UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-4533-cv(L); 13-4537-cv

Caption [use short title]

Expressions Hair Design v. Underwood

Motion for: Joint motion to vacate the the final judgment below, remand for dismissal of the complaint with prejudice, and to dismiss the appeals as moot

Set forth below precise, complete statement of relief sought:

An order vacating the final judgment below, remanding with directions to dismiss the complaint with prejudice, and dismissing the appeal as moot.

MOVING PARTY: Defendant-Appellant Underwood

☐ Plaintiff ☑ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Plaintiffs-Appellees Expressions Hair Design, et al.

MOVING ATTORNEY: Judith N. Vale

OPPOSING ATTORNEY: Deepak Gupta

[name of attorney, with firm, address, phone number and e-mail]

Office of the N.Y. Attorney General
28 Liberty Street, New York, NY 10005
(212) 416-6274, judith.vale@ag.ny.gov

Gupta Wessler PLLC
1735 20th Street, NW Washington, DC 20009
(202) 888-1741; deepak@guptawessler.com

Court-Judge/Agency appealed from: U.S. District Court for S.D.N.Y. (Rakoff, J.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): All parties join in this motion - see attached affidavits

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Judith N. Vale **Date:** January 8, 2019

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXPRESSIONS HAIR DESIGN, et al.,

Plaintiffs-Appellees,

v.

BARBARA D. UNDERWOOD, in her official capacity as Attorney General of the State of New York, et al.,

Defendants-Appellants.

No. 13-4533-cv(L);
13-4537-cv

JOINT AFFIRMATION IN SUPPORT OF MOTION TO VACATE JUDGMENT BELOW, REMAND FOR DISMISSAL OF THE COMPLAINT, AND DISMISS THE APPEAL AS MOOT

All of the parties to this appeal hereby move the Court to vacate the final judgment of the district court, remand with an order to the district court to dismiss the plaintiffs-appellees' complaint with prejudice, and dismiss the above-captioned appeals as moot.

Attached to this motion are affirmations in support filed separately on behalf of defendant-appellee Attorney General Letitia James[1] and plaintiffs-appellees. Defendants-appellees District Attorney Cyrus R. Vance, Jr and District Attorney Eric Gonzalez concur with the arguments set forth in the affirmation filed on behalf of Attorney General James.[2]

[1] On November 6, 2018, this Court automatically substituted then-Attorney General Barbara D. Underwood for former Attorney General Eric T. Schneiderman as defendant-appellant in this case pursuant to Federal Rule of Appellate Procedure (FRAP) 43(c)(2). Pursuant to FRAP 43(c)(2), Attorney General Letitia James should be substituted as a defendant in her official capacity.

[2] Pursuant to FRAP 43(c)(2), District Attorney Eric Gonzalez, who is currently the District Attorney of Kings County, should be automatically substituted in his

Respectfully submitted,

LETITIA JAMES
Attorney General of the
State of New York

By: /s/ Judith N. Vale
JUDITH N. VALE
Senior Assistant Solicitor General
28 Liberty St., 23th Floor
New York, NY 10005
(212) 416-6274

ZACHARY W. CARTER
Corporation Counsel of the
City of New York

By: /s/ John Moore
JOHN MOORE
Assistant Corporation Counsel,
Appeals Division
New York City Law Department
100 Church Street
New York, New York 10007
(212) 356-0840

By: /s/ Deepak Gupta
DEEPAK GUPTA
GUPTA WESSLER PLLC
1900 L Street, NW,
Suite 312
Washington, DC 20036
(202) 888-1741

Gary Friedman
FRIEDMAN LAW GROUP LLP
270 Lafayette Street
New York, NY 10012
(212) 680-5150

Counsel for Plaintiffs-Appellants

official capacity for former District Attorney Charles J. Hynes.

UNITED STATES COURT OF APPEALS
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v.

BARBARA D. UNDERWOOD, in her official capacity as Attorney General of the State of New York, et al.,

Defendants-Appellants.

No. 13-4533-cv(L);
13-4537-cv

AFFIRMATION IN SUPPORT OF JOINT MOTION TO VACATE JUDGMENT BELOW, REMAND FOR DISMISSAL OF THE COMPLAINT, AND DISMISS THE APPEAL AS MOOT

JUDITH N. VALE, an attorney duly authorized to the bar of this State, affirms under penalty of perjury the following:

1. I am a Senior Assistant Solicitor General in the office of Letitia James, Attorney General of the State of New York, who is a defendant-appellant in the above-listed appeal.[1] I submit this affirmation in support of the parties' joint motion of all parties to vacate the judgment of the district court, remand with an order to the district court to dismiss the complaint with prejudice, and dismiss the appeal as moot.

2. In 2013, plaintiffs Expressions Hair Design, Linda Fiacco, The Brooklyn Farmacy & Soda Fountain, Inc., Peter Freeman, Bunda Starr Corp., Donna Pabst, Five Points Academy, Steve Milles, Patio.com LLC, and David Ross filed this action

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pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York, challenging New York's statutory prohibition against credit-card surcharges. *See* General Business Law (GBL) § 518. Plaintiffs alleged, inter alia, that GBL § 518 violated the First Amendment and is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment. (J.A. 74-75.)

3. The defendants are Letitia James, in her official capacity as Attorney General of the State of New York, Cyrus R. Vance, Jr., in his official capacity as District Attorney of New York County, and Eric Gonzalez, in his official capacity as District Attorney of Kings County.[2]

4. On October 3, 2013, the district court (Rakoff, J.) issued an opinion and order preliminarily enjoining defendants from enforcing GBL § 518 against plaintiffs. (J.A. 20-54.) In concluding that plaintiffs were likely to succeed on their constitutional claims, the district court interpreted GBL § 518 as regulating the "words and labels" a seller may use to describe a difference in price between a cash price and a credit-card price (J.A. 40-41), even if the seller displayed its credit-card price in dollars and cents (J.A. 36). For example, in the district court's view, GBL § 518 prohibited a seller from characterizing the difference between a cash and credit-card price in certain ways, such as describing that price difference as a "surcharge" or "added fee," while allowing a

[2] Pursuant to FRAP 43(c)(2), District Attorney Eric Gonzalez, who is currently the District Attorney of Kings County, should be automatically substituted for former District Attorney Charles J. Hynes. Likewise, District Attorney Stephen K. Cornwell Jr., who is currently the District Attorney of Broome County, should be automatically substituted as a defendant in the place of former District Attorney Gerald Mollen. Plaintiffs' complaint named former District Attorney Gerald Mollen as a defendant in his official capacity; however, he is not an appellant in this appeal.

seller to characterize the same price differential as a "discount." The district court reached this interpretation of state law by declining to interpret GBL § 518 as mirroring a lapsed federal surcharge statute. (J.A. 38.) That prior federal surcharge statute had allowed a seller to charge different prices to cash and credit-card users, and had not regulated the descriptive terms that a seller could use to describe such price differentials, so long as the seller posted the total credit-card price in dollars-and-cents form when it posted prices.

5. On November 4, 2013, the district court entered a stipulated final judgment declaring GBL § 518 unconstitutional for the reasons stated in its preliminary-injunction order. In the final judgment, the court permanently enjoined defendants from enforcing GBL § 518 against plaintiffs. (J.A. 210-213.)

6. On appeal, this Court held, among other things, that the statute does not regulate speech at all and is thus not subject to the First Amendment. *Expressions Hair Design v. Schneiderman*, 808 F.3d 118 (2015). The Court vacated the final judgment below and remanded for the dismissal of plaintiffs' claims. *Id.* at 144.

7. On March 29, 2017, the United States Supreme Court vacated and remanded for this Court to analyze the statute as a speech regulation under the First Amendment. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

8. This Court then issued an order recalling its mandate and reinstating this appeal in light of the Supreme Court's decision. In December 2017, after receiving supplemental briefing from the parties, the Court issued an order certifying the following question to the New York Court of Appeals: "Does a merchant comply with New York's General Business Law § 518 so long as the merchant posts the total-dollars-

and-cents price charged to credit card users?" *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 100 (2d Cir. 2017).

9. On October 23, 2018, the New York Court of Appeals issued a decision answering the certified question in the affirmative. *Expressions Hair Design v. Schneiderman*, No. 100, 2018 N.Y. Slip Op. 07037, 2018 WL 5258853, at *1 (2018). The state Court of Appeals repudiated the statutory construction that the district court had previously adopted, instead interpreting GBL § 518 as replicating the prohibitions in the prior federal surcharge statute and creating "a ban coextensive with" that prior federal law. *Id.* at *4-5. Specifically, the state Court of Appeals determined that GBL § 518 allows a seller to charge different prices for a customer who pays with cash and a customer who pays with a credit card, "but requires that a higher price charged to credit card users be posted in total dollars-and-cents form." *Id.* at *6. And in direct contrast to the district court below, the state Court of Appeals further determined that "so long as the total dollars-and-cents price charged for credit card purchases is posted," "merchants are free to call the price differential anything they wish"—including characterizing the price differential as a "'surcharge'" "'additional fee'" or "'extra cost.'" *Id.*

10. On November 6, 2018, this Court issued an order noting that the New York Court of Appeals had responded in the affirmative to the question this Court certified, and directed the parties to submit simultaneous letter briefs by November 27, 2018, apprising the Court of the effect of the state Court of Appeals' opinion on their arguments in this case. The Court subsequently granted two requests for an extension of time for the parties to file these supplemental briefs, which are currently due on

January 8, 2019.

11. While the supplemental briefs were pending, plaintiffs informed defendants that plaintiffs no longer wish to pursue any of their claims or any of the relief they sought in their complaint. Plaintiffs represented that they want to dismiss their entire complaint with prejudice, including any claim for costs or attorney's fees from defendants.

12. Given plaintiffs' unilateral decision to abandon their claims, defendant-appellant Attorney General James moves the Court to vacate the final judgment below, remand with instructions to the district court to dismiss the complaint with prejudice, and dismiss the current appeals as moot. *See* 28 U.S.C. § 2106 (appellate court "may affirm, modify, vacate, set aside or reverse any judgment . . . and may remand the cause and direct the entry of such appropriate judgment, decree, or order . . . as may be just under the circumstances); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Oneida Indian Nation of N.Y. v. Madison County*, 665 F.3d 408, 426-27 (2d Cir. 2011). Plaintiffs and the District Attorney defendants join this motion.

13. Plaintiffs' unilateral abandonment of their claims has rendered this case moot. Because plaintiffs no longer wish to pursue their claims, there is no longer any live dispute between the parties. Accordingly, there is no longer any ongoing case or controversy for this Court to review. *See Arave v. Hoffman*, 552 U.S. 117, 118 (2008) (per curiam) (ineffective assistance claim rendered moot by abandonment during appeal); *Oneida Indian Nation*, 665 F.3d at 425 (sovereign immunity claims rendered academic by abandonment on appeal); 13B C. Wright, A. Miller, & M. Kane, *Federal Practice & Procedure* § 3533.2 (3d ed. 1998) ("There can be no doubt that an action is

mooted if the plaintiff voluntarily withdraws.").

14. If the Court agrees that plaintiffs' abandonment of their claims has mooted this case, then the Court should issue an order vacating the judgment below and dismissing plaintiffs' complaint with prejudice. Where, as here, a case that is pending on appeal has been mooted by the unilateral decision of the party that prevailed below to withdraw its claims, "the judgment below should be vacated with directions to the District Court to dismiss" the claims with prejudice. *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988); *see City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003); *Oneida Indian Nation*, 665 F.3d at 426. Under such circumstances, "the equities clearly favor vacating the district court's judgment," *Brooks v. Travelers Ins. Co.*, 297 F.3d 167, 172 (2d Cir. 2002), because the appellant "should not be required to suffer the adverse *res judicata* effects of [a] judgment" when the appeal was terminated through no fault of the appellant, *Oneida Indian Nation*, 665 F.3d at 426 (quotation marks omitted). Indeed, vacatur of the judgment below is particularly appropriate when the prevailing party withdraws its claims because the "winning party. . . should not be able to prevent appellate review of a perhaps-erroneous decision by attempting to render the district court's judgment unappealable." *Id.; see U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994).

15. Moreover, the equities further counsel in favor of vacatur here because plaintiffs' decision to withdraw their complaint should not leave intact a final judgment that declares a duly enacted state statute unconstitutional and enjoins the State and several District Attorneys from enforcing that statute against plaintiffs. Indeed, vacatur is especially warranted in this case because after the trial court entered final

judgment, the New York Court of Appeals issued its decision repudiating the interpretation of GBL § 518 on which the district court rested its final judgment. In particular, in contrast to the federal district court, the state Court of Appeals interpreted New York's surcharge statute to mirror the prior federal surcharge statute and thus to allow a seller to characterize a difference between its cash and credit-card prices in whatever way it wishes so long as the seller posts its credit-card price in dollars-and-cents form. Because the New York Court of Appeals' interpretation of state law supersedes the contrary interpretation of the federal district court, this Court should vacate the final judgment and ensure that plaintiffs' withdrawal of their claims does not insulate the final judgment from appellate review. *United States v. Sampson*, 898 F.3d 270, 286-87 (2d Cir. 2018) ("interpretation of a state statute or constitutional provision made by that state's highest court is binding on a federal court" (quotation marks omitted)); *see Microsoft Corp. v. Bristol Tech., Inc.*, 250 F.3d 152, 155 (2d Cir. 2001) (per curiam) (vacating final judgment on motion where, inter alia, judgment rested on federal court's interpretation of Connecticut law that "will be developed by Connecticut's state courts").

16. Moreover, if the Court agrees that this case has been rendered moot by the plaintiffs' willingness to withdraw their claims permanently, then "a dismissal with prejudice is indicated." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 513 (1989) (quotation marks omitted). As the Supreme Court has explained, dismissal of the complaint with prejudice will "prevent the regeneration of the controversy." *Deakins*, 484 U.S. at 200-01.

17. Finally, if the Court determines that plaintiffs' unilateral abandonment

of their claims has mooted the case and warrants an order vacating the final judgment and directing the district court to dismiss the complaint with prejudice, then the Court should also dismiss the current appeals as moot.

18. But, if the Court were to disagree with the parties and determine that plaintiffs' decision to withdraw their complaint has not mooted the case, then the Court should direct the parties to proceed with the appeal by filing the supplemental briefs previously ordered by the Court no later than two weeks after the Court issues an order denying the current motion. In other words, defendants are not by this motion seeking to withdraw their appeals voluntarily, but rather noting that if the district court's decision is vacated and the complaint is dismissed with prejudice, then the appeals will be moot.

Dated: New York, New York
January 8, 2019

/s/ Judith N. Vale

Judith N. Vale

UNITED STATES COURT OF APPEALS
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v.

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Defendants-Appellants.

No. 13-4533-cv(L);
13-4537-cv

AFFIRMATION OF PLAINTIFFS-APPELLEES IN SUPPORT OF MOTION TO VACATE JUDGMENT BELOW, REMAND FOR DISMISSAL OF THE COMPLAINT, AND DISMISS THE APPEAL AS MOOT

I, DEEPAK GUPTA, a member of the Bar of the District of Columbia and of the Bar of this Court, affirm under penalty of perjury the following:

1. I represent the plaintiffs-appellees in this appeal. I am submitting this affirmation in support of the parties' joint motion to dismiss this appeal as moot.

2. In early December 2018, we informed the defendants-appellants of our intent to dismiss all claims against them. Although we therefore join this motion, we do not agree with certain respects in which the defendants-appellants have described the course of proceedings in this case. Most notably, the defendants-appellants err in suggesting that the logic of the district court opinion depended upon a reading of G.B.L. § 518 that the New

York Court of Appeals "repudiated" in its October 3, 2018 opinion. *See* Vale Aff. at ¶ 9. It is more accurate to say that the New York Court of Appeals interpreted G.B.L. § 518 in a manner that obviated some but not all of the serious First Amendment concerns identified by the district court. Under the Court of Appeals' interpretation of G.B.L. § 518, it remains illegal to convey truthful information about prices using certain words, but it is now lawful to convey identical price information using other words. That hardly qualifies as a repudiation of the statutory premises on which the district court based its original decision to invalidate the statute on First Amendment grounds.

3. However, a determination of the effect of the Court of Appeals' decision is unnecessary to an assessment of whether to grant the parties' joint request for relief. This case is now moot. There is no longer a live controversy between the parties. Accordingly, there is no need for this Court to take steps beyond those jointly requested by the parties.

Respectfully submitted,

/s/ Deepak Gupta
DEEPAK GUPTA
GUPTA WESSLER PLLC
1900 L Street, NW,
Suite 312
Washington, DC 20036
(202) 888-1741

Gary Friedman
FRIEDMAN LAW GROUP LLP
270 Lafayette Street
New York, NY 10012
(212) 680-5150

Counsel for Plaintiffs-Appellees