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

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

TODD C. BANK
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125

Counsel to Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT PURSUANT TO RULE 40(b)(2) OF THE FEDERAL RULES OF APPELLATE PROCEDURE 1

REASONS TO GRANT THE PETITION 2

I. THE SUMMARY ORDER ERRONEOUSLY REASONED THAT THE DISTRICT COURT WAS JUSTIFIED IN DECLINING DECLARATORY-JUDGMENT JURISDICTION BOTH BECAUSE OF THE POSSIBILITY THAT, IN THE ABSENCE OF DECLARATORY RELIEF, PLAINTIFF WOULD NOT ENGAGE IN HIS DESIRED ACTIVITIES AND BECAUSE, IN THE ABSENCE OF THAT RELIEF, PLAINTIFF *WOULD* ENGAGE IN THOSE ACTIVITIES 2

A. It is Irrelevant That a Declaratory-Judgment Plaintiff, in the Absence of Declaratory Relief, Might Not Engage in His Desired Activities 2

B. It is Irrelevant That a Declaratory-Judgment Plaintiff, in the Absence of Declaratory Relief, Might Engage in His Desired Activities 4

II. THE SUMMARY ORDER WAS ERRONEOUS IN CONSIDERING THE SCOPE OF LIABILITY THAT A DECLARATORY-JUDGMENT PLAINTIFF COULD FACE IF HE WERE TO ENGAGE IN HIS DESIRED ACTIVITIES 6

A. The Scope of Potential Liability is Not Relevant 6

B. The Potential Scope of Plaintiff's Liability Would Be Substantial If He Engaged in His Desired Activities 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. III 7

STATUTES AND RULES

15 U.S.C. § 1117(a) 8

15 U.S.C. § 1117(c)(1) 8

5 U.S.C. § 1117(c)(2) 8

28 U.S.C. §§ 2201 - 2202 . . . . . *passim*

CASES

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 3

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 3, 6, 7

Medtronic, Inc. v. Mirowski Family Ventures, LLC,
571 U.S. 191, 201 (2014) 4

Saint-Amour v. Richmond Org., Inc.,
388 F. Supp. 3d 277 (S.D.N.Y. 2019) 7

Seals v. McBee,
907 F. 3d 885 (5th Cir. 2018) 7

Terrace v. Thompson,
263 U.S. 197 (1923) 6

Wilton v. Seven Falls Co.,
515 U.S. 277 (1995) 7-8

INTRODUCTION

Plaintiff-Appellant, Todd C. Bank ("Bank"), requests that the Court rehear, and suggests that it rehear *en banc*, the Summary Order dated November 12, 2026 (the "Summary Order"; Doc. 49.1), which affirmed the "Decision and Order Granting [Defendant-Appellee]'s Motion to Dismiss the Complaint; Denying [Defendant-Appellee]'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).

STATEMENT PURSUANT TO RULE 40(b)(2) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

This proceeding involves exceptionally important questions:

1. Whether it is relevant that a declaratory-judgment plaintiff, in the absence of declaratory relief, might not engage in his desired activities.

Suggested Answer: No.

2. Whether it is relevant that a declaratory-judgment plaintiff, in the absence of declaratory relief, might engage in his desired activities.

Suggested Answer: No.

3. Whether it is proper for a district court to decline declaratory-judgment jurisdiction because the plaintiff would, if he were to engage in his desired activities without having obtained his requested judgment, face relatively insubstantial liability if he were sued.

Suggested Answer: No.

4. Whether the liability that Plaintiff-Appellant would face if he were to engage in his desired activities and be sued would, in fact, be substantial.

Suggested Answer: Yes.

REASONS TO GRANT THE PETITION

POINT I

THE SUMMARY ORDER ERRONEOUSLY REASONED THAT THE DISTRICT COURT WAS JUSTIFIED IN DECLINING DECLARATORY-JUDGMENT JURISDICTION BOTH BECAUSE OF THE POSSIBILITY THAT, IN THE ABSENCE OF DECLARATORY RELIEF, PLAINTIFF WOULD NOT ENGAGE IN HIS DESIRED ACTIVITIES AND BECAUSE, IN THE ABSENCE OF THAT RELIEF, PLAINTIFF *WOULD* ENGAGE IN THOSE ACTIVITIES

A. It is Irrelevant That a Declaratory-Judgment Plaintiff, in the Absence of Declaratory Relief, Might Not Engage in His Desired Activities

The Summary Order, upon noting that, "[t]he district court decided that it would serve the interests of judicial economy to abstain from resolving Bank's admittedly manufactured dispute involving a minimal investment in thirty-three t-shirts and patches," Summary Order at 8, citing Order at 14-15 (A-107 - A-108), stated:

> The district court reasonably concluded that Bank might abandon the plan to sell the shirts—or, if he did engage in sales, then [Defendant-Appellee][,] NFLP[,] might not sue him. Either scenario would obviate the need for judicial resolution. If Bank sold shirts and NFLP sued, then Bank would still be able to assert the functionality theory as an affirmative defense. Given these possibilities, we cannot say

> that the district court abused its discretion by deciding that it would be more efficient at this stage to abstain from exercising jurisdiction.

Summary Order ("S.O.") at 8. With respect to the possibility that "Bank might abandon the plan to sell the shirts," the District Court stated:

> [W]hile reaching the merits on the question of the "functionality" of the marks in connection with their use on tee shirts would bring this matter to a definitive end, so, I suspect, will a decision to abstain. For the decision to abstain forces Bank either to put up or shut up - either he sells the shirts and get sued (in which case he can assert his functionality defense), or (as I suspect will happen) he slinks off into the sunset.

Order at 15 (A-108). However, forcing a declaratory-judgment plaintiff to "either to put up or shut up - [by] either [engaging in his desired activity] and get[ting] sued," or, instead, "slink[ing] off into the sunset" and thereby ensuring that he will not "get sued," is precisely what the Declaratory Judgment Act, 28 U.S.C. §§ 2201 - 2202 ("DJA"), is intended to prevent. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) ("[t]he dilemma posed by . . . putting the challenger to the choice between abandoning his [claimed] rights [to use another's intellectual property] or risking prosecution . . . is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate,'" quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). Thus, the notion that the declining of jurisdiction is warranted because the declaratory-judgment plaintiff might "slink[] off into the sunset" upon such declination has the matter entirely backwards: the declining of jurisdiction might be warranted where the

evidence shows that the "slink[ing] off" would occur even if the plaintiff were to *obtain* the declaratory relief that he was seeking.

B. It is Irrelevant That a Declaratory-Judgment Plaintiff, in the Absence of Declaratory Relief, Might Engage in His Desired Activities

With respect to the latter part of the Summary Order's either-way-you-lose rationale of 'darned because you might not sell and darned because you might sell,' the possibility that Bank, absent obtaining a declaratory judgment, "might . . .engage in [his desired] sales, [upon which] NFLP might not sue him," S.O. at 8, such that the lack of suit "would obviate the need for judicial resolution" (*id.*) of the subject of the declaratory-judgment action, *i.e.*, "[Bank's] legal theory that the logos are not protectable marks pursuant to the functionality doctrine of trademark law," *id.* at 2, does not warrant the declination of jurisdiction. Here again, the Court misses the point that the *raison d'être* of the DJA is not undermined by uncertainty over whether Bank would "get sued" if he "put[s] up" by selling the shirts, for the DJA is intended not merely to prevent a plaintiff from having to choose whether to "put up or shut up" only where he would, *in fact*, "get sued" if he "put[s] up," but from having to make that choice if "put[ting] up" would put him at *risk* of being sued, as "the very purpose of [the DJA] is to ameliorate the dilemma posed by putting one . . . to the choice between abandoning his rights or *risking* suit." *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 201 (2014) (emphasis added; citations and quotation marks

omitted). Indeed, the Summary Order, in finding that the District Court had subject-matter jurisdiction, stated: "[a]lthough NFLP has not said that it would necessarily sue Bank were he to use the trademarks, NFLP expressly reserved the right to do so in response to his November 2024 letter and again during oral argument in this case." S.O. at 6, citing Appx. 78 and Oral Argument Audio Recording at 15:33.

Even aside from the legal irrelevancy of the possibilities upon which the Order was based, and upon which the Summary Order affirmed the District Court, those possibilities are always present in a declaratory-judgment action. Worse yet is that the District Court made its ruling without any discovery having occurred, nor even a hearing regarding Bank's (or NFLP's) expectations. Perhaps the District Court was animated by its evident disagreement with Bank's "legal theory that the logos are not protectable marks pursuant to the functionality doctrine," S.O. at 2. *See* Order at 15 (A-108) ("Bank contends that he 'brought this action as a matter of principle.' Dkt. No. 40, at 8. Well, this court does not share Bank's principles.").

[continued on next page]

POINT II

THE SUMMARY ORDER WAS ERRONEOUS IN CONSIDERING THE SCOPE OF LIABILITY THAT A DECLARATORY-JUDGMENT PLAINTIFF COULD FACE IF HE WERE TO ENGAGE IN HIS DESIRED ACTIVITIES

A. The Scope of Potential Liability is Not Relevant

The Summary Order states:

> The allegations of the complaint do not suggest that Bank faces considerable liability. He acknowledges that he brought this action simply "as a matter of principle." Supp. App'x 77. His stated intent is to sell only thirty-three items, and he told the district court that he had no plan to become an online retailer "in a general, long-term sense."

S.O. at 8. Although the last sentence is a mischaracterization, as Bank had merely pointed out that he had not *alleged* that he had such a plan, but did not affirmatively state that "he had no [such] plan," *see* Supp. Appx., SA-15 - SA-16, the Summary Order's rationale is erroneous in its own right in any event. In *MedImmune*, which treated, as on par, declaratory-judgment actions against a government entity and such actions against a private party, *see MedImmune,* 549 U.S. at 128-134 (with which the dissent disagreed, *see id.* at 145-146 (Thomas, *J.*, dissenting)), the Court, in stating that, "we [do] not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff *bet the farm*, so to speak, by taking the violative action," *id.* at 129 (emphasis added), was referring to *Terrace v. Thompson*, 263 U.S. 197 (1923), in which "the State threatened the plaintiff with forfeiture of his farm, fines, and

penalties if he entered into a lease with an alien in violation of the State's anti-alien land law." *MedImmune*, 549 U.S. at 129. *MedImmune* also stated: "[t]he rule that a plaintiff must destroy a large building, bet the farm, or (as here) risk treble damages and the loss of 80 percent of its business before seeking a declaration of its actively contested legal rights finds no support in Article III." *Id.* at 134. Thus, although the Court was clearly addressing situations in which a coercive suit might allege substantial liability, the Court was not addressing discretionary DJA jursidiction, but, rather, *Article III standing* as pertains to DJA cases, *see id.* at 126-134; *see also Seals v. McBee*, 907 F. 3d 885, 889 (5th Cir. 2018) ("[t]he 'bet the farm' basis for standing, in other words, does not dispense with the requirement that every plaintiff, including civil[-]liberties plaintiffs, must prove personal injury as a prerequisite to standing"); *Saint-Amour v. Richmond Org., Inc.*, 388 F. Supp. 3d 277, 286 (S.D.N.Y. 2019) ("[t]o have Article III standing, a plaintiff need not '. . . bet the farm . . .,'" quoting *MedImmune*, 549 U.S. at 134).

The Summary Order concludes: "[e]ven if there is jurisdiction over this case, the district court still has the discretion to determine that the stakes are too low to justify the commitment of judicial resources. In other words, 'considerations of practicality and wise judicial administration" recommend awaiting a more developed controversy.'" S.O. at 8, quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). However, neither *Wilton*, which "conclude[d] only that the District Court acted within its bounds

in staying this action for declaratory relief where parallel proceedings, presenting opportunity for ventilation of the same state law issues, were underway in state court," *Wilton*, 515 U.S. at 290, nor any other Supreme Court decision, nor any other decision of this Court, has held that the factors used to determine whether to exercise DJA jurisdiction include the size of the potential liability that a declaratory-judgment plaintiff would face if he engaged in his desired activity and were thereupon sued.

B. The Potential Scope of Plaintiff's Liability Would Be Substantial If He Engaged in His Desired Activities

Contrary to the Summary Order's anticipation, NFLP would likely allege "considerable liability," S.O. at 8, if Bank were to sell the 33 shirts and "get sued." First, NFLP stated that it "will 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," NFLP Letter to Bank (A-77 - A-78) at 2 (A-78), presumably under 15 U.S.C. Section 1117(a). In addition to seeking legal fees, which alone would likely be substantial, NFLP would also likely seek "not less than $1,000 or more than $200,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just," 15 U.S.C. § 1117(c)(1), and allege that "[Bank's] use of the counterfeit mark[s] was willful," 15 U.S.C. § 1117(c)(1), and accordingly seek "not more than $2,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just." 15 U.S.C. § 1117(c)(2).

CONCLUSION

Plaintiff-Appellant's Petition should be granted along with such other and further relief as authorized by law.

Dated: November 18, 2026

s/ *Todd C. Bank*
TODD C. BANK,
ATTORNEY AT LAW, P.C.
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125
tbank@toddbanklaw.com
By: Todd C. Bank

Counsel to Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH 40(d) OF
THE FEDERAL RULES OF APPELLATE PROCEDURE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 40(d) because this brief contains 1,883 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This petition 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: November 18, 2026

s/ *Todd C. Bank*
Todd C. Bank
Counsel to Plaintiff-Appellant

APPENDIX

Summary Order Dated November 12, 2026 (Doc. 49.1)

25-2940
Bank v. NFL Properties LLC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of November, two thousand twenty-six.

PRESENT: Debra Ann Livingston,
Steven J. Menashi,
Matthew A. Schwartz,
Circuit Judges.

TODD C. BANK,

Plaintiff-Appellant,

v. No. 25-2940

NFL PROPERTIES LLC,

Defendant-Appellee.

For Plaintiff-Appellant: TODD C. BANK, pro se, Kew Gardens, NY.

For Defendant-Appellee: LENA H. HUGHES, Proskauer Rose LLP, Washington, DC (Craig B. Whitney, Jeffrey H. Warshafsky, Nicole O. Swanson, Proskauer Rose LLP, New York, NY, *on the brief*).

Appeal from a judgment of the United States District Court for the Southern District of New York (McMahon, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Todd C. Bank, a pro se attorney, appeals from the judgment of the district court dismissing his action against NFL Properties LLC ("NFLP"). Bank sued NFLP seeking a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), that his anticipated sale of t-shirts bearing unlicensed National Football League ("NFL") logos would not violate the Lanham Act. Bank "brought this action as a matter of principle," Supp. App'x 77, and to test his legal theory that the logos are not protectable marks pursuant to the functionality doctrine of trademark law, *see* App'x 13-41 (¶¶ 21-88). The district court declined in its discretion under the Declaratory Judgment Act to exercise jurisdiction over the case and dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). The district court subsequently denied Bank's motions for reconsideration. We assume the parties' familiarity with the facts, the procedural history, and the issues on appeal.

I

NFLP is the merchandising and licensing arm of the NFL. Bank alleges that he intends to sell thirty-three t-shirts bearing the trademarked logos of the thirty-

two NFL teams and the NFL itself without obtaining a license from NFLP. On November 1, 2024, Bank sent a letter to NFLP claiming to represent "John Doe," who intended to sell NFL merchandise without a license. *See* App'x 53-75. Bank asserted that these sales would not violate the Lanham Act because the logos were not protectable marks pursuant to the functionality doctrine, which provides that "aspects of a product that are 'functional' generally 'cannot serve as a trademark.'" *Id.* at 54 (quoting *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 218 (2d Cir. 2012)).[1]

In response, NFLP wrote a letter rejecting the functionality argument and warning Bank that if his client "engages in the unauthorized use of NFL Marks, or any marks confusingly similar thereto, such use will constitute trademark infringement, dilution, and/or unfair competition, and also will misappropriate the goodwill and reputation of the NFL and/or its Member Clubs." App'x 77-78. NFLP said that it "reserves the right to take appropriate action to protect" its intellectual property and that "NFLP will treat any unauthorized use of the NFL Marks by [Bank's] client as intentional and willful, which would entitle NFLP to enhanced damages and reimbursement of its attorneys' fees." *Id.* at 78.

The next day, Bank sued NFLP on behalf of himself seeking a declaration that he could sell unlicensed NFL-branded merchandise without violating the Lanham Act. *See* Complaint, *Bank v. NFL Props. LLC* (*Bank I*), No. 24-CV-8814 (S.D.N.Y. Nov. 19, 2024), ECF No. 1. NFLP moved to dismiss on the ground that Bank lacked standing. Bank amended his complaint, and after NFLP moved to dismiss the amended complaint, he conceded that he lacked standing and voluntarily dismissed the action. *See* Supp. App'x 54-55.

---

[1] *See also* 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 7:82 (5th ed. 2026) (describing "[a]esthetically functional use by defendant as a defense to infringement of a valid trademark"); 3 *id.* § 24:12 (describing "Criticism of the Extension of Trademark 'Merchandising' Rights").

Bank filed this action six weeks later, bringing a single claim for declaratory relief. *See Bank v. NFL Props. LLC* (*Bank II*), No. 25-CV-3981, 2025 WL 2961849, at *8 (S.D.N.Y. Oct. 20, 2025). To establish standing, Bank took several steps to demonstrate his readiness to sell the logo-bearing t-shirts. He obtained thirty-three shirts to which he affixed patches bearing the logos of the NFL and of the thirty-two NFL teams. *See* App'x 41 (¶¶ 89-91). He built a website to process sales of the shirts, and he alleges that he took "all necessary preliminary steps to enable the [website] to immediately operate"—that is, "to enable purchases, accept payments, and collect applicable sales taxes"—once he obtained the requested declaratory relief. *Id.* at 42 (¶¶ 92-97).

NFLP moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The district court concluded that Bank had standing but granted the motion based on its discretion to decline to exercise jurisdiction under the Declaratory Judgment Act. *See Bank II*, 2025 WL 2961849, at *6-7. Bank timely appealed.

II

"Generally, 'we review a district court's grant of a motion to dismiss *de novo*, accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor.'" *B.B. ex rel. Rosenthal v. Hochul*, 166 F.4th 259, 270 (2d Cir. 2026) (alteration omitted) (quoting *Schiebel v. Schoharie Cent. Sch. Dist.*, 120 F.4th 1082, 1092 (2d Cir. 2024)). When the district court has decided a question of standing or another issue that implicates subject matter jurisdiction, "an appellate court will review the district court's factual findings for clear error and its legal conclusions *de novo*." *Id.* at 271 (quoting *Miller v. Brightstar Asia, Ltd.*, 43 F.4th 112, 120 (2d Cir. 2022)). Because "the Declaratory Judgment Act 'confers on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants,'" the decision of the district court "to hear a declaratory-judgment action is reviewed for abuse of discretion." *Liberty Ins. Corp. v. Hudson*

Excess Ins. Co., 147 F.4th 249, 262 (2d Cir. 2025) (alteration omitted) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995)).

A

The district court correctly concluded that the requirements of Article III were met and therefore it had jurisdiction over this case.

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction," a district court "may 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." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). For a declaratory-judgment action to "satisfy the case-or-controversy requirement," the dispute must "be 'definite and concrete, touching the legal relations of parties having adverse legal interests,'" and must "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.* (alteration omitted) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

In the trademark context, our court has said that there is jurisdiction when the plaintiff has alleged "that he 'has engaged in a course of conduct evidencing a definite intent and apparent ability to commence use of the marks on the product.'" *Saleh v. Sulka Trading Ltd.*, 957 F.3d 348, 351 (2d Cir. 2020) (quoting *Starter Corp. v. Converse, Inc.*, 84 F.3d 592, 595-96 (2d Cir. 1996), *abrogated on other grounds by MedImmune*, 549 U.S. at 132 n.11). "That the liability may be contingent does not necessarily defeat jurisdiction of a declaratory-judgment action. Rather, courts should focus on the *practical likelihood* that the relevant contingencies will occur." *Admiral Ins. Co. v. Niagara Transformer Corp.*, 57 F.4th 85, 92 (2d Cir. 2023) (alterations omitted) (quoting *Emps. Ins. of Wausau v. Fox Ent. Grp.*, 522 F.3d 271, 278 (2d Cir. 2008)).

In this case, Bank alleges that he has affixed the NFL logos to the thirty-three shirts in his inventory and that he has "taken all necessary preliminary steps to enable" his website "to immediately operate" when he obtains the requested relief. App'x 41-42 (¶¶ 89-91, 97). Those allegations are sufficient for Article III purposes to establish Bank's "definite intent and apparent ability" to use the trademarks in commerce. *Saleh*, 957 F.3d at 355 (quoting *Starter Corp.*, 84 F.3d at 596). Although NFLP has not said that it would necessarily sue Bank were he to use the trademarks, NFLP expressly reserved the right to do so in response to his November 2024 letter and again during oral argument in this case. *See* App'x 78; Oral Argument Audio Recording at 15:33.

NFLP argues that because Bank has prepared to engage in commerce only to manufacture jurisdiction, no "real-world consequences" would follow from a declaratory judgment in this case. Appellee's Br. 23 (quoting *NLRB v. Constellium Rolled Prods. Ravenswood, LLC*, 43 F.4th 395, 404 (4th Cir. 2022)). We disagree. Taking the allegations of the complaint as true at this stage, Bank has plausibly alleged that he would begin using NFLP's marks in commerce if he obtained a declaratory judgment. As a result, a declaratory judgment "will cause real and immediate action or inaction by one of the parties that otherwise would not occur." *Constellium*, 43 F.4th at 402. The action does not become less real because of Bank's motive for bringing himself "into adversarial conflict with [NFLP]." *Saleh*, 957 F.3d at 354 (quoting *Starter Corp.*, 84 F.3d at 595). Because a declaratory judgment would "'have real meaning' for the parties," *Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020) (quoting *INS v. Chadha*, 462 U.S. 919, 939 (1983)), the district court had subject matter jurisdiction over this case.

B

Even when an action satisfies the case-or-controversy requirement of Article III, however, a district court may abstain from exercising jurisdiction over a claim under the Declaratory Judgment Act. We conclude that the district court did not abuse its discretion by declining to exercise jurisdiction here.

When a claim is brought under the Declaratory Judgment Act, "the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Wilton*, 515 U.S. at 288. Accordingly, "district courts retain 'broad discretion' to decline jurisdiction," *Admiral Ins.*, 57 F.4th at 99 (quoting *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 106 n.7 (2d Cir. 2012)), and "[t]he Supreme Court has made it clear that this broad discretion is reviewed deferentially," *id.* at 100 (alteration omitted) (quoting *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003)). We have identified six factors that guide the exercise of that discretion:

> (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 (internal quotation marks, alterations, and citation omitted). These factors are "non-exhaustive," but a district court abuses its discretion "(1) when a relevant factor that should have been given significant weight is not considered; (2) when an irrelevant or improper factor is considered and given significant weight; and (3) when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment." *Id.* at 100 (internal quotation marks omitted). A district court does not abuse its discretion when it omits from its analysis factors that "are either irrelevant or deserve less than 'significant weight.'" *Starr Indem. & Liab. Co. v. Exist, Inc.*, No. 23-912, 2024 WL 503729, at *2 (2d Cir. Feb. 9, 2024).

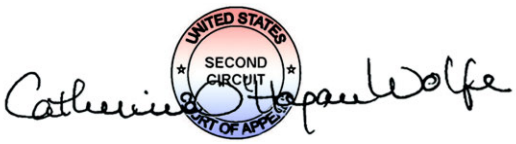
The district court did not abuse its discretion in concluding that concerns for judicial economy outweighed those factors that favored exercising jurisdiction. The district court decided that it would serve the interests of judicial economy to abstain from resolving Bank's admittedly manufactured dispute involving a minimal investment in thirty-three t-shirts and patches. *See Bank II*, 2025 WL 2961849, at *7. The district court reasonably concluded that Bank might abandon the plan to sell the shirts—or, if he did engage in sales, then NFLP might not sue him. Either scenario would obviate the need for judicial resolution. If Bank sold shirts and NFLP sued, then Bank would still be able to assert the functionality theory as an affirmative defense. Given these possibilities, we cannot say that the district court abused its discretion by deciding that it would be more efficient at this stage to abstain from exercising jurisdiction.

We have identified the "policy animating the Declaratory Judgment Act" as enabling "parties to adjudicate their disputes before either suffers great damage." *Starter Corp.*, 84 F.3d at 596. For that reason, "[d]eclaratory judgment actions are particularly useful in resolving trademark disputes" because such a dispute may be resolved without first incurring "considerable liability for a violation of the Lanham Act." *Id.* The allegations of the complaint do not suggest that Bank faces considerable liability. He acknowledges that he brought this action simply "as a matter of principle." Supp. App'x 77. His stated intent is to sell only thirty-three items, and he told the district court that he had no plan to become an online retailer "in a general, long-term sense." *Id.* at 15-16. Even if there is jurisdiction over this case, the district court still has the discretion to determine that the stakes are too low to justify the commitment of judicial resources. In other words, "considerations of practicality and wise judicial administration" recommend awaiting a more developed controversy. *Wilton*, 515 U.S. at 288.

* * *

We have considered Bank's remaining arguments, which we conclude are without merit. We affirm the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



CERTIFICATE OF SERVICE

I hereby certify that on November 18, 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.

s/ *Todd C. Bank*
Todd C. Bank
Dated: November 18, 2026