In The

Supreme Court Of The United States

App. No. ___

Lucky Brand Dungarees, Incorporated, Lucky Brand Dungarees Stores, Incorporated, Leonard Green & Partners, L.P., Lucky Brand Dungarees, LLC, Lucky Brand Dungarees Stores, LLC, Kate Spade & Co.,

Applicants,

v.

Marcel Fashion Group, Incorporated,

Respondent.

APPLICATION FOR A 59-DAY EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE JUSTICE RUTH BADER GINSBURG, CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Under this Court's Rule 13.5, applicants Lucky Brand Dungarees, Incorporated, Lucky Brand Dungarees Stores, Incorporated, Leonard Green & Partners, L.P., Lucky Brand Dungarees, LLC, Lucky Brand Dungarees Stores, LLC, and Kate Spade & Co. respectfully request a 59-day extension of time, to and including Friday, February 15, 2019 or such earlier time as the Court deems appropriate, to petition for a writ of certiorari.

1. The Second Circuit rendered its decision on August 2, 2018 (Appendix A), and denied a timely petition for rehearing en banc on September 19, 2018 (see Appendix B). Absent an extension, the deadline to petition for a writ of certiorari would be Tuesday, December 18, 2018. This application is being filed at least 10 days before that date. S. Ct. R. 13.5. This Court would have jurisdiction pursuant to 28 U.S.C. 1254(1).

2. The petition will seek review of the Second Circuit's decision, *Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc., et al.*, 898 F.3d 232 (2d Cir. 2018), which creates a circuit split with, at least, the Federal Circuit, Ninth Circuit, and Eleventh Circuit and conflicts with Supreme Court precedent.

3. This case concerns whether *res judicata* can preclude a defendant from raising a defense that it never before litigated when the claims at issue are new claims that also have never been litigated. The Second Circuit held that "claim preclusion (or, more precisely, defense preclusion)" can "bar the litigation of" such a defense. *Marcel Fashions Grp.*, 898 F.3d at 236; *id.* at 242 n.10.

4. Based on this newly articulated principle, the Second Circuit held that applicants were precluded from raising a settlement agreement as a defense in this case because they could have (but did not) litigated the defense in a prior dispute between the parties. *Id.* at 241–42. It did not matter that a different Second Circuit panel held that this case involves new claims that themselves are not barred by *res judicata*. *Id.* at 242 n.10. According to the Second Circuit, defenses can be barred by *res judicata* even when the claims at issue cannot be. *Id.*

5. By contrast, the Federal Circuit has held in numerous cases that claims and defenses go hand-in-hand. Put simply, the "plaintiff and defendant should be treated equally as to res judicata. If the plaintiff would not be barred from bringing a second [] suit, the defendant also should not be precluded from [raising defenses] in the second suit," even defenses that could have been litigated in the prior action. *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1327 (Fed. Cir. 2008); *see also Ecolab, Inc. v. Paraclipse, Inc.*, 285 F.3d 1362, 1376–77 (Fed. Cir. 2002) (defendant was not precluded from asserting defense that patent was invalid, even though defense could have been raised in prior patent infringement litigation); *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 478-79, 483 (Fed. Cir. 1991) (refusing to find invalidity defense barred where suit involved a "different cause of action").

6. The Ninth Circuit similarly has held that if a claim is new, defenses to the claim cannot be precluded, as "[o]ne requirement of claim preclusion is that 'the prior litigation involved the same claim or cause of action as the later suit." *Orff v. United States*, 358 F.3d 1137, 1144 (9th Cir. 2004) (citation omitted). The Eleventh Circuit agrees, holding that "[f]or res judicata to apply, the same cause of action must be involved in both cases (i.e., the cases must be based upon the same factual predicate)." *McKinnon v. Blue Cross & Blue Shield of Ala.*, 935 F.2d 1187, 1192 (11th Cir. 1991). Thus, in *McKinnon v. Blue Cross & Blue Shield of Alabama*, the Eleventh Circuit held that the defendant was not precluded from raising a defense that she could have, but did not, raise in a prior dispute because the claims were new claims.

Id. The Second Circuit's decision conflicts with these decisions from the Federal Circuit, Ninth Circuit, and Eleventh Circuit.

7. The Second Circuit's decision also conflicts with Supreme Court precedent. In *Cromwell v. Sac Cty.*, the Supreme Court held: "[W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." 94 U.S. 351, 353 (1876). In other words, if the claim or demand in a second litigation is new, only defenses actually litigated and resolved in the prior action are barred. *See id*.

8. In *Davis v. Brown*, the Supreme Court reiterated its holding from *Cromwell*. 94 U.S. 423 (1876). In *Davis*, the plaintiff brought two cases against the defendants. In the first, it sued defendants for payment on two "McOmber notes." *Id*. at 428. Defendants could have raised an assignment agreement as a defense in the first action, but they did not and were found liable. *Id*. The plaintiff then sued the defendants for payment on ten more McOmber notes. *Id*. at 424. This time, the defendants raised the assignment as a defense. *Id*. Plaintiff objected, arguing that the defendants should be precluded from raising the assignment defense because they had not raised it in the first action. *Id*. The Supreme Court rejected this argument as "clearly untenable." *Id*. at 429. The plaintiff "confounded the operation of a judgment upon the [claim] involved in the action . . . with its operation as an estoppel in another action between the parties upon a different [claim]." *Id*. at 428. The rule,

however, is that "[w]hen a judgment is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action." *Id.* (emphasis added). The Second Circuit did not follow this settled law.

9. Applicants respectfully request an extension of time for two reasons. First, an extension would allow the parties time to pursue settlement, which would make the filing of a petition for a writ of certiorari moot. A mediation is scheduled for December 10, 2018. A 59-day extension will allow the parties time to continue discussions following the mediation and paper any agreement before applicants must file their petition for writ of certiorari.

10. Second, an extension also will help accommodate applicants' counsel's other professional obligations during the time allotted to prepare a petition for writ of certiorari. For Mr. O'Quinn these include: (a) preparing petitioner's petition for writ of certiorari in *WesternGeco LLC v. ION Geophysical Corp.*, Fed. Cir. No. 16-2099, due in this Court on December 13, 2018; (b) preparing for and presenting oral argument in the Federal Circuit on December 6, 2018 in *Endo Pharmaceuticals Inc. v. Actavis LLC*, No. 18-1054; (c) preparing appellees' response brief, due December 13, 2018 in the Federal Circuit, in *Panduit Corp. v. Corning Optical Communications LLC*, No. 18-1999; and (d) preparing appellant's reply brief, due December 17, 2018 in the Federal Circuit, in *Eli Lilly and Co. v. Dr. Reddy's Laboratories, Ltd.*, No. 18-2128. For Ms. Cendali, these include: (a) preparing defendant's opposition to a motion for summary judgment in *RXD Media, LLC v. IP Application Development et al.*, 1:18-

cv-00486-LO-TCB that was due in the Eastern District of Virginia on November 29, 2018 and preparing for related oral argument; (b) preparing defendant's affirmative motion for summary judgment in *RXD Media, LLC v. IP Application Development et al.*, 1:18-cv-00486-LO-TCB for filing on December 17, 2018; and (c) preparing an opposition to a preliminary injunction in *RGN-US IP, LLC et al. v. WeWork Companies Inc.* No. 1:18-cv-00486-LO-TCB that was due in the Northern District of Texas on December 3, 2018. In the absence of an extension, those obligations will significantly impede counsel's ability to prepare a well-researched and comprehensive petition that will assist the Court in evaluating the Second Circuit's decision.

For the foregoing reasons, Lucky Brand Dungarees, Incorporated, Lucky Brand Dungarees Stores, Incorporated, Leonard Green & Partners, L.P., Lucky Brand Dungarees, LLC, Lucky Brand Dungarees Stores, LLC, and Kate Spade & Co. respectfully request a 59-day extension, to and including Friday, February 15, 2019, or such other date as the Court deems appropriate, to petition for a writ of certiorari.

December 7, 2018

Respectfully submitted,

Dale M. Cendali
Counsel of Record
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-4800
Fax: (212) 446-6460
dale.cendali@kirkland.com

John O' Quinn
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793
Telephone: (202) 879-5000
Fax: (202) 879-5200
john.oquinn@kirkland.com

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Defendants Lucky Brand Dungarees, Inc., Lucky Brand Dungarees Stores, Inc., Lucky Brand Dungarees, LLC, Lucky Brand Dungarees Stores, LLC, Kate Spade & Co., and Leonard Green & Partners, L.P. hereby state:

1. Lucky Brand Dungarees, LLC converted from a corporation to a Delaware LLC and concurrently changed its name from Lucky Brand Dungarees, Inc. to Lucky Brand Dungarees, LLC. Lucky Brand Dungarees, LLC is a wholly owned subsidiary of Lucky Brand Dungarees Intermediate Holdings, LLC, which is a wholly owned subsidiary of Lucky Brand Dungarees Parent Holdings, LLC, which is majority owned by Clover Holdings II LLC, which is wholly owned by investment funds managed by Leonard Green & Partners, L.P. No publicly held corporation owns 10% or more of its stock.

2. Lucky Brand Dungarees Stores, LLC converted from a corporation to a Delaware LLC and concurrently changes its name from Lucky Brand Dungarees Stores, Inc. to Lucky Brand Dungarees Stores, LLC. Lucky Brand Dungarees Stores, LLC is a wholly owned subsidiary of Lucky Brand Dungarees, LLC. No publicly held corporation owns 10% or more of its stock.

3. Kate Spade & Company, a Delaware corporation, was converted on November 3, 2017 and became Kate Spade & Company LLC. Kate Spade & Company LLC is a limited liability corporation and a wholly-owned subsidiary of Tapestry, Inc. Tapestry, Inc. is publicly-held corporation and has no parent corporation. Per Schedule 13 G/A filed in February 2018, as of December 31, 2017, the following owned greater than 10% of Tapestry, Inc. stock: The Vanguard Group and T Rowe Price Associates, Inc.

4. LGP Management, Inc. is Leonard Green & Partners, L.P.'s general partner. LGP Management, Inc. has no parent corporation. No publicly held corporation owns 10% or more of Leonard Green & Partners, L.P's stock.

December 7, 2018

Respectfully submitted,

Dale M. Cendali
Counsel of Record
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, NY 10022
Telephone: (212) 446-4800
Fax: (212) 446-6460
dale.cendali@kirkland.com

John O' Quinn
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5793
Telephone: (202) 879-5000
Fax: (202) 879-5200
john.oquinn@kirkland.com