

25-2940

United States Court of Appeals for the Second Circuit

TODD C. BANK,

Plaintiff-Appellant,

v.

NFL PROPERTIES LLC,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
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APPELLANT’S REPLY BRIEF

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RESPONSE TO NFLP’S STATEMENT OF THE CASE

Defendant-Appellee, NFL Properties LLC (“NFLP”), states that Plaintiff-Appellant, Todd C. Bank (“Bank”), “describes himself as an ‘annoyance lawyer’ and has appeared frequently as a *pro se* litigant in federal courts.” Def. Br. at 3, citing “Decision and Order Granting NFLP’s Motion to Dismiss the Complaint; Denying NFLP’s Motion for Costs; and Denying Bank’s Motion for Sanctions” by Senior District Judge Colleen McMahon of the Southern District of New York, dated, and entered on, October 20, 2025 (the “Order”; A-94 - A-114), at 3 (A-96). Instead of noting that the Order cites, as the source of that self-description, Bank’s law-practice website (*see* Order at 3, n.1 (A-96)), which shows that the description simply refers to areas of the law where violations ‘annoy’ people, NFLP only cites what the Order additionally cites, *i.e.*, an article whose title refers to Bank’s having been reprimanded by this Court. *See* Def. Br. at 3, n.2; Order at 3, n.1 (A-96). This citation was clearly superfluous, and undoubtedly intended not to note that Bank is a self-described “Annoyance Lawyer,” but to bias this Court against Bank.

NFLP cites “*Bank v. U.S. Dep’t of Health & Human Servs.*, 708 F. App’x 43, 44–45 (2d Cir. 2018), *reconsideration denied*, *Bank v. U.S. Dep’t of Treasury*, No. 19-3977, 2021 WL 5022645, at *3 (2d Cir. Oct. 29, 2021).” Def. Br. at 6. However, these decisions are from two cases, and the latter decision was a summary order, not a denial of reconsideration. More importantly, NFLP does not explain why that case, or any of

the other Bank-plaintiff cases that NFLP cites, *see* Def. Br. at 6-7, have any bearing on any of the issues before this Court, much less the “[o]ther examples [that] abound,” *id.* at 7, none of which NFLP provides.

NFLP states: “[Bank’s] intent is . . . evident from the barebones website, fairgamemerch.com [(the ‘FGM Website’)], that he will purportedly use to offer his tee shirts, as it currently serves as a platform to air Bank’s grievances with NFLP and the [D]istrict [C]ourt judge.” Def. Br. at 7, citing A-83 - A-87. However, NFLP omits: (i) that the cited Appendix pages are an exhibit in NFLP’s reply in support of its motion to its dismiss the Complaint (the “Dismissal Motion”; A-79 - A-80); and (ii) that different content, “immediately upon [Bank’s] being granted the relief requested [in the Complaint][,] would . . . appear on the FGM Website [[,] a copy of [such content’s] home page of which is attached as Exhibit ‘B’ [to the Complaint (A-47 - A-51)].” Compl., ¶ 94 (A-42). Moreover, the District Court, upon noting that “Bank has obtained [the] [FGM] [W]ebsite for the express purpose of marketing tee shirts bearing NFL [(*i.e.*, National Football League)] Trademarks [and] has created other content for the site as well, including multiple webpages titled ‘Home,’ ‘Terms,’ ‘Privacy,’ ‘Contact,’ and ‘Cart/Checkout,’” Order at 8-9 (A-101 - A-102), found that, due to these commercial features of the website, and to the fact that Bank had already manufactured the shirts that he intends to sell (the “FGM T-Shirts”), Bank has Article III standing. *See* Order at 10 (A-103).

The District Court's finding of standing necessarily shows that, regardless of Bank's motive for bringing the action, the District Court found that the action was not "purely notional," Def. Br. at 1, *i.e.*, brought "to obtain an advisory ruling on a purely hypothetical dispute." *Id.* at 8. In essence, NFLP contends that Bank's motive, rather than what he actually intends to do, *i.e.*, sell the FGM T-Shirts, is decisive, but, unsurprisingly, NFLP cites no authority in support of this unprecedented notion.

NFLP states that Bank "twice moved for reconsideration" of the Order. *Id.* Although the results of those two motions are not on appeal, the second motion was not for reconsideration in any event, as it was made pursuant to Rule 60(a), not (b), of the Federal Rules of Civil Procedure, *see* Notice of Motion (Doc. 53), and, accordingly, did not request that the District Court reach a different result than it had in the Decision and Order Denying Plaintiff's Motion for Reconsideration (Doc. 51) (the "Reconsideration Order"), but, rather, sought "an Order . . . correcting errors of the [Reconsideration Order]." Notice of Motion (Doc. 53).

NFLP notes that Bank filed the District Court action on "the same day he registered his website domain name," Def. Br. at 5, *i.e.*, the FGM Website's address (*see also id.* at 9 (same)), just like NFLP noted before the District Court, *see* Defendant's Reply Memorandum of Law in Support of the Dismissal Motion (Doc. 31) at 2, as if Bank, having taken all of the prerequisites to be able to sell the FGM T-Shirts, had to wait a certain (albeit, unknown) amount of time in order for his standing

to percolate. Likewise, NFLP claims, with neither a rationale nor authority, that, “[t]he [D]istrict [C]ourt erred in concluding that an Article III case or controversy exists [because] [i]ts reliance on Bank’s possession of thirty-three shirts and a newly registered website elevates form over substance.” Def. Br. at 10.

RESPONSE TO NFLP’S SUMMARY OF ARGUMENT

NFLP states: “Bank seeks . . . to vindicate a baseless legal theory about the validity of NFL trademarks that would upend decades of established trademark law.” Def. Br. at 8-9; *see also id.* at 14 (“baseless legal theory”). First, it is inappropriate to (mis)characterize the merits given that NFLP does not address them. Although NFLP sought, before the District Court, dismissal of the Complaint on three alternative bases, *i.e.*, lack of Article III standing, discretion to decline jurisdiction, *and the merits* (that is, failure to state a claim), *see* Defendant’s Memorandum of Law in Support of the Dismissal Motion (Doc. 17), NFLP does not request that this Court, should it find that Bank has standing and vacate the District Court’s declination of jurisdiction, affirm, based upon the merits, the dismissal of the Complaint, even though NFLP could have done so. *See Roistacher v. Bondi*, 624 F. Appx. 20, 23 (2d Cir. 2015). Second, the merits plainly favor Bank in any event, *see* Plaintiff’s Memorandum of Law in Opposition to the Dismissal Motion at 13-40 (SA-21 - SA-48), as recognized by numerous courts and scholars, including, in the latter category, a former long-serving NFL attorney. *See* Compl., ¶¶ 3-9 (A-8 - A-11); ¶¶ 46-72 (A-22 - A-39).

NFLP calls the FGM Website “rudimentary,” Def. Br. at 9, and contends that, “[Bank] has not alleged that he truly intends or is able to sell or transport *any* goods in commerce, has made concrete plans to do so, or has taken meaningful steps toward operating a legitimate business,” *id.* (emphasis added, as are all emphases herein unless noted otherwise), but, as the District Court found, Bank, through that website and the manufacturing of the FGM T-Shirts, “has shown a definite intent and apparent ability to commence use of the NFL Trademarks. . . .” Order at 10 (A-103).

NFLP contends that the District Court, in finding that Bank has standing, misunderstood (or failed to engage in) the requisite inquiry, *i.e.*, “whether the plaintiff has demonstrated a definite intent and apparent ability to use the marks in commerce, not a checklist of token preparatory acts.” Def. Br. at 10. However, the District Court made exactly that inquiry, and found that the actions that NFLP self-servingly refers to as “token preparatory acts” clearly showed that Bank has standing because he intends to sell the FGM T-Shirts if he prevails.

ARGUMENT

POINT I

NFLP FAILS TO REFUTE BANK’S ARGUMENT THAT THE DECLINATION OF JURISDICTION WAS A CLEAR ABUSE OF DISCRETION

A. The Parties’ Dispute is Real, Not Academic

NFLP states: “[Bank] is not entitled to force the [District] [C]ourt to ‘deal[] in

hypotheticals.”” Def. Br. at 13, quoting Order at 14 (A-107). However, the very purpose and nature of the Declaratory Judgment Act, 28 U.S.C. §§ 2201 - 2202 (“DJA”), is to deal with hypotheticals in the sense of dealing with facts that are *prospective* and thus, by definition, have not yet occurred; in this case, the sale of the FGM T-Shirts and a resulting lawsuit by NFLP against Bank. Indeed, even subject-matter jurisdiction in a case brought under the DJA, which is, of course, mandatory rather than subject to discretion, is determined by such facts:

[T]his Court examines the declaratory *defendant’s* [(i.e., NFLP’s in this case)] hypothetical well-pleaded complaint to determine whether federal-question subject-matter jurisdiction exists. We have summarized the law as follows: a complaint seeking a declaratory judgment is to be tested, for purposes of the well-pleaded complaint rule, as if the party whose adverse action the declaratory[-]judgment plaintiff apprehends [(again, NFLP in this case)] had initiated a lawsuit against the declaratory[-]judgment plaintiff.

Sunvestment Energy Grp. NY 64 LLC v. Nat’l Grid USA Servs. Co., 116 F.4th 106, 114 (2d Cir. 2024) (altered; emphasis in original; citations and quotation marks omitted).

NFLP also states that, “Bank has no ‘plans to go into the tee[-]shirt business *in competition with the NFLP*,’” Def. Br. at 13, quoting Order at 10 (A-103); *see also id.* at 15 (“‘Bank does not assert that he intends to sell *more than* the thirty-three tee shirts he has already created’ and he ‘does not pretend that he has any intention to create a profitable merchandising business’ . . . [Thus,] resolution [of the action] will not serve

the traditionally forward-looking purpose of clearing the way for a course of action a plaintiff genuinely wants to undertake,” quoting Order at 14 (A-107)); *id.* at 22-23 (“[Bank] alleged that, if he ultimately prevailed in litigation, he would publish his website and offer to sell *only* the thirty-three tee shirts he made” (emphasis by NFLP)).

First, neither NFLP nor the Order cite any authority for the notion that declaratory-judgment actions are limited to plaintiffs who intend to engage in a ‘traditional,’ *i.e.*, long-term, business (NFLP, in support of this notion, also states that, Bank *admits* that he brought this action ‘as a matter of principle’ and does not intend to enter the tee[-]shirt business in any *genuine or sustained* way,” *id.* at 9, quoting Plaintiff’s Memorandum of Law in Support of Motion for Sanctions Against Defendant and/or its Counsel Pursuant to Rule 11 of the Federal Rules of Civil Procedure at 8 (SA-77) (first emphasis by NFLP), and that, “Bank admitted . . . that he has no intent to become an online retailer of NFL merchandise in a ‘*general, long-term sense*,’” *id.* at 23, quoting Plaintiff’s Memorandum of Law in Opposition to the Dismissal Motion at 7 (SA-15), even though Bank, who did not allege such intent, also did not allege, nor state elsewhere, that he lacked such intent, thus showing that NFLP, rather than reporting on the record, tweaks the facts in order to make a contention that the record does not support).

Second, a plan to engage in a long-term business, like the plan that the Order found Bank to have, is ‘hypothetical’ in the sense of that word that NFLP employs.

Third, given the prospective essence of a declaratory-judgment action, the “*if* [the DJA plaintiff] actually sells infringing products” matter (Def. Br. at 13) is always present; indeed, were Bank to have *already* sold the FGM T-Shirts, it would have been *improper* of the District Court to exercise jurisdiction. *See* Pl. Br., Point I(A) (pp. 16-19).

Fourth, it is always the case that a declaratory-judgment defendant might, and might not, sue the plaintiff if the plaintiff, instead of bringing his action, were to engage in the activity at issue. However, it is telling that NFLP, notwithstanding its insistence that Bank does not wish to sell anything beyond the 33 FGM T-Shirts, has never even suggested that it would not sue Bank if he were to limit his sales to those items. *See* Point II(E), *infra*.

Fifth, the use of a declaratory-judgment action improperly deprives the defendant of “its traditional choice of forum and timing” in the exact opposite scenario of the one at issue here. *See* Pl. Br. at 9-11, 13-15.

B. The District Court’s Addressing of the Merits Would be in the Interests of, Not Contrary to, Judicial Economy

NFLP suggests that the District Court’s exercise of its discretion was proper due to judicial economy, as “federal district courts saw over 271,000 new civil case filings in 2025 alone.” Def. Br. at 14. NFLP did not make this argument, nor a similar one (*e.g.*, regarding 2024 filings), before the District Court, which did not consider (*sua sponte*) any such argument. Moreover, the number of new, or pending, cases in the

federal judicial system is not a factor whose consideration is supported by authority (although, NFLP, as long as it was making its argument, might have thought it fit to disclose that the number of 2025 filings, according to the document that NFLP cites, *see* Def. Br. at 14, was 22 percent lower than the 2024 number). Rather, the question of judicial economy concerns the choice between presiding over the declaratory-judgment action versus potentially presiding over a future action brought by the declaratory-judgment defendant. *See, e.g., Metropolitan Transportation Authority v. Duffy*, No. 25-cv-1413, 2026 WL 588117, *66 (S.D.N.Y. Mar. 3, 2026) (“[i]n the absence of declaratory relief, . . . there is a real risk that the Court will set the dispute up for a ‘redo’ in which event the issues that have been thoroughly vetted by the parties will have to be reviewed again by this Court or another court. That reason alone also speaks to the judicial efficiency and judicial economy that favors the issuance of declaratory relief.”). Like in *Duffy*, the parties have briefed the merits. *See* Defendant’s Memorandum of Law in Support of the Dismissal Motion (Doc. 17) at 12-19; Plaintiff’s Memorandum of Law in Opposition to the Dismissal Motion at 13-40 (SA-21 - SA-48); Defendant’s Reply Memorandum of Law in Support of the Dismissal Motion (Doc. 31) at 5-10.

NFLP states: “Bank’s suit asks the court to invest the time and resources into deciding the protectability of no fewer than thirty-three individual trademarks and the impact on potentially hundreds more,” Def. Br. at 13-14; *see also id.* at 1 (stating that

Bank is seeking a declaratory judgment regarding “hundreds of marks”). However, as the Complaint and above-cited briefing show: (i) the legal issues do not differ as between any of the 33 trademarks; and (ii) NFLP did not suggest, much less argue (nor could have truthfully done so), that the District Court, if addressing the merits, would have been required to consider any trademarks (let alone how) other than the 33 at issue. Accordingly, “[a]t issue in this lawsuit are thirty-three registered NFL trademarks: one consisting of the well-known NFL Shield, and thirty-two marks, each of which is the identifying mark of one of the NFL’s thirty-two Member Clubs.” Order at 2 (A-95). Thus, the District Court’s addressing of the merits, contrary to NFLP’s specious contention, would entail a fraction of the time and resources that NFLP suggests.

C. Bank Did Not Engage in ‘Procedural Fencing’

NFLP states: “[w]hether the forum chosen by the declaratory plaintiff is ‘logical’ can have only a minimal value in determining whether *procedural fencing* has occurred.” Def. Br. at 15, quoting *AmSouth Bank v. Dale*, 386 F.3d 763, 789 (6th Cir. 2004). However, the “procedural fencing” with which *AmSouth* was concerned, like the cases that the Order cited, *see* Pl. Br., Point I(A) (pp. 16-19), was the choosing of a court by a declaratory-judgment plaintiff in the exact opposite situation of the one presented here, *i.e.*, where “[t]he only ‘useful purpose’ [that the] declaratory-judgment action[] could serve is [as] an ultimate determination of liability on an *already-accrued*

damages claim.” *AmSouth*, 386 F.3d at 786.

NFLP, re-phrasing its ‘procedural fencing’ contention, states that, “the circumstances here show that Bank orchestrated this dispute to have his functionality defense resolved at a time and place of his choosing,” Def. Br. at 16, citing Order at 10 (A-103); again, such concerns apply in the exact opposite situation of the present one. NFLP supports its inapposite argument by stating that, “[w]ere Bank to infringe on NFLP’s marks in the manner he has threatened, he could be subject to suit in any district where one of the thirty-two NFL teams are located, in addition to the Southern District of New York, where NFLP is headquartered, and the Eastern District of New York, where Bank is located,” *id.* at 15-16, and that Bank, by bringing his action, was “allow[ed] . . . to avoid circuits and districts (including his own ‘home’ district, EDNY (see [Pl.] Br. [at] 14)) that have already rejected his meritless theory of functionality.” *Id.* at 16, citing *City of New York v. Blue Rage, Inc.*, 435 F. Supp. 3d 472 (E.D.N.Y. 2020). First, NFLP’s argument, which could be made in response to declaratory-judgment actions writ large, remains inapposite.

Second, NFLP’s suggestion that Bank could have brought his action in any court other than the one in which he did is erroneous, as there would have been no basis for venue in any other District. *See* 28 U.S.C. § 1391.

Third, although the merits are not at issue here, *Blue Rage* ruled on summary judgment, and, for that reason and others, is easily distinguished, *see* Plaintiff’s

Memorandum of Law in Opposition to the Dismissal Motion at 31-33 (SA-39 - SA-41); and NFLP’s characterization of *Blue Rage* as the law of the District, as though it would be binding on Bank if he had brought his case in that District, is, of course, incorrect.

NFLP states: “Bank’s assertion of ‘the anticipatory defense of functionality’ to a trademark infringement suit NFLP might bring *if* Bank actually sells infringing products serves no meaningful purpose other than to ‘depriv[e] NFLP of its traditional choice of forum and timing,’ which is an ‘improper’ ‘use of the [DJA].’” Def. Br. at 13, quoting Order at 13-14 (A-106 - A-107) (emphasis by NFLP). Again, the District Court found, as it had to find in order to reach its conclusion that Bank has Article III standing, that Bank *does* intend to sell the FGM T-Shirts if he prevails.

D. NFLP’s Argument Regarding Costs is Factually Wrong and Legally Irrelevant

NFLP concedes that, “the [D]istrict [C]ourt’s cited cases . . . involved declaratory[-]judgment plaintiffs that sought findings of nonliability ‘for damages alleged to have *already accrued*.’” Def. Br. at 16, quoting *Starr Indem. & Liab. Co. v. Exist, Inc.*, No. 23-cv-786, 2023 WL 4029821, *4 (S.D.N.Y. June 14, 2023), *aff’d*, 2024 WL 503729 (2d Cir. No. 23-912, Feb. 9, 2024). However, NFLP adds: “[b]ut the principle they applied was broader: use of the [DJA] is not ‘warranted’ when it would serve no ‘useful forward-looking function,’ such as where—as in *Starr* and here—there is no allegation that the plaintiff ‘would incur any further potential costs’ while waiting for the defendant to initiate suit.” Def. Br. at 16-17, quoting *Starr*, 2023 WL 4029821

at *3-*4 (*N.B.*: “would incur any further potential costs” is on page *6). Although Bank would, of course, incur costs in operating his business, the costs whose consideration is a factor in deciding whether to exercise DJA jurisdiction, as shown in the very case that NFLP invokes and which follows from the very nature of the DJA, are the costs associated with being sued for infringement should the DJA plaintiff, instead of securing a declaratory judgment, proceed to engage in his intended activity and thereupon be sued for infringement:

[The] [p]laintiff is . . . not forced to incur any “additional harm” by waiting for [the] [d]efendant to initiate suit. *See AmSouth Bank[,]* [*supra*], 386 F.3d at 786 (“[T]he threat of suit, however immediate, is not by itself sufficient for the invocation of the federal power to issue a declaratory judgment.” (citation omitted)). Even if [the] [d]efendant were to wait years to initiate suit, [the] [p]laintiff will be in no different position than it is today. It will either have to *pay out the money* for the two claims to [the] [d]efendant or it will not have to. [The] [p]laintiff *does not allege that it would incur any further potential costs in the interim*. This case is therefore *distinct* from, for example, a case involving a party *who wants to “embark on a marketing campaign”* but who has “*been threatened with suit over trademark infringement.*” *Id.* In that case, a declaratory[-]judgment action serves a *useful purpose* as it allows the party to “go to court under the [DJA] and seek a judgment that it is not infringing that trademark, *thereby allowing it to proceed without the fear of incurring further loss.*” *Id.* Here, however, [the] [p]laintiff seeks an adjudication that its past exercise of what it believes are its rights—not to pay on the claims—has given rise to no legal consequences. Thus, this suit is not necessary to clarify and settle the legal relations or afford relief from uncertainty, insecurity and controversy going forward.

Starr, 2023 WL 4029821 at *6 (additional citation and quotation marks omitted). Thus, NFLP’s claim that “Bank has already incurred all the costs he intends to incur related to this matter by creating his thirty-three tee shirts and purchasing his web domain,” Def. Br. at 19, is not only false in the sense intended by NFLP, but disregards the type of costs that are to be considered with respect to exercising DJA jurisdiction.

NFLP, perhaps recognizing its misuse of “costs,” contends that, “even if Bank’s sale of thirty-three shirts would expose him to liability for infringement, Bank can reasonably be required to take that risk if he wishes to compel a federal court to address his defense.” *Id.* Again, however, NFLP cites nothing in support of its notion that the DJA applies only to plaintiffs with long-term business plans.

NFLP claims that ““embark[ing] on a marketing campaign,”” Def. Br. at 17, quoting *Starr*, 2023 WL 4029821 at *6, constitutes, unlike Bank’s plan, “*bona fide* business operations,” *id.*, citing *Starr*, 2023 WL 4029821 at *6, but this attribution to *Starr* is fictitious, as *Starr*, in using a marketing campaign as an example, did not say anything about long-term vs. short-term businesses; instead, the sole distinction upon which *Starr* relied was, as shown above, the one between *past* acts that could result in the declaratory-plaintiff’s being sued and those same acts when *prospective*.

E. The District Court Precisely Required Bank to ‘Bet the Farm’ If He Wishes to Obtain a Ruling on the Functionality Defense

NFLP states: “as *Saleh* [*v. Sulka Trading Ltd.*, 957 F.3d 348 (2d Cir. 2020)][,] and *MedImmune*[,] *Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007)][,] recognize,

although a [declaratory-judgment] plaintiff need not [be left, absent a ruling on the merits of his action, with having to] ‘bet the farm’ for declaratory[-]judgment jurisdiction to exist, a district court still retains broad discretion to decline to exercise that jurisdiction.” Def. Br. at 17. That is, NFLP states that, in the absence of the ‘bet the farm’ alternative to declaratory-judgment jurisdiction, such jurisdiction could still exist even though, in such a situation, it is subject to discretion.

In *MedImmune*, the district court, having found that dismissal had been *mandated*, did not engage in any discretionary analysis, *see MedImmune*, 549 U.S. at 136, thus prompting the Supreme Court, which reversed the dismissal, to “leave the equitable, prudential, and policy arguments in favor of such a discretionary dismissal for the lower courts’ consideration on remand.” *Id.* By contrast, the District Court here *did* exercise discretion (albeit erroneously according to Bank).

In *Saleh*, this Court merely stated: “[w]e are mindful, of course, that a declaratory[-]judgment plaintiff need not ‘bet the farm,’ so to speak, by actually infringing the mark in question prior to filing suit. *MedImmune*, 549 U.S. at 129. But [the plaintiff]’s conduct here falls short of the kind of preliminary activity that we and other courts have found sufficient to uphold declaratory[-]judgment jurisdiction.” *Saleh*, 957 F.3d at 356.

NFLP adds: “[b]y exercising its discretion not to hear Bank’s contrived claims, the [D]istrict [C]ourt did not force Bank to ‘bet the farm,’ but rather made clear that

Bank’s purchase of a few dozen shirts and creation of a rudimentary website was not sufficient to *compel* a federal court to hear his anticipatory defense.” Def. Br. at 18 (emphasis by NFLP). On the contrary, the District Court *precisely* (indeed, expressly) required Bank to ‘bet the farm’ in order for “a federal court to hear his anticipatory defense.” *See* Pl. Br. at 7. In order to evade this fact, NFLP vacillates between claiming that Bank does not intend to sell *anything* (notwithstanding the District Court’s contrary finding and notwithstanding that no discovery was conducted) and claiming that Bank’s ‘farm’ is too small.

F. Bank Intends to Sell the FGM T-Shirts If He Obtains a Favorable Declaratory Judgment

NFLP contends: “Bank’s suit would . . . serve only to waste the court’s (and NFLP’s) time and resources. It will have no real-world consequences for Bank because he does not really want to merchandise NFLP’s marks.” Def. Br. at 19. NFLP then backtracks, stating: “[l]ittle weight is owed to whether resolving Bank’s functionality question now will ‘bring this matter to a definitive end,’ because the [D]istrict [C]ourt’s dismissal order *may* achieve the same result given that Bank has no genuine interest in *running a tee[-]shirt business*.” *Id.* at 20, citing Order at 10, 15, and quoting the latter) (A-103, A-108). However, the District Court, in finding that Bank has Article III standing, found that Bank *actually intends* to sell the FGM T-Shirts. Indeed, the District Court could not have held in favor of Article III standing absent that finding, for: “[w]hen an Article III injury hinges on a party’s intent to take some

future action, the Constitution requires more than mere some[-]day intentions. A plaintiff's few words of general intent, without substantial evidence of plans, do not support a finding of an actual or imminent injury.” *Saba Capital Cef Opportunities I, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 111 (2d Cir. 2023) (altered; citations and quotation marks omitted). Thus, given that the District Court found that Bank *does* intend to sell his shirts, NFLP's observation that Bank might not sell them, in which event the dismissal of the Complaint would (if affirmed) achieve the same result as a declaratory judgment, fails to distinguish the present action from any other declaratory-judgment action, for there is always a possibility that a declaratory-judgment plaintiff, upon prevailing, will not subsequently engage in the activity at issue.

POINT II

BANK HAS ARTICLE III STANDING

A. The Subject-Matter Jurisdiction Recognized by the District Court is Not Feigned

NFLP states: “Bank . . . admits that he undertook [preparatory] acts solely in an attempt to manufacture jurisdiction, not because he otherwise wishes to sell apparel in competition with the NFL.” Def. Br. at 22. Yet again, NFLP seems to contend, in its “competition with the NFL” remark, that only a would-be long-term seller could have standing; and, yet again, the District Court rejected that unprecedented, and unwarranted, notion. Moreover, taking measures to ensure jurisdiction is not “manufacturing jurisdiction” in the sense that NFLP uses that term, *i.e.*, in the sense of

feigning intent; again, the District Court found the opposite with respect to Bank.

NFLP seems to suggest, alternatively, that Bank does not even intend to sell the 33 FGM T-Shirts. *See id.* at 9, 18 (“abstract legal issue”), 19, 23, 24. However, the District Court found that Bank *does* intend to sell the FGM T-Shirts; and, although “his desire to have a federal court address his . . . theory of functionality” is, of course, neither sufficient nor even relevant, it also does not change the fact that Bank intends to “us[e] the NFL trademarks” at issue. *Id.* at 23. Thus, NFLP’s record-contradicting claim that, “[w]in or lose, Bank will face no real-world consequences,” *id.* at 23, is simply false, as the consequences of securing a declaratory judgment would do exactly what such a judgment is supposed to do, *i.e.*, remove the uncertainty that has deterred Bank from already selling the FGM T-Shirts; and, if the judgment were favorable, Bank would sell them.

NFLP states: “[t]he [D]istrict [C]ourt thus had ‘no doubt whatever that [this controversy] was created for the sole purpose of allowing Bank to engage in annoyance litigation.’” *Id.*, quoting Order at 10 (A-103) (bracketed “this controversy” by NFLP). Brazenly, NFLP, in making this contention, omits that the bracketed “this controversy” should have been “this *justiciable* controversy,” as the full quotation is: “[t]here is, therefore, a *justiciable* controversy — even though this court has no doubt whatever that it was created for the sole purpose of allowing Bank to engage in annoyance litigation, and even though I am under no illusion that Bank plans to go into the tee[-

]shirt business in competition with the NFLP.” Order at 10 (A-103). NFLP, in adding that its sleight-of-hand contention is supported by “Bank’s many prior unsuccessful ‘annoyance’ suits,” Def. Br. at 23, ignores the fact that no court in any such matter has ever found that Bank lacked any alleged intent (although those matters would remain irrelevant to the present case in any event).

NFLP states that, beginning in *Todd C. Bank v. NFL Properties LLC*, No. 1:24-cv-08814 (S.D.N.Y.) (“*Bank I*”), Bank took “incremental attempts to take the minimal steps he believed necessary to concoct a justiciable dispute.” Def. Br. at 23. However, this characterization is irrelevant given that the District Court found that Bank intends to sell the FGM T-Shirts; and, insofar as NFLP contends that Bank took his steps in order to “concoct” standing, just as NFLP contended that Bank “manufactur[ed] jurisdiction,” *id.* at 22, each in the sense feigning intent, the District Court, again, found the opposite. In any event, although the Complaint and Amended Complaint in *Bank I* are irrelevant (*Bank I*, Docs. 1, 21) here, they are in no way contradictory to, but instead entirely consistent with, the Complaint in the present case.

NFLP’s reliance upon *Lillbask v. State of Conn. Dept. of Ed.*, 397 F.3d 77, 84 (2d Cir. 2005), *see* Def. Br. at 23, is misplaced. In *Lillbask*, the court found that two aspects of the appeal “no longer present[ed] live controversies” and were thus “moot,” *Lillbask*, 397 F.3d at 81, because of “[the] defendants’ voluntary cessation” of one aspect of their challenged conduct, *id.* at 84, and because “there [was] no likelihood

that the alleged statutory wrong will be repeated[,] . . . because the [state] legislature has repealed the offending portion of the statute.” *Id.* at 91. As NFLP has never suggested that its threat of suit (*see* Compl., Exh. “B” (A-77 - A-78)) was inapplicable to the sale of the FGM T-Shirts (*see* Point II(E), *infra*), or that NFLP has otherwise been foreclosed from suing Bank if he were to sell them, the present case, unlike *Lillbask*, plainly presents a live controversy and is not moot.

B. NFLP Does Not Refute Bank’s Allegations That He Would Sell the FGM T-Shirts If He Obtained a Favorable Declaratory Judgment

NFLP states: “[it is] far from clear that, upon [prevailing], [Bank] would be motivated to actually sell even his thirty-three NFL-branded tee shirts if he were granted the relief he seeks.” Def. Br. at 24. This is utterly false. *See* Compl., ¶¶ 94-96 (A-42). Moreover, Article III standing does not, of course, require that a plaintiff do the impossible, *i.e.*, guarantee that the intended future conduct would occur if he prevails in the litigation; and, as nothing in the record suggests that Bank would not actually offer the FGM T-Shirts for sale and thereupon sell them, NFLP’s suggestion, made without any discovery having been conducted, is mere conclusory boilerplate. Similarly, and again in contradiction of the District Court’s finding based upon the straightforward allegations and facts, NFLP states: “[n]ot only did Bank fail to properly allege that he would sell the shirts, he also alleges no ‘specific conduct on his part that evidences’ an ‘ability’ to do so.” Def. Br. at 24, quoting *Saleh, supra*, 957 F.3d at 355. Moreover, not only does the actual sale of a trademark-bearing item without the

trademark owner’s permission constitute infringement, but, so, too, does the mere advertising of an offer to sell such item. *See* 15 U.S.C. § 1114(1)(a); *North Star IP Holdings, LLC v. Icon Trade Services, LLC*, 710 F. Supp. 3d 183, 207 (S.D.N.Y. 2024).

C. NFLP’s Contention Regarding the Ability of the FGM Website to Process Orders is Just as Misleading as When NFLP Made That Contention Before the District Court

NFLP states: “Bank makes no non-conclusory allegations showing that [the FGM] [W]ebsite . . . can process orders for sales of the shirts. ‘[N]or has he made any concrete plans about how his products will find their way to customers’” Def. Br. at 24, quoting *Saleh*, 957 F.3d at 356. However, the District Court, quoting from that very page, rejected this argument. *See* Order at 9-10 (A-102 - A-103).

NFLP, in arguing before the District Court that Bank did not have standing, stated: “[t]he [FGM] [W]ebsite’s purchasing features do not work, as an attempt to buy a shirt from the password-protected ‘Products’ page returns an error message: ‘We can’t accept online orders right now.’” Defendant’s Reply Memorandum of Law in Support of the Dismissal Motion (Doc. 31) at 4. Naturally, this was not “an error message,” as though Bank had tried to sell the FGM T-Shirts but was unable to do so. Rather, that message was part and parcel with the District Court action, as the message was simply the result of the fact that, although the website was fully designed to offer the FGM T-Shirts for sale upon Bank’s clicking of a few buttons, Bank was seeking

a declaratory judgment so that he would not have to risk being sued for infringement by selling them before obtaining a (favorable) judgment.

Of course, if “[t]he website’s purchasing features [*did*] work,” *that*, according to NFLP, “would thereby constitute trademark infringement, dilution, and/or unfair competition, and also will misappropriate the goodwill and reputation of the NFL and/or its Member Clubs,” Compl., Exh. “D” at 1-2 (A-77 - A-78), in which event NFLP would “treat any unauthorized use of the NFL Marks . . . as intentional and willful, which would entitle NFLP to enhanced damages and reimbursement of its attorneys’ fees,” *id.* at 2 (A-78); again, hence the District Court action. However, according to NFLP’s we-win-either-way argument, the District Court lacked jurisdiction because Bank had not yet sold the FGM T-Shirts, and yet, if Bank had sold them, it would have been improper for the District Court to exercise that jurisdiction.

Following NFLP’s representation to the District Court regarding the FGM Website’s supposed inability to process orders, Bank submitted a letter to the District Court (Doc. 35) “request[ing] permission to submit a declaration and exhibit showing that the . . . [w]ebsite . . . is capable of accepting orders (although, per the nature of this case, [Bank] ha[s], of course, since disabled the ordering function).” Bank further explained that he had provided, to NFLP, proof that he had placed a test order, but that NFLP stated that it opposed a request by Bank to submit that proof to the Court.

On July 29, 2025, the District Court denied Bank’s request (Doc. 44), stating:

“I understand the parties’ positions on the issue and will take them into account in rendering a decision. No additional filings are needed at this time.”

D. Bank Does Not Possess the FGM T-Shirts Alone, But, Rather, Those Items as Well as the Ready-to-Sell FGM Website

NFLP states that *Saleh* “never suggested that possession of the shirts alone would suffice to demonstrate the ‘definite intent and apparent ability to commence use of the marks[.]’” Def. Br. at 26, quoting *Saleh*, 957 F.3d at 354-355. However, the District Court, in finding that Bank has standing, did not rely on Bank’s “possession of the [FGM] [T-S]hirts alone,” but also on the ready-to-sell FGM Website; and, as the District Court noted, *Saleh* explained: “[w]e emphasize that we do not mean to imply that any particular action or combination of actions is always necessary to find that a case or controversy exists. For example, because he intends to start an online store, [the plaintiff] may not need to cultivate relationships with retail partners.” Order at 10 (A-103), quoting *Saleh*, 957 F.3d at 356.

NFLP notes that, in a subsequent declaratory-judgment action by the *Saleh* plaintiff, “the district court *still* dismissed the case for lack of jurisdiction.” Def. Br. at 27, citing *Saleh v. Sulka Trading Ltd.*, No. 19-cv-8488, 2020 WL 4059803 (S.D.N.Y. July 20, 2020) (*Saleh II*) (emphasis by NFLP). However, the reasoning of *Saleh II* is inapplicable here, as the District Court in the present case evidently found, for NFLP made the same argument before it. *See* Defendant’s Reply Memorandum of Law in Support of the Dismissal Motion (Doc. 31) at 2-4. Furthermore, in *Saleh II*, the court

noted that, “[g]iven how quickly [the plaintiff] filed his second action after the dismissal of his first request for declaratory relief, th[e] lack of verifiable information about the[] [plaintiff’s] steps raises questions as to the actual scope of [his] business and his apparent ability to use the Sulka mark.” *Saleh II*, 2020 WL 4059803 at *5 (citation and quotation marks omitted). In the present case, the District Court found, based upon the record, sufficient “verifiable information,” *i.e.*, Bank’s possession of the FGM T-Shirts and the FGM Website.

In *Saleh II*, the court found, specifically, that based on various problems, glitches, and shortcomings with the plaintiff’s website, *see Saleh II*, 2020 WL 4059803 at *6, the website “simply does not amount to compelling evidence that [the plaintiff] is ready to immediately use the SULKA mark in commerce in the United States,” *id.*, which is the opposite of what the District Court found in the present case (notwithstanding NFLP’s misleading attempt to have the District Court find otherwise, just as NFLP now attempts to have this Court do, *see Point II(C), supra*).

E. NFLP’s Threat of Suit is Not a Chimera

NFLP states that it “never threatened Bank with trademark litigation for his now-asserted intent to make token use of the marks solely to fabricate a purported dispute.” Def. Br. at 27. However, the District Court, referring to NFLP’s letter to Bank (Compl., Exh. “B” (A-77 - A-78)), found that, “NFLP’s own statements show that Bank engaged in a course of conduct that brought the parties into adversarial conflict,” Order at 11

(A-104), because NFLP’s letter “stated that [NFLP] will treat *any* unauthorized use of the trademarks ‘as intentional and willful, which would entitle NFLP to enhanced damages and reimbursement of its attorneys’ fees.’” *Id.*, quoting Compl., Exh. “B” at 2 (A-78). The District Court further noted: “[t]hough NFLP’s letter may not explicitly threaten a lawsuit, the implication of the letter is clear: if Bank sells unauthorized tee shirts bearing NFL Trademarks, the NFLP [sic] will take legal action against Bank to protect its intellectual[-]property rights. This is sufficient to show that the parties have adverse legal interests over the use of NFL Trademarks such that a justiciable case or controversy exists.” *Id.* Notably, NFLP has never suggested that it would not sue Bank if he were to sell, or even offer for sale, the FGM T-Shirts.

NFLP states that, in *Green Edge Enters., LLC v. Rubber Mulch Etc., LLC*, 620 F.3d 1287 (Fed. Cir. 2010), the court “h[e]ld[] that [a] lawsuit against Rubber *Mulch* for use of the term ‘rubber mulch’ did not support [a] justiciable case or controversy giving rise to declaratory[-]judgment jurisdiction over Rubber *Resources* based on its use of the same term.” Def. Br. at 27-28. In that lawsuit, the two defendants, “Rubber Mulch and Rubber Resources[,] . . . counterclaimed for a declaratory judgment of non[-][trademark] infringement and invalidity of the [the plaintiff’s] [trade]mark.” *Id.* The court found that one of those defendants, *i.e.*, Rubber *Resources*, lacked standing for its counterclaim:

Unlike [] *Mulch*, [] *Resources* had been *neither sued nor threatened with suit*. [] *Resources*’ sole argument is that it

uses the same term, “rubber mulch,” for which [] *Mulch* was sued. Although we have found a pattern of litigation to be a factor favoring the existence of declaratory[-]judgment jurisdiction, . . . [] Resources relies on a single suit, not a pattern. Furthermore, [the plaintiff], in one litigation, sued *both* [] *Mulch* and [] Resources for *patent* infringement and *sued* [] *Mulch* *alone* for *trademark* infringement. Presumably, if [the plaintiff] had wanted to sue [] Resources for trademark infringement, it could have included that claim in the *existing* suit. Its failure to include a claim against [] Resources for trademark infringement, despite its claims of trademark infringement against [] *Mulch* and its *other* claims against [] Resources in the same case, indicated its lack of intent to sue [] Resources for trademark infringement. Thus, there was no case or controversy with respect to [] Resources regarding its trademark counterclaims.

Id. at 1302 (citation omitted). In the present case, the District Court was not presented with any evidence, nor even an indication, that NFLP would not sue Bank for trademark infringement were he to sell, or even offer for sale, the FGM T-Shirts; indeed, the District Court found the precise opposite.

**F. Bank’s Unrelated First Amendment Case
Has Nothing to Do With the Present Action**

NFLP states that, in *Bank v. N.Y. State Dept. of Agric. & Mkts.*, No. 21-cv-642, 2022 WL 293812 (N.D.N.Y. Feb. 1, 2022), *reconsideration denied*, 2022 WL 1224327 (N.D.N.Y. Apr. 26, 2022), Bank alleged that he “‘wish[ed]’ to be ‘exposed’ to hate symbols that other, unidentified individuals will ostensibly attempt to affix to state property during the State Fair.” Def. Br. at 24. Although this case is plainly irrelevant here and, thus, obviously used in an attempt to bias this Court, Bank did not,

in any event, express a desire to see any particular symbol, whether or not classified by the challenged statute as a “hate” symbol. Rather, Bank “contend[ed] that . . . he ‘wishes to know, to the maximum possible extent, what the “marketplace of ideas” will produce, which [he] would be less able to do per each restriction on that marketplace.’” *Agric. & Mkts.*, 2022 WL 293812 at *3, quoting amended complaint. Moreover, Bank did not bring, nor did the court find that he had brought, that case “merely to satisfy his own [legal] musings,” Def. Br. at 24; instead the Court ruled that, because the “allegations [did not] identify a willing speaker, [Bank] lacks standing.” *Agric. & Mkts.*, 2022 WL 293812 at *4.

CONCLUSION

The Order of the District Court should be vacated; and, Plaintiff-Appellant should be granted such other relief as is proper and authorized by law.

Dated: April 1, 2026

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains fewer than 6,935 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman.

Dated: April 1, 2026

s/ Todd C. Bank
TODD C. BANK

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2026, a true and accurate copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system and copies will be mailed to those parties, if any, by certified mail who are not served via the Court's electronic filing system.

Dated: April 1, 2026

s/ **Todd C. Bank**
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