

# 25-2940-cv

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**United States Court of Appeals**  
*for the*  
**Second Circuit**

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TODD C. BANK,

*Plaintiff-Appellant,*

– v. –

NFL PROPERTIES LLC,

*Defendant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR DEFENDANT-APPELLEE**

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**CORPORATE DISCLOSURE STATEMENT**

NFL Properties LLC is a limited liability company existing under the laws of the State of Delaware. NFL Properties LLC is a wholly owned subsidiary of NFL Ventures LP. There are no publicly held corporations with an ownership interest of 10 percent or more in NFL Properties LLC.

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## **PRELIMINARY STATEMENT**

Plaintiff-Appellant Todd Bank admitted he has no intention of commercializing the National Football League's ("NFL") famous trademarks. Instead, he sought a declaration "as a matter of principle" that hundreds of marks owned by the NFL and its member clubs are unprotectable just to sensationalize his gross misreading of established trademark law. After Bank voluntarily dismissed his first attempt to obtain that declaration because of his admitted lack of standing, he affixed a few dozen NFL patches to blank tee shirts, posted photos of them on a website, and re-filed suit, claiming these superficial acts generated a justiciable controversy. The district court ruled that Bank's gambit sufficed to supply jurisdiction but properly declined to exercise its discretion under the Declaratory Judgment Act to entertain Bank's suit because doing so would serve no useful purpose.

The district court's decision dismissing Bank's suit should be affirmed because the Declaratory Judgment Act does not require the court to hear it, and Article III does not even permit the court to do so. By Bank's own admission, the dispute is purely notional. The district court thus appropriately exercised its discretion in declining to hear the case because a court need not spend its limited judicial resources to resolve whimsical legal questions. In fact, this dispute does not qualify as a justiciable controversy in the first place because it does not meet Article

III's requirements: Bank's engineered dispute is not a real, substantial, definite, and concrete dispute arising between parties with genuine stakes. The Court should affirm the district court's dismissal.

### **JURISDICTIONAL STATEMENT**

This Court has appellate jurisdiction to review the final judgment of the district court under 28 U.S.C. § 1291. The district court, however, lacked jurisdiction over Bank's Declaratory Judgment Act action because Bank failed to present a justiciable controversy. *Infra* pp. 21–28.

### **ISSUES PRESENTED FOR REVIEW**

1. Whether the district court properly exercised its discretion to dismiss Bank's declaratory judgment action because a declaratory judgment would serve no useful real-world purpose, would deprive Defendant-Appellee NFL Properties LLC ("NFLP") of its choice of forum, and would waste significant judicial resources.
2. Whether the district court had jurisdiction over Bank's declaratory judgment action, brought "as a matter of principle," seeking a declaration that shirts bearing thirty-three different NFL logos do not infringe any of the trademarks owned and/or managed by NFLP where Bank failed to allege non-conclusory facts demonstrating a definite intent and apparent ability to use the marks in a *bona fide* commercial venture.

## STATEMENT OF THE CASE

Defendant-Appellee NFLP is the merchandising and licensing arm of the NFL. A-95.<sup>1</sup> NFLP is responsible for licensing and enforcing the trademarks, logos, and other indicia associated with the NFL and its thirty-two member clubs. A-95. NFLP owns nearly one hundred federally registered trademarks, and the NFL's member clubs own hundreds more. A-95. The NFL trademarks include, among many others, the famous NFL Shield and the principal logos of each member club, all of which are registered for use on apparel, including tee shirts. A-95.

Plaintiff-Appellant Todd C. Bank is an attorney proceeding *pro se*. A-96. Bank describes himself as an “annoyance lawyer” and has appeared frequently as a *pro se* litigant in federal courts. A-96; *see also* Tom McParland, “‘Annoyance Lawyer’ Loses Appeal in First Trip to 2nd Circuit Since Public Reprimand.”<sup>2</sup>

### **A. *Bank I: Bank Makes His First Two Unsuccessful Attempts to Obtain a Declaratory Judgment Regarding NFL Trademarks***

On November 1, 2024, Bank sent a letter to NFLP in which he claimed to represent a “John Doe” client who planned to sell merchandise bearing NFL trademarks without a license. A-53–75. Bank asserted that such sales would not

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<sup>1</sup> Citations to A-\_\_\_ are to Bank’s appendix. Citations to SA-\_\_\_ are to NFLP’s supplemental appendix.

<sup>2</sup> NEW YORK LAW JOURNAL, (June 8, 2021, 2:41PM), <https://www.law.com/newyorklawjournal/2021/06/08/annoyance-lawyer-loses-appeal-in-first-trip-to-2nd-circuit-since-public-reprimand/?slreturn=20241226134820>

violate the Lanham Act because, in his view, the trademarks were “functional.” A-53–75. NFLP responded on November 18, 2024, rejecting that contention and advising that unauthorized use of the NFL trademarks would constitute infringement, dilution, and unfair competition. A-77–78.

The following day, Bank filed a declaratory judgment action on behalf of himself—revealing that he apparently had no client interested in the unauthorized sale of NFL merchandise—against NFLP in the Southern District of New York, captioned *Bank v. NFL Properties LLC*, No. 1:24-cv-08814 (S.D.N.Y.) (“*Bank I*”). *Bank I* sought a declaration that Bank could sell unlicensed NFL-branded merchandise without violating federal trademark law, alleging that he “wished to sell Bank’s NFL Merchandise while avoiding, or limiting, the risk of being subjected to legal action.” *Bank I*, ECF No. 1, ¶ 23. NFLP moved to dismiss for lack of a justiciable controversy and failure to state a claim. *Id.*, ECF No. 20. Bank amended his complaint, this time alleging that he was “willing and able” to take steps to sell NFL merchandise. *Id.*, ECF No. 21, ¶¶ 30–37. NFLP again moved to dismiss based on lack of a justiciable controversy and failure to state a claim. *Id.*, ECF No. 23. Before the district court ruled, Bank voluntarily dismissed the action. *Id.*, ECF No. 24. Bank later admitted that he did so because NFLP was correct that he lacked standing to bring his claim. SA-55.

**B. *Bank II: Bank Takes a Third Bite at the Declaratory Judgment Apple***

After dismissing *Bank I* following two deficient complaints, Bank took additional steps purportedly to prepare for the sale of unlicensed merchandise. *See Bank v. NFL Properties LLC*, No. 1:25-cv-03981 (S.D.N.Y.) (“*Bank IP*”). He purchased thirty-three embroidered patches bearing the NFL Shield and the logos of each of the thirty-two NFL member clubs, affixed those patches to thirty-three blank tee shirts, registered the domain name fairgamemerch.com, and posted photographs of the shirts on a website that did not accept orders. A-41–42 (¶¶ 89–98). On May 12, 2025 (the same day he registered his website domain name),<sup>3</sup> Bank refiled his lawsuit, seeking a declaratory judgment that the sale of those thirty-three tee shirts would not violate the Lanham Act because, according to Bank, the NFL’s federally registered trademarks are “functional” and therefore unprotectable. A-11, A-41 (¶¶ 10, 84–88).

Bank did not undertake these actions because he plans to go into business selling NFL-branded merchandise. Rather, in Bank’s own words, he “brought this action as a matter of principle.” SA-77; A-108. He has no desire to go into the tee shirt business in the “general, long-term sense.” SA-15. His intent is also evident from the barebones website, fairgamemerch.com, that he will purportedly use to

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<sup>3</sup> *See* <https://www.whois.com/whois/fairgamemerch.com>

offer his tee shirts, as it currently serves as a platform to air Bank's grievances with NFLP and the district court judge. A-83–87.

This is hardly the first action Bank has brought for theoretical purposes. For example, Bank unsuccessfully challenged the validity of a restaurant's registered trade dress consisting of goats on a grass roof as "demeaning to goats," culminating in a Federal Circuit decision affirming the dismissal of his action for lack of standing and awarding the defendant attorneys' fees for Bank's frivolous appeal. *Bank v. Al Johnson's Swedish Rest. & Butik, Inc.*, 795 F. App'x 822 (Fed. Cir. 2019). He challenged a New York law prohibiting the display of symbols of hate on New York State fairgrounds, simply because he "wishe[d] to know, to the maximum possible extent, what the 'marketplace of ideas' will produce[.]" *Bank v. N.Y. State Dep't of Agric. & Mkts.*, No. 21-cv-642, 2022 WL 293812, at \*3 (N.D.N.Y. Feb. 1, 2022), *reconsideration denied*, 2022 WL 1224327, at \*3 (N.D.N.Y. Apr. 26, 2022). This conceptual suit was also dismissed for lack of standing. *Id.* He has multiple times challenged the healthcare coverage requirement of the Affordable Care Act, but again, was found to lack standing each time. *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). And, before that, Bank unsuccessfully sued a judge and court clerk to establish a "right to wear jeans and a hat in court." *Bank v. Katz*, No. 08-cv-1033, 2009 WL

3077147, at \*1 (E.D.N.Y. Sept. 24, 2009), *aff'd*, 424 F. App'x 67 (2d Cir. 2011).

Other examples abound.

NFLP moved to dismiss Bank's third iteration of the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that Bank failed to present a justiciable controversy, that the court should decline to exercise jurisdiction under the Declaratory Judgment Act, and that Bank's functionality theory failed as a matter of law. A-98.

The district court granted NFLP's motion to dismiss. A-94–114. The court first held that Bank had alleged sufficient facts to establish a justiciable controversy, even though the court had “no doubt whatever that [the dispute] was created for the sole purpose of allowing Bank to engage in annoyance litigation, and even though [the court was] under no illusion that Bank plans to go into the tee shirt business in competition with the NFLP.” A-103. It reasoned that, by alleging that he manufactured thirty-three tee shirts and created a website through which to sell them, Bank had adequately pleaded a “definite intent and apparent ability to commence use of the NFL Trademarks in the United States market.” *Id.* The court nonetheless declined to exercise jurisdiction under the Declaratory Judgment Act, and appropriately so. A-107–08. In particular, the court held that dismissal was warranted because Bank's suit inappropriately sought an advance ruling on an affirmative defense to a hypothetical future infringement action and that principles

of judicial economy and sound administration counseled against adjudicating the merits. *Id.* The court declined to reach NFLP's argument that Bank's functionality theory failed as a matter of law. A-108.

Bank made his disagreement with the opinion known by letter to the district court. *Bank II*, ECF No. 48. He also twice moved for reconsideration, which the court denied in each instance. *Bank II*, ECF Nos. 49–51, 53–56. Bank appealed. A-115.

### **SUMMARY OF ARGUMENT**

This appeal presents an attempt by Bank to manufacture federal jurisdiction to obtain an advisory ruling on a purely hypothetical dispute. SA-77. The Declaratory Judgment Act does not require courts to entertain such litigation; in fact, Article III does not permit courts to do so.

*First*, the district court properly exercised its broad discretion in declining to entertain this declaratory judgment action. The Declaratory Judgment Act confers discretion, not a mandate, to hear cases and resolve disputes. Courts properly decline jurisdiction where a declaratory judgment action serves no useful forward-looking purpose, constitutes mere procedural fencing, or would needlessly squander judicial resources.

All those concerns are present here. Bank seeks an advance ruling on an anticipated affirmative defense to a hypothetical infringement suit—not to clear the

path for *bona fide* commercial activity, but to vindicate a baseless legal theory about the validity of NFL trademarks that would upend decades of established trademark law. Entertaining such a suit would deprive NFLP of its traditional choice of forum and timing in adjudicating this dispute, and would expend substantial judicial and party resources to resolve a manufactured controversy that carries no meaningful consequences for Bank. The district court is not required to devote its limited resources to resolving hypothetical and functionally meaningless disputes.

*Second*, even if the district court had wanted to entertain Bank's suit, it could not have done so, because Bank fails to present a justiciable case or controversy. To invoke declaratory judgment jurisdiction, a plaintiff must allege a dispute that is real, substantial, definite, and concrete, and arises between parties with adverse legal interests. No such dispute has been alleged, because none exists. Bank merely affixed NFL trademark patches to thirty-three tee shirts, created a rudimentary website, and filed suit the same day he registered the domain name. Other than taking these superficial steps for the express, and sole, purpose of filing a lawsuit, he 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. To the contrary, 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. SA-77. A controversy contrived solely to obtain

judicial resolution of an abstract legal question, without real-world stakes for the plaintiff, is not “definite and concrete,” not “real and substantial,” and not between parties with genuinely “adverse legal interests,” as Article III requires. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240–41 (1937)).

The district court erred in concluding that an Article III case or controversy exists. Its reliance on Bank’s possession of thirty-three shirts and a newly registered website elevates form over substance. The applicable precedents require a practical inquiry into whether the plaintiff has demonstrated a definite intent and apparent ability to use the marks in commerce, not a checklist of token preparatory acts. Bank’s incremental efforts to satisfy jurisdictional requirements after voluntarily dismissing his prior suit underscore that this dispute was engineered by Bank, rather than the result of an authentic controversy, as does Bank’s history of filing similar lawsuits on principle. Moreover, NFLP’s general assertion of its trademark rights in response to Bank’s earlier correspondence does not transform a hypothetical, self-created dispute into a constitutionally ripe one.

Because the district court acted well within its discretion in dismissing this action, and because Article III would not have permitted the court to entertain it in any event, the judgment should be affirmed.

## **STANDARD OF REVIEW**

This Court reviews a district court’s decision not to exercise Declaratory Judgment Act jurisdiction for abuse of discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995). It reviews a district court’s “jurisdictional determination” under the Declaratory Judgment Act “de novo.” *Saleh v. Sulka Trading Ltd.*, 957 F.3d 348, 353 n.6 (2d Cir. 2020).

## **ARGUMENT**

### **I. THE DISTRICT COURT PROPERLY DECLINED TO HEAR BANK’S DECLARATORY JUDGMENT ACTION**

A district court has broad discretion to decline to exercise jurisdiction over declaratory judgment actions. *Admiral Ins. Co. v. Niagara Transformer Corp.*, 57 F.4th 85, 89 (2d Cir. 2023). That is because “[s]ince its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.” *Wilton*, 515 U.S. at 286. The text of the statute signals this discretion, providing that a court “*may* declare the rights and other legal relations of any interested party seeking such declaration,” (28 U.S.C. § 2201(a) (emphasis added)), not that it *must*.

A district court’s discretion to decline jurisdiction is “broad” and this Court reviews its exercise for “abuse of discretion.” *Admiral Ins. Co.*, 57 F.4th at 96, 100. In deciding whether to exercise jurisdiction, district courts consider several factors “to the extent they are relevant in a particular case,” including:

- (1) whether the declaratory judgment sought will serve a useful purpose in clarifying or settling the legal issues involved;
- (2) whether such a judgment would finalize the controversy and offer relief from uncertainty;
- (3) whether the proposed remedy is being used merely for procedural fencing or a race to res judicata;
- (4) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court;
- (5) whether there is a better or more effective remedy; and
- (6) whether concerns for judicial efficiency and judicial economy favor declining to exercise jurisdiction.

*Id.* at 99–100 (citation modified). The district court has “broad discretion to weigh the[se] factors” as well as any other “relevant” ones. *Id.* at 100. No factor individually “mandate[s] that a district court exercise” its jurisdiction. *Id.* This discretion is intentionally vested in the district courts “because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp.” *Wilton*, 515 U.S. at 289.

**A. The District Court Properly Declined to Hear Bank’s Suit Because It Serves No Useful Purpose**

The district court properly exercised its discretion in declining to hear Bank’s speculative action. “If a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose, it cannot be incumbent upon the court to proceed to the merits before

staying or dismissing the action.” *Wilton*, 515 U.S. at 288. That is precisely the case here.

To begin, Bank’s suit is just a form of “procedural fencing” designed to secure a ruling on a hypothetical legal question, not a suit that serves any “useful purpose” or relieves any “uncertainty” in the real world. *Admiral Ins. Co.*, 57 F.4th at 100. As the district court explained, and Bank himself admitted, Bank “brought this action as a matter of principle.” A-108; *see also* A-103 (“[T]his court has no doubt whatever that [this controversy] was created for the sole purpose of allowing Bank to engage in annoyance litigation.”). He has no “plans to go into the tee shirt business in competition with the NFLP.” A-103. As a result, 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 Declaratory Judgment Act.” A-106–07. Bank’s aims are purely notional and he is not entitled to force the court to “deal[] in hypotheticals.” A-107.

Judicial economy also weighs heavily against exercising jurisdiction. As the district court explained, “[j]udicial economy is not served by entertaining a lawsuit seeking a declaration that Bank has a defense to a claim of trademark infringement.” A-107–08. 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. A-95. And, again, he demands that the court do so solely to express his baseless legal theory, not because he “plans to go into the tee shirt business.” A-103, A-108. Meanwhile, federal district courts saw over 271,000 new civil case filings in 2025 alone—most undoubtedly involving parties facing real stakes. *See* Judicial Caseload Indicators—Federal Judicial Caseload Statistics 2025, <https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/judicial-caseload-indicators-federal-judicial-caseload-statistics-2025>. Nothing in the Declaratory Judgment Act entitles Bank to “wast[e] [the] court’s time” in resolving his manufactured dispute. A-108; *Wilton*, 515 U.S. at 288 (“We are unwilling to impute to Congress an intention to require such a wasteful expenditure of judicial resources.”).

### **B. The District Court Did Not Abuse Its Broad Discretion**

Bank argues that the district court abused its discretion in declining to hear his suit for three reasons. Br. 6–23. Each argument fails.

First, Bank argues that the district court “abused its discretion by erroneously applying the principle against using a declaratory-judgment action to litigate an anticipated defense.” Br. 22–23. He claims that the district court took cases supporting that proposition “out of context” because those cases declined jurisdiction when a declaratory judgment plaintiff sued to determine the lawfulness

of past acts, not future ones. Br. 9–10. He argues that these cases support exercising jurisdiction because they contrast the improper retrospective use of declaratory judgment actions with proper prospective ones. *Id.* Bank further contends that he did not improperly forum shop because he chose NFLP’s home forum. *Id.*

It is Bank who takes the district court’s decision out of context. As the district court explained, Bank intentionally manufactured this dispute just to tee up a legal hypothetical. A-103. “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.” A-102. While that should render this declaratory judgment action nonjusticiable as a matter of law (*see infra* pp. 21–28), it certainly means that its resolution will not serve the traditionally forward-looking purpose of clearing the way for a course of action a plaintiff genuinely wants to undertake. And it is in that context that the district court pointed to the real effect of Bank’s maneuver, which is to “depriv[e] NFLP of its traditional choice of forum and timing.” A-107.

That Bank filed suit in New York, where NFLP has its principal place of business, is beside the point. “[W]hether the forum chosen by the declaratory plaintiff is ‘logical’ can have only a minimal value in determining whether procedural fencing has occurred.” *AmSouth Bank v. Dale*, 386 F.3d 763, 789 (6th Cir. 2004). Were 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. Furthermore, the circumstances here show that Bank orchestrated this dispute to have his functionality defense resolved at a time and place of his choosing (A-103), allowing him to avoid circuits and districts (including his own “home” district, EDNY (*see* Br. 14)) that have already rejected his meritless theory of functionality. *E.g., City of New York v. Blue Rage, Inc.*, 435 F. Supp. 3d 472, 491 (E.D.N.Y. 2020) (rejecting argument that NYPD’s and FDNY’s registered trademarks are functional, and noting that “[b]y Defendants’ reasoning, any logo or emblem would be precluded from trademark protection once it was used to ‘decorate’ or provide ‘ornamentation’ to an item of merchandise”).

Moreover, contrary to Bank’s arguments, the district court’s cited cases support its decision. To be sure, those cases involved declaratory judgment plaintiffs that sought findings of nonliability “for damages alleged to have already accrued.” *Starr Indem. & Liab. Co. v. Exist, Inc.*, No. 23-cv-786, 2023 WL 4029821, at \*4 (S.D.N.Y. June 14, 2023), *aff’d*, No. 23-912, 2024 WL 503729 (2d Cir. Feb. 9, 2024). But the principle they applied was broader: use of the Declaratory Judgment Act 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. *Id.* at \*3–4.

The useful forward-looking function those cases identify is using a declaratory judgment action to clear the path for *bona fide* business operations. *Id.* at \*6 (opining that declaratory judgment may serve a useful purpose in a “case involving a party who *wants to ‘embark on a marketing campaign’* but who has ‘been threatened with suit over trademark infringement’” (emphasis added)). Bank “does not pretend that he has any intention to create a profitable merchandising business.” A-102. He claims (at most) that he will offer for sale thirty-three tee shirts and no more. *Id.* Just as in the cited cases, Bank’s suit serves no useful forward-looking function and thus could serve only to deprive NFLP of its traditional choice of forum and timing.

Next, Bank argues that the district court improperly required Bank to “‘bet the farm,’ so to speak, by actually infringing on the marks in question,” to have his question resolved. Br. 21 (citation modified) (quoting *Saleh*, 957 F.3d at 356). He claims this is “directly contrary” to this Court’s decision in *Saleh* and the Supreme Court’s decision in *MedImmune*. Br. 20.

Bank is wrong. As *Saleh* and *MedImmune* recognize, although a plaintiff need not “bet the farm” for declaratory judgment jurisdiction to exist, a district court still retains broad discretion to decline to exercise that jurisdiction. *See MedImmune*,

*Inc.*, 549 U.S. at 133–34, 136. Indeed, the *MedImmune* Court expressly stated that it would “leave the equitable, prudential, and policy arguments in favor of [] a discretionary dismissal for the lower courts’ consideration on remand.” *Id.* at 136. By exercising its discretion not to hear Bank’s contrived claims, the district court 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. *See Wilton*, 515 U.S. at 288 (“By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court’s quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants.”).

The district court properly declined to exercise its jurisdiction where Bank had declined to take the steps necessary to start an apparel business. Seeking a declaratory judgment is a sensible step for a party who actually wishes to undertake a potentially infringing commercial activity, and who would otherwise be forced to “bet” its activities were lawful. That rationale does not apply to Bank, who by his own admission merely wants to litigate an abstract legal issue, and erected a Potemkin farm merely to try to get through the courthouse doors.

Bank’s argument that “[a] more restrictive view” of declaratory judgments could require a party “to go to substantial expense in the manufacture, marketing, and sale of its [product], and subject itself to considerable liability for a violation of

the Lanham Act before its right to even engage in this line of commerce could be adjudicated” misses the mark. Br. at 12 (citing *Classic Liquor Importers, Ltd. v. Spirits Int’l B.V.*, 151 F. Supp. 3d 451, 455 (S.D.N.Y. 2015)). This case implicates few, if any, of those concerns: 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. And 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. Bank is in the business of filing lawsuits, not selling apparel. Bank’s suit would thus 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.

Finally, Bank argues that the district court disregarded or mis-weighed certain *Admiral Insurance* factors. Br. 19–23. He believes that all six factors weigh in favor of hearing his case and the district court should have found as much. *Id.*

Once again, Bank identifies no abuse of discretion. A district court need only consider the *Admiral Insurance* factors “to the extent they are relevant in a particular case,” and it has “broad discretion to weigh” the relevant ones, which it abuses only when it “commits a clear error of judgment.” *Admiral Ins. Co.*, 57 F.4th at 99–100 (quotation marks omitted).

Contrary to Bank’s argument, the only factor the district court’s decision did not address is “whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court.” *Admiral Ins. Co.*, 57 F.4th at 100. “But here, there was no preexisting state-court [or foreign-court] action,” so “[t]his factor was thus irrelevant to the *Admiral Insurance* analysis.” *Starr Indemnity & Liability Co. v. Exist, Inc.*, No. 23-912, 2024 WL 503729, at \*2 (2d Cir. Feb. 9, 2024) (summary order).

As for the remaining factors, they weigh against hearing Bank’s case, and the district court committed no “clear error of judgment” in concluding as much. *Admiral Ins. Co.*, 57 F.4th at 100. Bank’s suit serves no useful purpose, and instead amounts to procedural fencing, because he orchestrated it to resolve a manufactured dispute at a time and place of his choosing, not because he genuinely wants to merchandise NFLP’s trademarks. A-106–08. Little weight is owed to whether resolving Bank’s functionality question now will “bring this matter to a definitive end,” because the district court’s dismissal order may achieve the same result given that Bank has no genuine interest in running a tee shirt business. A-103, A-108. And if Bank does move forward with selling a handful of tee shirts, a trademark infringement suit is the “better or more effective remedy” (*Admiral Ins. Co.*, 57 F.4th at 97) to resolve the parties’ dispute because that court would not be required to “deal[] in [the] hypotheticals” that Bank’s current suit presents. A-107. And,

plainly, “judicial economy” is not well served by forcing a busy district court to “wast[e] [its] time” hearing a hypothetical trademark dispute to allow Bank to try to prove a point. *Id.*

## **II. BANK’S ACTION FAILS TO PRESENT A JUSTICIABLE CASE OR CONTROVERSY**

Although the district court properly dismissed this action on discretionary grounds, the judgment below should also be affirmed because Bank failed to present a justiciable case or controversy, and the district court therefore lacked jurisdiction to entertain his declaratory judgment action. *See Langnes v. Green*, 282 U.S. 531, 539 (1931) (“[A]ppellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it”).

### **A. Bank Has Not Set Forth a Justiciable Controversy**

The Declaratory Judgment Act permits a district court, “[i]n a case of actual controversy within its jurisdiction,” to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). “[T]he phrase ‘case of actual controversy’ in the Act refers to the type of ‘Cases’ and ‘Controversies’ that are justiciable under Article III” of the Constitution. *MedImmune, Inc.*, 549 U.S. at 127.

To qualify as a case of actual controversy, a dispute must be “definite and concrete, touching the legal relations of parties having adverse legal interests,” be “real and substantial,” and “admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *Id.* This means the dispute “must be real and live, not feigned, academic, or conjectural.” *Lillbask v. State of Conn. Dep’t of Educ.*, 397 F.3d 77, 84 (2d Cir. 2005). And for parties to have adverse legal interests, “some real-world consequences [must] ride on the litigation that pits the parties against one another.” *NLRB v. Constellium Rolled Prods. Ravenswood, LLC*, 43 F.4th 395, 404 (4th Cir. 2022). In a trademark dispute, in particular, a plaintiff must “adequately allege that he or she ‘has engaged in a course of conduct evidencing a definite intent and apparent ability to commence use of the marks on the product.’” *Saleh*, 957 F.3d at 354 (quoting *Starter Corp. v. Converse, Inc.*, 84 F.3d 592, 595–96 (2d Cir. 1996)).

Bank failed to plead a justiciable controversy because his actions created neither a “definite and concrete” nor a “real and substantial” dispute where the parties have “adverse legal interests.” *MedImmune, Inc.*, 549 U.S. at 127. Bank alleged only that he affixed thirty-three embroidered patches, each bearing a different NFL trademark, to blank tee shirts, and created a website displaying a photo of these shirts. A-42. He 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. *Id.* Bank also admits that he undertook these acts solely in an attempt to manufacture jurisdiction, not because he otherwise wishes to sell apparel in competition with the NFL. SA-77. Bank’s dispute is thus “feigned,” not genuine, and no “real-world consequences” ride on its resolution for him. *Lillbask*, 397 F.3d at 84; *Constellium*, 43 F.4th at 404. Win or lose, Bank will face no real-world consequences because he has no interest—independent from his desire to have a federal court address his unfounded theory of functionality—in using the NFL trademarks.

Bank admitted that he “brought this action as a matter of principle,” A-108, and that he has no intent to become an online retailer of NFL merchandise in a “general, long-term sense.” SA-15. The district court thus had “no doubt whatever that [this controversy] was created for the sole purpose of allowing Bank to engage in annoyance litigation”—a reasonable conclusion in light of not only this lawsuit, but Bank’s many prior unsuccessful “annoyance” suits. A-103, *see supra* pp. 6–7. Bank’s intentions are similarly evident from the three iterations of his complaint, which reflect his incremental attempts to take the minimal steps he believed necessary to concoct a justiciable dispute. *See Bank I*, ECF Nos. 1, 21. Article III does not permit federal courts to be drawn into such “feigned” and “academic” disputes. *Lillbask*, 397 F.3d at 84. To find otherwise would incentivize future

plaintiffs to engage in similarly superficial and misleading tactics to manufacture the appearance of a dispute.

Additionally, Bank has not adequately alleged a definite intent to “commence use of the marks on the product.” *Saleh*, 957 F.3d at 354. It is not enough to “aver” intent; a plaintiff must point to “specific conduct on his part that evidences” such intent. *Id.* Bank alleged only that he would publish and draw attention to his website, which allegedly can operate to enable purchases. A-41–42. He has not alleged that he *will* in fact sell or transport the shirts bearing the marks in commerce. *Id.* Instead, he brought this case merely to satisfy his own musings—something he has done several times before. *Cf. Bank*, No. 5:21-CV-642, 2022 WL 293812, at \*4 (dismissing claim where Bank “‘wish[ed]’ to be ‘exposed’ to hate symbols that other, unidentified individuals will ostensibly attempt to affix to state property during the State Fair”). It is thus far from clear that, upon satisfying that urge, he would be motivated to actually sell even his thirty-three NFL-branded tee shirts if he were granted the relief he seeks.

Not 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. *Saleh*, 957 F.3d at 355. Bank makes no non-conclusory allegations showing that his website, which he registered the same day he filed his third complaint, 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 . . . .” *Id.* at 356.

**B. The District Court Erred In Concluding That A Justiciable Controversy Exists**

The district court’s decision that a justiciable controversy exists missed the forest for the trees. The court had “no doubt whatever” that Bank “created” this controversy “for the sole purpose” of testing a legal principle and was “under no illusion that Bank plans to go into the tee shirt business in competition with the NFLP.” A-103. Yet the court found a justiciable controversy because Bank had already “designed, purchased, and affixed embroidered NFL Trademark patches to all thirty-three tee shirts he plans to sell” and had “obtained a website for the express purpose of marketing tee shirts bearing NFL Trademarks.” A-101–02. The court contrasted Bank’s case with *Saleh*—a trademark declaratory judgment action involving shirts where jurisdiction was lacking—on the ground that Bank, “[u]nlike the plaintiff in *Saleh*,” was already in possession of shirts. A-101. The court also noted that Bank need not “demonstrate a definite intent and apparent ability to create an ongoing, profitable business” for a justiciable controversy to exist. A-102. And it pointed to the NFLP’s letter reserving its intellectual property rights in response to Bank’s letter purportedly on behalf of a “John Doe” client interested in using those marks as evidence that Bank “engaged in a course of conduct that brought the parties into adversarial conflict.” A-104.

None of the district court's reasoning demonstrates that a justiciable controversy exists. While a plaintiff may not need to show it can run a profitable business selling infringing goods, the dispute must still be "definite and concrete," "real and substantial," and pit "parties having adverse legal interests" against each other. *MedImmune, Inc.*, 549 U.S. at 127. Bank's controversy fails to meet that bar because Bank, who is a lawyer by trade, has no genuine interest in using the NFL trademarks other than for the purpose of litigating a speculative legal issue, and he has not adequately alleged a definite intent and ability to use the trademarks in any event. *Supra* pp. 21–25.

*Saleh* did not support the district court's contrary conclusion. To be sure, the plaintiff in *Saleh* (whose allegations of intent and ability to use the defendant's trademark on shirts to be sold in the United States were insufficient to demonstrate a justiciable controversy) did not yet have possession of the shirts. But that fact merely supported this Court's conclusion that the district court had good reason to be "skeptical" that the plaintiff had the "ability to transition his business to the United States." *Saleh*, 957 F.3d at 355–56. The Court never suggested that possession of the shirts alone would suffice to demonstrate the "definite intent and apparent ability to commence use of the marks[.]" *Id.* at 354–55. To the contrary, this Court expressly "eschewed" bright-line rules, instead "prefer[ing] to examine each case on its merits." *Id.* at 355.

Indeed, when the *Saleh* plaintiff subsequently re-filed in the district court alleging that he had since “[c]ontract[ed] with manufacturers to produce goods bearing the SULKA mark and with shipping services to ship goods to the United States,” and had “[p]urchas[ed] the domain name sulka-phulka.com and engag[ed] a web design company to stand up the website,” the district court *still* dismissed the case for lack of jurisdiction. *Saleh v. Sulka Trading Ltd.*, No. 19-cv-8488, 2020 WL 4059803, at \*5–7 (S.D.N.Y. July 20, 2020). The court reasoned that these unverified assertions still failed to show the plaintiff’s “definite intent and apparent ability to commence use” of the mark. *Id.*

NFLP’s response to Bank’s pre-suit letter does not support a justiciable controversy either. It is true that a “threat of future litigation remains relevant in determining whether an actual controversy exists.” *Saleh*, 957 F.3d at 353–54 (quoting *Nike, Inc. v. Already, LLC*, 663 F.3d 89, 95–96 (2d Cir. 2011)). But NFLP never threatened Bank with trademark litigation for his now-asserted intent to make token use of the marks solely to fabricate a purported dispute. It merely responded to Bank’s inquiry, made on false pretenses on behalf of a client that did not exist, with a statement of its general policy of protecting its intellectual property. A-77–78; see *Green Edge Enters., LLC v. Rubber Mulch Etc., LLC*, 620 F.3d 1287, 1302 (Fed. Cir. 2010) (holding that lawsuit against Rubber Mulch for use of the term “rubber mulch” did not support justiciable case or controversy giving rise to

declaratory judgment jurisdiction over Rubber Resources based on its use of the same term). And, regardless, “threats of legal action, alone, cannot create an actual controversy under the Declaratory Judgment Act,” as the plaintiff “must still demonstrate that the controversy was sufficiently immediate and real.” *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 750–51 (5th Cir. 2009). NFLP’s letter cannot fill that gap because it does not change the fact that Bank’s dispute is contrived, not real.

### **CONCLUSION**

If ever there were a case where a court appropriately declined to hear a declaratory judgment action, it is this one—where the plaintiff admits the purpose of his lawsuit is to vindicate an academic crusade to disrupt established trademark law. As the record makes plain, Bank does not seek to clear a path for any *bona fide* commercial venture or to resolve uncertainty regarding any impending real-world conduct. Because Bank’s requested declaration would serve no useful forward-looking purpose, the district court acted well within its broad discretion in declining to entertain this suit under the Declaratory Judgment Act. And the contrived nature of Bank’s suit means that the court lacked jurisdiction to hear it at all. The judgment of the district court should be affirmed.

Dated: March 11, 2026

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**CERTIFICATE OF COMPLIANCE**

Craig B. Whitney, an attorney for Defendant-Appellee NFL Properties LLC, hereby certifies that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and Local Rule 32.1(a) because it contains 6,688 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: March 11, 2026

*/s/ Craig B. Whitney*  
Craig B. Whitney

STATE OF NEW YORK     )  
  )  
COUNTY OF NEW YORK    )

ss.:

**AFFIDAVIT OF SERVICE  
BY OVERNIGHT FEDERAL  
EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 1702 Clay Avenue, Apt 11, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

**On March 11, 2026**

deponent served the within: **Brief for Defendant-Appellee**

**upon:**

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the address(es) designated by said attorney(s) for that purpose by depositing 1 true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York. This document was also served via the court's filing system.

**Sworn to before me on March 11, 2026**



**MARIANA BRAYLOVSKIY**  
Notary Public State of New York  
No. 01BR6004935  
Qualified in Richmond County  
Commission Expires March 30, 2030



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