

No. _____

In the Supreme Court of the United States

DARYL K. WASHINGTON, SUNDAY PLAYERS, INC.,
Petitioners,

v.

KELLWOOD COMPANY,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case asks the Court to consider questions left open in several previous cases: whether it is unconstitutional to permit U.S. judge magistrates to issue final judgments, unchecked by Article III district courts, that create legal precedent not unlike that of article III judges; whether consent is valid under 28 U.S.C. § 636 when obtained through coercive trial delays; whether 28 U.S.C. § 636 requires that a magistrate overseeing a trial possess a trial skill level comparable to that of an article III judge.

In addition, this case presents equally important—but distinct—factual and legal questions whether a magistrate’s vacatur of a jury verdict, despite the presence of undisputed industry evidence; and blanket exclusion of all expert and business owner testimony is erroneous when the rulings conflict with decisions in virtually every other circuit.

This case involves the second circuit’s dramatic expansion of the powers of a non-article III magistrate judge, with little or no trial experience in a judicial capacity, to vacate a valid jury verdict by a wholesale exclusion of a previously vetted expert and categories of evidence that are admissible in virtually every other circuit. It also involves a scenario where the alleged consent by the parties was less than ideally obtained and the magistrate did not allow the article III district court to decide a motion to vacate her assignment or to review the final judgment. Although this Court has referred to consent authority on occasions, it has not addressed directly the questions of (i) the

constitutionality of a magistrate assignment where the district judge maintains no reviewing authority over the magistrate's dispositive rulings; (ii) the constitutionality of apparent coerced consent; (iii) the constitutionality of allowing a magistrate judge's rulings to create legal precedent for the respective circuit, merely upon the consent of private parties; and (iv) the right of parties to have a magistrate judge with trial experience in a judicial capacity equivalent to that of the Article III judges who direct parties to agree that a magistrate should try a case.

Thus, this case presents the following formal questions:

1. Whether it is constitutional under 28 U.S.C. § 636 for a district court to assign, with or without consent, a dispositive function to a magistrate judge where the district court retains no authority to review the magistrate's final decision or to vacate the assignment.
2. Whether 28 U.S.C. § 636 permits a magistrate judge to conduct a trial where the parties were pressured to litigate involuntarily before a non-Article III magistrate.
3. Whether 28 U.S.C. § 636 permits a case to be reassigned, with or without objection, from a magistrate judge with substantial trial experience to a magistrate judge with little or no trial experience in a judicial capacity.
4. Whether the second Magistrate Judge's vacatur of the jury verdict and blanket exclusion of any expert or business owner testimony conflicts with the decisions of other United States courts of appeals departs from the accepted and usual course of judicial proceedings.

LIST OF PARTIES

Petitioners, who were Plaintiffs-Appellants-Cross-Appellees below, are Daryl K. Washington and Sunday Players, Inc.

Respondent, who was Defendant-Appellee-Cross-Appellee below, is Kellwood Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29 of this Court's Rules, Petitioners certify that Sunday Players, Inc. is a privately held corporation organized under the laws of Texas and does not have a parent company, nor does a publicly traded company hold more than 10% of its stock.

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1977 Annual Report of the Director of the Administrative Office of the United States Courts	23, 24
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TIMOTHY A. BAKER, The Expanding Role of Magistrate Judges in the Federal Courts, 39 Val. U. L. Rev. 661 (2005)	14
Cong. Rec. H5056 (daily ed. June 25, 1979) (statement of Mr. Danielson)	21
Cong. Rec. H8725 (daily ed. Sept. 28, 1979) (statement of Mr. Kastenmeier)	21
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Litigation Services Handbook: The Role of the Financial Expert(4th ed. 2007)	36
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Carroll Seron, The Roles of Magistrates: Nine Case Studies 84 (Federal Judicial Center 1985)	22
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PETITION FOR CERTIORARI

In 2003, the parties entered into a three-year, with optional renewal, exclusive license agreement for the manufacture, marketing, promotion, and sales of Petitioners' compression athletic wear, a rapidly expanding market niche of apparel. Respondent terminated the agreement prematurely and Petitioners filed Complaint in the Southern District of New York on November 29, 2005. After several years, the district court ruled on a partial motion to dismiss and Petitioners filed an Amended Complaint on June 25, 2009. Over the next few years, hearings were canceled, the case languished with inactivity, and it was shuttled back and forth between district judges.

Finally, nine years later, in 2014, after Petitioners continually asked for a trial date, the parties were contacted by the courtroom deputy and informed that they needed to consent to a magistrate judge to avoid further delays. Realizing they had no option, the parties signed the form. Initially, an experienced magistrate was assigned and made rulings in Petitioners' favor on summary judgment and *Daubert* motions. After these rulings, the case was reassigned, over an objection, to one of the newer magistrates, who, as Petitioners discovered much later, had little or no trial experience in a judicial capacity. Although Respondent asked to vacate the assignment of the new magistrate, the magistrate took up the motion herself and denied it. Eventually, after a jury trial, the new magistrate proceeded to, *inter alia*, (i) vacate the entire jury verdict; (ii) preclude all testimony from an expert who had previously been thoroughly vetted by the experienced Magistrate during robust *Daubert*

proceedings; (iii) grant, then vacate the ruling on, the motion for new trial; (iv) preclude Petitioners from utilizing any expert in a new trial and (v) preclude all testimony from business owners as to damages.

Review by this Court is necessary to address the unconstitutionality of the trial court's rulings, the undeniable conflict among the courts of appeal regarding the categories of evidence and witnesses the magistrate excluded, and to prevent the decision below by a non-Article III judge from eviscerating the protections of Article III in direct contravention of Congress' and the Framers' mandates.

OPINIONS AND ORDERS BELOW

The Second Circuit's panel decision is reported at 2017 WL 4994467 and reproduced at App.1. The Second Circuit's order denying rehearing en banc is reproduced at App.32. The district court's decision vacating the jury's verdict is reported at 2016 WL 4619207 and reproduced at App.14.

BASIS FOR JURISDICTION

The Second Circuit entered its decision on November 2, 2017 and denied the petition for rehearing on December 20, 2017. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Article III, section 1, of the U.S. Constitution provides:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to

time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

U.S. Constitution - Amendment VII provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Federal Magistrates Act (the “Magistrates Act”) provides in relevant part:

Magistrates Act - 28 U.S.C. § 636(b)(1)(A)

[A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A). The Act also prescribes the circumstances under which consent can be provided,

Magistrates Act - 28 U.S.C. § 636(c)(1), (2)

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court.

Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

28 U.S.C. § 636(c)(1), (2). The Magistrates Act is reproduced at App.42-51.

STATEMENT OF THE CASE

A. The Sunday Players Brand and Compression-wear Market

The origins of this suit date back to 2003, when Daryl Washington ("Washington"), an attorney, sports agent, and former accountant started Sunday Players ("SP"), a compression athletic-wear brand. Washington owns the trademarks "Sunday Players" and a logo of a stylized running person with an elliptical design and branded his apparel with this logo and name. Initially, Washington and his partners marketed the SP brand themselves by attending major trade shows, publishing product catalogs, visiting teams and colleges and making other personal sales calls. One SP principal, Izell Reese, is a former high-profile NFL defensive back who introduced the brand to customers and developed interest in the products among professional football players in NFL locker rooms. Another SP principal, Curley Kelly, a football, basketball, baseball, and volleyball coach, was head of team sales and developed relationships with coaches and teams throughout the

country. Through these efforts, SP made relatively substantial sales to high schools, colleges, and retail stores. Christopher Plumlee served as SP's Vice President of Sales. Plumlee had 25 years of sales and marketing experience and helped develop the brand's marketing strategy it wanted Kellwood to help implement. SP believed that it should base its strategy, in part, on a proven marketing strategy like that of Under Armour ("UA"). UA was a new leader in the compression market and was founded by a college football player. During the relevant time, UA's revenues grew from \$5.3 million in 2000 to \$242.2 million in 2005. SP's principals testified they studied the compression market for years, had actual market experience, and felt SP could compete in the market.

Before Kellwood Company took over SP's operation, the SP brand was gaining nationwide recognition and was seen worn by well-known athletes such as NFL Hall of Fame quarterback and NASCAR car owner Roger Staubach, NBA Hall of Famer Earvin "Magic" Johnson, and former No. 1 ranked female pool player in the world, Jeanette "Black Widow" Lee.

B. The Initiation and Termination of the Exclusive License Agreement

In November 2003, SP entered into an exclusive license agreement (the "Agreement") with Kellwood, whereby Kellwood agreed to manufacture, market and promote the SP brand and products as exclusive licensee. No one disputes that Kellwood's financial strength, high quality compression-wear manufacturing, demonstrated record of brand development, and relationships with national retailers—as well as experience turning new brands

into extremely profitable brands—enticed SP to enter into the Agreement. And SP was an attractive partner for Kellwood, who was seeking licensing agreements to increase sales and ensure future success. The Agreement’s term was three years (until 2007) with an electable option to renew for three additional years.

Kellwood terminated the Agreement prematurely in March 2005.

C. The District Court Delays in Advancing the Case to a Jury Trial

SP filed its Complaint in the Southern District of New York on November 29, 2005. In February 2006, Kellwood filed a partial motion to dismiss, but the district court did not rule on it until March 24, 2009, and in response to that Order, SP filed a Second Amended Complaint on June 25, 2009. The first scheduling order issued on October 30, 2009, but no trial date was scheduled. The second scheduling order issued on October 8, 2010, but, again, no trial date was scheduled. On April 21, 2011, an Order issued scheduling dates for *Daubert* expert-related motions. Consistent with District Judge Deborah A. Batts’s Order, both parties filed their *Daubert* motions on May 20, 2011, and briefing was complete by June 24, 2011. A Motion Hearing on the *Daubert* Motions was set for July 12, 2011 before Judge Batts, but the hearing was later cancelled.

On October 5, 2011, the case was reassigned to District Judge J. Paul Oetken. On October 18, 2011, the case was reassigned to Judge Batts. For the next three years, no substantive court activity was held on the case.

D. The Courtroom Deputy Contacts the Parties and Originates Discussion Regarding Trial by Magistrate.

During 2011-2014, Petitioners' counsel occasionally contacted the courtroom deputy to ask for a trial setting, to no avail. In addition to telephone calls, both parties sent correspondence to the district court in July 2011 and July 2013 seeking a setting for motions and trial. Each time contact was made with the court, the delays would continue. Then, in September 2014, district Judge Batts's courtroom deputy contacted the parties to discuss the parties "agreeing" to a trial by a magistrate. It was represented that allowing a magistrate to try the case was the only way to "avoid further delay." Because of the already substantial delays, and the implication from the courtroom deputy that non-consent would result in further delays, the parties agreed (clearly under pressure) to allow a magistrate to handle the case. According to Respondent's recollection, it agreed only to allow Magistrate Judge Dolinger to hear the case since, based on Kellwood's research of Magistrate Dolinger, it believed Magistrate Dolinger had the requisite trial experience to hear a case of this significance.

E. Judge Batts Assigns the Case to Magistrate Judge Michael Dolinger

On October 6, 2014, the case was assigned to Magistrate Dolinger. On April 21, 2015, Magistrate Dolinger made rulings on the *Daubert* motions that had been pending for years and ruled that most of SP's expert testimony was admissible under *Daubert*. On October 14, 2015, Magistrate Dolinger denied Kellwood's summary judgment motion and granted

SP's summary judgment motion in part, holding that Kellwood breached the Agreement in two ways. Magistrate Dolinger held, "a trial is warranted to put a dollar value on this infraction."

F. The Case is Reassigned, Without Notice to the Parties, to Magistrate Judge Sarah Netburn

On October 14, 2015, without notice, the case was reassigned to Magistrate Judge Sarah Netburn, who scheduled a status conference for October 28, 2015. During the status conference, Respondent's counsel indicated that it would file a motion to vacate Magistrate Netburn's assignment, which it did. However, instead of the Article III district judge ruling on the Motion to Vacate, Magistrate Netburn herself entered an order denying the Motion. Magistrate Netburn set trial for February 3, 2016.

G. Based on The Evidence Presented, the Jury Ruled in Petitioners' Favor

On the eve of trial, Kellwood filed a motion in limine to restrict the testimony of SP's expert Scott Barnes ("Barnes"), and Magistrate Netburn excluded parts of Barnes's testimony. Nevertheless, the jury returned a verdict that Kellwood breached the Agreement and awarded SP \$4.35 million in lost profits damages and \$500,000 in lost market value damages. During trial, seven industry-knowledgeable witnesses agreed that advertising, athletic-sponsorships, and direct consumer marketing were necessary to sell SP's products. The witnesses also effectively agreed that had Kellwood used its corporate strength, financial resources, sales and marketing expertise, and retailer contacts to

market/promote the brand, Kellwood/SP, exercising reasonable efforts, would have achieved substantially more sales, in the figures provided at trial.

The jury also heard that SP spent years comparing competitors' products; visiting stores to see points of sale; observing consumer behavior; studying how compression products were marketed; talking to consumers about brand name and philosophy; obtaining feedback from coaches, team equipment managers and athletes about what they liked and would buy; attending seminars regarding the market; and speaking with representatives at trade shows and store owners. Thus, SP's principals routinely conducted research to determine whether Kellwood/SP could compete in the rapidly expanding compression apparel market. Kellwood presented no experts or lay witnesses refuting testimony that those who researched, helped develop, and participated in the market considered Kellwood/SP sufficiently comparable to early-UA. See Yardstick Comparison at App.41. Moreover, Kellwood's expert performed no Yardstick analysis and offered no alternative Yardstick company.

Further, the Magistrate Judge did not demonstrate during the trial that she had any independent expertise in the compression-wear market with which to evaluate evidence differently from the jury.

H. Magistrate Netburn Vacates the Jury Verdict; Grants, then Denies, a New Trial; and Excludes all Testimony by Experts and Business Owners

Nonetheless, after trial, Magistrate Netburn vacated the jury's verdict and granted Kellwood's

conditional request for a new trial on damages but held that that SP would not be permitted to offer any expert testimony at a new trial. SP then prepared to make its case without an expert, indicating that it would use competent and admissible lay witness testimony to establish SP's damages from Kellwood's breaches. After SP had prepared for trial once again, and again on the eve of trial, Magistrate Netburn reversed course. She granted Kellwood's omnibus *motion in limine* to exclude all of SP's damages evidence, precluded SP's lay witness testimony on damages, cancelled the new damages trial, and retroactively granted Kellwood's post-trial judgment as a matter of law. SP moved for reconsideration, making detailed offers of evidence demonstrating what it would have established at the damages trial, but Magistrate Netburn refused to consider any of the evidence, or allow SP to use expert testimony, before entering an order of final judgment awarding nominal damages of \$1.

I. The Second Circuit Validates the Reassigned Magistrate Judge's Rulings.

Petitioners appealed to the Second Circuit, notifying it that the parties were effectively required to consent to a magistrate to get a trial date and that Magistrate Netburn made the decision herself [improperly] to deny Respondent's Motion to Vacate her assignment. See Plaintiffs-Appellants-Cross Appellees' Br. (docketed by 2nd Cir. January 13, 2017); p. 2. Petitioners also explained that Magistrate Netburn erred when she (i) vacated the jury verdict after making credibility determinations and improperly weighing the evidence; (ii) reversed the Order of a new damages trial, prohibiting Petitioners from introducing any evidence

to support damages; (iii) excluded Petitioners' expert, who had already been thoroughly vetted during *Daubert* proceedings conducted by the previous Magistrate; and (iv) precluded admissible evidence supporting damages. See Plaintiffs-Appellants-Cross Appellees' Br.; Plaintiffs-Appellants-Cross Appellees' Response and Reply Br. (docketed by 2nd Cir. July 15, 2017).

The Second Circuit rejected, without thorough explanation, the evidence from SP, Kellwood and MTV and retailer statements that established lost profits and lost business value based, in part, on Kellwood/SP's statuts as a yardstick to early-UA, including because of their: almost exclusive focus on compression; manufacturing prowess and capabilities; proposed advertising partners (e.g., similarities between a 2003 agreement between UA and ESPN and the 2003 MTV proposal); range, design and quality of products; ability to meet customer demand; market entry and expertise; retail capability; and financial resources. See Yardstick Comparison at App.41.

Petitioners' petition for rehearing or rehearing en banc was denied. App.32.

REASONS FOR GRANTING THE PETITION

The Federal Magistrates Act (the "Magistrates Act") was designed to "relieve the district courts of certain subordinate duties that often distract [them] from more important matters." *Peretz v. United States*, 501 U.S. 923, 934 (1991). In keeping with the distinct role that Article III district court judges play in the judicial system, Congress cautiously structured the Magistrates Act to avoid "improperly delegat[ing]" their

core duties to magistrates, *Mathews v. Weber*, 423 U.S. 261, 269 (1976), “in the interests of policy as well as constitutional constraints,” *Gomez v. United States*, 490 U.S. 858, 872 (1989). This is consistent with this Court’s view that a “magistrate acts subsidiary to and only in aid of the district court” and “the entire process takes place under the district court’s total control and jurisdiction.” *United States v. Raddatz*, 447 U.S. 667, 681 (1980). In fact, in *Raddatz*, the Court upheld decision-making by magistrate judges only because “the ultimate decision is made by the district court.” *Id.* at 683; *see also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83 (1982) (“Critical to the Court’s decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court.”).

In limited instances, the Magistrates Act allows parties to “consent” to trial by a non-Article III judge. One of the initial cases discussing adjudication of disputes by non-Article III judges with the parties’ consent is *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986). There, this Court held that the right to adjudication before an Article III court is “personal.” *Id.*, at 848. In *Commodity Futures*, this Court recognized that if Article III’s structural interests as “an inseparable element of the constitutional system of checks and balances” are implicated, “the parties cannot by consent cure the constitutional difficulty.” *Id.*, at 850–851.

Further, informed consent is required. See 28 U.S.C. § 636(c)(1) (“Upon the consent of the parties, a full-time United States magistrate judge ... may conduct any or all proceedings in a jury or nonjury civil

matter and order the entry of judgment in the case”). Due to the importance of obtaining valid consent, Section 636(c) and Federal Rule of Civil Procedure 73 mandate the requirements and processes for adjudication of disputes by non-Article III judges with the parties’ consent. It is surely common knowledge that although some courts use magistrate judges expansively in civil cases, other individual district judges delegate only limited civil pretrial duties to magistrates because, apparently, they do not see a need to do so or perhaps prefer to handle trials themselves, rather than delegate them to a judicial quasi-alter ego. Indeed, there have been many opinions discussing whether a case should have been handled by the magistrate judge as a dispositive or non-dispositive matter, whether the parties’ consent was needed, whether consent could be implied from a party’s conduct, and whether assignment was consistent with the Constitution and laws of the United States. The answers to many of these questions vary from circuit to circuit.¹

During the December 2016 statistical year, magistrate judges disposed of 1,087,249 cases and proceedings nationally, including 16,656 civil cases in which magistrate judges were the presiding judges for all proceedings on consent of the parties. Compared to 2012, magistrate judges concluded 11 percent more

¹ For a summary of the wide range of duties assigned to magistrates, see TIMOTHY A. BAKER, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 Val. U. L. Rev. 661, 677-680 (2005).

civil cases by consent.² Recognizing the growing use of magistrates and to avoid the likelihood of consent by coercion it is important that this Court consider this case. This case also emphasizes the need for article III district courts faithfully to guard the powers invested in article III judges and the rights of parties to have skilled judicial officers. Review will allow reversal of those important questions of federal law that the underlying case has effectively decided that have not been, but should be, settled by this Court.

First, this case provides the Court with the vehicle with which to find that it is unconstitutional to allow a Magistrate Judge's rulings, unchecked by an Article III judge, to create legal precedent. Second, this case can decide that a district court must not use fears of litigation delays to explicitly or implicitly force litigants to litigate before a non-Article III court. Third, even where consent is voluntarily provided, the Article III district court must establish mechanisms to ensure that trial magistrates possess sufficient trial-related competence with which to provide the same fair and impartial trial that the article III district judge could have provided. Fourth, that even where consent is legitimately provided, the article III court must ensure that article III values are protected by maintaining both administrative controls and direct supervision over each case. Indeed, the absence of direct article III scrutiny by a district judge over a less-experienced magistrate's rulings raises serious individual rights' violations, institutional concerns, and constitutional violations. In cases such as this, the individual litigant

² See, <http://www.uscourts.gov/statistics-reports/us-magistrate-judges-judicial-business-2016> (last visited Feb. 28, 2018)

and residents of the respective circuits are inappropriately and permanently subjected to the unreviewed rulings of a non-article III court. Fifth, this case allows the Court to settle the circuit conflict and find that motions to vacate a magistrate assignment must be decided by the article III district judge.

Finally, with or without consent, Magistrate Netburn's decision to overturn a valid jury verdict is wrong. And the second circuit effectively affirmed the Magistrate's decisions to vacate the jury verdict; grant, then vacate, a new trial; and preclude, wholesale, the testimony of experts and business owners. In doing so, the second circuit indicates that a party has no right to challenge in the Article III district court whether a magistrate has the requisite skill and trial experience with which to determine whether to vacate a jury verdict that is based on substantial and undisputed evidence and to decide whether to exclude expert and business owner testimony across-the-board.

Review is necessary to affirm the obligations the article III district court has to ensure that consent is voluntary; only magistrates with the requisite trial experience in a judicial capacity can try cases; and valid jury verdicts are not inappropriately vacated. Thus, review will restore certainty and predictability to article III and Seventh Amendment protections consistent with Congress' and the Framers' manifest intents.

**I. THE DECISION AFFIRMING THE
MAGISTRATE JUDGE'S RULINGS IS
CONTRARY TO THE PLAIN TEXT OF
SECTION 636 AND CONGRESS'
PURPOSES IN ESTABLISHING THE
MAGISTRATES ACT.**

Relying on precedent and legislative history, in *Gomez v. United States*, 490 U.S. 858 (1989), this Court cited its opinion in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), which emphasized the importance of the personal right to an Article III adjudicator:

“Article III, § 1, serves both to protect ‘the role of the independent judiciary within the constitutional scheme of tripartite government.’ Thomas [v. Union Carbide Agricultural Products Co., 473 U.S. 568, 583, 105 S.Ct. 3325, 3334, 87 L.Ed.2d 409 (1985)], and to safeguard litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government.’ *United States v. Will*, 449 U.S. 200, 218 [101 S.Ct. 471, 482, 66 L.Ed.2d 392] (1980). See also Thomas, *supra*, [473 U.S.,] at 582–583 [105 S.Ct., at 3333–3334]; *Northern Pipeline [Construction Co. v. Marathon Pipe Line Co.]*, 458 U.S. [50], at 58 [102 S.Ct. 2858, at 2864, 73 L.Ed.2d 598 (1982)]. Although our cases have provided us with little occasion to discuss the nature or significance of this latter safeguard, our prior discussions of Article III, § 1’s guarantee of an independent and impartial adjudication by the federal judiciary of matters within the judicial power of

the United States intimated that this guarantee serves to protect primarily personal, rather than structural, interests. See, e.g., *id.*, at 90 [102 S.Ct., at 2881] (Rehnquist, J., concurring in judgment) (noting lack of consent to non-Article III jurisdiction); *id.*, at 95 [102 S.Ct., at 2884] (WHITE, J., dissenting) (same).

Commodity Futures, 478 U.S. at 848. The Court discussed that the right to adjudication before an Article III court is “personal” and “subject to waiver.” *Id.*, at 848. But the Court also recognized that if Article III’s structural interests as “an inseparable element of the constitutional system of checks and balances” are implicated, “the parties cannot by consent cure the constitutional difficulty.” *Id.*, at 850–851. Indeed, the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary (e.g. article III judges) the power, not merely to rule on cases, but to decide them “render dispositive judgments.” *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995). There is no such provision in the Constitution bestowing the same authority upon magistrate judges.

It is undeniable that the Magistrates Act was never intended to provide magistrates with the constitutional authority to try cases and issue final judgments, only to assist district judges, so that the article III judges could be freed up to preside at trials. This theme pervades the Magistrates Act’s legislative history. See, e.g., S.Rep. No. 96–74, p. 3 (1979), U.S.Code Cong. & Admin.News 1979, pp. 1469, 1471 (1979 amendments to Federal Magistrates Act) (“In enacting the Federal Magistrates Act in 1968, the Congress clearly intended

that the magistrate should be a judicial officer whose purpose was to assist the district judge to the end that the judge could have more time to preside at the trial of cases”); H.R.Rep. No. 94–1609, p. 6 (1976) (same); S.Rep. 94–625, p. 6 (1976) (1976 amendments to Federal Magistrates Act) (“Without the assistance furnished by magistrates ... the judges of the district courts would have to devote a substantial portion of their available time to various procedural steps rather than to the trial itself”); see also S.Rep. No. 371, 90th Cong., 1st Sess., 9 (1967) (Federal Magistrates Act is intended “to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers”). Again, it was never intended that magistrates would be given constitutional authority to issue final judgments.

Further, *Commodity Futures* listed three factors to consider in judging whether a statute authorizing adjudication of an Article III claim in a non-Article III tribunal “threatens the institutional integrity of the Judicial Branch:” (1) the extent to which the essential attributes of judicial power are reserved to Article III courts; (2) the origins and importance of the right to be adjudicated; and (3) the concerns that drove Congress to depart from the requirements of Article III. Moreover, the House Report reflects a belief that only those cases not requiring sophisticated legal knowledge should be given to magistrates, rather than to Article III judges.

[A]t their choice, parties can utilize the particular advantages of magistrates and judges. There are cases which do not require those special attributes of Article III judges, but

nonetheless do require an impartial generalist to resolve issues of importance to the parties.

H.Rep. No. 1364, 95th Cong., 2d Sess. 12 (1978). In other words, the Magistrates Act's purpose was **not** to enable more non-Article III magistrates to create legal precedence that would be binding on all persons within the circuits to the same extent as the precedent established by Article III judges who have been properly vetted, appointed, and approved as provided in the Constitution.

A. The Consent Was Clearly Not Voluntary

The Article III personal rights are protected by the statutory language of 28 U.S.C. § 636(c), which requires the parties' consent for a magistrate judge to exercise jurisdiction over "all proceedings" in a civil matter. See 28 U.S.C. § 636(c)(1) ("Upon the consent of the parties, a full-time United States magistrate judge ... may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case") (emphasis added). However, the Magistrates Act makes clear that consent to a trial by magistrate is the exception: "Upon the consent of the parties ..." (phrase is repeated twice). Notwithstanding any provision of law (or rule) to the contrary, subsection 636(c)(2) clearly mandates the consent of all the parties: "[P]arties ... are free to withhold consent without adverse substantive consequences." "Rules of court ... shall include procedures to protect the voluntariness of the parties' consent." [emphasis added]

Further, the emphasis on the consent requirement in Congressional debates evinces a desire for a clear expression of consent by the parties before allowing a

magistrate authority under subsection (c). In the civil context, “[t]he applicable legislative history indicates that consent to reference was considered to be a vital element . . . to ensure that referral would not violate constitutional rights. See, e.g., Cong. Rec. H5056 (daily ed. June 25, 1979) (statement of Mr. Danielson); *id.* at H8725 (daily ed. Sept. 28, 1979) (statement of Mr. Kastenmeier).” *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 353–54 n.1 (5th Cir. 1980). A decision without consent by a magistrate, a non-Article III judge, undermines the Constitution’s objective and might violate the rights of the parties. *Glover v. Alabama Board of Corrections, et al.* 660 F.2d 120 (5th Cir. 1981).

To ensure that a litigant’s right to an Article III arbitrator is protected, without undesirable consequences, the Act provides, in part,

Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, **shall also advise the parties that they are free to withhold consent without adverse substantive consequences.** Rules of court for the reference of civil matters to magistrate judges **shall include procedures to protect the voluntariness of the parties’ consent.**

28 U.S.C. § 636(c)(2). Here, the parties wanted the case tried by the Article III judge. Indeed, during the years the case lay dormant in the district court (2005–2014) none of the parties broached the subject of trial by a magistrate. It was only at the district court’s behest that the subject of trial by a magistrate ever

surfaced. With the “advice” to consent coming directly from the district judge’s chambers, it can hardly be thought to have been voluntary. See Carroll Seron, *The Roles of Magistrates: Nine Case Studies* 84 (Federal Judicial Center 1985) at 61-62 (observing that consent may be illusory, because “when a judge raises the question of consent to a magistrate-for whatever reason-lawyers feel that they have little choice but to go along with the suggestion”); see also Reinier H. Kraakman, Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1049 (1979). Indeed, violations of the Magistrates Act occur even without personal coercion. See Kraakman at 1051 (“Even without judicial coercion, however, routinization and expansion of consensual reference must eventually come to violate Article III constraints.”)

The Magistrates Act also states that “neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate.” 28 U.S.C. § 636(c)(2). Yet it should come as no surprise that the parties here did not openly challenge the district court’s urging the assignment to the designated magistrate. That this case never advanced towards trial when the parties continually asked to schedule hearings and trial, and that the courtroom deputy advised the parties that consent to a magistrate was the only way to advance the case, certainly channels coercion. Indeed, the parties’ pleadings indicate they felt that they had to sign the consent form or would “face further delay’ [in a case] that had ‘been pending for over three years at that time’” and would allow the case to “proceed to a jury trial sooner.” Thus, the adverse consequences of

not agreeing to a magistrate trial was that the case would face further delays at the district courts' hands.

In *United States v. Johnston*, 258 F.3d 361 (5th Cir. 2001), the Fifth Circuit noted that waiver may not be conclusive with respect to the personal protections guaranteed by Article III “if the alternative to the waiver were the imposition of serious burdens and costs on the litigant.” *Id.* at 367, n.3 (citing *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 543 (9th Cir. 1984)). “If it were shown that the choice is between trial to a magistrate or the endurance of delay or other measurable hardships not clearly justified by the needs of judicial administration, we would be required to consider whether the right to an Article III forum had been voluntarily relinquished. *Pacemaker*, 725 F.2d at 543; see also *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1042 (7th Cir.1984) (requiring availability of trial before an Article III judge as a realistic and viable alternative to sustain constitutional challenge against reference of civil matters to magistrate judges).

In other words, here, consent was less than voluntary and not the product of free choice. To even assume there was free choice ignores the practical realities behind the Magistrates Act's passage and the very real pressures on district judges to channel more and more cases to magistrates. As mentioned earlier, the rapid growth in the use of magistrates has been well documented. From 159 full-time magistrate positions authorized for 1978, the number rose to 537 in 2016. See 1977 Annual Report of the Director of the Administrative Office of the United States Courts at 28

(Report); 2016 Report at 28.³ And, as discussed above, there has been a substantial increase in the use of magistrate judges in civil matters according to information included in the December 2016 statistical report. And courts recognize that pressure to submit cases to magistrates increases in direct proportion to the number of magistrate positions, thus leading to coercion. *Wharton-Thomas v. United States*, 721 F.2d 922, 931-31 (3d Cir. 1983).

Where it is unclear whether consent was proper, this Court has remanded cases to the district court. *See, e.g. Wellness Int'l Network, Ltd. v. Sharif*, — U.S. —, 135 S.Ct. 1932, 1939, (2015) (the Seventh Circuit [should] decide on remand whether Sharif's actions evinced the requisite knowing and voluntary consent). Here, however, the Court can rule as a matter of law that consent to Magistrate Netburn was not voluntary.

B. Magistrate Michael Dolinger Determined a Trial Was Proper

Soon after the lawsuit was filed, on November 29, 2005, Magistrate Dolinger was designated by the district court as the magistrate to assist with properly delegable matters. Then, on October 6, 2014, based on what the court considered to be consent, Judge Batts referred the case to Magistrate Dolinger “to conduct all proceedings and order the entry of a final judgment....” On April 21, 2015, Judge Dolinger ordered that most, but not all, of SP's expert witness testimony was admissible under *Daubert* standards. (reported at 105

³ See, http://www.uscourts.gov/sites/default/files/data_tables/jff_1.1_0930.2016.pdf (last visited February 26, 2018)

F. Supp. 3d 293 (S.D.N.Y. 2015)). On October 14, 2015, Magistrate Dolinger granted SP's summary judgment motion in part, holding that Kellwood breached the Agreement. (reported at 2015 WL 6437456 (S.D.N.Y. Oct. 14, 2015). Magistrate Dolinger also held that "a trial is warranted to put a dollar value on this infraction."

II. THE REASSIGNMENT OF THE CASE, WITHOUT NOTICE, TO MAGISTRATE NETBURN VIOLATES SECTION 636.

On October 14, 2015, the parties were informed that the case was reassigned to Magistrate Judge Sarah Netburn to conduct the trial. No other details were provided.

A. The Magistrates Act is Violated if an Assigned Magistrate Does Not Possess the Minimum Trial Proficiency of an Article III Judge.

Magistrate Netburn's reassignment was without notice to the parties and without an opportunity to consider the appointment. Thus, constitutional questions here are: (i) whether involuntary consent legitimated Magistrate Netburn's exercise of authority where the parties "consented" only because they were informed that consent was the only way to not encounter additional trial delays; and (ii) even if the parties consented to trial by magistrate, does an initial consent allow reassignment to another magistrate with little or no trial experience in a judicial capacity. A view expressed in *Gonzalez v. United States*, 553 U.S. 242 (2008) demonstrates that a magistrate's expertise is paramount to a fair trial and that a magistrate

should not be considered the equivalent of an article III judge:

There is no apparent reason, for example, why the right to an Article III judge should be deemed any less fundamental, or its exercise any more “tactical,” ante, at 1770 (opinion of the Court) (quoting Taylor, *supra*, at 418, 108 S.Ct. 646), than the right to a jury trial. The Framers viewed independent judges, no less than the right to a jury of one’s peers, as indispensable to a fair trial.

Magistrate judges do not enjoy the structural protections of Article III: They serve 8-year terms and may be removed for cause, 28 U.S.C. §§ 631(e), (i), and they are subject to diminution of their salaries and outright abolition of their offices by Congress. Accordingly, whatever their virtues, **magistrate judges are no substitute for Article III judges in the eyes of the Constitution.**

Gonzalez 553 U.S. at 249 (Thomas, J., dissenting). Indeed, the legislative history reiterates that magistrates must have the requisite expertise to be able to act in their respective roles. See H.R.Rep. No. 96–287, p. 20 (1979) (“Because of the consent requirement, magistrates will be used only as the bench, bar, and litigants desire, **only in cases where they are felt by all participants to be competent**”). Even recommendations from the Magistrate Judges Committee of the Judicial Conference make clear that

the parties should be fully informed of the Magistrates' experience and abilities.⁴

This case was reassigned to Magistrate Netburn on October 14, 2015, without notice to the parties and without an opportunity to consider the reappointment. In other words, even if it were determined that the initial consent was not coerced, the reassignment to Magistrate Netburn, after substantive motions had been decided by another magistrate, should have required that the district court provide the parties with information about the new magistrate's trial experience and an opportunity to object based on full disclosure. Federal Rule of Civil Procedure 73 fortifies this reading. The Rule mirrors § 636(c)(2) for informing parties of their option to proceed before a magistrate judge and of their obligation to file a consent form if they chose to do so. Fed. Rule Civ. Proc. 73(b) ("When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent," and if the parties agree, "they shall execute and file a joint form of consent or separate forms of consent ..." (emphasis added)).

⁴ *Suggestions for Utilization of Magistrate Judges, No. 4*. The Committee suggests that courts take steps to educate the bar about the **quality, abilities, and experience** of their Magistrate Judges and the availability and advantages of the consent option. Judges can disseminate this and other information about the consent option in pretrial conference notices, referral orders, and articles written for local legal publications, and it can highlight the consent option on its website (emphasis supplied).

Respondent's counsel, who had the area resources⁵ with which to investigate Magistrate Netburn's lack of trial experience in a judicial capacity, moved to vacate the assignment.

B. The Magistrates Act Was Violated When the Parties Were Not Advised They Could Withhold Consent from Allowing Magistrate Netburn to Try the Case

Congress provided in § 636(c)(2) that “[t]he decision of the parties shall be communicated to the clerk of court,” and, if the parties do not consent, the district judge may not raise the matter again without “advis[ing] the parties that they are free to withhold consent without adverse substantive consequences.” After Magistrate Dolinger decided various motions and prepared the case for trial, the case was reassigned to Magistrate Netburn. However, the district court did not provide the parties with the right to withhold consent from allowing the new magistrate to hear the case. This was plain error.

C. Magistrate Judge Netburn's Ruling on the Motion to Vacate Violated Section 636

Section 636(c)(4) provides that “[t]he court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate

⁵ Petitioners' counsels, however, were from outside of the Second Circuit and had no knowledge of Magistrate Netburn's lack of trial experience in a judicial capacity and received nothing from the district court regarding such.

judge under this subsection.” The immediate question is whether Magistrate Netburn should have ruled on the motion to vacate reference. Rule 73(b)(3) makes clear that district judge Batts should have decided the motion to vacate, where it states that “[on its own for good cause—or when a party shows extraordinary circumstances—the district judge may vacate a referral to a magistrate judge under this rule.” (emphasis added); see also *Fellman v. Fireman’s Fund Ins. Co.*, 735 F.2d 55, 58 (2d Cir. 1984) (“Once a case is referred to a magistrate under section 636(c), the reference can be withdrawn only by the district court, and only ‘for good cause shown on its own motion, or under extraordinary circumstances shown by any party.’”). The Fourth and Sixth Circuits have also indicated that only a district judge, not a magistrate judge, has the power to withdraw a consent reference. See *Milhous v. Metro Govt.*, 221 F.3d 1335, 2000 WL 876396, at *1 (6th Cir. Jan. 21, 2000) (“It is clear that once a case has been referred to a magistrate judge under § 636(c), the district judge is the only one who can withdraw the reference.”); *Dowell v. Blackburn*, 932 F.2d 963 (4th Cir. 1991) (concluding that only the district judge has jurisdiction to rule on a motion to withdraw consent).

Some courts treat the magistrate’s order on motions to vacate as a recommendation to be accepted or rejected by the district court. *Knapp v. Cate*, 2012 WL 5354928, at *2 (E.D. Cal. Oct. 29, 2012) (treating magistrate judge’s order denying motion to withdraw consent as recommendation); *Hopkins v. Steele*, 2010 WL 4340257, at *1 (E.D. Mo. Oct. 27, 2010); *Frazer v. Miller-Stout*, 2006 WL 3842152, at *1 (E.D. Wash. Dec. 28, 2006). Whereas some circuits assume, without explanation, that magistrates are permitted to rule on

motions to vacate. *See, e.g., Sockwell v. Phelps*, 906 F.2d 1096, 1097 n.1 (5th Cir. 1990); *Allen v. Wine*, 297 Fed. Appx. 524, 529 (7th Cir. 2008). Therefore, review is necessary to remedy Magistrate Netburn's constitutional violation or, alternatively, to resolve the circuit split and restore the Framers' intent.

III. A DISTRICT COURT'S CASE ASSIGNMENTS TO MAGISTRATES FOR TRIAL, WITHOUT MAINTAINING THE RIGHT TO REVIEW IT, VIOLATES SECTION 636.

The second Magistrate's decision to vacate both the jury verdict and the new trial order, as well as her wholesale exclusions of evidence and witnesses highlight the need for review by the Article III district court. As discussed above, the Magistrates Act reflects Congress's efforts to distinguish those tasks properly delegated to magistrates from those best suited for resolution by the district court. The underlying case highlights that permitting a magistrate to create legal precedent, unreviewable by a district court, raises serious individual rights and constitutional violations. In permitting it, the statute would allow magistrates, through private parties' consent, to create binding legal precedent that must be followed by litigants in other cases. In *Pacemaker*, the court stated that "[i]f the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by article III judges over the interpretation, declaration, and application of federal law." 725 F.2d at 544. *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n. 39 (1982). Here there is neither the

appearance nor the reality of article III control. In other words, in instances where neither of the parties in a case decided by a magistrate takes an appeal to the circuit court, legal precedent, binding on the public, and all Article III judges, is created by the unreviewable decisions of a non-article III magistrate.

Indeed, in both *Raddatz*⁶ and *Pacemaker*, for example, article III values were protected by administrative controls and direct supervision of individual cases. But in the absence of direct article III supervision of a referred case, when an incorrect decision is made, and no appeal is taken, there is no mechanism for correcting the magistrate's clearly erroneous decisions and maintaining article III values. In analyzing § 636(c), the second circuit stated that the relevant question was whether the statutory scheme "impermissibly allows district judges to place magistrate[] [judges] under the control of the executive or legislative branches." *Collins v. Foreman*, 729 F.2d 108, 114 (2d Cir.1984). There are three facets of the statutory scheme on which the *Collins* court relied to answer this question. First, magistrate judges may conduct all proceedings in a civil matter, including entry of judgment, only "when specially designated to exercise such jurisdiction by the district court or courts he [or she] serves." 28 U.S.C. § 636(c)(1). Second, the district court judges are entrusted with the exclusive responsibility to appoint and remove magistrate judges.

⁶ "Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants' activities." 447 U.S. at 685-686.

28 U.S.C. § 631(a), (i). Third, the district court retains the power to withdraw the order of reference. 28 U.S.C. § 636(c)(4). *Id.* The *Collins* court also believed that article III control was demonstrated by the provision, “an aggrieved party may appeal directly to the appropriate United States court of appeals,” that is, an Article III court, “from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court,” 28 U.S.C. § 636(c)(3); *Id.* But of course this provision would never come into play for those magistrate decisions that are not appealed to the circuit court. In that instance, no Article III court would have a means of correcting a magistrate’s erroneous findings.

Here it is integrally important that this Court enforce the Constitution’s and Congress’s intention that Article III courts maintain the power and obligation to review all decisions by magistrates. The concept of assignments to magistrate judges obviously contemplated that a district judge—insulated by life tenure and irreducible salary—would be waiting in the periphery, fully able to correct the magistrate’s errors. For instance, in *Wellness Int’l*, this Court held that “allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers **‘so long as Article III courts retain supervisory authority over the process.’”** *Id.* at 1943. (emphasis supplied). Here, it is a violation of the Constitution and the Magistrates Act to provide magistrates with unchecked authority.

IV. THE DECISION BELOW, IF NOT REVERSED, PRESENTS A SERIOUS AND WIDESPREAD THREAT TO ALL LAWFUL VERDICT WINNERS AT THE HANDS OF UNTRIED ARBITERS WHOSE OPINIONS ARE NOT SUBJECT TO REVIEW BY AN ARTICLE-III DISTRICT JUDGE

Where an exclusive licensee does nothing to market and sell branded items to consumers and wrongfully terminates the agreement, and where judges and jury determine the licensor has been meaningfully damaged, there should never be a finding of \$1 in nominal damages, especially where, pre-breach, everyone projected profits.

The Seventh Amendment provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

U.S. Const. amend. VII. Thus interpreted, the Seventh Amendment guarantees that suitors in actions at law shall have the benefits of trial of issues of fact by a jury. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 n. 11 (2001) (the Seventh Amendment constrains the trial court to defer to the fact-finding function of the jury). This Court has held that one of the most sacrosanct values is the rule that, with the rarest of exceptions, a court may not usurp the jury's finding of damages, unless all reasonable men, exercising an unprejudiced judgment, would draw an

opposite conclusion from the facts. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931) (noting that where a “conclusion rested upon inferences from facts within the exclusive province of the jury,” such a conclusion may “not be drawn by the court ... without usurping the functions of that fact-finding body”). There, this Court held, regarding the degree of proof required to prove the amount of damages, that:

The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.

Id. at 563. Here, the Jury found lost profits damages of \$4.35 million. The magistrate acknowledged that SP proved it had value before Kellwood’s breaches and that Kellwood’s breaches “destroyed” SP. SP made pre-breach sales, even considering the limited customers Kellwood permitted SP to contact. Undisputed evidence from seven industry witnesses (e.g. those from SP, Kellwood, sporting goods stores, and MTV) established that Kellwood/SP was a yardstick to early-UA. There was also testimony that had Kellwood used its corporate strength, financial resources and retailer contacts to market/promote the brand, Kellwood/SP would have achieved substantially more sales. In addition, if other evidence had been needed, each party, and an independent party, MTV, projected significant profits from the Agreement had Kellwood not breached it. Magistrate Netburn clearly erred when she ignored this undisputed testimony.

Further, the additional Magistrate's rulings, affirmed by the court of appeals, conflict with decisions of other United States courts of appeal and so far departs from the accepted and usual course of judicial proceedings that they must be reversed:

1. the establishment of a new rule that would not require the option of a remittitur or new trial if a magistrate believes the amount of damages awarded is excessive, creating a conflict among the circuits;⁷
2. the inconsistency of the Magistrate's opinions with the longstanding rule that "the wrongdoer must shoulder the burden of the uncertainty regarding the amount of damages," creating a conflict among the circuits;⁸
3. the establishment of a new method of evaluating Yardstick companies as a matter of law in the district court, creating a conflict among the circuits;⁹ and

⁷ See 12 Moore's § 59.13[2] [g][iii] at 59–83; *Franceschi v. Hosp. Gen. San Carlos, Inc.*, 420 F.3d 1, 5 (1st Cir.2005).

⁸ *MindGames, Inc. v. W. Publ'g Co. Inc.*, 218 F.3d 652, 658 (7th Cir. 2000); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 669 n.47 (5th Cir.1974) See also Restatement (Second) of Contracts § 352, cmt. a ("Doubts are generally resolved against the party in breach.")).

⁹ See *Cooper v. Pacific Life Ins. Co.*, 2007 WL 430693, at *1 (S.D.Ga. Feb. 6, 2007); *G.M. Brod & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526, 1538 (11th Cir.1985); *Heattransfer Corp. v. Volkswagenerk, A.G.*, 553 F.2d 964, 983 (5th Cir.1977); *Mechanical Wholesale, Inc. v. Universal-Rundle Corp.*, 432 F.2d 228 (5th Cir.1970); *Syufy Enters. v. Am. Multicinema, Inc.*, 793 F.2d 990, 1003 (9th Cir.1986)

4. the creation of new precedent disallowing projections' evidence and allowing damages testimony from business principals, if at all, and experts solely in cases involving undefined "established companies," creating a conflict among the circuits.¹⁰

Review of the Magistrate's ruling vacating the verdict will ensure that defendants do not benefit from uncertainty in damages engendered by their own breaches. The Magistrate's rulings, if allowed to stand, would lead to the creation of a *per se* rule denying damages in all cases involving arguably new ventures or difficult-to-prove damages, and encourage contract breaches in such situations. The rulings also eliminate any use of the Yardstick method, unless comparator companies have equal sales volumes. Finally, the Magistrate who tried the case had no independent knowledge of the compression-wear market with which to discount the testimony of the industry witnesses or deprive the jury of its verdict. Therefore, Magistrate Netburn's rulings must be reversed.

¹⁰ *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir.1993); *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1222 (11th Cir.2003); *Station Enter., Inc. v. Ganz, Inc.*, 2009 WL 3059148 (E.D.Mich. Sept. 24, 2009) (allowing the owners of a business who ran the day-to-day business to testify as to projected profits and/or resulting damages, basing the decision on FRE 701 and Advisory Committee Notes.); *Frank Sullivan Co. v. Midwest Sheet Metal Workers*, 335 F.2d 33, 41–42 (8th Cir.1964)(projections testimony admissible); *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1385 (Fed.Cir.2001)(same) See also *Litigation Services Handbook: The Role of the Financial Expert* 24:13 (4th ed. 2007)

CONCLUSION

For the reasons set forth above, Petitioners pray that the Court grant this petition.

Respectfully submitted,

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