In The

United States Court of Appeals

For The Fourth Circuit

SKIPPY INCORPORATED,

Plaintiff - Appellant,

v.

LIPTON INVESTMENTS, INCORPORATED; BESTFOODS, INCORPORATED; WILLIAM M. WEBNER; STEPHEN M. TRATTNER,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

Mary Helen Sears
M. H. SEARS LAW FIRM
910 Seventeenth Street, NW
Suite 800
Washington, DC 20006
(202) 463-3892

Counsel for Appellant

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REQUEST FOR
RECONSIDERATION OF SEPTEMBER 12, 2003
JUDGMENTS AND SUGGESTION FOR RECONSIDERATION EN BANC

Petitioner, appellant in each of the closely related captioned appeals, hereby respectfully requests reconsideration of the panel's two virtually identical *per curiam* affirmances, rendered without hearing, of the district court's Rule 12(b)(6) dismissals of the complaints in both cases and suggests that such reconsideration be afforded *en banc*. [1]

I. The Exceptional Public Importance of These Cases

The two captioned proceedings present at least one question of exceptional public as well as private importance, as follows:

When the essential facts that establish a 56-year, still ongoing, massive fraud on the USPTO, the American public and the plaintiff stand unrebutted and appear irrefutable on the face of a due diligence memorandum prepared for a corporate predecessor-in-title of defendant Lipton Investments, Inc. ("Lipton"--the present titleholder to a group of "Skippy" trademarks sought in Appeal #03-1086 to be cancelled as void from their inception), must the power of

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[1] These requests and suggestions are made in duplicate papers because both complaints below underlying 03-1085 and 03-1086 and the appeals themselves arose from a common 1933-1934 factual background *never* so far considered on its merits in any tribunal, which underlies and establishes the existence of a continuing massive fraud on the U.S. Patent and Trademark Office ("USPTO"), the public and the plaintiff. Consolidation of the two civil actions as filed was sought by motion below, but was never ruled upon because both complaints were dismissed before the scheduled motion hearing date. Consolidation for briefing and argument in this Court was timely sought but refused when the individual defendants in #03-1085 objected that this might require them to brief the trademark cancellation issues constituting the sole relief sought in #03-1086.

equity be availed of to set aside technical defenses,[2] particularly when 15 U.S.C. §1064(3) provides that trademark registrations obtained fraudulently may be cancelled "at any time"?

This question is *sub silentio* answered negatively by the September 12, 2003 panel decisions. It is not at all clear, however, that the panel considered either the seminal facts set forth in the due diligence memorandum, or the conflicts with each of the decisions identified in Section II below that result from its automatic affirmances of the district court. It is even less clear that the panel considered the scope of responsibility of the federal courts to exercise their inherent equity powers to set aside technical defenses where fraud is undeniable, especially

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[2] These technical defenses include (1) *res judicata* based upon the 1980 district court decision in *Skippy, Inc.* v. *CPC Int'l, Inc.*, 210 USPQ 589 (E.D. Va. 1980), *aff'd in part*, 647 F.2d 209 (4th Cir.1982), *cert. den.*, 459 U.S. 969 (1980) and the decision in *CPC Int'l Inc.* v. *Skippy, Inc.*, 651 F. Supp 62 (E.D. Va. 1986) which itself rests on the alleged *res judicata* effect of the 1980 decision; (2) *res judicata* based upon *CPC Int'l, Inc.* v. *Skippy, Inc.*, 3 USPQ 2d 1456 (T.T.A.B. 1987) which is in turn based on a USPTO "compulsory counterclaim" rule of highly dubious validity under 15 U.S.C. §§1064(3) and 1127; (3) laches; (4) a 1978 "release" document signed when Plaintiff did not know of the due diligence memorandum or its content which releases CPC International, Inc. *personally* but none of its predecessors or successors; and (5) the "presumption" that the due diligence memorandum, marked in evidence in the 1980 litigation was considered by that court, when the district court decision clearly evinces *lack* of knowledge of its content, the document was *buried* among over 1100 documents admitted in evidence but not expressly shown to the court, all of which the trial judge warned he would not read absent a specific request and the lawyers on both sides of the case falsely represented to the court, contrary to the due diligence memorandum, that the 1934 decision was based on a 1925 "Skippy" trademark registration which lapsed during the period between 1946 and 1980.

As plaintiff's reply brief in Appeal No. 03-1085 at pp.18-20 points out, "document burying" was held in *Rohm & Haas* v. *Crystal Chem. Co.*, 722 F.2d 1556 (Fed. Cir. 1983), *cert. den.*, 469 U.S. 857 (1984) to be a fraud preventing a correct decision on patentability when practiced on a patent examiner. Its rationale is believed to be equally applicable to a federal district judge.

when the fraud is massive and has never been previously considered on its merits in any tribunal. In addition, there is no indication that the panel considered that the provision of 15 U.S.C. §1064(3) permitting initiation of proceedings to cancel fraudulently procured trademarks "at any time" was thoroughly plumbed recently in *Marshak* v. *Treadwell*, 240 F.3d 184, 192-194 (3rd Cir. 2001). That court ordered that a fraudulently procured trademark be cancelled because it concluded that the statute embodies a policy that the public purpose of eliminating all fraudulently acquired trademarks from the Principal Register of trademarks transcends *at least* the technical defenses of laches, aquiescence, statutes of limitation and other time-related impediments to such cancellation.

II. The Two Summary Affirmances Conflict With Other Decisions of This Circuit and with Decisions of the Supreme Court

The two *per curiam* summary affirmances in these cases constitute a repudiation of *American Steel Foundries v. Robertson*, 269 U.S. 372 (1926) insofar as they refuse to consider on its merits that the USPTO on January 9,1934 made a binding decision, exercising the power and discharging the duty of the Commissioner of Patents "to determine in the exercise of an instructed judgment upon a consideration of all the pertinent facts" (*American Steel*, 269 U.S. at 382) whether Rosefield Packing Co., Ltd. ("Rosefield", a corporate predecessor of defendant Lipton Investments, Inc.) could register "Skippy" as a trademark for peanut butter in the face of plaintiff's pre-existing corporate name, Skippy, Inc. Necessarily invoking two existing legal doctrines,–i.e., (1) that "[t]he effect of a assuming a corporate name by a corporation under the law of its creation is to exclusively appropriate that name"(*Id.* at 380) and (2) "that equity...will enjoin the appropriation and use of a trademark or trade name

where it is completely identical with the name of the corporation ...." (*Id.* at 381), the USPTO denied Rosefield's application to register "Skippy" as a trademark for peanut butter and ruled that Skippy, Inc. had an exclusive property right in its own name under Section 5 of the 1905 Trade Mark Act. "Where the appropriation of the corporate name is complete, the rule of the statute, by its own terms, is absolute and the proposed mark must be denied registration without more." (*Id* at 381-382).

This Court in *Little Tavern Shops, Inc. v. Davis*, 116 F.2d 903 (4th Cir. 1941) enjoined the *partial* misappropriation of an established corporate name relying *inter alia,* upon *American Steel*. Its present *per curiam* decisions not only repudiate *American Steel*, but effectively nullify the January 9, 1934 USPTO decision and the ensuing conscious and deliberate theft of plaintiff's *entire* corporate name, Skippy, by the losing party, Rosefield and its corporate successors, thus creating a conflict with *Little Tavern Shops* as well as *American Steel*.[3]

Rosefield did not appeal from the USPTO decision which became final and *binding* on February 10, 1934. It had a *res judicata* effect under contemporaneous decision law.[4]

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[3] In so saying, plaintiff is aware that the *per curiam* affirmances here are "unpublished" and hence not binding precedent of this Court. The whole saga of Skippy, Inc. and Lipton's predecessors is, however, already so well known that the Court cannot realistically expect the decisions and the Court's apparent tolerance for a massive, still ongoing, fraud against public institutions to go unremarked.

[4] E.g. *Panhard Oil Corp.* v. *Societe Anonyme des Anciens Etablissements Panhard & Levassor*, 39 F.2d 496 (CCPA 1930), *cert. den.*, 282 U.S. 858 (1930); *Cohen, Bomzon & Co.*, v. *Biltmore Industries, Inc.*, 90 F.2d 369 (CCPA 1937).

Rosefield defiantly continued to use "Skippy" as its peanut butter trademark, thereby commencing the deliberate theft of plaintiff's property that remains ongoing today. In addition, on July 23, 1947 it filed a new application to register "Skippy" under the then newly effective Lanham Act. This application contained a verified statement that Rosefield believed it owned the "Skippy" mark. Such a verified statement, a statutory requisite under 15 U.S.C.§1051(a), is now and was then regularly accepted at face value by the USPTO, without any effort to check its legitimacy, either in USPTO files or elsewhere. Rosefield also verified a continuing *bona fide* use "in commerce"[5] of "Skippy" as a peanut butter trademark from February 1, 1933 to the application filing date, thus backhandedly *admitting* that beginning *at least* as early as February 10, 1934 it was selling its peanut butter under a pirated name. The unsuspecting USPTO issued Trademark Registration 504,940 to Rosefield on December 21, 1948.

As in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) the case here involves a massive fraud upon the USPTO and the public. This fraud is now 56 years old and it *still* continues. As said in *Hazel-Atlas*, "This matter does not concern only private parties" (*Id.* at 246). This matter involves deliberate hoodwinking of the *same* federal agency that was also hoodwinked in *Hazel-Atlas*, the USPTO, albeit concerning a different privilege that this agency is empowered to bestow, that of trademark registration. In *Hazel Atlas* the Court said that

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[5] I.e., "commerce lawfully regulatable by Congress" (U.S.C. §1127).

> "tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud" (*Id.* at 246).

The decision shows clearly that many technical defenses were raised as obstacles to the Court majority's clear conviction that the fraud presented *must* be remedied.

All were rejected by the Supreme Court majority which emphasized the *flexibility* of equity in dealing with fraud, saying in part:

> "Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations." (*id* at 248)

The *per curiam* decisions here conflict with *Hazel Atlas* by simply disregarding its central message that when a party has practiced egregious fraud and deceit upon a public agency or a court or other institution set up to safeguard and protect the public, equity is flexible enough to provide a remedy. Rosefield and its successors in title to Registration 504,940 have not only visited upon the USPTO, the district court and this Court the seminal fraud begun by its deliberate subversion and concealment of the 1934 Patent Office decision and the supporting factual basis from the agency itself, but have concealed the same facts from

the district court in 1980, both directly and through perpetration of the secondary fraud pleaded in the complaint in Appeal No. 03-1085. In 1986, *knowing* the infirmities of the 1980 judgment, Rosefield successor CPC further interposed "res judicata" allegedly flowing from that case and thereby successfully blocked all consideration of a counterclaim seeking to inquire into the *bona fides* of Trademark Registration 504,940.

In *Brown v. Felsen*, 442 U.S. 127 (1979)--a bankruptcy case cited by the district court to buttress its invocation of *res judicata* as a ground for dismissing, under Federal Rule of Civil Procedure 12(b)(6), both complaints that are before this Court on these appeals--the Supreme Court actually cautioned *against* kneejerk resort to this doctrine.

It said:

> "Because *res judicata* may govern grounds and defenses not previously litigated..., it blocks unexplored paths that may lead to truth. For sake of repose, *res judicata* shields the fraud and cheat as well as the honest person. It therefore is to be invoked only after careful inquiry. Petitioner contends, and we agree, that here careful inquiry reveals that neither the interests served by *res judicata*, the process of orderly adjudication in state courts, nor the policies of the Bankruptcy Act would be well served by foreclosing petitioner from submitting additional evidence to prove his case." (*Id.* at 132)

Going further in a later portion of this opinion, the Supreme Court also stated that

> "Refusing to apply *res judicata* here would permit the bankruptcy court to make an accurate determination whether respondent in fact committed the deceit, fraud and malicious conversion which the petitioner alleges. (*Id* at 138)

While petitioner appreciates that there are many differences between bankruptcy law and the law of trademarks and trade names, fraud is not exclusive to either branch of law. Fraud indeed almost *always* deserves careful inquiry. The considerations that led the Supreme

Court in *Brown* to caution that careful inquiry should precede a *res judicata* ruling are especially cogent here. Neither this Court's *per curiam* opinions nor the *pro forma* hearing below, which dealt only with the complaint dismissed in #03-1085 and was followed by final decisions and final orders of dismissal in both cases, entered the same day, can fairly be said to involve "careful inquiry". These decisions are of a length that strongly suggests they had been prepared *before the hearing even began.* What plaintiff sought here by appealing the dismissals below *was* careful inquiry--in favor of which *Hazel Atlas*, like *Brown*, clearly augurs.

The complaint in #03-1085 (JA in #03-1085, pp.5-119) describes many occurrences that constitute strong circumstantial evidence of fraudulent activities that may be attributable to efforts of Rosefield and successor corporations to protect Trademark Registration 504,940 and other "Skippy"-containing trademarks they subsequently obtained. These occurrences include, but are not limited to, (1) the convenient involuntary commitment of Percy Crosby, plaintiff's founder and first president, who *knew* the true facts of the 1933-1934 USPTO proceeding between plaintiff and Rosefield, to a mental institution shortly after Registration 504,940 was issued and his equally convenient retention there until his December 1964 death,(JA in #03-1085, pp.40-43, Compl. ¶¶41-47); (2) the convenient, allegedly "inadvertent" 1965 or 1966 destruction of the official USPTO file of the same 1933-1934 USPTO proceeding, (*id.* Pp. 57-58, ¶72); (3) the "convenient" conflict of interest that plaintiff's incorporators who were its principal counsel to about 1942 and remained its counsel in some matters even later, the firm of Lord, Day & Lord, asserted after Mr. Crosby's death, leading them to refuse to help reconstitute plaintiff's lost files over the period from 1965-1978 because of possible revelation

of information harmful to their client, Rosefield successor CPC International ("CPC"), (*id.* pp. 40-41, ¶¶41-42; pp.43-45, ¶¶50-51; pp.48-50; ¶¶57-59); (4) the many efforts to buy plaintiff conducted through CPC intermediaries that concealed their CPC affiliation and the direct effort to persuade plaintiff's president to dissolve plaintiff in 1977.(*id.* Pp. 50-53, ¶¶60-66; pp.54-55, ¶68)

All of them merit the careful inquiry foreclosed by the district court opinions which this Court affirmed *per curiam.*

This Court's own decision in *United States v. Shaffer*, 11 F.3d 450 (4th Cir 1993) relies strongly on "[t]he general duty to preserve the integrity of the judicial process...identified in *Hazel-Atlas",* to authorize strong sanctions against government attorneys who seriously breached their duty of candor to the court, while also reversing an outright dismissal that would have provided the defendants with a fortuitous but certainly unearned and perhaps unmerited, total release from their obligations under environmental protection laws and thus could not have helped to preserve of the integrity of the judicial process.

The contrast provided by the *per curiam* affirmances in these cases where hearing on the merits of a massive, unrebutted, and (in plaintiff's belief) irrefutable fraud of long duration is being denied out of hand, creates a conflict of obviously substantial proportion with *Shaffer.* Refusing even to consider and look carefully into such a fraud clearly breaches the duty to preserve the integrity of the judicial process.

III. The Unrebutted Due Diligence Memorandum Establishes a Seminal Fraud on the USPTO

This memorandum [6] was prepared on July 14, 1954 by a now deceased Washington, D.C. lawyer, E.F. Wenderoth, for Rosefield's immediate successor in title to Trademark Registration 504,940, The Best Foods Company, Inc., as a part of the due diligence leading up to the latter company's acquisition of the registration *and* its merger with Rosefield. The memorandum is addressed to James F. Hoge, a partner in the New York law firm of Rogers, Hoge and Hills. That firm was then The Best Foods Co.'s outside trademark counsel. The portion of the memorandum relating to Opposition 13,134, *Skippy, Inc.* v. *Rosefield Packing Co.* is stated to be based upon an inspection of the official USPTO file of Opposition 13,134, made on the same day the memorandum was prepared. This memorandum clearly reveals the following facts:

> On Sept. 6, 1933 plaintiff filed an opposition based on the "Name Clause" of Section 5 of the 1905 Trademark Act along with a copy of plaintiff's certificate of incorporation. Rosefield filed a Motion to Dismiss and waived its right to answer the opposition. Plaintiff filed a motion for judgment on the record. Both parties filed briefs. A hearing was held on December 28, 1933 at which Rosefield made no appearance, but plaintiff's counsel appeared and argued against the motion to dismiss. The decision, dated Jan.9, 1934 sustained the opposition, based on "Section 5 (the Name Clause) of the 1905 Act." The time for appeal expired Feb. 9, 1934 and no appeal was filed so the decision became final. (See JA in #03-1086 at 48)

The complete reliance of The Best Foods Company on these facts is clear from the letter of another lawyer, Lenore Stoughton of the Rogers, Hoge and Hills firm, to Martin

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[6] The entire memorandum appears in the Joint Appendix of Appeal No. 03-1086 at pages 46-48.

Field, an in-house attorney for The Best Foods, Inc., date October 7, 1954. (JA in Appeal 03-1086, pp.53-55) which notes the existence "of only one mark and one registration in the United States Patent Office" (*id.* at p. 53) to be conveyed by Rosefield and continues speaking on the next page of "an affidavit of use... due very shortly," to support this registration (*id* at p.54).

Mr. Wenderoth's memorandum (*id.* at p.46) states "No registration other than 504,940 dated Dec. 21, 1948 was found or appears ever to have been granted to Rosefield Packing Co. Ltd." This is clearly the source of Mrs. Stoughton's reference to "one registration" in the U.S. and also the basis for her affidavit of use information inasmuch as 15 U.S.C. §1058 has, since its inception, required filing an affidavit of use in every registration issued under the Lanham Act at the end of 6 years from its registration date–in this instance leading to a December 21, 1954 due date for that affidavit.

Mrs. Stoughton's letter then goes on, in further reliance upon the Wenderoth July 14, 1954 memorandum, (JA in #03-1086, p.54) to state that she is omitting reference to the "old protest"--clearly meaning Opposition 13,134--from the title papers of the merged company so that it can defend "without having your title papers show a reference to your present knowledge of the past history". (*Id.* at p.54).[7]

The Wenderoth due diligence memorandum of July 14, 1954 is clearly not only the sole surviving *record* of what happened in Opposition 13,134 that has ever been available to plaintiff or any tribunal; it is also an admission against interest on the part of Rosefield's

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[7] In context, this is a strong encouragement to cover up the fraudulent origins of Registration 504,940, which Rosefield's successors in title have clearly taken to heart.

immediate successor-in-interest, The Best Foods Co. and its successors. Each of those successor titleholders in Registration 504,940, including defendant Lipton, has repeatedly failed to make any rebuttal to the facts shown in the Wenderoth memorandum.

The *source* of this due diligence memorandum, i.e.--the official USPTO file destroyed in 1965 or 1966--and its *authorship,* by a lawyer conducting due diligence for a Lipton predecessor, plus the fact that the file review and preparation of the memorandum occurred on the same day combine to support the premise that the facts stated in it are today irrefutable.

The complaint in #03-1085 points out that plaintiff, through its president Mrs. Tibbetts, learned at the USPTO in late 1976 that the entire file of Opposition 13,134 was destroyed "inadvertently" about 1965 or 1966 (JA 57-58, Compl. ¶72). Plaintiff believes that it was not produced by CPC in the 1980 case (Id. at 64-65; Compl.. ¶87) even though CPC's Hanes Heller boasted that he had a copy of the file in May 1977 (Id at 54-55, ¶68). *If* produced to Stephen Trattner, plaintiff's less-than-loyal counsel in the 1980 case, Mr. Trattner has not turned it over to plaintiff, just as he never showed the Wenderoth memorandum to plaintiff, including Mrs. Tibbetts, who discovered it among documents from the 1980 litigation that were sent to her in late 1982 or 1983, did not then fully understand what the "Name Clause" was, but undertook to find out and to educate herself about it in law libraries, a task completed about mid-1984. (JA in #03-1085 at 68-70, Compl. ¶¶93-95). The complaint in #03-1085 at JA 74-97, ¶¶101-134, sets forth her subsequent, sustained but fruitless, efforts to raise in a court or the USPTO, and obtain a decision on the merits of the validity of Trademark Registration 504,940 in view of its fraudulent origins as revealed by the Wenderoth memorandum's account of Opposition 13,134, or else to reach a reasonable settlement with

Rosefield's successor CPC. Also mentioned in that portion of the cited complaint are her fruitless efforts to have the Opposition 13,134 file in the USPTO reconstituted and her invocation of Congressional assistance, which was given but also produced no result.

IV. The Ongoing Nature of the Fraud

Trademark Registration 504,940 remains alive today, having been repeatedly renewed through submission to the USPTO under 15 U.S.C. §1058 of repeated false verifications of both ownership and legitimate continuing use in commerce of the trademark "Skippy", all of which the USPTO accepted at face value. Since the merger of Rosefield into The Best Foods Company, the various holders of title to Registration 504,940 have filed a parade of additional applications for registration of trademarks covering "Skippy" alone or in combination with other words, most of which have been duly registered. Consistent with the statutory requirements for trademark applications, repeated false and fraudulent verified statements of both ownership and legitimate use in commerce have been made and accepted by the USPTO at face value. Many of these "spin-off" registrations have also been continued under 15 U.S.C. §1058(a) and renewed under 15 U.S.C. §1058(b) by virtue of the filing of additional verified statements falsely claiming ownership and legitimate continuing use in commerce.

Furthermore, despite this Court's holding in *Skippy, Inc.*, v. *CPC Int'l, Inc., supra*, that the 15 U.S.C. §1065 affidavit made in Registration 504,940 is false, Rosefield's successors in title to that registration have seldom, if ever, scrupled to make the same false representation of there being no decisions adverse to ownership relative to registrations additional to that one, to which they have title, that also include the "Skippy" name.

The official USPTO policy toward false statements made on matters as to which the Lanham Act (or any predecessor trademark act) requires an oath, affidavit, verification, or other sworn statement is now, and has always been, a stringent one. Persons who make solemn declarations in lieu of a sworn statement presently, for example, may either use the language of 28 U.S.C §1746 or *must* include a statement that:

> "The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true" (37 C.F.R. §2.20)

The USPTO deludes itself that so long as its policy is set out in strong language, its stewardship of trademark registrations under the law is adequate. Yet Rosefield's continuing theft, (which was *at least* tortious and can be viewed as downright felonious) in defiance of USPTO's own binding and correct 1934 ruling that "Skippy" is plaintiff's exclusive property, continues unchecked.

V. Conclusion

Preservation of that continuing theft and the severe, still ongoing fraud resulting from it by the two *per curiam* affirmances dated September 12, 2003 are an unexplained and unexplainable negation of the duty to preserve the integrity of the judicial system and also of this Court's heretofore steadfast effort to discharge that duty. Reconsideration of those decisions by the Court *en banc* is accordingly respectfully requested.

Respectfully submitted,

Mary Helen Sears
The M.H. Sears Law Firm, Chartered
910 Seventeenth Street, NW, Suite 800
Washington, D.C. 20006
Telephone: (202) 463-3892
Telecopy: (202) 463-4852

Certificate of Compliance

This Petition for Rehearing and Petition for Rehearing *en banc* has been prepared using:

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Signature of Filing Party

Certificate of Filing and Service

I hereby certify that on this 26th day of September, 2003, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of this Petition for Rehearing and Petition for Rehearing *en banc*, and further certify that I served, via UPS Ground Transportation, the required number of said Petition to the following:

William M. Webner
SUGHRUE MION, PLLC
2100 Pennsylvania Avenue, NW
Washington, DC 20032

Counsel for Appellees
Lipton Investments, Incorporated
and William M. Webner

Carol Thomas Stone
JORDAN, COYNE
& SAVITS, LLP
10509 Judicial Drive
Fairfax, Virginia 22030

Counsel for Appellee
Stephen M. Trattner

The necessary filing and service were performed in accordance with the instructions given me by counsel in this case.

The LEX Group
1108 East Main Street, Suite 1400
Richmond, Virginia 23219