

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.*
MICHAEL KRIGSTEIN,

Plaintiff,

v.

SIOUNI and ZARR CORPORATION;
DANNY & NICOLE; DANNY & NICOLE,
INC.; DANA KAY; DANA KAY, INC.;
ALAN HAKIMIAN; AFSHIN HAKIMIAN;
ABC CORP. (1-10); and individuals 1-10,

Defendants.

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

DANA KAY, INC. and SIOUNI & ZAR
CORPORATION,

Defendants.

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ELECTRONICALLY FILED
4/9/14

**STIPULATION AND ORDER
OF SETTLEMENT AND DISMISSAL**

11 Civ. 4247 (CM)

ECF Case

WHEREAS, this Stipulation and Order of Settlement and Dismissal (the "Stipulation") is entered into by and among the United States of America, by its attorney Preet Bharara, United States Attorney for the Southern District of New York, and on behalf of the Department of Homeland Security ("DHS") (collectively, the "Government"), Defendants Dana Kay Inc. ("Dana Kay") and Siouni & Zar Corporation ("Siouni & Zar") (collectively, "Defendants"), as well as Relator Michael Krigstein (the "Relator") (hereafter collectively referred to as "the Parties"), through their authorized representatives;

WHEREAS, Dana Kay is a New York corporation, with its principal place of business in Manhattan;

WHEREAS, Siouni & Zar is a New York corporation, with its principal place of business in Manhattan;

WHEREAS, Defendants have regularly imported women's apparel into the United States for commercial purposes, and have been required to pay appropriate customs duties on those goods;

WHEREAS, on or about June 22, 2011, Relator filed a *qui tam* action (the "Civil Action") in the United States District Court for the Southern District of New York (the "Court") pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the "Act"). In the Civil Action, Relator alleged that Defendants and others violated the Act through a scheme to evade payment of U.S. customs duties, which involved underpayment of customs duties by use of multiple invoices, including the use of invoices that fraudulently understated the transaction value of the apparel being imported;

WHEREAS, the Government has intervened in the Civil Action as against Defendants and filed a Complaint-in-Intervention of the United States of America (the "Federal Complaint");

WHEREAS, the Federal Complaint alleges that Defendants evaded customs duties during the period from 2003 through 2012 (the "Covered Period"), in that, with respect to transactions on which they were either importer of record or ultimate consignee, they "knowingly made, used, or caused to be made or used false records and/or statements to conceal, avoid, or decrease obligations to pay or transmit money or property, in the form of customs duties, to the United States." This conduct alleged in the Federal Complaint, and the conduct alleged in the Relator's Complaint, shall be defined as the "Covered Conduct"; and

WHEREAS, the Parties have reached a mutually agreeable resolution addressing the Covered Conduct through this Stipulation;

NOW, THEREFORE, upon the Parties' agreement, IT IS HEREBY ORDERED that:

TERMS AND CONDITIONS

1. The Parties consent to this Court's exercise of subject matter jurisdiction over this action and personal jurisdiction over each of them.
2. Defendants hereby admit, acknowledge as true, and accept responsibility for the following conduct:
 - a. During the Covered Period Defendants repeatedly presented to the Government commercial invoices for women's apparel being imported into the United States that reported less than the total value of the goods imported;
 - b. Defendants repeatedly paid apparel manufacturers an amount in excess of that recorded on the commercial invoice;
 - c. Defendants paid such an excess amount pursuant to a separate invoice referred to as a "debit note";
 - d. Defendants repeatedly failed to disclose the amounts paid pursuant to debit notes to the Government, instead reporting only the lesser amounts listed in the commercial invoices, which the Government then used to assess customs duties;
 - e. Defendants' failure to disclose the full amounts paid pursuant to debit notes led to the under-assessment of millions of dollars in duties owed by Defendants to the Government; and
 - f. Through their conduct, Defendants deprived the Government of millions of dollars of customs duties.
3. Defendants shall pay to the Government ten million dollars (\$10,000,000) (the "Settlement Amount") by electronic funds transfer pursuant to written instructions to be provided

by the United States Attorney's Office for the Southern District of New York no later than fifteen (15) business days after the Effective Date (defined below).

4. Subject to the exceptions in Paragraph 8 (concerning excluded claims) below, conditioned upon Defendants' full payment of the Settlement Amount, and subject to Paragraph 16 below (concerning bankruptcy proceedings commenced within 91 days of the Effective Date or any payment made under this Stipulation), the Government releases Defendants and all of their current and former officers, directors, and employees from any civil or administrative monetary claim the United States has for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812; the United States Customs laws and regulations, including 19 U.S.C. § 1592 and 19 C.F.R. § 162.73; and the common law theories of payment by mistake, unjust enrichment, and fraud.

5. Subject to the exceptions in Paragraph 8 below, conditioned upon Defendants' full payment of the Settlement Amount, and subject to Paragraph 16 below (concerning bankruptcy proceedings commenced within 91 days of the Effective Date or any payment made under this Stipulation), Relator, for himself and for his heirs, successors, attorneys, agents, and assigns, releases Defendants and all of their current and former officers, directors, and employees from any claims the Relator has on behalf of the United States for the Covered Conduct under the False Claims Act, 31 U.S.C. §§ 3729-3733; provided, however, that nothing in this Stipulation shall preclude Relator from seeking to recover his expenses or attorney's fees and costs from Defendants, pursuant to 31 U.S.C. § 3730(d).

6. Defendants agree to cooperate fully with the United States in any investigation or enforcement action against other entities and/or individuals involving the Covered Conduct.

Specifically, Defendants agree that they shall (a) provide complete and truthful disclosure of all non-privileged information as may be required by the United States with respect to any such investigation or enforcement action, and (b) provide testimony as requested by the United States in connection with any such investigation or enforcement action.

7. In consideration of the Relator's execution of this Stipulation and Relator's releases as set forth in Paragraph 5, Defendants and all of their current and former officers, directors, employees, attorneys, agents, affiliates and assigns, on behalf of themselves and their heirs, attorneys, agents, successors, and assigns, release the Relator, his heirs, attorneys, agents, successors, and assigns, from any and all claims for any action, events, or conduct that predates this Stipulation.

8. Notwithstanding the releases given in Paragraphs 4 and 5 of this Stipulation, or any other term of this Stipulation, the following claims of the Government are specifically reserved and are not released by this Stipulation:

- a. Any liability arising under Title 26, U.S. Code (Internal Revenue Code);
- b. Any criminal liability;
- c. Except as expressly stated herein, any administrative liability;
- d. Any liability to the Government (or its agencies) for any conduct other than the Covered Conduct; and
- e. Any liability based upon obligations created by this Stipulation.

9. Defendants shall be in default of this Stipulation if they fail to make the payment required in Paragraph 3. The Government will provide written notice of the default, to be sent by first-class mail and email to the undersigned attorneys for Defendants at the below-listed addresses and any new address of which notice is given. Defendants shall have an opportunity

to cure the default within seven (7) business days from date of receipt of the notice of default. In the event that a default is not fully cured within seven (7) business days of the receipt of notice of such default, the Settlement Amount shall be immediately due and payable, and interest shall accrue at the rate of 9% per annum compounded annually on the remaining unpaid principal balance, beginning seven (7) business days after delivery of the notice of default. In the event of an uncured default, Defendants agree to the entry of a consent judgment in the form attached hereto as Exhibit A, and further, the United States, at its option, may: (a) rescind this Stipulation and reinstate the Federal Complaint; (b) seek specific performance of the Stipulation; (c) offset the remaining unpaid balance from any amounts due and owing Defendants by any department, agency or agent of the United States at the time of default; or (d) exercise any other rights granted by law, or under the terms of this Stipulation, or recognizable at common law or in equity. Defendants shall not contest any offset imposed or any collection action undertaken by the Government pursuant to this paragraph, either administratively or in any court. In addition, Defendants shall pay the Government all reasonable costs of collection and enforcement under this paragraph, including attorney's fees and expenses. In the event that the United States opts to rescind this Stipulation pursuant to this paragraph, Defendants shall not plead, argue or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel or similar theories, to any civil or administrative claims which relate to the Covered Conduct, except to the extent those defenses were available on the Effective Date.

10. Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Stipulation but agree and confirm that this Stipulation is fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B). Subject to any claims Relator may have for his share of the Settlement Amount pursuant to the Stipulation and Order of

Settlement and Release between the Relator and the United States, Relator, for himself individually, and for his heirs, successors, attorneys, agents, and assigns, fully and finally releases, waives, and forever discharges the United States, its officers, agents, and employees, from any claims arising from the filing of the Civil Action and from any claims under 31 U.S.C. § 3730.

11. Defendants waive and shall not assert any defenses Defendants may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Stipulation bars a remedy sought in such criminal prosecution or administrative action. Nothing in this paragraph or any other provision of this Stipulation constitutes an agreement by the United States concerning the characterization of the Settlement Amount for purposes of the Internal Revenue laws, Title 26 of the United States Code.

12. Defendants fully and finally release the Government and its agencies, employees, servants, and agents from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that Defendants have related to the Covered Conduct and the Government's investigation and prosecution thereof.

13. Defendants agree to the following:

a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47) incurred by or on behalf of Defendants and their present or former officers, directors, employees, shareholders, and agents in connection with:

i. the matters covered by this Stipulation;

- ii. the Government's audit(s) and civil and/or criminal investigation(s) of the matters covered by this Stipulation;
- iii. Defendants' investigation, defense, and corrective actions undertaken in response to the Government's audit(s) and civil and/or criminal investigation(s) in connection with the matters covered by this Stipulation (including attorney's fees);
- iv. the negotiation and performance of this Stipulation;
- v. the payments Defendants make to the Government pursuant to this Stipulation and any payments that Defendants may make to Relator, including costs and attorney's fees,

are unallowable costs for government contracting purposes (hereinafter referred to as Unallowable Costs).

b. **Future Treatment of Unallowable Costs:** Unallowable Costs will be separately determined and accounted for by Defendants, and Defendants shall not charge such Unallowable Costs directly or indirectly to any contract with the Government.

c. **Treatment of Unallowable Costs Previously Submitted for Payment:** Within 90 days of the Effective Date of this Stipulation, Defendants shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Defendants or any of their subsidiaries or affiliates from the Government. Defendants agree that the Government, at a minimum, shall be entitled to recoup from Defendants any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable

Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its rights to audit, examine, or re-examine Defendants' books and records and to disagree with any calculations submitted by Defendants or any of their subsidiaries or affiliates regarding any Unallowable Costs included in payments previously sought by Defendants, or the effect of any such Unallowable Costs on the amount of such payments.

14. Except as expressly provided to the contrary in this Stipulation, this Stipulation is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity.

15. Defendants represent and warrant that they have reviewed their financial situation, that they currently are solvent within the meaning of 11 U.S.C. §§ 547(b)(3) and 548(a)(1)(B)(ii)(I), and that they reasonably believe that they shall remain solvent following payment to the Government of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Stipulation, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Defendants, within the meaning of 11 U.S.C. § 547(c)(1), and (b) conclude that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which Defendants were or became indebted to on or after the date of this transfer, within the meaning of 11 U.S.C. § 548(a)(1).

16. If within 91 days of the Effective Date of this Stipulation or of any payment made under this Stipulation, Defendants commence, or a third party commences, any case, proceeding, or other action under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking to have any order for relief of Defendants' debts, or seeking to adjudicate Defendants as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Defendants or for all or any substantial part of Defendants' assets, Defendants agree as follows:

- a. Defendants' obligations under this Stipulation may not be avoided pursuant to 11 U.S.C. § 547, and Defendants shall not argue or otherwise take the position in any such case, proceeding, or action that: (i) Defendant' obligations under this Stipulation may be avoided under 11 U.S.C. § 547; (ii) Defendants were insolvent at the time this Stipulation was entered into; or (iii) the mutual promises, covenants, and obligations set forth in this Stipulation do not constitute a contemporaneous exchange for new value given to Defendants.
- b. If Defendants' obligations under this Stipulation are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the Government, at its sole option, may rescind the releases in this Stipulation and bring any civil and/or administrative claim, action, or proceeding against Defendants for the claims that would otherwise be covered by the releases provided in Paragraphs 4 and 5 above. Defendants agree that (i) any such claims, actions, or proceedings brought by the Government are not subject to an "automatic stay" pursuant to 11 U.S.C. § 362(a) as a result of the action, case, or proceedings described in the first clause of this paragraph, and Defendants shall not

argue or otherwise contend that the Government's claims, actions, or proceedings are subject to an automatic stay; (ii) Defendants shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any such civil or administrative claims, actions, or proceeding that are brought by the Government within 60 calendar days of written notification to Defendants that the releases have been rescinded pursuant to this paragraph; and (iii) the Government has a valid claim against Defendants in the amount of \$10,000,000 plus penalties, and the Government may pursue its claim in the case, action, or proceeding referenced in the first clause of this paragraph, as well as in any other case, action, or proceeding.

- c. Defendants acknowledge that their agreements in this paragraph are provided in exchange for valuable consideration provided in this Stipulation.

17. Except as set forth in Paragraph 5 above (which, among other things, preserves Relator's ability to seek attorney's fees), each Party shall bear its own and its employees' legal and other costs incurred in connection with this matter, including the preparation and performance of this Stipulation.

18. Any failure by the Government to insist upon the strict performance of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and the Government, notwithstanding that failure, shall have the right thereafter to insist upon strict performance of any and all of the provisions of this Stipulation.

19. This Stipulation is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Stipulation is the United States District Court for the Southern District of New York. For purposes of construing this Stipulation, this

Stipulation shall be deemed to have been drafted by all Parties to this Stipulation and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

20. Subject to the exceptions in Paragraph 8, and in consideration of the obligations of the Defendant in this Stipulation, conditioned upon and following Defendants' timely full payment of the Settlement Amount, the Government shall dismiss with prejudice the Federal Complaint and, subject to the Relator's right to seek to recover attorney's fees, costs and expenses from Defendants pursuant to 31 U.S.C. § 3730(d), the Relator shall dismiss with prejudice the Civil Action; provided, however, that the Court shall retain jurisdiction over this Stipulation and each Party to the extent the obligations herein remain unsatisfied by that Party.

21. This Stipulation constitutes the complete agreement between the Parties. This Stipulation may not be amended except by written consent of the Parties.

22. The undersigned counsel and other signatories represent and warrant that they are fully authorized to execute this Stipulation on behalf of the persons and entities indicated below.

23. This Stipulation may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation. Facsimiles and/or PDFs of signatures shall constitute acceptable, binding signatures for purposes of this Stipulation.

24. The effective date of this Stipulation is the date upon which this Stipulation is entered by this Court (the "Effective Date").

Agreed to by:

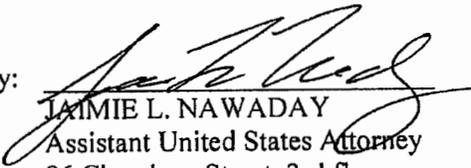
THE UNITED STATES OF AMERICA

Dated: New York, New York
April 7, 2014

*Attorneys for Plaintiff-Intervenor
United States of America*

PREET BHARARA
United States Attorney for the
Southern District of New York

By:


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DEFENDANTS

Dated: New York, New York
April 7, 2014

Attorneys for Defendant Siouni & Zar

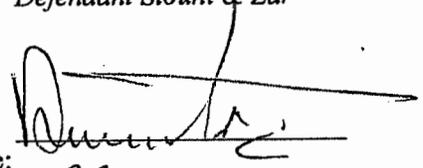
BINDER & SCHWARTZ LLP

By: 

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Dated: New York, New York
April 7, 2014

Defendant Siouni & Zar

By: 

Title: P.R.

Dated: New York, New York
April _____, 2014

Attorneys for Defendant Dana Kay

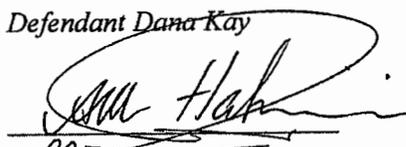
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Dated: New York, New York
April 7, 2014

Defendant Dana Kay

By: 

Title: PRÉSIDENT

DEFENDANTS

Dated: New York, New York
April _____, 2014

Attorneys for Defendant Siouni & Zar

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Dated: New York, New York
April _____, 2014

Defendant Siouni & Zar

By: _____

Title: _____

Dated: New York, New York
April _____, 2014

Attorneys for Defendant Dana Kay

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Facsimile No. (212) 750-3906

Dated: New York, New York
April _____, 2014

Defendant Dana Kay

By: _____

Title: _____

RELATOR

Dated: ~~New York, New York~~
April 7, 2014

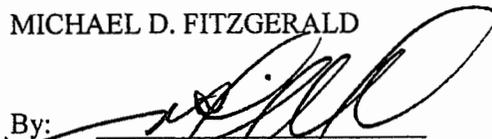
Relator


MICHAEL KRIGSTEIN

Dated: New York, New York
April 7th, 2014

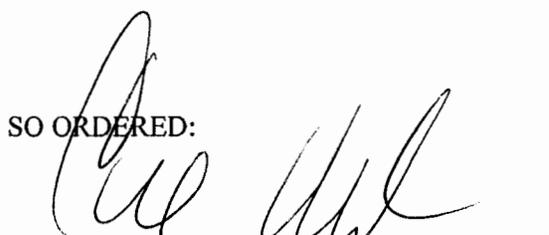
Attorney for Relator

MICHAEL D. FITZGERALD

By: 

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Facsimile No. (732) 223-7299

SO ORDERED:


THE HONORABLE COLLEEN MCMAHON
United States District Judge

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4-9-2014