

# APPENDIX TABLE OF CONTENTS

## OPINIONS AND ORDERS

### **DIRECT PROCEEDINGS BELOW**

---

Opinion, U.S. Court of Appeals for the Second Circuit, No. 23-1330, *Marco Destin v. Levy, et al.* (August 8, 2024)..... 1a

Memorandum Opinion and Order, U.S. District Court for the Southern District of New York, No. 22-CV-8459-LTS, *Marco Destin v. Levy, et al.* (August 28, 2023)..... 14a

### **BANKRUPTCY COURT PROCEEDINGS**

---

Order, U.S. Bankruptcy Court for the Southern District of New York, No. 21-10795(DSJ),  
*In re: L&L Wings, Inc.* (April 7, 2022) ..... 38a

Order, U.S. Bankruptcy Court for the Southern District of New York, No. 21-10795(DSJ),  
*In re: L&L Wings, Inc.* (February 23, 2022) ..... 41a

Order, U.S. Bankruptcy Court for the Southern District of New York, No. 21-10795(DSJ),  
*In re: L&L Wings, Inc.* (January 21, 2022)..... 45a

### **ORIGINAL NEW YORK DISTRICT COURT ACTION**

---

Stipulated Order of Settlement and Dismissal, U.S. District Court Southern District of New York, No. 07 Civ. 4137 (BSJ) (GWG),  
*L&L Wings, Inc. v. Marco Destin, et al.* (February 15, 2011) ..... 47a

## APPENDIX TABLE OF CONTENTS (Cont.)

Opinion and Order, U.S. District Court for the Southern District of New York, No. 07 Civ. 4137 (BSJ) (GWG), *L&L Wings, Inc. v. Marco Destin, et al.* (November 15, 2010)..... 57a

Order, U.S. District Court Southern District of New York, No. 07 Civ. 4137 (BSJ) (GWG), *L&L Wings, Inc. v. Marco Destin, et al.* (December 16, 2009) ..... 73a

### **DISCOVERY OF FRAUD IN THE *BEACH MART* CASE**

Judgment, U.S. District Court for the Eastern District of North Carolina, No. 2:11-CV-44-FL, *Beach Mart, Inc. v. L & L Wings, Inc.* (March 29, 2021) ..... 96a

### **HAZEL-ATLAS PRECEDENTIAL DECISION**

Decision, U.S. Supreme Court  
*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*  
(May 15, 1944)..... 102a

### **TRADEMARK OFFICE**

L.L. Wings Trademark Application for the WINGS Mark (August 29, 2006)..... 141a

Attorney Krasner's Response to PTO Office Action on Wings Trademark Application (July 30, 2007)..... 148a

## APPENDIX TABLE OF CONTENTS (Cont.)

### **LICENSE AGREEMENTS**

Trademark Licensing Agreement Between L&L  
Wings and Marco Destin (November 1, 1998) ..... 154a

Trademark License Agreement Between Shepard  
Morrow and L&L Wings (April 29, 1993) ..... 173a

### **ARTICLES**

ABA Article - Americans' Confidence By Debra  
Cassens Weiss (December 18, 2024) ..... 187a

Axios Article: Americans' Confidence in U.S.  
Courts Hits Record Low (December 17, 2024)..... 191a

AP News Article: Americans' Trust in Nation's  
Court System Hits Record Low, Survey Finds  
(December 17, 2024) ..... 195a

Annenberg Public Policy Center of the University  
of Pennsylvania Article: Over Half of Americans  
Disapprove of Supreme Court as Trust Plummets  
(October 10, 2022) ..... 198a

Gallup Article: Americans Pass Judgment on  
Their Courts By Benedict Vigers and Lydia Saad  
(December 17, 2024) ..... 208a

## APPENDIX TABLE OF CONTENTS (Cont.)

### **OTHER DOCUMENTS**

---

Marco Destin’s Complaint Seeking Recovery  
for Fraud on the Court, U.S. District Court  
for the Southern District of New York  
(October 4, 2022)..... 214a

L&L Wings’s Complaint Seeking Reocvery for  
Alleged Trademark Infringement, U.S. District  
Court Southern District of New York  
(March 29, 2007) ..... 247a

Third Amended Disclosure Statement for Debtor’s  
Third Amended Chapter 11 Plan of  
Reorganization (January 14, 2022)..... 265a

Brief for Defendant-Appellee Bennett Krasner,  
Individually and as Agent of L&L Wings, Inc.,  
Excerpts (January 11, 2024) ..... 336a

2024 Year End Report on the Federal Judiciary,  
Chief Justice Robert (December 31, 2024)..... 352a

**OPINION, U.S. COURT OF APPEALS  
FOR THE SECOND CIRCUIT,  
NO. 23-1330, *MARCO DESTIN v. LEVY, ET AL.*  
(AUGUST 8, 2024)**

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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MARCO DESTIN, INC., 1000 HIGHWAY 98 EAST  
CORP., E&T, INC., PANAMA SURF & SPORT, INC.,

*Plaintiffs-Appellants,*

v.

SHAUL LEVY, individually agent of L&L Wings,  
Inc., MEIR LEVY, individually agent of L&L Wings,  
Inc., BENNETT KRASNER, individually agent of  
L&L Wings, Inc., ARIEL LEVY,

*Defendants-Appellees.*

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No. 23-1330

Argued: May 2, 2024

Decided: August 8, 2024

Appeal from the United States District Court  
for the Southern District of New York  
No. 22-cv-8459, Laura Taylor Swain, Chief Judge.

Before: JACOBS, SACK, and SULLIVAN,  
Circuit Judges.

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RICHARD J. SULLIVAN, *Circuit Judge*:

Plaintiffs Marco Destin, Inc., 1000 Highway 98 East Corp., E&T, Inc., and Panama Surf & Sport, Inc. (collectively, “Marco Destin”) appeal from a judgment of the United States District Court for the Southern District of New York (Swain, *C.J.*) dismissing their claims for fraud and “fraud on the court” against agents of L&L Wings, Inc. (“L&L”), with whom Marco Destin had executed a stipulated judgment in a separate trademark action in 2011. Marco Destin alleged that the stipulated judgment was the product of fraud because L&L’s agents (“Defendants”) had secured that judgment in partial reliance on a trademark registration that it had fraudulently procured from the United States Patent and Trademark Office (“USPTO”). Based on that alleged fraud, Marco Destin requested that the 2011 judgment be vacated pursuant to Federal Rule of Civil Procedure 60(d)(3) and that Defendants be sanctioned and ordered to pay damages for injuries associated with the fraud. The district court dismissed the action for failure to state a claim. On appeal, Marco Destin argues that the district court erroneously denied it relief after concluding that Marco Destin had a reasonable opportunity to uncover any fraud in the initial litigation.

Taking up Marco Destin’s arguments, we confirm that we review a district court’s dismissal of an independent action asserting “fraud on the court” under Rule 60(d)(3) for abuse of discretion. We also conclude that the district court acted within its discretion when it declined to vacate the 2011 stipulated judgment based on its finding that Marco Destin should have uncovered the alleged fraud through the exercise of

due diligence in the earlier litigation. We therefore AFFIRM the judgment of the district court.

## **BACKGROUND**

In 2007, L&L commenced an action in the Southern District of New York (Jones, J.) asserting claims for, among other things, breach of contract and trademark infringement related to Marco Destin's unauthorized use of L&L's unregistered trademark "Wings" on beach apparel. L&L alleged that, in 1998, the two companies had entered into a temporary licensing agreement (the "License Agreement") that permitted Marco Destin to use the trademark, but that Marco Destin continued to use the mark after the agreement expired in 2006. Marco Destin answered the complaint and filed several counterclaims, and the parties engaged in discovery through mid-2008.

After the close of discovery, L&L revealed in its summary judgment filings that it had recently registered the "Wings" mark with the USPTO, which by law served as *prima facie* evidence that the mark was entitled to protection. Based in large part on that registration, the district court granted summary judgment to L&L with respect to liability, finding that Marco Destin had breached the License Agreement and infringed L&L's "Wings" mark. The parties ultimately entered into a stipulated order of settlement and dismissal in 2011 (the "Stipulated Judgment"), under which Marco Destin was required to pay L&L \$3.5 million and cease using the "Wings" mark. The settlement also included releases that precluded Marco Destin from bringing any action against L&L based on the "Wings" mark or the License Agreement.

At around the same time that L&L was litigating with Marco Destin in Manhattan, L&L became embroiled in another licensing dispute in the Eastern District of North Carolina with an unrelated company called Beach Mart, Inc. During the course of that litigation, Beach Mart discovered that L&L was *not* the owner of the “Wings” mark and that the trademark was in fact owned by Shepard Morrow, who had obtained five separate registrations with the USPTO on the name “Wings.” As revealed in the North Carolina action, L&L had *tried* to register “Wings” with the USPTO, but after those attempts failed, it resorted to licensing the mark from Morrow during a brief period in the 1990s. L&L eventually stopped paying the required fees under that license, claimed the unregistered mark as its own, and began licensing the mark to other entities – including Marco Destin and Beach Mart.

Aided by these revelations, Beach Mart secured a judgment in the district court for the Eastern District of North Carolina in 2021, which canceled L&L’s registration of the “Wings” mark on the ground that L&L had procured it by making false representations to the USPTO. The district court also granted Beach Mart’s motion for sanctions, finding that L&L’s founder, Shaul Levy, had engaged in “egregious discovery conduct” by failing to disclose Morrow’s registration of the mark and the Morrow license agreement. Sp. App’x at 7 (internal quotation marks omitted).

A year after the North Carolina judgment, Marco Destin filed this action in the Southern District of New York (Swain, C.J.) against Shaul Levy and three other agents of L&L – Ariel Levy, Meir Levy, and Bennett Krasner – based on their conduct during the initial



trademark suit before Judge Jones. The action asserted two causes of action, for “fraud on the court” and “fraud,” and demanded vacatur of the Stipulated Judgment, as well as sanctions and money damages. Defendants moved to dismiss the complaint pursuant to Rule 12(b)(6), and the Levy Defendants made a separate motion for sanctions against Marco Destin on the grounds that Marco Destin’s claims were meritless and unreasonably multiplied the proceedings.

The district court granted Defendants’ motion to dismiss but denied the Levy Defendants’ motion for sanctions. Construing the “fraud on the court” claim as an independent action for relief from a judgment under Rule 60(d)(3), the district court concluded that Marco Destin was not entitled to the extraordinary remedy of vacatur based on its own lack of diligence in uncovering L&L’s misrepresentations and concealment concerning the “Wings” trademark. In particular, the district court noted that the License Agreement expressly stated that “one or more individuals and/or entities have registered trademarks . . . to the mark ‘Wings’ and can and/or may claim a paramount right to the use of said mark.” *Id.* at 13 (citing paragraph 11.3 of the License Agreement); *see also* App’x at 616 (paragraph 11.3 of the License Agreement). Based on its finding that Marco Destin had a reasonable opportunity to discover the fraud that allegedly occurred during the initial litigation, the district court declined to vacate the Stipulated Judgment under Rule 60(d)(3) and granted Defendants’ motion to dismiss. It also dismissed Marco Destin’s separate “fraud” claim, finding that it was barred by (1) Rule 60(b)(3)’s one-year filing window on motions for fraud against an adverse party, (2) the New York statute of limitations for

fraud, and (3) the release clause in the 2011 Stipulated Judgment. The court further denied the Levy Defendants' motion for sanctions against Marco Destin.

This appeal by Marco Destin followed.<sup>1</sup>

## DISCUSSION

### I. Legal Framework

Federal Rule of Civil Procedure 60 permits parties to seek relief from a judgment, including in cases of fraud or mistake. The “normal procedure” to attack a judgment is by “motion in the court that rendered the judgment.” 11 Wright & Miller, Federal Practice & Procedure § 2868 (3d ed. 2023). However, Rule 60(d) also authorizes parties to file an “independent action” seeking the same relief. Fed. R. Civ. P. 60(d)(1). These independent actions trace back to the pre-Rule era, during which courts had inherent power to entertain motions seeking to set aside judgments they had entered. *See United States v. Beggerly*, 524 U.S. 38, 42 (1998). This power was generally time-limited, in that a court could hear such a motion only during the same “term” in which it entered the judgment. *Id.*; *see also Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944), *overruled on other grounds by Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 31 n.2 (1976). But in cases of “manifestly unconscionable” fraud – such as a fraud upon the court itself – parties were permitted to seek relief long after that term ended, which they could do by filing various writs in equity, such as a “bill[] of

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<sup>1</sup> The Levy Defendants have not cross-appealed the denial of their motion for sanctions.

review.” *Hazel-Atlas*, 322 U.S. at 244–45. The court then had “discretion” to grant that writ and vacate the judgment. *Id.* at 248.

When Rule 60 was enacted, it expressly preserved the “power” of district courts to “entertain” both motions and independent actions to set aside a judgment. Fed. R. Civ. P. 60(d)(3); *see also Beggerly*, 524 U.S. at 45 (“The revision made equally clear, however, that one of the old forms [of obtaining relief from a judgment], *i.e.*, the ‘independent action,’ still survived.” (footnote omitted)). Therefore, as in the old regime, a party challenging a judgment may file either a motion within a fixed time window – generally one year under Rule 60(b)(3) – or an “independent action” any time after that pursuant to Rule 60(d)(3). Like the old bills of review, these independent actions require a more demanding showing of “fraud” than a “timely motion,” such as a fraud on the court itself. *See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 663 (2d Cir. 1997) (quoting *Gleason v. Jandrucko*, 860 F.2d 556, 558 (2d Cir. 1988)). And as we and other circuits have long recognized, a district court has “discretion in determining whether to entertain independent actions for relief” and may look to “traditional equitable principles to guide its decision.” *Id.* at 661 (collecting cases).

## II. Standard of Review

At the outset, the parties dispute the standard of review for appeals that challenge a district court’s dismissal of an independent action to set aside a judgment for fraud on the court. Citing our recent decision in *Mazzei v. The Money Store*, 62 F.4th 88 (2d Cir. 2023), Marco Destin argues that we should review the

district court's dismissal *de novo*, as we would for a routine complaint dismissed under Rule 12(b)(6). Defendants, by contrast, argue that we should review only for abuse of discretion, in line with our traditional approach to Rule 60(b) motions. *See Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) ("We . . . review the denial of a Rule 60(b) motion for abuse of discretion."); *United States v. Parcel of Prop.*, 337 F.3d 225, 236 (2d Cir. 2003) ("We . . . review a claim of fraud on the court [brought by motion under Rule 60(b)] for abuse of discretion.").

We agree with Defendants that the dismissal of an independent action brought under Rule 60(d) is reviewed for abuse of discretion. In fact, we explicitly held as much in *Campaniello Imports*, where we explained that the trial court "exercises discretion in determining whether to entertain independent actions for relief" under Rule 60(d) and that "an appellate court should not disturb the equitable determination of the trial judge unless it can conclude that the trial judge abused its discretion." 117 F.3d at 661 (alterations and internal quotation marks omitted); *see also Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 71 (2d Cir. 1990) ("Decisions in [an independent action] are committed to the court's discretion, informed by traditional equitable principles."). This standard aligns with the equitable origins of these independent actions, which as explained above were firmly committed to the court's "discretion." *Hazel-Atlas*, 322 U.S. at 248.

*Mazzei* does not say otherwise. In fact, the issue of the proper standard of review for the dismissal of an independent action for fraud on the court was not even before the *Mazzei* panel, given that both parties agreed in their briefs that the standard of review was

*de novo*.<sup>2</sup> And while *Mazzei* repeated the parties’ articulation of that standard, it did not purport to “squarely address,” or otherwise decide on its own accord, what the proper standard of review is for dismissal of an independent action in equity to vacate a judgment for fraud on the court. *Deem v. DiMella-Deem*, 941 F.3d 618, 624–25 (2d Cir. 2019). At most, *Mazzei* assumed without deciding that *de novo* review applied based on party “concession[s],” an assumption that is not binding on later panels. See *Friends of the E. Hampton Airport, Inc. v. Town of East Hampton*, 841 F.3d 133, 153 (2d Cir. 2016); *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988) (“[A] *sub silentio* holding is not binding precedent.” (internal quotation marks omitted)).

We thus take this occasion to confirm what we have long held: we review the grant or dismissal of an independent action for fraud on the court under Rule 60(d)(3) for abuse of discretion. See *Campaniello Imports*, 117 F.3d at 661. As usual, “[a] district court . . . abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions.” *Motorola Credit*, 561 F.3d at 126 (internal quotation marks omitted).

### III. Analysis

Applying that standard, we readily conclude that the district court did not abuse its discretion in

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<sup>2</sup> See Brief for Plaintiffs-Appellants at 29, *Mazzei*, 62 F.4th 88 (No. 21-2696), 2022 WL 278534; Brief for Defendants-Appellees at 21, *Mazzei*, 62 F.4th 88 (No. 21-2696), 2022 WL 671913.

dismissing Marco Destin’s independent action for fraud on the court.<sup>3</sup> “Generally, claimants seeking equitable relief through independent actions must . . . (1) show that they have no other available or adequate remedy; (2) demonstrate that [their] own fault, neglect, or carelessness did not create the situation for which they seek equitable relief; and (3) establish a recognized ground – such as fraud, accident, or mistake – for the equitable relief.” *Campaniello Imports*, 117 F.3d at 662. Among those “recognized ground[s]” is fraud on the court. *Id.* at 661. To obtain relief on that basis, the plaintiff “must prove, by clear and convincing evidence, that the defendant interfered with the judicial system’s ability to adjudicate impartially and that the acts of the defendant must have been of such a nature as to have prevented the plaintiff from fully and fairly presenting a case or defense.” *Mazzei*, 62 F.4th at 93–94; *see also Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995) (explaining that “fraud on the court” includes only a limited “species of fraud”). And as in every action for equitable relief, the plaintiff must show that the equities tip in favor of relief under the first and second *Campaniello Imports* factors, such as by demonstrating that its own “neglect” did not lead to the fraudulent judgment. *Campaniello Imports*, 117 F.3d at 662 (“It is fundamental that equity will not grant relief if the complaining party

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<sup>3</sup> Marco Destin’s opening brief did not raise any specific challenges to the dismissal of its common law fraud claims or the denial of its motion for sanctions. We therefore decline to review those issues on appeal. *See JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) (“[A]rguments not made in an appellant’s opening brief are [forfeited] even if the appellant pursued those arguments in the district court or raised them in a reply brief.”).

has, or by exercising proper diligence would have had, an adequate remedy at law, or by proceedings in the original action to open, vacate, modify, or otherwise obtain relief against, the judgment.” (alterations and internal quotation marks omitted)).

Here, the district court dismissed Marco Destin’s independent action for fraud on the court on the equitable grounds that Marco Destin had a reasonable opportunity to uncover the fraud during the underlying action. We see no abuse of discretion in how the court reached that conclusion. As *Campaniello Imports* itself contemplated, courts generally will not grant relief under Rule 60(d) if the plaintiff could have prevented the fraudulent judgment through “proper diligence.” *Id.*; accord *Mazzei*, 62 F.4th at 94 (explaining that we are typically “unwilling[] to find fraud on the court where the alleged fraud could have been redressed in the underlying action”). That is what the district court found here when it concluded that, with “due diligence,” Marco Destin could have exposed L&L’s fraudulent efforts to conceal the Morrow license and his ownership of the “Wings” trademark. Sp. App’x at 13 (quoting *Mazzei*, 62 F.4th at 94). Indeed, the License Agreement explicitly informed Marco Destin that other parties may have paramount ownership claims to the “Wings” mark. *Id.* (citing to paragraph 11.3 of the License Agreement); see also App’x at 616 (paragraph 11.3 of the License Agreement). Consequently “[i]f Marco Destin had sought to ascertain from L&L during the [u]nderlying [a]ction who else could claim a paramount right to use the ‘Wings’ mark, it might well have found the Morrow [l]icense [a]greement on its own.” Sp. App’x at 14. Similar diligence likewise would have revealed L&L’s

fraudulent efforts to register the “Wings” mark with the USPTO, given that the public docket for L&L’s application explicitly identified Morrow as the previous owner of a similar mark. *See id.* Although the court was careful not to “condone” L&L’s nondisclosure, it ultimately concluded that Marco Destin “could have addressed the alleged fraud” in the initial action and therefore was not entitled to equitable relief. *Id.* at 15–16. We see no abuse of discretion in those conclusions, which are fully supported by the record and consistent with our precedent on equitable relief under Rule 60.<sup>4</sup>

Marco Destin leans heavily on *Hazel-Atlas*, asserting that it authorizes courts to grant relief to plaintiffs on their fraud-on-the-court claims even if those plaintiffs were not diligent in the underlying action. We agree, but only to a point. *Hazel-Atlas* established that a court has “*discretion*” to vacate a judgment even where the plaintiff was not diligent in the underlying action, at least in cases of particularly brazen fraud on the court. *Hazel-Atlas*, 322 U.S. at

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<sup>4</sup> In so ruling, we note that the district court dismissed the independent action based on equitable factors, which we review for abuse of discretion. A district court may dismiss an independent action because it fails to “establish a recognized ground – such as fraud, accident, or mistake – for the equitable relief” sought. *Campaniello Imports*, 117 F.3d at 662. Although that action would still generally be subject to abuse-of-discretion review, we take no position on whether we would review *de novo* the underlying question of whether the facts alleged or proven constitute the unique “species of fraud” that amounts to fraud on the court. *Hadges*, 48 F.3d at 1325 (“The concept of ‘fraud on the court’ embraces only that species of fraud which does[,] or attempts to, defile the court itself, or is a fraud perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.” (internal quotation marks omitted)).



248 (emphasis added). But nothing in *Hazel-Atlas* precludes a court from considering a party’s lack of diligence, nor does it compel vacatur of the prior judgment regardless of the plaintiff’s negligence in uncovering the asserted fraud. Instead, when a district court entertains an independent action for fraud on the court as contemplated by Rule 60(d)(3), it may balance the equities as usual in deciding whether to vacate the underlying judgment; in doing so, the court is free to assess the plaintiff’s diligence and the severity of the alleged fraud before granting the request for equitable relief.

Here, even though the district court did not explicitly invoke the equitable standard from *Campaniello Imports*, it nonetheless followed the same line of reasoning in dismissing Marco Destin’s action for lack of diligence. Because “nothing in the record suggests that the [d]istrict [c]ourt would appraise the facts differently” under the *Campaniello Imports* framework, we see no need to remand on that basis. *Monasky v. Taglieri*, 589 U.S. 68, 86 (2020) (explaining, in a different context, that an appeals court need not remand when there is no reason to “anticipate that the [d]istrict [c]ourt’s judgment would change”). We therefore affirm the district court’s judgment without resorting to remand.

## CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

**MEMORANDUM OPINION AND ORDER,  
U.S. DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK, NO. 22-CV-8459-  
LTS, MARCO DESTIN v. LEVY, ET AL.  
(AUGUST 28, 2023)**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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MARCO DESTIN, INC., PANAMA  
SURF & SPORT, INC., E&T, INC.,

*Plaintiffs,*

v.

SHAUL LEVY, individually and as agent of  
L&L WINGS, INC.; MEIR LEVY, individually  
and as agent of L&L WINGS, INC.; ARIEL LEVY,  
individually and as agent of L&L WINGS, INC.;  
and BENNETT KRASNER, individually and as  
agent of L&L WINGS, INC.,

*Defendants.*

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No. 22-CV-8459-LTS

Before: Laura TAYLOR SWAIN,  
Chief United States District Judge.

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**MEMORANDUM OPINION AND ORDER**

Plaintiffs Marco Destin, Inc., and its affiliates  
1000 Highway 98 East Corp., Panama Surf & Sport,

Inc., and E&T, Inc. (collectively, “Marco-Destin”), bring this action, pursuant to Federal Rule of Civil Procedure 60(d), against Defendants Shaul Levy, Meir Levy, Ariel Levy, and Bennett Krasner (collectively “Defendants”), in their individual capacities and as agents of L&L Wings, Inc. (“L&L”). (Docket entry no. 1 (“Compl.”).) Rule 60 permits a court to provide, subject to certain limitations, relief from its prior judgments or orders. In this action, Marco-Destin seeks to set aside a February 15, 2011 Stipulated Order of Settlement and Dismissal that concluded an earlier litigation in this district in which L&L brought claims against Marco-Destin for, *inter alia*, breach of contract and trademark infringement. Marco-Destin principally alleges that Defendants, acting individually and as agents of L&L, perpetrated fraud on the district court and on Marco-Destin in procuring the so-ordered settlement stipulation in the earlier action by asserting ownership rights in a trademark that L&L had fraudulently registered.

Before the Court are two motions to dismiss the Complaint, and a motion for sanctions. Shaul Levy, Meir Levy, and Ariel Levy (collectively, the “Levy Defendants”) move for dismissal and for sanctions, arguing that this action is precluded by *res judicata*, collateral estoppel, laches, and the applicable statute of limitations, and that Marco-Destin ought to be sanctioned for unreasonably multiplying proceedings. (Docket entry no. 31 (“Levy Mem.”).) Defendant Krasner separately moves to dismiss based on substantively similar arguments. (Docket entry no. 37 (“Krasner Mem.”).) The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1332, and under Federal Rule of Civil Procedure 60 because it has the inherent power

to revisit and provide relief in connection with its earlier orders.

The Court has reviewed carefully the parties' submissions in connection with the instant motions and, for the following reasons, grants Defendants' motions to dismiss and denies the Levy Defendants' motion for sanctions.

### **BACKGROUND<sup>1</sup>**

Because the factual record is extensive and encompasses two prior lawsuits as well as a bankruptcy case, the Court provides an abbreviated recitation of the background and discusses primarily those facts that are relevant to the disposition of the instant motions.

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<sup>1</sup> The facts as alleged in the Complaint are taken as true for the purposes of the instant motions to dismiss. While the Court supplements its factual summary with information provided in declarations appended to the Defendants' motions, the operative facts for the purposes of resolving the motions are only those alleged in the Complaint. The Court does, however, take judicial notice of documents filed in the earlier SDNY litigation, the North Carolina litigation, and the bankruptcy litigation, as well as those made available for public inspection by the United States Patent and Trademark Office. *See Sanders v. Sanders*, No. 22-99, 2022 WL 16984681, at \*1 (2d Cir. Nov. 17, 2022) (In addressing motions to dismiss, "[w]e have held that '[a] court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" (quoting *Intl Star Class Yacht Racing Assn v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998))).

## Underlying Action

On May 29, 2007, L&L sued Marco-Destin in the United States District Court for the Southern District of New York (the “Underlying Action”), asserting claims for, *inter alia*, breach of contract and trademark infringement under the Lanham Act. (Compl. ¶ 22; *See also* 07-CV-4137-BSJ-GWG (SDNY).) The 2007 Complaint alleged that Marco-Destin was in breach of a license agreement, dated November 1, 1998, between Marco-Destin and L&L. (Compl. ¶ 23.) L&L alleged that it had been using the “Wings” mark since 1978 in connection with its business, which specialized in the sale of beachwear, beach toys, souvenirs, and related items. (Compl., Ex. C (“2007 Compl.”) ¶ 6.) L&L claimed that its “Wings” mark was not yet registered with the United States Patent and Trademark Office (“USPTO”), but that, for nearly thirty years, the mark had been recognized by consumers as representing its retail stores and business operations. (2007 Compl. ¶ 9.)

From Marco-Destin’s inception in 1995 until 1998, two principals of L&L, Shaul Levy and Meir Levy, shared ownership rights in the company with the then-principal of Marco-Destin, Eliezer Tabib.<sup>2</sup> (*Id.* ¶ 13.) On or about November 1, 1998, L&L, Shaul Levy and Meir Levy sold their interest in Marco-Destin to Mr. Tabib, making him its exclusive owner, and, in connection with this sale, L&L, as licensor, entered into a license agreement with Marco-Destin, as licensee. (*Id.* ¶¶ 13-15; *See also* docket entry no. 35-

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<sup>2</sup> According to the 2007 Complaint, the shared ownership did not extend to the entity E&T, Inc., which was wholly owned by Mr. Tabib. (2007 Compl. ¶ 13.)

4, Richards Decl., Ex. D (“MDI License Agreement”).) Although the agreement provided that L&L was the “owner of the unregistered servicemark, ‘Wings,’” and the “owner of trade dress rights to its distinctive design,” it notably also contained the following paragraph:

11.3. Licensee acknowledges that Licensor informed him that there are one or more individuals and/or entities that have registered trademarks and/or servicemarks to the mark “Wings” and can and/or may claim a paramount right to the use of said mark “Wings”. Licensor does not warrant or give any other assurances and/or indemnification to Licensee’s use of said mark “Wings” and or the Mark. . . .

(MDI License Agreement at 1, 7 (emphasis added).) The MDI License Agreement gave Marco-Destin a license to use the “Wings” mark in a defined territory and for a definite term—until October 31, 2006. (MDI License Agreement at 1-2.)

The thrust of L&L’s claims in the Underlying Action was that Marco-Destin impermissibly continued to use the “Wings” mark after the MDI License Agreement had, by its own terms, terminated. (2007 Compl. ¶¶ 21-28.) L&L brought claims for breach of contract, trademark infringement, violations of the New York General Business Law, and common law service mark infringement and unfair competition. (*Id.* ¶¶ 29-73.) On September 18, 2007, approximately four months after L&L filed its complaint, Marco-Destin filed an answer, along with four counterclaims. (*See* 07-CV-4137 docket entry no. 9 (“2007 Answer”).) Marco-Destin’s counterclaims were based on L&L’s alleged

misconduct during the course of negotiating the MDI License Agreement, including that L&L allegedly withheld assets in connection with its sale of its ownership rights in Marco-Destin and refused to provide a complete and proper accounting of its control of one or more of Marco-Destin’s affiliates, and that Shaul Levy allegedly made misrepresentations regarding the extent of Marco-Destin’s rights in the “Wings” mark under the agreement. (*Id.* ¶¶ 92-94, 96-99.) Marco-Destin sought as relief the rescission, revocation, and/or reformation of the MDI License Agreement. (*Id.* ¶ 126.)

Following discovery, on September 4, 2008, and October 15, 2008, L&L and Marco-Destin filed, respectively, partial motions for summary judgment as to liability. (Compl., Ex. E (“2009 SJ Decision”) at 1.) In support of its motion, L&L submitted a Certificate of Registration, dated July 1, 2008, that it had obtained from the USPTO during the litigation of the Underlying Action, and which certified L&L as the registered owner of the “Wings” mark.<sup>3</sup> (*Id.* at 16; *See also*

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<sup>3</sup> After L&L applied for a registered trademark with the USPTO, the agency sent Defendant Krasner an “Office Action” on February 1, 2007, which documented the existence of similar marks already registered with the agency. (Docket entry no. 35-6, Richards Decl., Ex. F (“Office Action”).) Defendant Krasner responded to the Office Action on July 30, 2007, stating that one of the agency’s identified, previously-registered marks was no longer in use by its last known owner, “Shepard Morrow.” (Office Action at 113.) The Court notes that “[t]he USPTO is required by law to maintain records of trademark applications and registrations, and to make them available for public inspection.” *See* Personal Information in Trademark Records, USPTO, <https://www.uspto.gov/trademarks/apply/faqs-personal-information-trademark-records> (last visited Aug. 9, 2023) [<https://perma.cc/K775-XV3M>]; *See also* 37 C.F.R. § 2.27.

Compl. ¶¶ 28-37.) On December 16, 2009, District Judge Barbara S. Jones granted L&L's motion for partial summary judgment, and denied Marco-Destin's cross motion for the same. (2009 SJ Decision at 1-2.) Two sections of that decision merit a detailed recitation here. First, Judge Jones held that Marco-Destin was liable for breach of contract because, *inter alia*, it had continued using the "Wings" mark in contravention of the plain terms of the MDI License Agreement, and Judge Jones rejected Marco-Destin's arguments regarding fraught contract negotiations and alleged extratextual agreements between the parties. (*Id.* at 9-15.) She further noted that Mr. Tabib had retained the New York law firm of Moses & Singer LLP to represent him during the underlying transaction, that he "is an experienced businessman who has built numerous companies from the ground up" in areas such as retail and real estate, and that drafting the MDI License Agreement took over a year, during which period Moses & Singer LLP had "played a key role." (*Id.* at 4, 13.)

Second, Judge Jones held that Marco-Destin was liable for trademark infringement under the Lanham Act. To prevail on that claim, L&L had to show that (1) the "Wings" mark was entitled to protection, and (2) Marco-Destin's use of the mark was likely to cause consumers confusion as to the origin or sponsorship of its goods. (*Id.* at 16.) Judge Jones ruled that L&L's July 1, 2008 Certificate of Registration was *prima facie* evidence that the mark was entitled to protection, and that Marco-Destin bore the burden of demonstrating that the mark was invalid or that the use of its own mark was not likely to cause confusion. (*Id.*) She held that Marco-Destin did not meet its burden. (*Id.*) Judge



Jones then granted L&L summary judgment on the remaining four state and common law counts, only one of which—common law service mark infringement—involved consideration of the Certificate of Registration, because liability under the Lanham Act established liability for common law service mark infringement. (*Id.* at 20-25.)

Following Judge Jones’ decision as to liability, the litigation continued as to damages, culminating in a second decision on November 5, 2010, which granted in part and denied in part L&L’s motion for summary judgment. (*See* 07-CV-4137 docket entry no. 115.) On February 15, 2011, the parties entered into a Stipulated Order of Settlement and Dismissal to resolve their disputes arising in, out of, or relating to the Underlying Action. (Compl. ¶ 50; *See also* Compl., Ex. A (“2011 Settlement Order”).) Under the 2011 Settlement Order, Marco-Destin and its affiliates were required to pay L&L \$3,500,000 and cease using the “Wings” mark and trade dress. (Compl. ¶ 51.) The agreement also contained cross-releases, pursuant to which Marco-Destin agreed not to bring any action against L&L, and its present and former officers and agents, among others, based on the “Wings” mark and trade dress, or on the MDI Licensing Agreement. (*Id.*; *See also* 2011 Settlement Order at 6-7.)

## **Events Following Underlying Action**

### **EDNC Action**

On September 9, 2011, a few months after Judge Jones issued the 2011 Settlement Order, an unrelated company named Beach Mart, Inc. (“Beach Mart”), sued L&L in the United States District Court for the Eastern

District of North Carolina, regarding the parties' competing rights in the "Wings" mark under a licensing agreement, in which L&L was the licensor and Beach Mart was the licensee ("EDNC Action"). (Compl. ¶ 58; *See also* 11-CV-44-FL (EDNC).) The EDNC Action was lengthy, and two details are worth noting. First, the September 6, 2005 license agreement between L&L and Beach Mart, unlike the MDI License Agreement, contained no provision indicating that L&L had informed Beach Mart that a third party may own registered trademarks or servicemarks to the "Wings" mark; to the contrary, it set forth that Beach Mart would not "contest [L&L's] exclusive ownership of all rights to the name 'WINGS' and any similar name, without limitation including trademark and/or servicemark rights." (Docket entry no. 49-1, Richards Decl., Ex. M ("BMI License Agreement") at 2 (emphasis added).)

Second, after discovery was complete and on the eve of trial, Beach Mart learned from one of L&L's third-party licensees about the existence of a 1994 license agreement between L&L and Shepard Morrow. (*See* 11-CV-44 docket entry no. 438 ("Aug. 2019 Unpublished Fourth Circuit Op.") at 9.) According to that agreement, Shepard Morrow, as the licensor, was the owner of the "Wings" mark and five associated registrations with the USPTO, and L&L, as the licensee, was permitted to use the mark subject to prescribed terms. (Compl., Ex. D ("Morrow License Agreement").) As a result of this discovery, the district court permitted Beach Mart to amend its complaint—as the ownership status of the mark was a fundamental issue in the case—and granted Beach Mart's motion for sanctions, finding that Shaul Levy had engaged in

“egregious discovery conduct,” by, *inter alia*, intentionally withholding his knowledge of the Morrow License Agreement and other agreements that L&L had executed with third-party licensees. (Aug. 2019 Unpublished Fourth Circuit Op. at 9.) That decision was affirmed on appeal. (*Id.* at 5.)

The EDNC Action concluded with a jury verdict on or about November 16, 2020, that was later reduced to a judgment, on March 29, 2021, in which the district court held, *inter alia*, that: (1) Beach Mart had proven by a preponderance of the evidence that L&L fraudulently induced Beach Mart into entering their license agreement; (2) Beach Mart had proven by clear and convincing evidence that L&L knowingly made false representations of fact with the intent to deceive the USPTO, resulting in the issuance of two federal trademark registrations; and (3) Beach Mart had proven by a preponderance of the evidence that all rights in the “Wings” mark were owned by Shepard Morrow, and that the Morrow License Agreement remains in effect. (Compl., Ex. B (“Beach Mart Judgment”) at 1-2.)

### **L&L’s Bankruptcy**

On April 21, 2021, approximately one month after the EDNC Action concluded with an award of \$16 million in damages to Beach Mart, L&L filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. (*See* 21-BR-10795-DSJ (S.D.N.Y.)) Marco-Destin filed a proof of claim in the bankruptcy case that incorporated its fraud on the court claim relating to the Underlying Litigation and, after several rounds of

briefing and oral arguments, the bankruptcy court issued an order on April 7, 2022, sustaining L&L's objection to Marco-Destin's claim and disallowing that claim. (See docket entry no. 30-24, Rattet Decl., Ex. 24.) Marco-Destin appealed that order to this Court, which raised *sua sponte* a question as to whether the bankruptcy court had the power to adjudicate a claim premised on fraud allegedly perpetrated on a district court outside of the context of the bankruptcy proceeding, and elected to treat the bankruptcy court's order as Proposed Findings of Fact and Conclusions of Law. (See 22-CV-4058-LTS (S.D.N.Y.).) The bankruptcy court's proposed findings and conclusions remain pending before this Court.

### **Marco-Destin's Claims of Fraud**

We turn now to Marco-Destin's Complaint in the instant action. For purposes of the following analysis, the Court groups Plaintiffs' allegations of fraudulent conduct in the Underlying Action into three categories — (1) affirmative misrepresentations regarding ownership of the "Wings" mark, (2) intentional concealment of the Morrow License Agreement, and (3) fraudulent procurement from the USPTO of the Certificate of Registration and the submission of that Certificate in connection with a motion for summary judgment in the Underlying Action. First, Marco-Destin alleges that L&L's agents "made repeated misrepresentations to the Court claiming ownership in the 'Wings' mark and trade dress," including in a declaration filed by Defendant Krasner (who was, at the time, L&L's counsel), in a sworn affidavit filed by Defendant Ariel Levy (who was, at the time, L&L's Vice President), and in L&L's Counter Statement to Marco-Destin Rule 56.1 Statement. (Compl. ¶ 24(a)-(d).) Second,

Marco-Destin alleges that L&L’s agents purposefully withheld from the Court and from Marco-Destin the Morrow License Agreement, which would have revealed that Shepard Morrow was the “true owner” of the “Wings” mark. (*Id.* ¶¶ 25-26, 38.) Marco-Destin further claims that Defendants Shaul Levy, Meir Levy, and Krasner were personally involved in and had knowledge of L&L’s prior “failed [] efforts to obtain its own trademark registration” between 1987 and 1992, which were unsuccessful due to Morrow’s “superior trademark rights.” (*Id.* ¶¶ 26-27.) Third, Marco-Destin alleges that Defendant Krasner made multiple false statements to the USPTO in L&L’s application for a trademark about the company’s purported ownership of the “Wings” mark, including: in the original application filed on August 29, 2006; in response to an Office Action, on July 30, 2007; and around February 28, 2008, when the last trademark registration that L&L had licensed from Morrow expired. (*Id.* ¶¶ 29-33.) Citing the EDNC Court’s finding of fraud on the PTSO, Marco-Destin claims here<sup>4</sup> that Defendant Krasner knowingly submitted the fraudulently-obtained July 1, 2008 Certificate of Registration to the Court in the Underlying Action in support of L&L’s trademark infringement claim, procured a favorable summary judgment ruling, and thereafter induced Marco-Destin to enter into the 2011 Settlement Order based on the false claim of ownership. (*Id.* ¶¶ 34-51.)

Marco-Destin pleads two counts—“fraud on the court” and “fraud”—and appears to base each count on

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<sup>4</sup> Marco-Destin alleges that one of the two L&L trademark registrations that were ordered cancelled in the EDNC Action was procured during and submitted in the Underlying Action. (Compl. ¶¶ 3-4.)

the same three groups of allegations. Marco-Destin seeks vacatur of the 2011 Settlement Order, sanctions, and money damages. (Compl. at 26-27.) The Levy Defendants and Defendant Krasner each move to dismiss the complaint, and the former also move for sanctions.

## DISCUSSION

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A complaint cannot simply recite legal conclusions or bare elements of a cause of action; it must plead factual content that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Under the Rule 12(b)(6) standard, the court accepts as true the non-conclusory factual allegations in the complaint and draws all reasonable inferences in the plaintiff’s favor. *Roth v. Jennings*, 489 F.3d 499, 501 (2d Cir. 2007).

At the outset, the Court notes that much of the parties’ briefing addresses the preclusive effect of orders in the bankruptcy litigation, including the bankruptcy court’s order that sustained L&L’s claim objection and disallowed Marco-Destin’s fraud on the court claim. Because the Court has elected to treat that order not as a final order, but as Proposed Findings of Fact and Conclusions of Law, the Court need not and does not address any of those arguments. Therefore, the Court turns directly to merits of Marco-Destin’s claims.

### Count One: Fraud on the Court<sup>5</sup>

Federal Rule of Civil Procedure Rule 60(d)(3) recognizes a district court's power to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). Although Rule 60 is commonly used by parties to file *motions* seeking relief from an order or judgment of the Court, the Rule specifically provides that it "does not limit a court's power to [] entertain an independent action to relieve a party from a judgment, order, or proceeding." Fed. R. Civ. P. 60(d)(1). Nevertheless, the Second Circuit has cautioned that "the type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion' under Rule 60(b)(3) for fraud on an adverse party." *King v. First Am. Investigations, Inc.*, 287 F.3d 91, 95 (2d Cir. 2002) (quoting *Gleason v. Jandrucko*, 860 F.2d 556, 558 (2d Cir. 1988)).

"[T]o sustain an *independent action* for fraud on the court, a plaintiff must prove, by clear and convincing evidence, that [1] the defendant interfered with the judicial system's ability to adjudicate impartially and

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<sup>5</sup> In its consolidated opposition to the motions to dismiss, Marco-Destin objects to the bankruptcy court's "summary" dismissal of its fraud on the court claim without holding an evidentiary hearing. (*See, e.g.*, docket entry no. 41 ("Pl. Opp.") at 9.) To the extent Marco-Destin seeks an evidentiary hearing here, the Court finds that such a hearing is unnecessary because it can address the merits of the claim based on the pleadings and matters of which it takes judicial notice. *See, e.g., Shah v. Eclipsys Corp.*, 2010 WL 2710618, at \*15 (E.D.N.Y. July 7, 2010) (holding that "an evidentiary hearing is not always necessary before finding a party has committed fraud on the court," but noting that some courts "have exercised their discretion" to hold such hearings).

that [2] the acts of the defendant must have been of such a nature as to have prevented the plaintiff from fully and fairly presenting a case or defense.” *Mazzei v. The Money Store*, 62 F.4th 88, 93-94 (2d Cir. 2023). Moreover, as to the defendant’s state of mind, the law of this Circuit requires clear and convincing evidence of bad faith. *Id.* at 95. Because fraud on the court “is a claim that exists to protect the integrity of the judicial process,” it cannot be time-barred. *See In re Old Carco LLC*, 423 B.R. 40, 51-52 (Bankr. S.D.N.Y. 2010) (citation omitted), *aff’d*, 420 F. App’x 89 (2d Cir. 2011).

The Court, which assumes for purposes of this motion practice the truth of Plaintiffs’ allegations, concludes that Marco-Destin fails to state a claim of fraud on the Court because Plaintiffs have not met their burden of showing that they were prevented “from fully and fairly presenting a case or defense” in the Underlying Action. As shown in the Court’s factual recitation above and as further explained below, Marco-Destin was in possession of information that would have supported inquiry into the veracity of L&L’s claims of trademark ownership and had every opportunity in the Underlying Action to use the tools available in the adversarial process to contest L&L’s asserted ownership rights in the “Wings” mark. The record of the Underlying Action shows Defendants did not thwart any efforts by Marco-Destin to contest ownership; rather, Marco-Destin simply chose not to explore the issue.

The subject of the Underlying Action was the MDI License Agreement, and a significant part of the dispute, as indicated by the 2009 SJ decision, naturally focused on contract formation, including the parties’ respective understandings, their sophisticated repre-



sensation, the underlying negotiations, and the eventual terms. Those terms include paragraph 11.3 of the MDI License Agreement, which recites, clearly, that Marco-Destin “acknowledges” it was told by L&L that “one or more individuals and/or entities [] have registered trademarks and/or service marks to the ‘Wings’ mark and can and/or may claim a paramount right” to its use. Far from claiming that it attempted to discern, through discovery or otherwise, who such owner or owners may be, Marco-Destin fails to mention this provision in the instant Complaint, and does not address the provision in its consolidated opposition to the motions to dismiss. (*See generally* Compl.; docket entry no. 41 (“Pl. Opp.”).) That choice is not surprising.

In the Court’s review of the record in the Underlying Action, neither paragraph 11.3 nor any portion of its language appears in any decision. Neither Marco-Destin nor Defendants claim that the parties engaged in any litigation over, or even referred to this paragraph or any other aspect of the MDI License Agreement in connection with L&L’s claim of *ownership* rights in the “Wings” mark. “In short, had [Marco-Destin] exercised the required due diligence in the prior action and explored avenues of proof available to [it],” the alleged falsity of L&L’s claimed ownership would have been uncovered. *Mazzei*, 62 F.4th at 94.

Moreover, the Court finds that the same considerations apply to Marco-Destin’s arguments regarding concealment of the Morrow License Agreement and false representations in connection with the Certificate of Registration. Marco-Destin relies heavily on the judgment issued in the EDNC Action involving

L&L and Beach Mart in support of its claims. In contrast to the BMI License Agreement that was at issue in the EDNC Action, however, the MDI Licensing Agreement disclosed that another individual or entity possessed registered trademarks and/or service marks for the “Wings” mark and could claim a paramount right to its use. To be sure, the Court does not condone L&L’s failure to disclose the existence of the Morrow License Agreement in the Underlying Action, and, as already noted above, L&L was sanctioned for concealing that agreement in the EDNC Action. Nevertheless, L&L’s failure to disclose that agreement did not relieve Marco-Destin of its obligation to do appropriate due diligence based on what it did know under the terms of its own agreement. If Marco-Destin had sought to ascertain from L&L during the Underlying Action who else could claim a paramount right to use the “Wings” mark, it might well have found the Morrow License Agreement on its own. Thus, the Court declines to credit Marco-Destin’s conclusory allegation that, “[alt the time of the Underlying [] Action, neither Marco-Destin nor the District Court were or could have been aware that L&L was not in fact the true owner of the WINGS trademark.” (Compl. ¶ 25.)

Nor did Marco-Destin elect to challenge in any meaningful way L&L’s use of the Certificate of Registration in aid of its trademark infringement claim. That document constituted *prima facie* evidence of L&L’s right to exclusive use of the “Wings” mark that could have been rebutted. Clearly, had Marco-Destin made efforts in the first instance to identify the other owner(s) of the “Wings” mark referenced in the MDI License Agreement, it could have marshalled its

own evidence to rebut the Certificate of Registration. Moreover, the USPTO is required by law to make all trademark applications available for public inspection. *See, e.g.*, 37 C.F.R. § 2.27. Had Marco-Destin examined this record, even after L&L filed the Certificate of Registration in the Underlying Action, it would have revealed, *inter alia*, an agency “Office Action,” as well a response thereto by Defendant Krasner, in which Krasner identified Shepard Morrow as the previous owner of a similar mark, and asserted that Morrow no longer used the mark. Marco-Destin, armed with this discovery, could have requested more tailored information from L&L, or asked to depose any of its officers who had knowledge of Morrow’s registration.

Plaintiffs attempt to undercut this latter point—the availability of the trademark application in the public domain—by citing, yet again, the EDNC Action. (Pl. Opp. at 29-30.) There, the Court of the Appeals for the Fourth Circuit held that the district court had erred when it rejected Beach Mart’s negligent misrepresentation claim on the theory that Beach Mart could have discovered Morrow’s prior registrations through a reasonable inquiry of the public records because that claim was based on L&L’s failure to disclose its status as licensee of Morrow. *See Beach Mart, Inc. v. L&L Wings, Inc.*, 784 F. App’x 118, 126 (4th Cir. 2019). Marco-Destin’s comparison of its position to that of Beach Mart is ill-founded for at least two reasons. First, Marco-Destin fails to mention that the Fourth Circuit noted that “no evidence in the record” suggested that “Beach Mart could have discovered the license on its own,” which is not the case here, given the inclusion of paragraph 11.3 in the MDI License Agreement. *Id.* Second, Marco-Destin’s argument betrays a fundamental

misunderstanding of the relevant inquiry for evaluating a fraud *on the court* claim. The question here is whether Marco-Destin could have fully and fairly litigated L&L's purported ownership in the "Wings" mark during the Underlying Action, not whether L&L had a duty to disclose the Morrow License Agreement to Marco-Destin as part of their "commercial relationship." *See Id.*

The requirement that, in order to establish fraud on the court, "a party must have been prevented from fully and fairly presenting her case is consistent with the deference owed to the finality of judgments and respect for the adversarial process." *Mazzei*, 62 F.4th at 94. As the Second Circuit has aptly observed, "[o]ur adversarial process relies on the parties to keep one another in check." *Id.* at 95. Marco-Destin, like any other litigant, was afforded "broad discovery and disclosure supervised" by a judicial officer, and it cannot now seek to set aside a stipulated order after it failed to take advantage of these opportunities. *Id.* Because Marco-Destin could have addressed the alleged fraud in the Underlying Action, the Court need not and does not address whether L&L, acting in bad faith, "interfered with the judicial system's ability to adjudicate impartially." *Id.* at 94.

### **Count Two: Fraud**

Counts One and Two are based on the same factual allegations. To the extent Count Two asserts a second fraud on the court claim, the claim is dismissed for the same reasons explained above. To the extent it constitutes an independent fraud claim against the individual defendants acting "as agents" of L&L, it must also be dismissed.

By its plain terms, Rule 60 provides that, “[o]n motion or just terms,” the court may relieve a party from an order because of “fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.” Fed. R. Civ. P. 60(b)(3). A motion under Rule 60(b)(3) must be made “no more than a year after the entry of the judgment or order.” Fed. R. Civ. P. 60(c)(1). While the parties argue over the proper application of the statute of limitations for filing fraud tort claims under New York law, the Second Circuit has twice rejected the contention that a state statute of limitations applies to Rule 60 claims, once in a published opinion addressing a Rule 60 motion, and once in a summary order addressing a Rule 60 independent action. *See King v. First Am. Investigations, Inc.*, 287 F.3d 91, 94 (2d Cir. 2002); *LinkCo, Inc. v. Naoyuki Akikusa*, 367 F. App’x 180, 182 (2d Cir. 2010). The one-year limitations period for claims that are properly encompassed by Rule 60(b)(3) is “absolute.” *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000).

Moreover, if a party’s allegations properly fall under Rule 60(b)(3), and that party inexcusably fails to file a timely claim for relief within the one-year limitations period, it cannot salvage its claim by invoking Rule 60(d)(3). *See, e.g., Rowe Ent. v. William Morris Agency Inc.*, No. 98-CV-8272 RPP, 2012 WL 5464611, at \*15 n.4 (S.D.N.Y. Nov. 8, 2012) (citing *Anderson v. New York*, No. 07-CV-9599, 2012 WL 4513410, at \*4 (S.D.N.Y. Oct. 2, 2012)). The constraint applies here, whether Marco-Destin grounds its claim for relief in Rule 60(d)(1) or in 60(d)(3). Excepting fraud on the court, any allegation of fraud on the part of L&L and its agents in the Underlying Action is clearly covered

by the plain language of Rule 60(b)(3), and Marco-Destin may not sidestep the limitations period for that claim by packaging it in an independent action. The Court has already demonstrated that Marco-Destin had every opportunity to unearth L&L’s alleged fraudulent conduct during the Underlying Action, and its yearslong delay in bringing this standalone fraud claim is inexcusable. Because Rule 60 bars this claim, the Court cannot disturb the 2011 Settlement Order.

To the extent Count Two constitutes an independent fraud claim for damages against the individual defendants acting *individually*—in other words, not as an “opposing party” under Rule 60—it must be dismissed both because the applicable statute of limitations has expired and because it is precluded by the releases in the 2011 Settlement Order. First, under New York law, a plaintiff must bring a fraud action within “the greater of six years from the date the cause of action accrued or two years from the time plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it.” *Dowe v. Leeds Brown L., P.C.*, 419 F.Supp.3d 748, 761 (S.D.N.Y. 2019), *aff’d sub nom. Dowe v. Leeds, Morelli & Brown PC*, No. 21-3069-CV, 2023 WL 3986373 (2d Cir. June 14, 2023).

At the motion to dismiss stage, it is “proper under New York law to dismiss a fraud claim” when the alleged facts “establish that a duty of inquiry existed and that an inquiry was not pursued.” *Koch v. Christie’s Int’l PLC*, 699 F.3d 141, 155-56 (2d Cir. 2012). “[T]he court will impute knowledge of what a plaintiff in the exercise of reasonable diligence should have discovered concerning the fraud, and in such cases the limitations period begins to run from the date such

inquiry should have revealed the fraud.” *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 362 (2d Cir. 2013) (citation omitted). As explained in detail above, Marco-Destin did not exercise reasonable due diligence during the Underlying Action, and the Court imputes to Marco-Destin knowledge of what it should have discovered had it investigated L&L’s alleged ownership rights in the “Wings” mark. Instead of “shut[ting] [its] eyes to the facts which call for investigation,” Marco-Destin ought to have made that inquiry in the Underlying Action. *Koch*, 699 F.3d at 155. Thus, this claim is well outside the applicable statute of limitations as against all defendants.

Second, because Marco-Destin cannot avail itself of Rule 60 to disturb the 2011 Settlement Order, the order and its release provisions remain intact. In the stipulated order, Marco-Destin agreed not to bring any cause of action relating to the “Wings” mark or the MDI License Agreement—such as the instant fraud claim for damage—against the “present and former officers, directors, employees, agents, and representatives” of L&L. (*See* 2011 Settlement Order ¶ 10.) The order provides that the Court “retain[s] jurisdiction to enforce [its] terms and conditions.” (*Id.* ¶ 11.) The Court applies the release provisions as written; they mandate dismissal of the instant claim against the individual defendants.

Therefore, Count Two must be dismissed because it is time-barred under Rule 60, and the applicable state statute of limitations, and is precluded by the releases embodied in the 2011 Settlement Order.

### **Sanctions**

The Levy Defendants' motion includes a request for sanctions pursuant to 28 U.S.C. § 1927. They argue that Marco-Destin's claims are meritless and that Marco-Destin unreasonably multiplied proceedings. (Def. Mem. at 24-25.) "To succeed on a motion for sanctions under 28 U.S.C. § 1927 or the court's inherent powers, the movant must demonstrate `clear evidence that (1) the offending party's claims were entirely meritless and (2) the party acted for improper purposes.'" *Revson v. Cinque & Cinque, P.C.*, 221 F.3d 71, 79 (2d Cir. 2000) (quoting *Agee v. Paramount Commc'ns Inc.*, 114 F.3d 395, 398 (2d Cir. 1997)). This is a high bar, and the Court finds that it has not been met here. The bankruptcy court order that Defendants argue precludes Marco-Destin's instant claims is being treated as Proposed Findings and Conclusions of Law, because it is unclear whether an Article I court has the authority to finally adjudicate a claim seeking to set aside an order issued by an Article III court. As this is the first time Marco-Destin has brought such a claim in a district court, the Court finds that sanctions are inappropriate. The motion is denied to the extent it seeks the imposition of sanctions.

### **CONCLUSION**

For the foregoing reasons, the Court grants the Defendants' motions to dismiss the complaint, and denies the Levy Defendants' motion insofar as it seeks sanctions. The Clerk of Court is respectfully directed to terminate the motions at docket entry nos. 28 and 34, enter judgment in favor of the Defendants, and close case no. 22-CV-8459.



SO ORDERED.

/s/ Laura Taylor Swain  
Chief U.S. District Judge

Dated: New York, New York  
August 28, 2023

**ORDER, U.S. BANKRUPTCY COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK,  
NO. 21-10795(DSJ), *IN RE: L&L WINGS, INC.*  
(APRIL 7, 2022)**

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: L&L WINGS, INC.,

*Debtor.*

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Case No. 21-10795(DSJ)

Chapter 11

Before: Hon. David S. JONES,  
U.S. Bankruptcy Judge.

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**ORDER GRANTING DEBTOR’S OBJECTION TO CLAIM  
NO. 112 OF MARCO-DESTIN, INC.**

UPON the motion (ECF Doc. 237; the “Motion”)<sup>1</sup> of the above captioned Debtor (the “Debtor”) pursuant to Section 502 of the Bankruptcy Code and Rule 3018(a) of the Federal Rules of Bankruptcy Procedure, for an Order, inter alia, disallowing and/or expunging claim no. 112 (the “MDI Claim”) filed against the Debtor by Marco-Destin, Inc. (“MDI”) as set forth in the Motion; and the Debtor having filed an Omnibus Response in, inter alia, further support of the Motion

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings as set forth in the Motion.

(ECF Doc. 276), and MDI having filed a Reply To Debtor's Objection and Supplemental Submission in partial response to the Motion (ECF Doc. 275), and MDI having filed a letter dated February 15, 2022 (ECF Doc. 306) concerning, inter alia, the Court's alleged lack of jurisdiction over the Motion; and the Debtor having filed a letter response in opposition to the MDI Letter dated February 16, 2022 (ECF Doc. 308); and hearings having been held before the Court on the Motion on January 20, 2022, January 27, 2022 and February 17, 2022, and the Court having entered an order on February 23, 2022 (ECF Doc. 314) (a) estimating the MDI Claim at \$0 for voting and plan distribution purposes and (b) determining that the Court has continuing jurisdiction over the Motion and affording the parties an opportunity to submit a final, supplemental letter brief in support of their respective positions; and the Debtor having filed a final submission in the form of letter brief on February 24, 2022 (ECF Doc. 316); and MDI having filed a final submission in the form of a letter brief on February 26, 2022 (ECF Doc. 317); and the Court having found, after the filing of these last 2 submissions, that the Motion is fully submitted and that all parties have had a full and fair opportunity to be heard with respect to the Motion; and the Court having read its decision on the Motion into the record of the Court at a hearing held on April 7, 2022 (the "Ruling"), and as set forth in the Ruling, the Court having considered the Motion and all oral argument, responses and subsequent pleadings thereon, and, for the reasons set forth in the Ruling, it is hereby

ORDERED, that the Motion is granted in all respects; and it is further

ORDERED, that the MDI Claim is hereby disallowed and expunged in its entirety; and it is further

ORDERED, that the Court hereby retains jurisdiction over the Motion and the implementation of this Order, respectively.

/s/ David S. Jones

U.S. Bankruptcy Judge

Dated: New York, New York  
April 7, 2022

**ORDER, U.S. BANKRUPTCY COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK,  
NO. 21-10795(DSJ), *IN RE: L&L WINGS, INC.*  
(FEBRUARY 23, 2022)**

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: L&L WINGS, INC.,

*Debtor.*

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Case No. 21-10795(DSJ)

Chapter 11

Before: Hon. David S. JONES,  
U.S. Bankruptcy Judge.

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**ORDER (1) ESTIMATING CLAIM NO. 112 OF MARCO-  
DESTIN, INC. FOR PURPOSES OF VOTING ON AND  
DISTRIBUTIONS PURSUANT TO DEBTOR’S CHAPTER  
11 PLAN OF REORGANIZATION AND (2) GOVERNING  
DEBTOR’S MOTION OBJECTING TO CLAIM  
112 OF MARCO-DESTIN, INC.**

UPON the motion (ECF Doc. 237; the “Motion”)<sup>1</sup>  
of the above captioned Debtor (the “Debtor”) pursuant  
to Section 502 of the Bankruptcy Code and Rule  
3018(a) of the Federal Rules of Bankruptcy Procedure,  
for an Order (a) disallowing and/or expunging claim

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<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings as set forth in the Motion.

no. 112 (the “MDI Claim”) filed against the Debtor by Marco-Destin, Inc. (“MDI”) as set forth in the Motion or, in the alternative, (b) estimating the MDI Claim at zero dollars for purposes of voting on and distributions pursuant to the Debtor’s Chapter 11 Plan of Reorganization (the “Plan”); and the Debtor having filed an Omnibus Response In, inter alia, further support of the Motion (ECF Doc. 276) and MDI having filed a Reply To Debtor’s Objection and Supplemental Submission in partial response to the Motion (ECF Doc. 275); and MDI having filed a letter dated February 15, 2022 (ECF Doc. 306; the “MDI Letter”) concerning, inter alia, the Court’s alleged lack of jurisdiction over the Motion; and the Debtor having filed a letter response in opposition to the MDI Letter dated February 16, 2022 (ECF Doc. 308); and hearings having been held before the Court on the Motion on January 20, 2022, January 27, 2022 and February 17, 2022, respectively, and upon due deliberation thereon the Court having considered the Motion and all responses thereto, and the Court having heard and considered oral arguments of the parties presented at the February 17, 2022 hearing, at which counsel for NDI represented that it does not object to the substance of the relief that is set forth herein; and for reasons stated by the Court upon the record during the February 17 hearing; it is hereby [DSJ 2/23/2022]

ORDERED, that the Court hereby retains exclusive jurisdiction over the Motion; and it is further

ORDERED, that the MDI Claim is hereby estimated pursuant to Section 502(c) of the Bankruptcy Court at \$0 for voting and distribution purposes under the Plan; however, the estimation shall not be utilized

for res judicata, collateral estoppel or claim preclusion purposes by any party in interest; and it is further

ORDERED, that such estimation is without prejudice to (a) the Debtor's continued prosecution of the Motion in this Court seeking the expungement and disallowance of the MDI Claim in full; and (b) MDI's rights to further defend such request for expungement and disallowance (to the limited extent provided below); and it is further

ORDERED, that the Court shall determine the balance of the Debtor's request under the Motion for disallowance and expungement of the MDI Claim in full without the need for further hearing unless otherwise directed by the Court; and it is further [DSJ 2/23/2022]

ORDERED, that, as directed during the February 17 hearing, all interested parties shall file with the Court a letter brief no longer than five (5) pages in length, single spaced, on the limited issue of whether inquiry notice is sufficient to establish the Debtor's laches argument under the Motion no later than February 24, 2022 at 5:00 p.m.; and it is further [DSJ 2/23/2022]

ORDERED, that the Court shall retain jurisdiction over the terms and implementation of this Order.

App.44a

/s/ David S. Jones

U.S. Bankruptcy Judge

Dated: New York, New York  
February 23, 2022



**ORDER, U.S. BANKRUPTCY COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK,  
NO. 21-10795(DSJ), *IN RE: L&L WINGS, INC.*  
(JANUARY 21, 2022)**

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: L&L WINGS, INC.,

*Debtor.*

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Case No. 21-10795(DSJ)

Chapter 11

Before: Hon. David S. JONES,  
U.S. Bankruptcy Judge.

---

**ORDER DENYING MOTION OF MARCO-DESTIN, INC.,  
1000 HIGHWAY 98 EAST CORP., PANAMA SURF &  
SPORT, INC. AND E&T, INC. FOR ENTRY OF AN  
ORDER GRANTING RELIEF FROM THE AUTOMATIC  
STAY PURSUANT TO 11 U.S.C. § 362(D)**

UPON the motion (the “Motion”) filed by Marco-Destin, Inc., 1000 Highway 98 East Corp., Panama Surf & Sport, Inc. and E&T, Inc. (collectively, the “Movant”) for entry of an order granting (A) relief from the automatic stay pursuant to 11 U.S.C. § 362(d); and (B) estimating claim pursuant to 11 U.S.C. § 502(c) (ECF Doc. No. 258), and the Motion having been opposed by the above captioned debtor (the “Debtor”) (ECF Doc. Nos. 262 and 276) and the Official Com-

mittee of Unsecured Creditors (ECF Doc. No. 268; collectively, the “Objections”), and a hearing having been held to consider the Motion on January 20, 2022 (the “Hearing”), and the Court having considered the Motion, the Objections and Movant’s response thereto (ECF Doc. No. 275), and for the reasons stated on the record of the Hearing, it is hereby

ORDERED, that the portion of the Motion requesting relief from the automatic stay is hereby DENIED in all respects; and it is further

ORDERED, that Movant’s Proof of Claim No. 112 is no longer withdrawn.

/s/ David S. Jones

U.S. Bankruptcy Judge

Dated: New York, New York  
January 21, 2022

**STIPULATED ORDER OF SETTLEMENT  
AND DISMISSAL, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK,  
NO. 07 CIV. 4137 (BSJ) (GWG),  
*L&L WINGS, INC. v. MARCO DESTIN, ET AL.*  
(FEBRUARY 15, 2011)**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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L & L WINGS, INC.,

*Plaintiff,*

v.

MARCO-DESTIN INC.,  
1000 HIGHWAY 98 EAST CORP.,  
PANAMA SURF & SPORT, INC. and E & T INC.,

*Defendants.*

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Civil Action No. CV-07-4137 (BSJ) (GWG)

Before: Barbara S. JONES, U.S. District Judge.

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**STIPULATED ORDER OF SETTLEMENT  
AND DISMISSAL**

WHEREAS, on May 29, 2007, plaintiff L & L Wings, Inc. (“Wings” or “Plaintiff”) filed this action (the “Action”) against defendants Marco-Destin Inc., 1000 Highway 98 East Corp., Panama Surf & Sport, Inc. and E & T Inc. (collectively, “Defendants”), alleging breach

of contract, trademark and trade dress infringement under the Lanham Act, 15 § 1051 *et seq.*, violation of sections 360-1 and 133 of the New York General Business Law, and common law unfair competition and service mark infringement;

WHEREAS, on September 18, 2007, Defendants answered the Complaint and alleged counterclaims for rescission, revocation and/or reformation of the parties' Licensing Agreement dated November 1, 1998 (the "Licensing Agreement"), attorneys' fees based on Plaintiff's alleged bad faith and fraudulent representations, and an equitable accounting;

WHEREAS, by Order dated December 16, 2009 (docket no. 100), this Court granted partial summary judgment in Plaintiff's favor finding Defendants liable for breach of contract, as well as trademark infringement under the Lanham Act, violation of sections 360-I and 133 of the New York General Business Law, and common law unfair competition and service mark infringement, and dismissed all of Defendants' counterclaims;

WHEREAS, by Opinion and Order dated November 15, 2010 (docket no. 115), this Court further granted partial summary judgment in Plaintiff's favor on its breach of contract claim as to the reasonableness and enforceability of the liquidated damages provision in the Licensing Agreement, as well as for attorneys' fees, and directed that Defendants permanently cease any future use of Plaintiff's "Wings" mark (the "Mark") and trade dress (the "Trade Dress");

WHEREAS, to avoid further costs, burdens and expense, the parties desire to resolve fully and finally all of their disputes, including the claims and counter-

claims concerning, relating to, and arising out of this Action;

NOW, THEREFORE, upon the Court's consideration of the foregoing and upon the consent and agreement of the parties by their authorized officials,

IT IS STIPULATED, ADJUDGED, ORDERED AND DECREED THAT:

1. Defendants shall deliver to Plaintiff (at the address provided in paragraph 8 below) four (4) payments (each, a "Payment," and collectively, the "Payments") in the aggregate amount of three million five hundred thousand dollars (\$3,500,000.00). Payments shall be made by either certified check made payable to "L, & L Wings, Inc." or by wire transfer to Plaintiff's account, Account No. 158005348; Crescent Bank, Myrtle Beach, South Carolina 29577 (ABA No. 053208079).

The four Payments must be delivered by Defendants and received by Plaintiff as follows:

- a. one million dollars (\$1,000,000.00), on or before March 31, 2011;
- b. one million dollars (\$1,000,000.00), on or before June 30, 2011;
- c. one million dollars (\$1,000,000.00), on or before July 31, 2011; and
- d. five hundred thousand dollars (\$500,000.00), on or before March 31, 2012.

2. If Defendants fail to deliver to Plaintiff any Payment as required by paragraph 1 hereof by the date specified, Plaintiff may thereafter immediately provide written notice to Defendants that such Payment has not been received. If ten (10) business days after

that written notice such Payment remains undelivered, Defendants shall be in default of this Stipulated Order of Settlement and Dismissal (“Stipulated Order”) without requirement of further notice to them. Such written notice shall be deemed to have been served and/or delivered when received by addressee. Upon such default, Plaintiff shall be entitled to immediate payment from Defendants in an amount (the “Default Payment”) equal to (i) three million five hundred thousand dollars (\$3,500,000. 00), less the amount of any Payments timely received by Plaintiff under paragraph 1 hereof, multiplied by 150% (the “Accelerated Sum”), (ii) post-judgment interest on the Accelerated Sum as provided by 28 U.S.C. § 1961, and (iii) reasonable attorneys’ fees and costs incurred in connection with subparts (i) and (ii) of this paragraph.

3. In the event of Defendants’ default under paragraph 2, Plaintiff may request entry of the Judgment in the form attached hereto as Exhibit A, in the amount of the Default Payment (calculated in accordance with paragraph 2), by filing the Judgment with this Court along with an accompanying affidavit by Plaintiffs authorized representative setting forth the calculation of the Default Payment. Defendants hereby waive and are deemed to have waived any right to appeal from or otherwise attack, directly or indirectly, the entry of the Judgment.

4. Within thirty (30) calendar days of the date of entry of this Stipulated Order by the Court (hereafter the “Effective Date”), Defendants shall (a) cease any and all use or utilization of the Mark, or any similar name (each, a “Similar Name”), and (b) subject to paragraph 5 below, cease any further use or utilization of the Trade Dress in any form whatsoever, including

with or without neon lights (each, a “Similar Trade Dress”).

5. Notwithstanding paragraph 4(b) above, Defendants may use the Trade Dress (a) in connection with their store located at 102 Highway 17 North, North Myrtle Beach, South Carolina 29582 (“Store 745”) until no later than March 31, 2011, and (b) in connection with their stores located at 1251A Miracle Strip Parkway, Fort Walton Beach, Florida 32548 (“Store 748”) and 1115 Highway 98 East, Destin, Florida 32541 (“Store 749”) until no later than October 31, 2011. With respect to Stores 745, 748 and 749, as of the dates respectively indicated in this paragraph, Defendants shall cease any further use or utilization of the Trade Dress or a Similar Trade Dress in connection with each such Store.

6. In the event that Defendants use the Mark, a Similar Mark, Trade Dress or a Similar Trade Dress other than as expressly permitted by this Stipulated Order, whether intentionally or unintentionally and regardless of the extent of any such use, Defendants agree that they will be jointly and severally liable, and each jointly and severally obligated immediately, to pay Plaintiff an amount equal to the sum of two hundred dollars (\$200.00) per day per business establishment in which there is any use of the Mark, Similar Name, Trade Dress, or Similar Trade Dress for the duration of such unauthorized use, which shall be deemed to be continuing unless and until Defendants cease and desist all such unauthorized use, and provide Plaintiff with a sworn certification stating with specificity all steps taken to terminate the unauthorized use and that such unauthorized use has ceased.

7. Section 2(c) of the Licensing Agreement is hereby deleted and shall be of no further force or effect; provided, however, that as of the Effective Date until October 31, 2016 only Plaintiff, its Principals and their present or future Related Companies may use the Mark and/or Trade Dress in the Territory (as defined in section 1.2 of the Licensing Agreement). For purposes hereof, "Principals" shall mean Shaul Levy and Meir Levy; and "Related Company" shall mean any corporation or legal entity (i) the majority of whose shares or other securities entitled to vote for election of directors (or other managing authority) is now or hereafter owned or controlled by Plaintiff or its Principals either directly or indirectly, or (ii) which does not have outstanding shares or securities, but the majority (more than 50%) of the equity interest in which is now or hereafter owned by Plaintiff or its Principals either directly or indirectly, but only for so long as such ownership or control exists in (i) or (ii) above.

8. All written notices and payments required or permitted to be given hereunder shall be delivered by hand, or if dispatched by prepaid courier with package tracing capabilities or by registered or certified mail, postage prepaid, addressed as follows (in all cases with copies to the facsimile numbers and e-mail addresses indicated below):

For Plaintiff

The Wings Group c/o Nancy Cibrano  
666 Broadway, 2nd Floor  
New York, NY 10012  
nancy.cibrano@wingsgroup.com  
Fax: (212) 481-8218



With copy to:

Richard S. Taffet, Esq.  
Bingham McCutchen LLP  
399 Park Avenue New York, NY 10022  
richard.taffet@bingham.com  
Fax: (212) 702-3603

Bennett D. Krasner, Esq.  
1233 Beech Street, No. 49  
Atlantic Beach, NY 11509  
bkrasner@bdklaw.net  
Fax: (516) 432-7016

For Defendants

Dror Levy  
Marco-Destin, Inc.  
10400 Northwest 33rd Street, #110  
Miami, FL 33172  
drorlevy@marcodestin.net  
Fax: (305) 471-9398

With a copy to:

Brent G. Wolmer, Esq.  
Cohen, Norris, Scherer, Weinberger & Wolmer  
712 U.S. Highway One, Suite 400  
North Palm Beach, FL 33408  
bgw@cohenlaw.com  
Fax: (561) 842-4104

Scott M. Kessler, Esq.  
Akerman Senterfitt LLP  
335 Madison Avenue, 26th Floor  
New York, NY 10017  
scott.kessler@akerman.com  
Fax: (212) 880-8965

Such notices and payments shall be deemed to have been served and/or delivered when received by addressee. Either party may give written notice of a change of address and, after notice of such change has been received, any notice, payment or request shall thereafter be given to such party as above provided at such changed address.

9. Subject to the above, this Action shall be, and hereby is, dismissed with prejudice and without costs to any party.

10. Except to enforce and subject to the terms of this Stipulated Order and the obligations created hereunder, and without limiting or compromising any of the foregoing, (a) Plaintiff releases, forever discharges, and covenants not to sue Defendants and their respective successors, assigns, affiliates, subsidiaries, parents, and their present and former officers, directors, employees, agents and representatives (the "Defendant Releasees"), from any and all actions, causes of action, suits, investigations, debts, attorneys' fees, costs, accounts, covenants, controversies, agreements, promises, damage, claims, grievances, arbitrations, of any kind whatsoever, now known or unknown, which Plaintiff now has or has had from the beginning of time until the Effective Date against the Defendant Releasees relating to the Mark, Trade Dress or Licensing Agreement, and (b) Defendants release, forever discharge, and covenant not to sue Plaintiff and its successors, assigns, affiliates, subsidiaries, parents, and its present and former officers, directors, employees, agents and representatives (the "Plaintiff Releasees"), from any and all actions, causes of action, suits, investigations, debts, attorneys' fees, costs, accounts, covenants, controversies, agreements,

promises, damage, claims, grievances, arbitrations, of any kind whatsoever, now known or unknown, which Defendants now have or have had from the beginning of time until the Effective Date against the Plaintiff Releasees relating to the Mark, Trade Dress or Licensing Agreement.

11. The Court shall retain jurisdiction to enforce the terms and conditions of this Stipulated Order and to resolve disputes arising hereunder.

12. This Stipulated Order, including all attachments and materials expressly incorporated by reference, comprises the entire agreement among the parties. There shall be no modification of this Stipulated Order without written approval of all of the parties and the Court. Notwithstanding this limitation, the parties may mutually agree in writing to minor modifications of the Stipulated Order without the approval of the Court.

Dated: New York, New York.  
(February 11. 2011

By: /s/ Richard S. Taffet

Diane C. Hertz

John P. Son

Bingham McCutchen LLP

399 Park Avenue

New York, NY 10022-4689

Bennett D. Krasner  
1233 Beech Street #49  
Atlantic Beach, NY 11509  
Tel: (516) 889-9353

*Attorneys for Plaintiff  
L & L Wings, Inc.*

By /s/ Scott M. Kessler  
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335 Madison Avenue  
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New York, NY 10017-4836  
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NOVAK, DRUCE & QUIGG, LLP  
CityPlace Tower, 15th Floor  
525 Okeechobee Blvd.  
West Palm Beach, FL 33401  
Telephone: (561) 847-7800  
Facsimile: (561) 847-7801

*Attorneys for Defendants*

SO ORDERED:

Dated: New York, New York.  
Feb. 15, 2011

/s/ Barbara S. Jones  
U.S. District Judge

**OPINION AND ORDER, U.S. DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW  
YORK, NO. 07 CIV. 4137 (BSJ) (GWG),  
L&L WINGS, INC. v. MARCO DESTIN, ET AL.  
(NOVEMBER 15, 2010)**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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L & L WINGS, INC.,

*Plaintiff,*

v.

MARCO-DESTIN INC.,  
1000 HIGHWAY 98 EAST CORP.,  
PANAMA SURF & SPORT, INC. and E & T INC.,

*Defendants.*

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Civil Action No. CV-07-4137 (BSJ) (GWG)

Before: Barbara S. JONES, U.S. District Judge.

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**OPINION AND ORDER**

**BARBARA S. JONES  
UNITED STATES DISTRICT JUDGE**

On May 28, 2007, Plaintiff L & L Wings, Inc. (“Plaintiff”) filed suit against Defendants Marco-Destin, Inc., 1000 Highway 98 East Corp., Panama Surf & Sport, Inc., and E & T, Inc. (collectively “Defendants”) alleging breach of contract, trademark infringement

under the Lanham Act, violations of the New York General Business Law, and common law service mark infringement and unfair competition. On December 18, 2009, this Court granted Plaintiff's Motion for Partial Summary Judgment on liability and denied Defendants' Cross Motion for Partial Summary Judgment on liability. On January 27, 2010, Plaintiff's filed a Motion for Summary Judgment on Damages. For the reasons set forth below, Plaintiff's Motion for Summary Judgment on damages is GRANTED in part and DENIED in part.

### **BACKGROUND**

This Order assumes familiarity with the facts set forth in *L & L Wings, Inc. v. Marco-Destin, Inc. et al.*, No. 07 Civ. 4137 (S.D.N.Y. Dec. 16, 2009) ("*L & L Wings I*"), which addressed the parties' cross-motions for partial summary judgment. In that Order, issued on December 16, 2009, this Court concluded that Plaintiff was entitled to summary judgment on its breach of contract claim, trademark infringement claim under the Lanham Act, and claims arising under New York statutory and common law.

Before the Court is Plaintiff's Motion for Summary Judgment on Damages. Plaintiff seeks (1) liquidated damages pursuant to the Licensing Agreement; (2) additional damages under Lanham Act Section 35(a); (3) punitive damages; (4) attorneys' fees and costs; and (5) an order directing Defendants to permanently cease any further use of the Mark and Trade Dress.

For the reasons to follow, the Court (1) finds the liquidated damages provision in the Licensing Agreement reasonable, but determines that there remain disputed issues of fact with regard to the calculation of

liquidated damages; (2) denies plaintiff's motion for additional damages under Lanham Act Section 35(a); (3) denies plaintiff's motion for punitive damages; (4) grants plaintiff's motion for attorneys' fees and costs; and (5) orders Defendants to permanently cease any further use of the Mark and Trade Dress.

## DISCUSSION

To prevail on a motion for summary judgment, a party must establish that there is no genuine issue of material fact in dispute such that it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir.1990). "In determining whether there are genuine issues of material fact, we are required to resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003) (quoting *Stern v. Trustees of Columbia Univ. in the City of N.Y.*, 131 F.3d 305, 312 (2d Cir.1997)). Uncertainty regarding the true state of any material fact is enough to defeat a motion for summary judgment. *United States v. One Tintoretto Painting*, 691 F.2d 603, 606 (2d Cir.1982). However, "the mere existence of some alleged factual dispute between the parties," without more, will not defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 247-48, 106 S.Ct. 2505. There must be enough evidence in support of the non-moving party's case such that "a reasonable jury could return a verdict" in its favor. *Id.* at 248, 106 S.Ct. 2505 (internal citation omitted).

**A. Reasonableness of the Liquidated Damages Provision**

Plaintiff seeks an award of damages in the amount of \$2,109,600 for breach of contract based on the liquidated damages provision of the Licensing Agreement (the “Agreement”), dated February 17, 2000, in relevant part, Section 8 of the Agreement provides:

Licensee specifically acknowledges that the use of the Mark, the name “Wings” or any Similar Name and/or the use of the Licensor’s Trade Dress after the Termination Date will cause Licensor to suffer irreparable harm, damages for which would be extremely difficult to ascertain. Therefore, in addition to all other remedies, including but not limited to injunctive relief, in the even of Licensee’s breach of this Agreement to which Licensor shall be entitled, Licensor shall be entitled to injunctive relief, and liquidated damages in the sum of \$200.00 per day . . . per business establishment utilizing the Mark and/or name “Wings” and/or any Similar Name or Trade Dress until cessation of any improper use, together with all costs and disbursements, including reasonable attorney’s fees arising from Licensee’s failure to promptly use the name “Wings” or any Similar Name or Trade Dress. The calculation of the liquidated damages of \$200.00 per day per business establishment shall be calculated without regard to the four month period . . . if Licensee does not comply with the terms and conditions of the removal set-forth herein within said four month period.



### i. Applicable Law

The reasonableness of such a liquidated damages provision is a question of law for the Court, “giving due consideration to the nature of the contract and the circumstances.” *Bates Adver. USA, Inc. v. 498 Seventh, LLC*, 7 N.Y.3d 115, 120 (2006) (internal quotation marks and citation omitted). New York law “favors freedom of contract through the enforcement of stipulated damage provisions so long as they do not clearly disregard the principle of compensation.” *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 380-81 (2005) (quoting 3 Farnsworth, Contracts § 12.18 at 303-04 (3d ed.)). “Parties to a contract have the right . . . to specify within a contract the damages to be paid in the event of a breach, so long as such a clause is neither unconscionable nor contrary to public policy.” *Rattigan v. Commodore Int’l Ltd.*, 739 F.Supp. 167, 169 (S.D.N.Y. 1990).

The reasonableness of the liquidated damages and the certainty of actual damages must be measured as of the time the parties enter the contract, not as of the time of the breach. *Vernitron Corp. v. CF 48 Assocs.*, 478 N.Y.S.2d 933, 934 (2d Dep’t 1984). As such, a liquidated damages provision will be upheld “if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. . . . If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced.” *Kingsbridge Med. Ctr., P.C. v. Hill*, 357 F.Supp.2d 754, 758 (S.D.N.Y. 2005) (citing *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420 (1977)).

In order to challenge a liquidated damages provision, a party “must demonstrate either that damages flowing from a prospective [breach] were readily ascertainable at the time [the parties] entered into their [contract], or that the [liquidated damages are] conspicuously disproportionate to these foreseeable losses.” *JMD Holding*, 4 N.Y.3d at 380. “The burden is firmly on the party challenging the provision to provide that justification by demonstrating that the stipulated damages are, in fact, an unconscionable penalty.” *GFI Brokers, LLC v. Santana*, 2009 WL 2482130, Nos. 06 Civ. 3988(GEL), 06 Civ. 4611(GEL), at \*2 (Aug. 13 2009 S.D.N.Y.). “[W]here there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty.” *Willner v. Willner*, 538 N.Y.S.2d 599, 602 (2d Dep’t 1989).

When evaluating a liquidated damages provision, a court must also give due consideration to “whether the parties were sophisticated and represented by counsel, the contract was negotiated at arms-length between parties of equal bargaining power, and . . . that [the provision] was freely contracted to.” *The Edward Andrews Group, Inc. v. Addressing Servs. Co., Inc.*, No. 04 Civ. 6731(LTS)(AJP), 2005 WL 3215190, at \*6 n. 3 (S.D.N.Y. Nov. 30, 2005) (internal quotation marks and citations omitted).

## ii. Analysis

Defendants contend that “the contractually agreed-upon liquidated damages clause, of \$200 per day per store, or \$73,000 per store per year, is a coercive penalty.” (Def. Br. 21). Defendants note that Plaintiff’s Fed.R.

Civ.P. 30(b)(6) designee witness on damages referred to the provision as a “penalty.” (Def. Br. 22). Defendants argue that the amount of \$200 per day, per store does not bear a relationship to any other facet of the business or any potential actual damage. (Def. Br. 30). Defendants also argue that the non-compete provisions of the Agreement prohibited Plaintiff from competing in Defendants’ territory for an additional 10 years, ensuring that no actual damages were possible if breach occurred, and thereby rendering the liquidated damages provision a coercive penalty. (Def. Br. 33).

The Court finds that the liquidated damages provision in the Agreement does not constitute an unenforceable penalty. “Liquidated damages clauses are suited to factual situations where there is uncertainty concerning the measure of damages.” *Willner*, 538 N.Y.S.2d at 602. Here, where the damages result from the continued use of a trademark after the expiration of a license, is just such a situation.

Even though no diversion of sales from Plaintiff to Defendants was possible due to the non-compete provisions in the Agreement, this does not render the liquidated damages provision unreasonable. This Court found that Defendants’ use of the Mark was likely to cause consumer confusion. *L & L Wings I*, at 18. Such a loss of control of a trademark puts Plaintiff’s “reputation beyond its own control.” *Church of Scientology Int’l v. Elmira Mission of the Church of Scientology*, 794 F.2d 38, 44 (2d Cir.1986). “[I]t is that loss of control which is the very thing that constitutes irreparable harm in the licensing context.” *Id.* This potential harm to Plaintiff’s reputation and goodwill caused by post-termination use of the Mark would be nearly impossible to quantify at the time the Agreement was

signed in February, 2000. Thus, this is not a case where “the damages fixed are plainly disproportionate to the injury, and the plaintiff’s actual loss is susceptible of calculation.” *Evangelista v. Ward*, 764 N.Y.S.2d 705, 706 (2d Dep’t 2003).

In the Agreement, the parties settled on liquidated damages of \$200 per day, per store. This arrangement preserved the one-to-one proportionality between the days the breach continued and the value of compensation. *See Bates Adver. USA*, 7 N.Y.3d at 119, Just because the liquidated damages could be characterized as a “penalty,” as Plaintiff’s 30(b)(6) witness did, “the prospect of damages in the event of a breach may always be said to encourage parties to comply with their contractual obligations. Liquidated damages are not transformed into a penalty merely because they operate in this way as well, so long as they are not grossly out of scale with foreseeable losses.” *Id.* at 120, To the extent that the damages are now significant, it is because Defendants willfully continued to use the Mark and Trade Dress in at least eleven stores in connection with the sale of beachwear and accessories for a significant period of time after October 31, 2006. *L & L Wings I*, at 14.

In addition, the parties’ respective bargaining positions at the time of creation supports the enforceability of this liquidated damages clause. Much of the traditional “[h]ostility to liquidated damages clauses reflects a concern that such clauses are often unconscionably imposed by the stronger, or more sophisticated party on the weaker.” *Jordache Enter., Inc. v. Global Union Bank*, 688 F.Supp. 939, 944 (S.D.N.Y.1988). Though clearly not dispositive, this concern is not present here. In *L & L Wings I*, this

Court found that Defendants were sophisticated and represented by competent counsel who played a key role in the drafting of the agreement. *L & L Wings I*, at 13-14. Nothing about the parties' respective bargaining positions or the circumstances surrounding the negotiation of the agreement indicates that the liquidated damages clause was anything other than the product of an arms' length negotiation rather than "a situation fraught with possible overreaching." *GFI Brokers*, 2009 WL 2482130, at \*8.

Thus, for the reasons stated above, it is determined that the liquidated damages provision provided for in the Agreement is reasonable.

## **B. Calculation of Liquidated Damages**

Plaintiffs seek Summary Judgment on the amount of damages pursuant to the liquidated damages provision for Defendants' continued unauthorized use of Plaintiff's Mark and Trade Dress after the termination of the Agreement on October 31, 2006. Plaintiff alleges that it is entitled to an award of \$2,109,600 based upon the continued use of 12 stores after the termination date-Plaintiff calculates that 7 stores were in violation for 714 days, 1 store was in violation for 814 days, and 4 stores were in violation for at least 1,184 days. Plaintiff also claims that the use of the trade dress continues to this day in 4 stores and seeks additional liquidated damages consistent with the Agreement. (Pl. Br. 6).

Defendants argue that Plaintiff incorrectly calculated the number of days that the Mark and Trade Dress were used by Defendants after October 31, 2006. Defendants contend that as of November 1, 2006, the Mark and/or the Trade Dress were used in

only 11 stores. Defendants also contest Plaintiff's dates for when use of the trademark ceased. Defendants claim that they changed their website, removed their WINGS exterior signage, removed interior signage and hang tags, and had their credit card company change the credit card receipts and printing on credit card statements earlier than Plaintiff alleges. (Def. Br. 21) Among other things, Defendants also claim that the erroneous continued use of the Mark by a credit card company on purchasers' credit card statements cannot be attributed to Defendants, and that store 320 was never a Wings store and that the Mark and Trade Dress were never used by Defendants at that store at all. (Def. Br. 40). Defendants also argue that the Trade Dress consists of a combination of a wave design and neon lights. Thus, when the use of the neon lights was discontinued, use of the Trade Dress discontinued as well. By Defendants' calculation, use of the Mark and Trade Dress continued beyond October 31, 2006 for a combined 7,334 days in 11 stores, for a total liquidated damages amount of \$1,466,800.

When determining whether there is a genuine issue of material fact, a court must resolve all ambiguities and draw all reasonable references against the moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 38 (2d Cir.1994).

Resolving all inferences against the moving party, there clearly remain issues of material fact,

including the question of when individual stores stopped using the Mark and Trade Dress. As such, the Court DENIES Summary Judgment on the number of days the use of the Mark and Trade Dress by Defendants continued after October 31, 2006. Plaintiff is advised to inform the Court as to how it wants to proceed in the calculation of liquidated damages.

### **C. Damages Under Lanham Act § 35(a)**

In addition to the enforcement of the liquidated damages provision of the Agreement, Plaintiff seeks Defendants' profits from the infringing stores under § 35(a) of the Lanham Act, codified at 15 U.S.C. § 1117(a). Plaintiff argues that an accounting of Defendants' profits is merited in order to prevent Defendants' unjust enrichment from their continued use of the Mark and to deter further infringement. (Pl. Reply Br. 5). Defendants argue that an award of damages under the Lanham Act represents an impermissible double recovery and that, in any event, damages under the Lanham Act are inappropriate in this instance. For the following reasons, Plaintiff's motion for an award of damages under the Lanham Act is DENIED.

Under the Lanham Act, a plaintiff may seek either actual damages under § 1117(a) or statutory damages under § 1117(c). 15 U.S.C. § 1117. There are three distinct rationales for an award of profits under the Act, namely "if the defendant is unjustly enriched, if the plaintiff sustained damages from the infringement, or if the accounting is necessary to deter a willful infringer from doing so again." *Empresa Cubana Del Tabaco v. Culbro Corp.*, 123 F.Supp.2d 203, (quoting *George Basch Co., Inc. v. Blue Coral, Inc.*, 968 F.2d 1532, 1537 (2d Cir. 1992)). As the

Second Circuit has made clear, a plaintiff seeking compensation for a single injury under different legal theories is only entitled to one recovery. *See Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 497 (2d Cir.1995). Thus, in light of the liquidated damages provision of the Agreement, discussed *supra*, the only purpose that an accounting of Defendants' profits could serve would be to prevent Defendants' unjust enrichment and to deter further willful infringement.

The statute itself provides little guidance when determining damages under the Lanham Act. As such, courts are left with broad discretion in awarding damages. *See e.g., Sara Lee Corp. v. Bags of N.Y., Inc.*, 36 F.Supp.2d 161, 166 (S.D.N.Y.1999). Section 1117(a) reads, in part:

If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty.

15 U.S.C. § 1117(a).

Thus, a prevailing plaintiff is not automatically entitled to an accounting for the defendant's profits. Rather, "[u]nlimited enhancement or reduction of an award based on defendant's profits is permitted in order to correct inadequacy or excessiveness." *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 109 (2d Cir.1988). When determining the damages award, a finder of fact may consider: "the degree of certainty that the defendant benefited [sic] from the



unlawful conduct” and the “availability and adequacy of other remedies,” among other things, to determine whether, “on the whole, the equities weigh in favor of an accounting.” *George Basch*, 968 F.2d at 1540. In this instance, the Court finds that the equities weigh against an accounting.

First, it bears repeating that there was no head-to-head competition between Plaintiff and Defendants. Plaintiff did not operate any stores or otherwise compete with Defendants in their exclusive territory at the time of the breach. Indeed, under the Agreement, Plaintiff could not compete or license any other competitors in Defendants’ territory for the next ten years. Nor is there any showing that the Defendants committed any affirmative acts designed to deliberately deceive customers. In addition, according to Plaintiff’s own Rule 30(b)(6) witness, location, store management, price point of merchandise, variety of merchandise, and advertising are the main factors that contribute to profitability. (Def. 56.1 Statement ¶ 112).

Under these circumstances, it is more likely that Defendants profits were overwhelmingly attributable to these factors than they were to the Defendants’ holdover use of the Mark. Indeed, it is not at all certain that Defendants continued use of the Mark led to any substantial additional profits.

Second, the liquidated damages provision in the Agreement provides an adequate alternative remedy, whereas an accounting would unjustly overcompensate for Plaintiff’s actual injury and create a windfall judgment at Defendants’ expense. *See George Basch*, 968 F.2d at 1540.

In sum, Plaintiff has not made the requisite showing that disgorgement of profits is necessary to prevent Defendants' unjust enrichment or to that it is necessary to deter Defendants from continued use of the Mark. Given that profits are overwhelmingly attributable to factors other than the holdover use of the Mark and the availability of the liquidated damages provision, the Court finds that an award of Defendants profits would be inequitable.

For the reasons set forth above, Plaintiff's Motion for an Order directing Defendants to disgorge to Plaintiff their infringing profits pursuant to Section 35(a) of the Lanham Act and enhanced damages under the Lanham Act is DENIED.

#### **D. Punitive Damages**

Plaintiff seeks to recover punitive damages under its state unfair competition claim. It bases this request on the Court's finding that Defendants willfully infringed on Plaintiff's Mark. Under New York law, punitive damages are available "where a defendant's conduct has constituted gross, wanton, or willful fraud or other morally culpable conduct to an extreme degree." *Getty Petroleum Corp. v. Island Transp. Corp.*, 878 F.2d at 657 (2d Cir.1989) (quotation marks and citations omitted). Plaintiff has not made the requisite showing that Defendants' conduct was extreme to the degree that would make an award of punitive damages appropriate here. As such, Plaintiff's motion for punitive damages under New York's unfair competition law is DENIED.

**E. Attorneys Fees, Costs, and Continued Use of the Mark and Trade Dress**

Plaintiff seeks an award of reasonable attorneys' fees under the Agreement and under the Lanham Act. Section 8 of the Agreement provides that Plaintiff is entitled to an award of reasonable attorneys' fees in the event of the licensee Defendants' breach of the Agreement.<sup>[1]</sup>

Under New York Law, "while parties may agree that attorneys' fees should be included as another form of damages, such contracts must be strictly construed to avoid inferring duties that the parties did not intend to create." *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 199 (2d Cir.2003). Here, the provision clearly states that Licensor is entitled to reasonable attorneys' fees arising from breach of the Agreement. Further, Defendants do not deny Plaintiff's entitlement to attorneys' fees under the Agreement. Plaintiff's motion for summary judgment for attorneys' fees pursuant to the Agreement is GRANTED. As such, the Court need not reach the question of whether this is one of the "exceptional cases" where a court may award reasonable attorney fees to the prevailing party under the Lanham Act. 15 U.S.C. § 1117(a).

At the conclusion of the matter, Plaintiff is instructed to submit contemporaneous time records that show, for each attorney, the date, the hours expended, and the nature of the work done.

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<sup>1</sup> Section 8 of the Agreement states, in part: "Licensor shall be entitled to . . . reasonable attorneys fees arising from Licensee's failure to promptly use the name 'Wings' or any Similar Name or Trade Dress."

Defendants claim that they are no longer using the Trade Dress or Mark in any of their stores. To the extent that any use continues, in light of the liability determination in *L & L Wings I*, Defendants are ordered to permanently cease further use of the Mark and Trade Dress.

### CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Summary Judgment on damages is GRANTED in part and DENIED in part. The Court (1) grants summary judgment with respect to the reasonableness of the liquidated damages provision in the Agreement; but (2) determines that there remain disputed issues of material fact as to the calculation of the liquidated damages; (3) denies Plaintiff's motion for additional damages under Lanham Act Section 35(c); (4) denies Plaintiff's motion for punitive damages; (5) grants plaintiff's motion for attorneys' fees and costs; and (6) orders Defendants to permanently cease any further use of the Mark and Trade Dress.

The parties are directed to meet and confer with each other and submit a joint pre-trial order on or before December 15, 2010.

SO ORDERED.

/s/ Barbara S. Jones

U.S. District Judge

Dated: New York, New York  
November 15, 2010

**ORDER, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK,  
NO. 07 CIV. 4137 (BSJ) (GWG),  
L&L WINGS, INC. v. MARCO DESTIN, ET AL.  
(DECEMBER 16, 2009)**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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L & L WINGS, INC.,

*Plaintiff,*

v.

MARCO-DESTIN INC.,  
1000 HIGHWAY 98 EAST CORP.,  
PANAMA SURF & SPORT, INC. and E & T INC.,

*Defendants.*

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Civil Action No. 07 Civ. 4137 (BSJ) (GWG)

Before: Barbara S. JONES, U.S. District Judge.

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**ORDER**

BARBARA S. JONES  
UNITED STATES DISTRICT JUDGE

On May 28, 2007, Plaintiff L & L Wings, Inc. (“Wings” or “Plaintiff”) filed suit against Defendants Marco-Destin, Inc., 1000 Highway 98 East Corp., Panama Surf & Sport, Inc., and E & T, Inc. (collectively “Defendants”) alleging breach of contract, trademark

infringement under the Lanham Act, violations of the New York General Business Law, and common law service mark infringement and unfair competition. On September 4, 2008, Plaintiff filed a Motion for Partial Summary Judgment. On October 15, 2008, Defendants filed a Cross Motion for Partial Summary Judgment. For the reasons set forth below, Plaintiff's Motion for Partial Summary Judgment is GRANTED and Defendants' Cross Motion for Partial Summary Judgment is DENIED.

### BACKGROUND<sup>1</sup>

Plaintiff L & L Wings, a South Carolina corporation, is the owner of a chain of retail stores operating under the trademark "Wings." The stores specialize in the sale of beachwear, souvenirs, bathing suits, sunglasses, and related items. (Pl.'s Rule 56.1 Stmt. ¶ 1; Def.'s Rule 56.1 Stmt. ¶ 1.) Plaintiff has, at various times since 1978, operated and managed "Wings" stores in South Carolina, Florida, North Carolina, Massachusetts, Texas, California, New York, Tennessee,

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<sup>1</sup> The facts stated here are drawn from Plaintiff and Defendants' Local Rule 56.1 statements. Under Local Civil Rule 56.1(c), "material facts set forth in the statement required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted." See *Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003) ("If the opposing party . . . fails to controvert a fact so set forth in the moving party's Rule 56.1 statement, that fact will be deemed admitted."). Further, Defendants rely extensively on affidavits submitted by Dror Levy asserting "facts" which Levy has no personal knowledge of. Under Fed. R. Civ. P. 56(3), these statements are hearsay and will not be considered by this Court for the purposes of this motion. See *Hollander v. Am. Cynamid Co.*, 172 F.3d 192, 198 (2d Cir. 1999) (upholding district court's rejection of an affidavit which did not comply with Rule 56(e)).

New Jersey, and Alabama. (Pl.'s Rule 56.1 Stmt. ¶ 3; Def.'s Rule 56.1 Stmt. ¶ 3.)

Defendants Marco-Destin Inc. ("Marco-Destin"), 1000 Highway 98 East Corp. ("Highway 98"), and Panama Surf & Sport, Inc. ("Panama") are each Florida corporations. Defendant E & T Inc. ("E & T") is a South Carolina corporation. While there is some dispute regarding the exact nature of the four Defendants relationship, Defendants contend that Marco-Destin and E & T operate retail stores selling beachwear and accessories, Panama provides senior management consulting services to Marco-Destin and E & T, and Highway 98 is a landlord to Marco-Destin. (Def's Opp'n Mem. At 38-39). According to Eli Tabib, owner of TLE Management, LLC, each of the defendants is owned by TLE Management, LLC. (Pl.'s Rule 56.1 Stmt. ¶ 4; Def.'s Rule 56.1 Stmt. ¶ 4.) Since November 1, 1998, the four defendants have shared nearly identical corporate officers, directors and main office employees. (Pl.'s Rule 56.1 Stmt. ¶ 6; Def.'s Rule 56.1 Stmt. ¶ 6.)

In 1977, Plaintiff's principals, Shaul and Meir Levy, opened their first beachwear and accessories store in Myrtle Beach, South Carolina, which they named "Wings" (the "Mark"). (Pl.'s Rule 56.1 Stmt. ¶ 9; Def.'s Rule 56.1 Stmt. ¶ 9.) Plaintiff has also used a trade dress consisting of a unique wave sculpture design highlighted with a colored neon light combination (the "Trade Dress") to be placed on the roof of some Wings stores. (Pl.'s Rule 56.1 Stmt. ¶ 11; Def.'s Rule 56.1 Stmt. ¶ 11.)

Prior to 1998, Plaintiff's principals, Shaul and Meir Levy, owned 50% of three of the four Defendant corporations, namely Marco-Destin, Highway 98, and

Panama. The remaining 50% interest of these companies was owned by Eli Tabib. (Pl.'s Rule 56.1 Stmt. ¶ 16; Def.'s Rule 56.1 Stmt. ¶ 16.) In 1998, Shaul Levy, Meir Levy, and Eli Tabib mutually agreed to redefine their business relationships and transfer 100% ownership of Marco-Destin, Highway 98, and Panama to Eli Tabib. (Pl.'s Rule 56.1 Stmt. ¶ 17; Def.'s Rule 56.1 Stmt. ¶ 17.) Mr. Tabib retained the New York law firm of Moses & Singer LLP to represent him during this transaction. (Pl.'s Rule 56.1 Stmt. ¶ 19; Def.'s Rule 56.1 Stmt. ¶ 19.) Mr. Tabib is an experienced businessman who has built numerous companies from the ground up in areas such as retail, real estate, and wedding/reception services. Mr. Tabib also owns a professional soccer team in Israel. (Pl.'s Rule 56.1 Stmt. ¶ 20; Def.'s Rule 56.1 Stmt. ¶ 20.)

Between November 1, 1998 and February 17, 2000, the parties' principals and respective counsels negotiated the agreements and documentation to formalize their business relationship. These included a Purchase Agreement, an Assignment/Surrender and Assumption of Leases, Promissory Notes, Consulting Agreements, and a Licensing Agreement, dated February 17, 2000. (Pl.'s Rule 56.1 Stmt. ¶ 25; Def.'s Rule 56.1 Stmt. ¶ 25.)

The Licensing Agreement (the "Agreement") details the Defendants' rights to use Plaintiff's Mark and Trade Dress in connection with the sale of beachwear and accessories at Defendants' business establishments. (Pl.'s Rule 56.1 Stmt. ¶ 26; Def.'s Rule 56.1 Stmt. ¶ 26.) During the course of negotiations, several different finite periods for the license were proposed. (Pl.'s Rule 56.1 Stmt. ¶ 29; Def.'s Rule 56.1 Stmt. ¶ 29.) The final Licensing Agreement included



a term of eight years, effective from November 1, 1998 through October 31, 2006. (Pl.'s Rule 56.1 Stmt. ¶ 30; Def.'s Rule 56.1 Stmt. ¶ 30.)

On February 17, 2000, counsel for Shaul Levy, Meir Levy, and Eli Tabib held a closing for each of the agreements at the offices of Moses & Singer in New York City. (Pl.'s Rule 56.1 Stmt. ¶ 32; Def.'s Rule 56.1 Stmt. ¶ 32.) Shaul Levy and Eli Tabib were in Miami, Florida on February 17, 2000, at the time of the closing. They each participated in the closing from the office in the Wings' Miami store while in telephone contact with their respective counsel in New York. (Pl.'s Rule 56.1 Stmt. ¶ 33; Def.'s Rule 56.1 Stmt. ¶ 33.) Eli Tabib signed the signature page for each agreement on behalf of the four Defendant corporations and returned the documents by facsimile. Shaul Levy signed the signature page of each agreement on behalf of the Plaintiff except for the Licensing Agreement, which was inadvertently overlooked, on behalf of the Plaintiff and returned the documents by facsimile as well. (Pl.'s Rule 56.1 Stmt. ¶ 35; Def.'s Rule 56.1 Stmt. ¶ 35.) After realizing the oversight, Meir Levy signed the Licensing Agreement in New York later that day. (Pl.'s Rule 56.1 Stmt. ¶ 36; Def.'s Rule 56.1 Stmt. ¶ 36.)

At the time the documents were signed, Eli Tabib's attorney and accountant were both aware that the Licensing Agreement contained a termination date of October 31, 2006. (Pl.'s Rule 56.1 Stmt. ¶ 39; Def.'s Rule 56.1 Stmt. ¶ 39.) On March 8, 2000, Moses & Singer sent Eli Tabib and his accountant a closing binder of all of the executed documents, including the fully executed Licensing Agreement. (Pl.'s Rule 56.1 Stmt. ¶ 40; Def.'s Rule 56.1 Stmt. ¶ 40.)

During the period of the Licensing Agreement, Defendants Marco-Destin and E & T used the Mark and/or Trade Dress in connection with the sale of beachwear and accessories in twelve Wings stores, eleven of which currently remain in operation. Defendants Marco-Destin and E & T also used the Mark and/or Trade Dress for outdoor signage, shopping bags, product hang tags, TV signs, and boogie boards. (Pl.'s Rule 56.1 Stmt. ¶ 43; Def.'s Rule 56.1 Stmt. ¶ 43.) During that same period, Plaintiff fully performed its obligations under the Licensing Agreement. (Pl.'s Rule 56.1 Stmt. ¶ 47; Def.'s Rule 56.1 Stmt. ¶ 47.)

According to its written terms, the Licensing Agreement terminated on October 31, 2006. (Pl.'s Rule 56.1 Stmt. ¶ 49; Def.'s Rule 56.1 Stmt. ¶ 49.) On both October 10 and November 9, 2006, Plaintiff reminded Defendant Marco-Destin of the written termination date and advised that Defendants were required to remove signage and all items bearing the Mark and Trade Dress. (Pl.'s Rule 56.1 Stmt. ¶ 50-51; Def.'s Rule 56.1 Stmt. ¶ 50-51.) On February 27, 2006, Plaintiff advised all Defendants that if Defendants did not cease using the Mark and Trade Dress, Plaintiff would pursue legal remedies. (Pl.'s Rule 56.1 Stmt. ¶ 52; Def.'s Rule 56.1 Stmt. ¶ 52.)

Defendants continued to use the Mark and Trade Dress in at least eleven stores in connection with the sale of beachwear and accessories after October 31, 2006. (Pl.'s Rule 56.1 Stmt. ¶ 53; Def.'s Rule 56.1 Stmt. ¶ 53.) After October 31, 2006, Plaintiff received several communications from dissatisfied customers of Defendants' Wings stores, mistakenly believing Defendants' stores to be owned by Plaintiff. (Pl.'s Rule 56.1 Stmt. ¶ 54; Def.'s Rule 56.1 Stmt. ¶ 54.)

## LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). “The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish their right to judgment as a matter of law.” *Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61 (2d Cir. 1995). The substantive law governing the case will identify those facts that are material and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper.” *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

## DISCUSSION

Plaintiff contends that it “is entitled to summary judgment on its breach of contract claim, trademark infringement claim under the Lanham Act, and claims

under New York statutory and common law, as well as on Defendants' counterclaims, as a matter of law." (P1. Mem. at 9.) The Court agrees.

## **I. Breach of Contract Claim**

In Count VI of the Complaint, Plaintiffs allege that Defendants breached the Licensing Agreement executed on February 17, 2000. To establish a claim for breach of contract under New York law, Plaintiff must demonstrate (1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damage. *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996).

First, it is clear that a valid contract existed between the parties. It is undisputed that the Licensing Agreement was validly executed by the parties on February 17, 2000. Furthermore, Section 15 of the Agreement states that, "This Agreement shall be binding upon the parties and their agents. . . ." (Hertz Decl., Ex. A). Meir Levy signed the Agreement on behalf of the Plaintiff and Eli Tabib signed the Agreement on behalf of each of the four Defendants. *Id.*

Defendants claim that the Agreement between the parties was invalid or incomplete because "the Licensing Agreement is part of a package of written and oral agreements which exist between the parties. . . ." (Def.'s Opp'n Mem. at 2.) According to Defendants, the relationship between the Plaintiff and Defendants was "operated on the basis of trust" and that "the principals knew their agreements and where they stood, notwithstanding the contents of any documents regarding their partnership." (*Id.* at 4-5). Specifically, Defendants contend, Shaul Levy assured

Eli Tabib that Tabib could continue to use the Mark and Trade Dress in perpetuity regardless of what was stated in the Licensing Agreement. Therefore, Tabib did not read all of the documents and was not aware of the license termination date.

Even if Defendants assertions are taken as true, they do not invalidate the Licensing Agreement or its termination date. “The fundamental, neutral precept of contract interpretation is that agreements are construed in accordance with the parties’ intent, and that the best evidence of what parties to a written agreement intend is what they say in their writing.” *JA Apparel Corp. v. Abboud*, 591 F.Supp.2d 306, 338 (S.D.N.Y. 2008). In this case, it is undisputed that the Licensing Agreement clearly sets a termination date of October 31, 2006. (Pl.’s Rule 56.1 Stmt. ¶ 49; Def.’s Rule 56.1 Stmt. ¶ 49.) “Matters extrinsic to the agreement may not be considered when the intent of the parties can fairly be gleaned from the face of the instrument.” *Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2d Cir. 2000).

Defendants’ contention that Shaul Levy made assertions to Eli Tabib that contradicted the plain terms of the Agreement does not invalidate the contract. As Section 17 of the Licensing Agreement states, “This Agreement contains the entire agreement between the parties and supersedes all agreements and understandings previously made between the parties relating to its subject matter, all of which have been merged herein.” (Hertz Decl., Ex. A). The purpose of this merger clause is to require the full application of the parol evidence rule to bar the introduction of extrinsic evidence to alter, vary, or contradict the terms of the writing. *Ixe Banco, S.A. v.*

*MBNA America Bank, N.A.*, 2008 WL 650403, \*7 (S.D.N.Y. 2008) (citing *Jarecki v. Shung Moo Louie*, 95 N.Y.2d 665, 669, 745 N.E.2d 1006, 1009 (2001)). As such, if there is a contradiction between any alleged agreements made prior to execution of the Agreement and the plain terms of the Agreement itself, the clear language of the Agreement controls.

If, as Defendants contend, Shaul Levy told Eli Tabib that the termination date in the Licensing Agreement had no legal effect, the Agreement is still valid. Courts in this jurisdiction have “repeatedly refused to accept the defense that an agreement should be invalidated merely because one party induced the other to sign the document by falsely stating that it had no legal effect.” *Sotheby’s Inc. v. Dumba*, 1992 WL 27043, \*6 (S.D.N.Y. 1992). The parties to a contract are bound by their signatures and may not rely on oral representations that there is no contract when the face of the document would indicate otherwise. *Id.*

The Agreement also may not be invalidated if Eli Tabib did not read its terms. “A party who enters into a plain and unambiguous contract cannot avoid it by stating that he or she misunderstood its terms.” If a party had the opportunity to review the contracts terms, “to not have read it is gross negligence.” *Id.* at \*2; see also *Republic Nat. Bank v. Hales*, 75 F.Supp.2d 300, 313-314 (S.D.N.Y.,1999) (“whether or not a party to an agreement has actually read and understood all portions of an agreement, the law generally assumes that he has.”); *Humble Oil & Refining Co. v. Gibbered Esso Serv. Station, Inc.*, 30 A.D.2d 952, 294 N.Y.S.2d 190, 192 (1st Dep’t 1968) (“Since the written instrument contains terms different from those allegedly orally represented, and [the sophisticated businessman] is

presumed to have read the writing, he may not claim he relied on the [alleged misrepresentations]).

Defendants claim that “English is not Mr. Tabib’s native language.” (Def.’s Opp’n Mem. at 4). The fact that Tabib may have needed assistance in understanding the terms of the Agreement does not “relieve him from an obligation to seek assistance in reading the documents’ terms; his failure to do so amounts to negligence, which bars him from asserting his disability as a defense.” *Sotheby’s* at \*3. It is undisputed that Tabib retained Moses & Singer LLP to represent him during the drafting and execution of the Agreement. (Pl.’s Rule 56.1 Stmt. ¶ 19; Def.’s Rule 56.1 Stmt. ¶ 19.) It is further undisputed that this drafting took place over more than a year period, during which Moses & Singer LLP played a key role. (Pl.’s Rule 56.1 Stmt. ¶ 25; Def.’s Rule 56.1 Stmt. ¶ 25.) Tabib was also in telephone contact with his counsel during the execution of the Agreement. (Pl.’s Rule 56.1 Stmt. I 33; Def.’s Rule 56.1 Stmt. ¶ 33.) Therefore, Tabib had ample opportunity to consult with counsel regarding the terms of the Agreement and should have done so if there was any question as to their legal effect. *See NCR Corp. v. Lemelson Medical, Educ. and Research Foundation*, 2001 WL 1911024, \*7 (S.D.N.Y. 2001) (rejecting counterclaims of rescission and reformation where counterclaimant was represented by “sophisticated counsel, who had the ability to analyze and to comprehend the terms” of the agreement, and who “played a considerable role in drafting the document”).

Second, Plaintiff must show that there was adequate performance of the contract by the Plaintiff. *Segui* at 348. It is undisputed that Plaintiff fully per-

formed its obligations under the Licensing Agreement. (Pl.'s Rule 56.1 Stmt. ¶ 47; Def.'s Rule 56.1 Stmt. ¶ 47.)

Third, Plaintiff must show that there was a breach of contract by the Defendants. *Segui* at 348. It is undisputed that Defendants continued to use the Mark and Trade Dress in at least eleven stores in connection with the sale of beachwear and accessories after October 31, 2006. (Pl.'s Rule 56.1 Stmt. ¶ 53; Def.'s Rule 56.1 Stmt. ¶ 53.) As Defendants admit, "Defendants Marco-Destin and E & T never disputed using the trademarks and trade dress after the date in the Licensing Agreement. . . ." (Def. Mem. at 2.) Thus, Plaintiff has shown a breach of the contract by Defendants.

Fourth, Plaintiff must show that there were damages as a result of Defendants' breach. Section 8 of the Licensing Agreement states, "Licensee specifically acknowledges that the use of the Mark, the name 'Wings' or any Similar Name and/or the use of Licensor's Trade Dress after the Termination Date will cause Licensor to suffer irreparable harm, damages for which would be extremely difficult to ascertain." (Hertz Decl., Ex. A). To the extent that Defendants dispute the amount of liquidated damages that should be assessed under the Agreement, Defendants may raise such issues at a later proceeding before this Court on the amount of damage.

Plaintiff's Motion for Partial Summary Judgment on Count VI of the Complaint is GRANTED and Defendants Cross Motion for Partial Summary Judgment on this Count IV DENIED.



## **II. Trademark Infringement Claim under the Lanham Act**

In Count I of the Complaint, Plaintiff alleges that Defendants committed trademark infringement under the Lanham Act. A claim of trademark infringement brought under the Lanham Act is analyzed under the two-prong test described in *Gruner + Jahr USA Publ'g v. Meredith Corp.*, 991 F.2d 1072 (2d Cir. 1993). The test considers (1) whether the plaintiff's mark is entitled to protection, and (2) whether defendant's use of the mark is likely to cause consumers confusion as to the origin or sponsorship of the defendant's goods. *Gruner*, 991 F.2d at 1074.

### **a. The Mark is entitled to protection**

First, Plaintiff's July 1, 2008 Certificate of Registration from the Patent and Trademark Office is *prima facie* evidence "that the mark is registered and valid (*i.e.*, entitled to protection), that the registrant owns the mark, and that the registrant has the exclusive right to use the mark in commerce." *Lorillard Tobacco Co. v. Jamelis Grocery, Inc.*, 378 F.Supp.2d 448, 454 (S.D.N.Y. 2005); *see also Lane Capital Mgmt. v. Lane Capital Mgmt.*, 15 F.Supp.2d 389, 394 (S.D.N.Y. 1998) (where plaintiff's mark was granted registration after filing of suit, the Court held that "defendant bears the burden of demonstrating either that plaintiff's mark is invalid or that the use of its own mark is not likely to confuse consumers").

Second, the Mark is inherently distinctive. "The strength of a trademark in the marketplace and the degree of protection it is entitled to are categorized by the degree of the mark's distinctiveness in the following ascending order: generic, descriptive,

suggestive, and arbitrary or fanciful.” *Gruner*, 991 F.2d at 1075; *see also Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976). Arbitrary marks are “inherently distinctive and are entitled to protection” under the Lanham Act. *Two Pesos v. Taco Cabana*, 505 U.S. 763, 768 (U.S. 1992); *see also Marshak v. Sheppard*, 666 F.Supp. 590, 600 (S.D.N.Y. 1987) (stating that arbitrary marks should receive “maximum trademark protection”). A mark is arbitrary if it has an actual dictionary meaning that does not describe the goods or services offered under the mark. *See, e.g., Virgin Enters. v. Nawab*, 335 F.3d 141, 148 (2d Cir. 2003) (holding that “Virgin” is an arbitrary mark that has “no intrinsic relationship whatsoever” with sales of consumer electronics); *Morningside Group, Ltd. v. Morningside Capital Group, L.L.C.*, 182 F.3d 133, 139 (2d Cir. Conn. 1999) (holding that “Morningside” is an arbitrary mark as applied to financial investment services); *Marshak*, 666 F.Supp. at 600 (S.D.N.Y. 1987) (holding that “Drifters” is an arbitrary mark as applied to a musical group).

In this case, the Plaintiff’s stores specialize in the sale of beachwear, souvenirs, bathing suits, sunglasses, and related items. (Pl.’s Rule 56.1 Stmt. ¶ 1; Def.’s Rule 56.1 Stmt. ¶ 1.) Although the term “wings” has a common dictionary meaning, there is nothing about the term that is intrinsically related to beachwear and accessories. Therefore, the Mark is arbitrary and entitled to protection under the Lanham Act. *Two Pesos*, 505 U.S. at 768.

**b. Defendant's use of the Mark is likely to cause consumers confusion**

When an ex-licensee continues to use a mark after its license expires, likelihood of confusion is established as a matter of law. *Ryan v. Volpone Stamp. Co.*, 107 F.Supp.2d 369, 399 (S.D.N.Y. 2000); *see also Bowmar Instrument Corp. v. Continental Microsystems, Inc.*, 497 F.Supp. 947, 959 (S.D.N.Y. 1980) (holding that continued use of a mark after termination of a license constitutes trademark infringement). In such situations, confusion is almost inevitable because consumers have already associated the formerly licensed infringer with the trademark owner. *See Volpone Stamp*, 107 F.Supp.2d at 399; *see also Church of Scientology International v. Elmira Mission of Church of Scientology*, 794 F.2d 38, 44 (2d Cir. 1986). In this case, it is undisputed that Defendants Marco-Destin and E & T continued to use the Mark and Trade Dress after the termination date in the Licensing Agreement. Therefore, a likelihood of confusion is established as a matter of law.

Furthermore, Plaintiff may establish likelihood of confusion under the test established in *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).<sup>2</sup> “It is evident that the so-called Polaroid

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<sup>2</sup> *Polaroid* established an eight non-exclusive factor test to determine likelihood of confusion. “The eight factors are: (1) strength of the trademark; (2) similarity of the marks; (3) proximity of the products and their competitiveness with one another; (4) evidence that the senior user may “bridge the gap” by developing a product for sale in the market of the alleged infringer’s product; (5) evidence of actual consumer confusion; (6) evidence that the imitative mark was adopted in bad faith; (7) respective quality of the products; and (8) sophistication of

factors are more geared towards comparing two distinct, albeit similar, marks. Thus, their application may be unnecessary in the case of an ex-licensee using a previously licensed mark where only one trademark is involved.” *Volpone Stamp*, 107 F.Supp.2d at 400. Despite this, Plaintiff in this case establishes each of the *Polaroid* factors in its brief citing undisputed facts. Defendants do not rebut these assertions.

As Plaintiff has established both prongs of the *Gruner* test, Plaintiff’s Motion for Partial Summary Judgment on Count I of the Complaint is GRANTED and Defendants’ Cross Motion for Partial Summary Judgment on Count I is DENIED.

### **III. New York state and common law claims**

In Count III of the Complaint, Plaintiff contends that Defendants violated N.Y. GEN. Bus. LAW § 350-1 for injury to business reputation or dilution of the distinctive quality of a mark. To prevail, Plaintiff must show that “(1) that the trademark is truly distinctive or has acquired secondary meaning, and (2) a likelihood of dilution either as a result of ‘blurring’ or ‘tarnishment.’” *U-Neek, Inc. v. Wal-Mart Stores, Inc.*, 147 F.Supp.2d 158, 175 (S.D.N.Y. 2001). As discussed above, Plaintiff’s trademark is arbitrary and inherently distinctive, satisfying the first prong of the analysis.

“Dilution by ‘blurring’ may occur where the defendant uses or modifies the plaintiff’s trademark to identify the defendants’ goods and services, raising the possibility that the mark will lose its ability to serve as a unique identifier of the plaintiff’s product.”

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consumers in the relevant market.” *Star Indus. v. Bacardi & Co.*, 412 F.3d 373, 384 (2d Cir. 2005).

*Id.* New York courts consider six factors to determine whether blurring is likely,<sup>3</sup> the first five of which are “closely analogous” to the Polaroid factors, which this Court has already determined weigh strongly in favor of the Plaintiff. *Paco Sport, Ltd. v. Paco Rabanne Parfums*, 86 F.Supp.2d 305, 330 (S.D.N.Y. 2000).

Defendants argue that there could not been a dilution of the Mark’s ability to uniquely identify Plaintiff’s products because the beachwear and accessories sold in the parties’ establishments are similar, if not identical. Defendants cite to decisions in this Circuit that blurring “*typically* involved the whittling away of an established trademark’s selling power through its unauthorized use by others upon dissimilar products.” *Deere & Co. v. MTD Prods.*, 41 F.3d 39, 43 (2d Cir. N.Y. 1994) (emphasis added). However, this Circuit has also determined that the anti-dilution statute applies to establishments selling similar or identical products as well. *See Nikon, Inc. v. Ikon Corp.*, 987 F.2d 91, 96 (2d Cir. N.Y. 1993) (holding that the anti-dilution statute “does not preclude competitive products from being covered”); *Volkswagen Astiengesellschaft v. Uptown Motors*, 1995 WL 605605, \*11 (S.D.N.Y.,1995) (finding dilution where services were “similar if not identical”); *Frito-Lay, Inc. v. Bachman Co.*, 704 F.Supp. 432, 438

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<sup>3</sup> The six factors courts should consider to determine if blurring is likely are: “(1) similarity of the marks, (2) similarity of the products covered by the marks, (3) sophistication of consumers, (4) predatory intent, (5) renown of the senior mark, (6) renown of the junior mark.” *Mead Data Cent., Inc. v. Toyota Motor Sales, Inc.*, 875 F.2d 1026, 1035 (2d Cir. N.Y. 1989). In this case, the sixth factor is not relevant as the mark used by Defendants is identical to Plaintiff’s “Wings” Mark.

(S.D.N.Y. 1989) (finding dilution where both parties sold nearly identical potato chips).

Tarnishment occurs when a trademark is “linked to products of shoddy quality” or is portrayed in an “unwholesome or unsavory context” and the trademark’s reputation and commercial value might be diminished because “the public will associate the lack of quality or lack of prestige in the defendant’s goods with the plaintiff’s unrelated goods.” *Deere & Co.*, 41 F.3d at 43 (2d Cir. 1994). Plaintiffs have cited a number of communications received by Plaintiffs complaining about the quality of products or services at Defendants’ stores. (Pl.’s Rule 56.1 Stmt. ¶ 54; Def.’s Rule 56.1 Stmt. ¶ 54.)

Defendants contend that these communications are “inadmissible hearsay contrary to Fed. R. Evid. 802. . . .” (Def. Mem. at 14). However, these communications are not offered for the truth of their contents, but rather to show that patrons expressed confusion regarding the owner of Defendants’ establishments. Defendants further contend that such complaints were “de minimis evidence” representing “less than 2.6 one-thousandths of one percent of customers.” (Def. Mem. at 34). To prevail on its claim, Plaintiff need only show a “likelihood” of confusion amongst the public. *U-Neek, Inc.*, 147 F.Supp.2d at 175. By citing the communications, Plaintiffs have shown that confusion is not only likely, but actually occurred.

In Claim III of the Complaint, Plaintiff also asserts that Defendants violated N.Y. GEN. Bus. LAW § 133 for use of a name with intent to deceive. To prevail, Plaintiff must show that (1) defendant used the mark, and (2) defendant acted in bad faith to deceive the public. *Houbigant, Inc. v. ACB Mercantile (In re*

*Houbigant, Inc.*), 914 F.Supp. 964, 984 (S.D.N.Y. 1995) (“New York Courts have held that the elements of the claim include the intent to deceive the public and the assumption of the identity of another”). It is undisputed that Defendants Marco-Destin and E & T continued to use the Mark and Trade Dress after the termination date in the Agreement, thereby assuming the identity of another. Defendants argue that as “hold-over licensees” that “acted in good faith” believing that the written termination date would not be enforced, their conduct was not intentional. As discussed above, Defendants were bound by the termination date set in the Licensing Agreement. Furthermore, it is undisputed that Defendants received three notices from Plaintiff reminding Defendants of the termination date in the Agreement and instructing them to cease use of the Mark and Trade Dress. (Pl.’s Rule 56.1 Stmt. ¶ 50-52 Def.’s Rule 56.1 Stmt. ¶ 5052) By willfully ignoring both the termination date in the Agreement and the notices sent by Plaintiffs, Defendants acted intentionally. As such, Defendants acted in bad faith to deceive the public by using Plaintiff’s Mark and Trade Dress in association with the sale of Defendants’ products.

Defendants also contend that Plaintiff “must establish that there is significant confusion among the public at large,” citing *Sung v. Paolucci*, 566 N.Y.S.2d 371 (2d Dep’t 1991). However, *Sung* states that Plaintiff must show that use of a mark “threatens” to produce confusion in the public’s mind. *Id.* at 371. As this Court has already found that there was likelihood of confusion and, in some cases, actual confusion by members of the public, the threat of confusion in the public’s mind has been established.

In Count IV of the Complaint, Plaintiff alleges that Defendant committed common law service mark infringement. Once a defendant has been shown to have committed infringement under the Lanham Act, “he has necessarily also done so under New York State and common law.” *Baker v. Parris*, 777 F.Supp. 299, 304 (S.D.N.Y. 1991). As this Court has already found Defendants in violation of the Lanham Act, Defendants have also committed common law service mark infringement.

In Count V of the Complaint, Plaintiff alleges that Defendants committed common law unfair competition. To succeed on this claim, Plaintiff must demonstrate that (1) there is actual confusion or likelihood of confusion, and (2) Defendants have acted in bad faith. As discussed previously, Plaintiff has established both elements of this claim.

Plaintiff’s Motion for Partial Summary Judgment on Counts IV, and V of the Complaint is GRANTED and Defendants’ Cross Motion for Partial Summary Judgment on Counts III, and V is DENIED.

#### **IV. Liability of Defendants Highway 98 and Panama**

Defendants argue that Defendants Highway 98 and Panama cannot be held liable because they did not individually use the Plaintiff’s Mark or Trade Dress in the conduct of their businesses. Defendants contend that Defendant Highway 98 is a landlord to the Defendant Marco-Destin and Defendant Panama provides senior management consulting services to Defendants Marco-Destin and E & T. (Def.’s Opp’n Mem. at 38-39). Plaintiffs argue that the four Defend-



ants should be considered a “single entity,” each held jointly and severally liable. (Pl.’s Reply Mem. at 22).

The undisputed facts show that since November 1, 1998, the four defendants have shared nearly identical corporate officers, directors and main office employees. (Pl.’s Rule 56.1 Stmt. 1 6; Def.’s Rule 56.1 Stmt. ¶ 6.) According to Eli Tabib, owner of TLE Management, LLC, each of the defendants is owned by TLE Management, LLC. (Pl.’s Rule 56.1 Stmt. ¶ 4; Def.’s Rule 56.1 Stmt. 91 4.) All four defendants are also parties to the Licensing Agreement at issue in this case and Eli Tabib signed the Agreement on behalf of all four defendants. (Hertz Decl., Ex. A).

Even if each of the four defendants were operated as completely independent entities, as Defendants contend, they are each contributorially responsible for the trademark infringement at issue. As the Supreme Court has stated:

“[I]f a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorially responsible for any harm done as a result of the deceit.”

*Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 854 (1982).

In this case, Defendants Highway 98 and Panama did not provide a concrete product to Defendants Marco-Destin and E & T. Rather, Defendants Highway 98 and Panama provided a service. “While the Second Circuit Court of Appeals has not yet reached this

issue, other courts, including courts in this District, have similarly applied the *Inwood* test for contributory liability to venues that provide a service.” *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F.Supp.2d 463, 505 (S.D.N.Y.,2008); *see also Polo Ralph Lauren Corp. v. Chinatown Gift Shop*, 855 F.Supp. 648, 650 (S.D. N.Y.1994) (sustaining claim for contributory liability for landlords who allowed trademark infringers to use their property); *Mini Maid Services Co. v. Maid Brigade Systems, Inc.*, 967 F.2d 1516 (11th Cir.1992) (imposing liability on franchisers who allowed franchisees to infringe trademarks); *Habeeba’s Dance of the Arts, Ltd. v. Knoblauch*, 430 F.Supp.2d 709, 714-15 (S.D. Ohio 2006) (sustaining claim for contributory liability for landlords who allowed trademark infringers to use their property). Furthermore, this Court has recognized “that one may be held liable as a contributory infringer, notwithstanding the fact that one does nothing to assist an infringing party.” *Power Test Petroleum Distribs. v. Manhattan & Queens Fuel Corp.*, 556 F.Supp. 392, 395 (S.D.N.Y. 1982).

The undisputed facts show that Defendants Highway 98 and Panama were notified of the termination of the Licensing Agreement by letter on February 27, 2006. (Pl.’s Rule 56.1 Stmt. ¶ 52; Def.’s Rule 56.1 Stmt. ¶ 52.) Therefore, these defendants had actual knowledge of the infringing activity and are liable, jointly and severably.

## CONCLUSION

For the reasons set forth above, Plaintiff’s Motion for Partial Summary Judgment for liability is GRANTED and Defendant’s Cross Motion for Partial Summary Judgment is DENIED. The parties are di-

rected to appear before this Court for a scheduling conference on the issue of damages on January 6, 2010 at 3:00 p.m. in Courtroom 17C at 500 Pearl Street, New York, New York, 10007.

SO ORDERED:

/s/ Barbara S. Jones

U.S. District Judge

Dated: New York, New York  
December 16, 2009

**JUDGMENT, U.S. DISTRICT COURT  
FOR THE EASTERN DISTRICT OF  
NORTH CAROLINA, NO. 2:11-CV-44-FL,  
BEACH MART, INC. v. L & L WINGS, INC.  
(MARCH 29, 2021)**

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
NORTHERN DIVISION

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BEACH MART, INC.,

*Plaintiff,*

v.

L & L WINGS, INC.,

*Defendant.*

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No. 2:11-CV-44-FL

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**JUDGMENT**

**DECISION BY THE COURT.**

It is ORDERED, ADJUDGED AND DECREED that for the reasons detailed in the Court's October 3, 2014, Order, that L&L Wings, Inc.'s claims for trademark infringement under 28 U.S.C. § 1114 and 15 U.S.C. § 1125(a) are dismissed with prejudice.

It is further ORDERED, ADJUDGED AND DECREED that for the reasons detailed in the Court's October 3, 2014 and March 29, 2018 Orders, sanctions

in the amount of \$107,436.25 in attorney's fees and \$11,318.83 in costs are awarded against L&L Wings, Inc., in favor of Beach Mart, Inc.

JURY VERDICT. The remaining claims in this action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED, ADJUDGED AND DECREED that Beach Mart, Inc. has proven by the preponderance of the evidence that L&L Wings, Inc. fraudulently induced Beach Mart, Inc. to enter into the parties' August 29, 2005, agreement, and L&L Wings, Inc. negligently misrepresented information in connection with the parties' August 29, 2005, agreement, upon which Beach Mart, Inc. justifiably relied, thereby causing damage to Beach Mart, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Beach Mart, Inc. has proven by clear and convincing evidence that L&L Wings, Inc. knowingly made false representations of material fact with an intent to deceive to the United States Patent and Trademark Office in 2006, 2007, and/or 2008, resulting in the issuance of federal trademark Registration No. 3,458,144 (the "'144 Registration"), and in 2011, resulting in the issuance of federal trademark Registration No. 4,193,881 (the "'881 Registration"), thereby causing injury to Beach Mart, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Beach Mart, Inc. has proven by the preponderance of the evidence that L&L Wings, Inc. made false statements and/or misrepresentations in connection with the solicitation and negotiation of the August 29, 2005, agreement with Beach Mart, Inc., and

L&L Wings, Inc. made false statements and/or misrepresentations in connection with the 2006 application leading to the '144 Registration and the 2011 application leading to the '881 Registration, in or affecting commerce, thereby causing damages to Beach Mart, Inc. The Court finds that the foregoing acts of L&L Wings, Inc. constitute unfair and deceptive conduct, as prohibited under N.C. Gen. Stat. § 75-1.1, and Beach Mart, Inc. is entitled to recover all of its damages arising therefrom.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Beach Mart, Inc. is entitled to compensatory damages arising from the foregoing in the amount of \$4,184,135.00, and that such compensatory damages shall be trebled pursuant to N.C. Gen. Stat. § 75-16 such that Beach Mart, Inc. is entitled to recover of L&L Wings, Inc. in the amount of \$12,552,405.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Beach Mart, Inc. has proven by the preponderance of the evidence that all right, title, and interest in and to the WINGS trademark for use in connection with retail clothing stores was owned by Shepard R. Morrow in April of 1993 when L&L Wings, Inc. and Shepard R. Morrow entered into the April 29, 1993, license agreement for the use by L&L Wings, Inc. of the WINGS mark.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Beach Mart, Inc. has proven by the preponderance of the evidence that the April 29, 1993, trademark license between Shepard R. Morrow and L&L Wings, Inc. (the "Morrow License") remains in effect and has not terminated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that because Beach Mart, Inc. has proven by clear and convincing evidence that L&L Wings, Inc. knowingly made false representations of material fact with an intent to deceive to the United States Patent and Trademark Office in 2006, 2007, and/or 2008, resulting in the issuance of federal trademark Registration No. 3,458,144, and in 2011, resulting in the issuance of federal trademark Registration No. 4,193,881, thereby causing injury to Beach Mart, Inc., it is hereby ORDERED AND DECREED pursuant to 15 U.S.C. § 1119 that:

- 1) the Clerk of Court is hereby directed to send a certified copy of this Judgment, within 14 days of the date hereof, to the Director of the United States Patent and Trademark Office, Office of the Solicitor, Mail Stop 8, P.O. Box 1450, Alexandria, Virginia 22313-1450.
- 2) the Director of the United States Patent and Trademark Office is directed to cancel Registration No. 3,458,144 for WINGS and Registration No. 4,193,881 for WINGS;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Beach Mart, Inc. has proven by the preponderance of the evidence that Beach Mart, Inc. has all right, title and interest in and to its SUPER WINGS trademark arising from use for retail store services in North Carolina as of January 1, 2006.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims for declaratory judgment of L&L Wings, Inc. and Beach Mart, Inc., to the extent not otherwise addressed herein, are hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Beach Mart, Inc. shall recover pre judgment interest, accruing from September 9, 2011, up to and until date of entry of judgment at the rate of eight percent (8%) per annum on the sum of \$4,184,135.00. for a total amount of \$3,196,908.41. Beach Mart, Inc. is entitled to and shall recover post-judgment interest on the entire amount awarded under this judgment, in an amount determined by the rate established by 28 U.S.C. § 1961, accruing as of the date of entry of judgment up to and until satisfaction in full.

This Judgment Filed and Entered on March 29, 2021.  
and Copies To:

Jacob S. Wharton (via CM/ECF Notice of Electronic Filing)

John D. Wooten, IV (via CM/ECF Notice of Electronic Filing)

David L Brown (via CM/ECF Notice of Electronic Filing)

David G. Harris, II (via CM/ECF Notice of Electronic Filing)

Madison B. Waller (via CM/ECF Notice of Electronic Filing)

Robert Danny Mason, Jr. (via CM/ECF Notice of Electronic Filing)

Stephen F. Shaw (via CM/ECF Notice of Electronic Filing)

Charles A. Burke (via CM/ECF Notice of Electronic Filing)



Amanda A. Bailey (via CM/ECF Notice of Electronic Filing)

Brooke R. Watson (via CM/ECF Notice of Electronic Filing)

Henrietta U. Golding (via CM/ECF Notice of Electronic Filing)

March 29, 2021

Peter A. Moore, Jr. Clerk

/s/ Sandra K. Collins

(By) Sandra K. Collins,  
Deputy Clerk

I certify the foregoing to be a true and correct copy of the original Peter A. Moore, Jr., Clerk United States District Court Eastern District of North Carolina



/s/ Sandra K. Collins

(By) Sandra K. Collins,  
Deputy Clerk

**DECISION, U.S. SUPREME COURT**  
***HAZEL-ATLAS GLASS CO. v.***  
***HARTFORD-EMPIRE CO.***  
**(MAY 15, 1944)**

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UNITED STATES SUPREME COURT

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HAZEL-ATLAS GLASS COMPANY

v.

HARTFORDEMPIRE COMPANY

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No. 398

Argued February 9, 10, 1944. Decided May 15, 1944.

Certiorari to the Circuit Court of Appeals  
for the Third Circuit

Before: ROBERTS, REED, FRANKFURTER, Justices.

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This case involves the power of a Circuit Court of Appeals, upon proof that fraud was perpetrated on it by a successful litigant, to vacate its own judgment entered at a prior term and direct vacation of a District Court's decree entered pursuant to the Circuit Court of Appeals' mandate.

Hazel-Atlas commenced the present suit in November, 1941, by filing in the Third Circuit Court of Appeals a petition for leave to file a bill of review in the District Court to set aside a judgment entered by that Court against Hazel in 1932 pursuant to the Third Circuit Court of Appeals' mandate. Hazel contended

that the Circuit Court of Appeals' judgment had been obtained by fraud and supported this charge with affidavits and exhibits. Hartford-Empire, in whose favor the challenged judgment had been entered, did not question the appellate court's power to consider the petition, but filed counter affidavits and exhibits. After a hearing the Circuit Court concluded that, since the alleged fraud had been practiced on it rather than the District Court, it would pass on the issues of fraud itself instead of sending the case to the District Court. An order was thereupon entered denying the petition as framed but granting Hazel leave to amend the prayer of the petition to ask that the Circuit Court itself hear and determine the issue of fraud. Hazel accordingly amended, praying that the 1932 judgments against it be vacated and for such other relief as might be just. Hartford then replied and filed additional exhibits and affidavits. The following facts were shown by the record without dispute.

In 1926 Hartford had pending an application for a patent on a machine which utilized a method of pouring glass into molds known as 'gob feeding.' The application, according to the Circuit Court, 'was confronted with apparently insurmountable Patent Office opposition.' To help along the application, certain officials and attorneys of Hartford determined to have published in a trade journal an article signed by an ostensibly disinterested expert which would describe the 'gob feeding' device as a remarkable advance in the art of fashioning glass by machine. Accordingly these officials prepared an article entitled 'Introduction of Automatic Glass Working Machinery; How Received by Organized Labor', which referred to 'gob feeding' as one of the two 'revolutionary devices'

with which workmen skilled in bottle-blowing had been confronted since they had organized. After unsuccessfully attempting to persuade the President of the Bottle Blowers' Association to sign this article, the Hartford officials, together with other persons called to their aid, procured the signature of one William P. Clarke, widely known as National President of the Flint Glass Workers' Union. Subsequently, in July 1926, the article was published in the National Glass Budget, and in October 1926 it was introduced as part of the record in support of the pending application in the Patent Office. January 38 1928, the Patent Office granted the application as Patent No. 1,655,391.

On June 6, 1928, Hartford brought suit in the District Court for the Western District of Pennsylvania charging that Hazel was infringing this 'gob feeding' patent, and praying for an injunction against further infringement and for an accounting for profits and damages. Without referring to the Clarke article, which was in the record only as part of the 'file-wrapper' history, and which apparently was not then emphasized by counsel, the District Court dismissed the bill on the ground that no infringement had been proved. D.C., 39 F.2d 111. Hartford appealed. In their brief filed with the Circuit Court of Appeals, the attorneys for Hartford, one of whom had played a part in getting the spurious article prepared for publication, directed the Court's attention to 'The article by Mr. William Clarke, former President of the Glass Workers' Union.' The reference was not without effect. Quoting copiously from the article to show that 'labor organizations of practical workmen recognized' the 'new and differentiating elements' of the 'gob feeding' patent

owned by Hartford, the Circuit Court on May 5, 1932, held the patent valid and infringed, reversed the District Court's judgment, and directed that court to enter a decree accordingly. 3 Cir., 59 F.2d 399, 403, 404.

At the time of the trial in the District Court in 1929, where the article seemingly played no important part, the attorneys of Hazel received information that both Clarke and one of Hartford's lawyers had several years previously admitted that the Hartford lawyer was the true author of the spurious publication. Hazel's attorneys did not at that time attempt to verify the truth of the hearsay story of the article's authorship, but relied upon other defenses which proved successful. After the opinion of the Circuit Court came down on May 5, 1932, quoting the spurious article and reversing the decree of the District Court, Hazel hired investigators for the purpose of verifying the hearsay by admissible evidence. One of these investigators interviewed Clarke in Toledo, Ohio, on May 13 and again on May 24. In each interview Clarke insisted that he wrote the article and would so swear if summoned. In the second interview the investigator asked Clarke to sign a statement telling in detail how the article was prepared, and further asked to see Clarke's files. Clarke replied that he would not 'stultify' himself by signing any 'statement or affidavit'; and that he would show the records to no one unless compelled by a subpoena. At the same time he reinforced his claim of authorship by asserting that he had spent seven weeks in preparing the article.

But unknown to Hazel's investigator, a representative of Hartford, secretly informed of the investigator's view that Hazel's only chance of reopening the case 'was to get an affidavit from

someone, to the effect that this article was written' by Hartford's attorney, also had traveled to Toledo. Hartford's representative first went to Toledo and talked to Clarke on May 10, three days before Hazel's investigator first interviewed Clarke; and he returned to Toledo again on May 22 for a five day stay. Thus at the time of the investigator's second interview with Clarke on May 24, representatives of both companies were in touch with Clarke in Toledo. But though Hartford's representative knew the investigator was there, the latter was unaware of the presence of the Hartford representative. On May 24, Hazel's investigator reported failure; the same day, Hartford's man reported 'very successful results.' Four days later, on May 28, Hartford's representative reported his 'success' more fully. Clarke, he said, had been of 'great assistance' and Hartford was in a 'most satisfactory position'; it did not 'seem wise to distribute copies of all the papers' the representative then had or to 'go into much detail in correspondence'; and Hartford was 'quite indebted to Mr. Clarke' who 'might easily have caused us a lot of trouble. This should not be forgotten \* \* \*.' Among the 'papers' which the representative had procured from Clarke was an affidavit signed by Clarke stating that he, Clarke, had 'signed the article and released it for publication.' The affidavit was dated May 24-the very day that Clarke had told Hazel's investigator he would not 'stultify' himself by signing any affidavit and would produce his papers for no one except upon subpoena.

Shortly afterward, Hazel capitulated. It paid Hartford \$1,000,000 and entered into certain licensing agreements. The day following the settlement, Hartford's representative traveled back to Toledo and

talked to Clarke. At this meeting Clarke asked for \$10,000. Hartford's representative told him that he wanted too much money and that Hartford would communicate with him further. A few days later the representative paid Clarke \$500 in cash; and about a month later delivered to Clarke, at some place in Pittsburgh which he has sworn he cannot remember, an additional \$7,500 in cash. The reason given for paying these sums was that Hartford felt a certain moral obligation to do so, although Hartford's affidavits deny any prior agreement to pay Clarke for his services in connection with the article.

Indisputable proof of the foregoing facts was, for the first time, fully brought to light in 1941 by correspondence files, expense accounts and testimony introduced at the trial of the *United States v. Hartford-Empire Company et al.*, D.C., 46 F.Supp. 541, an anti-trust prosecution begun December 11, 1939. On the basis of the disclosures at this trial Hazel commenced the present suit.

Upon consideration of what it properly termed this 'sordid story' the Circuit Court, one Judge dissenting, held first, that the fraud was not newly-discovered; second, that the spurious publication, though quoted in the 1932 opinion, was not the primary basis of the 1932 decision; and third, that in any event it lacked the power to set aside the decree of the District Court because of the expiration of the term during which the 1932 decision had been rendered. Accordingly the Court refused to grant the relief prayed by Hazel.

Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the

term at which the judgments were finally entered. *Bronson v. Schulten*, 104 U.S. 410, 26 L.Ed. 797. This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment after the term. From the beginning there has existed along side the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. *Marine Insurance Company v. Hodgson*, 7 Cranch 332, 3 L.Ed. 362; *Marshall v. Holmes*, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870. This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. *United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93. But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable', *Pickford v. Talbott*, 225 U.S. 651, 657, 32 S.Ct. 687, 689, 56 L.Ed. 1240, they have wielded the power without hesitation.<sup>1</sup> Litigants who have

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<sup>1</sup> See, e.g., *Art Metal Works v. Abraham Strauss*, 107 F.2d 940 and 944; *Publicker v. Shallcross*, 106 F.2d 949; *Chicago, R.I. P. Ry. Co. v. Callicotte*, 267 F. 799; *Pickens v. Merriam*, 242 F. 363; *Lehman v. Graham*, 135 F. 39; *Bolden v. Sloss-Sheffield Steel*



sought to invoke this equity power customarily have done so by bills of review or bills in the nature of bills of review, or by original proceedings to enjoin enforcement of a judgment.<sup>2</sup> And in cases where courts have exercised the power the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it.<sup>3</sup> But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away.

Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. *Cf. Marshall v. Holmes, supra*. Proof of the scheme, and of its complete success up to date, is conclusive. *Cf. United States v. Throckmorton,*

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*Iron Co.*, 215 Ala. 334, 110 So. 574, 49 A.L.R. 1206. For a collection of early cases see Note (1880) 20 Am. Dec. 160.

<sup>2</sup> See *Whiting v. Bank of the United States*, 13 Pet. 6, 13; *Dexter v. Arnold*, 5 Mason 303, 308-315. See, also, generally, 3 Ohlinger's Federal Practice pp. 814-818; 3 Freeman on Judgments (5th ed.) § 1191; Note (1880) 20 Am. Dec. 160, *supra*.

<sup>3</sup> See 3 Freeman on Judgments (5th ed.) §§ 1178, 1779.

*supra*. And no equities have intervened through transfer of the fraudulently procured patent or judgment to an innocent purchaser. *Cf. Ibid; Hopkins v. Hebard*, 235 U.S. 287, 35 S.Ct. 26, 59 L.Ed. 232.

The Circuit Court did not hold that Hartford's fraud fell short of that which prompts equitable intervention, but thought Hazel had not exercised proper diligence in uncovering the fraud and that this should stand in the way of its obtaining relief. We cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud. But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public in a patent suit. *The Mercoid Corporation v. Mid-Continent Investment Company*, 320 U.S. 661, 64 S.Ct. 268; *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

The Circuit Court also rested denial of relief upon the conclusion that the Clarke article was not 'basic'

to the Court's 1932 decision. Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators.

We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered. Did the Circuit Court have the power to set aside its own 1932 judgment and to direct the District Court likewise to vacate the 1932 decree which it entered pursuant to the mandate based

upon the Circuit Court's judgment? Counsel for Hartford contend not. They concede that the District Court has the power upon proper proof of fraud to set aside its 1932 decree in a bill of review proceeding, but nevertheless deny that the Circuit Court possesses a similar power for the reason that the term during which its 1932 judgment was entered had expired. The question, then, is not whether relief can be granted, but which court can grant it.

Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. It was this flexibility which enabled courts to meet the problem raised when leave to file a bill of review was sought in a court of original jurisdiction for the purpose of impeaching a judgment which had been acted upon by an appellate court. Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission to file the bill is sought in the appellate court. The hearing conducted by the appellate court on the petition, which may be filed many years after the entry of the challenged judgment, is not just a

ceremonial gesture. The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and the appellate court may in the exercise of a proper discretion reject the petition, in which case a bill of review cannot be filed in the lower court. *National Brake Co. v. Christensen*, 254 U.S. 425, 430-433, 41 S.Ct. 154, 156, 157, 65 L.Ed. 341.

We think that when this Court, a century ago, approved this practice and held that federal appellate courts have the power to pass upon, and hence to grant or deny, petitions for bills of review even though the petitions be presented long after the term of the challenged judgment has expired, it settled the procedural question here involved. *Southard v. Russell*, 16 How. 547, 14 L.Ed. 1052.<sup>4</sup> To reason otherwise would be to say that although the Circuit Court has the power to act after the term finally to deny relief, it has not the power to act after the term finally to grant relief. It would, moreover, be to say that even in a case where the alleged fraud was on the Circuit Court itself, the relevant facts as to the fraud were agreed upon by the litigants, and the Circuit Court concluded relief must be granted, that Court nevertheless must send the case to the District Court for decision. Nothing in reason or precedent requires such a cumbersome and dilatory procedure. Indeed the whole history of equitable procedure, with the traditional flexibility which has enabled the courts to grant all the relief

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<sup>4</sup> See also *Tyler v. Magwire*, 17 Wall. 253, 283: "Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be reexamined at a subsequent term, except in cases of fraud, as there is no act of Congress which confers any such authority." (Italics supplied.)

against judgments which the equities require, argues against it. We hold, therefore, that the Circuit Court on the record here presented<sup>5</sup> had both the duty and the power to vacate its own judgment and to give the District Court appropriate directions.

The question remains as to what disposition should be made of this case. Hartford's fraud, hidden for years but now admitted, had its genesis in the plan to publish an article for the deliberate purpose of deceiving the Patent Office. The plan was executed, and the article was put to fraudulent use in the Patent Office, contrary to law. U.S.C., Title 35, § 69, 35 U.S.C.A. § 69; *United States v. American Bell Telephone Company*, 128 U.S. 315, 9 S.Ct. 90, 32 L.Ed. 450. From there the trail of fraud continued without break through the District Court and up to the Circuit Court of Appeals. Had the District Court learned of the fraud on the Patent Office at the original infringement

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<sup>5</sup> We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses. It should again be emphasized that Hartford has never questioned the accuracy of the various documents which indisputably show fraud on the Patent Office and the Circuit Court, and has not claimed, either here or below, that a trial might bring forth evidence to disprove the facts as shown by these documents. And insofar as a trial would serve to bring forth additional evidence showing that Hazel was not diligent in uncovering these facts, we already have pointed out that such evidence would not in this case change the result.

Moreover, we need not decide whether, if the facts relating to the fraud were in dispute and difficult of ascertainment, the Circuit Court here should have held hearings and decided the case or should have sent it to the District Court for decision. Cf. *Art Metal Works v. Abraham Strauss*, *supra*, Note 1.

trial, it would have been warranted in dismissing Hartford's case. In a patent case where the fraud certainly was not more flagrant than here, this Court said: 'Had the corruption of Clutter been disclosed at the trial \* \* \*, the court undoubtedly would have been warranted in holding it sufficient to require dismissal of the cause of action there alleged for the infringement of the Downie patent.' *Keystone Co. v. General Excavator Co.*, 290 U.S. 240, 246, 54 S.Ct. 146, 148, 78 L.Ed. 293; *cf. Morton Salt Co. v. G.S. Suppiger Co.*, *supra*, 314 U.S. at pages 493, 494, 62 S.Ct. at pages 405, 406, 86 L.Ed. 363. So, also, could the Circuit Court of Appeals have dismissed the appeal had it been aware of Hartford's corrupt activities in suppressing the truth concerning the authorship of the article. The total effect of all this fraud, practiced both on the Patent Office and the courts, calls for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced.

Since the judgments of 1932 therefore must be vacated, the case now stands in the same position as though Hartford's corruption had been exposed at the original trial. In this situation the doctrine of the *Keystone* case, *supra*, requires that Hartford be denied relief.

To grant full protection to the public against a patent obtained by fraud, that patent must be vacated. It has previously been decided that such a remedy is not available in infringement proceedings, but can only be accomplished in a direct proceeding brought by the government. *United States v. American Bell Telephone Company*, *supra*.

The judgment is reversed with directions to set aside the 1932 judgment of the Circuit Court of Appeals, recall the 1932 mandate, dismiss Hartford's appeal, and issue mandate to the District Court directing it to set aside its judgment entered pursuant to the Circuit Court of Appeals' mandate, to reinstate its original judgment denying relief to Hartford, and to take such additional action as may be necessary and appropriate.

It is so ordered.

Reversed with directions.



Mr. Justice ROBERTS.

No fraud is more odious than an attempt to subvert the administration of justice. The court is unanimous in condemning the transaction disclosed by this record. Our problem is how best the wrong should be righted and the wrongdoers pursued. Respect for orderly methods of procedure is especially important in a case of this sort. In simple terms, the situation is this. Some twelve years ago a fraud perpetrated in the Patent Office was relied on by Hartford in the Circuit Court of Appeals. The court reversed a judgment in favor of Hazel, decided that Hartford was the holder of a valid patent which Hazel had infringed and, by its mandate, directed the District Court to enter a judgment in favor of Hartford. This was done and, on the strength of the judgment, Hartford and Hazel entered into an agreement of which more hereafter. So long as that judgment stands unmodified, the agreement of the parties will be unaffected by anything involved in the suit under discussion. Hazel concedely now desires to be in a position to disregard the agreement to its profit.

The resources of the law are ample to undo the wrong and to pursue the wrongdoer and to do both effectively with due regard to the established modes of procedure. Ever since this fraud was exposed, the United States has had standing to seek nullification of Hartford's patent.<sup>1</sup> The Government filed a brief as

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<sup>1</sup> *United States v. American Bell Telephone Co.*, 128 U.S. 315, 9 S.Ct. 90, 32 L.Ed. 450; *Id.*, 167 U.S. 224, 238, 17 S.Ct. 809, 42 L.Ed. 144.

amicus below and one in this court. It has elected not to proceed for cancellation of the patent.<sup>2</sup>

It is complained that members of the bar have knowingly participated in the fraud. Remedies are available to purge recreant officers from the tribunals on whom the fraud was practiced.

Finally, as to the immediate aim of this proceeding, namely, to nullify the judgment if the fraud procured it, and if Hazel is equitably entitled to relief, an effective and orderly remedy is at hand. This is a suit in equity in the District Court to set aside or amend the judgment. Such a proceeding is required by settled federal law and would be tried, as it should be, in open court with living witnesses instead of through the unsatisfactory method of affidavits. We should not resort to a disorderly remedy, by disregarding the law as applied in federal courts ever since they were established, in order to reach one inequity at the risk of perpetrating another.

In a suit brought by Hartford against Hazel in the Western District of Pennsylvania charging infringement of Hartford's patent No. 1,655,391, a decree was entered against Hartford March 31, 1930, on the ground that Hazel had not infringed. On appeal, the Circuit Court of Appeals filed an opinion, May 5, 1932, reversing the judgment of the District Court and holding the patent valid and infringed. On Hazel's application, the time for filing a petition for rehearing was extended five times. On July 21, 1932, Hazel entered into a general settlement and license agreement with Hartford respecting the patent in suit and other

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<sup>2</sup> The facts with respect to the fraud practiced on the Patent Office have been known for some years.

patents, which agreement was to be effective as of July 1, 1932. Hazel filed no petition for rehearing and, on July 30, 1932, the mandate of the Circuit Court of Appeals went to the District Court. Pursuant to the mandate, that court entered its final judgment against Hazel for an injunction and an accounting. No such accounting was ever had because Hazel and Hartford had settled their differences.

November 19, 1941, Hazel presented to the Circuit Court of Appeals its petition for leave to file in the District Court a bill of review. Attached was the proposed bill. Affidavits were filed by Hazel and Hartford. The Circuit Court of Appeals heard the matter and made an order denying the petition for leave to file, holding that any fraud practiced had been practiced on the Circuit Court of Appeals and, therefore, that court should itself pass upon the question whether the mandate should be recalled and the case reopened. Leave was granted to Hazel to amend its petition to seek relief from the Circuit Court of Appeals. The order provided for an answer by Hartford and for a hearing and determination by the Circuit Court of Appeals.

The Circuit Court of Appeals, on the basis of the amended petition, the answer, and the affidavits, denied relief on the grounds: (1) That the fraud had not been effective to influence its earlier decision; (2) that the court was without power to deal with the case as its mandate had gone down and the term had long since expired; (3) that Hazel had been negligent and guilty of inexcusable delay in presenting the matter to the court; and (4) that the only permissible procedure was in the District Court, where the judgment rested, by bill in equity in the nature of a bill of review. One

judge dissented, holding that the court had power (1) to recall the cause; (2) to enter upon a trial of the issues made by the petition and answer, and (3) itself to review and revise its earlier decision, enter a new judgment in the case on the corrected record and send a new mandate to the District Court.

As I understand the opinion of this court, while it reverses the decision below, it only partially adopts the view of the dissenting judge, for the holding is: (1) That the court below has power at this date to deal with the matter either as a new suit or as a continuation of the old one; (2) that it can recall the case from the District Court; (3) that it can grant relief; (4) that it can hear evidence and act as a court of first instance or a trial court; (5) that such a trial as it affords need not be according to the ordinary course of trial of facts in open court, by examination and cross-examination of witnesses, but that the proofs may consist merely of ex parte affidavits; and (6) that such a trial has already been afforded and it remains only, in effect, to cancel Hartford's patent.

I think the decision overrules principles settled by scores of decisions of this court which are vital to the equitable and orderly disposition of causes –principles which, upon the soundest considerations of fairness and policy, have stood unquestioned since the federal judicial system was established. I shall first briefly state these principles. I shall then as briefly summarize the reasons for their adoption and enforcement and, finally, I shall show why it would not be in the interest of justice to abandon them in this case.

1. The final and only extant judgment in the litigation is that of the District Court entered pursuant to the mandate of the Circuit Court of Appeals. The term

of the District Court long ago expired and, with that expiration, all power of that court to re-examine the judgment or to alter it ceased, except for the correction of clerical errors. The principle is of universal application to judgments at law,<sup>3</sup> decrees in equity,<sup>4</sup> and convictions of crime, though, as respects the latter, its result may be great individual hardship.<sup>5</sup> The rule might, for

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<sup>3</sup> *Bank of United States v. Moss*, 6 How. 31, 38, 12 L.Ed. 331; *Roemer v. Simon*, 91 U.S. 149, 23 L.Ed. 267; *Phillips v. Negley*, 117 U.S. 665, 672, 678, 6 S.Ct. 901, 903, 906, 29 L.Ed. 1013; *Hickman v. Fort Scott*, 141 U.S. 415, 12 S.Ct. 9, 35 L.Ed. 775; *Tubman v. Baltimore & O.R. Co.*, 190 U.S. 38, 23 S.Ct. 777, 47 L.Ed. 946; *Wetmore v. Karrick*, 205 U.S. 141, 151, 27 S.Ct. 434, 436, 437, 51 L.Ed. 745; *In re Metropolitan Trust Co.*, 218 U.S. 312, 320, 31 S.Ct. 18, 20, 54 L.Ed. 1051; *Delaware L. & W.R. Co. v. Rellstab*, 276 U.S. 1, 5, 48 S.Ct. 203, 72 L.Ed. 439; *Realty Acceptance Corp. v. Montgomery*, 284 U.S. 547, 549, 52 S.Ct. 215, 76 L.Ed. 476.

<sup>4</sup> *Cameron v. McRoberts*, 3 Wheat. 591, 4 L.Ed. 467; *Sibbald v. United States*, 12 Pet. 488, 492, 9 L.Ed. 1167; *Washington Bridge Co. v. Stewart*, 3 How. 413, 426, 11 L.Ed. 658; *Central Trust Co. v. Grant Locomotive Works*, 135 U.S. 207, 10 S.Ct. 736, 34 L.Ed. 97; *Wayne Gas Co. v. Owens Co.*, 300 U.S. 131, 136, 57 S.Ct. 382, 385, 81 L.Ed. 557; *Sprague v. Ticonic Bank*, 307 U.S. 161, 169, 59 S.Ct. 777, 781, 83 L.Ed. 1184.

<sup>5</sup> *United States v. Mayer*, 235 U.S. 55, 67, 35 S.Ct. 16, 18, 59 L.Ed. 129. In this case one Freeman was convicted in the District Court. After he had taken an appeal to the Circuit Court of Appeals he filed, after the term had expired, a motion to set aside the judgment on the ground that a juror wilfully concealed bias against the defendant when examined on his voir dire. After hearing this motion the District judge found as a fact that the juror had been guilty of misconduct and that the defendant and his counsel neither had knowledge of the wrong nor could have discovered it earlier by due diligence. The District judge was in doubt whether, after the expiration of the term, he had power to deal with the judgment of conviction. The Circuit Court of Appeals certified the question to this court which, in a unanimous

that reason, have been relaxed in criminal cases, if it ever is to be, for there, in contrast to civil cases, no other judicial relief is available.

In the promulgation of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, this court took notice of the fact that terms of the district court vary in length and that the expiration of the term might occur very soon, or quite a long time, after the entry of a judgment. In order to make the practice uniform Rule 60(b) provides: 'On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. \* \* \* This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding. \* \* \*' Thus there has been substituted for the term rule a definite time limitation within which a district court may correct or modify its judgments. But the salutary rule as to finality is retained and, after the expiration of six months, the party must apply, as heretofore, by bill of review-now designated a civil action-to obtain relief from a judgment which itself is final so far as any further steps in the original action are concerned.

The term rule applies with equal force to an appellate court. Over the whole course of its history,

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opinion, rendered after full argument by able counsel, held in accordance with all earlier precedents that, even in a case of such hardship, the District Court had no such power.

this court has uniformly held that it was without power, after the going down of the mandate, and the expiration of the term, to rehear a case or to modify its decision on the merits.<sup>6</sup> And this is equally true of the circuit courts of appeal.<sup>7</sup>

The court below, unless we are to overthrow a century and a half of precedents, lacks power now to revise its judgment and lacks power also to send its process to the District Court and call up for review the

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<sup>6</sup> *Hudson v. Guestier*, 7 Cranch 1, 3 L.Ed. 249; *Jackson v. Ashton*, 10 Pet. 480, 9 L.Ed. 502; *Sibbald v. United States*, *supra*, 12 Pet. at page 492, 9 L.Ed. 1167; *Washington Bridge Co. v. Stewart*, *supra*; *Brooks v. Burlington & S. W. Railroad Co.*, 102 U.S. 107, 26 L.Ed. 91; *Barney v. Friedman*, 107 U.S. 629, 2 S.Ct. 830, 27 L.Ed. 601; *Hickman v. Fort Scott*, *supra*, 141 U.S. at page 419, 12 S.Ct. at page 10, 35 L.Ed. 775; *Bushnell v. Crooke Mining Co.*, 150 U.S. 82, 14 S.Ct. 22, 37 L.Ed. 1007.

<sup>7</sup> *Ex parte National Park Bank*, 256 U.S. 131, 41 S.Ct. 403, 65 L.Ed. 863. 'That court was powerless to modify the decree after the expiration of the term at which it was entered. If the omission in the decree had been adequately called to the court's attention during the term it would doubtless have corrected the error complained of, or relief might have been sought in this court by a petition for a writ of certiorari. The bank failed to avail itself of remedies open to it.' 256 U.S. at page 133, 41 S.Ct. at page 404, 65 L.Ed. 863. The circuit courts of appeal have uniformly observed the rule thus announced. *Hart v. Wiltsee*, 1 Cir., 25 F.2d 863; *Nachod v. Engineering & Research Corp.*, 2 Cir., 108 F.2d 594; *Montgomery v. Realty Acceptance Corp.*, 3 Cir., 51 F.2d 642; *Foster Bros. Mfg. Co. v. N.L.R.B.*, 4 Cir., 90 F.2d 948; *Wichita Royalty Co. v. City National Bank*, 5 Cir., 97 F.2d 249; *Hawkins v. Cleveland C.C. & St. L. Ry.*, 7 Cir., 99 F. 322; *Walsh Construction Co. v. United States Guarantee Co.*, 8 Cir., 76 F.2d 240; *Waskey v. Hammer*, 9 Cir., 179 F. 273.

judgment entered on its mandate twelve years ago.<sup>8</sup> No such power is inherent in an appellate court; none such is conferred by any statute.

2. The Circuit Court of Appeals is without authority either to try the issues posed by the petition and answer on the affidavits on file, or, to do as the dissenting judge below suggests, hold a full dress trial.

The federal courts have only such powers as are expressly conferred on them. Certain original jurisdiction is vested in this court by the Constitution. Its powers as an appellate court are those only which are given by statute.<sup>9</sup>

The circuit courts of appeal are creatures of statute. No original jurisdiction has been conferred on them. They exercise only such appellate functions as Congress has granted. The grant is plain. "The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions \* \* \* in the district courts \* \* \*."<sup>10</sup> Nowhere is there any grant of jurisdiction to try cases, to enter judgments, or to issue executions or other final process.

"\* \* \* courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an

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<sup>8</sup> *Sibbald v. United States*, *supra*, 12 Pet. at page 492, 9 L.Ed. 1167; *Roemer v. Simon*, 91 U.S. 149, 23 L.Ed. 267; *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414.

<sup>9</sup> *Ex parte Bollman*, 4 Cranch 75, 93, 2 L.Ed. 554.

<sup>10</sup> Judicial Code § 128 as amended, 28 U.S.C. 225, 28 U.S.C.A. § 225.



authority with which they may not be invested by it, or which may be clearly denied to them.”<sup>11</sup>

This court has never departed from the view that circuit courts of appeal are statutory courts having no original jurisdiction but only appellate jurisdiction.<sup>12</sup>

Neither this court<sup>13</sup> nor a circuit court<sup>14</sup> of appeals may hear new evidence in a cause appealable from a lower court. No suggestion seems ever before to have

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<sup>11</sup> *Cary v. Curtis*, 3 How. 236, 245, 11 L.Ed.576. See *Sheldon v. Sill*, 8 How. 441, 449, 12 L.Ed. 1147; *Commonwealth of Kentucky v. Powers*, 201 U.S. 1, 24, 26 S.Ct. 387, 393, 50 L.Ed. 633, 5 Ann.Cas. 692.

<sup>12</sup> *Whitney v. Dick*, 202 U.S. 132, 137, 26 S.Ct. 584, 586, 50 L.Ed. 963; *United States v. Mayer*, *supra*, 225 U.S. at page 65, 35 S.Ct. at page 18, 59 L.Ed. 129; *Realty Acceptance Corp. v. Montgomery*, *supra*, 284 U.S. at page 549, 52 S.Ct. at page 215, 76 L.Ed. 476.

<sup>13</sup> *Russell v. Southard*, 12 How. 139, 158, 159, 13 L.Ed. 927; *United States v. Knight's Adm'r*, 1 Black 488, 17 L.Ed. 76; *Roemer v. Simon*, *supra*. In the *Russell* case Chief Justice Taney said (12 How. 159, 13 L.Ed. 927): 'It is very clear that affidavits of newly-discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting, as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal. *Eden v. Earl Bute*, 1 Bro.Par.Cas. 465; 3 Bro.Par.Cas. 546; *Studwell v. Palmer*, 5 Paige (N.Y.) 166. "Indeed, if the established chancery practice had been otherwise, the act of Congress of March 3d 1803, expressly prohibits the introduction of new evidence, in this court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes."

<sup>14</sup> *Realty Acceptance Corp. v. Montgomery*, *supra*, 284 U.S. at page 550, 551, 52 S.Ct. at page 216, 76 L.Ed. 476.

been made that they may constitute themselves trial courts, embark on the trial of what is essentially an independent cause and enter a judgment of first instance on the facts and the law. But this is what the opinion sanctions.

3. The temptation might be strong to break new ground in this case if Hazel were otherwise remediless. Such is not the fact. The reports abound in decisions pointing the way to relief if, in equity, Hazel is entitled to any.

Since Lord Bacon's day a decree in equity may be reversed or revised for error of law,<sup>15</sup> for new matter subsequently occurring, or for after discovered evidence. And this head of equity jurisdiction has been exercised by the federal courts from the foundation of the nation.<sup>16</sup> Such a bill is an original bill in the nature of

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<sup>15</sup> A bill filed to correct error of law apparent on the record is called a strict bill of review and some rules as to time are peculiarly applicable to such bills. See *Whiting v. Bank of United States*, 13 Pet. 6, 13, 14, 15, 10 L.Ed. 33; *Shelton v. Van Kleeck*, 106 U.S. 532, 27 L.Ed. 269; *Central Trust Co. v. Grant Locomotive Works*, 135 U.S. 207, 10 S.Ct. 736, 34 L.Ed. 97. Street, Federal Equity Practice § 2129 et seq. With this type of bill we are not here concerned.

<sup>16</sup> *Ocean Ins. Co. v. Fields*, Fed.Cas.No.10,406, 2 Story 59; *Whiting v. Bank of United States*, *supra*; *Southard v. Russell*, 16 How. 547, 14 L.Ed. 1052; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L.Ed. 886; *Purcell v. Miner*, 4 Wall. 519 note, 18 L.Ed. 459; *Rubber Co. v. Goodyear*, 9 Wall. 805, 19 L.Ed. 828; *Easley v. Kellom*, 14 Wall. 279, 20 L.Ed. 890; *Putnam v. Day*, 22 Wall. 60, 22 L.Ed. 764; *Buffington v. Harvey*, 95 U.S. 99, 24 L.Ed. 381; *Craig v. Smith*, 100 U.S. 226, 25 L.Ed. 577; *Shelton v. Van Kleeck*, *supra*; *Pacific R.R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505, 4 S.Ct. 583, 28 L.Ed. 498; *Central Trust Co. v. Grant Locomotive Works*, *supra*; *Boone County v. Burnington & M.R.R. Co.*, 139 U.S. 684, 11 S.Ct. 687, 35 L.Ed. 319; *Hopkins v. Hebard*,

a bill of review. Equity also, on original bills, exercises a like jurisdiction to prevent unconscionable retention or enforcement of a judgment at law procured by fraud, or mistake unmixed with negligence attributable to the losing party, or rendered because he was precluded from making a defense which he had. Such a bill may be filed in the federal court which rendered the judgment or in a federal court other than the court, federal or state, which rendered it.<sup>17</sup>

Whether the suit concerns a decree in equity or a judgment at law, it is for relief granted by equity against an unjust and inequitable result, and is subject to all the customary doctrines governing the award of equitable relief.

New proof to justify a bill of review must be such as has come to light after judgment and such as could not have been obtained when the judgment was entered. The proffered evidence must not only have been unknown prior to judgment, but must be such as could not have been discovered by the exercise of reasonable

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235 U.S. 287, 35 S.Ct. 26, 59 L.Ed. 234; *Scotten v. Littlefield*, 235 U.S. 407, 35 S.Ct. 125, 59 L.Ed. 289; *National Brake & Electric Co. v. Christensen*, 254 U.S. 425, 41 S.Ct. 154, 65 L.Ed. 341; *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 42 S.Ct. 196, 66 L.Ed. 475; *Jackson v. Irving Trust Co.*, 311 U.S. 494, 61 S.Ct. 326, 328, 85 L.Ed. 297.

<sup>17</sup> *Logan v. Patrick*, 5 Cranch 288, 3 L.Ed. 103; *Marine Ins. Co. v. Hodgson*, 7 Cranch 332, 3 L.Ed. 362; *Dunn v. Clarke*, 8 Pet. 1, 8 L.Ed. 845; *Truly v. Wanzer*, 5 How. 141, 12 L.Ed. 88; *Creath's Adm'r v. Sims*, 5 How. 192, 12 L.Ed. 111; *Humphreys v. Leggett*, 9 How. 297, 13 L.Ed. 145; *Walker v. Robbins*, 14 How. 584, 14 L.Ed. 552; *Hendrickson v. Hinckley*, 17 How. 443, 15 L.Ed. 123; *Leggett v. Humphreys*, 21 How. 66, 16 L.Ed. 50; *Gue v. Tide Water Canal Co.*, 24 How. 257, 16 L.Ed. 635; *Freeman v. Howe*, 24 How. 450, 16 L.Ed. 749;

diligence in time to permit its use in the trial. Unreasonable delay, or lack of diligence in timely searching for the evidence, is fatal to the right of a bill of review, and a party may not elect to forego inquiry and let the cause go to judgment in the hope of a favorable result and then change his position and attempt, by means of a bill of review, to get the benefit of evidence he neglected to produce. These principles are established by many of the cases cited in notes 16 and 17, and specific citation is unnecessary. The principles are well settled. And, in this class of cases as in others, although equity does not condone wrongdoing, it will not extend its aid to a wrongdoer; in other words, the complainant must come into court with clean hands.

4. Confessedly the opinion repudiates the unbroken rule of decision with respect to the finality of a judgment at the expiration of the term; that with respect to jurisdiction of an appellate court to try issues of fact upon evidence, and that with respect to the necessity for resorting to a bill of review to modify or set aside a judgment once it has become final. Perusal of the authorities cited will sufficiently expose the reasons for these doctrines. It is obvious that parties ought not to be permitted indefinitely to litigate issues once tried and adjudicated. [18] There must be an end to

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<sup>18</sup> It has frequently been said that where the ground for a bill of review is fraud, review will not be granted unless the fraud was extrinsic. See *United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93. The distinction between extrinsic and intrinsic fraud is not technical but substantial. The statement that only extrinsic fraud may be the basis of a bill of review is merely a corollary of the rule that review will not be granted to permit relitigation of matters which were in issue in the cause and are, therefore, concluded by the judgment or decree. The classical example of intrinsic as contrasted with extrinsic fraud is the commission of

litigation. If courts of first instance, or appellate courts, were at liberty, on application of a party, at any time to institute a summary inquiry for the purpose of modifying or nullifying a considered judgment, no reliance could be placed on that which has been adjudicated and citizens could not, with any confidence, act in the light of what has apparently been finally decided.

If relief on equitable grounds is to be obtained it is right that it should be sought by a formal suit upon adequate pleadings and should be granted only after a trial of issues according to the usual course of the trial of questions of fact. A court of first instance is the appropriate tribunal, and the only tribunal, equipped for such a trial. Appellate courts have neither the power nor the means to that end.

On the strongest grounds of public policy bills of review are disfavored, since to facilitate them would tend to encourage fraudulent practices, resort to perjury, and the building of fictitious reasons for setting aside judgments.

5. I think the facts in the instant case speak loudly for the observance, and against the repudiation,

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perjury by a witness. While perjury is a fraud upon the court, the credibility of witnesses is in issue, for it is one of the matters on which the trier of fact must pass in order to reach a final judgment. An allegation that a witness perjured himself is insufficient because the materiality of the testimony, and opportunity to attack it, was open at the trial. Where the authenticity of a document relied on as part of a litigant's case is material to adjudication, as was the grant in the Throckmorton case, and there was opportunity to investigate this matter, fraud in the preparation of the document is not extrinsic but intrinsic and will not support review. Any fraud connected with the preparation of the Clarke article in this case was extrinsic, and, subject to other relevant rules, would support a bill of review.

of all the rules to which I have referred. The court's opinion implies that the disposition here made is justified by uncontradicted facts, but the record demonstrates beyond question that serious controverted issues ought to be resolved before Hazel may have relief.

In 1926 Hartford brought a suit for infringement of the Peiler Patent against Nivison-Weiskopf Company in the Southern District of Ohio. Counsel for the defendants in that case were Messrs. William R. and Edmund P. Wood of Cincinnati. About the same time Hartford brought a similar suit for infringement against Kearns-Gorsuch Bottle Company, a subsidiary of Hazel. Counsel for Kearns were the same who have represented Hazel throughout this case.

In 1928 Hartford brought suit against Hazel in the Western District of Pennsylvania for a like infringement. The same counsel represented Hazel. The Ohio suits came to trial first. In them a decision was rendered adverse to Hartford. Appeals were taken to the Circuit Court of Appeals of the Sixth Circuit, were consolidated, and counsel for the defendants appeared together in that court, which decided adversely to Hartford (*Hartford-Empire Co. v. Nivison-Weiskopf Co.*, 58 F.2d 701).

In the preparation for the defense of the Nivison suit, William R. Wood called upon Clarke and interviewed him in the presence of a witness. Clarke admitted that Hatch of Hartford had prepared the article published under Clarke's name. In the light of this fact the Messrs. Wood notified Hartford that they would require the presence of Hatch at the trial of the suit and Hatch was in attendance during that trial. Repeatedly during the trial Hatch admitted to the Messrs. Wood that he was in fact the author of the

article. It was well understood that the defendant wanted him present so that if any reference to or reliance upon the article developed they could call Hatch and prove the facts. There was no such reference or reliance.

As counsel for the various defendants opposed to Hartford were acting in close cooperation, Messrs. Wood attended the trial of the Hartford-Hazel suit in Pittsburgh, which must have occurred in 1929 or early 1930. (*See* 39 F.2d 111.) One or other of the Messrs. Wood was present throughout that trial and Edmund P. Wood was in frequent consultation with the Hazel representatives and counsel. Hazel's counsel was the same at that trial as in the present case. The Messrs. Wood told Hazel's counsel and representatives that Clarke had admitted Hatch was the author of the article and that Hatch had also freely admitted the same thing. Hazel's counsel and representatives discussed at length, in the presence of Mr. Wood, the advisability of attacking the authenticity of the article. Counsel for Hazel, in these conferences, took the position that 'an attack on the article might be a boomerang in that it might emphasize the truth of the only statements in the article' which he regarded as of any possible pertinence. Mr. Wood's affidavit giving in detail the discussions and the conclusion of Hazel's counsel is uncontradicted, and demonstrates that Hazel's counsel knew the facts with regard to the Clarke article and knew the names of witnesses who could prove those facts. After due deliberation, it was decided not to offer proof on the subject.

The District Court found in favor of Hazel, holding that Hazel had not infringed. Hartford appealed to the Third Circuit Court of Appeals. In that court

Hartford's counsel referred in argument to the Clarke article and the court, in its decision, referred to the article as persuasive of certain facts in connection with the development of glass machinery. The Circuit Court of Appeals for the Sixth Circuit rendered its decision in the Nivison and Kearns cases on May 12, 1932, and the Third Circuit Court of Appeals rendered its decision in the Hartford-Hazel case on May 6, 1932.

Counsel for Hazel was then, nearly ten years prior to the filing of the instant petition, confronted with the fact that, in its opinion, the Circuit Court of Appeals had accredited the article. Naturally counsel was faced with the question whether he should bring to the court's attention the facts respecting that article. As I have said, he asked and was granted five extensions of time for filing a petition for rehearing. Meantime negotiations were begun with Hartford for a general settlement and for Hazel's joining in the combination and patent pool of which Hartford was the head and front. At the same time, however, evidently as a precaution against the breakdown of the negotiations, Hazel's counsel obtained affidavits to be signed by the Messrs. Wood setting forth the facts which they had gleaned concerning the authorship of the Clarke article. These affidavits were intended for use in the Third Circuit Court of Appeals case for they were captioned in that case. Being made by reputable counsel who are accredited by both parties to this proceeding they were sufficient basis for a petition for rehearing while the case was still in the bosom of the Circuit Court of Appeals. It is idle to suggest that counsel would not have been justified in applying to the court on the strength of them.



Had counsel filed a petition and attached to it the affidavits of the Messrs. Wood, without more, he would have done his duty to the court in timely calling its attention to the fraud which had been perpetrated. But more, the court would undoubtedly have reopened the case, granted rehearing, and remanded the case to the District Court with permission to Hazel to summon and examine witnesses. It is to ignore realities to suggest, as the opinion does, that counsel for Hazel was helpless at that time and in the then existing situation.

But counsel did not rest there. He commissioned an investigator who interviewed a labor leader named Maloney in Philadelphia. This man refused to talk but the investigator's report would make it clear to anyone of average sense that he knew about the origin of the article, and any lawyer of experience would not have hesitated to summon him as a witness and put him under examination. Moreover, the investigator interviewed Clarke and his report of the evasive manner and answers of Clarke convince me, and I believe would convince any lawyer of normal perception, that the Woods' affidavits were true and that Clarke would have so admitted if called to the witness stand. Most extraordinary is the omission of Hazel's counsel, although then in negotiation with Hartford for a settlement, to make any inquiry concerning Hatch or to interview Hatch, or to have him interviewed when counsel had been assured that Hatch had no inclination to prevaricate concerning his part in the preparation of the article.

The customary modes of eliciting truth in court may well establish that in the circumstances Hazel's counsel deliberately elected to forego any disclosure

concerning the Clarke article and to procure instead the favorable settlement he obtained from Hartford.

In any event, we know that, on July 21, 1932, Hartford and Hazel entered into an agreement, which is now before this court in the record in Nos. 7-11 of the present term, on appeal from the District Court for Northern Ohio. Under the agreement Hazel paid Hartford \$1,000,000. Hartford granted Hazel a license on all machines and methods embodying patented inventions for the manufacture of glass containers at Hartford's lowest royalty rates. Hartford agreed to pay Hazel one-third of its net royalty income to and including January 3, 1945, over and above \$850,000 per annum. At the same time, Hazel entered into an agreement with the Owens-Illinois Glass Company, another party to the Hartford patent pool and the conspiracy to monopolize the glass manufacturing industry found by the District Court.

In the autumn of 1933 counsel for Shawkee Company, defendant in another suit by Hartford, obtained documents indicating Hatch's responsibility for the Clarke article, and wrote counsel for Hazel inquiring what he knew about the matter. Hazel's counsel, evidently reluctant to disturb the existing status, replied that, while he suspected Hartford might have been responsible for the article, he did not at the time of trial, know of the papers which counsel for Shawkee had unearthed, and added that his recollection was then 'too indefinite to be positive and I would have to go through the voluminous mass of papers relating to the various Hartford-Empire litigations, including correspondence, before I could be more definite.'

The District Court for Northern Ohio has found that the 1932 agreement and coincident arrangements

placed Hazel in a preferred position in the glass container industry and drove nearly everyone else in that field into taking licenses from Hartford, stifled competition, and gave Hazel, as a result of rebates paid to it, a great advantage over all competitors in the cost of its product. It is uncontested that, as a result of the agreement, Hazel has been repaid the \$1,000,000 it paid Hartford and has received upwards of \$800,000 additional.

In 1941 the United States instituted an equity suit in Northern Ohio against Hartford, Hazel, Owens Illinois, and other corporations and individuals to restrain violation of the antitrust statutes. That court found that the defendants conspired to violate the antitrust laws and entered an injunction on October 8, 1942. (46 F.Supp. 541.) Hazel and other defendants appealed to this court. The same counsel represented Hazel in that suit, and in the appeal to this court, as represented the company in the District Court and in the Third Circuit Court of Appeals in this case. In its brief in this court Hazel strenuously contended that the license agreement executed in 1932, and still in force, was not violative of the antitrust laws and should be sustained.

Of course, in 1941 counsel for Hazel faced the possibility that the District Court in Ohio might find against Hazel, and that this court might affirm its decision. Considerations of prudence apparently dictated that Hazel should cast an anchor to windward. Accordingly, November 19, 1941, it presented its petition for leave to file a bill of review in the District Court for Western Pennsylvania and attached a copy of the proposed bill. In answer to questions at our bar as to the ultimate purpose of this proceeding, counsel

admitted that, if successful in it, Hazel proposed to obtain every resultant benefit it could.

In the light of the circumstances recited it becomes highly important closely to scrutinize Hazel's allegations. It refers to the use by the Circuit Court of Appeals of the Clarke article in the opinion and then avers:

'That although prior to the decision of this Court your petitioner suspected and believed that the article had been written by one of plaintiff's employees, instead of by Clarke, and had been caused by plaintiff to be published in the National Glass Budget, petitioner did not know then or until this year material and pertinent facts which, if petitioner had then known and been able to present to this Court, should have resulted in a decision for petitioner. (Italics added)

'That such facts were disclosed to petitioner for the first time in suit of *United States of America v. Hartford et al.*, in the United States District Court for the Northern District of Ohio, and are specified in paragraphs 4, 5 and 6 of the annexed bill of review, which is made a part hereof.

'That your petitioner could not have ascertained by the use of proper and reasonable diligence the newly discovered facts prior to the said suit, and that the newly discovered evidence is true and material and should cause a decree in this cause different from that heretofore made.'

In the proposed bill of review these allegations are repeated and it is added that the new facts ascertained consist of the testimony of Hatch in the antitrust suit and five letters written by various parties connected with the conspiracy and a memorandum prepared by Hatch which were in evidence in that suit. The bill then adds:

‘The new matter specified in the preceding paragraphs 4, 5 and 6 is material, it only recently became known to plaintiff, which could not have previously obtained it with due diligence, and such new evidence if it had been previously known to this Court and to the Circuit Court of Appeals would have caused a decision different from that reached.’

Neither the petition nor the bill is under oath but there is attached an affidavit of counsel for Hazel in which he states that in or before 1929 Hazel ‘had suspected, and I believed,’ that the Clarke article had been written by Hatch and that Hartford had caused the article to be published, adding: ‘having been so told by the firm of Messrs. Wood and Wood, Cincinnati lawyers, who said they had so been told by Clarke and also by Hatch.’ The affidavit also attaches the reports of the investigator above referred to and refers to the exhibits and testimony in the antitrust suit in Northern Ohio.

In the light of the facts I have recited, it seems clear that if Hazel’s conduct be weighed merely in the aspect of negligent failure to investigate, the decision of this court in *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719, may well justify a holding, on all available evidence, that, at

least, Hazel was guilty of inexcusable negligence in not seeking the evidence to support an attack upon the decree. But it is highly possible that, upon a full trial, it will be found that Hazel held back what it knew and, if so, is not entitled now to attack the original decree. In *Scotten v. Littlefield*, 235 U.S. 407, 35 S.Ct. 125, 59 L.Ed. 289, in affirming the denial of a bill of review, this court said that if the claim now made was 'not presented to the Court of Appeals when there on appeal it could not be held back and made the subject of a bill of review, as is now attempted to be done.' Repeatedly this court has held that one will not be permitted to litigate by bill of review a question which it had the opportunity to litigate in the main suit, whether the litigant purposely abstained from bringing forward the defense or negligently omitted to prosecute inquiries which would have made it available.<sup>19</sup>

And certainly an issue of such importance affecting the validity of a judgment, should never be tried on affidavits.<sup>20</sup>

As I read the opinion of the court, it disregards the contents of many of the affidavits filed in the cause

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<sup>19</sup> *Hendrickson v. Hinckley*, *supra*, 17 How. at page 446, 15 L.Ed. 123; *Rubber Co. v. Goodyear*, *supra*, 9 Wall. at page 806, 19 L.Ed. 828; *Crim v. Handley*, *supra*, 94 U.S. at page 660, 24 L.Ed. 216; *Bronson v. Schulten*, *supra*, 104 U.S. at pages 417, 418, 26 L.Ed. 797; *Richards v. Mackall*, 124 U.S. at pages 188, 189, 8 S.Ct. at page 440, 31 L.Ed. 396; *Boone County v. Burlington & M.R.R. Co.*, *supra*, 139 U.S. at page 693, 11 S.Ct. at page 689, 35 L.Ed. 319; *Pickford v. Talbott*, *supra*, 225 U.S. at page 658, 32 S.Ct. at page 689, 56 L.Ed. 1240.

<sup>20</sup> *Jackson v. Irving Trust*, *supra*, 311 U.S. at page 499, 61 S.Ct. at page 328, 85 L.Ed. 297; *Sorenson v. Sutherland*, 2 Cir., 109 F.2d 714, 719.

and holds that solely because of the fraud which was practiced on the Patent Office and in litigation on the patent, the owner of the patent is to be amerced and in effect fined for the benefit of the other party to the suit, although that other comes with unclean hands<sup>21</sup> and stands adjudged a party to a conspiracy to benefit over a period of twelve years under the aegis of the very patent it now attacks for fraud. To disregard these considerations, to preclude inquiry concerning these matters, is recklessly to punish one wrongdoer for the benefit of another, although punishment has no place in this proceeding.

Hazel well understood the course of decision in federal courts. It came into the Circuit Court of Appeals with a petition for leave to file a bill of review, a procedure required by long settled principles. Inasmuch as the judgment it attacked had been entered as a result of the action of the Circuit Court of Appeals, Hazel properly applied to that court for leave to file its bill in the District Court.<sup>22</sup> The respondent did not object on procedural grounds to the Circuit Court of Appeals considering and acting on the petition. That court of its own motion denied the petition and permitted amendment to pray relief there.

On the question what amounts to a sufficient showing to move an appellate court to grant leave to

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<sup>21</sup> *Creath's Admr. v. Sims*, *supra*, 5 How. at page 204, 12 L.Ed. 111.

<sup>22</sup> *Southard v. Russell*, *supra*, 16 How. at pages 570, 571, 14 L.Ed. 1052; *Purcell v. Miner*, *supra*, 4 Wall. 519 note, 18 L.Ed. 459; *Rubber Co. v. Goodyear*, *supra*; *National Brake & Electric Co. v. Christensen*, *supra*, 254 U.S. at page 431, 41 S.Ct. at page 156, 65 L.Ed. 341; *Simmons Co. v. Grier Bros. Co.*, *supra*, 258 U.S. at page 91, 42 S.Ct. at page 199, 66 L.Ed. 475.

file a bill of review in the trial court, the authorities are not uniform. Where the lack of merit is obvious, appellate courts have refused leave,<sup>23</sup> but where the facts are complicated it is often the better course to grant leave and to allow available defenses to be made in answer to the bill.<sup>24</sup> In the present instance, I think it would have been proper for the court to permit the filing of the bill in the District Court where the rights of the parties to summon, to examine, and to cross examine witnesses, and to have a deliberate and orderly trial of the issues according to the established standards would be preserved.

I should reverse the order of the Circuit Court of Appeals with directions to permit the filing of the bill in the District Court.

Mr. Justice REED and Mr. Justice FRANKFURTER join in this opinion.

The CHIEF JUSTICE agrees with the result suggested in this dissent.

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<sup>23</sup> *Purcell v. Miner, supra; Rubber Company v. Goodyear, supra.*

<sup>24</sup> *Ocean Insurance Co. v. Fields*, Fed.Cas.No.10,406, 2 Story 59; *In re Gamewell Fire-Alarm Tel. Co.*, 1 Cir., 73 F. 908; *Raffold Process Corp. v. Castanea Paper Co.*, 3 Cir., 105 F.2d 126.



**L.L. WINGS TRADEMARK APPLICATION  
FOR THE WINGS MARK  
(AUGUST 29, 2006)**

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**Trademark/Service Mark Application,  
Principal Register**

TEAS Plus Application

Serial Number: 78962652

Filing Date: 08/29/2006

*Note: Data fields with the \* are mandatory under TEAS Plus. The wording "(if applicable)" appears where the field is only mandatory under the facts of the particular application.*

The table below presents the data as entered.

**Input Field Entered**

TEAS Plus YES

**Mark Information**

\*MARK WINGS

\*STANDARD CHARACTERS YES

USPTO-GENERATED IMAGE YES

LITERAL ELEMENT WINGS

\*MARK STATEMENT

The mark consists of standard characters,  
without claim to any particular font, style,  
size, or color.

**Applicant Information**

\*OWNER OF MARK L & L Wings, Inc.

\*STREET                      8 East 41st Street  
\*CITY                         New York  
\*STATE  
(Required for U.S. applicants) New York  
\*COUNTRY United States  
\*ZIP/POSTAL CODE  
(Required for U.S. applicants only) 10017  
PHONE                        212 481-8299  
AUTHORIZED TO COMMUNICATE VIA  
EMAIL                        No

**Legal Entity Information**

\*TYPE                      CORPORATION  
\*STATE/COUNTRY OF INCORPORATION  
South Carolina

**Goods and/or Services and Basis Information**

\*INTERNATIONAL CLASS    035  
\*DESCRIPTION              Retail apparel stores  
\*FILING BASIS              SECTION 1(a)  
\*FIRST USE ANYWHERE DATE  
At least as early as 02/01/1978  
\*FIRST USE IN COMMERCE DATE  
At least as early as 02/01/1978  
\*SPECIMEN FILE NAME  
    \\TICRS\EXPORT3\IIMAGEOUT3  
    17891626178962652\xml1TTK0003.JPG  
SPECIMEN DESCRIPTION

App.143a

Photograph of one store.

\*DESCRIPTION           Retail clothing stores

\*FILING BASIS           SECTION 1(a)

\*FIRST USE ANYWHERE DATE

At least as early as 02/01/1978

\*FIRST USE IN COMMERCE DATE

At least as early as 02/01/1978

\*SPECIMEN FILE NAME

\\TICRS\EXPORT3IIMAGEOUT3  
17891626178962652\xml1TTK0003.JPG

SPECIMEN DESCRIPTION

Photograph of one store.

\*DESCRIPTION

Retail discount store services in the field  
of beachware clothing and beachware  
accessories

\*FILING BASIS           SECTION 1(a)

\*FIRST USE ANYWHERE DATE

At least as early as 02/01/1978

\*FIRST USE IN COMMERCE DATE

At least as early as 02/01/1978

\*SPECIMEN FILE NAME

\\TICRS\EXPORT3IIMAGEOUT3  
17891626178962652\xml1TTK0003.JPG

SPECIMEN DESCRIPTION

Photograph of one store.

**Additional Statements Information**

[ . . . ]

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AUTHORIZED TO COMMUNICATE VIA  
EMAIL Yes

**Fee Information**

NUMBER OF CLASSES	1
FEE PER CLASS	275
TOTAL FEE DUE	275

**Signature Information**

\*SIGNATURE / Bennett D. Krasner/

\*SIGNATURE NAME Bennett D. Krasner

SIGNATORY POSITION

Attorney for Applicant

\*SIGNATURE DATE 08/29/2006

**Filing Information Section**

Submit Date

TUE Aug 29 12:40:12 EDT 2006

TEAS STAMP

USPTO/FTK-XX.XXX.XXX.XXX-  
2006082912401255522-78962652-  
332311470a3fe97ede98fa5de3eb7266d-  
CC-1583-20060829122049202409

Trademark/Service Mark Application, Principal  
Register

TEAS Plus Application

App.146a

Serial Number: 78962652

Filing Date: 08/29/2006

App.147a

## WINGS



**ATTORNEY KRASNER'S RESPONSE TO  
PTO OFFICE ACTION ON WINGS  
TRADEMARK APPLICATION  
(JULY 30, 2007)**

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The table below presents the data as entered.

<b>Input Field</b>	<b>Entered</b>
Serial Number	78962652
Law Office Assigned	Law Office 112
Mark Section (no change)	

**Argument(s)**

The examining attorney has refused registration based upon three prior registered marks. The Applicant has been in continuous high profiled use of the mark it is seeking registration of for almost 30 years. During these 30 years, it has used the mark on retail clothing stores in New York and New Jersey and beachwear stores in Massachusetts (Cape Code), North Carolina, South Carolina Florida, Texas and California. The number of stores have varied over the years but at one time there were as many as 60 to 70 retail stores and presently there are 28.

During almost 30 years of operating in these highly visible and profiled market places, there has not been one known claim of confusion by any consumer and/or vendor.

A search of the mark "Wings" shows there are many registrations of this mark for different usages with many examples of related usage. Notwithstanding, the lack of confusion has permitted registration for



these similar registrations. Notwithstanding the similar usage that Applicant may have, there has been not one known claim of confusion in almost 30 years of usage.

Furthermore, based upon a search of both the internet and the clothing industry, it is believed that Serial No. 71504632 whose Registration No. is 0429691 in IC 025. US 039. G & S: MEN'S UNDERWEAR-NAMELY, UNDERSHIRTS, SHORTS, AND COMBINATIONS;

PAJAMAS; AND NECKTIES. FIRST USE: 19431103. FIRST USE IN COMMERCE: 19431103 is no longer used by its last known owner SHEPARD MORROW and/or PIEDMONT INDUSTRIES, INC. Applicant, if necessary, will file a petition for cancellation of that Registration.

Based upon the foregoing, Applicant believes there is no likelihood of confusion and the refusal on that basis is unfounded.

Applicant is unclear how to prove that there have been no known claims of confusion over almost 30 years of use but should the examining attorney give examples of acceptable evidence, Applicant will supplement this response.

### **Signature Section**

Response Signature

/Bennet D. Krasner/

Signatory's Name

Bennet D. Krasner

Signatory's Position

App.150a

Attorney of Record

Date Signed

07/30/2007

Authorized Signatory

YES

**Filing Information Section**

Submit Date

Mon Jul 30 15:28:22 EDT 2007

TEAS STAMP

USPTO/ROA-XX.XXX.XXX.XXX-  
20070730152822050775-78962652-  
380c28d42e6d2d38red3 72520b2e23feb-  
N/A-N/A-2007Cr730151157141865

**RESPONSE TO OFFICE ACTION**

To the Commissioner for Trademarks:

Application serial no. 78962652 has been amended as follows:

**Argument(S)**

In response to the substantive refusals), please note the following:

The examining attorney has refused registration based upon three prior registered marks. The Applicant has been in continuous high profiled use of the mark it is seeking registration of for almost 30 years. During these 30 years, it has used the mark on retail clothing stores in New York and New Jersey and beachwear stores in Massachusetts (Cape Code), North Carolina, South Carolina Florida, Texas and California. The number of stores have varied over the years hut at one time there were as many as 60 to 70 retail stores and presently there are 28.

During almost 30 years of operating in these highly visible and profiled market places, there has not been one known claim of confusion by any consumer and/or vendor.

A search of the mark “Wings” shows there are many registrations of this mark for different usages with many examples of related usage. Notwithstanding, the lack of confusion has permitted registration for these similar registrations. Notwithstanding the similar usage that Applicant may have, there has been not one known claim of confusion in almost 30 years of usage.

Furthermore, based upon a search of both the internet and the clothing industry, it is believed that Serial No. 71504632 whose Registration No. is 0429691 in IC 025. US 039. G & S: MEN'S UNDER-WEAR-NAMELY, UNDERSHIRTS, SHORTS, AND COMBINATIONS; PAJAMAS;

AND NECKTIES. FIRST USE: 19431103. FIRST USE IN COMMERCE: 19431103 is no longer used by its last known owner SHEPARD MORROW and/or PIEDMONT INDUSTRIES, INC. Applicant, if necessary, will file a petition for cancellation of that Registration.

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Applicant is unclear how to prove that there have been no known claims of confusion over almost 30 years of use but should the examining attorney give examples of acceptable evidence, Applicant will supplement this response.

**Signature(s)**

Response Signature

Signature: /Bennett D. Krasner/ Date: 07/30/2007

Signatory's Name: Bennett D. Krasner

Signatory's Position: Attorney of Record

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof, and to

the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

Serial Number: 78962652

Internet Transmission Date: Mon Jul 30 15:28:22  
EDT 2007

TEAS Stamp: USPTO/ROA-XX.XXX.XXX.XXX-  
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380c28d42e6d2d38fed372520 b2e23feb-N/A-NIA-  
20070730151157141865

**TRADEMARK LICENSING AGREEMENT  
BETWEEN L&L WINGS AND MARCO DESTIN  
(NOVEMBER 1, 1998)**

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THIS AGREEMENT dated for purposes of reference as of the 1st day of November, 1998, is made by and between L & L WINGS, INC. d/b/a Wings, a South Carolina Corporation with an address at 18 East 42nd Street, New York, New York 10017, ("Licensor") and Marco-Destin Inc. (hereinafter, "Marco-Destin"), 1000 Highway 98 East Corp. ("Highway"), Panama Surf & Sport, Inc. ("Surf") and E&T Inc. (hereinafter, "ET"), being Florida and South Carolina corporations, and all having an address all c/o Marco Destin 10400 Northwest 33rd Street, Miami, Florida (collectively, hereinafter, "Licensee").

WHEREAS, Licensor is the owner of the unregistered servicemark, "Wings" and is the owner of trade dress rights to its distinctive design; and

WHEREAS, Licensee utilized the mark "Wings" on retail stores that it owns and has been for many years with the permission and an oral license from Licensor who was a one-half owner of the issued and outstanding shares of stock of Licensee (except shares in ET); and

WHEREAS, the ownership by Licensor of the shares of Licensee are being sold simultaneous with the execution of this Agreement; and

WHEREAS, Licensor and Licensee each adorn some of their retail locations with Licensor's unique wave sculpture design highlighted with a signature colored neon light combination, (hereinafter, Licensor's "Trade Dress"); and

WHEREAS, Licensee recognizes the goodwill, reputation and strong marketing value of using the “Wings” name as a trade/servicemark and trade name and its Trade Dress in the operation of its retail business establishments; and

WHEREAS, Licensee desires to continue do business using the name “Wings” in the “Territory” hereinafter defined after the separation of their respective ownership; and

WHEREAS, Licensee and/or entities and/or principals of Licensee are unwilling to enter into the simultaneous agreements purchasing the interest of Licensor and/or its principals interest in Licensee (except any interest in ET) without this Agreement; and

WHEREAS, Licensor is willing to grant a license to Licensee to use “Wings” and the Trade Dress in the Territory upon the terms and conditions set forth below and other than as set-forth hereinafter has the authority to do so;

NOW, THEREFORE, in consideration of the covenants and agreements hereinafter set forth, one dollar (\$1.00) and other valuable consideration, the receipt and sufficiency of which hereby are acknowledged, the parties hereto agree as follows:

1. Definitions. The following terms as used in this Agreement shall have the meanings set forth below:

- 1.1. “Trade Dress” shall mean the unique wave sculpture design highlighted with a signature colored neon light combination used by Licensor (and also heretofore used by

Licensee) in connection with some of their respective business locations.

- 1.2. "Territory" shall be defined as the following geographic areas: (i) Within the city limits of Marco Island, Florida; St Augustine, Florida; and Pigeon Forge, Tennessee; (and within two miles of each such city limit); (ii) in North Myrtle Beach within the area bound by from the south side of 1639 Highway 17S in North Myrtle Beach, SC to the intersection of Highway 9 and Highway 175 which is just north of North Myrtle Beach SC and the boundaries shall include the coast line and two miles inland between such points. (By way of clarification, Licensor may operate in all other areas of the Myrtle Beach Area except the area described hereinabove); and (iii) in the geographic area from Panama City Beach, Florida west to the Alabama-Mississippi state line and not more than 10 miles inland from the coast line. All areas not specifically included herein are specifically excluded from the Territory.
- 1.3. "Termination Date" shall be October 31, 2006 or such other date as the license granted hereunder-shall be properly terminated pursuant to the terms of this Agreement.
2. Grant of License.
  - (a) So long as Eli Tabib, and upon his death his estate, heirs and/or beneficiaries, shall be the owner or owners of not less than 66 2/3% of the shares of Licensee, Licensee shall



have, and Licensor hereby grants to Licensee, an exclusive license in the Territory to use the name “Wings” and the Trade Dress (hereinafter the “Mark”) in connection with Licensee’s business establishments, and only for the term (the “Term”) commencing from November 1, 1998 until October 31, 2006, unless sooner properly terminated or extended as provided herein (hereinafter, the “Termination Date”); provided, however, that upon the death of Eli Tabib, it shall also be a condition of continuation that either Nir Tzanani or Raffi Zabari shall continue to be involved in the management of Licensee. Licensee may not use the Mark outside the Territory and the License granted hereunder shall be exclusive in the Territory with the exception of the State of South Carolina, where the License shall be limited to area specified in paragraph 1.2(ii). The License granted hereby shall extend to any entity hereafter acquired or created by Eli Tabib so long as his ownership interest therein shall comply with this paragraph 2 (a) and such entity shall notify Licensor in writing and become a party to this Agreement pursuant to a suitable instrument.

- (b) Licensor hereby warrants and represents to Licensee that except as set-forth hereinafter it has the authority to grant the License to Licensee and that its Board of Directors and shareholders have consented to this License.
- (c) Licensor agrees that during the Term and for a period of 10 years immediately thereafter

Licensor shall not, nor shall it permit any licensee to, use the name Mark (or any derivative or similar name and/or Trade Dress) in the Territory.

3. Advertising Reimbursement.

- (a) Licensor is under no obligation to advertise the Mark in the Territory.
- (b) In Licensor's sole discretion, Licensor may shall advertise the Mark in the Territory. Should Licensor advertise in the Territory set forth in paragraph 1.2(ii), Licensee shall pay to Licensor at its address set forth above, Licensee's pro rata share of all advertising costs incurred for advertising in the Myrtle Beach Area. (By way of example, Licensee operates two (2) stores and Licensor operates twenty (20) stores in the Myrtle Beach, South Carolina region. Therefore, if Licensor advertises in that region, Licensee shall pay 1/11 of the advertising costs incurred by Licensor.) Any stores which Licensor licenses to third persons shall be treated as operated by Licensor for the purposes of the calculations required in this Paragraph 3. On or before September 30th of any year, Licensor shall render to Licensee statement of such advertising costs, which statement shall be deemed a conclusive substantiation for such costs unless Licensee shall within 30 days contest the same in writing. Payment of the statement shall be due within thirty (30) days of the date thereof unless contested. At Licensor's option, Licensor may provide state-

ments at shorter intervals but in no event less than once per year.

- (c) Notwithstanding the foregoing for the Territory set forth paragraph 1.2(ii), Licensee shall not be responsible for advertising costs for any twelve month' period in excess of \$10,000.00 per store increased annually by the increase in the Consumer Price Index. The Consumer Price Index shall mean the Consumer Price Index published by the Bureau of Labor Statistics of the U.S. Department of Labor, All Items, New York; New York-Northeastern, N.J., for urban wage earners and clerical workers, or any successor or substitute index appropriately adjusted.

4. Termination. Licensors may, at its option, terminate the license and rights granted in this Agreement to Licensee immediately and without prior notice upon the occurrence of any of the following events (but the restriction on Licensors in Paragraph 2(c) shall continue in effect):

- 4.1. If Licensee shall file a voluntary petition in bankruptcy or is adjudicated bankrupt or insolvent or files any petition or answer seeking any reorganization, arrangement, composition, adjustment or readjustment, liquidation, dissolution or similar relief under the present or any future Federal Bankruptcy Act or any present or future applicable United States federal, state or other statute or law, or seeks or consents to, or acquiesces in, the appointment or any trustee, receiver, conservator in, the appointment of any

trustee, receiver, conservator or liquidator of Licensee, or of all or any substantial part of its properties or of its interests.

- 4.2. If within ninety (90) days after the commencement of any proceeding against Licensee seeking any bankruptcy, reorganization, arrangement, composition, adjustment or readjustment, liquidation, dissolution or similar relief under the present or any future applicable United States federal, state or other statute or law the proceeding is not stayed or dismissed, or if within ninety (90) days after the expiration of any stay, the filing is not vacated.
- 4.3. If Licensee executes an assignment of substantially all of its assets or any other similar agreement for the benefit of creditors.
- 4.4. If Licensee fails to pay any amounts to Licensor properly due pursuant to this Agreement or fails to perform any of the obligations required of it set forth in this Agreement in Paragraphs 6, 7, 8, 10 or of any other obligation contained in this Agreement and such default shall continue uncured for 30 days after written notice thereof by Licensor.
- 4.5 If Licensee initiates any action, proceeding or claim against Licensor challenging any provision or the validity of this Agreement and said action is determined to be either frivolous and/or Licensor's prevails in said action and/or claim except as set forth in paragraph 19 hereinafter. (Claim does not include any counterclaims by Licensee in

response to a claim initiated by Licensor against Licensee.)

- 4.6 If there is any change in ownership of Licensee in violation of Paragraph 2.

5. Obligations and Responsibilities Upon Termination. Upon expiration or termination of the License granted hereunder, by operation of law or otherwise:

- 5.1. All rights of Licensee to use the Mark granted hereunder (other than its rights under Paragraph 2(c)), including the right to use the name “Wings” and the Licensor’s Trade Dress shall (subject to the four month removal period set forth in Paragraph 5.2) cease.
- 5.2. Licensee, at its own cost and expense, shall within four months remove and/or cause to be removed, all materials, signs, promotions, bags, and any and all other items, bearing the Mark or any evidence of the Mark licensed hereunder. Thereafter, Licensee shall not, in any manner whatsoever, use the name Mark, any similar name or any name created by changing, adding or dropping one or more letters from the name “Wings”, (hereinafter, collectively, referred to as “Similar Name”) nor shall Licensee use Licensor’s Trade Dress in any form whatsoever.
- 5.3. Licensee shall pay any and all outstanding proper statements for advertising within thirty (30) days of the termination or expiration hereof.

5.4. In the event Licensee fails to promptly fulfill all of its obligations upon the termination or expiration of this Agreement, Licensor shall have the right to pursue all legal remedies including, but not limited to, an action for trademark and/or servicemark infringement and/or for trade dress infringement, temporary restraining order, preliminary and/or permanent injunction. Licensee shall have the same rights with respect to Licensee's obligations (including without limitation, under Paragraph 2(c)).

6. Infringement.

6.1. In the event Licensee learns of any infringement or alleged infringement, has notice of any written claim or allegation by a third person of infringement of Licensor's Mark, Licensee shall promptly notify Licensor with the particulars thereof.

6.2. In the event Licensor decides to pursue any infringement claim against a third party in the Territory, Licensor may request that Licensee join in or assist in any of the steps necessary to enforce the infringement claim. In the event Licensee agrees to assist, then each party shall bear one-half of the costs of any action; provided, however, that Licensee's share shall not exceed for any calendar year the product of (x) one-half of the costs incurred in the year, and (y) a fraction, the numerator of which is the number of years then remaining on the License and denominator of which is eight. In the event Licensee does not agree to assist within a

reasonable period, then Licensor may terminate this License Agreement (but subject to Paragraph 2(c)). In all events, Licensee shall cooperate with Licensor in the pursuit of any action (but Licensee shall not, except as required by this Paragraph, be obligated to incur material expense in so cooperating).

7. Indemnification.

- 7.1. Licensee, jointly and severally, shall hold Licensor harmless and shall indemnify Licensor from any and all liabilities, injuries, damages, claims, suits, attorney's fees, etc., sustained by Licensor by reason of this Agreement which Licensee has, may have or which may hereinafter exist or due to Licensee's operation of its business, use of the Licensor's Mark, Trade Dress, and/or *use* of the name "Wings" (provided, however, that Licensee shall have no indemnification obligation to the extent that any claim, damages, etc. is attributable to any defect or alleged defect in Licensor's ownership or right to license the name "Wings" or the Trade Dress). Licensee will, at all times, act and conduct business in such a manner so as not to adversely affect or otherwise harm the good will and reputation associated with the name "Wings", and will promptly comply with reasonable written notices from Licensor with respect thereto. Licensee will, at all times, maintain general liability, errors and omissions insurance naming Licensor as an additional insured (to the extent permitted by the carrier). Licensee understands that

Licensor is or may be bound by and subject to certain Court orders, consent orders, stipulations, agreements and the like and Licensee agrees that, in the conduct of its business, it shall abide by any such Court orders, consent orders, stipulations, agreements and the like of which Licensor shall give it notice, including, in particular, those with Anheuser Busch Incorporated and Two's Company, a Rhode Island Corporation, copies of which are annexed hereto. Notwithstanding anything herein contained to the contrary, Licensor may terminate this Agreement effective immediately, subject to Licensee's right to a 30 day period to cure, upon written notice to Licensee in the event Licensee shall act or refrain from acting in any way that a reasonable consumer would determine that said action and/or inaction materially diminished the reputation and/or goodwill of Licensor's Mark. (By way of example and not by way of limitation, actions that may be determined to diminish the reputation of and/or goodwill are trade/servicemark and/or other intellectual property violations, deceptive trade practices or false advertising.)

- 7.2. Licensee shall notify Licensor of any claims to which Paragraph 7.1 may apply within thirty days from when Licensee learns thereof.
- 7.3. Owners Designation. Licensee shall, at all times, post a placard in a clearly visible and unobstructed location situated at the entrance-way to each of its stores doing business as "Wings", which placard shall be at least 12



inches by 18 inches and shall bear the inscription "THIS STORE IS OWNED AND OPERATED BY" and name the appropriate entity. The lettering of the inscription shall be no smaller than one inch high. In addition, promptly upon execution of this Agreement, Licensee shall file a certificate of assumed name with the appropriate governmental agencies, to the extent required thereby.

8. Liquidated Damages. Licensee specifically acknowledges that the use of the Mark, the name "Wings" or any Similar Name and/or the use of Licensors' Trade Dress after the Termination Date will cause Licensors to suffer irreparable harm, damages for which would be extremely difficult to ascertain. Therefore, in addition to all other remedies, including but not limited to injunctive relief, in the event of Licensee's breach of this Agreement to which Licensors shall be entitled, Licensors shall be entitled to injunctive relief, and liquidated damages in the sum of \$200.00 per day (subject, however, to the four month period described in Paragraph 5.2) per business establishment utilizing the Mark and/or name "Wings" and/or any Similar Name or Trade Dress until cessation of any improper use, together with all costs and disbursements, including reasonable attorney's fees arising from Licensee's failure promptly to use the name "Wings" or any Similar Name or Trade Dress. The calculation of the liquidated damages of \$200.00 per day per business establishment shall be calculated without regard to the four month period described in Paragraph 5.2 if Licensee does not comply with the terms and conditions of the removal set-forth herein within said four month period. (By way of example if Licensee complies with

the removal of the Mark etc. within the four months then there shall be no liquidated damages but if Licensee removes the Mark etc. four months and 1 day later then Licensors shall be entitled to \$2,420.00 (\$200.00 X 121) per store as liquidated damages assuming 30 days per month.)

9. Assignment Prohibited. Except as explicitly stated herein, this Agreement shall not be assignable either in whole or in part. Nothing in this Agreement is intended or shall be construed to confer upon or to give to any person, firm, or corporation, other than the parties hereto, any right, remedy, or claim under or by reason of this Agreement. All terms and conditions in this Agreement shall be for the sole and exclusive benefit of the parties. Nothing contained in this Agreement shall be deemed or construed to create or effectuate the relationship of principal and agent or of franchisor and franchisee or of partnership or joint venture between the parties hereto.

10. Waiver. No failure by Licensors and/or Licensee to insist upon the strict performance of any term or condition of this Agreement or to exercise any right or remedy consequent upon the breach, and no acceptance of full or partial payments due under this Agreement during the continuance of any breach, shall constitute a waiver of the breach or the term or condition. No term or condition of this Agreement to be performed or observed by Licensors and/or Licensee and no breach shall be waived, altered or modified except by written instrument executed by the parties. No waiver of any breach shall affect or alter this Agreement but each term and condition of this Agreement shall remain and continue in effect with respect to any other existing or subsequent breach. No delay

or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right. No waiver, modification or amendment of this Agreement shall be valid unless in writing signed by the party to be charged.

11. Licensor's Paramount Rights.

- 11.1. Licensee shall not contest Licensor's exclusive ownership of all rights including trademark and/or servicemark rights to the name "Wings" or copyright rights to any element of the Trade Dress. Licensee shall not at any time apply for a registration for the name "Wings" or any confusingly similar mark or for any other right in the name anywhere in the world nor shall Licensee file any opposition or in any other manner hinder any application for registration of the mark "Wings" that Licensor has, will or may make.
- 11.2. Licensee acknowledges and agrees that any and all rights and assets in the Mark accruing and/or arising from the use of the Mark "Wings" and/or its Trade Dress, shall belong to and be the property of Licensor free of any and all claims of Licensee except as state herein.
- 11.3 Licensee acknowledges that Licensor informed him that there are one or more individuals and/or entities that have registered trademarks and/or servicemarks to the mark "Wings" and can and/or may claim a paramount right to the use of said mark "Wings". Licensor does not warrant or give any other

assurances and/or indemnification to Licensee's use of said mark "Wings" and or the Mark. Notwithstanding anything to the contrary, if any claim is made against Licensor and/or Licensee for infringement related to the use of the Mark and/or "Wings", neither shall indemnify the other for any loss and/or expense including an award for infringement and/or legal fees.

12. Governing Law. This Agreement shall be governed solely by the laws of the State of New York without giving effect to any conflict of laws provisions thereof. Any and all matters of dispute between the parties hereunder or in connection herewith shall be resolved in New York County, New York State by arbitration before the American Arbitration Association and shall include the jurisdiction in the federal courts of the Southern District of New York of the state courts and the State of New York in New York County to enforce such arbitration and/or confirm any award thereof. Licensee and Licensor hereby consent to jurisdiction as set forth herein. Notwithstanding the foregoing, either party may apply to a court of competent jurisdiction for a temporary restraining order, preliminary or permanent injunction or any other form of relief to assure that any judgment awarded in arbitration is not rendered ineffective and/or prevent termination of the License prior to an opportunity to cure in the event of dispute hereunder as to a party's rights and/or obligations. Furthermore, notwithstanding the foregoing, in the event of a timely objection to arbitration, either party may commence a proceeding in Supreme Court of the State of New York and County

of New York and/or Federal District Court for the Southern District of New York.

13. Attorneys' Fees. If Licensor or Licensee shall file any action against the other party for any breach of this Agreement and shall successfully recover on the same, such prevailing party shall be entitled to recover from the other party reasonable attorneys' fees incurred in so doing.

14. Notices. Notices required under this Agreement shall be made or given to the parties at the addresses specified at the beginning of this Agreement or at any other address that the parties may, by notice, specify. Copies of all notices shall be sent to the attorney for the party. Notices shall be deemed given 5 days after mailing by certified or registered mail, return receipt requested (unless sent by overnight mail service in which event notice shall be deemed given 1 day after mailing).

15. Binding. Effect. This Agreement shall be binding upon the parties and their agents, and successors, including, without limitation, successor officers, directors and trustees, if any, of the Licensor or Licensee.

16. Headings. The headings for each paragraph are simply for the convenience of the parties and shall not be used to interpret the meaning of any of the provisions.

17. Entire Agreement. This Agreement contains the entire agreement between the parties and supersedes all agreements and understandings previously made between the parties relating to its subject matter, all of which have been merged herein. There are no other understandings or agreements between

them, nor are there any representations made which are not herein contained. This agreement shall be governed in accordance with the laws of the State of New York, the courts of which (and the Federal District for the Southern District of New York) shall have exclusive jurisdiction (subject to and in accordance with the arbitration clause of Paragraph 13).

18. Time Of The Essence. All dates and obligations in this Agreement which rely upon specific dates or periods of time shall be deemed to be "Time of the Essence" and any failure to timely comply with any such obligations and/or dates shall, subject to any notice requirements and 'period to cure, be deemed a material breach of this agreement.

19. Breach of Related Agreements. Licensor and Licensee are parties to various other agreements. If Licensee and/or their assigns and/or successors default and/or fail to comply with terms and/or conditions contained in one or more of the other agreements between the parties and such failure to comply with said terms and/or conditions continue for more than 30 days after written notice to the party against whom compliance is sought then that default shall be deemed a material default hereunder and shall automatically terminate the Licensee subject however to the party against whom compliance is sought having a right to bring a "Yellowstone Injunction" or similar remedy to toll the time to comply while the parties litigate the issue of default or their respective rights and/or obligations.

20. Breach of This Agreement. If Licensor and/or Licensee and/or their assigns and/or successors default and/or fail to comply with terms and/or conditions contained herein and such failure to comply with said terms and/or conditions continue for more than 30

after written notice to the party against whom compliance is sought or such greater time if provided for hereinabove then that default shall be deemed a material default hereunder and shall automatically terminate the Licensee subject however to the party against whom compliance is sought having a right to bring a “Yellowstone injunction” or similar remedy to toll the time to comply while the parties litigate the issue of default or their respective rights and/or obligations.<sup>21</sup>.

21. Compliance. Neither party is aware of any breach by either party prior to the execution of this Agreement.

[ . . . ]

IN WITNESS WHEREOF, the parties have set their bands hereto as of the day and date above first appearing.

L & L WINGS, INC.

By: /s/ Meir Levy  
V. President

Marco-Destin, Inc.  
Panama Surf & Sport, Inc.  
1000 Highway 98 East Corp.  
E&T, Inc.

By: Eli Tabib, President

Eli Tabib



**TRADEMARK LICENSE AGREEMENT  
BETWEEN SHEPARD MORROW  
AND L&L WINGS  
(APRIL 29, 1993)**

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**TRADEMARK LICENSE AGREEMENT**

This is a TRADEMARK LICENSE AGREEMENT (the "Agreement") between SHEPARD R. MORROW, an individual with offices at H.R. Enterprises, 305 West 86th Street, Suite 3A, New York, New York 10024 ("Licensor"), and L & L WINGS, INC. d/b/a WINGS, a South Carolina corporation with offices at 48-49 35th Street, Long Island. City, New York 11101 ("Licensee").

**BACKGROUND**

Licensor is the owner of the trademark WINGS, as shown in U.S. trademark registration nos. 429,691, 777,087, 1,498,697, 1,521,883, and 1,615,780 (the "Registrations"), and the logotypes and trade dress associated therewith. Licensee is a retailer of men's, women's and children's clothing and accessories, beach accessories, packs, tote bags and other casual luggage, and sporting goods (the "Merchandise") with 64 stores in 7 states. Licensor has agreed to grant Licensee a license to use the trademark WINGS (the "Mark") in connection with Licensee's retail stores in accordance with the terms of this Agreement.

**TERMS**

NOW, THEREFORE, for good and valuable consideration and intending to be legally bound hereby, the parties agree as follows:

1. Grant of License. Licensors hereby grants to Licensee, for the duration of the term of this Agreement, a non-exclusive license to use the Mark in the licensed Territory (as defined in Subsection 1(b) below) on signs, letterhead, point-of-purchase materials, advertising and other promotional materials used in connection with retail store services rendered in stores owned and operated or licensed by Licensee which sell the Merchandise (the “Licensed Services”). Such license shall be strictly limited according to the following terms and conditions:

- (a) Licensee acknowledges that the ownership of all right, title and interest in the Registrations is and remains solely vested in the Licensors and that such Registrations are prima facie evidence of the validity of the registered marks, of Licensors’ ownership of the registered marks, and of Licensors’ exclusive right to use the registered marks in commerce or in connection with the goods specified in the Registrations.
- (b) For purposes of this Agreement, “Licensed Territory” means the United States of America.
- (c) During the term of this Agreement, Licensee shall use the Mark only in connection with the Licensed Services rendered in the Licensed Territory and not in connection with any other service, product, business or through any other marketing channels or in any other geographical area. Without limiting the foregoing, Licensee agrees not to use any form of the Mark as a trademark for any product, including without limitation the

Merchandise or any other private label goods, whether sold in Licensee's stores or otherwise. Licensee acknowledges that Licensor has granted to a third party a license to use WINGS as a trademark for clothing, and that Licensor retains the right to grant such licenses as it chooses to third parties for any goods and services in any territory, with the sole exception that Licensor shall not grant any other licenses of the Mark in the Licensed Territory during the term of this Agreement for use in connection with retail stores.

2. Royalties.

- (a) In consideration for the license granted by this Agreement, Licensee shall pay to Licensor a royalty of one-hundred thousand dollars (\$100,000) (the "Royalty"), payable in ten (10) equal annual installments of ten thousand dollars (\$10,000) together with interest on the unpaid balance of the Royalty at the rate of ten percent (10%) per annum (each, a "Royalty Payment").
- (b) The first Royalty Payment shall be made concurrently with the execution of this Agreement and each subsequent Royalty Payment shall be due on the anniversary of the date hereof. In the event that this Agreement is terminated pursuant to Section 8 less than ten years from the date hereof, the Royalty Payment and interest due in the year of termination shall be prorated and upon Licensee's payment of such prorated Royalty Payment and interest, Licensee shall

have no further obligation to make Royalty Payments under this Agreement.

- (c) In the event that this Agreement has not been earlier terminated pursuant to Section 8 hereto ten years from the date hereof and the Mark has not been assigned to Licensee pursuant to Section 9 hereof, then the license granted by this Agreement shall become royalty-free and Licensee shall thereafter have no further obligation to pay royalties for the use of Mark.
- (d) Concurrent with the first Royalty Payment, Licensee will pay Licensor \$2,000 for Licensor's legal fees in connection with this Agreement.

3. Quality Control.

- (a) Licensor acknowledges that Licensee operates two different types of stores at beach locations (the "Beach Stores") and a third type of store at urban locations (the "Urban Stores"), with the mix and levels of Merchandise and the level of fixtures and design varying with the type of store. Licensor acknowledges that he has inspected Licensee's Urban Stores. Licensee acknowledges that it has supplied Licensor with interior and exterior photographs of both types of Beach Stores, with general specifications for the design of both types of Beach Stores, and with descriptions and samples of the merchandise sold in both types of Beach Stores, and Licensee represents and warrants to Licensor that such photographs,

specifications, descriptions, and samples are generally representative of the physical plant, fixtures and merchandise in both types of Beach Stores. licensee shall only use the Mark in connection with Licensed Services that are of a quality equal to or better than those provided by Licensee under the Mark as of the date hereof. Licensor shall have the right to monitor and inspect the quality of the Licensed Services at all of Licensee's stores from time to time in its sole discretion.

- (b) Licensee shall submit to Licensor on an annual basis representative samples or photographs of all signs, point-of-purchase materials, and other advertising or promotional material bearing the Mark and used in connection with the Licensed. Services. Licensor shall also have the right to provide Licensee with reasonable written guidelines or standards for the use of the Mark and to amend or supplement such guidelines from time to time during the term of this Agreement upon sixty (60) days prior notice.
- (c) Licensee acknowledges that the purpose of the inspections conducted and quality control standards prescribed by Licensor in this Agreement is to maintain the reputation and the goodwill of the Mark, and Licensor shall not bear or assume any responsibility or liability to third parties as a result of setting or enforcing such standards or for any failure of the Services to conform to such standards.

4. Maintenance of Marks/Infringement Claims.

- (a) Licensee shall take no action that would prejudice or interfere with the validity or Licensor's ownership of the Mark and shall not oppose or seek to cancel any of Licensor's applications to register the Mark or the Registrations. Licensee shall not enter into any agreement with any third party which in any way alters, diminishes or restricts the rights of Licensor or Licensee in the Mark or places any restrictions or conditions upon the use or appearance of the Mark. Licensee shall not attack the title of Licensor in and to the Registrations or Licensor's related rights thereunder, nor shall it attack the validity and enforceability of this Agreement or the parties' rights and obligations hereunder. Licensee shall not foster or encourage any conduct by any third party that would infringe the Mark or the Registrations or aid or encourage any third party in any attack on the validity of the Mark or the Registrations.
- (b) Licensee shall not prosecute any application for the registration of any trademark or service mark containing any form or variation of the term "wings" or any design or logotype that could be confusingly similar to any design or logotype used or licensed by Licensor.
- (c) Licensee shall fully cooperate with Licensor in maintaining and defending the validity and ownership of the Mark and any registrations of the Mark, in applying for regis-

tration of the Mark, and in protecting the Mark against infringement. Licensee acknowledges and agrees that Licensor shall seek registration of the Mark for retail store services, that Licensor shall be the sole owner of any such registration, and that Licensee shall fully cooperate in seeking and maintaining such registration. Any registrations of the Mark obtained by Licensor after the date of this Agreement shall automatically be included within the defined term "Registrations" used herein and the terms and conditions of this Agreement shall fully apply to such registrations. Licensee shall promptly notify Licensor of (i) any unauthorized use or infringement by any third party of the Mark and (ii) any assertion by any third party that Licensee's use of the Mark constitutes trademark, service mark, trade dress or trade name infringement, unfair competition or any other tortious act. If Licensor initiates or defends any legal action with regard to the Mark, Licensee shall cooperate fully with Licensor in the prosecution or defense of such action.

- (d) Licensee may initiate or defend any legal action with regard to the Mark, provided that it seeks and obtains Licensor's prior written consent, such consent not be unreasonably withheld. If Licensee initiates or defends any legal action with regard to the Mark after receiving Licensor's consent, Licensee shall indemnify, defend and hold Licensor harmless against any and all

claims, losses, liabilities, damages and expenses (including attorneys' fees expenses) arising from or relating to such action and Licensor shall cooperate fully with Licensee in the prosecution or defense of such action. All damage, awards, settlements or other compensation recovered by Licensee in such legal actions shall be for the benefit of Licensee.

5. Representations and Warranties of Licensor.

Licensor makes no representation or warranty concerning the Mark except that it is the owner of U.S. trademark registration nos. 429,691, 777,087, 1,498,697, 1,521,883 and 1,615,780 of the Mark and that such registrations are prima facie evidence of the validity of the registered marks, of Licensor's ownership of the registered marks, and of Licensor's exclusive right to use the registered marks in commerce on or in connection with the goods specified in the registrations.

6. Indemnification. Licensee shall indemnify, defend and hold Licensor harmless against any and all claims, losses, liabilities, damages and expenses (including attorneys' fees and expenses) arising from or relating to the operation of retail stores by Licensee or its licensees or franchisees, the marketing, distribution or sales of any merchandise in conjunction therewith, or otherwise with Licensee's performance of this Agreement. Licensee shall maintain sufficient insurance coverage to fulfill its obligations under this Section 6.

7. Assignment of the Mark to Licensee. In the event that, ten years after the date hereof (a) Licensor is not using the Mark and (b) Licensee is the sole licensee of the Mark or all other licensees of the



Mark are making token or de minimis use of the Mark, Licensor shall assign to Licensee all right, title and interest to the Mark (subject to the rights of all such existing licensees) upon the full payment of and in consideration of the Royalty.

8. Termination. Licensor may terminate this Agreement at any time in the event that Licensee fails to make a Royalty Payment. In such event, Licensor shall deliver written notice of such non-payment to Licensee and allow Licensee fifteen (15) days after the delivery of such notice in which to remit the Royalty Payment (the "Cure Period"). If the Royalty Payment is not made during the Cure Period, then this Agreement shall terminate fifteen (15) days after the date of such notice.

9. Assignment and Sublicensing. Licensee shall not sublicense, assign, pledge, grant or otherwise encumber or transfer to any third party all or any part of its rights or duties under this Agreement, except that:

- (a) Licensee may assign this Agreement with the prior written consent of Licensor to (i) any entity which controls, is controlled by, or is common control with Licensee or (ii) the purchaser or other transferee of all or substantially all of Licensee's retail store business or assets; and
- (b) Licensee may grant sublicenses under the Agreement to use the mark in connection with stores that (i) sell the Merchandise, (ii) are owned and operated by individuals who have been employed as managers of stores owned by Licensee, (iii) buy their Merchandise

from Licensee or Licensee-approved vendors or suppliers, and (iv) maintain quality standards and trade dress that is consistent with Licensee-owned stores in the same geographical area, including without limitation the stores listed on Exhibit A hereto, so long as the owners and operators of such stores are bound by the terms of this Agreement to the same extent that Licensee is so bound and are granted no greater rights to use the Mark than are granted by this Agreement.

Licensor, upon written notice to licensee, may assign all or any part of its rights or duties under this Agreement. Subject to the foregoing restrictions, all rights, duties and obligations of the parties under this Agreement shall bind and inure to the benefit of the parties' respective successors and assigns.

10. Miscellaneous.

- (a) Any notice or consent required to be given under this Agreement shall be in writing and shall be deemed given if personally delivered or sent by registered or certified first class mail to the following persons at the following addresses (or to such other person or address as either party may from time to time designate in writing):

If to Licensor, to:

Mr. Shepard R. Morrow  
c/o H.R. Enterprises  
305 West 86th Street  
Suite 3A  
New York, NY 10024

If to Licensee, to:

L & L Wings, Inc.

48-49 35th Street

Long Island City, NY 11101

Attn: Bennett D. Krasner, Esquire

- (b) In the event of a breach by Licensee of the terms of this Agreement, Licenser shall be entitled to all of its remedies at law and in equity. Licenser acknowledges that a breach of this Agreement will cause irreparable damage to Licenser, the exact amount of which will be difficult or impossible to ascertain, and that Licenser's remedies at law for any such breach will be inadequate. Accordingly, Licensee acknowledges that upon a breach of this Agreement, Licenser shall be entitled to injunctive or other equitable relief, without posting bond or other security.
- (c) This Agreement shall be construed in accordance with the laws of the State of New York, and may be amended or modified only by a writing executed by all parties.
- (d) This Agreement together with its exhibits sets forth all of the promises, covenants, agreements, conditions and undertakings between the parties hereto relating to the subject matter hereof and supersede all prior and contemporaneous agreements and understandings, inducements or conditions, express or implied, oral or written with respect to the subject matter hereto.

IN WITNESS WHEREOF, the parties hereto  
have executed. this Agreement on April 29, 1993.

/s/ Shepard K. Morrow  
Shepard K. Morrow

L & L WINGS. INC.

/s/ Shepard K. Morrow  
Name: Shepard K. Morrow  
Name: President

[ . . . ]

EXHIBIT A  
Sublicensed Stores

[ . . . ]

EXHIBIT GG

[ . . . ]

**L & L WINGS, INC.**

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Legal Department

Bennett D. Krasner  
Attorney-At-Law

April 29, 1993

Glenn A. Gundersen, Esq.  
DECHERT PRICE & RHOADS  
400 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103-2793

SENT VIA FEDERAL EXPRESS

RE: Trademark License Agreement by and  
between Shepard Morrow as Licensor and  
L & L Wings, Inc. as Licensee

Dear Mr. Gundersen,

Enclosed herewith please find four duly executed copies of the aforementioned along with the required payment in the amount of \$12,000.00. I ask that these documents be forwarded to Mr. Morrow for his execution and thereupon please return two copies to me for my files.

I would like to thank you for your prompt forwarding of the five registrations (429, 691, 777, 087, 1,498, 697, 1,521, 883 and 1,615,780) so that I may proceed with trademark oppositions as a licensee.

Should you have any questions, please do not hesitate to contact me.

Thank you for your prompt attention to this matter.

App.186a

Sincerely,

/s/ Bennett D. Krasner

Bennett D. Krasner, Esq.  
Office of the General Counsel  
Executive Liaison

BK/kp

enclosures as stated

48-49 35TH STREET, LONG ISLAND CITY,  
NEW YORK 11101 • 718-392-6.210 • FAX 718-392-7462

**ABA ARTICLE:  
AMERICANS' CONFIDENCE IN COURTS  
HITS ALL-TIME LOW; DID TRUMP CASES  
HAVE BIPARTISAN IMPACT?  
(DECEMBER 18, 2024)**

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Americans' confidence in courts hits all-time low; did Trump cases have bipartisan impact?

By Debra Cassens Weiss

December 18, 2024, 10:25 am CST



*Americans' confidence in the courts hit an all-time low of 35% in 2024, a decrease of 24 percentage points in four years, according to a Gallup poll released Tuesday. (Image from Shutterstock)*

Americans' confidence in the courts hit an all-time low of 35% in 2024, a decrease of 24 percentage points in four years, according to a Gallup poll released Tuesday.

Confidence declined among those who disapproved of President Joe Biden's leadership, as well as among those who approved, according to an online Gallup summary. The poll did not ask about political party.

The Associated Press covered the findings.

"The results come after a tumultuous period that included the overturning of the nationwide right to abortion, the indictment of former President Donald Trump and the subsequent withdrawal of federal charges, and his attacks on the integrity of the judicial system," the article says.

The only indictment that led to a conviction had alleged that Trump falsified business records to pay hush money to adult film actress Stormy Daniels in a bid to bolster his election in 2016.

Confidence in courts among those disapproving of Biden's leadership declined from 46% in 2021 to 29% in 2024. Among those who approved of Biden's leadership, confidence remained steady at 62% between 2021 and 2023, before decreasing to 44% this year.

The legal cases against Trump likely affected the confidence of both sets of respondents, Gallup said. Those who dislike Biden may have been dissatisfied with the cases against Trump. Those who like Biden many have been dissatisfied with court decisions favoring Trump.

Only nine nations had greater decreases in confidence in the courts over the same four-year period, the New York Times points out. They were Myanmar, Venezuela, Croatia, South Africa, Syria, Hong Kong, Morocco, the Democratic Republic of the Congo and Uzbekistan.



Lydia Saad, the director of U.S. social research at Gallup, told the New York Times that the results represent “a striking decline” in the global context.

“These drops are typically associated with pretty significant political upheavals,” Saad said.

A separate Gallup poll asked about Americans’ trust in the federal judicial branch headed by the U.S. Supreme Court. Forty-eight percent said they had a great deal or a fair amount of confidence, according to findings released in October.

But political party made a difference. Among Republicans, 71% had a great deal or a fair amount of trust in the federal judicial branch headed by the Supreme Court. Among Democrats, only 24% had such confidence.

Gallup also asked whether respondents approved or disapproved of the job being done by the Supreme Court. Overall, 44% of Americans approved of the Supreme Court. Seventy-two percent of Republicans approved, while 15% of Democrats approved.

The Supreme Court ruled in July in *Trump v. United States* that presidents have absolute immunity when exercising core constitutional powers and at least presumptive immunity for acts “within the outer perimeter” of their official responsibilities.

The Supreme Court’s decision holding that there is no constitutional right to abortion, *Dobbs v. Jackson Women’s Health Organization*, was released in June 2022. The next month, Democratic approval of the court decreased to 13%.

“When we ask Republicans about the Supreme Court, they’re still very positive,” Saad told the New

York Times. “When you don’t pin them down on the Supreme Court and talk about the courts, they’re saying the courts are misbehaving and engaging in quote-unquote lawfare.”

**AXIOS ARTICLE:  
AMERICANS' CONFIDENCE IN  
U.S. COURTS HITS RECORD LOW  
(DECEMBER 17, 2024)**

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**Americans' Confidence in  
U.S. Courts Hits Record Low**



Avery Lotz



Illustration: Natalie Peebles/Axios

Americans' confidence in the nation's courts and judicial systems has plummeted 24 percentage points in the past four years, sagging to a record low, per a new Gallup poll.

Why it matters: Not only does the decline make the U.S. an outlier among other wealthy nations, but it is one of the steepest drops Gallup has measured globally on this metric.

- The nine countries or territories with larger percentage-points drops in judicial system confidence over a four-year period include Myanmar (overlapping military rule), Venezuela (deep economic and political turmoil) and civil-war-era Syria.

Driving the news: Thirty-five percent of respondents said they had confidence in the U.S. judicial system and courts, per Gallup's poll.

- That's a drop from 42% last year.

By the numbers: Confidence in the courts has dropped for both those who approve and disapprove of U.S. leadership under President Biden.

- 2024 also marks the first time that confidence in the courts has been below 50% among both those who approve and those who disapprove of U.S. leadership.
- Only 44% of those who approve of U.S. leadership under Biden expressed confidence in the judicial system and courts in 2024.
- This year is the first on record that confidence in the judiciary among those who approve of U.S. leadership has dipped below 60%. Sentiment among this group remained steady between 2021 and 2023 before dropping this year.

Zoom out: While it's not abnormal for those who disapprove of their country's leadership to lose confidence in the judiciary over time, according to Gallup, the significant drop under Biden "signals that something profound occurred."

- It's likely, Gallup notes, that President-elect Trump's web of legal cases, which he has consistently railed against as politically motivated, was a notable factor.
- Similarly, the decline for those who approve of U.S. leadership could be tied to disapproval of some Supreme Court and lower court rulings that went in Trump's favor, per Gallup.

Zoom out: Americans' confidence in the courts lags far behind that of their peers in other wealthy nations.

- Between 2006 and 2020, Americans' perceptions of courts often fell in line with the median of countries in the Organization for Economic Co-operation and Development (OECD), a forum of 37 democracies with market-based economies. This year, the OECD median settled at 55% expressing confidence in courts.
- The decline in judiciary confidence in the U.S. has left the largest gap (20 points) between Americans and the median of OECD nations since the Gallup poll began in 2006.

Methodology: Results for this Gallup poll are based on telephone interviews conducted June 28-Aug. 1, 2024, with random samples of 1,000 adults, aged 15 and older, living in the United States. For results based on the total sample of national adults, the margin of sampling error is  $\pm 4.4$  percentage points at the 95% confidence level.



Dave Lawler

Dec 26, 2024 - Politics & Policy

Americans end 2024 feeling pessimistic about the U.S.

Satisfaction with direction of country, by party

Monthly surveys of around 1,000 U.S. adults from Jan. to Dec. 2024.

{ Complex chart excluded }

Just 19% of Americans believe the country is heading in the right direction as 2024 comes to a close, per Gallup's latest monthly survey.

Why it matters: Gallup's monthly data reveals a deep-seated pessimism among Americans about their country. You'd have to go back two decades to find a time when half of Americans felt the U.S. was on the right track.

**AP NEWS ARTICLE:  
AMERICANS' TRUST IN NATION'S COURT  
SYSTEM HITS RECORD LOW, SURVEY FINDS  
(DECEMBER 17, 2024)**

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**BY LINDSAY WHITEHURST**

Updated 4:55 PM GMT+5:30, December 17, 2024



WASHINGTON (AP) — At a time of heightened political division, Americans' confidence in their country's judicial system and courts dropped to a record low of 35% this year, according to a new Gallup poll.

The United States saw a sharp drop of 24 percentage points over the last four years, setting the country apart from other wealthy nations where most people on average still express trust in their systems.

The results come after a tumultuous period that included the overturning of the nationwide right to abortion, the indictment of former President Donald Trump and the subsequent withdrawal of federal charges, and his attacks on the integrity of the judicial system.

The drop wasn't limited to one end of the political spectrum. Confidence dropped among people who disapproved of the country's leadership during Joe Biden's presidency and among those who approved, according to Gallup. The respondents weren't asked about their party affiliations.

It's become normal for people who disapprove of the country's leadership to also lose at least some confidence in the court system. Still, the 17-point drop recorded among that group under Biden was precipitous, and the cases filed against Trump were likely factors, Gallup said.

Among those who did approve of the country's leadership, there was an 18-point decline between 2023 and 2024, possibly reflecting dissatisfaction with court rulings favoring Trump, Gallup found. Confidence in the judicial system had been above 60% among that group during the first three years of Biden's presidency but nosedived this year.

Trump had faced four criminal indictments this year, but only a hush-money case in New York ended with a trial and conviction before he won the presidential race.

Since then, special counsel Jack Smith has ended his two federal cases, which pertained to Trump's efforts to overturn his 2020 election loss and allegations that he hoarded classified documents at his Mar-a-



Lago estate in Florida. A separate state election interference case in Fulton County, Georgia, is largely on hold. Trump denies wrongdoing in all.

Other Gallup findings have shown that Democrats' confidence in the Supreme Court dropped by 25 points between 2021 and 2022, the year the justices overturned constitutional protections for abortion. Their trust climbed a bit, to 34%, in 2023, but dropped again to 24% in 2024. The change comes after a Supreme Court opinion that Trump and other former presidents have broad immunity from criminal prosecution.

Trust in the court among Republicans, by contrast, reached 71% in 2024.

The judicial system more broadly also lost public confidence more quickly than many other U.S. institutions over the last four years. Confidence in the federal government, for example, also declined to 26%. That was a 20-point drop — not as steep as the decline in confidence in the courts.

The trust drop is also steep compared with other countries around the world. Only a handful of other countries have seen larger drops during a four-year period. They include a 46-point drop in Myanmar during the period that overlapped the return of military rule in 2021, a 35-point drop in Venezuela amid deep economic and political turmoil from 2012 to 2016 and a 28-point drop in Syria in the runup and early years of its civil war.

The survey was based on telephone interviews with a random sample of 1,000 U.S. adults between June 28 and August 1.

**ANNENBERG PUBLIC POLICY  
CENTER OF THE UNIVERSITY OF  
PENNSYLVANIA ARTICLE:  
OVER HALF OF AMERICANS DISAPPROVE  
OF SUPREME COURT AS TRUST PLUMMETS  
(OCTOBER 10, 2022)**

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**Over Half of Americans Disapprove of Supreme Court as Trust Plummets**

Trust that the U.S. Supreme Court is operating in the best interests of the American people has plummeted amid growing perceptions that the justices are partisans just like any other politicians, according to the latest Annenberg Public Policy Center survey, which includes questions tracking the court across more than a decade and a half.

The survey, which was conducted in August, two months after the Supreme Court overturned the 49-year-old *Roe v. Wade* ruling guaranteeing a constitutional right to abortion, finds that 53% of U.S. adults disapprove of how the court handles its job. The survey also reveals a chasm between the qualities the American people say they value most in judges, such as fairness and impartiality, and the traits they perceive in Supreme Court justices.

In most of the years the policy center has conducted this survey, differences in trust in the court by party affiliation have not been meaningful. That changed in 2022, with a wide gap separating Republicans from Democrats and independents on some attitudes toward the court.

“Whether the perceptions registered in our survey are justified or not, they are worrisome,” said Annenberg Public Policy Center Director Kathleen Hall Jamieson, who has directed the survey since its inception in 2005. “For the court to play its role in our system of government, it is important that it be perceived to be an independent branch that impartially and fairly bases its decisions on the Constitution, the law, and the facts of the case.”

The Supreme Court questions were part of the Annenberg Constitution Day Civics Survey, a nationally representative survey conducted annually for Constitution Day (Sept. 17) by the Annenberg Public Policy Center (APPC) of the University of Pennsylvania. The 2022 survey of 1,113 U.S. adults was conducted by phone for APPC by independent research company SSRS on August 2-13, 2022. It has a margin of error of  $\pm 3.6$  percentage points at the 95% confidence level. The year-to-year changes reported here are statistically significant unless noted otherwise. Analyses were conducted by APPC research analyst Shawn Patterson Jr., Ph.D.

For the questions and additional data, see the Appendix and Methodology statement. Findings on civics knowledge were previously released for Constitution Day.

### **Supreme Court survey highlights**

The survey found that:

- Only 39% of U.S. adults approve of how the Supreme Court is handling its job, while 53% disapprove.

## App.200a

- Over half (53%) have little or no trust in the Supreme Court to operate in the best interests of the American people, up 22 percentage points since 2019.
- Trust is driven by party: 70% of Republicans but only 32% of Democrats have a great deal/fair amount of trust in the court.
- If voting for a local or state judge, 90% of respondents say that having judges who rule based on the Constitution, the law, and the facts of the case is essential/very important.
- But when the public is asked whether Supreme Court justices are more likely to set aside their personal and political beliefs to make rulings based on the Constitution, the law, and the facts, just 40% say they are likely to do so.
- Half of Americans (50%) strongly disapprove of the Supreme Court's Dobbs ruling that the Constitution does not guarantee a right to abortion.

The findings come as the court begins its fall term amid growing concerns about trust in the court. In a speech last month in Colorado Springs, Colo., Chief Justice John G. Roberts Jr. defended the integrity of the court. "The court has always decided controversial cases and decisions always have been subject to intense criticism and that is entirely appropriate," Roberts told judges and lawyers. "You don't want the political branches telling you what the law is. And you don't want public opinion to be the guide of what the appropriate decision is....But simply because people disagree

with an opinion is not a basis for criticizing the legitimacy of the court.”

The findings are consistent with data in other recent surveys using similar questions. A Gallup poll in September found 47% of U.S. adults have a great deal or a fair amount of trust in the Supreme Court, while a Marquette Law School Poll found the court’s approval rating at 40%.

### **Approval and trust**

- **Approval:** The APPC survey found that 53% of U.S. adults disapprove of how the Supreme Court is handling its job, more than a third of them disapproving (36%) strongly; 39% approve of the court, 7% of them approving strongly.

- **Trust:** Only 46% of U.S. adults have a great deal/fair amount of trust in the Supreme Court to operate in the best interests of the American people, down from 68% in 2019, when we last asked this question. In APPC surveys since 2005, this is only the second time trust has dropped below 60%.

- **Other courts:** The lack of trust extends to other parts of the judiciary as well. Asked about how much they trust the federal and state courts, 48% of U.S. adults have a great deal/fair amount of trust, while 51% trust the courts not too much/not at all.

- **Party and trust:** In most years when the survey has asked about trust, party differences have not been significant. But in 2022, the survey found that 70% of self-described Republicans have a great deal/fair amount of trust in the Supreme Court, while a great deal/fair amount of trust is held by only 32% of self-described Democrats and 44% of independents

and those with other or no party identification (independent/other/none).

- **Party and approval:** Approval is likewise driven by party. While 68% of Republicans approve of how the court is handling its job, just 21% of Democrats approve. And while 76% of Democrats disapprove of the court, just 25% of Republicans disapprove.

{ Complex Data Chart Omitted }

## Reining in the Supreme Court

In a series of questions, large numbers of Americans feel that the Supreme Court gets “too mixed up in politics” and favor limiting the Supreme Court’s jurisdiction or independence, nearly all on a par with prior years or increasing:

- **Justices are like other politicians:** Half of U.S. adults (50%, up from 35% in 2019) feel that Supreme Court justices “are just like any other politicians” and “we cannot trust them to decide court cases in a way that is in the best interest of our country.”
- **More feel it is too “mixed up in politics”:** Nearly 7 in 10 people (69%) feel the court gets too mixed up in politics, an increase of 12 percentage points since 2019.
- **Congress should limit the court:** Nearly 4 in 10 people (38%) agree that when Congress disagrees with the Supreme Court’s decisions, Congress should pass legislation saying the Supreme Court can no longer rule on that

issue or topic, the same as in 2021 and 10 percentage points higher than in 2018.

- **More seek to make the court less independent:** Over half of those surveyed (56%) agree that the Supreme Court ought to be made less independent so that it listens a lot more to what the people want, up from 49% in 2019.
- **More seek to limit the court's ability to decide some issues:** Nearly half (48%) say the right of the Supreme Court to decide certain types of controversial issues should be reduced, up from 36% in 2019.
- **Many more feel it has too much power:** Over 4 in 10 people (42%) feel that the Supreme Court has too much power, double the number (21%) who thought so in 2019.
- **But fewer would abolish the court:** A quarter of U.S. adults (26%) think “it might be better to do away with the court altogether” if the court “started making a lot of rulings that most Americans disagreed with” – a decline from last year (34%) but higher than our surveys prior to that.

### **Stripping jurisdiction from the Supreme Court**

On questions of stripping the Supreme Court of jurisdiction or abolishing it altogether, responses by party in this survey have usually not differed significantly. Again, that changed in 2022, when 51% of Democrats but only 21% of Republicans agreed with the statement that Congress should pass legislation

to limit the court's jurisdiction if Congress disagrees with the court's decisions.

{ Complex Data Chart Omitted }

Over 1 in 4 Democrats (27%) and independents/other/no party (29%) agreed that if the court started making a lot of rulings that most Americans disagreed with, it might be better to do away with the court altogether. Just 15% of Republicans agreed with this.

{ Complex chart excluded }

### **Partisanship, ideology and the court**

- **Most think the Supreme Court majority was appointed by Republicans:** Asked whether a majority of the Supreme Court justices were appointed by Democratic or Republican presidents, 68% say the majority were definitely or probably appointed by Republican presidents and 18% say definitely/probably by Democratic presidents.

- **More see the court as conservative:** About half of those surveyed (49%) say the court is “sometimes liberal, sometimes conservative, depending on the law and facts of the case,” a decrease from nearly two-thirds (63%) in 2019. Over a third (36%) feel the court is generally conservative, up 17 points since 2019, and 8% say generally liberal. In 2020, Justice Amy Coney Barrett was confirmed to the Supreme Court, the last of three conservative justices added during President Donald Trump's term, giving conservatives a 6-3 majority on the court.

- **Most who see an ideological tilt think it's bad:** Among those who feel the court is generally liberal or conservative, the vast majority (75%) think



it is bad for our system of government that the court is generally either of those.

### **What motivates Supreme Court justices**

- **Setting aside personal and political views:** Asked to consider the individual Supreme Court justices, less than half of U.S. adults (40%) think the justices “set aside their personal and political views and make rulings based on the Constitution, the law, and the facts of the case” – down 19 points from last year.

- **Following party leanings:** Half of U.S. adults (49%, up from 37% in 2021) say Supreme Court justices nominated by Democratic presidents are more likely to make liberal rulings and justices nominated by Republican presidents are more likely to make conservative rulings, “regardless of the Constitution, the law, and the facts of the case.”

- **What’s driving this:** Responses are driven by party – 62% of Democrats, 48% of independents/other/no party but only 34% of Republicans say that party leanings influence justices more than the Constitution, the law, and the facts of the case. The survey finds a dramatic shift upward for Democrats from 2021 and 2020, when 37% and 38%, respectively, said party leanings had a greater influence.

{ Complex Data Chart Omitted }

### **What Americans value in judges**

The survey noted that in some states, state and local judges are elected. Respondents were given a choice of different qualities and asked how important each would be in deciding whether to vote for a

candidate for judge. Respondents said the most essential/very important qualities are that a judge:

- Is fair and impartial (91%)
- Will make rulings based on the facts of the case, the law and the Constitution (90%)
- Is highly recommended by the state bar association (45%)
- Shares your political beliefs (34%)
- Shares your religious beliefs (16%).

Those responses did not change significantly from 2019.

### **The abortion ruling – and increasing the size of the court**

**Abortion:** On June 24, 2022, the Supreme Court ruled in *Dobbs v. Jackson Women’s Health Organization* that there was no constitutional guarantee of a right to abortion, overturning the *Roe v. Wade* decision recognizing such a right. The *Dobbs* ruling is widely unpopular among U.S. adults:

- Nearly 6 in 10 U.S. adults (58%) said they disapprove of that decision on abortion, 50% of whom were strongly disapproving
- Nearly 4 in 10 (39%) approve of the ruling, 27% strongly approving.

**Increasing the size of the court:** The survey also asked Americans what they thought of proposals to increase the number of justices on the Supreme Court – a proposal that some Democrats and left-leaning critics of the court have said would restore

ideological balance to it. In the survey, a plurality of respondents opposed such a proposal:

- 38% opposed increasing the number of justices on the court, 29% strongly
- 30% favored increasing the number of justices on the court, 18% strongly

Full data for the survey is in the Appendix.

**GALLUP ARTICLE:  
AMERICANS PASS JUDGMENT  
ON THEIR COURTS  
(DECEMBER 17, 2024)**

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Americans Pass Judgment on Their Courts

Sharp decline in confidence in judiciary is among the largest Gallup has ever measured

By Benedict Vigers and Lydia Saad



LONDON – Americans' confidence in their nation's judicial system and courts dropped to a record-low 35% in 2024.

The result further sets the U.S. apart from other wealthy nations, where a majority, on average, still expresses trust in an institution that relies largely on the public's confidence to protect its authority and independence.

{ Complex Data Chart Omitted }

Between 2006 and 2020, Americans' perceptions of their courts were most often in line with the median for OECD (Organisation for Economic Co-operation and Development) countries, with a majority in each typically expressing confidence.

Since 2020, confidence in the courts across the other OECD countries has been stable, while the U.S. has seen a sharp decline – 24 percentage points – in the past four years. The resulting 20-point gap in confidence between the U.S. and the median of OECD nations in 2024 is the largest in the Gallup trend, which dates to 2006.

### **A Globally Significant Collapse**

The decline in confidence in the U.S. judicial system not only means the U.S. ranks below other rich nations, it is also among the steepest declines Gallup has measured globally on this metric.

Few countries and territories have seen larger percentage-point drops in confidence in the judiciary (over a similar four-year span) than the U.S. These include Myanmar (from 2018 to 2022) overlapping the return to military rule in 2021, Venezuela (2012-2016) amid deep economic and political turmoil, and Syria (2009-2013) in the runup to and early years of civil war, and others that have experienced their own kinds of disorder in the past two decades.

{ Complex Data Chart Omitted }

While confidence in U.S. courts is at its record low, it is still higher than what Gallup has previously measured in places such as Venezuela in 2016 (16%), Democratic Republic of Congo in 2013 (22%) or Syria in 2013 (25%).

### **Confidence Drops Regardless of Leadership Views**

A look at trends in judicial confidence by Americans' approval of their country's leadership (Gallup doesn't measure party identification in its global surveys) provides insights into how the U.S. has reached its lowest point on record for faith in the courts.

Under Joe Biden's presidency, those disapproving of U.S. leadership have lost confidence in the judicial system and courts, from 46% in 2021 to 29% in 2024. By contrast, judicial confidence among those approving of U.S. leadership was steady at 62% between 2021 and 2023, before dipping sharply to 44% this year. This follows a pattern similar to, though more pronounced than, the one seen in the first four years of Barack Obama's administration.

This year marks the first time on record that judicial confidence among those approving of U.S. leadership has ever dipped below 60%, and the first time that confidence in the courts has been below 50% among both those who approve and those who disapprove of U.S. leadership, a double whammy pushing the national figure to its lowest in two decades.

{ Complex Data Chart Omitted }

It's been the norm for those disapproving of their country's leadership during Democratic administrations to lose confidence in the judicial system over time (just as disapprovers of the country's leadership did during Donald Trump's presidency, though to a lesser degree).

However, the 17-point drop under Biden signals that something profound occurred to atypically shake his opponents' confidence in the courts – with the various legal cases against Trump likely factors. Similarly, the 18-point decline in confidence in the judicial system between 2023 and 2024 among those who approve of their country's leadership may also be related to Trump's legal cases, reflecting dissatisfaction with several circuit court and Supreme Court decisions that went in Trump's favor.

Meanwhile, the stability of U.S. leadership approvers' confidence in the judicial system, above 60% across the first three years of Biden's presidency (before plunging in 2024), contrasts with the decline Gallup has documented in Democrats' trust in the Supreme Court, specifically, over the same period. This suggests that the questions measure different sentiments – particularly that respondents may not have had only the Supreme Court in mind when asked about the judicial system and courts more generally.

Democrats' trust in the judicial branch headed by the Supreme Court fell 25 points (from 50% to 25%) between 2021 and 2022, spanning the Dobbs decision overturning constitutional protections for abortion. Democrats' confidence in the Supreme Court rebounded

a bit, to 34% in 2023, before sinking to 24% in 2024. By contrast, Republicans' trust in the high court increased slightly between 2021 (61%) and 2022 (67%), and stretched to 71% in 2024.

### **Not All Institutions See Similar Drops in Confidence**

The judiciary stands out for losing more U.S. public confidence than many other U.S. institutions experienced between 2020 and 2024. Even though confidence in the national government also declined, by 20 points to 26% in 2024, the decline of 24 points in judicial confidence is somewhat outsized, which is atypical. Dozens of countries have at different points seen larger collapses in government confidence than the U.S., while few have seen bigger declines in judicial confidence.

Americans also express less confidence in the military and financial institutions in 2024 than they did in 2020, but these declines have not been as severe. About half of Americans today are confident in the honesty of elections, up slightly compared with 2020 (45%).

The net result is that for the first time on record, many more Americans trust the honesty of their elections (51%) than trust their judicial system (35%).

{ Complex data chart omitted }



### **Bottom Line**

Confidence in the rule of law is foundational to a free society. But Americans' faith in the embodiment of the rule of law – the judicial system – has fallen significantly in recent years.

Once Trump takes office in early 2025, attitudes could change yet again. But if confidence in the courts remains jaded – perhaps for different reasons and irrespective of approval toward the country's leadership under Trump – it could undermine the public's faith in the legitimacy of important legal cases and decisions.

**MARCO DESTIN'S COMPLAINT SEEKING  
RECOVERY FOR FRAUD ON THE COURT,  
U.S. DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK  
(OCTOBER 4, 2022)**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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MARCO DESTIN, INC., 1000 HIGHWAY  
98 EAST CORP., PANAMA SURF & SPORT, INC.,  
E&T, INC.,

*Plaintiffs,*

v.

SHAUL LEVY, individually and as agent of  
L&L WINGS, INC.; MEIR LEVY, individually  
and as agent of L&L WINGS, INC.; ARIEL LEVY,  
individually and as agent of L&L WINGS, INC.;  
and BENNETT KRASNER, individually and as  
agent of L&L WINGS, INC.,

*Defendants.*

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Civil Action No.: \_\_\_\_\_

**JURY TRIAL DEMANDED**

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**COMPLAINT**

Plaintiffs Marco Destin, Inc. and its affiliates  
1000 Highway 98 East Corp., Panama Surf & Sport,

Inc., and E&T, Inc., (collectively “Marco-Destin”), by and through its undersigned counsel, brings this Complaint for Fraud on the United States District Court for the Southern District of New York (the “Court”) and on Marco-Destin against the following defendants: Shaul Levy; Meir Levy; Ariel Levy; and attorney Bennett Krasner (collectively, the “Defendants”), in their individual capacities for their intentional tortious acts as agents of L&L Wings, Inc. (“L&L”), and further alleges as follows:

### **NATURE OF THE ACTION**

1. Plaintiffs Marco-Destin seeks relief against the Defendants from a February 15, 2011, Stipulated Order of Settlement and Dismissal (the “Settlement Order”), attached as Exhibit “A” hereto, previously entered in this Court and fraudulently obtained by L&L in the prior trademark infringement action styled *L&L Wings, Inc. v. Marco-Destin, Inc. et al*, Case 1:07-CV-04137-GWG (S.D.N.Y) (the “Underlying Trademark Action”), and recovery from Defendants for losses sustained by Marco-Destin as a result of this fraud. The fraud affected by the agents of L&L as alleged herein constituted a deliberately planned and carefully executed scheme to defraud not only this Court and Marco-Destin, but also the Patent and Trademark Office (“PTO”) and other licensees of L&L.

2. The fraud on the Court in the Underlying Trademark Action is a wrong against the judicial institutions set up to protect and safeguard the public because the paramount objective of the law of trademark infringement is the protection of the public interest.

3. The claims pursued by L&L in the Underlying Trademark Action, arising from trademark rights and a trademark registration fraudulently obtained by L&L, were recently revealed to be a fraud on the Court in a final judgment entered on March 29, 2021, by the United States District Court for the Eastern District of North Carolina in the case styled *Beach Mart, Inc. v. L&L Wings, Inc.*, Case No. 2:11-CV-44-FL et al. (the “Beach Mart Case”). In its judgment, the District Court in North Carolina found, *inter alia*, that:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Beach Mart, Inc. has proven by clear and convincing evidence that L&L Wings, Inc. knowingly made false representations of material fact with an intent to deceive to the United States Patent and Trademark Office in 2006, 2007, and/or 2008, resulting in the issuance of federal trademark Registration No. 3,458,144 (the “’144 Registration”), and in 2011, resulting in the issuance of federal trademark Registration No. 4,193,881 (the “’881 Registration”), thereby causing injury to Beach Mart, Inc.

*See* March 29, 2021 Final Judgment (emphasis added). A true and correct copy of the final judgment in the Beach Mart Case (“Final Judgment”) is attached hereto as Exhibit “B.”

4. The ’144 Registration, which was recently determined by the District Court in North Carolina to have been fraudulently procured by L&L, is the same registration that attorney Bennett Krasner, under the direction and control of Ariel Levy, Meir Levy, and Shaul Levy, knowingly caused L&L to present to this Court in the Underlying Trademark Action in support

of L&L's trademark infringement claim against Marco-Destin.

5. The Underlying Trademark Action was previously assigned to United States District Judge Barbara S. Taylor and United States Magistrate Judge Gabriel W. Gorenstein.

6. In the Underlying Trademark Action, L&L, through its agents and attorneys, pursued claims against Marco-Destin to enforce rights in the "Wings" mark that it knew it did not own. A true and correct copy of the Complaint in the Underlying Trademark Action is attached hereto as Exhibit "C." L&L, through its agents and attorneys, knowingly fraudulently misrepresented to the Court and Marco-Destin that it had proprietary rights in the "Wings" mark, while knowing that its rights in the mark were only rights of a mere licensee of Shepard R. Morrow, the true owner of the WINGS trademark. Despite knowing that it did not own rights to the "Wings" mark, L&L, through the Defendants, sought to enforce such purported rights anyway, by making false representations of fact to the Court so that the Court could not properly adjudicate the action.

7. L&L's intentional concealment of its status as a licensee of the "Wings" mark and misrepresentation to the Court and Marco-Destin regarding its purported ownership rights in the same, as described above and in more detail below, was a willful obstruction of justice and fraud on the Court and Marco-Destin. L&L, through and with the knowing and willful participation of its attorney Bennett Krasner, knowingly made false representations of material fact to the Court which affected the integrity of the judicial process.

8. As a result of L&L's fraudulent conduct, this Court authorized and entered the Settlement Order after granting L&L partial summary judgment for trademark infringement and related claims. Pursuant to the fraudulently obtained Settlement Order, Marco-Destin was forced to pay L&L millions of dollars for purportedly violating trademark and trade dress rights that it has now discovered L&L did not and does not have. Marco-Destin was also forced to expend thousands of dollars to rebrand its stores and comply with the Court's Settlement Order.

### **PARTIES**

9. Plaintiff Marco-Destin, Inc. is a Florida Corporation with a principal place of business in Medley, Florida.

10. Plaintiff 1000 Highway 98 East Corp. is a Florida Corporation with a principal place of business in Medley, Florida.

11. Plaintiff Panama Surf & Sport, Inc. is a Florida Corporation with a principal place of business in Medley, Florida.

12. Plaintiff E&T, Inc., is a Florida Corporation with a principal place of business in Medley, Florida.

13. Upon information and belief, Defendant Shaul Levy, an individual, is a resident of New York, New York. Upon further information and believe, Shaul Levy is an owner of, and former officer and director of, the South Carolina Corporation, L&L Wings, Inc, which is licensed to do business in the State of New York, and which maintains its principal place of business at 666 Broadway, 8th Floor, New York, New York 10012.

14. Upon information and belief, Defendant Meir Levy, an individual, is a resident of New York, New York. Upon further information and belief, Meir Levy is an owner of, and former officer and director of the South Carolina Corporation, L&L Wings, Inc, which is licensed to do business in the State of New York, and which maintains its principal place of business at 666 Broadway, 8th Floor, New York, New York 10012.

15. Upon information and belief, Defendant Ariel Levy, an individual, is a resident of New York, New York. Upon further information and belief, Ariel Levy is an officer and director of the South Carolina Corporation, L&L Wings, Inc, which is licensed to do business in the State of New York, and which maintains its principal place of business at 666 Broadway, 8th Floor, New York, New York 10012.

16. Upon information and belief, Defendant Bennett Krasner, an individual, is a resident of New York, New York. Upon further information and belief, Bennett Krasner was at all times relevant herein the attorney and agent of the South Carolina Corporation, L&L Wings, Inc, which is licensed to do business in the State of New York, and which maintains its principal place of business at 666 Broadway, 8th Floor, New York, New York 10012. Attorney Bennett Krasner personally signed and filed the initial Complaint of L&L in the Underlying Trademark Action on or around May 29, 2007, and therein attorney Bennett Krasner knowingly and falsely represented that L&L Wings owned the rights to the mark "WINGS". *See, e.g.,* Complaint ¶ 54.

17. L&L Wings, Inc. is a South Carolina Corporation, owned by brothers Shaul and Meir Levy and managed by Ariel Levy, which is licensed to do busi-

ness in the State of New York, and which maintains its principal place of business at 666 Broadway, 8th Floor, New York, New York 10012. L&L Wings, Inc. owns and operates beach accessory stores in South Carolina, North Carolina, Florida, Texas, Massachusetts, and California.

18. As a result of the bankruptcy court proceedings initiated by L&L in response to the judgment in the Beach Mart Action, L&L Wings, Inc. is presently named in two co-pending and related actions in this Court filed by appellants Marco-Destin, Inc., *et al.*: Case No 1:22-cv-1082 and Case No 1:22-cv-4058, both styled as *In Re: L&L Wings, Inc.*

### **JURISDICTION**

19. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, as the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states. This Court further has subject matter jurisdiction over this action as the fraud of L&L and its employees and agents that underlies the fraud on the Court is of the nature of a trademark action, and subject matter jurisdiction is provided under 28 U.S.C. §§ 1331 and 1338. This Court further has subject matter jurisdiction pursuant to this Court's inherent and equitable powers and pursuant to Fed. R. Civ. P. 60(d), in that this Court is authorized and empowered to provide relief from its earlier judgments and to ensure the accurate and equitable administration of justice in connection with cases properly before it, including to correct and rectify the fraud on the court as alleged herein.



20. This Court has personal jurisdiction over the individual defendants Shaul Levy, Meir Levy, Ariel Levy, and attorney Bennett Krasner, because each is a resident of the State of New York and because each is, or was at all relevant times, employed by L&L as an employee or an independent agent of L&L which maintains its principal place of business in New York. In addition, jurisdiction over each of the defendants is proper because L&L engaged in the fraudulent conduct in the Underlying Trademark Action as complained of herein, through the Defendants as its employees and agents, which was brought in this judicial district. In addition, the conduct complained of herein occurred in the State of New York, resulting in the entry by the Southern District of New York of the Settlement Order that ultimately terminated the Underlying Trademark Action. Also, on page 2 of Exhibit “C” (Complaint filed in the Underlying Trademark Action), L&L and Marco-Destin consented to personal jurisdiction in the Southern District of New York.

21. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 as L&L’s principal place of business is in this district, a substantial part of the events giving rise to this action occurred in this judicial district, and L&L and its attorney and employees are subject to personal jurisdiction in this judicial district. Furthermore, the actions of L&L’s employees and attorney, as described in detail below, have caused losses to Marco-Destin in this judicial district.

## **FACTUAL BACKGROUND**

### **The Underlying Trademark Action**

22. On or about May 29, 2007, L&L filed suit against Marco-Destin in the Underlying Trademark Action, asserting claims for, among other things, federal trademark and trade dress infringement under the Lanham Act (15 U.S.C. § 1051 *et seq.*), breach of contract, violations of New York General Business Law, and common law unfair competition and services mark infringement, arising from L&L's purported ownership of the WINGS mark and Marco-Destin's use in alleged violation of said ownership rights. *See* Exhibit "C" (Complaint in Underlying Trademark Action).

23. The allegations of L&L's Complaint against Marco-Destin focused on L&L's affirmative claim of purported ownership rights in the "Wings" mark. L&L's claims against Marco-Destin arose from the purported breach by Marco-Destin of a certain License Agreement dated November 1, 1998 (the "License Agreement"). Pursuant to the License Agreement, L&L purported to give Marco-Destin the right to use its proprietary property in the "Wings" mark and trade dress. L&L alleged that Marco-Destin used the "Wings" mark and trade dress in violation of the License Agreement.

24. During the course of the Underlying Trademark Action and to support its claims, L&L, under the direction and approval of its officers Shaul Levy and Meir Levy, made repeated misrepresentations to the Court claiming ownership in the "Wings" mark and trade dress, including the following:

- a. In its Complaint, filed on May 29, 2007, L&L through its attorney Bennett Krasner, asserted that it used and claimed propriety rights in the “Wings” mark and trade dress since as early as March 1978. (Compl., ¶¶ 6, 10, 22, 54).
- b. L&L’s counsel, Bennett Krasner stated in his sworn Declaration filed in opposition to a Motion for Summary Judgment that a store, located on property owned by one of the Defendants in the Underlying Trademark Action “utiliz[ed] *Plaintiff’s mark and trade dress* after expiration of the License Agreement[.]” (D.E. 23, p. 4) (emphasis added).
- c. In a sworn affidavit, Ariel Levy, the Vice President of L&L, referred to the “Wings” mark and trade dress as L&L’s property. (See D.E. 23-2) (referring to WINGS as “*Plaintiff’s mark and trade dress*[.]” and that Defendants utilized “*Plaintiff’s trade dress*”) (emphasis added).
- d. In its Counter Statement to Defendants’ Rule 56.1 Statement, L&L admitted that it “claims to use the unregistered service mark “WINGS” and a decorative trade dress[.]” (D.E. 25, ¶ 5).

### **The Then-Unknown History of L&L’s License for Wings from Shepard Morrow**

25. At the time of the Underlying Trademark Action, neither Marco-Destin nor the District Court were or could have been aware that L&L was not in fact the true owner of the WINGS trademark.

26. In contrast to L&L's affirmative claims in the Underlying Trademark Action, L&L was not the owner of the WINGS trademark but had entered into a license with the true owner, Shepard Morrow, on April 29, 1993. L&L was forced to take a license for WINGS from the true owner, Shepard Morrow, because L&L had previously failed in multiple efforts to obtain its own trademark registration for WINGS between 1987 and 1992, because of Shepard Morrow's superior trademark rights.

27. Each of Shaul Levy, Meir Levy, and Bennett Krasner were personally involved in and have personal knowledge of L&L's failed trademark application efforts of WINGS between 1987 and 1992, and of L&L's negotiation and execution of the WINGS trademark license from Shepard Morrow in 1993. A true and correct copy of the executed version of the Morrow License, with accompanying transmittal correspondence, is attached hereto as Exhibit "D."

### **Krasner's Misrepresentations To The United States Patent & Trademark Office**

28. In addition to the foregoing misrepresentations, during the course of the Underlying Trademark Litigation, L&L obtained from the PTO, as a result of fraudulent misrepresentations of ownership, a Certificate of Registration dated July 1, 2008, for the "Wings" mark.

29. On August 29, 2006, Bennett D. Krasner, the attorney and agent of applicant L&L, made the following statement to the PTO: "declares that . . . he/she believes the applicant to be the owner of the trademark/service mark sought to be registered[.]" This statement was knowingly false and was, as deter-

mined in the Beach Mart Action, intended to deceive the PTO. At the time this statement was made, L&L and Bennett Krasner knew that another individual, Shepard Morrow, was the owner of the WINGS trademark as applied for. Krasner also knew that L&L's use of that mark was pursuant to a license from Morrow dating from 1993.

30. On August 29, 2006, Bennett Krasner also made the following statement to the PTO: "no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive[.]" This statement was knowingly false and was, as determined in the Beach Mart Action, intended to deceive the PTO. At the time this statement was made L&L and Bennett Krasner knew that Morrow, as the owner of the mark applied for, had the right to use the mark in commerce.

31. On August 29, 2006, Bennett Krasner told the PTO that L&L could claim continuous use of the WINGS service mark dating back to "at least as early as 02/01/1978." This statement was false and misleading, and also omitted critically important facts, because the PTO was not informed that any use of WINGS by L&L in 1978 was at the time infringing Morrow's marks; that all of L&L's use of WINGS after the Morrow License inured to the benefit of Morrow; that any independent trademark rights L&L could claim prior to 1993 were extinguished by the Morrow License; and that since 1993, L&L had been using the WINGS mark as a licensee under the Morrow License and not as a trademark owner. Based upon the

foregoing material facts all of which were known to L&L and Bennett Krasner, but withheld from the PTO, the statement that L&L could claim continuous use of the WINGS mark back to 1978 was knowingly false and misleading.

32. On or about July 30, 2007, in response to a non-final office action from the PTO refusing registration of the WINGS mark, Bennett Krasner represented to the PTO that L&L “has been in continuous high-profiled use of the mark it is seeking registration of for almost 30 years.” This statement was knowingly false for the reasons described in paragraphs 26-28 above, and was, as determined in the Beach Mart Case, intended to deceive the PTO. At this time, Bennett Krasner also stated to the PTO that L&L believed Morrow’s trademark “is no longer used by its last known owner Shepard Morrow.” This statement was knowingly false and was, as recently determined in the Beach Mart Case, intended to deceive the PTO. In making this representation, L&L and Bennett Krasner knew that the true facts were that much of L&L’s-claimed thirty years of use had been either infringing or under license from Morrow, and further knew but failed to disclose that L&L’s use of WINGS pursuant to the Morrow License constituted use of the mark by Morrow in accordance with 15 U.S.C. § 1055.

33. On or about February 28, 2008, during the litigation of the Underlying Trademark Action and less than two weeks after the expiration of the last federal registration for the trademark that L&L had licensed from Morrow, Bennett Krasner contacted the PTO as the attorney and agent of applicant L&L. Upon information and belief, Bennett Krasner brought to the attention of the trademark examiner, Ms.

Charisma Hampton, the fact that the last Morrow registration had recently expired. Upon information and belief, Krasner again failed to disclose the existence of the Morrow License, and instead of admitting the true facts that L&L was using the mark as licensee of the owner of the now-expired registration, Krasner affirmatively and knowingly misrepresented to the trademark examiner that Morrow had abandoned rights in his WINGS marks through nonuse. The Certificate was issued based upon L&L's counsel's false representations to the PTO that "no other person, firm, corporation, or association has the right to use the [WINGS] mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive[.]" and that L&L Wings could claim continuous use of the WINGS service mark dating back to "at least as early as 02/01/1978."

34. In reliance on Bennett Krasner's affirmative misrepresentations on behalf of L&L, which were knowingly false, and which were intended to deceive the PTO, the PTO, being so deceived, issued to L&L on July 1, 2008, the federal trademark registration for WINGS, Reg. No. 3,488,144.

**Krasner's And L&L's Misrepresentations  
To The US Court For The Southern  
District Of New York**

35. During the pendency of L&L's motion for summary judgment, L&L, through its attorney Bennett Krasner and under the direction and control of Meir Levy, Shaul Levy, and Ariel Levy caused the fraud-

ulently-obtained July 1, 2008 Registration Certificate to be presented to the Court in support of L&L's trademark infringement claims against Marco-Destin.

36. Specifically, L&L, acting through attorney Bennett Krasner and with the knowledge and authority of Shaul Levy, Meir Levy, and Ariel Levy, presented the July 1, 2008 Certificate of Registration for WINGS to the Court as evidence of its ownership in the "Wings" mark, although each of L&L, Bennett Krasner, Shaul Levy, Ariel Levy, and Meir Levy all knew that L&L's only lawful rights in the "Wings" mark were that of a mere licensee of Shepard Morrow.

37. L&L, acting through Bennett Krasner, Shaul Levy, Ariel Levy, and Meir Levy intended to deceive the Court by providing the July 1, 2008 Registration Certificate to the Court in support of L&L's trademark infringement claims against Marco-Destin.

38. In addition to its false claims of ownership, throughout the Underlying Trademark Litigation, L&L intentionally concealed the existence of its License Agreement with Shepard Morrow, which merely gave L&L rights to use the "Wings" mark as a licensee. L&L, through its counsel, falsely alleged that it had proprietary rights in the "Wings" mark and trade dress since as early as March 1978.

39. L&L, through its officers and directors and attorney as alleged herein, knew of the false misrepresentations, concealments, and false information and statements made to the Court and Plaintiff.

40. L&L, through its officers and directors and attorney as alleged herein, knew that the Certificate of Registration it presented to the Court in support of its claims in the Underlying Trademark Litigation



was obtained as a result of false statements of ownership in the “Wings” mark.

41. On the basis of L&L’s fraudulently-obtained Registration Certificate, the Court on December 16, 2009 in the Underlying Action found Marco-Destin to be liable at summary judgment on L&L’s claim for trademark infringement. A true and correct copy of the liability judgment in the Underlying Action (the “Liability Order”) is attached hereto as Exhibit “E.”

42. L&L’s misrepresentations, concealments, and other fraudulent acts, through the Defendants (its officers and directors and attorney as alleged herein), were material and seriously affected the integrity of the judicial proceedings in the Underlying Trademark Litigation and the Court’s ability to adjudicate the case. Furthermore, L&L, through its officers and directors and attorney as alleged herein, knowingly and intentionally presented to the Court a Certificate of Registration that L&L had obtained by making false statements to the PTO in connection with L&L’s false claim of ownership of the mark WINGS.

43. L&L, through its officers and directors and attorney as alleged herein, knowingly and purposefully committed the fraudulent acts described above to enforce rights in the “Wings” mark that it did not possess and mislead the Court into ruling in its favor.

44. L&L, through its officers and directors and attorney as alleged herein, knew that the Court and Marco-Destin would rely on its misrepresentations, concealments and other fraudulent conduct, as shown by the rulings of the Court and presentations of the case by both L&L and Marco-Destin.

45. The Court and Marco-Destin did in fact rely upon and were clearly misled by L&L's misrepresentations, concealments, and other fraudulent conduct, as demonstrated by the Court's rulings and the Settlement Order.

46. The Court and Marco-Destin were as a matter of law and fact justified in relying on L&L's misrepresentations, concealments and other fraudulent conduct, as evidenced by the Court's rulings and the Settlement Order.

**The Damaging Impact Of L&L's Fraud On The  
Court As Orchestrated And Effected By The  
Conduct Of Shaul Levy, Meir Levy,  
Ariel Levy, And Bennett Krasner**

47. As a direct result of L&L's fraudulent conduct through its officers and directors and attorney as alleged herein, the integrity of the judicial system was compromised. The Defendants, as agents of L&L, engaged in this fraudulent conduct to defraud the PTO, this District Court and Marco-Destin. Furthermore, through this conduct, which implicated its attorney, L&L tampered with the administration of justice and violated the public's right to impartial and fair judicial proceedings.

48. As further direct and proximate cause of L&L's fraudulent conduct through its officers and directors and attorney as alleged herein, Marco-Destin was induced to enter into the Settlement Order, Exhibit A hereto, which required it to pay to L&L monies that L&L was not entitled to and prevented it from using a trademark to which L&L had no ownership rights in. Marco-Destin was also required to expend thousands of dollars to comply with

the Settlement Order and cease using the “Wings” mark.

49. The District Court in the Underlying Trademark Action relied on L&L’s various misrepresentations and omissions, and the July 1, 2008 Certificate of Registration, to conclude that L&L “own[ed] the mark, and that [L&L] has the exclusive right to use the mark in commerce.” The July 1, 2008 Certificate of Registration and L&L’s other fraudulent misrepresentations ultimately lead the Court to grant summary judgment in L&L’s favor on both liability for trademark infringement and damages.

50. As a result of the Court’s orders granting L&L’s motions for summary judgment on both liability for trademark infringement and damages, and without disclosing the true nature of L&L’s trademark rights or the fact that L&L obtained its July 1, 2008 Registration Certificate for WINGS through fraud, L&L induced Marco-Destin to enter into the Settlement Order on February 15, 2011, to fully and finally resolve all of their disputes arising in, out of, or relating to the Underlying Trademark Action.

51. Pursuant to the Settlement Order, Marco-Destin and its affiliate/co-defendants were required to pay L&L a total amount of \$3,500,000.00 (the “Settlement Amount”). Marco-Destin was also required to cease using the “Wings” mark and trade dress. The Settlement Order procured by L&L’s fraud on this Court also contained release provisions that, according to L&L, purport to prohibit Marco-Destin from bringing an action against L&L’s officers, directors and attorneys.

**The Conspiracy of the Levys and Krasner,  
Through L&L, To Defraud Marco-Destin**

52. All of the foregoing misrepresentations and material omissions by L&L, its attorneys, officers and directors, as alleged in paragraphs 19-48, are part and parcel of the scheme to defraud, agreed to by Shaul Levy, Meir Levy, Ariel Levy, and attorney Bennett Krasner in order to advance and profit from a fraudulent scheme which claimed exclusive ownership rights in and to the WINGS trademark, which ultimately resulted in injury and damage to Marco-Destin including through entry of summary judgment and the Settlement Order.

53. Specifically, including as set forth herein in paragraphs 19-48 above, each of Shaul Levy, Meir Levy, Ariel Levy, and attorney Bennett Krasner agreed to pursue a strategy to fraudulently cement L&L's claim to trademark rights in WINGS as against Marco-Destin, notwithstanding their actual knowledge of the Morrow License under which L&L licensed Morrow's WINGS trademark in 1993, which was never terminated.

54. Specifically, including as set forth herein in paragraphs 19-48 above, upon information and belief, each of Shaul Levy, Meir Levy, Ariel Levy, and attorney Bennett Krasner each took affirmative actions in furtherance of this agreement, including:

- a. Shaul Levy and Meir Levy authorized the filing of trademark litigation by L&L against Marco Destin on or about May 29, 2007;
- b. Shaul Levy and Meir Levy authorized the filing of L&L's application for federal

registration of the WINGS trademark on or about August 29, 2006;

- c. Bennet Krasner filed and prosecuted on behalf of L&L its application for federal registration of the WINGS trademark between 2006 and 2008;
- d. Bennet Krasner filed and pursued claims for and on behalf of L&L, against Marco-Destin in the Underlying Action, that were predicated on L&L's claimed trademark rights in the WINGS mark;
- e. Bennett Krasner and Ariel Levy submitted sworn declarations and a copy of L&L's Certificate of Registration, to the Court in the Underlying Trademark Action in order to advance L&L's trademark infringement claims against Marco-Destin; and
- f. Shaul Levy and Meir Levy, directing and controlling L&L, and with the participation of attorney Bennett Krasner and L&L's officer Ariel Levy, caused Marco-Destin to be induced to agree to the Settlement Order requiring payment to L&L of damages of \$3,500,000 and permanently enjoining Marco-Destin's "future use of Plaintiffs [L&L's] "Wings" mark (the "Mark")."

55. Each of Shaul Levy, Meir Levy, Ariel Levy, and attorney Bennett Krasner intentionally and knowingly participated in the conspiracy to deceive and defraud the District Court and Marco Destin with respect to L&L's claim of trademark ownership of the WINGS mark, given their actual knowledge of the Morrow License under which L&L licensed Morrow's

WINGS trademark in 1993, which was never terminated.

56. Each of Shaul Levy, Meir Levy, Ariel Levy, and Bennett Krasner, through their agreement to and participation in the foregoing conspiracy, obtained a personal and individual benefit as a result of the purported release from liability provided in the Settlement Order obtained by L&L in the Underlying Trademark Action.

57. The conspiracy of Shaul Levy, Meir Levy, Ariel Levy, and attorney Bennett Krasner to deceive and defraud the District Court and Marco Destin caused losses to Marco-Destin in excess of \$3,500,000.

**Marco-Destin's Discovery Of L&L's Fraudulent Conduct As A Result Of The Outcome Of The Beach Mart Litigation**

58. Later in 2011 and after the Settlement Order was entered, another one of L&L's licensees, Beach Mart, Inc. ("Beach Mart") commenced an action in the United States District Court for the Eastern District of North Carolina, against L&L, to wit: the Beach Mart Case, related to the use of the trademark "Wings."

59. After nearly a decade of litigation, on or about November 16, 2020, the Beach Mart Case went to trial and the jury rendered a verdict in Beach Mart's favor on all counts. The jury specifically found that Shepard Morrow, and not L&L, owned the rights to the "Wings" mark, and that L&L's license with Morrow had not been terminated. During the Underlying Trademark Litigation, L&L did not disclose to the

Court or Marco-Destin that it had obtained rights in the “Wings” mark as a licensee of Shepard Morrow.

60. On or about March 29, 2021, the Court in the Beach Mart Case entered its Final Judgment (Exhibit “B” hereto) ordering, adjudging and decreeing that L&L made misrepresentations of material fact with the registration of the “Wings” marks with the PTO, that L&L had acted fraudulently in its dealings with Beach Mart, that L&L had never owned the WINGS trademark and that it had violated the North Carolina Unfair and Deceptive Trade Practices Act in so doing.

61. Marco-Destin only first became aware of L&L’s fraudulent representations of trademark ownership and L&L’s true position as a licensee of Morrow after Marco-Destin learned of the jury’s verdict in the Beach Mart Case and the Court’s Final Judgment dated March 29, 2021.

62. Specifically, through the publication of the Final Judgment dated March 29, 2021, giving effect to and confirming the jury’s determination at verdict, Marco-Destin finally learned that it had been proven, by “clear and convincing evidence,” that L&L knowingly made false representations of material fact with an intent to deceive to the United States Patent and Trademark Office in 2006, 2007, and/or 2008, resulting in the issuance of federal trademark Registration No. 3,458,144 (the “’144 Registration”).

63. Further and specifically, through the publication of the Final Judgment dated March 29, 2021, giving effect to and confirming the jury’s determination at verdict, Marco-Destin learned that “all right, title, and interest in and to the WINGS trademark for use in connection with retail clothing stores was

owned by Shepard R. Morrow in April of 1993 when L&L Wings, Inc. and Shepard R. Morrow entered into the April 29, 1993, license agreement for the use by L&L Wings, Inc. of the WINGS mark[,]” and that such rights were not owned by L&L as Bennett Krasner and L&L claimed in the Underlying Trademark Action.

64. Further and specifically, through the publication of the Final Judgment dated March 29, 2021, giving effect to and confirming the jury’s determination at verdict, Marco-Destin learned that “the April 29, 1993, trademark license between Shepard R. Morrow and L&L Wings, Inc. (the “Morrow License”) remains in effect and has not terminated.”

65. But for the entry of the Final Judgment in the Beach Mart Case, Marco-Destin could not have known of or have discovered the underlying facts of L&L’s fraud or of Morrow’s true ownership of the WINGS mark and L&L’s position as a licensee, including through the exercise of reasonable diligence. Upon information and belief, even if Marco-Destin had pursued discovery of L&L’s fraud upon the revelation of the Morrow License in 2013, Marco-Destin could not have obtained the outcome as revealed in the Final Judgment any sooner than did Beach Mart. Upon further information and belief, while Beach Mart was pursuing the Final Judgment that was finally obtained in March 2021, which determined the facts underlying L&L’s fraud as alleged herein, Marco-Destin believed that it would not have been reasonable to institute duplicative and parallel proceedings against L&L until the Beach Mart Case was resolved. Indeed, to await the outcome of the Beach Mart Case would be the only prudent thing to do, as



the Beach Mart Case was before a federal District Court which would determine the same issues: whether L&L committed fraud before the PTO and its licensees and whether L&L was truly the licensee of Morrow and not the trademark owner.

66. Upon the revelation of facts set forth in the Final Judgment, it is clear to Marco-Destin that L&L instituted the Underlying Trademark Litigation to enforce ownership rights in the “Wings” mark that it did not possess. Throughout the duration of the Underlying Trademark Litigation, L&L misrepresented on numerous occasions to this Court and Marco-Destin that it had ownership and proprietary rights in the “Wings” mark and trade dress, repeatedly asserting claims to ownership in such mark.

67. As a result of the foregoing, L&L, through its officers and attorney, has committed a fraud on the Court and Marco-Destin is entitled to sanctions to redress the losses sustained and relief from the releases in the Settlement Order that improperly benefit the Defendants as a result of L&L’s fraud on the Court and Marco-Destin, which releases should be vacated pursuant to Fed. R. Civ. P. 60(d).

## **COUNT ONE**

### **Fraud on the Court**

***As to Defendants Bennett Krasner, Shaul Levy,  
Ariel Levy, and Meir Levy.***

68. All of the preceding paragraphs are re-alleged and incorporated herein by reference as if set forth fully herein.

69. L&L's officers, directors and agents, Shaul Levy, Ariel Levy, and Meir Levy, and L&L's attorney Bennett Krasner, instituted the Underlying Trademark Litigation to enforce ownership rights in the "Wings" mark that L&L did not possess. Throughout the duration of the Underlying Trademark Litigation, L&L through its officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and attorney Bennett Krasner, misrepresented on numerous occasions to this Court and Marco-Destin that it had ownership and proprietary rights in the "Wings" mark and trade dress, repeatedly asserting claims to ownership in such mark.

70. In addition to its false claims of ownership, throughout the Underlying Trademark Litigation, L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and attorney Bennett Krasner, knowingly and intentionally concealed the existence of a License Agreement with Shepard Morrow, which merely gave L&L rights to use the "Wings" mark as a licensee. L&L, through its counsel, falsely alleged that it had proprietary rights in the "Wings" mark and trade dress since as early as March 1978.

71. L&L, through its officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and attorney Bennett Krasner, presented as evidence of its ownership rights in the "Wings" mark a Certificate of Registration it obtained from the PTO. In order to obtain the Certificate of Registration, L&L's, through its counsel Bennett Krasner, knowingly made false representations to the PTO that "no other person, firm, corporation, or association has the right to use the [WINGS] mark in commerce, either in the identical form thereof or in such near resemblance thereto as to

be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive[.]” and that L&L could claim continuous use of the WINGS service mark dating back to “at least as early as 02/01/1978.” L&L through its officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, presented the Certificate of Registration to the Court as evidence of its ownership in the “Wings” mark, knowing that its only rights in the “Wings” mark were that of a licensee of Shepard Morrow.

72. L&L’s officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, knew that the Certificate of Registration it presented to the Court in support of its claims in the Underlying Trademark Litigation was obtained as a result of intentional false statements of ownership in the “Wings” mark.

73. Each defendant (a) knowingly caused L&L to pursue its frivolous claims by knowingly making false representations of material fact and omitting material facts in support of L&L’s Complaint in the Underlying Trademark Action, (b) improperly influenced this Court in its decision to enter summary judgment in favor of L&L by knowingly making or causing to be made false representations of material fact and omissions of material facts, and submitting a fraudulently-obtained trademark registration in support of the false claim, and (c) unfairly, through those fraudulent means, hampered the timely discovery and presentation of a complete defense by Marco-Destin’s based on the existence of the Morrow License.

74. As a result of these actions, each of the defendants perpetrated a fraud on the Court with the

active participation of an officer of the Court (attorney Bennett Krasner) who owed this Court juridical duties and loyalty requiring integrity and honesty when dealing with the Court, so that the judicial machinery could not perform in the usual manner its impartial task of adjudging the Underlying Trademark Action.

75. By knowingly making false misrepresentations of material facts and omissions of material facts to this Court, with the willful and knowing substantial assistance, approval and support of L&L's defendant officers, attorney Bennett Krasner knowingly and willfully violated his juridical duties of integrity and honesty owed to this Court, thereby committing fraud on the court on behalf of his client, L&L, and thus successfully procuring by fraud interlocutory orders granting summary judgment and the Settlement Order.

76. The fraud perpetrated by the defendants, including indirectly through the fraud on the PTO, was directed at the Court itself.

77. The fraudulent evidence and fraudulently-obtained PTO registration not only deceived Marco-Destin and caused it significant losses in payments pursuant to the Settlement Order and attorneys' fees, but because this Court relied on them as well, the Court was defiled by the carefully planned scheme to defraud that was executed by the defendants with the direct participation of an officer of the court.

78. Thus, this Court has the power to grant the equitable relief sought in this case, as there is no adequate remedy at law to relieve Marco-Destin from the Settlement Order, including the releases in favor of the defendants herein contained therein, and the

orders granting summary judgment in favor of L&L in the Underlying Trademark Action.

## **COUNT TWO**

### **Fraud**

#### ***As to Defendants Bennett Krasner, Shaul Levy, Ariel Levy, and Meir Levy.***

79. All of the preceding paragraphs from 19 to 64 are re-alleged and incorporated herein by reference as if set forth fully herein.

80. L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, instituted the Underlying Trademark Litigation to enforce ownership rights in the "Wings" mark that L&L did not possess. Throughout the duration of the Underlying Trademark Litigation, L&L through its officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, misrepresented on numerous occasions to the District Court and Marco-Destin that it had ownership and proprietary rights in the "Wings" mark and trade dress, repeatedly asserting claims to ownership in such mark.

81. In addition to its false claims of ownership, throughout the Underlying Litigation, L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, intentionally concealed the existence of a License Agreement with Shepard Morrow, which merely gave L&L rights to use the "Wings" mark as a license. L&L, through its counsel, falsely alleged that it had proprietary rights in the "Wings" mark and trade dress since as early as March 1978.

82. L&L, through its officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, presented as evidence of its ownership rights in the “Wings” mark a Certificate of Registration it obtained from the PTO. In order to obtain the Certificate of Registration, L&L’s, through its counsel Bennett Krasner, made false representations to the PTO that “no other person, firm, corporation, or association has the right to use the [WINGS] mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive[,]” and that L&L could claim continuous use of the WINGS service mark dating back to “at least as early as 02/01/1978.” L&L through its officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, presented the Certificate of Registration to the Court as evidence of its ownership in the “Wings” mark, knowing that its only rights in the “Wings” mark were that of a licensee of Shepard Morrow.

83. L&L’s officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, knew of the false misrepresentations, concealments, and false information and statements made to the Court and Plaintiff.

84. L&L’s officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, knew that the Certificate of Registration it presented to the Court in support of its claims in the Underlying Litigation was obtained as a result of false statements of ownership in the “Wings” mark.

85. The misrepresentations, concealments and other fraudulent acts of L&L and L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, were material and seriously affected the integrity of the judicial proceedings in the Underlying Litigation and the Court's ability to adjudicate the case. Furthermore, L&L knowingly and intentionally presented to the Court a Certificate of Registration that it obtained by making false statements to the PTO.

86. L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, knowingly and purposefully committed the fraudulent acts described above to enforce rights in the "Wings" mark that it did not possess and mislead the Court into ruling in its favor.

87. L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, knew that the Court and Marco-Destin would rely on its misrepresentations, concealments and other fraudulent conduct, as shown by the rulings of the Court and presentations of the case by both L&L and Marco-Destin.

88. The Court and Marco-Destin did in fact rely upon and were clearly misled by the misrepresentations, concealments, and other fraudulent conduct of L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, as demonstrated by the Court's rulings and the Liability Judgment and the Settlement Order.

89. The Court and Marco-Destin were as a matter of law and fact justified in relying on the misrepresentations, concealments and other fraudulent conduct of

L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, as evidenced by the Court's rulings and the Liability Order and the Settlement Order.

90. As a direct result of the fraudulent conduct of L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, the integrity of the judicial system was compromised. L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, engaged in this fraudulent conduct to defraud the Court and Marco-Destin. Furthermore, through this conduct, L&L's officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, tampered with the administration of justice and violated the public's right to impartial and fair judicial proceedings.

91. As further direct and proximate cause of the fraudulent conduct of L&L and its officers, directors and agents, Shaul Levy, Ariel Levy, Meir Levy, and Bennett Krasner, Marco-Destin was induced to enter into the Settlement Order, which required it to pay L&L monies it was not entitled to and prevented it from using a trademark to which L&L had no ownership rights in. Marco-Destin was also required to expend thousands of dollars to comply with the Settlement Order and cease using the "Wings" mark.

### **PRAYER FOR RELIEF**

WHEREFORE, Marco-Destin respectfully requests that this Court grant the following relief:

- (a) Find that the Settlement Order and prior interlocutory Orders entered in the Underlying Action, which were obtained through



the acts of the agents of L&L and through L&L's fraud on this Court, are subject to being vacated under Rule 60(d);

- (b) Enter sanctions for fraud on the court pursuant to Count I against the Defendants, jointly and severally, sufficient to compensate Marco-Destin for the losses incurred as a result of the Settlement Order, including the payments made totaling \$3,500,000 and the fees and costs incurred in having to defend the Underlying Trademark Action;
- (c) Award damages to Marco-Destin pursuant to Count II against Defendants, jointly and severally, for the fraud and conspiracy to commit fraud as alleged herein, in an amount to be determined at trial, in excess of \$3,500,000;
- (d) Award Marco-Destin its attorneys' fees and costs, as permitted by law;
- (e) Award Marco-Destin its costs of suit; and
- (f) For such further relief as the Court deems just and proper.

**JURY DEMAND**

Plaintiff hereby demands a trial by jury on issue so triable.

/s/ Anthony A. Coppola

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Date: October 4, 2022  
New York, New York

**L&L WINGS'S COMPLAINT SEEKING  
RECOVERY FOR ALLEGED TRADEMARK  
INFRINGEMENT, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
(MARCH 29, 2007)**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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L & L WINGS, INC.,

*Plaintiff,*

v.

MARCO-DESTIN INC.,  
1000 HIGHWAY 98 EAST CORP.,  
PANAMA SURF & SPORT, INC. and E & T INC.,

*Defendants.*

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Civil Action No. 07 cv 4137

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**COMPLAINT**

Plaintiff, L&L WINGS, INC., (herein, "Wings"), complaining of Defendants, MARCO-DESTIN INC. (herein, "Marco Destin"), 1000 HIGHWAY 98 EAST CORP. (herein, "Highway 98 East"), PANAMA SURF & SPORT, INC. (herein, "Panama"), and E&T INC. (herein, "ET"), (also, herein, collectively, "Defendants"), respectfully alleges upon information and belief as follows:

## **NATURE OF ACTION**

This is an action for service mark and trademark infringement and unfair competition under the Trademark Act of 1946, as amended (The Lanham Act, 15 U.S.C. § 1051 et seq.), and related causes of action under the laws of the State of New York arising from the use by Defendants of Plaintiffs trade name and common law service mark “Wings” (herein, “the Mark”) and Plaintiff’s distinctive trade dress in violation of Plaintiff’s rights in the Mark and in its trade dress, as hereinafter more fully appears.

## **JURISDICTION AND VENUE**

This Court has jurisdiction under 28 U.S.C. §§ 1338 (a) and (b). This Court also has supplementary jurisdiction pursuant to 28 U.S.C. § 1367. Venue in this judicial district is proper under 28 U.S.C. §§ 1391 in that Defendants are subject to personal jurisdiction in this district.

This action is based upon an agreement between the parties (described *infra*), which provides that the law of the State of New York shall govern and that any disputes shall be resolved in New York County, New York and that jurisdiction shall be with the federal courts of this district and the courts of the State of New York, New York County.

## **PARTIES**

1. Plaintiff, Wings, is a South Carolina corporation authorized to do business in the State of New York and having its principal place of business at 8 East 41st Street, in the City, County and State of New York.

2. Upon information and belief, Defendant, Marco Destin is a Florida corporation having a place of business located at 10400 Northwest 33rd Street, Miami, Florida.

3. Upon information and belief, Defendant, Highway 98 East, is a Florida corporation having a place of business located at 10400 Northwest 33rd Street, Miami, Florida.

4. Upon information and belief, Defendant, Panama, is a Florida corporation having a place of business located at 10400 Northwest 33rd Street, Miami, Florida.

5. Upon information and belief, Defendant, ET, is a South Carolina corporation having a place of business located at 10400 Northwest 33rd Street, Miami, Florida.

## **BACKGROUND**

6. Plaintiff, Wings, is and has been since as early as March, 1978, using the Mark “Wings” in connection with the ownership, operation and management of retail stores specializing in the sale of beachwear, souvenirs, beach toys, chairs, bathing suits, shorts, tee shirts, sunglasses, and other related items.

7. The Mark is not yet registered on the Principal Register of Trademarks with the United States’ Patent and Trademark Office.

8. Plaintiff, Wings, currently has 27 retail stores in the contiguous United States, as follows: 8 stores in Florida, 8 stores in North Carolina, 7 stores in South Carolina; 2 stores in California; 2 stores in Texas; 1 store in Massachusetts. Additionally, Plaintiff has, at

various times, owned, operated and managed retail stores in New York, Tennessee and Alabama.

9. For nearly 30 years Plaintiff has expended considerable time and effort and expense to advertise, promote and build the goodwill of the Mark. Consequently, the Mark has been, is and continues to be recognized by consumers as representing Plaintiff's retail stores and business operations.

10. For over 20 years Plaintiff has used and claims proprietary rights to, a distinctive Trade Dress in connection with its retail stores, which Trade Dress is decorative and not functional and consists of Plaintiff's unique wave sculpture design highlighted with a signature colored neon light combination (herein, the "Trade Dress").

11. As a result of years of use and the nationwide operation of retail stores bearing the Mark and the Trade Dress, the name "Wings" ("the Mark") has come to be recognized by the beachwear retail industry and by the consuming public as exclusively identifying Plaintiff's retail store services originating from Plaintiff.

12. Moreover, as a result of years of use and the nationwide operation of retail stores bearing the Trade Dress, the Trade Dress has acquired a secondary meaning and become distinctive in the minds of the consuming public.

13. Prior to November 1, 1998 the principals of Plaintiff, Wings, namely; Shaul Levy and Meir Levy, possessed ownership rights in the Defendant corporations (with the exception of Defendant, ET) with the current principal of Defendant corporations, Eliezer Tabib. The Defendant corporations historically owned, operated and managed retail stores located in Florida,

Alabama and Tennessee, bearing the Mark and Plaintiffs unique Trade Dress. Defendant, ET, was wholly owned by Eleizer Tabib and, with Plaintiff's permission, operated under the name "Wings".

14. Prior to November 1, 1998, Plaintiff, Wings, and/or its principals, Shaul Levy and Meir Levy, agreed to transfer to Defendants and/or to Defendants' principal, Eliezer Tabib, interest in and to the stock owned in Defendant corporations.

15. On or about November 1, 1998, Wings, as Licensor, entered into an agreement with Defendants, collectively as Licensee, entitled "License Agreement" (and herein referred to as "the License Agreement") whereby Defendants were given a license to use the proprietary property of Plaintiff, namely; the Mark and the Trade Dress in a defined territory and for a definite term. The locations of Defendants' stores where the Mark and Trade Dress are presently used, are as follows:

581 S Collier Blvd, Marco Island, FL 34145

1000 Hwy 98 E, Destin, FL 32541

12208 Front Beach Road, Panama City Beach, FL  
32407

102 Old Highway 17 N, North Myrtle Beach, SC  
29582

1251 Miracle Strip Pkwy SE, Fort Walton Beach,  
FL 32548

1115 Hwy 98 E, Destin, FL 32541

34888 Emerald Coast Pkwy, Destin, FL 32541

3848 State Road A1A, St. Augustine Beach, FL  
32080

632 Scenic Gulf Dr, Miramar Beach, FL 32550

3 Via De Luna Drive, Pensacola Beach, FL 32583

2673 Parkway, Pigeon Forge, TN 37863

A copy of the License Agreement is annexed hereto as Exhibit A.

16. As part of the License Agreement, Defendants recognized and acknowledged Plaintiff's ownership of the Mark and Trade Dress. Paragraph 11 of the License Agreement (Exhibit A hereto) states as follows:

11. Licensor's Paramount Rights.

11.1. Licensee shall not contest Licensor's exclusive ownership of all rights including trademark and/or servicemark rights to the name "Wings" or copyright rights to any element of the Trade Dress. Licensee shall not at any time apply for a registration for the name "Wings" or any confusingly similar mark or for any other right in the name anywhere in the world nor shall Licensee file any opposition or in any other manner hinder any application for registration of the mark "Wings" that Licensor has, will or may make.

11.2. Licensee acknowledges and agrees that any and all rights and assets in the Mark accruing and/or arising from the use of the Mark "Wings" and/or its Trade Dress, shall belong to and be the property of Licensor free of any and all claims of Licensee except as stated herein.

17. The term of the License Agreement ended on October 31, 2006.



18. As part of the License Agreement (Exhibit A hereto at ¶ 5) Defendants agreed to cease using the Mark and the Trade Dress upon termination as follows:

5. Obligations and Responsibilities Upon Termination. Upon expiration or termination of the License granted hereunder, by operation of law or otherwise:
  - 5.1. All rights of Licensee to use the Mark granted hereunder (other than its rights under Paragraph 2 (c)), including the right to use the name “Wings” and the Licensors Trade Dress shall (subject to the four month removal period set forth in Paragraph 5.2) cease.
  - 5.2. Licensee, at its own cost and expense, shall within four months remove and/or cause to be removed, all materials, signs, promotions, bags, and any and all other items, bearing the Mark or any evidence of the Mark licensed hereunder. Thereafter, Licensee shall not, in any manner whatsoever, use the name Mark, any similar name or any name created by changing, adding or dropping one or more letters from the name “Wings”, (hereinafter, collectively, referred to as “Similar Name”) nor shall Licensee use Licensors Trade Dress in any form whatsoever.
  - 5.3. Licensee shall pay any and all outstanding proper statements for advertising within thirty (30) days of the termination or expiration thereof.
  - 5.4. In the event Licensee fails to promptly fulfill all of its obligations upon the termination or

expiration of this Agreement, Licensors shall have the right to pursue all legal remedies including, but not limited to, an action for trademark and/or servicemark infringement and/or for trade dress infringement, temporary restraining order, preliminary and/or permanent injunction. Licensee shall have the same rights with respect to Licensors' obligations (including without limitation, under Paragraph 2 (c)).

19. The four month period ended on February 28, 2007.

20. The License Agreement (Exhibit A hereto at ¶ 8) provides in pertinent part as follows:

8. Liquidated Damages. Licensee specifically acknowledges that the use of the Mark, the name "Wings" or any Similar Name and/or the use of Licensors' Trade Dress after the Termination Date will cause Licensors to suffer irreparable harm, damages for which would be extremely difficult to ascertain. Therefore, in addition to all other remedies, including but not limited to injunctive relief, in the event of Licensee's breach of this Agreement to which Licensors shall be entitled, Licensors shall be entitled to injunctive relief, and liquidated damages in the sum of \$200.00 per day (subject, however, to the four month period described in Paragraph 5.2) per business establishment utilizing the Mark and/or name "Wings" and/or any Similar Name or Trade Dress until cessation of any improper use, together with all costs and disbursements, including

reasonable attorneys' fees arising from Licensee's failure promptly to use the name "Wings" or any Similar Name or Trade Dress. The calculation of the liquidated damages of \$200.00 per day per business establishment shall be calculated without regard to the four month period described in Paragraph 5.2 if Licensee does not comply with the terms and conditions of the removal set forth herein within said four month period . . .

21. Despite the end of the term of the License Agreement and the four month "grace period" contained therein and in violation of the provisions thereof and in violation of the trademark laws of the United States and without Plaintiff's authorization, Defendants used and continue to use the Mark and the Trade Dress in connection with the ownership, operation and/or management of their retail stores, including, but not limited to, using the Mark "Wings" on labels, receipts, hang tags, merchandise, shopping bags and store displays; and including, but not limited to, using the Trade Dress for their retail stores.

22. The use by Defendants of the Mark and the Trade Dress in violation of Plaintiff's proprietary rights is likely to cause confusion or mistake or deception to the consuming public regarding any affiliation of Defendants' retail stores with Plaintiff.

23. Following the termination of the contractual relationship between Plaintiff and Defendants, Plaintiff has no control over the business practices of Defendants.

24. Plaintiff's good will in the Mark and the Trade Dress are of enormous value gained over nearly thirty and twenty, respectively, years of use and promotion.

25. Plaintiff has suffered and will continue to suffer irreparable harm should Defendants' infringing activities be allowed to continue to the detriment of Plaintiffs trade reputation and good will.

26. Plaintiffs have notified Defendants and Defendants' counsel in writing that Defendants' infringing activities must cease.

27. Despite notice the infringement by Defendants will continue unless enjoined by this Court.

28. Pursuant to the License Agreement, Plaintiff is entitled to injunctive relief.

## **COUNT I**

### **False Designation of Origin under § 43 (a) of the Lanham Act as to use of the Mark**

29. Plaintiff repeats and realleges the allegations contained in ¶¶ 1 through and including 28 as if fully set forth at length herein.

30. This Count is for false designation of origin and unfair competition pursuant to § 43 (a) of the Lanham Act, 15 U.S.C. § 1125 (a) with respect to Defendants' unauthorized use of the Mark.

31. As set forth herein above, Defendants have violated 15 U.S.C. § 1125 (a) by continuing to use in commerce in connection with their retail stores, a false designation of origin, namely, the Mark, in several states of the United States, without Plaintiff's authorization and with the intent of passing off and

confusing the public into believing that Defendants' retail stores are related to and affiliated with those of Plaintiff.

32. Defendants' use of the Mark constitutes a false designation of origin which is likely to deceive and has deceived the consuming public into believing that Defendants' retail establishments are related to and affiliated with those of Plaintiff.

33. Plaintiff has no control over the nature and quality of Defendants' retail business establishments. Any failure, neglect or default by Defendants in providing the services to the consuming public will reflect adversely on Plaintiff as the believed source of origin thereof, hampering efforts by Plaintiff to protect its reputation, resulting in loss of sales and loss of the considerable expenditure of time and assets to promote the Mark, all to the irreparable injury of Plaintiff.

34. In the License Agreement, Defendants expressly acknowledged the injury to Plaintiff complained of herein as described herein above.

35. The afore-described activities of Defendants constitute unfair competition.

36. Defendants willfully intended to trade on Plaintiff's reputation and to cause dilution of the Mark.

37. Defendants' false designation of origin will continue unless enjoined by this Court.

38. Plaintiff has no adequate remedy at law.

## COUNT II

**False Designation of Origin under § 43 (a) of the Lanham Act by virtue of use of Trade Dress**

39. Plaintiff repeats and realleges the allegations contained in ¶¶ 1 through and including 38 as if fully set forth at length herein.

40. This Count is for false designation of origin and unfair competition pursuant to § 43 (a) of the Lanham Act, 15 U.S.C. § 1125 (a) with respect to Defendants' unauthorized use of Plaintiff's distinctive Trade Dress.

41. As set forth herein above, Defendants have violated 15 U.S.C. § 1125 (a) by continuing to use in commerce in connection with their retail stores, a false designation of origin, namely the Trade Dress, in several states of the United States, without Plaintiff's authorization and with the intent of passing off and confusing the public into believing that Defendants' retail stores are related to and affiliated with those of Plaintiff.

42. Defendants' use of the Trade Dress constitutes a false designation of origin which is likely to deceive and has deceived the consuming public into believing that Defendants' retail stores are related to and affiliated with those of Plaintiff.

43. Plaintiff has no control over the nature and quality of Defendants' retail stores. Any failure, neglect or default by Defendants in providing the services to the consuming public will reflect adversely on Plaintiff as the believed source of origin thereof, hampering efforts by Plaintiff to protect its reputation, resulting in loss of sales and in loss of considerable expenditure in time and assets to promote Plaintiff's services, all to the irreparable injury of Plaintiff.

44. In the License Agreement, Defendants expressly acknowledged the injury to Plaintiff complained of herein as described herein above.

45. The afore-described activities of Defendants constitute unfair competition.

46. Defendants willfully intended to trade on Plaintiff's reputation and to cause dilution of the Mark by using Plaintiff's Trade Dress.

47. Defendants' false designation of origin will continue unless enjoined by this Court.

48. Plaintiff has no adequate remedy at law.

### **COUNT III**

#### **Injury to Reputation and Dilution of the Mark**

49. Plaintiff repeats and realleges the allegations contained in ¶¶ 1 through and including 48 as if fully set forth at length herein.

50. This Count arises under §§ 360-I (Injury to Business Reputation and Dilution) and 133 (Use of Name or Address with Intent to Deceive) of the New York General Business Law.

51. Defendants' use of the Mark in connection with their retail stores as afore-described has injured and likely will, unless enjoined by this Court, continue to cause injury to Plaintiff's business reputation and to dilute the distinctive nature of the Mark in violation of §§ 360-I and 133 of the New York General Business Law, all to Plaintiff's irreparable harm.

52. Plaintiff has no adequate remedy at law.

## **COUNT IV**

### **Common Law Service Mark Infringement**

53. Plaintiff repeats and realleges the allegations contained in ¶¶ 1 through and including 52 as if fully set forth at length herein.

54. Plaintiff owns and claims common law rights to the unregistered Mark.

55. As described herein above, the Mark has gained extensive public recognition and is associated with Plaintiff's retail stores.

56. Defendants' afore-described activities constitute unfair competition and an infringement of the Mark.

57. The use of the Mark by Defendants in connection with their retail stores is likely to cause and has caused confusion as to Defendants' source in that the consuming public will be likely to associate or has associated Defendants' business establishments with and as originating with Plaintiff, all to the detriment of Plaintiff.

58. Defendants' infringement will continue unless enjoined by this Court.

59. Plaintiff has no adequate remedy at law.

## **COUNT V**

### **Unfair Competition under Common Law**

60. Plaintiff repeats and realleges the allegations contained in ¶¶ 1 through and including 59 as if fully set forth at length herein.



61. This Count arises under the New York common law of unfair competition.

62. By committing the acts alleged herein, Defendants are guilty of unfair competition, deceptive advertising and unfair trade practices, in violation of the New York common law of unfair competition causing Plaintiff damages and loss of profits.

63. Defendants' unlawful conduct will continue to damage Plaintiff unless enjoined by the Court and Plaintiff has no adequate remedy at law.

## **COUNT VI**

### **Breach of Contract**

64. Plaintiff repeats and realleges the allegations contained in ¶¶ 1 through and including 63 as if fully set forth at length herein.

65. The License Agreement constitutes a valid and binding contract between Plaintiff and the Defendants.

66. Plaintiff duly fulfilled its obligations under the License Agreement.

67. In the License Agreement, Defendants acknowledge that their afore-described activities constitute infringement entitling Plaintiff to all remedies, including but not limited to, injunction and liquidated damage.

68. Defendants breached the terms of the License Agreement by failing to cease using the Mark and the Trade Dress pursuant to its terms.

69. Defendants failed and refused and still fail and refuse to cure the breach and cease using the

Mark and the Trade Dress despite due demand therefor.

70. The License Agreement provides for, in addition to all other remedies which may be available to Plaintiff herein for Defendants' breach, liquidated damages in the sum of \$200.00 per day per store calculated from November I, 2006 to the date the breach is cured. The damage is calculated to May 31, 2007 at \$466,400.00 continues to accrue.

71. Defendants failed and refused and still fail and refuse to pay the liquidated damage sum to Plaintiff despite due demand therefor.

72. The License Agreement provides for, in addition to all remedies which may be available to Plaintiff herein for Defendants' breach, an award of attorneys' fees to Plaintiff.

73. By reason of the foregoing, Plaintiff has been damaged in a sum which is not readily ascertainable at this time but which is at least \$466,400.00 and which shall be determined at trial.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays:

A. That the Court find that Defendants have willfully and intentionally infringed upon Plaintiff's Mark "Wings"; and

B. That the Court find that Defendants have willfully and intentionally infringed upon Plaintiff's Trade Dress; and

C. That Defendants, their officers, directors, employees, agents, and any person and/or entity claiming by, under and/or through Defendants, be

enjoined from infringing upon Plaintiff's Mark "Wings" or any mark confusingly similar thereto by using and adopting the Mark "Wings" in connection with Defendants' retail stores; and

D. That Defendants, their officers, directors, employees, agents, and any person and/or entity claiming by, under and/or through Defendants, be enjoined from infringing upon Plaintiff's Mark "Wings" or any mark confusingly similar thereto by using and adopting Plaintiff's Trade Dress in connection with Defendants' retail stores; and

E. That Defendants be ordered to surrender for destruction all products, labels, brochures, advertisements, hang tags, shopping bags, paper and any other materials constituting a false designation of origin of Defendants' business; and

F. That Defendants be required to pay to Plaintiff the Defendants' profits and the actual damages suffered by Plaintiff as a result of Defendants' acts; and

G. That Plaintiff have judgment against Defendants and against each of them in an amount based upon the liquidated damages provision of the License Agreement at the rate of \$200.00 per day per store calculated from November 1, 2006; and

H. That Defendants be compelled to pay Plaintiff's attorneys' fees, together with the costs and disbursements of this action; and

I. That the Court award to Plaintiff interest, including pre-judgment interest, on the foregoing sums; and

J. That the Court grant such other and further relief as may be just and proper under the circumstances.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a jury trial on all issues.

Dated: Atlantic Beach, New York  
May 23, 2007

Respectfully submitted,

/s/ Bennett D. Krasner  
Bennett D. Krasner, Esq. (bk-8375)  
Attorney for Plaintiff  
1233 Beech Street #49  
Atlantic Beach, New York 11509  
Tel. (516) 889-9353  
*Counsel for Plaintiff*

**THIRD AMENDED DISCLOSURE STATEMENT  
FOR DEBTOR'S THIRD AMENDED CHAPTER  
11 PLAN OF REORGANIZATION  
(JANUARY 14, 2022)**

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**THIS IS NOT A SOLICITATION OF  
ACCEPTANCE OR REJECTION OF THE PLAN.  
ACCEPTANCES OR REJECTIONS MAY NOT BE  
SOLICITED UNTIL A DISCLOSURE  
STATEMENT HAS BEEN APPROVED BY THE  
COURT. THIS DISCLOSURE STATEMENT IS  
BEING SUBMITTED FOR APPROVAL BUT HAS  
NOT BEEN APPROVED BY THE COURT.**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: L&L WINGS, INC.,

*Debtor.*

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Case No. 21-10795(DSJ)

Chapter 11

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**I. Introduction**

L&L Wings Inc. d/b/a Wings (the “Debtor”)<sup>1</sup> submits this Third Amended Disclosure Statement (the “Disclosure Statement”) pursuant to Section

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<sup>1</sup> Capitalized terms not defined herein have the same meanings ascribed to them in the Plan.

1125(b) of Title 11, United States Code, 11 U.S.C. §§ et seq. (the “Bankruptcy Code”) and Rule 3017 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), in connection with its Third Amended Plan of Reorganization dated January 14, 2022 (the “Plan”) to all known holders of Claims against or Interests in the Debtor in order to adequately disclose information deemed to be material, important and necessary to make a reasonably informed judgment about the Plan, including, who is entitled to vote to accept or reject the Plan. A full copy of the Plan is attached to this Disclosure Statement as Exhibit “A”. *Your rights may be affected. You should read the Plan and this Disclosure Statement carefully and discuss them with your attorney. If you do not have an attorney, you may wish to consult one.*

Under Section 1126(b) of the Bankruptcy Code, only Classes of Allowed Claims that are “impaired” under the Plan, as defined by Section 1124 of the Bankruptcy Code, are entitled to vote on the Plan. Generally, a Class is impaired if its legal, contractual, or equitable rights are altered or reduced under the Plan. Under the Plan, Classes 1, 2, 3, 4, 6 and 8 are Unimpaired and deemed to accept the Plan. Class 5 is Impaired and is entitled to vote on the Plan. Class 7 is deemed to reject the Plan but supports the Plan. To be accepted by an Impaired Class, the Plan must be accepted by more than one half in number and two-thirds in dollar amount of the Allowed non-Insider Claims of such Class that have timely and properly voted in such Class.

### **A. Purpose of This Document**

This Disclosure Statement describes:

- The Debtor and significant events during the bankruptcy case,
- How the Plan proposes to treat claims of the type you hold (*i.e.*, what you will receive on your claim if the plan is confirmed and your claim is “allowed” within the meaning of the Plan),
- Who can vote on or object to the Plan,
- What factors the Bankruptcy Court (the “Court”) will consider when deciding whether to confirm the Plan,
- Why the Debtor believes the Plan is feasible, and how the treatment of your claim under the Plan compares to what you would receive on your claim in liquidation, and
- The effect of confirmation of the Plan.

Be sure to read the Plan as well as the Disclosure Statement. This Disclosure Statement describes the Plan, but it is the Plan itself that will, if confirmed, establish your rights.

## **B. Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing**

The Court has not yet confirmed the Plan described in this Disclosure Statement. This section describes the procedures pursuant to which the Plan will or will not be confirmed.

### **1. Time and Place of the Hearing to Confirm the Plan**

The hearing at which the Court will determine whether to confirm the Plan will take place on March

1, 2022 at 10:00 a.m. before the Honorable David S. Jones, U.S.

Bankruptcy Judge, at the United States Bankruptcy Court, Southern District of New York, One Bowling Green, Courtroom 501, New York, New York 10004.

## **2. Deadline for Voting to Accept or Reject the Plan**

If you are entitled to vote to accept or reject the plan, vote on the enclosed ballot, and return the ballot to Davidoff Hutcher & Citron LLP, Counsel for the Debtor, 605 Third Avenue, New York, New York 10158, Attn: Robert L. Rattet, Esq., (914) 381-7400 or via email to [rlr@dhclegal.com](mailto:rlr@dhclegal.com). See Section IV.A below for a discussion of voting eligibility requirements.

Your ballot must be received by February 22, 2022 at 4:00 p.m. (Eastern Time) or it will not be counted (the “Voting Deadline”).

## **3. Deadline for Objecting to the Confirmation of the Plan**

Objections to the confirmation of the Plan must be filed with the Court and served upon: (a) Davidoff Hutcher & Citron LLP, Counsel for the Debtor, 605 Third Avenue, New York, New York 10158, Attn: Robert L. Rattet, Esq., (914) 381-7400 or via email to [rlr@dhclegal.com](mailto:rlr@dhclegal.com); (b) Otterbourg P.C., Counsel to the Creditors Committee, 230 Park Avenue, New York, New York 10169, Attn: Melanie L. Cyganowski, Esq., (212) 661-9100 or via email to [mcyganowski@otterbourg.com](mailto:mcyganowski@otterbourg.com); and Office of the United States Trustee, 201 Varick Street, New York, New York 10014, Attn:



Richard Morrissey, Esq, (212) 510-0500 or via email to richard.morrissey@usdoj.gov. by February 22, 2022.

#### **4. Identity of Person to Contact for More Information**

If you want additional information about the Plan, you should contact Davidoff Hutcher & Citron LLP, Counsel for the Debtor, 605 Third Avenue, New York, New York 10158, Attn: Robert L. Rattet, Esq., (914) 381-7400 or via email to rlr@dhclegal.com.

#### **5. Summary of Treatment of Creditors Under the Plan**

The following is a summary of Claims and Interests and their proposed treatment under the Plan. Creditors should carefully review the Plan for the specific terms of treatment.

##### **Class**

—

##### **Type of Claim**

Professionals Claims

##### **Est. Amount**

\$1,000,000

##### **Treatment**

Paid in full on Effective Date or Allowance

##### **Voting**

N/A

**Class**

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**Type of Claim**

20 Day Vendor Claims

**Est. Amount**

\$137,108

**Treatment**

Paid in full on Effective Date

**Voting**

N/A

**Class**

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**Type of Claim**

Priority Tax Claims

**Est. Amount**

\$360,000

**Treatment**

Paid in full over 5 years from Petition Date

**Voting**

N/A

**Class**

1

**Type of Claim**

Non-Tax Priority Claims

**Est. Amount**

-0-

**Treatment**

Paid in full on Effective Date

**Voting**

No/Accept

**Class**

2

**Type of Claim**

Other Secured Claims

**Est. Amount**

\$300,000

**Treatment**

Continued payments under agreements

**Voting**

No/Accept

**Class**

3

**Type of Claim**

TD Bank-Secured Claims

**Est. Amount**

\$10,621,026

**Treatment**

No payments required. Debtor to reaffirm obligations under existing agreements

**Voting**

No/Accept

**Class**

4

**Type of Claim**

Convenience Claims (Claims Under \$10,000)

**Est. Amount**

\$160,000

**Treatment**

Paid in full on Effective Date

**Voting**

No/Accept

**Class**

5

**Type of Claim**

General Unsecured Claims Incl. The BMI Claim

**Est. Amount**

\$25,889,988

**Treatment**

50% on Effective Date

**Voting**

Yes

**Class**

6

**Type of Claim**

Bank Guarantees

**Est. Amount**

\$9,341,132

**Treatment**

No payments required. Debtor to Reaffirm obligations under existing agreements

**Voting**

No/Accept

**Class**

7

**Type of Claim**

Insider Claims

**Est. Amount**

\$4,224,660

**Treatment**

Waived

**Voting**

No/Reject But Supports

**Class**

8

**Type of Claim**

Interests

**Est. Amount**

N/A

**Treatment**

Retain Interests

## **Voting**

No/Accept

## **Disclaimer**

*[The Court has approved this Disclosure Statement as containing adequate information to enable parties affected by the Plan to make an informed judgment about its terms. The Court has not yet determined whether the Plan meets the legal requirements for confirmation, and the fact that the Court has approved this Disclosure Statement does not constitute an endorsement of the Plan by the Court, or a recommendation that it be accepted.]*

## **II. Background**

### **A. Description of the Debtor and Events Leading to Bankruptcy**

The Debtor was founded in 1978 by Meir Levy and his brother Shaul Levy, who are each 50% shareholders of the Debtor, for the purpose of developing retail stores focusing on beachwear and beach sundry items. Meir and Shaul are former directors and officers of the Debtor but are currently only shareholders. Bernard A. Katz (the “Independent Director”) was appointed as sole and independent director of the Debtor in March 2021. Ariel Levy is the current CEO and sole officer of the Debtor.

The Debtor is a corporation organized under the laws of South Carolina but manages its operations at 666 Broadway, 8th Floor, New York, New York 10012.

The Debtor operates under the tradename, trademark, and service mark WINGS. When it started its business – beach wear retail stores offering beach

wear and sundry items-in 1978, it started under the WINGS name. Subsequently in 1993, the Debtor entered into a trademark license agreement with Shepard Morrow for use of the mark WINGS in conjunction with signs, advertising, promotional materials, etc. in connection with Debtor's retail store services (the "Morrow License"). Following the first \$10,000 royalty payment, Debtor made no additional payments to Morrow and Morrow did not undertake his responsibility under the license agreement, and trademark law, to monitor the use of the WINGS mark and the quality of services provided thereunder from at least as early as September 1994. Therefore, Debtor maintains this license agreement was abandoned, expired and/or was terminated by its terms, and additionally, such termination/expiration of the license agreement permitted the Debtor to acquire federally registered trademarks without engaging in fraudulent, deceptive, or unfair activities or representations. Upon such information and belief, the Debtor applied to register the mark WINGS with the United States Patent and Trademark Office ("USPTO"). The Debtor owned two WINGS marks registered on the Principal Register at the USPTO: (1) Reg. No. 3,458,144 for retail apparel, clothing, and discount store services; and (2) Reg. No. 4,193,881 for beach towels, men's, women's, and children's clothing, and retail store services. The Debtor continues to use the mark WINGS to this day in conjunction with the aforementioned goods and services.

The Debtor currently operates 26 beach wear retail stores under the WINGS mark throughout North Carolina, South Carolina, Florida, Texas, and California and has achieved annual sales in excess of

\$30 million over the past several years leading up to 2021. The Debtor employs in excess of 250 people.

The Debtor leases its stores from a combination of unaffiliated, third party landlords and affiliates owned by entities or partnerships in turn owned by Meir and Shaul Levy (the “Levy Parties”).

In 2005, Debtor entered into a trademark license agreement with a former employee and his company, Beach Mart, Inc. (“BMI”) that permitted BMI’s operation of similar beach wear stores under the trade name “Super Wings” or “Big Wings”. Pursuant to the license agreement, BMI opened beach wear stores under the trade name Super Wings in the Outer Banks of North Carolina. Sometime in or around 2011, a dispute arose between the Debtor and BMI regarding BMI’s use of the trade name Super Wings.

In 2011, BMI commenced an action in the United States District Court for the Eastern District of North Carolina against the Debtor seeking various causes of action and damages and claiming various breaches of the underlying license agreement between the parties.

On November 16, 2020, the jury rendered its verdict in the District Court Action in favor of BMI and against the Debtor, awarding damages to BMI against the Debtor in the amount of \$4,184,135.

On March 25, 2021, the Court issued a decision and order with judgment against the Debtor in the aggregate amount of \$15,749,313.41, which judgment included \$3,196,908.41 of pre-judgment interest and trebled the verdict award to \$12,552,405 pursuant to the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 *et seq.* (“NCUDTPA”) leaving undecided BMI’s additional



claims for attorneys' fees and costs under said statute. The judgment set forth that the license agreement between the Debtor and Morrow did not terminate and ordered Debtor's trademark registration to be canceled.

Due to the substantially increased size of the judgment in comparison to the verdict, the Debtor, which vigorously disputed the verdict and judgment and recently appealed the judgment, did not have the financial wherewithal to bond an appeal.

In addition, if the judgment were enforced and executed upon, it would have led to the likely cessation of the Debtor's business and forced liquidation of its assets.

The Debtor therefore filed the Chapter 11 Case to permit it to prosecute an appeal and/or resolve the judgment, restructure its other debt, seek out new capital or other strategic transactions and liquidate the claims of BMI so that a Plan of Reorganization can be filed within a reasonable amount of time.

## **B. Significant Events During the Bankruptcy Case**

### **1. Commencement of the Chapter 11 Case**

On April 24, 2021 (the "Petition Date"), the Debtor filed a voluntary petition for reorganization in Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York and continued in possession of its property and management of its affairs as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy

Code. (ECF. No. 1). The case was originally assigned to the Hon. Shelley C. Chapman, United States Bankruptcy Judge, for administration under the Bankruptcy Code. The case was then reassigned to the Hon. David S. Jones by order of the court dated July 6, 2021. (ECF. No. 107).

## **2. Employment of the Debtor's Professionals**

At the outset of this case the Debtor retained Davidoff Hutcher & Citron, LLP as its Bankruptcy counsel to assist in the successful administration of the Debtor's bankruptcy case. The retention of Davidoff Hutcher & Citron LLP was approved by an Order of the Bankruptcy Court dated May 19, 2021, effective as of the Petition Date (ECF No. 72). Separately, by order of the Bankruptcy Court dated May 19, 2021, the retention of Burr & Forman LLP as Special Litigation Counsel to the Debtor was approved, effective as of the Petition Date (ECF No. 73). Additionally, by order of the Bankruptcy Court dated June 21, 2021, the retention of CFGI as financial advisors to the Debtor was approved as of the Petition Date (ECF No. 102). On August 4, 2021, by order of the Bankruptcy Court, the retention of A&G Realty Partners, LLC as real estate consultant and advisor to the Debtor was approved. (ECF No. 123). On October 28, 2021, by order of the Court the Debtor's application to employ Lowenstein Sandler LLP as special tax counsel to the Debtor was approved (ECF No. 198). On December 9, 2021, the Debtor filed an application to employ and retain SSG Advisors, LLC as investment bankers to the Debtor to perform a market valuation of the Debtor in connection with the requirement to satisfy the "new value" corollary to the absolute priority rule

required to confirm the Plan in the event that any Class of creditors votes to reject the Plan. *See* discussion, *infra*.

On May 19, 2021, the Bankruptcy Court entered an Order Establishing Procedures For Monthly Compensation of the Professionals (the “Compensation Order”) which permitted the Professionals to receive monthly interim compensation equal to 80% of requested fees and 100% of expenses. The Debtor has been making payments to the Professionals throughout the Chapter 11 case in accordance with such order.

### **3. Appointment of the Official Committee of Unsecured Creditors**

On May 7, 2021, the United States Trustee for the Southern District of New York appointed an Official Committee of Unsecured Creditors (the “Creditors’ Committee”). The Creditors’ Committee currently consists of: (i) BMI, (ii) Rosenthal & Rosenthal, Inc., (iii) Island World Apparel, (iv) White by Mazuoz, and (v) Ocean Drive. (ECF No. 48). By order of the Bankruptcy Court dated June 21, 2021, the Creditors’ Committee retained Otterbourg P.C. as its attorneys, Rock Creek Advisors, LLC as its Financial Advisor, and Thompson Hine LLP as its Conflicts Counsel. (ECF No. 96, 97, and 98).

### **4. Filing of Schedules of Assets and Liabilities and Statement of Financial Affairs**

On May 24, 2021, the Debtor filed its Schedules of Assets and Liabilities, together with its Statement of Financial Affairs (collectively, the “Schedules”, ECF

No. 76). The Debtor's Schedules are available on the Bankruptcy Court's website: [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov).

## **5. Claims Bar Dates**

Pursuant to an order of the Bankruptcy Court dated May 25, 2021 ("Bar Date Order"), July 19, 2021 was established as the last date by which non-governmental creditors (other than former licensees of the debtor) may file proofs of claim in the Chapter 11 Case asserting a pre-petition general unsecured claim or a claim under Section 503(b)(9) of the Bankruptcy Code, except as otherwise provided in the Bar Date Order (ECF No. 78). On June 10, 2021, a notice of entry of the order was mailed to all creditors listed on the Debtor's creditor matrix filed with the Bankruptcy Court (ECF No. 92).

Pursuant to an order of the Bankruptcy Court dated October 8, 2021 ("Supplemental Bar Date Order"), November 30, 2021 was established as the last date by which former licensees of the Debtor may file proofs of claim in the Chapter 11 Case (ECF No. 157). On October 8, 2021, a notice of entry of the order was mailed to all creditors listed on the Debtor's creditor matrix filed with the Bankruptcy Court (ECF No. 158).

## **6. 341A Meeting and Case Status Conferences**

On May 19, 2021, the Debtor attended its Initial Debtor Interview, and on May 26, 2021 the Debtor attended Section 341(a) Meeting of Creditors. The Debtor also appeared at the initial case conference in this Bankruptcy proceeding and has appeared at all

hearings and continued case conferences as scheduled by the Bankruptcy Court.

### **7. Post-Petition Operations**

Subsequent to the Debtor's Chapter 11 filing, the Debtor filed several motions to continue its post-petition operations. On April 24, 2021, The Debtor filed its Motion To Pay Pre-Petition Wage Claims, Etc. (the "Critical Labor Motion"), and its Motion To Compel Utilities To Continue to Provide Service and Provide Adequate Protection Therefor (the "Utilities Motion") (ECF Nos. 4 and 6), which were then approved by order of the court on June 21, 2021. (ECF No. 99 and 100). On April 30, 2021, The Debtor filed its Motion to Continue Insurance Practices (the "Insurance Motion") (ECF No. 34), which was approved by order of the Bankruptcy Court on June 21, 2021. (ECF No. 101).

### **8. Debtor's Authority to Use Cash Collateral**

Debtor filed a motion and has obtained, throughout the course of the Chapter 11 Case, continued interim authority to use cash collateral of TD Bank, N.A. ("TD Bank"), the Debtor's pre-petition lender and first priority secured creditor by virtue of a combination of (a) providing the Debtor with a historical line of credit facility and (b) the Debtor guaranteeing 4 separate secured loans made by TD Bank to entities owned by the Levy Parties.<sup>2</sup>

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<sup>2</sup> In August, 2021, one of the 4 guarantees was cancelled by virtue of the Levy Parties' refinancing of one of the subject properties.

## **9. Extensions of Exclusive Periods and Other Material Chapter 11 Deadlines**

On August 3, 2021, the Bankruptcy Court entered orders (a) extending the Debtor's time to assume or reject its nonresidential unexpired leases to November 21, 2021 (ECF Doc. 122) and (b) extending the Debtor's exclusive period in which to file a plan to December 20, 2021 and to solicit acceptances therefor until February 18, 2022 (ECF Doc. 123).

On November 1, 2021, the Court entered a Stipulation and Order extending the Debtor's time in which to assume or reject its unexpired non-residential leases with the Levy Parties through confirmation of the Plan (ECF Doc. 189).

On November 16, 2021, the Court entered an order authorizing the Debtor to assume its unexpired non-residential leases with all of the Debtor's landlords other than the Levy Parties.

## **10. Litigation with BMI, the BMI Claim, the BMI Adversary Proceeding, the STN Motions and the BMI Settlement Agreement**

Sometime in or around 2011, a dispute regarding use of the trade name Super Wings arose between the Debtor and a former employee and his company, BMI, to whom the Debtor, in 2005, had entered into a license agreement permitting the operations of similar beachwear stores under the adapted name "Super Wings" or "Big Wings". In 2011, BMI commenced an action in the United States District Court for the Eastern District of North Carolina (the "District Court") against the Debtor encaptioned *Beach Mart*,

*Inc. v. L&L Wings, Inc.*, Index No. 2:11-CV-44-FL (the “District Court Action”) seeking various causes of action and damages and claiming various breaches of the underlying license agreement between the parties.

On November 16, 2020, the jury rendered its verdict (the “Verdict”) in the District Court Action in favor of the Defendant and against the Debtor, awarding damages to the Defendant against the Debtor of \$4,184,135 for each cause of action asserted by the Defendant. Further, the jury made findings that the Morrow License did not terminate and the Debtor’s own registrations of the WINGS mark were ordered to be cancelled. The Debtor disputes the Verdict and BMI requested, inter alia, the District Court to enter judgment including, inter alia, treble damages of the Verdict pursuant to the North Carolina Unfair and Deceptive Trade Practices Act.

On March 25, 2021, the Court issued a decision and order with judgment (the “Judgment”) against the Debtor in the approximate amount of \$15,868,068.49 comprised as follows: (a) actual damages in the amount of \$4,184,135.00 (“Actual Damage”); (b) trebling of Actual Damages pursuant to the Court’s finding of unfair and deceptive conduct, as prohibited under N.C. Gen. Statute § 75-1.1, made applicable pursuant to N.C. Gen Statute section 75-16 by means of adding \$8,368,270.00 (the “Treble Damages Adjustment”); (c) attorneys’ fees pursuant to October 3, 2014 and March 29, 2018 orders in the amount of \$107,436.25; (d) prejudgment interest in the amount of \$3,196,908.41, calculated at 8% of Actual Damages from September 9, 2011; and (e) costs in amount of \$11,318.83 for a total Judgment award of \$15,868,068.49, subject to increase upon determination of BMI’s request for

approximately \$5,640,674.59 in legal fees and costs under NCUDTPA (the “Claimed Legal Fees”)(b) through (e), together with the Claimed Legal Fees, collectively, the “Punitive Damage Claim”).

The Debtor wholly disputed the Verdict, the Judgment and all of the findings of the District Court. On May 4, 2021, the Bankruptcy Court approved a stipulation between the Debtor and BMI to permit the continuation of the District Court Action and any appeals taken thereon. Both the Debtor and BMI subsequently filed post-Judgment motions. Recently, the District Court denied the Debtor’s motion for reargument and/or a new trial, and the Debtor is in the process of appealing the Judgment to the United States Court of Appeals for the Fourth Circuit seeking to overturn the entire award to BMI. The Judgment entered is not a final judgment, is currently stayed from enforcement, and, absent the settlement reached by the parties, could have been amended, modified, reconsidered, or set aside as a result of the pending appeals. It is further possible that the District Court could have awarded or declined to award BMI significant legal fees to be added to the Judgment based on BMI’s motions for attorneys’ fees and costs.

On July 16, 2021, BMI filed a proof of claim in the Chapter 11 Case in the minimum amount of \$21,389,988 (the “BMI Claim”). The BMI Claim includes the Claimed Legal Fees in the amount of \$5,640,674.59.

On October 6, 2021, the Debtor commenced an adversary proceeding against BMI under Adv. Pro. No. 21-01191 (the “BMI Adversary Proceeding”) seeking, inter alia, in the alternative, the disallowance or equitable subordination of the Punitive Damage Claim portion of the BMI Claim.



On November 5, 2021, BMI filed a motion to dismiss the BMI Adversary Proceeding. The matter is currently sub judice before the Court, subject to dismissal of the BMI Adversary Proceeding under the BMI Settlement Agreement (described below).

On November 19, 2021, BMI filed two (2) motions seeking standing to prosecute various actions against TD Bank, the Guaranteed Lenders, and the Levy Parties on behalf of the Debtor (the “STN Motions”). The Debtor, the Levy Parties and the Committee opposed the motions.

*BMI Settlement Agreement.* On December 21, 2021, the Debtor and BMI entered into the BMI Settlement Agreement, which fully resolves all Claims, issues and disputes between the Debtor and BMI, including but not limited to (a) the Chapter 11 Case, (b) the Plan, (c) the District Court Action and the pending appeals therefrom, (d) the BMI Claim, (e) the BMI Adversary Proceeding and (f) the STN Motions, respectively. The BMI Settlement Agreement is incorporated into and made part of the Plan.

The salient terms of the BMI Settlement Agreement are as follows:

1. Debtor shall pay BMI upon Effective Date of the Plan the amount of \$10,694,994 (which equals 50% of the BMI Claim in the amount of \$21,389,988).
2. BMI grants Debtor a four year trademark license to use the WINGS mark in Debtor’s existing Wings stores on the following summary terms:

- a. Royalty of \$750,000 due at the beginning of each year. License commencement date: 1/1/22. First year payment not due until the Effective Date of the Plan.
- b. Shaul and Meir Levy sign guarantees of all royalty obligations.
- c. There is a two-year minimum for royalty payments. In any year after the second year, Debtor may terminate the license in its sole discretion provided that it (a) provides 90 days' notice of the termination prior to the beginning of the year of termination, and (b) completely cease all uses of WINGS before the start of the year of termination.
- d. The parties will execute the trademark license agreement attached as Exhibit A to the Settlement Agreement.
- e. The license shall only be valid for so long as Shaul and Meir Levy (or their immediate family members) are the owners of the Debtor. If Debtor is sold to any third party that is not an immediate family member, then the license and all of Debtor's uses of WINGS shall cease.
- f. Once the license agreement between Debtor and BMI takes effect, then the Morrow License shall be terminated.
- g. Scope of license shall permit Debtor to use the WINGS trademarks in conjunction with the same goods and services it currently uses the mark in the same

manner and in the same locations as it is currently operating, including but not limited to retail store services, apparel, towels, and other beachwear and sundry items.

- h. If Debtor uses the WINGS trademark outside of the scope of the license, then the parties' stipulate to the issuance of a temporary, preliminary, and permanent injunction to stop such use.
- 3. The parties acknowledge and agree as follows:
  - a. BMI is the owner of the trademark WINGS and SUPER WINGS for use in conjunction with beachwear, beach accessories, and retail store services, including all goodwill accruing thereto,
  - b. Debtor will not in any way dispute, oppose, or challenge BMI's status as the owner of the WINGS or SUPER WINGS trademarks.
  - c. Debtor acknowledges that it has no continuing ownership interest in or to the trademarks WINGS or SUPER WINGS.
  - d. Debtor acknowledges that during the terms of the license its use of WINGS in its retail stores is as the licensee of BMI.
- 4. Debtor agrees to fully cooperate in transferring the ownership of all of its federal WINGS trademark registrations to BMI and will agree to sign any truthful or legally valid documentation requested by BMI.

5. The key terms of the settlement will be set forth in a stipulated judgment filed in the District Court litigation. Once the District Court signs the stipulated judgment, all District Court and appeal proceedings will be dismissed with prejudice. However, the District Court will retain jurisdiction over the matter if necessary for the purposes of future enforcement of the consent judgment or the BMI Settlement Agreement.
6. BMI represents it has no control or influence over other claimants, and has no say or role in their claims against Debtor. BMI will not cooperate or assist any other claimants other than as may be directed by Court order. Nothing in the BMI Settlement Agreement shall preclude Womble Bond's continuing representation of other claimants in the Chapter 11 Case.
7. For term of license plus 2 years following termination of the license agreement, BMI will agree to not open or license to a third party a WINGS retail store within ten (10) miles of any existing Debtor store. Debtor will in turn agree to similar noncompete in favor of BMI.
8. BMI will not object to any application by Debtor for replacement mark(s) provided, the proposed replacement mark does not contain the words "Wing", "Wings", "Super", rhymes with "Wings" or is confusingly similar to "Wings" or "Super Wings".

9. Parties to exchange mutual releases which shall include all of the Debtor's officers, shareholders, independent director, employees and all affiliates and entities related to Meir or Shaul Levy in any way, including all entities owned or controlled by any Levy family members, whether legal or via marriage, together with their shareholders, officers, managers, affiliates, employees and similar parties of BMI.
10. BMI will covenant not sue any of (1) the lenders identified in the STN Motions, (2) any other party identified in the STN Motions, or (3) any third party based upon claims or causes of action released by the BMI Settlement Agreement.
11. BMI will withdraw the STN Motions with prejudice.
12. L&L will dismiss the BMI Adversary Proceeding with prejudice.
13. BMI to consent to approval of this Third Amended Disclosure Statement that is consistent with the BMI Settlement Agreement and withdraw all pending objections.
14. All pending discovery on hold. Moratorium from filing any new adversarial or contested motions or pleadings.
15. BMI to return all discovery produced by Debtor or Levy Parties without duplication.
16. BMI to vote the BMI Claim in favor of the Plan incorporating the BMI Settlement Agreement.

17. BMI Settlement Agreement is subject to approval by the Bankruptcy Court pursuant to Bankruptcy Rule 9019.

[On January 20, 2022, the Bankruptcy Court approved the BMI Settlement Agreement. As a result of the BMI Settlement Agreement, and subject to acceptance of the Plan by the Class 5 Unsecured Creditors, the Debtor believes the Plan can be confirmed under Section 1129(a) of the Bankruptcy Code without the need to seek “cram down” of the Plan on any Impaired Classes under Section 1129(b) of the Bankruptcy Code or have the Plan contested or objected to by any creditors].

### **11. Plan Negotiations with the Creditors’ Committee**

The Debtor was also successful in negotiating a consensual plan with the Creditors’ Committee, which negotiations resulted in the Plan and the Creditors’ Committee’s support thereof.

## **III. The Plan of Reorganization**

The following is a brief summary of the Plan. The Plan represents a proposed legally binding agreement and creditors are urged to consult with their counsel in order to fully understand the Plan and to make an intelligent judgment concerning it. The Plan governs over any discrepancy in this summary.

As required by the Bankruptcy Code, the Plan places claims in various classes and describes the treatment each class will receive. The Plan also states whether each class of claims is impaired or unimpaired.

If the Plan is confirmed, your recovery will be limited to the amount provided by the Plan.

### **A. Treatment of Unclassified Claims Under the Plan**

Certain types of claims are automatically entitled to specific treatment under the Bankruptcy Code. They are not considered impaired, and holders of such claims do not vote on the Plan. They may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Bankruptcy Code. As such, the Debtor has not placed the following claims in any class:

#### **1. Allowed Administrative Claims other than Fee Claims**

Administrative expenses are costs or expenses of administration in connection with the Chapter 11 Case, including, without limitation, any actual, necessary costs, and expenses of preserving the Debtor's estate, and all fees and charges assessed against the Debtor's estate pursuant to 28 U.S.C. Section 1930. The term Administrative Claim does not include Fee Claims and statutory fees, which are treated separately in this Plan. These Allowed Claims shall be paid by the Debtor in Cash in the ordinary course of business on normal and customary payment terms as exist between the Debtor and the claimant.

#### **2. Allowed Professionals Fee Claims**

These are Claims by any Professionals for compensation for legal and other services and reimbursement of expenses allowed or awarded under Bankruptcy Code sections 327, 328, 330(a), 331, 503(b)

and/or 1103 to the extent not previously paid in accordance with the Compensation Order. The Debtor has six (6) Professionals whose employment has been approved by the Bankruptcy Court: (i) the Debtor's current bankruptcy counsel, Davidoff Hutcher & Citron LLP ("DHC"); (ii) WebsterRogers as tax accountants to the Debtor; (iii) CFGI as financial advisors to the Debtor; (iv) Burr & Forman LLP as Special Litigation Counsel to the Debtor; (v) A&G Realty Partners, LLC as real estate consultants to the Debtor and (vi) Lowenstein Sandler LLP as special tax counsel to the Debtor. The Creditors' Committee has retained Otterbourg P.C. as its bankruptcy counsel, Rock Creek Advisors, LLC as its Financial Advisor, and Thompson Hine LLP as its Special Counsel. The Allowed Administrative Claims of the Professionals shall be paid in full, in Cash, upon the later of (i) allowance by the Court pursuant to 11 U.S.C. § 330, or (ii) the Effective Date. The Debtor estimates that the total net unpaid fee claims on the Effective Date will total approximately \$1,000,000.00, representing net unpaid professional fees incurred through the Effective Date. This amount may be greater or lower and the payment of all Professionals Fee Claims are subject to the approval of the Bankruptcy Court.

### **3. Statutory Fees**

These are Claims for fees for which the Debtor is obligated pursuant to Section 1930(a)(6) of title 28 of the United States Code, together with interest, if any, pursuant to Section 3717 of title 31 of the United States Code. The Debtor shall pay outstanding Statutory Fees in full, in Cash, on or as soon after the Effective Date as practicable. Such fees shall be paid in full, in Cash, in such amount as incurred in the ordinary



course of business by the Debtor. Thereafter, the Debtor shall continue to pay Statutory Fees due and payable until the earlier of conversion of the Chapter 11 Case to a case under Chapter 7 of the Code, dismissal or the entry of a final decree closing the Chapter 11 Case. The Debtor is current, and these fees total \$0.

#### **4. Allowed Priority Tax Claims**

Priority tax claims are unsecured income, employment, sales, and other taxes described by § 507(a)(8) of the Bankruptcy Code. The Debtor shall pay all Allowed Priority Tax claims in full, in Cash, in equal quarterly installments, commencing within 90 days after Effective Date over a period not to exceed five (5) years from the Petition Date. These Claims are filed in the aggregate approximate amount of \$360,000.

#### **5. Allowed 20 Day Claims**

These are Claims timely filed on or before the Bar Date for goods and services received by the Debtor within 20 days of the Petition Date. The 20 Day Vendor Claims are entitled to Administrative Expenses priority under section 503(b)(9) of the Bankruptcy Code and will be paid in full, in Cash, on or shortly after the Effective Date. There are approximately 5 of such Allowed 20 Day Vendor Claims filed pursuant to the Bar Date Order that total approximately \$137,108.

### **B. Classes of Claims**

The following are the classes set forth in the Plan, and the proposed treatment that they will receive under the Plan:

**1. Class 1: Allowed Non-Tax Priority Claims**

Class 1 Claims consist of Claims entitled to priority under Section 507(4)(2)(7) of the Bankruptcy Code. Holders of Allowed Class 1 Claims, if any, shall each receive 100% of their Allowed Class 1 Claims in full on the Effective Date. The Debtor believes there are no such Claims. The Class 1 Claims are unimpaired and deemed to accept the Plan.

**2. Class 2: Allowed General Secured Claims**

Class 2 Claims consist of the holders of Allowed Secured Claims against the Debtor for various financed equipment and vehicles owned by the Debtor. Class 2 Claims total approximately \$300,000. Holders of Class 2 Claims will retain their respective liens on their specifically financed collateral and shall continue to receive payments in accordance with their respective finance agreements. Class 2 Claims are unimpaired and are deemed to accept the Plan.

**3. Class 3: Allowed Secured Claims of T.D. Bank, N.A.**

Class 3 Claims consist of the Allowed Secured Claims of T.D. Bank pursuant to the pre-petition loan agreements and guarantees of the Debtor. The holder of Allowed Class 3 Claims shall not receive a distribution under the Plan but continue to retain its liens against the Debtor's assets to secure the Debtor's obligations under (a) its 3 existing guarantees executed in favor of the Class 3 creditor (collectively, the "TD Guarantees") and (b) any post-Effective date loan agreements. The Debtor hereby reaffirms its obligations under the TD

Guaranties. Nothing contained in the Plan shall modify, limit or otherwise impair the Class 3 claimholder's rights and remedies post-Effective Date against the Debtor based on the TD Guaranties. The Class 3 claimholder has filed a Secured proof of Claim, as recently amended, in the amount of \$10,621,026.12 on account of the TD Guarantees, although no monies are currently being sought by TD for payment. In addition, the Class 3 creditor is currently owed no monies under the existing loan agreement and shall not receive any distribution under the Plan. Class 3 is Unimpaired and deemed to accept the Plan.

#### **4. Class 4: Convenience Claims**

Class 4 consists of the holders of General Unsecured Claims less than \$10,000 ("Convenience Claims"). The Holders of Convenience Claims will be paid 100% of their Allowed Convenience Claims, in Cash, on or shortly after the Effective Date. The Debtor estimates that there are approximately 50-60 of such Convenience Claims that total approximately \$160,000.

#### **5. Class 5: Allowed General Unsecured Claims**

Class 5 consists of the holders of Allowed General Unsecured Claims (*i.e.*, Allowed Unsecured Claims other than the Allowed 20 Day Claims, the Convenience Claims, the Class 6 Unsecured Claims of the Guaranteed Lenders, and the Class 7 Insider Claims) and includes the Allowed BMI Claim of \$21,389,988. The Debtor estimates that the Allowed Class 5 Claims total approximately \$25,889,988. The holders of Allowed Class 5 Unsecured Claims shall each receive a 50% distribution on account of their Allowed Class 5

Unsecured Claims in Cash, on or shortly after the Effective Date. Such payments shall be in full and final satisfaction of all Class 5 Claims. Class 5 Claims are Impaired and are entitled to vote on the Plan.

**6. Class 6: Allowed Guaranteed Lenders of Unsecured Claims**

Class 6 consists of the holders of Unsecured Claims arising from pre-petition guarantees of the Debtor signed in connection with certain of its non-residential leases. Class 6 consists of (a) Bank of America, N.A., (b) Truist Bank and (c) United Community Bank. The Debtor pre-petition issued one guarantee to Bank of America that currently guarantees underlying related party debt in the approximate amount of \$2,672,863.24. The Debtor pre-petition issued three guarantees to Truist Bank that currently guarantees underlying related party debt in the approximate amounts of \$764,175.10, \$2,927,958.00, and \$549,848.35. The Debtor pre-petition issued three guarantees to United Community Bank that currently guarantees underlying related party debt in the approximate amounts of \$1,334,843.34, \$628,892.74, and \$462,553.05. No amounts are currently outstanding on the guarantees or any of the underlying obligations. The holders of Claims under Class 6 shall not receive a distribution under the Plan; notwithstanding, the guarantees shall remain in full force and effect, and the Debtor reaffirms its obligations under all existing guarantees executed in favor of the Class 6 claimholders. Class 6 Claims are Unimpaired under and deemed to accept the Plan.

## **7. Class 7: Insider Claims**

Class 7 consists of all Insider Claims, including all Claims held by the Levy Parties, except for (a) cure Claims with respect to the Debtor's unexpired leases discussed in Section VII of the Plan and (b) the Claims of Strand Import & Dist., Inc., SIE, LLC and Onia LLC. Class 7 Claims total approximately \$4,224,660<sup>3</sup>. Upon the Effective Date, the holders of Allowed Class 7 Claims shall receive no distribution under the Plan and shall be deemed to have waived their Claims against the Debtor in full in exchange for and in partial consideration of the Levy Parties Releases. Class 7 Claims are deemed to reject the Plan but support the Plan.

## **8. Class 8: Interests**

Interests are holders of an equity security or membership interest in the Debtor, within the meaning of Bankruptcy Code Sections 101(16) and (17), represented by any issued and outstanding shares of common or preferred stock or other instrument evidencing a present ownership or membership interest in the Debtor, whether or not transferable, or any option, warrant, or right, contractual or otherwise, to acquire any such interest, including a partnership, limited liability company or similar interest.

Class 8 consists of the Holders of Interests in the Debtor. Class 8 Interests consists of Meir (50%) and Shaul (50%) Levy. The holders of Class 8 interests shall continue to retain their Interests in the Debtor

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<sup>3</sup> Includes rejection Claim arising out of Debtor's rejection of its lease for 666 Broadway, Third Floor Premises in the amount of \$487,500.

after the Effective Date, subject to entry of the Confirmation Order. Class 8 Interests are not impaired under the Plan and are deemed to accept the Plan.

## **C. Resolution of Disputed Claims & Reserves**

### **1. Objections**

An objection to either the allowance of a Claim or an amendment to the Debtor's Schedules shall be in writing and may either be filed with the Bankruptcy Court or pursued and resolved by other means by the Debtor, at any time on or before the Effective Date, or for a period of sixty (60) days thereafter, or within such other time period as may be fixed by the Bankruptcy Court. Except as otherwise set forth in the Plan, (i) any Claim against the Debtor that arose prior to the Petition Date not filed with the Bankruptcy Court by the Bar Date or Supplemental Bar Date, as may be applicable, unless specifically scheduled by the Debtor as nondisputed, noncontingent and liquidated, or (ii) any Administrative Claim not filed with the Bankruptcy Court by the Bar Date, is hereby deemed invalid for all purposes. The Debtor and the Creditors will object to and settle any Claims and shall settle, compromise, or prosecute all Claims objections.

### **2. Amendment of Claims**

A Claim may be amended prior to the Effective Date only as agreed upon by the Debtor and the holder of such Claim and as approved by the Bankruptcy Court or as otherwise permitted by the Bankruptcy Code and Bankruptcy Rules. After the Effective Date, a Claim may be amended as agreed upon by the holder

thereof and the Debtor to decrease, but not increase, the face amount thereof.

### **3. Reserve for Disputed Claims**

The Debtor shall reserve for account of each holder of a Disputed Claim that property which would otherwise be distributable to such holder on such date were such Disputed Claim an Allowed Claim on the Effective Date, or such other property as the holder of such Disputed Claim and the Debtor may agree upon. The property so reserved for the holder, to the extent such Disputed Claim is allowed, and only after such Disputed Claim becomes a subsequently Allowed Claim, shall thereafter be distributed to such holder.

### **4. Distributions to Holder of Subsequently Allowed Claims**

Unless another date is agreed on by the Debtor and the holder of a particular subsequently Allowed Claim, the Debtor shall, on the first Business Day to occur after the fourteenth (14th) day after the Allowed amount of such theretofore Disputed Claim is determined, distribute to such holder with respect to such subsequently Allowed Claim the amount of distribution required under the Plan at that time, in Cash. The holder of a subsequently Allowed Claim shall not be entitled to any interest on the Allowed amount of its Claim, regardless of when distribution thereon is made to or received by such holder.

## **D. Plan Funding and Means of Implementing the Plan**

### **1. Plan Funding**

The Plan shall be funded from (i) a portion of the Debtor's Cash on hand as of the Effective Date, (ii) post-Effective date financing from TD or such other financial institution and (iii) an Effective Date no less than \$2,000,000 Cash capital contribution and up to \$4,000,000 in loans from the Interest holders to the extent necessary for working capital or post Effective Date payments required under the Plan. The distributions required under the Plan shall be distributed by the Debtor (the "Disbursing Agent") on or shortly after the Effective Date solely and strictly in accordance with the terms of the Plan and subject to entry of the Confirmation Order. Accordingly, the Debtor submits that it should not be required to obtain a bond pursuant to Section 345 of the Bankruptcy Code. Except as otherwise provided in the Plan, including without limitation Article IX of this Plan, the first distribution from the Plan Distribution Fund shall be distributed to holders of Allowed Claims under the Plan by the Disbursing Agent on the later of the following dates: (i) on the Effective Date to the extent the Claim has been Allowed or (ii) to the extent that a Claim becomes an Allowed Claim after the Effective Date, within fourteen (14) days after the order allowing such Claim becomes a Final Order.

### **2. Means for Implementation**

On or shortly after the Effective Date, the Disbursing Agent shall commence to make distributions in accordance with this Plan. Payments will be made



from Debtor's Cash on hand, post-Effective Date financing from TD or such other financial institution to either the Debtor or Meir and Shaul Levy, and the \$2 million Cash capital contribution from Meir and Shaul Levy in consideration for their retention of their Interests.

### **E. Executory Contracts and Leases**

Non-Levy Leases. On November 16, 2021, the Bankruptcy Court entered an order authorizing the Debtor to assume its 8 unexpired nonresidential leases with non-Levy Parties at the following locations: (1) 9700N Kings HWY Myrtle Beach, SC, (2) 3136 Mission Blvd San Diego, CA, (3) 4948 Newport Ave San Diego, CA, (4) 4918 Seawall Blvd Galveston, TX, (5) 529 Seawall Blvd Galveston, TX, (6) 16850 Collins Ave, #106A Sunny Isles Beach, FL, (7) 8103 Emerald Dr Emerald Isle, NC, (8) 106A N New River Drive Surf City, NC 28445 (the "Non-Levy Leases"). The total amount of cure claims required to paid to assume the Non-Levy Leases totals \$187,833.21.

Levy Leases. Upon the Effective Date, all of the following Levy Parties unexpired nonresidential leases ("Levy Leases") shall be assumed: (1) 401 Mission Ave., Ste C130, Oceanside, CA, (2) 2020 NE 2nd Street, Deerfield Beach, FL, (3) 6705 Gulf Blvd., St. Petersburg, FL, (4) 349 Johnson Street, Hollywood Beach, FL, (5) 201 Lincoln Road, Miami Beach, FL, (6) 2601-5 N. Ocean Dr., Riviera Beach, FL, (7) 607 N. Atlantic Ave., Daytona Beach, FL, (8) 512 E. Atlantic Ave., Delray Beach, FL, (9) 4392 NE Ocean Blvd., Jensen Beach, FL (10) 82 South Lumina Ave., Wrightsville Beach, NC, (11) 1014 N. Lake Park Blvd., Carolina Beach, ND, (12) 32-10 Holden Beach Rd. SW, Holden

Beach, NC, (13) 2800 NW 125th St., B-2, Miami, FL, (14) 666 Broadway, 8th Floor, New York, NY<sup>4</sup> and (15) 529 Seawall Blvd., Galveston, TX. The total amount of cure claims required to be paid to assume the Levy Leases totals \$9,837,493. Upon the Effective Date, the Levy Parties, in partial consideration of the Levy Releases, shall be deemed to have waived all cure Claims arising from assumption of the Levy Leases.

#### **F. Tax Consequences of the Plan**

*Creditors Concerned with How the Plan May Affect Their Tax Liability Should Consult with Their Own Accountants, Attorneys, and/or Advisors.*

Confirmation may have federal income tax consequences for the Debtor and Creditors. The Debtor has not obtained, and does not intend to request, a ruling from the Internal Revenue Service (the “IRS”), nor has the Debtor obtained an opinion of counsel with respect to any tax matters. Any federal income tax matters raised by confirmation of the Plan are governed by the Internal Revenue Code and the regulations promulgated thereunder. Creditors are urged to consult their own counsel and tax advisors as to the consequences to them, under federal and applicable state, local and foreign tax laws, of the Plan. The following is intended to be a summary only and not a substitute for careful tax planning with a tax professional. The federal, state, and local tax consequences of the Plan may be complex in some circumstances and, in some cases, uncertain. Accordingly, each holder of a Claim is strongly urged to consult with his or her own tax

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<sup>4</sup> Debtor’s office headquarters. All other locations are retail stores or warehouses.

advisor regarding the federal, state, and local tax consequences of the Plan, including but not limited to the receipt of cash and/or stock under this Plan.

### **1. Tax Consequences to the Debtor**

As the Debtor is an S corporation, the tax consequences to the Debtor are borne by the Interest holders.

### **2. Tax Consequences to Unsecured Creditors**

An unsecured creditor that receives cash in satisfaction of its Claim may recognize gain or loss, with respect to the principal amount of its Claim, equal to the difference between (i) the creditor's basis in the Claim (other than the portion of the Claim, if any, attributable to accrued interest), and (ii) the balance of the cash received after any allocation to accrued interest. The character of the gain or loss as capital gain or loss, or ordinary income or loss, will generally be determined by whether the Claim is a capital asset in the creditor's hands. A creditor may also recognize income or loss in respect of consideration received for accrued interest on the Claim. The income or loss will generally be ordinary, regardless of whether the creditor's Claim is a capital asset in its hands.

### **G. Estate Causes of Action**

Upon the Effective Date, any or all potential or existing Estate Causes of Action (including the BMI Adversary Proceeding) that may have been heretofore or hereafter asserted by the Debtor and/or its estate, including but not limited to any Avoidance Actions

against the Debtor's vendors and any Estate Causes of Action against any parties, including the Levy Parties, shall be deemed dismissed, waived, released, discharged, null and void, and have no further force or effect (as to the Levy Parties, the "Levy Parties Releases"). The Levy Parties Releases are being given in consideration of and exchange for: a) the waiver of all lease assumption cure Claims by the Levy Parties (\$9,837,497), b) waiver of all potential rejection claims in the event that the Levy Leases are not assumed (approximately \$6,000,000), and (c) the waiver of other Claims by the Levy Parties (approximately \$4,000,000).<sup>5</sup> The Debtor believes that the value and/or potential recovery from all Estate Causes of Action, which Causes of Action would be materially disputed and contested by, *inter alia*, the Levy Parties, is far less than the amount of consideration being given in the form of the above waivers. Absent such waivers, the Estate would be burdened with an approximately \$10 million cure claim payable upon the Effective Date and a doubling of the size of the General Unsecured Creditor body. Accordingly, the consideration being given for the Levy Parties Release far exceeds any value of the Estate Causes of Action that could be brought against the Levy Parties, which claims the Debtor believes would be subject to material defenses, protracted litigation, cost and delay, all to the direct detriment of the estate.

The Debtor does not intend, but reserves the right, to bring Estate Causes of Action against any

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<sup>5</sup> This consideration is entirely different and separate than, *and in addition to*, the up to \$6 million capital contribution and loans being made by Meir and Shaul Levy in consideration of their retention of Class 10 Interests under the Plan.

other creditors or parties in interest within 60 days after the Effective Date.

## **H. Post-Confirmation Management**

Continuing Existence. All matters provided under this Plan, including all corporate action to be taken or required to be taken by the Debtor, and the execution of all necessary documents shall be deemed to have occurred and be effective as provided herein, and shall be authorized and approved in all respects without any requirement or further action by directors of the Debtor. From and after the Effective Date, the Debtor shall continue in existence for all purposes including (i) resolving disputed Claims and (ii) administering this Plan.

Independent Director; Post-Confirmation Corporate Governance. Upon effectuation of all Effective Date payments to Allowed Class 5 Unsecured Creditors, the Independent Director shall terminate, subject to extension by further agreement between the Reorganized Debtor and the Independent Director.

Upon the termination of the Independent Director, Ariel Levy shall be appointed as sole director and, upon the Confirmation Date, shall continue as CEO of the Reorganized Debtor and receive compensation in accordance with the budgets on file with the Bankruptcy Court, subject to modification at the sole discretion of the Reorganized Debtor. The Interest holders may appoint additional post-Confirmation Date directors at their sole discretion and election.

#### **IV. Confirmation Requirements and Voting Procedures**

To be confirmable, the Plan must meet the requirements listed in §§ 1129(a) or (b) of the Bankruptcy Code. These include the requirements that the Plan must be proposed in good faith; at least one impaired class of claims must accept the plan, without counting votes of insiders; the Plan must distribute to each creditor at least as much as the creditor would receive in a chapter 7 liquidation case, unless the creditor votes to accept the Plan; and the Plan must be feasible. These requirements are not the only requirements listed in § 1129, and they are not the only requirements for confirmation.

The following are the procedures approved by the Bankruptcy Court in connection with voting on the Plan:

- (a) any Ballot which is otherwise properly completed, executed, and timely returned to the Balloting Agent that does not indicate an acceptance or rejection of the Plan shall be counted as a vote in favor of the Plan;
- (b) any Ballot which is returned to the Balloting Agent indicating acceptance or rejection of the Plan but is unsigned shall not be counted;
- (c) whenever a creditor casts more than one Ballot voting the same claim prior to the Voting Deadline, only the last proper and timely Ballot received by the Balloting Agent shall be counted;

- (d) if a creditor casts simultaneous duplicative Ballots voted inconsistently, such Ballots shall count as one vote accepting the Plan;
- (e) creditors shall not split their vote within a class; thus each creditor shall vote all of its claim on one Ballot within a particular class either to accept or reject the Plan;
- (f) any Ballot that partially rejects and partially accepts the Plan shall not be counted;
- (g) if no votes to accept or reject the Plan are received with respect to a particular class, such class shall be deemed to have voted to accept the Plan;
- (h) any Ballot received by the Balloting Agent by facsimile, email, or other electronic communication shall not be counted;
- (i) any Ballot that is illegible or contains insufficient information to permit the identification of the claimant shall not be counted;
- (j) any Ballot cast by a person or entity that does not hold a claim in a class that is entitled to vote to accept or reject the Plan shall not be counted; and
- (k) creditors that have filed duplicate claims against the Debtor that are classified under the Plan in the same Class will receive only one Ballot for voting their claims with respect to that Class.

Additionally, solely for purposes of voting to accept or reject the Plan, and not for the purpose of allowance of, or distribution on account of, a claim or

interest, and without prejudice to the Debtor's rights in any other context, the Debtor proposes that (i) any claim within a class of claims that is entitled to vote to accept or reject the Plan that has not been previously allowed by this Court but is the subject of an objection filed by the Debtor before the Voting Deadline shall be temporarily allowed to vote to accept or reject the Plan in the proposed allowed amount set forth in the Debtor's objection for such claim; provided, however, that if the Debtor's objection proposes to reduce the amount of the claim to zero and/or expunge the claim, then, absent the granting of a motion for estimation under Bankruptcy Rule 3018, the holder of such claim shall not be entitled to vote, and (ii) any claim within a class of claims that is entitled to vote to accept or reject the Plan that has not been previously allowed by this Court and is not the subject of an objection filed by the Debtor before the Voting Deadline shall be temporarily allowed to vote to accept or reject the Plan pursuant to Bankruptcy Rule 3018 in an amount equal to the greater of:

- (l) the claim amount listed in the Debtor's schedules of liabilities, provided that (i) such claim is not scheduled as contingent, unliquidated, or disputed and (ii) no proof of claim has been timely filed;
- (m) the liquidated amount specified in a proof of claim timely filed with the Court (or in the case of a claim resolved pursuant to stipulation or order entered by the Bankruptcy Court before the Voting Deadline, the amount set forth in such stipulation or order), or if a proof of claim is filed in an unliquidated amount, the amount of \$1; or



- (n) the amount temporarily allowed by the Court for voting purposes, pursuant to Bankruptcy Rule 3018(1), after notice and a hearing prior to the Confirmation Hearing.

### **A. Who May Vote or Object**

Any party in interest may object to the confirmation of the Plan if the party believes that the requirements for confirmation are not met.

Many parties in interest, however, are not entitled to vote to accept or reject the Plan. A creditor has a right to vote for or against the Plan only if that creditor has a claim that is both (1) allowed or allowed for voting purposes and (2) impaired.

In this case, the Debtor believes that there is one Impaired Class under the Plan and that the holders of Claims in Class 5 are entitled to vote to accept or reject the Plan. The Debtor believes that the classes that are unimpaired under the Plan do not have the right to vote to accept or reject the Plan.

### **1. What Is an Allowed Claim?**

Only a creditor with an allowed claim has the right to vote on the Plan. Generally, a claim is allowed if either (1) the Debtor has scheduled the claim on the Debtor's schedules, unless the claim has been scheduled as disputed, contingent, or unliquidated, or (2) the creditor has filed a proof of claim, unless an objection has been filed to such proof of claim. When a claim is not allowed, the creditor holding the claim cannot vote unless the Court, after notice and hearing, either overrules the objection or allows the claim for voting

purposes pursuant to Rule 3018(a) of the Federal Rules of Bankruptcy Procedure.

*The deadline for filing a proof of claim in this case was July 19, 2021. Governmental entities had until October 21, 2021 to file proofs of claim. The Debtor's former licensees had until November 30, 2021 to file proofs of claim.*

## **2. What Is an Impaired Claim?**

As noted above, the holder of an Allowed Claim has the right to vote only if it is in a class that is impaired under the Plan. As provided in § 1124 of the Bankruptcy Code, a class is considered Impaired if the Plan alters the legal, equitable, or contractual rights of the members of that class. Class 5 is Impaired under the Plan and entitled to vote.

Each Holder of a Claim in Class 5 has been sent a ballot together with this Disclosure Statement. The ballot is to be used for voting to accept or reject the Plan.

The Bankruptcy Court has directed that, to be counted for voting purposes, ballots for the acceptance or rejection of the Plan must be mailed or delivered by hand or courier so that they are ACTUALLY RECEIVED no later than 4:00 p.m. (Eastern Standard Time) on February 22, 2022 at the following address:

Robert L. Rattet, Esq.  
Davidoff Hutcher & Citron LLP  
605 Third Avenue  
New York, New York 10158  
rlr@dhclegal.com

Each Holder of an Allowed Claims in Class 5 shall be entitled to vote to accept or reject the Plan as provided for in the order approving the Disclosure Statement. A vote may be disregarded if the Bankruptcy Court determines that such vote was not solicited or procured in good faith and in accordance with the Bankruptcy Code.

### **3. Who is Not Entitled to Vote**

The holders of the following five types of claims are *not* entitled to vote:

- holders of Claims that have been disallowed by an order of the Court;
- holders of other Claims that are not Allowed Claims, unless they have been Allowed for voting purposes;
- holders of Claims in Unimpaired classes;
- holders of Claims deemed to accept the Plan; holders of Claims entitled to priority pursuant to §§ 507(a)(2), (a)(3), and (a)(8) of the Bankruptcy Code; and
- administrative expenses.

*Even If You Are Not Entitled to Vote on the Plan, You Have a Right to Object to the Confirmation of the Plan and to the Adequacy of the Disclosure Statement.*

### **4. Who Can Vote in One or More Class**

A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim, or who otherwise hold claims in multiple classes, is entitled to accept or reject a Plan in each capacity, and should cast one ballot for each claim.

## **B. Votes Necessary to Confirm the Plan**

If impaired classes exist, the Court cannot confirm the Plan unless (1) at least one impaired class of creditors has accepted the Plan without counting the votes of any insiders within that class, and (2) all impaired classes have voted to accept the Plan, unless the Plan is eligible to be confirmed by “cram down” on non-accepting classes, as discussed later in Section B.2.

### **1. Votes Necessary for a Class to Accept the Plan**

A class of claims accepts the Plan if both of the following occur: (1) the holders of more than one-half (1/2) of the allowed claims in the class, who vote, cast their votes to accept the Plan, and (2) the holders of at least two-thirds (2/3) in dollar amount of the allowed claims in the class, who vote, cast their votes to accept the Plan.

### **2. Treatment of Nonaccepting Classes**

Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan if the nonaccepting classes are treated in the manner prescribed by § 1129(b) of the Bankruptcy Code. A plan that binds nonaccepting classes is commonly referred to as a “cram down” plan. The Bankruptcy Code allows the Plan to bind nonaccepting classes of claims if it meets all the requirements for consensual confirmation except the voting requirements of § 1129(a)(8) of the Bankruptcy Code, does not “discriminate unfairly,” and is “fair and equitable” toward each impaired class that has not voted to accept the Plan.

In the event that any Class of Impaired Creditors votes to reject the Plan, the Debtor intends to seek Confirmation of the Plan under Section 1129(b) of the Bankruptcy Code. You should consult your own attorney if a “cramdown” confirmation will affect your claim as the variations on this general rule are numerous and complex.

The Plan provides for the retention of the Interests by the current Interest holders in consideration for, inter alia, “new value” contributions and loans to the Debtor for a portion of the Cash required to fund and effectuate the Plan totaling up to \$6,000,000 in Cash.

Although the Plan does not pay all of the Debtor’s creditors in full, the Interest holders may still retain their interests under the following scenarios: (a) all Impaired Classes of creditors vote to accept the Plan; or (b) the Plan must satisfy the requirements under the “new value” corollary to the “absolute priority rule” contained in Section 1129(b)(2)(B) of the Bankruptcy Code.

The absolute priority rule is a “Bedrock principle of bankruptcy law, under which creditors are entitled to be paid ahead of shareholders in the distribution of corporate assets.” *In re Latam Airlines Group S.A.*, 620 B.R. 722, 796, citing *Adler v. Lehman Bros. Holdings, Inc. (In re Lehman Bros Holdings Inc.)*, 855 F.3d 459, 470 (2d Cir 2017) (citation omitted). The rule is codified in various provisions of the Bankruptcy Code, and “is particularly prominent in 11 U.S.C. § 1129(b)(2)(B) . . .” *Id* at 471, n.11. Pursuant to section 1129(b)(1), for a court to confirm a chapter 11 reorganization plan over the vote of a dissenting class of claims, the plan must be “fair and equitable with respect to [each] class of claims . . . that is impaired

under, and has not accepted, the plan.” 11 U.S.C. § 1129(b)(1). A plan will be “fair and equitable” with respect to a class of unsecured claims if –

- (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
- (ii) the holder of any claim or interest that is junior to the claims of such class will not received or retain under the plan on account of such junior claim or interest any property . . .

11 U.S.C. § 1129(b)(2)(B). In this way, the “fair and equitable” rule “includes a form of the absolute priority rule as a prerequisite.” *DISH Network Co. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 94 (2d Cir 2011) (hereinafter “*DSBD*”). That is to say, under the rule a reorganization plan “may not give ‘property’ to the holders of any junior claims or interests ‘on account of those claims or interests, unless all classes of senior claims either received the full value of their claims or give their consent.” *Id.* at 88. *See also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988) (“Under current law, no Chapter 11 reorganization plan can be confirmed over the creditors’ legitimate objections . . . if it fails to comply with the absolute priority rule”).

In *Latam*, *supra*, this Court stated that the “new value exception” is the proposition that “the objection of an impaired senior class does not bar junior claim holders from receiving or retaining property interests

in the debtor after reorganize, if they contribute new capital in money or money's worth, reasonably equivalent to the property's value, and necessary for successful reorganization of the restructured enterprise.” *Bank of Am. Nat. Tr. & Sav. Ass’n v. 203 N. LaSalle St. P’ship* (hereafter, “*North LaSalle*”), 526 U.S. at 442, 119 S.Ct. 1411. See also *Liberty Nat’l Enters v. Ambanc La Mesa Ltd. P’ship* (*In re Ambanc La Mesa Ltd. P’ship*), 115 F.3d 650(9th Cir. 1997)(“Allowing old equity to retrain an interest does not violate the absolute priority rule if the former equity holders provide new value to the reorganized debtor, under the ‘new value corollary’ to the absolute priority rule.”). The new value corollary permits a debtor’s old equity holders – in exchange for a new capital contribution – to retain their equity in the company, even as creditors are not paid in full. See *In re RAMZ Real Estate Co., LLC*, 510 B.R. 712, 718 (Bankr. S.D.N.Y. 2014) (“Recognizing that sometimes that best option for all parties is to allow old equity to participate in the reorganized debtor, the ‘new value exception’ was created.” (citation omitted)).

In this Circuit, to invoke the new value corollary, “the capital contribution by old equity must be (1) new, (2) substantial, (3) money or money’s worth, (4) necessary for a successful reorganization and (5) reasonably equivalent to the property the old equity is retaining or receiving.” *BT/SAP Pool C Assocs. V. Coltex Loop Cent. Three Partners*, 203 B.R. 527, 534 (S.D.N.Y.1996) (citation omitted), *aff’d*, 138 F.3d 39 (2d Cir. 1998) (hereinafter, “*Coltex I*”); *In re RAMZ Real Estate Co., LLC*, 510 B.R. at 718 (same). *Accord Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 121-22, 60 S.Ct. 1, 10, 84, L. Ed. 110 (1939).

First, the Debtor believes that the total “new value” consideration being given by the Interest Holders far exceeds the liquidation value of the Interests. See Liquidation Analysis, Exhibit C.

Second, the Debtor believes that the “new value” consideration being given by the Interest Holders also exceeds the current market value of the Interests based on, *inter alia*, (a) the short term nature of a majority of the Debtor’s store leases, (b) the significant cure amounts (approximately \$9.7 million) required to assume the Debtor’s leases with the Levy Parties, and (c) the uncertainty surrounding the Debtor’s right to use of the WINGS name and trade style in light of the verdict in the District Court Action. The Debtor therefore submits that the \$2 million “new value” capital contribution being offered by the Interest holders significantly exceeds the current market value, if any, of the Interests. If the Court determines that the “new value” being offered exceeds the current market value of the Interests, the Court may confirm the Plan under and subject to the cram down provisions of Section 1129(b) of the Code.

### **C. Feasibility and Best Interests Test**

The Bankruptcy Code requires that in order to confirm the Plan, the Bankruptcy Court must find that confirmation of the Plan is not likely to be followed by liquidation or the need for further financial reorganization of the Debtor (the “Feasibility Test”).

For a plan to meet the Feasibility Test, the Bankruptcy Court must find that the Debtor will possess the resources to meet its obligations under the Plan. The Plan contemplates a reorganization of the Debtor’s assets and Confirmation of the Plan is not



likely to be followed by the need for further financial reorganization of the Debtor or any successor to the Debtor under the Plan. Moreover, on the Effective Date, the Debtor will have sufficient funds on hand to fund the Plan. *See Projections* attached to this Disclosure Statement as Exhibit “B”. *You Should Consult with Your Accountant or other Financial Advisor If You Have Any Questions Pertaining to These Projections.*

In addition, the Bankruptcy Court must determine that the values of the distributions to be made under the Plan to each Class will equal or exceed the values which would be allocated to such Class in a liquidation under Chapter 7 of the Bankruptcy Code (the “Best Interest Test”).

Annexed hereto as Exhibit “C” is the Debtor’s Liquidation Analysis.

The Best Interest Test with respect to each impaired Class requires that each holder of a Claim or Interest in such Class either (i) accept the Plan or (ii) receive or retain under the Plan property of a value, as of the Effective Date, that is not less than the value such holder would receive or retain if the Debtor was liquidated under Chapter 7 of the Bankruptcy Code. Based on the Debtor’s Liquidation Analysis, Class 5 Unsecured Creditors are receiving substantially more on account of their Claims than they would receive under a Chapter 7 liquidation scenario. In fact, were the Debtor’s assets liquidated in a Chapter 7 case, the creditors of the estate would stand to receive far less as the Administrative costs associated with such a case would be significantly higher. In addition, the potential rejection and lease arrears claims of no less than \$16,000,000 and the other claims of approximately \$4,000,000 held by the Levy Parties would further

erode and diminish any potential return to Unsecured Creditors.

The Debtor therefore believes that the Plan satisfies all of the statutory requirements of Chapter 11 of the Bankruptcy Code, including the “best interest” and feasibility requirements. In addition, the Plan is “fair and equitable” and “does not discriminate unfairly” against any class of Claims or Interests. The Plan complies with all other requirements of Chapter 11 of the Bankruptcy Code and the Plan has been proposed in good faith.

#### **D. Risk Factors; Alternatives To Plan**

Creditors should understand that there is a risk the Plan could not be confirmed by the Bankruptcy Court. In the event the Plan is not confirmed, the alternatives would include:

- (a) Use of WINGS name. Debtor owned two registrations for the WINGS Mark registered on the Principal Register at the United States Patent and Trademark Office (“USPTO”): (1) Reg. No. 3,458,144 (the “144 Registration”) for retail apparel, clothing, and discount store services, which it applied to register in August 2006; and (2) Reg. No. 4,193,881 (the “881 Registration”) for beach towels, men’s, women’s and children’s clothing, and retail store services, which it applied to register in December 2011 (the ‘144 Registration and ‘881 Registration, collectively, the “WINGS Registrations”). In litigation precipitating the Chapter 11 Case captioned *Beach Mart, Inc. v. L&L Wings, Inc.*, Index No. 2:11-CV-44-FL *et al.*, the Court’s judgment ordered

cancellation of the WINGS Registrations. This issue, among others, were disputed by the Debtor and were appealed by the Debtor to the Fourth Circuit Court of Appeals (Case No. 21-2259). The current legal status of the Debtor's ownership and/or use of the trademark WINGS does not affect the feasibility of the Plan or the funding of same and these disputes have been resolved by the BMI Settlement Agreement, which provides for the Debtor's use of the WINGS Mark under a trademark license agreement with BMI (as more specifically set forth in the BMI Settlement Agreement).

- (b) Conversion to Chapter 7 Liquidation. Conversion would result in a forced liquidation of the Debtor's business and assets. In accordance with the Liquidation Analysis (Exhibit C), the Debtor's Unsecured Creditors would receive a substantially lesser distribution than what is being provided under the Plan. Liquidation may also result in a cessation of operation and accompanying loss of jobs, adversely affecting the Debtor's employees as well as a substantial portion of the Unsecured Creditors who continue to do business with the Debtor.
- (c) Dismissal. A dismissal could also result in a cessation of business as well as a protracted continuation of the District Court Action. Without the protection of bankruptcy, the Debtor could be forced to obtain a multi-million dollar supersedeas bond while it prosecuted its appeal of the BMI judgment,

which would severely hamper the Debtor's cash flow, credit worthiness and liquidity.

- (d) Alternative Plan. An alternative plan proposed by a party other than the Debtor would not contain either (the waiver of more than \$14 million in claims by the Levy Parties nor (b) the \$2 million new value contribution proposed under the Plan. Also, in light of, inter alia, the short term nature and limited value of most of the Debtor's leases, the future viability of the Debtor would be in serious jeopardy under any alternative plan.

Based upon the foregoing, the Debtor believes that the alternatives to confirmation of the Plan will greatly diminish the return to creditors, jeopardize jobs and adversely affect the business relationships between the Debtor and many of its creditors who continue to conduct business with the Debtor. The Debtor therefore believes that the Plan is the best alternative to creditors and other parties in interest in the Chapter 11 Case. The Creditors' Committee also supports the Plan.

### **E. Notices**

All notices and correspondence should be forwarded in writing to:

If to the Debtor:

Robert L. Rattet, Esq.  
Davidoff Hutcher & Citron LLP  
605 Third Avenue  
New York, NY 10158  
(212) 557-7200  
Email: rlr@dhclegal.com

If to the Creditor's Committee:

Melanie L. Cyganowski, Esq.  
Jennifer Feeney, Esq.  
Otterbourg P.C.  
230 Park Avenue  
New York, NY 10169-0075  
(212) 905-3677  
Fax : (917) 368-7121  
Email: mcyganowski@otterbourg.com  
jfeeney@otterbourg.com

## **V. Effect of Confirmation of the Plan**

### **A. Discharge of Debtor**

Since the Plan provides for a reorganization of the Debtor, the Confirmation Order shall operate as a discharge of the Debtor pursuant to section 1141(d)(1) of the Bankruptcy Code.

#### **1. Exculpation**

*To the extent permitted under Section 1125(e) of the Bankruptcy Code, except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from, any Exculpated Claim, or obligation, cause of action or liability for any Exculpated Claim, and shall be entitled to reasonably rely on the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. Each Exculpated Party and their respective affiliates, agents, directors, members, officers, officials, employees, advisors and attorneys have, and upon the Effective Date shall be deemed to have participated in good faith and in compliance with the applicable provisions of the*

*Bankruptcy Code and applicable non-bankruptcy law and shall not be liable at any time for the violation of any applicable law, rule or regulation governing the solicitation of acceptances or rejections of this Plan or distributions made pursuant to the Plan. From and after the Effective Date and upon the distributions contemplated in the Plan, a copy of the Confirmation Order and the Plan shall constitute and may be submitted as a complete defense to any claim or liability satisfied, enjoined or subject to exculpation pursuant to Article XI of the Plan; provided, however, that nothing in the Plan shall, or shall be deemed to, release the Debtor and its current officers, directors, members, managers, employees, or exculpate the Debtor and its current officers, directors, members, managers, employees of the Debtor with respect to, their obligations or covenants arising from bad faith, willful misconduct, gross negligence, breach of fiduciary duty, malpractice, fraud, criminal conduct, unauthorized use of confidential information that causes damages, and/or ultra vires acts. Upon confirmation of the Plan, Creditors will be unable to pursue any claims that are satisfied, enjoined or subject to exculpation under the Plan, but creditors may pursue claims against the Debtor and its current officers, directors, members, managers, or employees that may arise in the future, or pursuant to the Plan. Any such liability against the Debtor's professionals will not be limited to their respective clients contrary to the requirement of DR 6-102 of the Code of Professional Responsibility.*

## **2. Confirmation Injunction**

*Effective on the Effective Date, all persons who (a) have held, hold or may hold Claims against the Debtor, regardless of classification or treatment under*

*the Plan (on account of or related to such Claim(s)), or (b) have or may become liable for any Estate Causes of Action arising before or after the Petition Date (on account of or related to such liability), are, together with all successors, assignees and subrogees of the persons described in clauses (a) and (b), permanently and irrevocably enjoined from taking, causing, supporting or facilitating any of the following actions against or affecting the Debtor or assets of the Debtor, except as otherwise set forth in the Plan:*

- (i) Commencing, conducting or continuing in any manner, directly or indirectly, any suit, action, arbitration, or other proceeding of any kind against the Debtor seeking payment for (1) any Claim against the Debtor (other than the District Court Action for purposes of dismissing the District Court Action as required under the BMI Settlement Agreement), or (2) any indemnification, contribution or other recovery sought on account of any Estate Causes of Action;*
- (ii) Enforcing, levying, attaching, or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree, or order against the Debtor on account of or relating to (1) any Claim against the Debtor, or (2) any indemnification, contribution or other recovery sought on account of any Estate Causes of Action;*
- (iii) Creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the Debtor or the assets of the Debtor on account of or relating to (1) any Claim against the Debtor*

*or (2) any indemnification, contribution or other recovery sought on account of any Estate Cause of Action; and*

- (iv) *Proceeding in any manner and any place whatsoever that does not conform to or comply with the provisions of the Plan. The injunction set forth in section 11.3 of the Plan (the "Injunction") shall be fully enforceable and effective against all Persons described above, and shall be enforceable by all Persons who benefit from such injunction, including without limitation, the Debtor and its respective agents, principals, parents, affiliates and subsidiaries and each such benefitted Person shall have immediate, independent standing, without the need to notify, join or otherwise involve the Debtor or any other beneficiary of the Injunction, to enforce such Injunction against all Persons subject to it. All Persons who benefit from the Injunction are recognized third party beneficiaries of section 11.3 of the Plan. The Injunction shall be effective immediately upon the Effective Date, and shall be continuing, permanent and irrevocable as of such date (except to the extent the Confirmation Order is reversed or modified in relevant part on appeal), regardless of any default (including any Event of Default (defined below)) under the Plan, the lack or status of consummation of the Plan, the conversion of the Chapter 11 Case to a case under any other chapter of the Bankruptcy Code, the dismissal of the Chapter 11 Case, or any other reason. To the extent any section*



*or other provision of the Plan (other than the BMI Settlement Agreement) is inconsistent with section 11.3 of the Plan, section 11.3 of the Plan shall govern and control to the exclusion of such inconsistent section or other provision.* Nothing contained in Section 11.3 of the Plan or the injunction provided for therein shall enjoin TD Bank, as Class 3 claimholder, from enforcement of the TD Guaranties post-Effective Date. Section 11.3 and the injunction contained in the Plan is only effective as against BMI upon the occurrence of both the Effective Date and full satisfaction of the BMI Claim in accordance with Section 4.6 of the Plan.

### **3. Releases of the Exculpated Parties, the Released Parties, and the Levy Parties Included in the Plan**

The Plan sets forth various releases between and among the Debtor, the Estate, the Released Parties, and the Levy Parties.

Under Article XI of the Plan, and as set forth in detail in Section III. G and this Section V of this Disclosure Statement, the Plan provides for releases of all Estate Causes of Action and Claims between and among the Debtor, on behalf of itself and the Estate, the Released Parties and the Levy Parties in connection with and pursuant to the Plan in exchange for the good and valuable consideration and the valuable waivers, releases and/or compromises (all of the above persons and entities are the “Release Parties”).

Article XI of the Plan specifically provides for releases of certain Claims and Causes of Action in

favor of and against the Released Parties in exchange for the good and valuable consideration and the valuable waivers, releases and/or compromises made by the Released Parties under the Plan. Articles 11.2 through 11.5 of the Plan, and as set forth in detail in this Section V of this Disclosure Statement, provides for the exculpation and release of each Exculpated Party for certain acts or omissions taken in connection with the Chapter 11 Case subject to the limitations under Section 1125 and excluding claims arising out of bad faith, breach of fiduciary duty, malpractice, fraud., criminal conduct, unauthorized use of confidential information that causes damages and/or ultra vires acts. The Exculpated Parties are, in each case solely in their capacity as such: (i)(a) the Debtor, (b) the Creditors' Committee, and (c) with respect to each of the foregoing parties in clauses (i)(a), (i)(b) and (i)(c), each of such entity's current officers, directors, members, managers, employees, attorneys and advisors, in each case in their capacity as such, and only if serving in such capacity.

Article 11.3 of the Plan, and as set forth in detail in this Section V of this Disclosure Statement, provides for permanent injunction against certain entities who have held, hold, or may hold Claims or Interests that have been released pursuant to the Plan, or are subject to exculpation pursuant to the Plan, from asserting such Claims or Interests against the Debtor on account of or relating to (1) any Claim against the Debtor, or (2) any indemnification, contribution or other recovery sought on account of any Estate Cause of Action all as more fully set forth above and in the Plan. Nothing contained in Section 11.3 or the injunction provided for therein shall enjoin TD Bank, as Class 3

claimholder, from enforcement of the TD Guaranties post-Effective Date. Further, the injunction contained in the Plan is only effective as against BMI upon the occurrence of both the Effective Date and full satisfaction of the BMI Claim in accordance with Section 4.6 of the Plan.

Article 11.4 and 11.5 of the Plan provide for releases for the Released Parties by: (a) the Debtor and the Estate; and (b) all of the Debtor's creditors, provided that such creditor (i) votes in favor of the Plan and (ii) voters to "opt in" to the releases. Notwithstanding, nothing contained Section 11.5 or the injunction provided for therein shall enjoin TD Bank, as Class 3 claimholder, from enforcement of the TD Guaranties post-Effective Date. Further, to the extent BMI is a Releasing Party, the releases contained in the Plan are only effective as against BMI upon the occurrence of both the Effective Date and full satisfaction of the BMI Claim in accordance with Section 4.6 of the Plan.

The Plan provides for releases of various third parties and injunctions preventing creditors from pursuing certain claims against parties other than the Debtor. Confirmation of the Plan will, among other things, result in the releases being granted and the injunctions becoming valid and enforceable, to the extent provided for under the Plan, on all creditors of the Debtor.

Check the box on Item 3 on the Ballot if you elect to opt into the releases contained in Article 11.5 of the Plan. Election to give consent is at your option. If you submit the Ballot without this box checked, or do not submit a Ballot, you will not be deemed to grant the releases, regardless of whether you vote to accept or

*reject the Plan. Electing not to grant the releases will not impact your eligibility to receive distributions under the Plan.*

It is well-settled that debtors are authorized to settle or release their claims in a chapter 11 plan. *See In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 263 n.289, 269 (Bankr. S.D.N.Y. 2007) (debtor may release its own claims); *In re Oneida Ltd.*, 351 B.R. 79, 94 (Bankr. S.D.N.Y. 2006) (noting that a debtor's release of its own claims is permissible). Debtor releases are granted by courts in the Second Circuit where the debtors establish that such releases are in the "best interests of the estate." *See In re Charter Commc'ns.*, 419 B.R. 221, 257 (Bankr. S.D.N.Y. 2009) ("When reviewing releases in a debtor's plan, courts consider whether such releases are in the best interest of the estate."). Courts often find that releases pursuant to a settlement are appropriate. *See, e.g., In re Spiegel, Inc.*, 2005 WL 1278094, at \*11 (approving releases pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a)); *In re AMR Corp.*, No. 11-15463 (SHL) (Bankr. S.D.N.Y. Oct. 22, 2013) (confirming chapter 11 plan containing releases of members, directors, officers and employees of the debtors as well as prepetition lenders that were party to a restructuring support agreement); *see also In re Bally Total Fitness Holding Corp.*, 2007 WL 2779438, at \*12 ("To the extent that a release or other provision in the Plan constitutes a compromise of a controversy, this Confirmation Order shall constitute an order under Bankruptcy Rule 9019 approving such compromise."); accord *In re Adelphia Communications Corp.*, 368 B.R. 140, 263 n. 289 (Bankr. S.D.N.Y. 2007) ("The Debtors have considerable leeway in issuing releases

of any claims the Debtors themselves own.”). Additionally, in the Second Circuit, third party releases are permissible where “truly unusual circumstances” render the release terms integral to the success of the plan. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142-43 (2d Cir. 2005). The determination is not a matter of “factors and prongs,” but courts have provided some guidance for allowing third party releases. “Unusual circumstances” include instances in which: (a) the estate received a substantial contribution; (b) the enjoined claims were “channeled” to a settlement fund rather than extinguished; (c) the enjoined claims would indirectly impact the debtors’ reorganization by way of indemnity or contribution; (d) the plan otherwise provided for the full payment of the enjoined claims; and (e) the affected creditors consent. *Id.* at 141. Courts typically allow releases of third party claims against non-debtors where there is the express consent of the party giving the release or where other circumstances in the case justify giving the release. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005).

Finally, exculpation provisions that extend to prepetition conduct and cover non-estate fiduciaries are regularly approved. *See, e.g., Oneida*, 351 B.R. at 94 & n.22 (considering an exculpation provision covering a number of prepetition actors with respect to certain prepetition actions, as well as post-petition activity). In approving these provisions, courts consider a number of factors, including whether the beneficiaries of the releases have participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan. *See In re Bearing Point, Inc.*, 435 B.R. 486, 494 (Bankr. S.D.N.Y.

2011) (“Exculpation provisions are included so frequently in chapter 11 plans because stakeholders all too often blame others for failures to get recoveries they desire; seek vengeance against other parties, or simply wish to second guess the decision makers.”); *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009) (same), *aff’d*, *In re DBSD N. Am., Inc.*, No. 09-10156, 2010 WL 1223109 (S.D.N.Y. May 24, 2010), *aff’d* in part, *rev’d* in part, 634 F.3d 79 (2d Cir. 2011); *In re Bally Total Fitness*, 2007 WL 2779438, at \*8 (finding exculpation, release, and injunction provisions appropriate because they were fair and equitable, necessary to successful reorganization, and integral to the plan); *In re WorldCom, Inc.*, No. 02-13533, 2003 WL 23861928, at \*28 (Bankr. S.D.N.Y. Oct. 31, 2003) (approving an exculpation provision where it “was an essential element of the [p]lan formulation process and negotiations”); *In re Enron Corp.*, 326 B.R. 497, 203 (S.D.N.Y. 2005)(excising similar exculpation provisions would “tend to unravel the entire fabric of the Plan, and would be inequitable to all those who participated in good faith to bring it into fruition.”

The Debtor believes that the respective releases, exculpations, and injunctions set forth in the are appropriate because, among other things, the releases are narrowly tailored to the Debtor’s Plan effectuation, and each of the Release Parties has afforded considerable value to the Debtor in exchange for such releases in the form of, *inter alia*, waiver of more than \$20,000,000 in potential Claims against the estate, the cessation of costly, time-consuming and risk-laden litigation and the payment (or release conditioned on payment) of actual consideration (*i.e.*, monies) to the estate or that benefits the estate, which waivers will directly

benefit all creditors of the Debtor under the Plan. Absent such releases, it is likely that the Plan could not be confirmed and/or the Debtor's creditors will recover significantly less (if anything at all) on account of their Claims than the amounts estimated herein. The Debtor further believes that such releases, exculpations, and injunctions are a necessary part of the Plan and will facilitate the satisfaction of the conditions to the effectiveness of the Plan. Without the release and injunction provisions of the Plan, the effectiveness of the Plan could be materially delayed if not totally jeopardized and will require additional litigation (and administrative cost to the estate) with certain of the Release Parties and others. The Debtor will be prepared to meet their burden to establish the basis for the releases, exculpations, and injunctions for each Release Party and Exculpated Party as part of Confirmation of the Plan.

#### **4. Full and Final Satisfaction**

To the fullest extent permitted by Section 1141(a)-(c) of the Bankruptcy Code, all payments, and all distributions pursuant to the Plan, shall be in full and final discharge, satisfaction, settlement and release of all Claims and Interests, except as otherwise provided in the Plan.

#### **B. Amendment, Modification, Withdrawal, or Revocation of the Plan**

The Debtor reserves the right, in accordance with section 1127(a) of the Bankruptcy Code, and subject to the consent of the Creditors' Committee, to amend or modify the Plan prior to the Confirmation Date so long as such amendments or modifications are not in-

consistent with the BMI Settlement. After the Confirmation Date, the Debtor may, upon order of the Bankruptcy Court, in accordance with section 1127(b) of the Bankruptcy Code, remedy any defect or omission or reconcile and inconsistencies in the Plan in such manner as may be necessary to carry out the purposes and intent of the Plan.

### **C. Unclaimed Property**

Distributions to holders of Allowed Claims shall be sent to their last known address set forth on a proof of claim filed with the Bankruptcy Court or if no proof of claim is filed, on the Schedules, or to such other address as may be designated by such Creditor in writing to the Debtor. A payment is to be deemed unclaimed if the payment on the distribution is not negotiated by the particular claimholder within 120 days of it being sent by the Debtor. If after thirty (30) days additional attempted notice to the claimholder such distribution remains unclaimed or unnegotiated, then and in that event such holder's Claim shall thereupon be deemed canceled and any such holder shall not be entitled to any payments under the Plan, and such unclaimed distributions shall be returned to the Debtor.

### **D. Retention of Jurisdiction**

The Bankruptcy Court shall retain jurisdiction of the Chapter 11 Case:

- (a) To determine all controversies relating to or concerning the allowance of Claims upon objection to such Claims, including but not limited to the BMI Adversary Proceeding;



- (b) To determine requests for payment of Claims entitled to priority under section 507(a)(1) of the Bankruptcy Code, including any and all applications for compensation for professional and similar fees;
- (c) To determine any and all applications pursuant to section 365 of the Bankruptcy Code for the rejection, or assumption and/or assignment, as the case may be, of executory contracts and unexpired leases to which the Debtor is a party or with respect to which the Debtor may be liable, and to determine and, if necessary, to liquidate, any and all Claims arising therefrom;
- (d) To determine any and all applications, adversary proceedings, and contested or litigated matters over which the Bankruptcy Court has subject matter jurisdiction pursuant to 28 U.S.C. sections 157 and 1334;
- (e) To determine all Disputed Claims and amendments to the Debtor's Schedules;
- (f) To adjudicate controversies or interpretations pursuant to any order or stipulation entered by the Bankruptcy Court prior to the Confirmation Date;
- (g) To preside over and adjudicate any disputes regarding the BMI Settlement Agreement;
- (h) To modify the Plan pursuant to section 1127 of the Bankruptcy Code or to remedy any defect or omission or reconcile any inconsistencies in this Plan or Confirmation Order to the extent authorized by the Code;

- (i) To make such orders as are necessary or appropriate to carry out the provisions of this Plan;
- (j) To resolve controversies and disputes regarding the interpretation or enforcement of the terms of this Plan; and
- (k) To enter a final decree closing the Chapter 11 Case.

## **VI. Recommendation**

The Debtor believes that Confirmation of the Plan is preferable to any of the alternatives described above and that the Plan will provide greater recoveries than those available in liquidation to all holders of Claims. Any other alternative would cause significant delay and uncertainty, as well as substantial additional administrative costs. The Plan is being proposed with the support of the Creditors' Committee. THE DEBTOR AND THE CREDITORS' COMMITTEE THEREFORE STRONGLY RECOMMEND ACCEPTANCE OF THE PLAN.

Dated: New York, New York  
January 14, 2022

L&L WINGS INC.

By: /s/ Ariel Levy  
Ariel Levy, CEO

/s/ Bernard A. Katz  
Bernard A. Katz, Independent Director  
DAVIDOFF HUTCHER & CITRON, LLP

App.335a

*Attorneys for the Debtor*  
605 Third Avenue  
New York, New York 10158  
(212) 557-7200

By: /s/ Robert L. Rattet  
Robert L. Rattet, Esq.

**BRIEF FOR DEFENDANT-APPELLEE  
BENNETT KRASNER, INDIVIDUALLY AND AS  
AGENT OF L&L WINGS, INC., EXCERPTS  
(JANUARY 11, 2024)**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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MARCO DESTIN, INC., 1000 HIGHWAY 98 EAST  
CORP., E&T, INC., PANAMA SURF & SPORT, INC.,

*Plaintiffs-Appellants,*

v.

SHAUL LEVY, individually agent of L&L Wings,  
Inc., MEIR LEVY, individually agent of L&L Wings,  
Inc., BENNETT KRASNER, individually agent of  
L&L Wings, Inc., ARIEL LEVY,

*Defendants-Appellees.*

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No. 23-1330

On Appeal from the United States District Court  
for the Southern District of New York  
(New York City)

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Furman Kornfeld & Brennan LLP  
*Attorneys for Defendant-Appellee Bennett Krasner,  
individually agent of L&L Wings, Inc.*  
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[ . . . ]

. . . the administration of justice does not apply here where the claim is merely that MDI's adversary withheld evidence in a prior action. Accordingly, the District Court's decision dismissing MDI's Complaint must be affirmed.

### **COUNTERSTATEMENT OF ISSUES PRESENTED**

- A. Whether the District Court properly determined that MDI fails to state an independent cause of action for fraud on the court.
- B. Whether the District Court properly determined that the statute of limitations on MDI's fraud claim expired.
- C. Whether the District Court properly determined that a release bars MDI's claims.

### **STATEMENT OF THE CASE**

#### **A. L&L and Shepard Marrow Execute a License Agreement For the Mark**

L&L is a South Carolina corporation, owned by Co-Defendants Shaul and Meir Levy and managed by Ariel Levy (collectively, the "Levys"). L&L operates beach accessory stores in South Carolina, North Carolina, Florida, Texas and California. (A. 17). In or around 1978, L&L began using the Mark in connection with the ownership and operation of retail stores specializing in beachwear, beach accessories, and

other related items. Between 1987 and 1992, L&L filed two trademark applications with the USPTO seeking to register the Mark; however, both applications were denied due to a registered trademark owned by Piedmont Shirt Company thereafter assigned to Shepard Morrow for the Mark. (A. 19).

Attorney Krasner began as in house counsel and thereafter outside counsel representing L&L in or around 1988, after the first trademark application was filed, to assist L&L in its efforts to formalize L&L's continued use of the Mark in connection with L&L's ownership and operation of the retail stores since 1978.

On April 29, 1993, L&L entered into a trademark license agreement with Shepard Morrow as Licensor and L&L as Licensee for the use of the Mark ("Morrow Agreement"). (A. 65-73). In consideration for the license granted under the Morrow Agreement, L&L agreed to "pay to [Shepard Morrow] a royalty of [\$100,000] payable in ten (10) equal annual installments of [\$10,000]" with the first payment made at the time the agreement was executed. (A. 66).

Moreover, Section 8 of the Morrow Agreement provides that Shepard Morrow may terminate the agreement at any time in the event the licensee fails to make a royalty payment. (A. 68). In such event, Shepard Morrow "shall deliver notice of such non-payment to [L&L] and allow [L&L] fifteen days after delivery of such notice in which to remit the Royalty Payment ("Cure Period")." (A. 68). The agreement further provides that if the royalty payment is not made during the Cure Period, then the Morrow Agreement "shall terminate within fifteen days after the date of such notice." (A. 68).

Finally, the Morrow License permitted L&L to sublicense the Mark. (A-69). Specifically, the Morrow Agreement explicitly states that “Licensee may grant sublicenses under the Agreement to use the mark in connection with stores that (i) sell the Merchandise, (ii) are owned and operated by individuals who have been employed as managers of stores owned by Licensee[.]” (A-69).

Ultimately, L&L made its first royalty payment to Sheppard Marrow contemporaneously with the execution of the Morrow Agreement, but made no further royalty payments thereafter starting in 1994, notwithstanding Attorney Krasner’s receipt of written notice from Shepard Morrow of nonpayment. *See* Appellants’ Br. at 5.

## **B. L&L and MDI Execute A License Agreement for the Mark**

From MDI’s inception in 1995 until approximately November 1998, L&L principals, Shaul and Meir Levy, possessed one-half ownership rights in MDI with Tabib. (A. 52). MDI owned and operated retail stores bearing the Mark in light of the Levys’ partial ownership in MDI. In 1998, the Levys transferred their ownership interests in MDI to Tabib. (A. 52). By the time the Levys transferred their ownership interests in MDI, L&L had been using the Mark in connection with the ownership and operations of L&L for approximately twenty years, the royalty payments under the Morrow Agreement had lapsed for four years, and L&L had not heard from Shepard Morrow at all.

In furtherance of the sale of the Levys’ interest in MDI, except E&T, on November 1, 1998, L&L, represented by Attorney Krasner, and Tabib and MDI,

“(“MDI License Agreement”)” represented by its own counsel, entered into a Licensing Agreement whereby L&L and MDI negotiated MDI’s use of the “Wings” mark for a period of eight years and specified that L&L had not registered the Mark with the USPTO. (A. 610-619). Under the MDI Agreement, L&L also put MDI on notice that there is another entity that registered the Mark. (A. 616). MDI acknowledged the notice:

11.3 Licensee [MDI] acknowledges that Licensor [L&L] informed him that there are one or more individuals and/or entities that have registered trademarks and/or service marks to the mark “Wings” and can and/or may claim a paramount right to the use of said mark “Wings”. Licensor [L&L] does not warrant or give any other assurances and/pr indemnification to Licensee’s use of said mark “Wings” and/or the Mark. Notwithstanding anything to the contrary, if any claim is made against Licensor and/or Licensee for infringement related to the use of the Mark and/or “Wings”, neither shall indemnify the other for any loss and/or expense including an award for infringement and/or legal fees.

(A. 616).

The MDI Licensing Agreement was scheduled to terminate on October 31, 2006. (A. 616). As part of the MDI Licensing Agreement, MDI agreed to cease using the Mark upon termination of the agreement. (A. 613).



### **C. L&L Commences a Breach of Contract Action Against MDI**

During the duration of the MDI Licensing Agreement, L&L “fully performed its obligations under the Licensing Agreement. (A. 627). On October 10 and November 31, 2006, L&L reminded MDI of the written termination date under the MDI Licensing Agreement and advised MDI that it was required to remove signage and all items bearing the Mark. (A. 627). L&L also advised MDI that in the event MDI did not cease using the Mark, L&L would pursue legal remedies. (A. 627). In breach of the termination provision in the MDI Licensing Agreement, MDI continued to use the Mark. (A. 627).

On or about May 29, 2007, L&L filed suit against MDI alleging, *inter alia*, breach of contract, trademark infringement under the Lanham Act (15 U.S.C. § 1051, et seq.), violations of New York General Business Law, and common law unfair competition and services mark infringement in connection with MDI’s breach of the Licensing Agreement (“Underlying Action”). (A. 49-64). The Underlying Action complaint alleged, in sum, that MDI breached the Licensing Agreement by failing to cease using the Mark upon termination of the agreement, as was negotiated and agreed upon by the principals of L&L and MDI upon the separation of the business relationship. (A. 53). Notably, the Underlying Action complaint alleged that L&L had not registered the Mark. (A. 51).

### **D. L&L Registers the Mark**

During the pendency of the Underlying Action, L&L, through Attorney Krasner, submitted applications for a registered trademark for the Mark with the

USPTO. (A. 649 – 762) On August 29, 2006, over 13 years after L&L entered into the Morrow Agreement, and 12 years after L&L did not make royalty payments under the Morrow Agreement without receiving any indication of Morrow’s use of the Mark, Attorney Krasner stated that he believes [L&L] to be the owner of the Mark (A. 761-762).

On February 1, 2007, the USPTO sent Attorney Krasner an Office Action, which publicly indicated that there were similar marks registered with the USPTO, including the Mark owned by Shepard Morrow. (A. 651-654; 761-762). The Office Action, published publicly on the USPTO website during the pendency of the Underlying Litigation, gave public notice of the Shepard Morrow registered trademark of the Mark. Attorney Krasner submitted a response to the Office Action indicating that L&L had been using the Mark for thirty years and it was his belief that Shepard Morrow, “its last known owner,” was no longer using the Mark based on a search of the internet and clothing industry. (A. 761-762). The Mark was officially registered as of July 1, 2008. (A. 636).

#### **E. L&L Obtains Summary Judgment In The Underlying Action**

On September 4, 2008, nineteen months after the Office Action, L&L filed a motion for partial summary judgment on the issue of liability in the Underlying Action. (A. 621). On December 16, 2009, the Hon. Barbara S. Jones, U.S.D.J. (“Judge Jones”), granted L&L partial summary judgment on liability and denied MDI’s cross motion for partial summary judgment on liability (“Liability Decision”). (A. 621-648).

Judge Jones determined that MDI was liable on all of L&L's causes of actions. (A. 648).

In granting summary judgment as to L&L's breach of contract cause of action, Judge Jones determined that MDI breached its contractual obligation under the Licensing Agreement because "a valid contract existed[.]" because MDI was bound by the terms of the License Agreement, and because MDI continued to use the Mark after the termination date of the License Agreement. (A. 629-632). Judge Jones found that MDI admitted that MDI used the Mark after the date of termination of the Licensing Agreement and breached the agreement. (A. 630).

Judge Jones further determined MDI was liable for trademark infringement under the Lanham Act. (A. 636 – 640). Judge Jones specifically determined that L&L's Certificate of Registration is *prima facie* evidence that the Mark is registered and entitled to protection, that L&L owns the Mark, that L&L has exclusive rights to the Mark, and that MDI did not dispute L&L's *prima facie* showing—notwithstanding the public filings with the USPTO—entitling L&L to obtain summary judgment on the Lanham Act infringement claim. (A. 636).

A year later, on November 5, 2010, the District Court granted L&L summary judgment on damages in the Underlying Action ("Damages Decision"). (A. 764-783). In the Damages Decision, Judge Jones determined that the liquidated damages provision under the MDI License Agreement was reasonable. (A. 773). Specifically, Judge Jones determined that (1) during the drafting and execution of the Licensing Agreement, both parties were represented by competent counsel, (2) Tabib, owner of MDI, was a sophisticated

businessman, and (3) the Licensing Agreement contained an enforceable liquidating damages provision, which was the product of “an arm’s length negotiation[.]” (A. 770-774).

Even though MDI did not dispute L&L’s *prima facie* showing entitling L&L to obtain summary judgment on the Lanham Act infringement claim, Judge Jones, however, denied, in the Damages Decision, damages based under the Lanham Act based on MDI’s infringement. (A. 776-777).

#### **F. L&L and MDI Execute a Stipulation Order**

On February 15, 2011, L&L and MDI, represented by counsel, entered into the Stipulated Order to fully and finally resolve all of their disputes arising in, out of, or relating to, the Underlying Action. Specifically, MDI released Attorney Krasner from any claims arising from the Underlying Action:

Except to enforce and subject to the terms of this Stipulated Order and the obligations created hereunder, and without limiting or compromising any of the foregoing, Defendants release, forever discharge, and covenant not to sue Plaintiff and its successors, assigns, affiliates, subsidiaries, parents, and, its present and former officers, directors, employees, agents and representatives (the “Plaintiff Releasees”), from any and all actions, causes of action, suits, investigations) debts, attorneys’ fees, costs, accounts, covenants, controversies, agreements, promises, damages, claims, grievances, arbitrations, of any kind whatsoever, now known or unknown, which Defendants now have or have had from the

beginning of time until the Effective Date against the Plaintiff Releasees relating to the Mark, Trade Dress or Licensing Agreement.

(A.790-791).

#### **G. BMI Obtains A Judgment Against L&L**

On September 9, 2011, Beach Mart, Inc. (“BMI”) commenced an action in the District Court, Eastern District of North Carolina captioned: *Beach Mart, Inc. v. L&L Wings, Inc.*, 2:11 cv. 44, under a separate licensing agreement executed between L&L and the licensee, Beach Mart, Inc. (“BMI Action”) seeking damages for fraudulent inducement.(A. 46).

The license agreement at issue in the BMI Action, executed on or about August 9, 2005, is materially different from the License Agreement at issue in the Underlying Action. (A. 953-958). Specifically, unlike the MDI License Agreement at issue in the Underlying Action, the license agreement at issue in the BMI Action did not require BMI to acknowledge that another entity other than L&L may have superior rights to the Mark. (A. 953).

Ultimately, BMI obtained a judgment against L&L for fraudulently inducing BMI to enter into the BMI license agreement. (A. 46). The BMI judgment finds that L&L made false statements in connection with the solicitation of the negotiation of the August 2005 BMI license agreement. Attorney Krasner did not represent L&L in the license agreement with BMI and was not a party to such action.

## **H. L&L Files a Voluntary Petition for Bankruptcy**

On April 24, 2021, L&L filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York from the BMI Judgment (the “Bankruptcy Proceeding”). (A. 211).

MDI filed the MDI Claim, proof of Claim No. 112 on November 29, 2021. (A. 215). In MDI’s proof of Claim, MDI asserted the exact same allegations against L&L as MDI asserts now: that L&L “committed fraud in registering [the Mark] and did not legally hold, the tradename ‘Wings’”, and that the Underlying Action and Settlement Order were based on fraud. (A. 221-224).

On December 9, 2021, the Debtor (L&L) filed its objection to the MDI Claim (the “MDI Claim Objection”). (A. 239). On December 29, 2021, L&L filed a motion seeking approval of a settlement agreement with BMI. (A. 253-265).

On December 31, 2021, MDI filed a motion to lift the stay in the Bankruptcy Proceeding (“MDI Lift Stay Motion”). (A. 276). On January 13, 2022, the Official Committee of Unsecured Creditors filed its joinder to the Debtor’s objection to the MDI Claim. Separately, and the subject of a pending separate appeal (the “Lift Stay Denial Appeal”), MDI filed a Motion for Relief from the Automatic Stay on December 31, 2021 (the “Lift Stay Motion”) in order to “nominally” name L&L as a defendant in an action to be brought in the court for the identical relief as it seeks in this action. (A. 276).

On January 13, 2022, MDI filed a Notice of Withdrawal of Claim No. 112. (A. 338). On January 18, 2022, L&L filed a Reply in further support of the MDI Claim Objection. Among its other contortions, MDI then “withdrew” their “withdrawal of claim.” (A. 467). This “withdrawal” of their “withdrawal of claim” was “so ordered.” (A. 467) On January 21, 2022, the Bankruptcy Court issued the Lift Stay Denial Order (Bankruptcy Court ECF Docket No. 283) which, in addition to denying the MDI Lift Stay Motion, stated, *inter alia* that “Movant’s Proof of Claim No. 112 is no longer withdrawn.” (A. 467).

On February 2, 2022, MDI filed a Notice of Appeal of the Order denying the Lift Stay Motion. On March 1, 2022, Hon. David S. Jones allowed BMI’s claim, as negotiated and materially reduced, under L&L’s plan of reorganization. (A. 479). On April 7, 2022 the Hon. David S. Jones, granted L&L’s motion objecting to MDI’s claim No. 112. In sum, Hon. David S. Jones disallowed MDI’s claim and expunged the claim in its entirety. (A. 553).

## **I. MDI Commences the Instant Action**

On October 4, 2022, MDI commenced this action by filing a Summons and Complaint in the District Court. In sum, MDI seeks to vacate the 2011 Stipulated Order asserting that it was “procured by fraud” on behalf of L&L, the Levys and Attorney Krasner in connection with the alleged claimed ownership of the Mark 13 years after the Morrow Agreement was executed (12 years after L&L stopped paying royalties and Shepard Morrow ceased contact with L&L regarding the Mark, and Sheppard Morrow let the trademark lapse). (A. 11).

Specifically, MDI asserts two counts in the Complaint against Attorney Krasner and the Levys: Fraud on the Court and Fraud. (A. 31-33). MDI alleges that because BMI obtained a judgment for fraudulent inducement of a license agreement against L&L, MDI stands in a similar position to BMI and can thus vacate the 2011 Stipulate Settlement Order and the appurtenant releases. (A. 28-29).

Notably absent from MDI's Complaint, however, is reference to Paragraph 11.3 of the MDI license agreement with L&L, in which MDI acknowledged that other entities may have superior rights to L&L for the Mark. (A. 616).

#### **J. Judge Swain Permits MDI to Withdraw The Proof of Claim**

During the pendency of this action, in the context of the appeal from the order disallowing MDI's Claim No. 112, the Hon. Laura Taylor Swain gave MDI an opportunity to renew their application to withdraw their bankruptcy proof of claim, without prejudice to litigation of the claims against the defendants in this case. *See In Re L&L WINGS, INC*, 1:22-cv-04058 ECF Doc. No. 36. On September 7, 2023, Judge Swain issued a decision withdrawing the reference of L&L Wings' bankruptcy case solely to the extent necessary to act on the Withdrawal Motion, and granted MDI's Withdrawal Motion to the extent it seeks withdrawal of MDI's proof of claim number 112. *Id.* at. ECF 42. This withdrawal was with prejudice, and did not contain qualifying conditions MDI sought to insert.



**K. Judge Swain Correctly Dismisses MDI's Complaint**

On August 28, 2023, Judge Swain dismissed MDI's Complaint based on the merits. (SPA 11). In dismissing MDI's first count, Judge Swain correctly determined that MDI "fails to state a claim of fraud on the Court because Plaintiffs have not met their burden of showing that they were prevented 'from fully and fairly presenting a case or defense in the Underlying Action.'" (SPA 12). Judge Swain correctly determined that MDI was in "possession of information that would have supported inquiry into the veracity of L&L's claims of trademark ownership and had every opportunity in the Underlying Action to use the tools available in the adversarial process to contest L&L's asserted ownership rights in the 'Wings' mark." (SPA 12).

Reviewing the MDI License Agreement, Judge Swain correctly determined that MDI "acknowledges that it was told by L&L that one or more individuals and/or entities have registered trademarks and/or service marks to the 'Wings' mark and can and/or may claim a paramount right' to its use." (SPA 13). Judge Swain further correctly recognized that MDI failed to allege in the Complaint that MDI acknowledged under the MDI License Agreement that other entities may have paramount rights to the Mark and failed to address the provision in opposition to the motions to dismiss. (SPA 13). Judge Swain further correctly recognized that that the BMI License Agreement did not contain a provision where BMI acknowledged that other entities may have paramount rights to the Mark.

Judge Swain also correctly determined that MDI's Complaint failed to address a fundamental issue for a fraud on the court cause of action: whether or not L&L, Attorney Krasner, or the Levys, prevented MDI from "fully and fairly" presenting its case in the Underlying Action. (SPA 15). Because MDI had the opportunity through broad discovery to uncover the fraud in the Underlying Action, Judge Swain determined that MDI cannot now set aside the Stipulated Order. (SPA 15).

In dismissing MDI's fraud count, Judge Swain correctly determined that the statute of limitations for MDI's fraud claim expired and is otherwise barred by the release. (SPA 16-18). Citing to Fed. R. 60(b)(3), Judge Swain correctly determined that "[a] motion under Rule 60(b)(3) must be made "no more than a year after the entry of the judgment or order." (SPA 16). Judge Swain further acknowledged that the Stipulated Order cannot be disturbed because this Court determined that the "one-year limitations period for claims that are properly encompassed by Rule 60(b)(3) is 'absolute[.]'" Accordingly, Judge Swain determined that the fraud claim under Count Two expired in 2012. (SPA-18). Because Judge Swain could not disturb the Stipulated Order, the release provisions also barred MDI's claim. (SPA-18).

### **SUMMARY OF THE ARGUMENT**

MDI now appeals the District Court's Decision and Order arguing, in sum, that the District Court applied the incorrect law. *See* Appellant Br. at 9. Specifically, MDI argues that the District Court ignored *Hazel-Atlas Glass, Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), a case where the defendant attorney

tampered with evidence and the Court determined that there was fraud on the court, in rendering a decision to dismiss the MDI's Complaint. *See* Appellant Br. at 9-10. Unlike here, however, the Court in *Hazel* determined that "[w]e cannot easily understand how, under the admitted facts, Hazel should have been expected to do more than it did to uncover the fraud." *Hazel*, 322 U.S. at 247.

In this case, the District Court correctly determined that unlike the petitioner in *Hazel*, MDI was not prevented from fully and fairly presenting its case because the MDI License Agreement, under section 11.3 "disclosed that another individual or entity possessed registered trademarks and/or service marks for the 'Wings' mark." (SPA-13). MDI, does not and cannot dispute that it had in its possession the MDI License Agreement. Because MDI had in its possession the MDI License Agreement, the District Court also determined that MDI did not challenge the . . . .

[ . . . ]

**2024 YEAR END REPORT ON THE FEDERAL  
JUDICIARY, CHIEF JUSTICE ROBERT  
(DECEMBER 31, 2024)**

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*J. Waties Waring Judicial Center, Charleston, South Carolina*

**2024 Year End Report on the Federal Judiciary**

In December 1761, a little more than one year into what would be a fifty-nine year reign, King George III decreed that from that date forward, colonial judges were to serve “at the pleasure of the Crown.” This royal edict departed from the longstanding practice in England, enshrined by Parliament in the 1701 Act of Settlement, of allowing judges to retain their offices “during good behavior.”

The King’s order was not well received. To the colonists, stripping lifetime appointments from judicial officers marked yet another instance in which British subjects living on the west side of the Atlantic Ocean were treated as second class. George III compounded the insult about a decade later, in 1772, when he estab-

lished a salary set by the Crown for superior court judges in Massachusetts, preventing them from accepting the then prevailing local government wages for their services. A prominent Boston lawyer by the name of John Adams protested that the King's actions made colonial judges "entirely dependent on the Crown for Bread [as] well as office."<sup>1</sup>

Despite widespread disapproval in the colonies over this interference with the independence of their judges, the King held his ground. Accordingly, the ninth of twenty-seven grievances enumerated in the Declaration of Independence charged that George III "has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."

After securing independence, the fledgling United States did not immediately set about creating a national judiciary. Indeed, among the many defects of the Articles of Confederation, the absence of any mention of a judicial branch—or judges at all—seems particularly glaring.

The Constitutional Convention of 1787 remedied that oversight. In a tidy rebuttal to the King, Article III, Section 1 of the Constitution of the United States states that "The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

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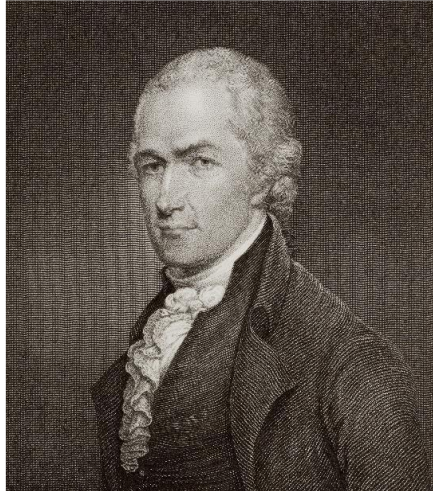
<sup>1</sup> J. Adams, *Diary and Autobiography of John Adams*, Vol. 1, 1961.

You might have expected the man who soon would become the first Chief Justice of the United States, John Jay, to have authored the portions of the Federalist Papers devoted to the judicial branch. But, as I explained in my 2019 Year End Report, Jay spent the winter of 1788 recovering from a severe head injury sustained while trying to protect a group of medical students from an angry mob who thought, erroneously, that the students were stealing cadavers from graves to practice surgery. As Jay rested to heal the “two large holes in his forehead,” the task of championing judicial independence fell to Alexander Hamilton.

Quoting the French political philosopher Montesquieu, Hamilton endorsed in Federalist No. 78 the principle that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”<sup>2</sup> Hamilton anticipated that the relatively weak judicial

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<sup>2</sup> Federalist No. 78.



*Stipple engraving of Alexander Hamilton, c. 1834*

branch—possessing neither the sword nor the purse—would require “all possible care . . . to defend itself” against the attacks of the other branches.<sup>3</sup> To that end, “permanent tenure of judicial offices” would free judges to perform their essential role as “the bulwarks of a limited Constitution against legislative encroachments.”<sup>4</sup> In Federalist No. 79, Hamilton argued for judicial compensation that could not be diminished—noting that “power over a man’s subsistence amounts to a power over his will.”<sup>5</sup> Hamilton’s masterful defense of judicial independence also went on to presage Chief Justice Marshall’s foundational decision in *Marbury v. Madison*, recognizing the duty of the courts

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Federalist No. 79.

“to declare all acts contrary to the manifest tenor of the Constitution void.”<sup>6</sup>

The independent federal judiciary established in Article III and preserved for the past 235 years remains, in the words of my predecessor, one of the “crown jewels of our system of government.”<sup>7</sup> Indeed, it is no exaggeration to conclude, as Chief Justice Rehnquist did, that “the creation of an independent constitutional court, with the authority to declare unconstitutional laws passed by state or federal legislatures, is probably the most significant contribution the United States has made to the art of government.”<sup>8</sup> Before the American founding, no other country had found a way to ensure that the people *and* their government respect the law. One reason judicial review has endured and served us well lies in yet another insight from Chief Justice Rehnquist, articulated in his 2004 Year End Report: “The Constitution protects judicial independence not to benefit judges, but to promote the rule of law.”<sup>9</sup> Or, as Justice Kennedy put it, “Judicial independence is not conferred so judges can do

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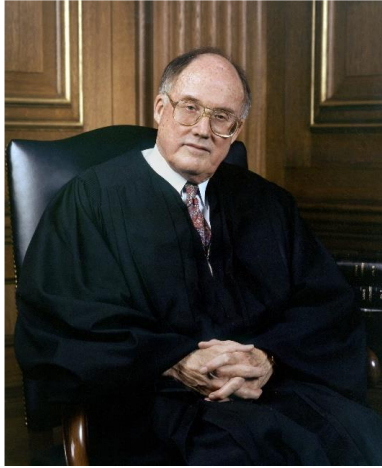
<sup>6</sup> Federalist No. 78.

<sup>7</sup> W. H. Rehnquist, Remarks of the Chief Justice at the Washington College of Law Centennial Celebration, American University, April 9, 1996.

<sup>8</sup> W. H. Rehnquist, Judicial Independence, 38 U. Rich. L. Rev. 57980 (Mar. 1, 2004).

<sup>9</sup> W. H. Rehnquist, 2004 Year End Report on the Federal Judiciary.





*Chief Justice William H. Rehnquist, 1993*

as they please. Judicial independence is conferred so judges can do as they must.”<sup>10</sup>

In that same 2004 Report, which would prove to be his last, Chief Justice Rehnquist observed that “[c]riticism of judges has dramatically increased in recent years, exacerbating in some respects the strained relationship between the Congress and the federal Judiciary.”<sup>11</sup> That statement is just as true, if not more so, today.

In truth, some tension between the branches of the government is inevitable and criticism of judicial interpretations of the people’s laws is as old as the Republic itself. In Hamilton’s and Jefferson’s time, the debate was framed by pitting those who believed that the government’s powers extended only to those spe-

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<sup>10</sup> A. M. Kennedy, Testimony in Senate Judiciary Committee Hearing on Judicial Independence, 2007.

<sup>11</sup> W. H. Rehnquist, 2004 Year End Report on the Federal Judiciary.

cifically enumerated in the document against those who found in it more expansive powers. Today we often use terms like originalism and pragmatism to describe these differences of opinion. The political branches sometimes inquire into judicial philosophy when considering nominees for the federal courts. But the oath—and the duties that follow—are the same regardless of the President who nominated and the Senate that confirmed every new Article III judge.

Judicial review makes tensions between the branches unavoidable. Judicial officers resolve crucial matters involving life, liberty, and property. At times, as Hamilton recognized, an independent judiciary must uphold the Constitution against the shifting tides of public opinion, as “no man can be sure that he may not tomorrow be the victim of a spirit of injustice, by which he may be a gainer today.”<sup>12</sup> It should be no surprise that judicial rulings can provoke strong and passionate reactions. And those expressions of public sentiment—whether criticism or praise—are not threats to judicial independence.

To the contrary, public engagement with the work of the courts results in a better-informed polity and a more robust democracy. Indeed, when working in panels, judges themselves join from time to time the ranks of critics through concurring and dissenting opinions. Two district judges independently looking at the same legal issue can also come to different conclusions, leaving it to higher courts to resolve the split of authority. And room for disagreement is almost endless when it comes to the vast swath of trial court work that involves the application of variable legal tests to

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<sup>12</sup> Federalist No. 78.

unique fact patterns in individual cases. In last year's Year End Report, I opined that the application of discretion in these situations explains why machines will never fully replace human judges. But it also creates fertile ground for debate and criticism.

At the end of the day, judges perform a critical function in our democracy. Since the beginning of the Republic, the rulings of judges have shaped the Nation's development and checked the excesses of the other branches.

Of course, the courts are no more infallible than any other branch. In hindsight, some judicial decisions were wrong, sometimes egregiously wrong. And it was right of critics to say so. In a democracy—especially in one like ours, with robust First Amendment protections—criticism comes with the territory. It can be healthy. As Chief Justice Rehnquist wrote, “[a] natural consequence of life tenure should be the ability to benefit from informed criticism from legislators, the bar, academy, and the public.”<sup>13</sup>

Unfortunately, not all actors engage in “informed criticism” or anything remotely resembling it. I feel compelled to address four areas of illegitimate activity that, in my view, *do* threaten the independence of judges on which the rule of law depends: (1) violence, (2) intimidation, (3) disinformation, and (4) threats to defy lawfully entered judgments.

There is of course no place for violence directed at judges for doing their job. Yet, in recent years, there has been a significant uptick in identified threats at all levels of the judiciary. According to United States

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<sup>13</sup> W. H. Rehnquist, 2004 Year End Report on the Federal Judiciary.

Marshals Service statistics, the volume of hostile threats and communications directed at judges has more than tripled over the past decade. In the past five years alone, the Marshals report that they have investigated more than 1,000 serious threats against federal judges. In several instances, these threats have required the assignment of fulltime U.S. Marshals Service security details for federal judges, and approximately fifty individuals have been criminally charged. In extreme cases, judicial officers have been issued bulletproof vests for public events.

Fortunately for our Nation's judges, the vigilance of law enforcement officers and investigators has stopped many threats of violence before they could be carried out. Indeed, from the founding of the Republic in 1789 until 1979, only one federal judicial officer, Chief Justice John Slough of the New Mexico Territorial Supreme Court, was killed in office. And the quarrel that led to Slough's shooting in the billiard room of a Santa Fe hotel in December 1867 did not stem from a judicial ruling, but rather from the judge's off-the-bench criticism of a territorial legislator.

In more recent decades, however, disgruntled litigants have perpetrated acts of violence against several judges and members of their families. Between 1979 and 1989, three federal judicial officers—two district judges and a circuit judge—were killed for doing their jobs. In 2005 and 2020, close relatives of federal judges were shot to death by assailants intent on harming the judges who had handled their cases. More recently, in 2022 and 2023, state judges in Wisconsin and Maryland were murdered, also at their homes. Each instance constituted a targeted attack

following an adverse ruling issued by the judge exercising ordinary judicial duties.

These tragic events highlight the vulnerability of judges who sign their names to the decisions they render each day and return home each night to communities, where they remain involved as neighbors, volunteers, and concerned citizens. Judges cannot hide, nor should they. I am grateful to the many federal and state legislators who have stepped forward to sponsor bills shielding judges' personal identifying information from the public domain. I also thank Congress for providing additional funding to protect the physical security of judges and justices. And I commend the Marshals and other officers who work on the front lines day and night to keep judicial officers across the country as safe as possible. It is regrettable that law enforcement officers must now dedicate significant additional resources to protecting judges, tracking and investigating threats against them, and prosecuting those who cross the line between lawful criticism and unlawful threats or actions.

Of course, attempts to intimidate need not physically harm judges to threaten judicial independence. In earlier times, these provocations usually were directed at judges' homes. Perhaps the most egregious example involved U.S. District Judge Julius Waties Waring. As a judge in South Carolina from 1942 to 1952, Judge Waring issued numerous rulings opening voting and educational opportunities for Black Americans. Local residents outraged by these decisions burned a cross in the judge's lawn, fired gunshots at his home, and hurled a large lump of concrete through his front window. Elected officials called for his impeachment. But Judge Waring stood

strong until taking senior status at age 71, secure in the knowledge that an equal protection challenge to racial segregation had made its way to the Supreme Court. By the time the landmark decision in *Brown* was issued in May 1954, Waring had moved to New York City, returning to South Carolina only in 1968 to be buried in Charleston, near the federal courthouse that now bears his name.

Today, in the computer era, intimidation can take different forms. Disappointed litigants rage at judicial decisions on the Internet, urging readers to send a message to the judge. They falsely claim that the judge had it in for them because of the judge's race, gender, or ethnicity—or the political party of the President who appointed the judge. Some of these messages promote violence—for example, setting fire to or blowing up the courthouse where the target works.

Occasionally, court critics deploy “doxing”—the practice of releasing otherwise private information such as addresses and phone numbers—which can lead to a flood of angry, profane phone calls to the judge's office or



*This cross was burned on the lawn of  
Chief Justice Warren's apartment building early in  
the morning on July 14, 1956.*

Home. Doxing also can prompt visits to the judge's home, whether by a group of protestors or, worse, an unstable individual carrying a cache of weapons. Both types of activity have occurred in recent years in the vicinity of the Nation's capital. Activist groups intent on harassing judges have gone so far as to offer financial incentives for posting the location of certain judicial officers.

Public officials, too, regrettably have engaged in recent attempts to intimidate judges—for example, suggesting political bias in the judge's adverse rulings without a credible basis for such allegations. Within the past year we also have seen the need for state and federal bar associations to come to the defense of a federal district judge whose decisions in a high-profile case prompted an elected official to call for her impeachment. Attempts to intimidate judges for their rulings in cases are inappropriate and should be vigorously opposed. Public officials certainly have a right to criticize the work of the judiciary, but they should be mindful that intemperance in their statements when it comes to judges may prompt dangerous reactions by others.

Disinformation, even if disconnected from any direct attempt to intimidate, also threatens judicial independence. This can take several forms. At its most basic level, distortion of the factual or legal basis for a ruling can undermine confidence in the court system. Our branch is peculiarly ill-suited to combat this problem, because judges typically speak only through

their decisions. We do not call press conferences or Generally issue rebuttals.

To make matters worse, as I noted in my 2019 Year End Report, the modern disinformation problem is magnified by social media, which provides a ready channel to “instantly spread rumor and false information.” At that time, I endorsed a renewed emphasis on civic education as the best antidote for combating the epidemic of misinformation. I am happy to report that the bench, bar, and academy have embraced this essential project—writing and speaking about the distinct role of courts in American government and explaining what they do and don’t do.

But much more is needed—and on a coordinated, national scale—not only to counter traditional disinformation, but also to confront a new and growing concern from abroad. In recent years, hostile foreign state actors have accelerated their efforts to attack all branches of our government, including the judiciary. In some instances, these outside agents feed false information into the marketplace of ideas. For example, bots distort judicial decisions, using fake or exaggerated narratives to foment discord within our democracy. In other cases, hackers steal information—often confidential and highly sensitive—for nefarious purposes, sometimes for private benefit and other times for the use of state actors themselves. Either way, because these actors distort our judicial system in ways that compromise the public’s confidence in our processes and outcomes, we must as a Nation publicize the risks and take all appropriate measures to stop them.

The final threat to judicial independence is defiance of judgments lawfully entered by courts of competent jurisdiction. As noted above, two of the major pillars



of our Republic—separation of powers and judicial review—create an inevitable tension between the branches of our government. Hamilton foresaw, and Chief Justice Marshall confirmed, the role of the judicial branch to say what the law is. But judicial independence is undermined unless the other branches are firm in their responsibility to enforce the court's decrees.

After *Brown v. Board of Education*, for example, multiple state governors sought to defy court orders to desegregate schools in the South. The courage of federal judges to uphold the law in the face of massive local opposition—and the willingness of the Eisenhower and Kennedy Administrations to stand behind those judges—are strong testaments to the relationship between judicial independence and the rule of law in our Nation's history.

It is not in the nature of judicial work to make everyone happy. Most cases have a winner and a loser. Every Administration suffers defeats in the court system—sometimes in cases with major ramifications for executive or legislative power or other consequential topics. Nevertheless, for the past several decades, the decisions of the courts, popular or not, have been followed, and the Nation has avoided the standoffs that plagued the 1950s and 1960s. Within the past few years, however, elected officials from across the political spectrum have raised the specter of open disregard for federal court rulings. These dangerous suggestions, however sporadic, must be soundly rejected.

Judicial independence is worth preserving. As my late colleague Justice Ruth Bader Ginsburg wrote, an independent judiciary is “essential to the rule of law in any land,” yet it “is vulnerable to assault; it can be shattered if the society law exists to serve does not

take care to assure its preservation.”<sup>14</sup> I urge all Americans to appreciate this inheritance from our founding generation and cherish its endurance. I also echo the words of Chief Justice Charles Evans Hughes, who remarked—in the aftermath of a significant prior threat to judicial independence—that our three branches of government “must work in successful cooperation” to “make possible the effective functioning of the department of government which is designed to safeguard with judicial impartiality and independence the interests of liberty.”<sup>15</sup>

Our political system and economic strength depend on the rule of law. The rule of law depends, in turn, on Article III of the Constitution and judges and justices appointed and confirmed under it. Those men and women remain connected to the people they serve and do their work in the public eye. Chief Justice Taft is the only person to have served as head of the judicial and a political branch. As he put it, “Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism.”<sup>16</sup> But violence, intimidation, and defiance directed at judges because of their work undermine our Republic, and are wholly unacceptable.

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<sup>14</sup> R. B. Ginsburg, Remarks on Judicial Independence, Conference of American Judges Association, 2006.

<sup>15</sup> C. E. Hughes, Address of the Chief Justice of the United States to Joint Session of Congress, Mar. 4, 1939.

<sup>16</sup> W. H. Taft, Remarks at the Annual Meeting of the American Bar Association, *American Law Register and Review* 43(9) 577 (1895).

The federal courts must do their part to preserve the public's confidence in our institutions. We judges must stay in our assigned areas of responsibility and do our level best to handle those responsibilities fairly. We do so by confining ourselves to live "cases or controversies" and maintaining a healthy respect for the work of elected officials on behalf of the people they represent. I am confident that the judges in Article III and the corresponding officials in the other branches will faithfully discharge their duties with an eye toward achieving the "successful cooperation" essential to our Nation's continued success.

As always, I am privileged and honored to thank all the judges, court staff, and other judicial branch personnel throughout the Nation for their commitment to upholding judicial independence and the rule of law through their outstanding public service.

Best wishes to all in the New Year.

John G. Roberts, Jr.

Chief Justice of the United States

December 31, 2024

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