 (2d Cir. 1979)); Covington Indus., Inc. v. Resintex
8 A.G., 629 F.2d 730, 732 (2d Cir. 1980).

9 Had the defendants asserted their voidness argument
10 before the district court in the first instance, they might have
11 done so pursuant to Rule 60(b)(4). That rule provides: "On
12 motion and just terms, the court may relieve a party . . . from a
13 final judgment . . . [if] the judgment is void." Fed. R. Civ.
14 60(b)(4); see "R" Best Produce, 540 F.3d at 122-23 (explaining
15 that a defendant seeking to challenge a default judgment for lack
16 of personal jurisdiction may proceed under Rule 60(b)(4)). We
17 therefore find it appropriate to consider our precedent governing
18 Rule 60(b)(4) motions.

19 "A judgment is void under Rule 60(b)(4) of the Federal
20 Rules of Civil Procedure . . . 'if the court that rendered it
21 lacked jurisdiction of the subject matter, or of the parties, or
22 if it acted in a manner inconsistent with due process of law.'" Grace,
23 443 F.3d at 193 (quoting In re Texlon Corp., 596 F.2d at
24 1099). "'Whereas we generally review motions pursuant to the

1 provisions of Rule 60(b) for abuse of discretion, we review de
2 novo a district court's denial of a Rule 60(b)(4) motion.'" Burda Media, Inc. v. Viertel, 417 F.3d 292, 298 (2d Cir. 2005)
3 (quoting State St. Bank & Trust Co., 374 F.3d at 178). That is
4 because, if the underlying judgment is void for lack of
5 jurisdiction, "it is a per se abuse of discretion for a district
6 court to deny a movant's motion to vacate the judgment under Rule
7 60(b)(4)." Id. (internal quotation marks omitted); accord
8 Spamhaus Project, 500 F.3d at 598. "'[T]he judgment is either
9 void or it is not.'" Cent. Vt. Pub. Serv. Corp. v. Herbert, 341
10 F.3d 186, 189 (2d Cir. 2003) (quoting Recreational Props., Inc.
11 v. Sw. Mortg. Serv. Corp., 804 F.2d 311, 314 (5th Cir. 1986)).

13 B. Analysis

14 The procedural history of this case is dispositive of
15 our voidness analysis. The district court may have erred in its
16 determination that the City had made a prima facie showing of
17 personal jurisdiction over each of the defendants, for the
18 reasons discussed in Judge Wesley's concurring opinion. But we
19 have already concluded that by appearing, litigating, and then
20 intentionally withdrawing from the proceedings, the defendants
21 forfeited their jurisdictional defense. As a result, the
22 defendants submitted to the jurisdiction of the district court.
23 The default judgment that the court rendered was thus supported
24 by personal jurisdiction and is not void.

1 The defendants appear to assume that a default judgment
2 is void for lack of personal jurisdiction even where a
3 defendant's litigation tactics before the district court were
4 inconsistent with the preservation of its jurisdictional defense.
5 The defendants also appear to rely on the well-established
6 principle that a defendant who does not answer a complaint in the
7 first instance, and later suffers a default judgment to be
8 entered against it, may subsequently challenge the default
9 judgment as void for lack of personal jurisdiction.

10 The defendants overlook the critical distinction
11 between defendants who "appear" in court -- even if only to
12 challenge the court's jurisdiction -- and those who do not. See
13 Sinoying Logistics, 619 F.3d at 213. A non-appearing defendant
14 does not, by defaulting, forfeit its right to challenge any
15 ensuing default judgment for lack of personal jurisdiction. "A
16 defendant is always free to ignore the judicial proceedings, risk
17 a default judgment, and then challenge that judgment on
18 jurisdictional grounds in a collateral proceeding." Ins. Corp.
19 of Ireland, 456 U.S. at 706; see also "R" Best Produce, 540 F.3d
20 at 123; Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d
21 146, 160 (2d Cir. 2005), cert. denied, 547 U.S. 1175 (2006);
22 Transaero, 162 F.3d at 729; Restatement (Second) of Judgments §
23 65 cmt. b. In such a case, "voidness of a judgment for lack of

1 personal jurisdiction can be asserted on a collateral challenge"
2 pursuant to Rule 60(b)(4). "R" Best Produce, 540 F.3d at 123.

3 But "when a defendant appears and challenges
4 jurisdiction," we interpret that to constitute "it[s] agree[ment]
5 to be bound by the court's determination on the jurisdictional
6 issue." Transaero, 162 F.3d at 729; see Ins. Corp. of Ireland,
7 456 U.S. at 706 ("By submitting to the jurisdiction of the court
8 for the limited purpose of challenging jurisdiction, the
9 defendant agrees to abide by that court's determination on the
10 issue of jurisdiction."); cf. SEC v. Ross, 504 F.3d 1130, 1150
11 (9th Cir. 2007) (defendant-intervener does not, through Rule
12 24(a) intervention, consent to personal jurisdiction, but does
13 "consent[] to have the district court determine all issues in the
14 case, including issues of jurisdiction"). Although an appearing
15 defendant may, if it disagrees with the district court's
16 threshold ruling on personal jurisdiction, seek reversal of that
17 ruling on appeal, the defendant must properly preserve its
18 defense for appellate review.

19 Both Adventure Outdoors and Mickalis Pawn were
20 "appearing" defendants. Both retained counsel who filed notices
21 of appearance on their behalf. Both challenged the City's
22 pleadings with two rounds of Rule 12(b) motions. Adventure
23 Outdoors continued to litigate the case through summary judgment;
24 Mickalis Pawn, though it withdrew prior to the close of
25 discovery, nonetheless "appeared [and] defended vigorously" over

1 the course of "about two years of active litigation." Opening
2 Br. of Mickalis Pawn at 4. By submitting to the jurisdiction of
3 the district court to decide the question of personal
4 jurisdiction -- but then withdrawing from the proceedings, rather
5 than litigating the case to final judgment -- the defendants
6 failed to preserve their jurisdictional defense for review on
7 appeal. And because they failed to preserve that defense, they
8 acquiesced to the jurisdiction of the district court, and the
9 resulting judgment of that court is not void.²⁴

10 We recognize that even where a defense has been
11 forfeited, appellate review is not necessarily foreclosed.

12 "[T]his Court has discretion to decide the merits of a forfeited
13 claim or defense where the issue is purely legal and there is no

²⁴ Some of the parties' submissions on appeal assume that our review of the defendants' challenge to the default judgment is governed by a three-factor balancing test. To be sure, district and appellate courts considering whether to grant relief from a default judgment under Rule 60(b) ordinarily consider three criteria: "(1) whether the default was willful, (2) whether the defendant demonstrates the existence of a meritorious defense, and (3) whether, and to what extent, vacating the default will cause the nondefaulting party prejudice." Green, 420 F.3d at 108 (quoting State St. Bank & Trust Co., 374 F.3d at 166-67). But that framework assumes that the defendant in question seeks to be restored to its pre-default position, thereby permitting the resolution of the dispute on its merits. Here, by contrast, the defendants seek not to re-open this case for further litigation; rather, they urge that this lawsuit be dismissed altogether. See Opening Br. of Mickalis Pawn at 30 (requesting that "the matter [be] dismissed"); Opening Br. of Adventure Outdoors at 61 (urging that this case be remanded "with instructions to dismiss"). Moreover, the "voidness" vel non of a judgment is not a matter subject to discretion. We conclude that these considerations render inapposite the standard three-factor discretionary test in this instance.

1 need for additional fact-finding or where consideration of this
2 issue is necessary to avoid manifest injustice." Patterson v.
3 Balsamico, 440 F.3d 104, 112 (2d Cir. 2006) (internal quotation
4 marks omitted). However, we will not excuse the defendants'
5 forfeiture in this instance, where there is every indication that
6 the defendants' default was not the product of inadvertence, but
7 a deliberate tactic instead. We will not allow the defendants to
8 "escape the consequences" of their strategic decisions simply
9 because they have proven to be disadvantageous to them. Spamhaus
10 Project, 500 F.3d at 600; cf. LNC Invs., Inc. v. Nat'l
11 Westminster Bank, 308 F.3d 169, 176 n.8 (2d Cir. 2002) (noting
12 that "[i]t would be particularly unusual" to "address an argument
13 despite its abandonment on appeal . . . where the abandonment
14 appears, as it does here, to be a strategic choice rather than an
15 inadvertent error"), cert. denied, 538 U.S. 1033 (2003).

16 Our decision not to excuse the forfeiture is also
17 informed by our respect for the limits of our own jurisdiction --
18 limits that the defendants sought to evade through their
19 strategic decisions to default.

20 The core of our appellate jurisdiction is to review
21 "final decisions" of the district courts. See 28 U.S.C. § 1291.
22 With limited exceptions, see generally Myers v. Hertz Corp., 624
23 F.3d 537, 552 (2d Cir. 2010), only final orders and judgments may
24 be appealed, see Cruz v. Ridge, 383 F.3d 62, 64 (2d Cir. 2004)

1 (per curiam). "[T]he general rule [is] that a party is entitled
2 to a single appeal, to be deferred until final judgment has been
3 entered." Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 605
4 (2009) (internal quotation marks omitted).

5 In including a requirement of finality in defining the
6 scope of our jurisdiction under 28 U.S.C. § 1291, Congress
7 "'express[ed] a preference that some erroneous trial court
8 rulings go uncorrected until the appeal of a final judgment,
9 rather than having litigation punctuated by piecemeal appellate
10 review of trial court decisions which do not terminate the
11 litigation.'" In re World Trade Ctr. Disaster Site Litig., 521
12 F.3d 169, 178 (2d Cir. 2008) (quoting Richardson-Merrell, Inc. v.
13 Koller, 472 U.S. 424, 430 (1985)). Denials of dispositive
14 motions are therefore not ordinarily appealable on an
15 interlocutory basis. See, e.g., Napoli v. Town of New Windsor,
16 600 F.3d 168, 170 (2d Cir. 2010) (per curiam).

17 We cannot permit the defendants to short-circuit the
18 normal litigation process by withdrawing, inducing a default
19 judgment to be entered against them, and then obtaining de facto
20 interlocutory review over otherwise non-appealable decisions. We
21 have observed, with respect to similar strategic conduct by
22 plaintiffs:

23 [I]f a litigant could refuse to proceed
24 whenever a trial judge ruled against him, wait
25 for the court to enter a dismissal for failure
26 to prosecute, and then obtain review of the

1 judge's interlocutory decision, the policy
2 against piecemeal litigation and review would
3 be severely weakened. This procedural
4 technique would in effect provide a means to
5 avoid the finality rule embodied in 28 U.S.C.
6 § 1291.

7 Moreover, if a party who was disappointed by
8 an interlocutory ruling could obtain an appeal
9 of that ruling by simply refusing to prosecute
10 his or her lawsuit, adherence to the merger
11 rule^[25] would reward that party for dilatory
12 and bad faith tactics. Such a result would
13 conflict with the purpose of a Rule 41(b)
14 dismissal for failure to prosecute, which is
15 to penalize dilatoriness and harassment of
16 defendants.

17 Shannon v. Gen. Elec. Co., 186 F.3d 186, 192 (2d Cir. 1999)
18 (brackets, ellipsis, citations, and internal quotation marks
19 omitted; footnote added); see also Rabbi Jacob Joseph Sch. v.
20 Province of Mendoza, 425 F.3d 207, 210-11 (2d Cir. 2005); Martens
21 v. Thomann, 273 F.3d 159, 183 (2d Cir. 2001).

22 The same concerns arise here. To overlook the
23 defendants' forfeiture would be to "permit[] . . . an end-run
24 around the final judgment rule."²⁶ Palmieri v. Defaria, 88 F.3d

²⁵ The "merger rule" holds that "[w]hen a district court enters a final judgment in a case, interlocutory orders rendered in the case . . . merge with the judgment," thereby rendering them amenable to appellate review. Shannon, 186 F.3d at 192.

²⁶ Mickalis Pawn's default also prejudiced the City's ability to obtain further discovery related to personal jurisdiction. Cf. Ins. Corp. of Ireland, 456 U.S. at 707-09; S. New Eng. Tel. Co. v. Global NAPs Inc., 624 F.3d 123, 146 (2d Cir. 2010) (observing "that it does not violate due process for a district court to impose under Rule 37(b) an order subjecting a party to personal jurisdiction in that court as a sanction for the party's failure to comply with a discovery order seeking to establish facts relating to the court's personal jurisdiction

1 136, 140 (2d Cir. 1996). But see Savin v. Ranier, 898 F.2d 304,
2 307 (2d Cir. 1990) (reviewing, on appeal from default judgment,
3 the merits of appearing defendant's jurisdictional defense, where
4 plaintiff did not claim that defendant had forfeited that defense
5 by defaulting).

6 We also decline to overlook the defendants' forfeiture
7 based on their assertion that they suffered grave financial
8 hardship by being forced to defend a lawsuit in New York. The
9 defendants appear to contend that it would be unfair to expect
10 them to have waited until after trial to seek appellate review of
11 the district court's adverse interlocutory decisions concerning
12 personal jurisdiction. Citing Gulf Coast Fans, Inc. v. Midwest
13 Elecs. Imps., Inc., 740 F.2d 1499 (11th Cir. 1984), they urge
14 that the district court's decision to delay final adjudication of
15 their jurisdictional defense until trial "put [them] in the
16 uncomfortable position of having to prepare for a full-blown
17 trial even if [they] might eventually prevail on the
18 jurisdictional claim," id. at 1511.

19 We are not without sympathy for these sentiments, nor
20 do we necessarily disagree with Judge Wesley's conclusion that
21 the district court erred in its jurisdictional analysis. But the
22 Supreme Court has made clear that "the possibility that a ruling
23 may be erroneous and may impose additional litigation expense" is

over it").

1 not a sufficient basis for affording appellate review over
2 interlocutory decisions. Richardson-Merrell, 472 U.S. at 436.

3 IV. The Injunctions

4 We review the district court's issuance of a permanent
5 injunction for abuse of discretion. See Third Church of Christ,
6 Scientist v. City of New York, 626 F.3d 667, 669 (2d Cir. 2010).

7 A. The Terms of the Injunctions

8 Simultaneously with entry of a default judgment, the
9 district court imposed separate, but substantively identical,
10 permanent injunctions to "abate the public nuisance" caused by
11 Adventure Outdoors and Mickalis Pawn. Mickalis Pawn Inj., 2009
12 WL 792042, ¶ 1; Adventure Outdoors Inj., 2009 WL 792023, ¶ 1
13 (same). The injunctions provide for the appointment of a special
14 master (the "Special Master") to implement, and monitor the
15 defendants' compliance with, certain remedial measures
16 contemplated by the injunctions. Mickalis Pawn Inj., 2009 WL
17 792042, ¶ 2.

18 Paragraph 3 of each injunction provides, with respect
19 to the duties of the Special Master:

20 It will be the responsibility of the Special
21 Master to ensure, to the fullest extent
22 practicable, that from the effective date of
23 this [injunction] forward, firearms sales by
24 [the defendant] are made in full conformity
25 with applicable laws pertaining to firearms
26 and that [the defendant] adopts appropriate
27 prophylactic measures to prevent violation of
28 the firearms laws.

1 Id. ¶ 3.²⁷ Paragraph 7 of each injunction mandates that
2 [the defendant] shall adopt those practices
3 that in the opinion of the Special Master
4 serve to prevent in whole or in part^[28] the
5 illegal sale of firearms. [The defendant]
6 shall also adopt those prophylactic practices
7 that in the opinion of the Special Master will
8 serve to prevent the movement of guns into the
9 illegal market.

10 Id. ¶ 7 (footnote added).

11 The injunctions contemplate several ways by which the
12 defendants may become subject to penalties. First, any
13 participation by the defendants in a "straw purchase" -- or any
14 sale "otherwise in violation of Federal, State, or local law or
15 regulation," as determined by the Special Master -- constitutes a
16 violation punishable by a fine that increases with each
17 successive violation.²⁹ Id. ¶ 12. The term "straw purchase" is
18 defined as including "[a] sale . . . made to an investigator
19 conducting a 'Simulated Straw Purchase,' which shall mean a
20 purchase in a form substantially as described in the Amended
21 Complaint filed in this action, for example, in paragraph 188."

²⁷ The injunctions specify certain methods to be used in monitoring the defendants' compliance, including in-store observation, videotape surveillance, records monitoring, "random and repeated integrity testing," inventory inspections, and instructional training for the defendants' employees. Mickalis Pawn Inj., 2009 WL 792042, ¶ 4.

²⁸ The phrase "in whole or in part" appears only in the Mickalis Pawn injunction. Compare Mickalis Pawn Inj., 2009 WL 792042, ¶ 7, with Adventure Outdoors Inj., 2009 WL 792023, ¶ 7.

²⁹ The injunctions require each defendant to post a \$ 25,000 bond with the district court; any monetary penalties imposed for violations of the injunctions would be drawn from this sum. Mickalis Pawn Inj., 2009 WL 792042, ¶¶ 11-12.

1 Id. ¶ 13(iii). The injunctions also provide, more generally,
2 that any other "[a]ction[] . . . by which [the defendant] seeks
3 to evade any of the requirement[s]" of the injunction constitutes
4 a violation. Id. ¶ 8. Finally, any failure by the defendants
5 "to cooperate with the Special Master," as determined by the
6 Special Master himself, constitutes a violation. Id.

7 If the defendants fully comply with the foregoing
8 terms, each injunction terminates automatically after three
9 years. Id. ¶ 17. Any violation of the injunction, however -- or
10 any "violation of an applicable firearms law or regulation"
11 certified to have occurred by the Special Master -- "will re-
12 commence the running of the three-year Compliance Period from the
13 date of the violation." Id. ¶ 18.

14 B. Governing Law

15 The defendants did not, by defaulting, forfeit the
16 right to challenge the lawfulness of the injunctions. See
17 Finkel, 577 F.3d at 83 n.6; Brock, 786 F.2d at 65; see also
18 Spamhaus Project, 500 F.3d at 603-04 (vacating permanent
19 injunction imposed after default judgment as violative of Rule
20 65(d)); SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 814 (2d Cir.
21 1975) (vacating permanent injunction imposed after default
22 judgment).

23 In appealing the injunctions entered against them, the
24 defendants principally argue that the injunctions are
25 unconstitutionally vague and that they violate the requirements

1 of Federal Rule of Civil Procedure 65(d). We review de novo
2 whether the injunctions comply with Rule 65(d). See Garcia v.
3 Yonkers Sch. Dist., 561 F.3d 97, 103 (2d Cir. 2009).

4 Rule 65(d) provides that "[e]very order granting an
5 injunction . . . must: (A) state the reasons why it issued; (B)
6 state its terms specifically; and (C) describe in reasonable
7 detail -- and not by referring to the complaint or other document
8 -- the act or acts restrained or required." Fed. R. Civ. P.
9 65(d)(1). We have interpreted Rule 65(d) as requiring that "an
10 injunction . . . be specific and definite enough to apprise those
11 within its scope of the conduct that is being proscribed." S.C.
12 Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 240-41 (2d Cir.
13 2001) (internal quotation marks omitted). The Supreme Court has
14 explained:

15 [T]he specificity provisions of Rule 65(d) are
16 no mere technical requirements. The Rule was
17 designed to prevent uncertainty and confusion
18 on the part of those faced with injunctive
19 orders, and to avoid the possible founding of
20 a contempt citation on a decree too vague to
21 be understood. Since an injunctive order
22 prohibits conduct under threat of judicial
23 punishment, basic fairness requires that those
24 enjoined receive explicit notice of precisely
25 what conduct is outlawed.

26 Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (footnotes and
27 citations omitted). Rule 65(d) is satisfied "only if the
28 enjoined party can ascertain from the four corners of the order
29 precisely what acts are forbidden or required." Petrello v.
30 White, 533 F.3d 110, 114 (2d Cir. 2008) (internal quotation marks
31 omitted).

1 Rule 65(d) is said to serve two general purposes: "to
2 prevent uncertainty and confusion on the part of those to whom
3 the injunction is directed," and to ensure "that the appellate
4 court knows precisely what it is reviewing." S.C. Johnson & Son,
5 241 F.3d at 241 (internal quotation marks omitted); see also
6 Schmidt, 414 U.S. at 476-77; Lau v. Meddaugh, 229 F.3d 121, 123
7 (2d Cir. 2000) (per curiam), cert. denied, 534 U.S. 833 (2001).
8 We have cautioned that injunctions that do not satisfy the
9 requirements of Rule 65(d) "will not withstand appellate
10 scrutiny." Corning Inc. v. PicVue Elecs., Ltd., 365 F.3d 156,
11 158 (2d Cir. 2004) (per curiam) (internal quotation marks
12 omitted).

13 In addition to complying with Rule 65(d)'s specificity
14 requirements, district courts must take care to ensure that
15 injunctive relief is not overbroad. Although a district court
16 has "a wide range of discretion in framing an injunction in terms
17 it deems reasonable to prevent wrongful conduct," it is
18 nonetheless "the essence of equity jurisdiction" that a court is
19 only empowered "to grant relief no broader than necessary to cure
20 the effects of the harm caused by the violation." Forschner
21 Grp., Inc. v. Arrow Trading Co., 124 F.3d 402, 406 (2d Cir. 1997)
22 (internal quotation marks omitted). We have instructed that
23 injunctive relief should be "narrowly tailored to fit specific
24 legal violations," Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41,
25 50 (2d Cir. 1996) (internal quotation marks omitted), and that
26 the court must "mould each decree to the necessities of the

1 particular case," Forschner Grp., 124 F.3d at 406 (internal
2 quotation marks omitted); see also Patsy's Brand, Inc. v. I.O.B.
3 Realty, Inc., 317 F.3d 209, 220 (2d Cir. 2003); Brooks v.
4 Giuliani, 84 F.3d 1454, 1467 (2d Cir.), cert. denied, 519 U.S.
5 992 (1996); Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775,
6 785 (2d Cir. 1994). An injunction may not "enjoin 'all possible
7 breaches of the law.'" John B. Hull, Inc. v. Waterbury Petroleum
8 Prods., Inc., 588 F.2d 24, 30 (2d Cir. 1978) (quoting Hartford-
9 Empire Co. v. United States, 323 U.S. 386, 410 (1945)).

10 C. Analysis

11 We agree with the defendants that several portions of
12 the injunctions are insufficiently specific or overbroad, or
13 otherwise violate Rule 65(d).

14 First, the injunctions impose on defendants an
15 obligation to act "in full conformity with applicable laws
16 pertaining to firearms," and to "adopt[] appropriate prophylactic
17 measures to prevent violation" of those laws, without specifying
18 which laws are "applicable" or identifying the ways in which the
19 defendants must alter their behavior to comply with those laws.

20 Mickalis Pawn Inj., 2009 WL 792042, ¶ 3; see also id. ¶ 17
21 (requiring "full compliance" with "applicable firearms laws and
22 regulations"). A directive to undertake "appropriate" measures
23 does not "describe in reasonable detail . . . the act or acts
24 restrained or required," Fed. R. Civ. P. 65(d)(1), nor does it
25 provide "explicit notice of precisely what conduct is outlawed,"
26 Schmidt, 414 U.S. at 476. Indeed, we have said that to comply

1 with Rule 65(d), "an injunction must be more specific than a
2 simple command that the defendant obey the law." Peregrine
3 Myanmar Ltd., 89 F.3d at 51.

4 Second, it appears that the injunctions, fairly read,
5 prohibit not only "straw purchases" -- the sole kind of illegal
6 practice identified in the City's amended complaint -- but other,
7 unidentified types of sales practices as well. An injunction is
8 overbroad when it seeks to restrain the defendants from engaging
9 in legal conduct, or from engaging in illegal conduct that was
10 not fairly the subject of litigation. See Lineback v. Spurlino
11 Materials, LLC, 546 F.3d 491, 504 (7th Cir. 2008) (noting that an
12 injunction is overbroad if it results in a "likelihood of
13 unwarranted contempt proceedings for acts unlike or unrelated to
14 those originally judged unlawful" (internal quotation marks
15 omitted)); Spamhaus Project, 500 F.3d at 604 (vacating injunction
16 that "fail[ed] to comply with the rule requiring courts to tailor
17 injunctive relief to the scope of the violation found" (internal
18 quotation marks omitted)).

19 The injunctions are also problematic because of the
20 extent to which they vest the Special Master with discretion to
21 determine the terms of the injunctions themselves. Paragraph 7
22 of each injunction requires the defendants to "adopt those
23 practices that in the opinion of the Special Master serve to
24 prevent in whole or in part the illegal sale of firearms" and
25 "adopt those prophylactic practices that in the opinion of the
26 Special Master will serve to prevent the movement of guns into

1 the illegal market." Mickalis Pawn Inj., 2009 WL 792042, ¶ 7
2 (emphases added). A defendant's "failure to cooperate with the
3 Special Master" constitutes a violation. Id. ¶ 8. Moreover, the
4 injunctions provide that any dispute as to whether a violation
5 has occurred, or any disagreements concerning decisions made by
6 the Special Master, are to be resolved by the Special Master
7 himself in the first instance. Id. ¶ 9. Although a party may
8 appeal "any decision or practice of the Special Master" to the
9 district court, the Special Master's decisions are made subject
10 only to "arbitrary and capricious" review. Id. The injunctions
11 further specify that if a defendant is unsuccessful in
12 challenging the Special Master's decision, the defendant "shall
13 pay the Special Master's costs and attorneys' fees." Id. ¶ 10.

14 "The power of the federal courts to appoint special
15 masters to monitor compliance with their remedial orders is well
16 established," United States v. Yonkers Bd. of Educ., 29 F.3d 40,
17 44 (2d Cir. 1994), cert. denied, 515 U.S. 1157 (1995), and a
18 special master possesses some power to "determine the scope of
19 his own authority," Bridgeport Guardians, Inc. v. Delmonte, 537
20 F.3d 214, 219 (2d Cir. 2008). But the Supreme Court has also
21 warned that "[t]he use of masters is to aid judges in the
22 performance of specific judicial duties, as they may arise in the
23 progress of a cause, and not to displace the court." La Buy v.
24 Howes Leather Co., 352 U.S. 249, 256 (1957) (citation and
25 internal quotation marks omitted). Serious constitutional

1 questions arise when a master is delegated broad power to
2 determine the content of an injunction as well as effectively
3 wield the court's powers of contempt. "If the master makes
4 significant decisions without careful review by the trial judge,
5 judicial authority is effectively delegated to an official who
6 has not been appointed pursuant to article III of the
7 Constitution." Meeropol v. Meese, 790 F.2d 942, 961 (D.C. Cir.
8 1986).

9 Constitutional questions aside, we conclude that, at
10 the very least, the injunctions' sweeping delegations of power to
11 the Special Master violate Rule 65(d). "A court is required to
12 frame its orders so that those who must obey them will know what
13 the court intends to forbid." Diapulse Corp. of Am. v. Carba,
14 Ltd., 626 F.2d 1108, 1111 (2d Cir. 1980) (emphasis added); see
15 also United States v. Microsoft Corp., 147 F.3d 935, 954 (D.C.
16 Cir. 1998) (concluding that injunction was improper insofar as
17 "the parties' rights must be determined, not merely enforced," by
18 special master).

19 Finally, Paragraph 13(iii) of each injunction prohibits
20 certain conduct by reference to the amended complaint. This
21 drafting technique, however efficient, is expressly prohibited by
22 Rule 65(d), which provides that "[e]very order granting an
23 injunction" must "describe in reasonable detail -- and not by
24 referring to the complaint or other document -- the act or acts

1 restrained or required." Fed. R. Civ. P. 65(d)(1)(C) (emphasis
2 added).

3 The City defends the injunctions principally on the
4 basis that "[t]wenty other firearms dealers have entered into
5 negotiated settlement agreements with the City under virtually
6 the same terms." Opening Br. of City (Adventure Outdoors'
7 Appeal) at 58; see also Opening Br. of City (Mickalis Pawn's
8 Appeal) at 57. But there is an obvious difference between
9 settlement agreements, which are voluntary contracts freely
10 negotiated between parties, and injunctions, which are unilateral
11 directives backed by a court's powers of contempt. Parties may
12 consent to settlement terms that would otherwise, if imposed
13 unilaterally, violate Rule 65(d) or a defendant's due process
14 rights. See, e.g., SEC v. First Jersey Sec., Inc., 101 F.3d
15 1450, 1479 (2d Cir. 1996), cert. denied, 522 U.S. 812 (1997);
16 Stauble v. Warrob, Inc., 977 F.2d 690, 698 (1st Cir. 1992). The
17 fact that other defendants were willing to settle voluntarily
18 with the City on essentially the same terms as those included in
19 the injunctions does not tend to prove, let alone itself
20 establish, that the injunctions comply with the Federal Rules and
21 comport with due process.³⁰

³⁰ We reject, however, the defendants' argument that the injunctions violate principles of state sovereignty, comity, and federalism. To be sure, "[t]he court's discretion to frame equitable relief is limited by considerations of federalism," Knox v. Salinas, 193 F.3d 123, 129-30 (2d Cir. 1999) (internal

1 WESLEY, *Circuit Judge*, concurring:

2 I join the majority's opinion in full. I write
3 separately to express concerns with the jurisdictional
4 analysis conducted by the court below. While I fully agree
5 with the majority's conclusion that this affirmative defense
6 was waived, I am concerned that others might embrace the
7 district court's jurisdictional analysis. In my view, that
8 would be a mistake because the district court's
9 jurisdictional analysis has no basis in New York law.

10 The claims brought by the City of New York against
11 defendants Mickalis Pawn Shop, LLC and Adventure Outdoors,
12 Inc. were pled as torts under New York law. See N.Y. Penal
13 Law §§ 240.45, 400.05(1). The district court's subject
14 matter jurisdiction was grounded in 28 U.S.C. § 1332(a)(1).
15 Therefore, the court was permitted to "exercise personal
16 jurisdiction to the same extent as the courts of general
17 jurisdiction" in the State of New York. *Bank Brussels*
18 *Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 124
19 (2d Cir. 2002). And yet, the district court devised a test
20 that has no basis in the New York statute governing long-arm
21 jurisdiction.¹ See N.Y. C.P.L.R. § 302(a)(3)(ii). In my

¹ This appeal concerns only two defendants among many implicated by a "series of civil cases brought by the City

1 view, the court had no authority to apply a novel
2 jurisdictional test that created an unwarranted expansion of
3 the meaning of personal jurisdiction under New York law.

4 The district court termed this case one of "first
5 impression" and created, out of whole cloth, a seven-factor
6 test for determining whether personal jurisdiction exists
7 over "retail gun establishments." *City of New York v. A-1*
8 *Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369, 374, 424
9 (E.D.N.Y. 2007) (Weinstein, J.). This case, however, is not
10 one of first impression. In fact, this particular federal
11 judge has decided a number of other cases involving the
12 firearms industry in which he has declined to apply the
13 long-arm statute as interpreted by the New York Court of
14 Appeals. *See, e.g., Johnson v. Bryco Arms*, 304 F. Supp. 2d
15 383, 397 (E.D.N.Y. 2004) (Weinstein, J.); *N.A.A.C.P. v. A.A.*
16 *Arms, Inc.*, Nos. 99 Civ. 3999, 99 Civ. 7037, 2003 WL
17 21242939, at *4 (E.D.N.Y. Apr. 1, 2003) (Weinstein, J.).
18 And, in any event, federally licensed out-of-state firearms
19 distributors, such as defendants in this case, are governed

of New York" before this district court. *City of N.Y. v.*
Bob Moates' Sport Shop, Inc., 253 F.R.D. 237, 238 (E.D.N.Y.
2008) (Weinstein, J.).

1 by the same long-arm statute as are all other out-of-state
2 defendants alleged to have committed a tortious act outside
3 of New York that causes injury in the State of New York.

4 On August 8, 2006, following limited discovery,
5 defendants moved to dismiss the complaint against them for
6 lack of personal jurisdiction. By an order dated August 15,
7 2007, the district court denied defendants' motion to
8 dismiss. *A-1 Jewelry & Pawn*, 501 F. Supp. 2d at 374. In
9 declining to grant defendants' motion to dismiss, the
10 district court applied a test to assess whether defendants
11 were properly subject to personal jurisdiction not
12 previously employed by a New York court. The district judge
13 appears to be of the view that there should be no limits on
14 the exercise of personal jurisdiction over a defendant
15 "except those of reasonable forum (venue) and a rational
16 state interest in the litigation."² Jack B. Weinstein, *Mass*

² Judge Weinstein has acknowledged in his academic writing that "New York's long-arm statute, unlike that of most states, has not been interpreted as going to the constitutional limit[]." Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 37 Willamette L. Rev. 145, 148 (2001). Judge Weinstein is, however, critical of New York's long-arm statute because, in his view, it "inhibit[s] the expansion of personal jurisdiction to its full potential" and its limitations "should be

1 *Tort Jurisdiction and Choice of Law in a Multinational World*
2 *Communicating by Extraterrestrial Satellites*, 37 Willamette
3 L. Rev. 145, 146 (2001). Specifically, the district court
4 concluded that defendants' "knowing cumulative illegal
5 parallel conduct outside New York causing widespread injury
6 in New York made them amenable to suit in" New York. 501 F.
7 Supp. 2d at 374. The court asserted that "the extent of the
8 combined harm" could provide a basis for the exercise of
9 personal jurisdiction over each individual defendant, even
10 if the allegedly illegal out-of-state conduct of a single
11 defendant would not suffice to establish jurisdiction. *Id.*
12 at 422. The district court took the view that "[w]here a
13 defendant deals in [] inherently dangerous products, a
14 lesser showing than is ordinarily required will support
15 jurisdiction." *Id.* at 420 (internal quotation marks
16 omitted).

17 Prior to defendants' default, the City filed an amended
18 complaint, which sought injunctive relief against defendants
19 for the creation of a public nuisance. See N.Y. Penal Law
20 §§ 400.05(1), 240.45. Defendants then made a renewed motion

eliminated." *Id.* at 149.

1 to dismiss in which they reasserted their objection to the
2 exercise of personal jurisdiction to no avail.³ *City of*
3 *N.Y. v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 338
4 (E.D.N.Y. 2007). In denying defendants' renewed motion to
5 dismiss, the district court again relied, in part, on the
6 allegedly "knowing parallel conduct" of the defendants. *Id.*
7 at 336. The district court implied that, perhaps, a
8 different standard for assessing personal jurisdiction was
9 warranted because jurisdiction was "sought . . . not simply
10 to vindicate an individual right or to resolve an individual
11 commercial dispute" but rather was "sought to protect the
12 safety of an entire community." *Id.* at 339.

13 While the district judge below may take issue with the
14 limitations placed on New York's long-arm statute as an
15 academic matter, these limitations "were deliberately
16 inserted to keep the provision well within constitutional
17 bounds," *Ingraham v. Carroll*, 90 N.Y.2d 592, 597 (1997), and
18 a federal district court is not free to read them out of the
19 statute. In addition, the exercise of personal jurisdiction

³ Defendant Adventure Outdoors also filed an unsuccessful motion for summary judgment based in part on its contention that it was not properly subject to the district court's exercise of personal jurisdiction.

1 over these defendants does not, in my view, "comport[] with
2 the requirements of due process." *Met. Life Ins. Co. v.*
3 *Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996)
4 (citing *Savin v. Ranier*, 898 F.2d 304, 306 (2d Cir. 1990)).

5 In evaluating whether personal jurisdiction exists as
6 to a particular defendant the court must examine the
7 "quality and nature" of the defendant's contacts with the
8 forum. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242-43
9 (2d Cir. 2007). Here, the defendants' connection to the
10 forum was tenuous at best.⁴ Defendants did not "transact[]
11 any business within the state or contract[] . . . to supply
12 goods . . . in the state," N.Y. C.P.L.R. § 302(a)(1), and
13 defendants did not commit any tortious act in New York
14 State, *id.* § 302(a)(2). More to the point, nothing in the
15 record supports the conclusion that they conducted or
16 solicited business in New York or that they "engage[d] in
17 any other persistent course of conduct, or derive[d]
18 substantial revenue from goods used . . . in the state."
19 *Id.* § 302(a)(3)(i).

⁴ As characterized by the City, defendant Adventure Outdoors is a "storefront establishment in Smyrna, Georgia" and defendant Mickalis Pawn Shop is "a store in Summerville, South Carolina."

1 There is nothing in the record that supports the
2 conclusion that defendants knew or should have known that
3 sales of guns in their home states were having consequences
4 in New York. *Id.* § 302(a)(3)(ii). Moreover, section
5 302(a)(3)(ii) provides that in order to form the basis for
6 the exercise of personal jurisdiction over a non-
7 domiciliary, the defendant must know (or be deemed to know)
8 of the consequences of its conduct *and* "derive[] substantial
9 revenue from interstate or international commerce." *Id.*
10 Here, even if we were to impute knowledge to the defendants,
11 the record does not reveal anything approaching "substantial
12 revenue" that could be said to have resulted from guns that
13 made their way to New York. The conjunctive requirement
14 present in section 302(a)(3)(ii) could be understood to be
15 constitutionally mandated. As the Supreme Court has
16 explained, "foreseeability alone has never been a sufficient
17 benchmark for personal jurisdiction." *World-Wide Volkswagen*
18 *Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (internal
19 quotation marks omitted). To the contrary, a "defendant's
20 awareness that the stream of commerce may or will sweep the
21 product into the forum State does not convert the mere act
22 of placing the product into the stream into an act

1 purposefully directed toward the forum State." *Asahi Metal*
2 *Indus. v. California*, 480 U.S. 102, 112 (1987).

3 The district court concluded that when a defendant
4 deals in inherently dangerous products a lesser showing is
5 required in order to establish personal jurisdiction.
6 However, neither the New York Court of Appeals nor this
7 Court have ever so held.⁵ If the City "could satisfy the
8 requirements of [section 302(a)(3)(ii)] on so attenuated a
9 consequence of defendant[s'] act[s] as has been accepted by
10 the court[] below, it would burden unfairly non-residents
11 whose connection with the state is remote." *Fantis Foods,*
12 *Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 327 (1980).

13 A particularly troubling aspect of the jurisdictional
14 analysis conducted below is the reliance on what the
15 district judge termed the defendants' "cumulative parallel
16 conduct" as a basis for establishing personal jurisdiction.

⁵ As a substantive matter, the New York Court of Appeals has rejected the argument that a "general duty of care arises out of [a] gun manufacturer[']s ability to reduce the risk of illegal gun trafficking through control of the marketing and distribution of [its] products." *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 235 (2001). The hazardous materials doctrine, which is based on a products liability theory, *id.*, does not support the loosening of the requirements for establishing personal jurisdiction.

1 According to the district court's theory, although the "out-
2 of-state activities of a single defendant alone may not
3 suffice to establish jurisdiction," because of "knowing
4 parallel conduct, the extent of the combined harm may
5 provide a basis for jurisdiction over each one." 501 F.
6 Supp. 2d at 422. The New York Court of Appeals has never
7 adopted a theory pursuant to which combined or parallel
8 conduct may be relied upon to establish a basis for the
9 exercise of personal jurisdiction over a defendant when
10 jurisdiction does not otherwise exist.

11 The New York Court of Appeals has instructed that "[t]o
12 determine whether a non-domiciliary may be sued in New York,
13 [the court must] first determine whether [New York's] long-
14 arm statute . . . confers jurisdiction over [the non-
15 domiciliary] in light of its contacts with [New York] State.
16 If the defendant's relationship with New York falls within
17 the terms of [section 302(a)(3)(ii)], [the court must then]
18 determine whether the exercise of jurisdiction comports with
19 due process." *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210,
20 214 (2000). Rather than follow the instructions of the New
21 York Court of Appeals, the district court created a seven-
22 factor test for analyzing whether long-arm jurisdiction

1 exists over "retail gun establishments."⁶ 501 F. Supp. 2d
2 at 424.

3 The district court determined that an "inflexible
4 application of a traditional jurisdictional analysis that
5 fails to take account of unique practical commercial factors
6 does not effectively insure the fair and orderly
7 administration of the law." *Id.* at 419. The court
8 preferred to adopt what it termed a "reality-based pragmatic

⁶ As announced by the district court, these factors are as follows:

- 1) Number of "trace" handguns linked to criminal investigations in New York and elsewhere that are attributable to the defendant;
- 2) Distribution practices and their possible effects on crimes in New York;
- 3) Time-to-crime of the retailer's guns recovered in New York . . . ;
- 4) Sales price, type of gun and the intended use of the retailer's handguns . . . ;
- 5) Crimes committed in New York with the retailer's handguns;
- 6) Total number of handguns the retailer . . . sold in the United States and retailer's total revenue from the United States and New York markets; and
- 7) Actions of regulatory authorities related to the retailer's distribution practices

501 F. Supp. 2d at 424-25.

1 jurisdictional analysis." *Id.* However, the district court
2 was not free to depart from "traditional jurisdictional
3 analysis" in order to hold defendants subject to suit in New
4 York. The "fair and orderly administration of the law" is
5 best achieved by applying the same standards to all
6 litigants and by adherence to well-defined legal principles.

7 The district court's jurisdictional analysis undermines
8 the protection afforded to out-of-state defendants by
9 section 302(a)(3)(ii). As both this Court and the New York
10 Court of Appeals have previously explained, this provision
11 "is intended to ensure some link between a defendant and New
12 York State to make it reasonable to require a defendant to
13 come to New York to answer for tortious conduct committed
14 elsewhere." *LaMarca*, 95 N.Y.2d at 215 (quoting *Ingraham*, 90
15 N.Y.2d at 598). The relevant long-arm provision is
16 specifically "designed to . . . preclude the exercise of
17 jurisdiction over nondomiciliaries who might cause direct,
18 foreseeable injury within the State but 'whose business
19 operations are of a local character.'" *Id.* (quoting
20 *Ingraham*, 90 N.Y.2d at 599). Here, it is indisputable that
21 defendants' businesses are of a local character.

22 The district court also asserted that "[t]here is no

1 specific dollar threshold at which revenue becomes
2 substantial for purposes of [section] 302(a)(3)(ii)."⁷ 501
3 F. Supp. 2d at 417. Even if this is so, it was error to
4 excuse the City from making any showing that defendants
5 derived substantial revenue from interstate commerce. See
6 *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 29 (2d Cir.
7 1997). Indeed, it "offend[s] 'traditional notions of fair
8 play and substantial justice'" to subject a non-domiciliary
9 defendant to jurisdiction when that defendant does not have
10 the requisite "minimum contacts" with the forum state.
11 *LaMarca*, 95 N.Y.2d at 216 (quoting *Int'l Shoe Co. v.*
12 *Washington*, 326 U.S. 310, 316 (1945)). The record in this
13 case is devoid of information that would allow anyone to

⁷ Other courts have sensibly held that "[w]hether revenue is 'substantial' under New York law is determined on both relative and absolute scales." *Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 316 (S.D.N.Y. 1986); see also *Vecchio v. S & T Mfg. Co.*, 601 F. Supp. 55, 57 (E.D.N.Y. 1984); *Allen v. Canadian Gen. Elec. Co.*, 410 N.Y.S.2d 707, 708-09 (3d Dep't 1978). Adventure Outdoors asserts that "uncontroverted evidence demonstrates that over the six year period preceding the institution of this action, [it] derived an average of \$3,619.89 from interstate or international commerce, constituting a paltry 0.36% of its overall revenue." Mickalis Pawn Shop denies receiving any revenue from interstate sales and asserts that the City never alleged, or showed – and the trial court never found – "a sum certain amount of revenue" it allegedly derived from interstate commerce.

1 conclude that defendants had "meaningful 'contacts, ties, or
2 relations'" with New York. *Burger King Corp. v. Rudzewicz*,
3 471 U.S. 462, 472 (1985) (quoting *Int'l Shoe*, 326 U.S. at
4 319)).

5 The seven-factor test for personal jurisdiction relies
6 heavily on alleged conduct by third parties - specifically,
7 straw purchasers of handguns - in establishing a basis for
8 the assertion of jurisdiction. However, the "unilateral
9 activity of those who claim some relationship with a
10 nonresident defendant cannot satisfy the requirement of
11 contact with the forum State." *Id.* at 474 (internal
12 quotation marks omitted); see also *World-Wide Volkswagen*,
13 444 U.S. at 298. Rather, it is "essential . . . that there
14 be some act by which the defendant purposefully avails
15 itself of the privilege of conducting activities within the
16 forum State, thus invoking the benefits and protections of
17 its laws." *Burger King*, 471 U.S. at 475 (internal quotation
18 marks omitted). Here, the City did not come forward with
19 any evidence that defendants purposefully established any
20 meaningful contacts with New York state.

21 The district court maintained that New York City has a
22 strong interest in adjudicating this case, and that "[b]y

1 enacting strong gun control laws to protect its citizens
2 from gun-related crimes New York has expressed a special
3 public policy interest in the subject matter of this
4 litigation." 501 F. Supp. 2d at 428, 429. It is
5 indisputable that "New York has a strong interest in the
6 safety of its residents and territory from handgun
7 violence." *Id.* at 429; see generally *Bach v. Pataki*, 408
8 F.3d 75 (2d Cir. 2005). However, the City's efforts to
9 "regulat[e] the illegal flow of handguns into its
10 territory," 501 F. Supp. 2d at 429, cannot violate the due
11 process rights of defendants it alleges played some
12 attenuated role in the presence of illegal guns in New York
13 City. As the Supreme Court has explained:

14 [The limits on the exercise of personal
15 jurisdiction over a defendant] are more
16 than a guarantee of immunity from
17 inconvenient or distant litigation. They
18 are a consequence of territorial
19 limitations on the power of the respective
20 States. . . . Even if the defendant would
21 suffer minimal or no inconvenience from
22 being forced to litigate before the
23 tribunals of another State; even if the
24 forum State has a strong interest in
25 applying its law to the controversy; even
26 if the forum State is the most convenient
27 location for litigation, the Due Process
28 Clause, acting as an instrument of
29 interstate federalism, may sometimes act to
30 divest the State of its power to render a

1 valid judgment.

2
3 *World-Wide Volkswagen*, 444 U.S. at 294. Here, although
4 defendants are federally licensed to sell firearms, they are
5 "small-town [stores that have] no on-going contacts with New
6 York and [their] interstate activities [if any] are not the
7 sort which make [them] generally equipped to handle
8 litigation away from [their business] location[s]." *Markham*
9 *v. Anderson*, 531 F.2d 634, 637 (2d Cir. 1976) (internal
10 quotation marks omitted).

11 In sum, the district court's analysis with respect to
12 defendants' affirmative defense based on lack of personal
13 jurisdiction was a substantial and unjustified deviation
14 from well-known and easily understood principles of New York
15 law. The jurisdictional analysis performed by the court
16 below appears to be based on one federal judge's view of how
17 the law of New York ought to be constructed, rather than on
18 how it is clearly delineated by statute and in the decisions
19 of the state and federal courts.

20 By virtue of their default prior to trial, defendants
21 waived their defense based on lack of personal jurisdiction.
22 *See Transaero, Inc. v. La Fuerza Aera Boliviana*, 162 F.3d
23 724, 729 (2d Cir. 1998). Therefore, I join the majority's

1 well-written opinion. But an affirmance here is not an
2 endorsement of the jurisdictional analysis conducted below.
3 One's agreement or disagreement with the policies that
4 animate liability rules for firearms retailers cannot bear
5 on jurisdictional analysis. The district court was bound to
6 apply New York's long-arm statute, as clearly interpreted by
7 the New York Court of Appeals. The court below did not do
8 so in this case.