

TRADEMARK ASSIGNMENT COVER SHEET

Electronic Version v1.1
Stylesheet Version v1.2

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SUBMISSION TYPE:	RESUBMISSION
NATURE OF CONVEYANCE:	Court order filed in Commonwealth of Massachusetts Superior Court, Essex, partially dissolving order relating to said marks, with accompanying motion, and correcting ownership stated at R/F 5646/0096.
RESUBMIT DOCUMENT ID:	900350956

CONVEYING PARTY DATA

Name	Formerly	Execution Date	Entity Type
Avalanche Licensing LLC		12/18/2015	LIMITED LIABILITY COMPANY: MASSACHUSETTS

RECEIVING PARTY DATA

Name:	Avalanche Licensing LLC
Street Address:	35 Congress Street, Suite 250
City:	Salem
State/Country:	MASSACHUSETTS
Postal Code:	01970
Entity Type:	LIMITED LIABILITY COMPANY: MASSACHUSETTS

PROPERTY NUMBERS Total: 4

Property Type	Number	Word Mark
Serial Number:	86346268	
Serial Number:	86345627	AVALANCHE
Registration Number:	3081544	AVALANCHE WEAR
Registration Number:	3100672	AVALANCHE WEAR

CORRESPONDENCE DATA

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. ESCV2015-00341-B

RED ROCK TRADING CO., INC., & others¹

vs.

LAWRENCE SHUTZER & others²

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION
TO DISSOLVE, OR, IN THE ALTERNATIVE, MODIFY THE COURT'S
AUGUST 7, 2015 ORDER ON DEFENDANT LAWRENCE
SHUTZER'S MOTION FOR PREJUDGMENT SECURITY NO. 2
AND DEFENDANT SHUTZER'S CROSS-MOTION TO ENJOIN
PLAINTIFFS FROM MAKING CERTAIN TRANSFERS BETWEEN
RED ROCK AND AVALANCHE LICENSING

While defendant Shutzer's use of Red Rock designs may not bar him from recovery on the Stock Agreement, such use of Red Rock designs³ does render him no longer legally entitled to equitable relief. The doctrine of "unclean hands" denies equitable relief to one tainted with inequitable conduct or bad faith directly affecting the matter in which equitable relief is sought. Amerada Hess Corp. v. Garabedian, 416 Mass. 149, 156 (1993); Fidelity Management & Research Co. v. Ostrander, 40 Mass.App.Ct. 195, 200 (1996). However, even a party guilty of intentional violation of the law does not lose the right to relief where his cause of action arises independently of his unlawful conduct and relief by the court will not further any unlawful scheme or produce substantial injustice or public harm. Braga v. Braga, 314 Mass. 666, 672

¹Avalanche Licensing LLC and Ronald Petrucci.

²Stuart Edelman, Lauren Gaudet, Alyssa Dandreo, Mark Diamond, Carolann Sierra, Salem Apparel Company, Elements Apparel, Vakko Apparel and John Doe, Inc.

³The specific Findings of Fact by Welch, J. in his Findings and Rulings on Complaint for Contempt include that "Diamond and Edelman followed Shutzer's directive to arrange for the pirating of the Red Rock/Avalanche 2015 designs."

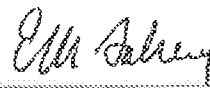
(1943); New York, N.H. & H.R.R. Co. v. Pierce Coach Lines, Inc., 281 Mass. 479, 482 (1933).

The question of whether to deny relief to a party under the doctrine of unclean hands is committed to the sound discretion of the trial judge. Fales v. Glass, 9 Mass.App.Ct. 570, 575 (1980). Accordingly, based on Welch, J.'s Findings, this court vacates paragraphs 1 and 3 of the August 7, 2011 Preliminary Injunction.

Defendant Shutzer's Cross Motion to Further Enjoin Plaintiff from Making Certain Transfers stands on a different footing (than the relief sought in Paragraphs 1 and 3) in light of the Agreement. Based on the Agreement Petrucci and Shutzer signed, Paragraph 2 of this court's August 7, 2015 Preliminary Injunction remains in full force and effect until further court order. In all other respects defendant Shutzer's Cross Motion is denied.


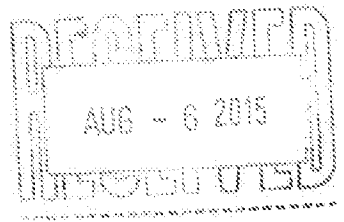
ORDER

Plaintiff's Motion to Dissolve, or, in the alternative, modify the Court's August 7, 2015 Order is allowed in part and denied in part. Paragraphs 1 and 3 of this court's Preliminary Injunction that entered on August 7, 2015 are stricken. Defendant's Cross Motion to Enjoin is denied in all respect except that Paragraph 2 of this Court's Preliminary Injunction entered on August 7, 2015 remains in full force and effect until further court order.



Elizabeth M. Fahey
Justice of the Superior Court

Date: December 18, 2015

<p style="text-align: center;">CLERK'S NOTICE</p>	<p>DOCKET NUMBER 1577CV00341</p>	<p>Trial Court of Massachusetts The Superior Court</p> 
	<p>CASE NAME: Red Rock Trading Co Inc et al vs. Lawrence Shutzer et al</p>	<p>Thomas H. Driscoll, Jr., Clerk of Courts</p>
<p>TO: Anthony M Metaxas, Esq. Metaxas Brown Pidgeon LLP 900 Cummings Center Suite 207T Beverly, MA 01915</p>	<p>COURT NAME & ADDRESS Essex County Superior Court - Newburyport 145 High Street Newburyport, MA 01950</p>	
<p>You are hereby notified that on 08/03/2015 the following entry was made on the above referenced docket:</p> <p>Endorsement on Motion for Defendant Lawrence Shutzer's Motion for Pre-Judgment Security No. 2 (#55.0): ALLOWED After review, this motion is allowed as to Paragraphs 1, 2, and 3 below, finding that defendant Shutzer is likely to be successful and to preserve the status of plaintiff's finances. Preliminary Injunction as to these three (3) paragraphs.</p> <div style="text-align: right; margin-top: 200px;">  </div>		
<p>DATE ISSUED 08/03/2015</p>	<p>ASSOCIATE JUSTICE/ ASSISTANT CLERK Hon. Elizabeth M Fahey</p>	<p>SESSION PHONE# (978)462-4474</p>

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
C.A. NO. ESCV2015-00341

ESSEX, SS.

RED ROCK TRADING CO., INC.,
AVALANCHE LICENSING, LLC, and
RONALD PETRUCCI.

Plaintiff.

v.

LAWRENCE SHUTZER,
STUART EDELMAN,
LAUREN GAUDET,
ALYSSA DANDREO,
MARK DIAMOND,
CAROLANN SIERRA,
SALEM APPAREL COMPANY,
ELEMENTS APPAREL,
YAKKO APPAREL, and
JOHN DOE, INC.,

Defendants.

FILED
IN THE SUPERIOR COURT
FOR THE COUNTY OF ESSEX

JUL 15 2015

[Signature]
CLERK

*After review, this motion is allowed
as to paragraphs 52-53
below find in favor of the Plaintiff
[Signature]
8/15
The value of
it's products.*

DEFENDANT LAWRENCE SHUTZER'S MOTION FOR PRE-JUDGMENT SECURITY

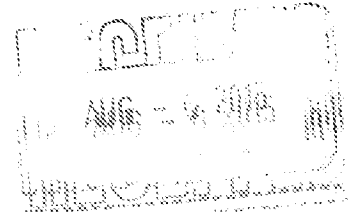
NO. 2

*For Order Enjoining Plaintiffs From Transferring Or Selling Corporate Assets Or Paying
Dividends, Distributions, or Bonuses Until Stock Payment Is Paid In Full*

Defendant/Plaintiff-in-Counterclaim Lawrence Shutzer now moves for an Order
enjoining Plaintiffs Red Rock Trading Co., Inc. ("Red Rock"), Ronald Petrucci, and Avalanche
Licensing, LLC ("Avalanche Licensing") from:

- ① selling or transferring all or substantially all of their assets;
- ② taking any other action, directly or indirectly, to transfer, alienate, liquidate, encumber, pledge, loan, assign, conceal, dissipate, convert, withdraw, or otherwise dispose of any of the Avalanche Trademarks, as defined below; or
- ③ paying any dividends to shareholders, distributions to members, or bonuses to officers, directors, members, and employees;

*PT 1)
7/15/15
3/13
[Signature]
sp/ks*



TRADEMARK

REEL: 005717 FRAME: 0238

*Demanded in Motion put in place to removed after
compliance with 919, mentioned to 7/15/15
[Signature]*

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COMMONWEALTH OF MASSACHUSETTS

ESSEX ss.

SUPERIOR COURT
DOCKET NO. ESCV2015-00341B

.....)
 RED ROCK TRADING CO., INC.,)
 AVALANCHE LICENSING LLC &)
 RONALD PETRUCCI)
 Plaintiffs,)
))
 v.)
))
 LAWRENCE SHUTZER,)
 STUART EDELMAN, LAUREN)
 GAUDET, ALYSSA DANDREO,)
 MARK DIAMOND, CAROLANN)
 SIERRA, SALEM APPAREL COMPANY,)
 ELEMENTS APPAREL,)
 VAKKO APPAREL & JOHN DOE, INC.,)
 Defendants.)

**PLAINTIFF'S MOTION TO DISSOLVE, OR, IN THE ALTERNATIVE, MODIFY THE
 COURT'S (FAHEY, J.) AUGUST 7, 2015 ORDER ON DEFENDANT LAWRENCE
 SHUTZER'S MOTION FOR PREJUDGMENT SECURITY NO.2**

The Plaintiffs, Ronald Petrucci ("Petrucci"), Red Rock Trading Co., Inc. ("Red Rock") and Avalanche Licensing LLC ("Avalanche LLC") hereby move the Court to dissolve, or, in the alternative, modify its August 7, 2015 Order on Defendant Lawrence Shutzer's Motion for Prejudgment Security No. 2 (the "August Order"). Dissolving the August Order is proper because the facts of this case have changed significantly since the August Order issued, and it is clear that Defendant Lawrence Shutzer ("Shutzer") does not have a reasonable likelihood of success on the merits of his claim to enforce the November 1, 2014 Agreement (the "November Agreement") executed among the parties. Most notably different is that the Court (Welch, J.) on October 3, 2015, after a full contempt trial, found that Shutzer and defendants Edelman and

Diamond had converted and attempted to market Red Rock's 2015 designs – the very designs Petrucci purchased by way of the November Agreement. Further, Shutzer has taken every opportunity, on the limited reach of the August Order, to interfere with Avalanche's business by wrongly claiming the August Order restricts Avalanche's ability to enter licensing agreements and has gone as far as filing a non-existent "lien" against the Avalanche trademark at the United States Patent and Trademark Office ("PTO").

Clearly, as discussed below, had the evidence of Shutzer's breach been before the Court when Shutzer's motion was being considered in August, then the August Order would not have been issued. The issue of whether Shutzer has a reasonable likelihood of success on his claims must be reexamined in the current landscape. It also cannot go without mention that when Shutzer filed the motion at issue here, he failed, as he did at the March 19, 2015 injunction hearing, to inform the Court that he had, in fact, converted the very fruits of the contract for which he was seeking relief. It is simply unconscionable for Shutzer to have sought relief from the Court without fully disclosing the true facts. In that regard, not only should the August Order be dissolved, but Shutzer should be sanctioned for his lack of candor to the Court.¹

¹ Given Judge Welch's characterization of Shutzer's representations in his March 18, 2015, affidavit present at the injunction hearing as "either outright perjury or . . . willful blindness," (see Exhibit B at 3) it is clear that, in failing to reveal to the Court that he, in fact, converted the very designs Petrucci purchased when seeking security in July, Shutzer has engaged in a pattern of conduct that rises to the level of "fraud on the court."

"A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Rockdale Mgmt. Co. v. Shawmut Bank, N.A.*, 418 Mass. at 598, quoting from *Aoude v. Mobil Oil Corp.*, 892 F.2d at 1118. The court in *Rockdale* also stated:

The immediate need for dissolving the August Order has been spotlighted by Shutzer's October 15, 2015 filing of a "lien" against the Avalanche trademark with the PTO. Despite having no actual lien against Avalanche, Shutzer filed the Court's August Order, as well as his Motion on the issue, with the PTO and specifically misrepresented to the world that he had a "lien" against the Avalanche Trademark.² Shutzer's filing of a non-existent "lien" was done for the sole purpose of harming Avalanche. At no time has this Court, or any other court, provided Shutzer with any relief in the form of lien.³ The only relief provided by this Court was a preservation of the status quo order. This Court cannot countenance Shutzer's actions in attempting to create in the public eye relief that he was never granted.⁴

"When a fraud on the court is shown through clear and convincing evidence to have been committed in an ongoing case, the trial judge has the inherent power to take action in response to the fraudulent conduct. [] The judge has broad discretion to fashion a judicial response warranted by the fraudulent conduct. Dismissal of claims or of an entire action may be warranted . . . as may be the entry of a default judgment. We examine judicial responses to findings of fraud on the court for an abuse of discretion." (Citations omitted.) *Rockdale Mgmt. Co. v. Shawmut Bank, N.A., supra.*

Munshani v. Signal Lake Venture Fund II, LP, 60 Mass. App. Ct. 714, 718-19, 805 N.E.2d 998, 1002-03 (2004).

² See "Trademark Assignment Cover Sheet" and its attachments, attached hereto as Exhibit A.

³ Generally, a lien is created by statute or by an Order of the Court, neither of which exist here. Shutzer obtained a preliminary injunction that preserved the status quo and did not create any lien or other interest in Avalanche. A lien denotes a right to keep possession of property belonging to another person until a debt owed by that person is discharged. Shutzer has established no existing debt and has only inchoate claim to damage under a contract.

⁴ In defense of filing the non-existent lien, Shutzer's counsel states that personnel at the PTO told them to designate their filing as a lien. Such an excuse finds its place directly next to those in the great pantheon of tired excuses, such as "the dog ate my homework." It is simply unreasonable for lawyers to rely on administrative staff for advice. See, e.g., *Calnan v. Planning Bd.*, 63 Mass. App. Ct. 384, 390 (2005) (holding that "as a matter of law, it was not reasonable for counsel to rely on the statement of a clerk of the board for a determination of the last day for completing the procedural requirements for initiating an appeal from the board's decision. Counsel had an obligation to determine the date on which the board's decision was filed, and he was bound to

Not only do the facts found at the contempt trial clearly indicate that Shutzer has no reasonable likelihood of success on the merits, his recent actions illustrate the harm that can befall Avalanche if the August Order remains in place. The August Order also greatly restricts Avalanche's ability to carry on its business and incentivize its employees, because, as the August Order stands now, employees could be not be awarded year-end bonuses. To the extent some of those employees are entitled to bonuses as a matter of contract, Avalanche would be unable to meet its contractual obligations if the August Order is not dissolved or modified. Further, because on its face the August Order does not in any way restrict Avalanche's ability to license the brand -- a revenue generating activity -- Avalanche asks the Court to clarify for Shutzer the August Order so that he understands that Avalanche is not restricted in its licensing activities. Shutzer's insistence that somehow that August Order restricts licensing is now being used as his excuse for filing the false lien notice with the PTO. He simply must be stopped from creating a further path of destruction.

BACKGROUND

At the time the Court (Fahey, J.) reviewed Shutzer's Motion for Prejudgment Security No. 2, the evidence before the Court was far more limited than today. Since that time, the following facts have been found by the Court (Welch, J.):

1. "By late 2014 while still employed with Red Rock, Diamond and Edelman were involved in an extensive scheme with Shutzer to copy 2015 Avalanche Designs, alter them ever so slightly, and market them under the VAKKO label on behalf of Red Rock's

take notice of the statutory requirements." (quoting *O'Blenes v. Board of Appeals of Saugus*, 397 Mass. 555, 558-559 (1986)).

- new competitor, Salem Apparel.” (Findings and Rulings on Complaint for Contempt at 1, attached hereto as Exhibit B.)
2. “Shutzer, Diamond, and Edelman knew that the 2015 designs were proprietary property owned by Red Rock.” (Findings and Rulings at 1-2.)
 3. “Nevertheless, Diamond and Edelman followed Shutzer's directive to arrange for the pirating of the Red Rock/Avalanche 2015 designs.” (Findings and Rulings at 2.)
 4. In early December 2014, Diamond, with Shutzer's knowledge, sent 2015 Red Rock designs to a factory in China for the purpose of making samples for Shutzer's new competing company. (Findings and Rulings at 2.)
 5. “[I]n early December, 2014, Diamond, Red Rock's Director of Production, emailed both Shutzer and Edelman regarding 16 styles from Captain [a Chinese manufacturing facility] they are working on for Vakko.” Exhibit 3 at Contempt Trial. Diamond has admitted that several of the "16 styles" sent to Captain for manufacture and marketing under the Vakko name were, in fact, 2015 Red Rock designs.” (Findings and Rulings at 2.)
 6. “This attempt to steal the proprietary designs of Red Rock was part of a plan hatched between Shutzer, Edelman, and Diamond, in mid to late 2014, to take Red Rock/Avalanche designs (including many proprietary 2015 designs), to make very slight or no changes, and to market those designs under the Salem Apparel/Vakko brand.” (Findings and Rulings at 2.)
 7. Salem Apparel/Vakko “samples manufactured by Captain were nearly identical to ‘the Red Rock/Avalanche 2015 proprietary designs.” (Findings and Rulings at 2.)
 8. “As late as March 15, 2015, Diamond (who, at this point, had taken the position of Vice President of Manufacturing at Salem Apparel having left Red Rock in late February

2015) was emailing to Chinese manufacturers Red Rock "tech packs" that contained all the proprietary information regarding the 2015 Red Rock "Monti" shirt." (Findings and Rulings at 2.)

9. On March 19, 2015, the Court "held a hearing on the plaintiffs' request for a preliminary injunction. Coincidentally, March 19th was the same date that defendant Diamond was receiving an email from a Chinese manufacturer regarding a pirated 2015 Red Rock design." (Findings and Rulings at 3.)

10. In a March 2015 affidavit, Shutzer denied having any 2015 Red Rock designs, through which, in all likelihood, Shutzer "committed outright perjury or displayed willful blindness" to Edelman's and Diamond's actions. (Findings and Rulings at 3.)

11. In Edelman's March 2015 affidavit, he likewise denied possessing any 2015 Red Rock designs, which the Court (Welch, J.) found to be a false statement. (Findings and Rulings at 3.)

12. At least by January, 2015 (if not before), Edelman was attempting to sell various garments "based on Red Rock's confidential 2015 designs" to a large account, TJ Maxx. (Findings and Rulings at 3.)

13. "On February 1, 2015 (well before the March 18th affidavit) Edelman sent to Diamond (with a copy to Shutzer) an email that detailed the designs that Salem Apparel/Vakko was trying to sell to TJ Maxx. The list included reference to, at the very least, two designs that Edelman certainly knew were 2015 Red Rock designs because he used the Red Rock names for these garments." (Findings and Rulings at 3-4.)

14. "During this same period of time, Edelman, at Shutzer's direction, was marking up Red Rock 2015 designs with the slightest of changes and arranging for these knock-off

- designs to be Manufactured in China and sold by Salem Apparel/Vakko." (Findings and Rulings at 2.)
15. On March 25, 2015, Shutzer and Edelman continued to use the 2015 Red Rock designs in an attempt to sell garments to T.J. Maxx. (Findings and Rulings at 5.)
 16. Shutzer and Edelman, "hung both Avalanche and Salem Apparel designs on a display rack, photographed the items, and compared the Salem Apparel offerings to the Avalanche 2015 designs. At least six of the photographed items were, rather plainly, Salem Apparel garments based on Red Rock 2015 designs." (Findings and Rulings at 5.)
 17. "Edelman and Shutzer were knowingly "using" Red Rock propriety information and 2015 designs in violation of this Court's order." (Findings and Rulings at 5.)
 18. "Shutzer sent an email to Eileen Owens of TJX (with a copy to his counsel), on March 27th, assuring her: "I do want you to know that Salem Apparel (my company) is not showing or selling, or [sic] anything connected to 2015 designs or proprietary information of Red Rock in any form and that none of the designs shown to Lindsey reflect any 2015 Red Rock designs." The statement that the designs shown to Lindsey Goode at the March 25th meeting did not "reflect any 2015 Red Rock designs" is patently false." (Findings and Rulings at 5-6.)
 19. "Despite the photographic evidence to the contrary, Shutzer still falsely claimed at the contempt trial that he did not try to sell any Red Rock 2015 designs to TJX Industries during the March 25th meeting." (Findings and Rulings at 6.)
 20. Diamond and Edelman were found in contempt of the Court's order to "return all such proprietary information . . . immediately," Edelman and Shutzer are in contempt of the Court's order prohibiting "using any Red Rock . . . proprietary information or any 2015

Red Rock designs," These contempts are clear and undoubted.'" (Findings and Rulings at 6.)

ARGUMENT

I. BASED ON FACTS ACTUALLY KNOWN TO DATE, SHUTZER CANNOT DEMONSTRATE A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS OF HIS CLAIM UNDER THE NOVEMBER AGREEMENT.

By affirmatively misrepresenting to the Court in March 2015 that Shutzer (and the other defendants) did not possess the very designs that Petrucci purchased by way of the November Agreement, and by again failing to disclose to the Court in July 2015 that Shutzer was in possession of Red Rock's designs, Shutzer deprived the plaintiffs of the essential defense to his claim for payment, and, hence a primary argument as to why the August Order should not have been issued. This Court cannot countenance Shutzer's continued failure to show candor to the Court and should, therefore, dissolve in the August Order. Without question, equitable principles weigh heavy in the plaintiffs' favor:

The Supreme Court of the United States has described the unclean hands doctrine as the "equitable maxim that 'he who comes into equity must come with clean hands.'" *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814, 65 S. Ct. 993, 89 L. Ed. 1381, 1945 *Dec. Comm'r Pat.* 582 (1945). The "maxim is more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Id.* An equitable remedy "should not be granted when the requesting party has engaged in conduct 'savored with injustice touching the transaction.'" *Hawthorne's, Inc. v. Warrenton Realty, Inc.*, 414 Mass. 200, 208, 606 N.E.2d 908 (1993), quoting *Economy Grocery Stores Corp. v. McMenamy*, 290 Mass. 549, 552, 195 N.E. 747 (1935). When a party's actions are so "inherently inequitable" as to offend the court, that party's case "should not prevail." *Carabetta v. Board of Appeals of Truro*, 73 Mass. App. Ct. 266, 272-73, 897 N.E.2d 607 (2008).

Savery v. Duane, 2014 Mass. LCR LEXIS 107, *45 (Mass. Land Ct. 2014).

In addition to the traditional notion that a bad actor should not benefit from his deplorable conduct, it is also evident that the Plaintiffs have substantive defenses to Shutzer's claim for payment.

A. SHUTZER'S INTENTIONAL BREACH OF THE NOVEMBER AGREEMENT BARS ANY RECOVERY BY HIM UNDER THE NOVEMBER AGREEMENT AND ILLUSTRATES HE HAS NO REASONABLE LIKELIHOOD OF SUCCESS.

The law of this Commonwealth precludes recovery by one who wilfully commits a breach of a contract regardless of whether the breach goes to the essence of the contract. *Serv. Pubs., Inc. v. Governan*, 396 Mass. 567, 573 (1986) (citing *Sipley v. Stickney*, 190 Mass. 43, 46 (1906)). This premise is well supported. *See, e.g., Ficara v. Belleau*, 331 Mass. 80, 81 (1954) (stating that "any willful default in the performance of a contract bars recovery"); *Walsh v. Atl. Research Assocs., Inc.*, 321 Mass. 57, 62 (1947) (noting the general applicability of the *Sipley* rule and citing *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 43, 115 N.E. 42; *Jewett v. Warriner*, 237 Mass. 36, 129 N.E. 296; *Cobb v. Library Bureau*, 268 Mass. 311, 167 N.E. 765; *Jackson v. Boston Safe Deposit & Trust Co.* 310 Mass. 503, 505, 39 N.E.2d 85).

The facts found by the Court, as it relates to Shutzer's use of the 2015 Red Rock Designs, as a result of the Contempt trial clearly illustrate that Shutzer's actions were a willful breach of the November Agreement.⁵ Not only is it evident that Shutzer breached the November

⁵ Even if somehow the contempt findings are not given preclusive effect at trial, the simple fact is that the evidence presented will be the same and a jury will come to the same conclusion as did the Court (Welch, J.). Indeed on the issue of the defendants claiming they altered the Red Rock designs enough that they were no longer Red Rock designs, the Court specifically commented that it was a "difference that, frankly, many fact finders are gonna have a hard time with. But anyway, the 2015 inspired designs, which, again, almost any fact finder is going say were very close knockoffs . . ." Contempt Trans. at 210:6-9 (attached hereto as Exhibit C.). Certainly, Judge Welch's characterization of some of Shutzer's testimony as "incredible" does not bode well for how Shutzer will be received by a jury. *See* Exhibit C at 211:17-19 ("[F]rankly, I find it incredible what Mr. Shutzer says about not knowing about any Red Rock 2015 designs.")

Agreement by using 2015 Red Rock designs, it is clear that he had every intention of doing so, and, in fact, began doing so, even before the November Agreement was signed. (See Findings and Rulings at 2) (“This attempt to steal the proprietary designs of Red Rock was part of a plan hatched between Shutzer, Edelman, and Diamond, in mid to late 2014, to take Red Rock/Avalanche designs (including many proprietary 2015 designs), to make very slight or no changes, and to market those designs under the Salem Apparel/Vakko brand.”)

B. SHUTZER IS BARRED FROM RECOVERY BECAUSE HE MATERIALLY BREACHED THE NOVEMBER AGREEMENT.

Even if the Court rejects the argument that Shutzer’s breach, regardless of materiality, bars him from recovery, a jury could reasonably conclude that Shutzer’s claims under the November Agreement are barred because his actions detailed above constitute a material breach of the November Agreement. Again, at the time the court heard argument on the motion at issue here, Shutzer failed to disclose to the Court that he, in fact, possessed and was trying to sell the 2015 designs. It is truly astonishing that Shutzer could enter this Court knowing that he had wholly and materially breached the very contract under which he was seeking affirmative relief. It is well-settled that a material breach of contract by one party excuses the other party from performance as a matter of law. *Dunkin’ Donuts Inc. v. Gav-Stru Donuts, Inc.*, 139 F. Supp. 2d 147, 155 (D. Mass. 2001) (citing *HRPT Advisors, Inc. v. MacDonald, Levine, Jenkins & Co.*, P.C., 43 Mass. App. Ct. 613, 626 n.16 (1997)). A material breach is one that goes to an essential and inducing feature of the contract: i.e., the root of the contract. *Bucholz v. Green Bros. Co.*, 272 Mass. 49, 52 (1930); *Lease-It v. Massachusetts Port Auth.*, 33 Mass. App. Ct. 391, 396 (1992). The existence of a material breach must be determined from the circumstances of each case. *Boston Housing Auth. v. Hemingway*, 363 Mass. 184, 200 (1973). “What constitutes materiality for this purpose is, of course, the crucial question. The case law supplies descriptive

language, but no bright-line rule." *Quirk v. Commonwealth*, 15 Mass. L. Rep. 515 (2002) (citing *Lease-It, Inc. v. Massachusetts Port Authority*, 33 Mass. App. Ct. at 396 ("material breach occurs when there is a breach of 'an essential and inducing feature of the contract"; party's refusal to perform its "sole obligation 'was a substantial breach going to the root of the contract"").

"Factors relevant to the issue of whether a breach is material include the extent to which the injured party is deprived of the benefit which he reasonably expected, the extent to which that party can be adequately compensated for the benefit of which he will be deprived, the extent to which the breaching party will suffer forfeiture, the likelihood that the breaching party will cure his failure, and the extent to which the breaching party's conduct comports with standards of good faith and fair dealing." *Advanced Cell Tech. v. Infigen, Inc.*, 2002 Mass. Super. LEXIS 377, *29-31 (Mass. Super. Ct. June 18, 2002) (citing *O'Connell Mgt. Co. v. Carlyle-XIII Managers*, 765 F. Supp. 779, 783 (D. Mass. 1991); Restatement (Second) of Contracts § 241 (1979)).

Had Shutzer revealed to the Court in March and July 2015 that he, in fact, had converted the 2015 Red Rock designs, the Court could have considered the plaintiffs' defenses and could have come to a different conclusion. To be sure, the Court out rightly denied Shutzer's request that the Plaintiffs be required to escrow the monies he was seeking under the November Agreement and issued only a status quo order. Had the evidence now known been before the Court at the time, it is likely that no relief would have been given. Combined with Shutzer's omissions and misrepresentations to the Court, the substantive defenses clearly illustrate that the August Order should be dissolved. Mass. R. Civ. P. 60(b)(5) plainly allows relief from an Order where "it is no longer equitable that the [order] judgment should have prospective application."

II. THE AUGUST ORDER UNDULY BURDEN'S THE PLAINTIFFS' ABILITY TO CARRY ON ITS DAY-TO-DAY BUSINESS

Because the August Order does not apply to Avalanche's licensing activities, one would assume it would have no impact on that part of its business; however, Shutzer's October 15, 2015 false filing of a "Lien" with the PTO has the potential of causing Avalanche harm that it would not otherwise be subject to. Without question, by falsely informing potential licensees of a lien that does not exist, and by publishing false statements contained in the motion attached to the bogus filing, Shutzer intended to harm Avalanche. Fortunately, the false lien filing was discovered by Avalanche's trademark counsel and not a potential licensee. In no way does the August Order restrict Avalanche's licensing activities and Shutzer should not be attempting to use it in manner to cloud Avalanche's trademark.

In addition to the false lien filing, the August Order can severely interrupt the plaintiffs' business and should be dissolved. Even if Shutzer is somehow entitled to some form of a status quo order, it cannot restrict Avalanche's normal course of day-to-day business operations. Where a party is legitimately concerned about the dissipation of corporate assets, courts may enjoin corporate parties from transferring *other than in the ordinary course of business*. See *Commonwealth v. Caliri*, 85 Mass. App. Ct. 1127 (2014) (enjoining defendants from dissipating assets "except such real or personal assets as may be used in the ordinary course of business"); *Sebago v. Tutunjian*, 85 Mass. App. Ct. 1119 (2014) (affirming preliminary injunction enjoining defendants from "transferring their ownership interests in any assets outside the ordinary course of business"). Courts will not, however, use their equitable powers to render a business insolvent or unable to operate by enjoining the company from spending any of its available funds. *4 MVR, LLC v. Warren W. Hill Constr. Co.*, 2012 U.S. Dist. LEXIS 102204, 2012 WL 3016223 (D.

Mass. July 23, 2012); *Revolutions Med. Corp. v. Medical Inv. Group LLC*, 2012 U.S. Dist. LEXIS 186815, *23 (D. Mass. Nov. 7, 2012).

Moreover, Shutzer's own counsel has stated that Shutzer does not want to hinder Red Rock or Avalanche's business in any way:

At the outset, let me clearly state that Mr. Shutzer has no interest in hampering Red Rock's or Avalanche's ability to remain in business. Indeed, a profitable Red Rock and Avalanche very much is Mr. Shutzer's interest.

(See October 27, 2015 letter from Attorney Fliegauf, attached hereto as Exhibit D.) To be sure, if Avalanche is handcuffed from operating in the normal course of business, it will be harmed and, therefore, so would Shutzer. Unfortunately, Shutzer has blinded himself to the reality that his actions in seeking to stifle Avalanche's business can ultimately cause him harm, as a vibrant, healthy Avalanche ensures that, if Shutzer ever prevails on his claim, the Avalanche guarantee will be available.

The August Order is especially unjust as to Avalanche, as it is not a primary obligor under the November Agreement. Avalanche LLC and Red Rock have two separate and completely different roles under the November Agreement: (1) Red Rock was the primary object of and was the main obligor under the November Agreement, as Red Rock's 2014 profits were to make up the initial payment to Shutzer⁶; (2) Avalanche LLC, wholly and distinct from Red Rock, is only a limited guarantor of Red Rock's obligations. To be clear, Avalanche has no performance obligations under the November Agreement and is a party to the agreement in the sole capacity of a guarantor. (See Daniel Petrucci Affidavit at ¶ 13, attached hereto as Exhibit E.) Indeed,

⁶As has been well plead by plaintiffs, Red Rock's 2014 profit as represented by Shutzer, and confirmed by Red Rock's CPA, Scott Sagan, was grossly overstated and Plaintiffs are seeking to reform the November Agreement based upon such misrepresentations. The plaintiffs are also seeking to end any obligations under the November Agreement due to Shutzer's conversion of the 2015 Red Rock designs -- the primary asset purchased by Petrucci.

during the negotiations of the November Agreement, Shutzer asked for, but was denied, greater security on the Red Rock guarantee. He simply should not be put in a better position now than the one he bargained for, especially considering his omissions and misrepresentations to the Court.

As explained in the Affidavit of Daniel Petrucci, Red Rock's CFO and a manager of Avalanche, the vitality of Avalanche requires that it be able to work freely without the yoke of the August Order. Avalanche Licensing LLC ("Avalanche LLC") was formed in July 2014 to house the intellectual property related to all things regarding the Avalanche brand, including all trademarks and product designs that it may choose to create and exploit all opportunities relevant to advancing brand equity. (*See id.* at ¶¶3-4.) These activities include strategically expanding trademark registrations into both new categories and regions of the world, as well as engaging in all activities to promote and expand the brand including licensing, marketing, public relations and advertising, which increase royalty streams and brand value. Avalanche LLC is in the business of growing the value of its key asset – the brand – and realizing that value in the near term. (*See id.* at ¶¶5-6.)

Avalanche LLC is an independent third party entity because it is not controlled by Red Rock, nor does it control Red Rock. Red Rock is simply one of the licensees in Avalanche LLC's growing stable of licensees. (*See id.* at ¶ 11.) The conditions of the August 7, 2015 Order unjustly restrict Avalanche LLC's ability to conduct its business. (*See id.* at ¶14.) For instance, Red Rock and Avalanche LLC in December 2014 entered into a two-year Factoring Agreement ("FA") with its lender, Merchant Factors, LLC ("Merchants") in order to obtain financing for Red Rock's 2015 operations. As part of the FA, Avalanche LLC pledged its trademarks as collateral, and that pledge remains in place through 2016. (*See id.* at ¶15.) In the

normal course of any business, it's common practice to encumber, pledge and/or assign some or all assets of a business to conduct a healthy business. (*See id.* at ¶16.)

Shutzer left Red Rock with poor credit and with numerous unpaid 2014 bills. But for Avalanche LLC's financial support through direct infusions of cash and the pledge of Avalanche LLC's assets as collateral to Merchants, Red Rock would not have continued in business. (*See id.* at ¶16.) To this day, Red Rock is unable to support itself without the support of Avalanche LLC's assets. If Avalanche LLC was prohibited from continuing to pledge it's assets, Red Rock will be harmed and certainly be out of business. Because the December 2014 FA is a two-year agreement, luckily Avalanche does not face that challenge at present. (*See id.* at ¶17.) However, Avalanche should not be prevented from further pledging its assets to Merchants or others in the near future if it is done to promote the vitality and financial footing of Avalanche. (*See id.* at ¶17.)

Further, Avalanche LLC can be harmed if it is restricted from "Selling or transferring all or substantially all or of [its] assets," as Avalanche LLC is in the business of maximizing the value of its assets, and realizing that result, including an outright sale of all its assets, without restrictions if it chooses. This includes selling any or all of its assets partially to support its goals and obligations, including the November Agreement. (*See id.* at ¶18.) To the extent Avalanche LLC would seek to sell any of its assets, the existence of the August 7, 2015 Order would impact any attempted sale. To be sure, the existence of the August 7, 2015 Order would greatly weaken Avalanche LLC's negotiating position with any prospective buyer or investor. This unduly harms Avalanche LLC and its members. At a minimum, the nature of the preliminary injunction alone casts a shadow on Avalanche LLC and implies that its members are nefarious in some way. This is, in every way, unjust and harmful. (*See id.* at ¶20.)

Given that Red Rock has paid and owes the Avalanche LLC for professional services rendered to date (which, to date, have substantially been reimbursement of expenses, i.e., no mark-up), royalties for use of the Avalanche trademarks and a Fee for the use of its assets as collateral to support Red Rock's production, Red Rock will be left with no profits to distribute to shareholders. Red Rock has no employees on payroll, so there are no employees to receive bonuses. Accordingly, all bonuses and incentive to employees would flow through Avalanche LLC. (*See id.* at ¶22.)

Avalanche LLC's inability to pay bonuses unduly restricts its ability to conduct its business by not allowing it to sufficiently incentivize its employees (the majority of which indirectly and solely provide services to Red Rock). It goes without saying that Avalanche LLC's employees (whether they are members, officers or not) deserve bonuses at the discretion of the management of Avalanche LLC. In cases where contractual obligations to pay employees bonuses exist, the LLC must make payments. If it cannot pay bonuses, the LLC will be harmed for obvious reasons. (*See id.* at ¶23.) With regard to payment of distributions to Avalanche LLC's members, this unduly harms people who are not a party to the redemption agreement. Additionally, it also harms Shutzer because of Ronald Petrucci's personal guarantee of \$350,000 in the November Agreement, which, in part, would likely, be funded by distributions from Avalanche LLC. (*See id.* at ¶24.)

Given the significant change in circumstances since the Court heard on argument on and allowed the subject motion and the harm it is causing the plaintiffs, there is every reason to dissolve the August Order.

III. SHUTZER'S FILING OF THE NON-EXISTENT LIEN WITH PTO EVIDENCES HIS RECKLESS DISREGARD FOR ORDERS OF THIS COURT AND PROVIDES YET ANOTHER REASON FOR DISSOLVING THE AUGUST ORDER.

In July 2015, Shutzer filed two motions styled as requests for prejudgment security. In the first he asked the Court for security in the form of having plaintiff escrow the judgment he proposed he would win. Essentially, he was asking for hard security, much like one would have if they actually had a lien interest in the property of another to satisfy an existing debt. The Court (Fahey, J.) denied that motion and, instead, allowed Shutzer's second request, which simply sought to preserve the status quo of the plaintiffs' finances. Despite the Court's clear denial of his request for hard security, Shutzer took it upon himself to file a notice of lien with the PTO for no reason other than to harm Avalanche. It is clear that Shutzer has no respect for Orders of this Court or the rule of law in general.

Despite not actually having a lien, and standing by their claim that personnel at the PTO told them to call their filing a "lien," counsel for Shutzer refuses to withdraw the notice of lien from the PTO. Accordingly, dissolving the August Order is the only means available to expunge the false lien filing from the PTO's website. Removing the false lien from the PTO's records is crucial, as Shutzer's stated reason for filing with the PTO is his belief that the August Order infringes on Avalanche's ability to enter licensing agreements. Nowhere in the August Order is a restriction on licensing mentioned, and it would strain to credulity to believe the Court, in attempting to ensure Avalanche was able to cover its \$1M guarantee under the agreement, would restrict Avalanche's ability to generate income. It is an absurd position posited by an equally absurd litigant whose only goal is to destroy the plaintiffs' business, livelihood and family. Nothing Shutzer has done to date is actually aimed at securing payment; it is simply a sadistic final hand of poker being played by a man in the gloaming of his life.

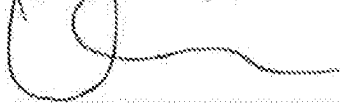
CONCLUSION

WHEREFORE, The Plaintiffs, Ronald Petrucci, Red Rock Trading Co., Inc. and Avalanche Licensing LLC hereby move the Court to dissolve, or, in the alternative, modify its August 7, 2015 Order on Defendant Lawrence Shutzer's Motion for Prejudgment Security No. 2 (the "August Order"). If the Court chooses not to dissolve the August Order in whole, the plaintiffs request that the Court revise its August Order in a manner consistent with the arguments set forth above.

RESPECTFULLY SUBMITTED,

RED ROCK TRADING CO, INC.,
AVALANCHE LICENSING, LLC &
RONALD PETRUCCI

By their attorneys,



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Dated: November 25, 2015

CERTIFICATE OF SERVICE
I hereby certify that on this day a true copy of the
above document was served from the attorney of
record for each party by initial hand
Dated 11/21/15

EXHIBIT B

81

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

**SUPERIOR COURT
CIVIL ACTION
NO: 15-341 B**

**RED ROCK TRADING CO., INC., AVALANCHE LICENSING LLC
and RONALD PERTUCCI,
Plaintiffs**

vs.

**LAWRENCE SHUTZER, LAUREN GAUDET, ALYSSA DANDREO, MARK
DIAMOND, CAROLANN SIERRA, SALEM APPAREL COMPANY, ELEMENTS
APPAREL, VAKKO APPAREL AND JOHN DOE, INC.,
Defendants**

FINDINGS AND RULINGS ON COMPLAINT FOR CONTEMPT

After hearing all the evidence submitted at the trial for contempt, I find that the following facts are proven by clear and convincing evidence.

Plaintiff Ronald Petrucci and defendant Lawrence Shutzer were partners in an outdoor inspired clothing company named Red Rock Trading Co., Inc. and which did business under the name "Avalanche". In mid 2014, Shutzer left the company and started a new business called "Salem Apparel" (sometimes referred to as North Salem Apparel). Salem Apparel also did business under the name "Vakko". After Shutzer left Red Rock, defendant Mark Diamond and defendant Stuart Edelman continued to work at Red Rock. Diamond was the Director of Production and was Red Rock's New York based salesman.

By late 2014, while still employed with Red Rock, Diamond and Edelman were involved in an extensive scheme with Shutzer to copy 2015 Avalanche Designs, alter them ever so slightly, and market them under the VAKKO label on behalf of Red Rock's new competitor, Salem Apparel. Shutzer, Diamond, and Edelman knew that the 2015 designs were propriety

property owned by Red Rock. Nevertheless, Diamond and Edelman followed Shutzer's directive to arrange for the pirating of the Red Rock/Avalanche 2015 designs.

For example, in early December, 2014, Diamond, Red Rock's Director of Production, emailed both Shutzer and Edelman regarding "16 styles from Captain [a Chinese manufacturing facility] they are working on for Vakko." Exhibit 3 at Contempt Trial. Diamond has admitted that several of the "16 styles" sent to Captain for manufacture and marketing under the Vakko name were, in fact, 2015 Red Rock designs. This attempt to steal the proprietary designs of Red Rock was part of a plan hatched between Shutzer, Edelman, and Diamond, in mid to late 2014, to take Red Rock/Avalanche designs (including many proprietary 2015 designs), to make very slight or no changes, and to market those designs under the Salem Apparel/Vakko brand. Evidence at trial (e.g. Exhibits 10 [the Avalanche Bolt sweater] and 11 [the Avalanche Vulcan hooded jacket]) clearly established that the Salem Apparel/Vakko samples manufactured by Captain were nearly identical to the Red Rock/Avalanche 2015 proprietary designs.

As late as March 15, 2015, Diamond (who, at this point, had taken the position of Vice President of Manufacturing at Salem Apparel having left Red Rock in late February 2015) was emailing to Chinese manufacturers Red Rock "tech packs" that contained all the proprietary information regarding the 2015 Red Rock "Monti" shirt. Exhibit 2. During this same period of time, Edelman, at Shutzer's direction, was marking up Red Rock 2015 designs with the slightest of changes and arranging for these knock-off designs to be manufactured in China and sold by Salem Apparel/Vakko. Edelman, who believed that these 2015 Red Rock designs were no longer Red Rock designs because they contained marks or notations upon them noting changes ordered by Edelman, has never produced these marked-up Red Rock designs.

On March 19, 2015, I held a hearing on the plaintiffs' request for a preliminary injunction. Coincidentally, March 19th was the same date that defendant Diamond was receiving an email from a Chinese manufacturer regarding a pirated 2015 Red Rock design. See Exhibit 2. Shutzer and Edelman both submitted affidavits, signed under the pains and penalties of perjury, in opposition to any injunctive relief. Shutzer insisted that:

I understand that the plaintiffs allege that during this time, Mr. Edelman, Mr. Diamond, and/or others received Red Rock's confidential 2015 designs which were not yet on the market. At no time did I ever ask Mr. Edelman, Mr. Diamond, or anyone else to take Red Rock's confidential 2015 designs, and I fully acknowledge that Red Rock's confidential 2015 designs are entitled to protection. Any such property should be returned to Red Rock, and as stated at the outset of this affidavit, I have no objection to the Court issuing an Order requiring the prompt return of Red Rock's confidential 2015 designs. I further fully acknowledge that none of Red Rock's confidential 2015 designs should be used as a basis to develop my new company's designs....

Shutzer Affidavit, paragraph 20. Given the facts established at the contempt trial, Shutzer's sworn statement that he never asked Edelman or Diamond to "take Red Rock's confidential 2015 designs" is either outright perjury or evidence that Shutzer was displaying a willful blindness to what his top employees were doing at Salem Apparel. Since early December, 2014, Shutzer plainly was aware that Diamond and Edelman were shipping 2015 proprietary Red Rock designs to Chinese manufacturers in order to have those designs manufactured and marketed under the Salem Apparel/Vakko label.

Edelman was equally forceful in his March 18, 2015 affidavit. He stated: "I have not, and will not, make any attempt to sell any apparel that is based on Red Rock's confidential 2015 designs...." Edelman Affidavit, paragraph 8. Given the evidence presented at the contempt trial, the falsity of this statement is rather breathtaking. At least by January, 2015 (if not before), Edelman was attempting to sell various garments "based on Red Rock's confidential 2015 designs" to a large account, TJ Maxx. On February 1, 2015 (well before the March 18th

affidavit), Edelman sent to Diamond (with a copy to Shutzer) an email that detailed the designs that Salem Apparel/Vakko was trying to sell to TJ Maxx. The list included reference to, at the very least, two designs that Edelman certainly knew were 2015 Red Rock designs because he used the Red Rock names for these garments. He listed "our Mila" as one of the garments to be marketed to TJ Maxx and "our Volcan Hoody". The Mila and Volcan Hoody designs were Red Rock 2015 proprietary designs. See Exhibit 5.

Edelman's testimony at the contempt trial that the Salem Apparel knockoffs were not "based on Red Rock's confidential 2015 designs", but, rather, were "inspired" by the proprietary Red Rock designs falls particularly flat and smacks of the desperation that one expects from a witness caught in a lie.

After hearing the parties on March 19, 2015, this Court carefully considered the affidavits and pleadings submitted in support of and opposition to the motion and, on March 23, 2015, issued an order that prohibited the defendants, or any agent or employee of the defendants, from "using any Red Rock Trading/Avsanche proprietary information or any 2015 Red Rock designs" and requiring the defendants "to return all such proprietary information and/or designs to the plaintiffs immediately."

Despite Edelman having 2015 designs that he had marked up and Diamond possessing various Red Rock "tech packs" and similar materials (that he had emailed to various agents of Salem Apparel), Diamond and Edelman claimed not to have any proprietary information and did not return any items immediately.¹ Shutzer, through his attorney, claimed to have no

¹ At the hearing, the following representation was made.
The Court: Well, you would agree with me if – now, this is a big if. If Edelman and Diamond have a 2015 design, they've got to give it back.
Mr. Shutzer [counsel for defendants Edelman and Diamond]: If they had it, they would gladly give it back. Their affidavits, which by the way are signed under the pains and penalties of perjury ... and they can be held responsible. They're saying we don't have it. We don't have it. And we've never done anything with it. (Emphasis supplied). Transcript of March 19, 2015 hearing, page 36.

information or designs to return. Exhibit 17 (to be fair, Shutzer later offered to return a 2015 Red Rock catalogue he discovered). Edelman's failure to return the marked-up Red Rock 2015 designs was plainly in contempt of this Court's clear order. Diamond, likewise, intentionally violated this Court's order when he failed to immediately produce such Red Rock tech packs as were attached to Exhibit 2.

More troubling were the actions of Shutzer and Edelman immediately following the issuance of the order. As the defendants well knew (although the plaintiffs and the Court did not), Edelman and Shutzer had scheduled a meeting with a large potential customer, TJ Maxx (or TJX Industries) for March 25, 2015. Perhaps concerned with the Court's injunction, Edelman "dropped" one of the Red Rock 2015 copied designs (the "our Mila" design labeled VW007 on Exhibit 12) on the morning of his meeting with Lindsey Goode of TJX Industries. Still, Edelman and Shutzer attempted to close the sale on numerous other Salem Apparel knockoffs of Red Rock 2015 designs during the March 25th meeting. Edelman brought various samples of Salem Apparel offerings, many based on Red Rock 2015 designs, to the meeting. During the meeting, TJ Maxx, concerned with this Court's order, hung both Avalanche and Salem Apparel designs on a display rack, photographed the items, and compared the Salem Apparel offerings to the Avalanche 2015 designs. At least six of the photographed items were, rather plainly, Salem Apparel garments based on Red Rock 2015 designs. Exhibit 14. Thus, Edelman and Shutzer were knowingly "using" Red Rock propriety information and 2015 designs in violation of this Court's order.

Perhaps to close the deal and persuade TJX that it should buy the Salem Apparel products, Shutzer sent an email to Eileen Owens of TJX (with a copy to his counsel), on March 27th, assuring her: "I do want you to know that Salem Apparel (my company) is not showing or

selling, or [sic] anything connected to 2015 designs or proprietary information of Red Rock in any form and that none of the designs shown to Lindsey reflect any 2015 Red Rock designs.” Exhibit 16. The statement that the designs shown to Lindsey Goode at the March 25th meeting did not “reflect any 2015 Red Rock designs” is patently false. Some of the Salem Apparel offerings were mirror images of the 2015 Red Rock designs. Apparently the legal department of TJX Industries reached the same conclusion as the Court, and the TJX sale of Salem Apparel garments based on Red Rock designs did not go forward. Despite the photographic evidence to the contrary, Shutzer still falsely claimed at the contempt trial that he did not try to sell any Red Rock 2015 designs to TJX Industries during the March 25th meeting.

Thus, Diamond and Edelman are in contempt of the Court’s order to “return all such proprietary information ... immediately.” Edelman and Shutzer are in contempt of the Court’s order prohibiting “using any Red Rock ... proprietary information or any 2015 Red Rock designs.” These contempts are clear and undoubted. The harm flowing from the contempt, however, is not clear. As plaintiff Petrucci admitted, no Salem Apparel garment based on a proprietary 2015 Red Rock design was ever sold to the public, or placed into the retail market. After all, TJX cancelled its large potential order, and Edelman was unsuccessful at selling the knockoffs to his past customers because others in the industry had become aware of this lawsuit. Further, many (although not all) of the proprietary items have eventually (although not “immediately”) been produced during the course of extensive discovery. One damage is clear, however, that is the expense incurred by the plaintiffs in bringing this successful contempt action. The plaintiffs are entitled to be compensated by the three defendants for all reasonable attorney’s fees and expenses directly incurred in bringing and prosecuting this contempt action. The plaintiffs shall submit, within seven days, verified attorney bills and itemize any other

expenses or costs. The defendants will have five days to respond to the plaintiffs' fee and cost submission.

So Ordered,



Richard E. Welch III
Justice of Superior Court

Dated: October 2, 2015