

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

<p>ZEST ANCHORS, LLC d/b/a ZEST DENTAL SOLUTIONS,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>BIOMET 3i, LLC d/b/a ZIMVIE,</p> <p style="text-align: center;">Defendant.</p>	<p>Index No.</p> <p>SUMMONS</p>
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TO THE ABOVE NAMED DEFENDANT:

Biomet 3i LLC d/b/a ZimVie
c/o United Agent Group Inc.
801 U.S. Highway 1
North Palm Beach, Florida 33408

YOU ARE HEREBY SUMMONED to answer the Complaint of the Plaintiff in this action and to serve a copy of your answer on the Plaintiff’s attorneys within 20 days after the service of this Summons, exclusive of the day of service, or within 30 days after service is complete if the Summons is not delivered personally to you within the State of New York. In case of your failure to appear or answer, judgement will be taken against you by default for the relief demanded in the Complaint.

Plaintiff designates New York County as the place of trial. The basis of venue is the parties’ written agreement to the designated place of trial, and the residency of all parties outside the State of New York, namely the residency of Plaintiff in the State of California, County of San Diego, and the residency of Defendant in the State of Florida, County of Palm Beach.

Dated: July 13, 2023

SIMPSON THACHER & BARTLETT LLP

By: /s/ Michael J. Garvey
Michael J. Garvey

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*Attorneys for Plaintiff Zest Anchors,
LLC d/b/a Zest Dental Solutions*

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

ZEST ANCHORS, LLC d/b/a ZEST DENTAL
SOLUTIONS,

Plaintiff,

v.

BIOMET 3i, LLC d/b/a ZIMVIE,

Defendant.

Index No.

COMPLAINT

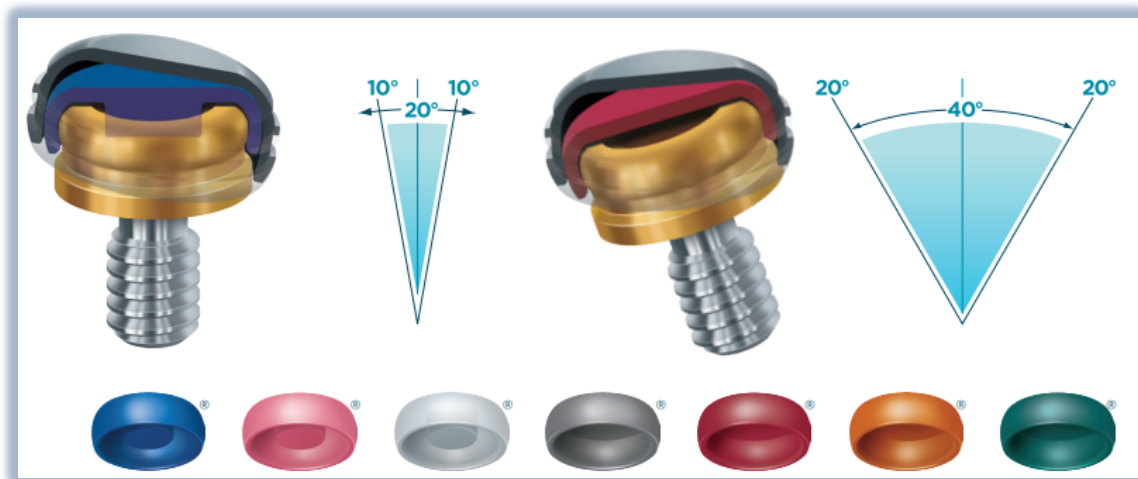
Plaintiff Zest Anchors, LLC d/b/a Zest Dental Solutions (“Zest”) alleges as follows against Defendant Biomet 3i, LLC d/b/a ZimVie (“Biomet”) upon personal knowledge with respect to themselves and their own acts and information and belief as to all other matters:

INTRODUCTION

1. This is a lawsuit for breach of a distribution agreement. Zest is the world’s leading manufacturer of denture attachment products, the hardware dentists use to affix removable dentures to patients’ jaws. Biomet was a distributor of Zest’s products and had a limited right to use Zest’s trademarks during the term of the parties’ distribution agreement. Before the Zest/Biomet distribution agreement ended, Biomet breached the agreement by secretly teaming up with a firm that manufactures and sells knock-offs of Zest products so that, once the distribution agreement ended, Biomet could seamlessly begin offering the knock-offs. Since the distribution agreement ended, Biomet has continued to profit from Zest’s trademarks in violation of the surviving provisions of the parties’ distribution agreement by advertising and selling the knock-offs. This lawsuit seeks redress for Biomet’s breaches.

2. Under their distribution agreement (the “Distribution Agreement,” or “DA”), Zest authorized Biomet to market Zest’s iconic denture attachment product suite, called LOCATOR®.

LOCATOR® is instantly recognizable to dentists because of its distinctive appearance, including a trademarked color scheme for its brightly colored, nylon “inserts” that correspond to different denture retention strengths:



3. During its long distribution relationship with Zest, Biomet received limited permission to market LOCATOR® using inserts in Zest’s trademarked colors (the “Insert Color Marks”). Because the Insert Color Marks are an integral part of Zest’s flagship LOCATOR® brand, the parties agreed that Biomet would “use the [Insert Color Marks] solely in connection with the advertising and promotion of Products obtained from Zest [th]ereunder,” and “only in the manner specified by Zest.” DA §§ 2.1, 6.2.

4. Biomet further agreed that, upon the expiration or termination of the Distribution Agreement, “all rights granted to [Biomet] shall cease and [Biomet] shall refrain from further use of the” Insert Color Marks. *Id.* § 13.5.

5. Prior to the termination of the Distribution Agreement, in willful disregard of its obligations to Zest thereunder, Biomet negotiated a new distribution arrangement with a firm based in Spain that manufactures a LOCATOR® knock-off called “DESSLoc,” which improperly uses Zest’s Insert Color Marks and is advertised to be “100% compatible with Locator®.”

6. On September 2, 2021, the Distribution Agreement between Zest and Biomet terminated, and Biomet's limited authorization to use Zest's signature Insert Color Marks ended. Biomet was required to "refrain from further use of the" Insert Color Marks. *Id.* § 13.5.

7. In violation of that obligation, Biomet has kept on using the Insert Color Marks in its advertising and marketing materials, but now supplies its former LOCATOR® customers with Spanish knock-offs rather than the genuine LOCATOR® products.

8. As a result of Biomet's conduct, customers have been confused into thinking that Biomet's relationship with Zest is ongoing when, in fact, it has ended and Biomet has pivoted to a knock-off brand. By engaging in this conduct, Biomet is willfully breaching the Distribution Agreement. Zest is entitled to contractual remedies for Biomet's breaches.

PARTIES

9. Plaintiff Zest Anchors, LLC is a limited liability company organized under the laws of Delaware with its principal place of business at 2875 Loker Avenue East, Carlsbad, California 92010. Zest Anchors, LLC does business under the name Zest Dental Solutions.

10. On information and belief, Defendant Biomet 3i, LLC is a limited liability corporation organized under the laws of Florida with its principal place of business at 4555 Riverside Drive, Palm Beach Gardens, Florida 33410. Biomet 3i, LLC does business under the name ZimVie. Currently, Biomet 3i, LLC is a wholly-owned direct or indirect subsidiary of nonparty ZimVie Inc. Prior to March 1, 2022, Biomet 3i, LLC was a wholly-owned direct or indirect subsidiary of nonparty Zimmer Biomet Holdings, Inc.

JURISDICTION AND VENUE

11. This action arises under the Distribution Agreement, which involved the sale and marketing of products in transactions amounting, in the aggregate, to not less than \$1,000,000.

12. The Distribution Agreement is subject to the laws of the State of New York pursuant to the Distribution Agreement's choice of law of provision, Section 17.6, and GOL § 5-1401.

13. Under New York law, jurisdiction is mandatory pursuant to GOL § 5-1402 because the parties to the Distribution Agreement agreed "that all actions or proceedings arising in connection with th[e] [Distribution] Agreement shall be tried and litigated exclusively in the state or federal courts located in the city of New York." This choice of venue was "intended by the parties to be mandatory and not permissive in nature and both parties [] waive[d] any objection for forum *non-conveniens* or otherwise." DA § 17.6.

14. Venue is proper pursuant to this choice of venue agreement pursuant to CPLR § 501 and because no party resides in this State. *Id.* § 503(a).

FACTS

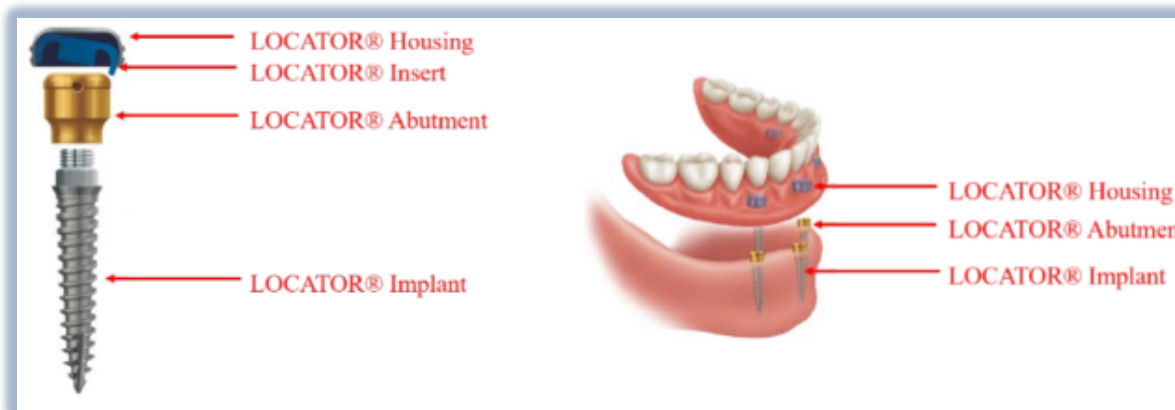
A. Zest's Premier LOCATOR® Products

15. Zest is a global leader in the research, development, and manufacturing of dental attachment products used for securing removable dentures in patients' mouths. Since its founding in 1972, Zest has been a consistent innovator, designing and selling an array of high quality attachment solutions to clinicians, oral surgeons, dental laboratories, dentists, and other third parties.

16. Since 1999, Zest's premier denture attachment solution has been LOCATOR®, a suite of attachment products that has enjoyed enduring popularity due to its simplicity and effectiveness, as well as its distinctive visual appearance, which reassures LOCATOR® purchasers that they are buying a product backed by Zest's longstanding commitment to quality.

17. Today, LOCATOR® is indisputably the world's foremost denture attachment suite. Over the last decade alone, Zest has invested millions of dollars promoting LOCATOR® and has sold hundreds of millions of dollars' worth of LOCATOR® products.

18. The LOCATOR® suite includes four primary components, illustrated below:
- LOCATOR® attachments, anchors fixed to a patient's jaw that include bar attachments, root connectors, and screw-like dental "implants";
 - Gold LOCATOR® "abutments," which are studs that sit on an attachment and feature a fanciful triangular design on their tops;
 - Round nylon LOCATOR® "inserts" that come in distinctive shades of blue, pink, clear, gray, red, orange, and green and snap over abutments; and
 - LOCATOR® " housings," which are metal caps that sit in a denture and hold an insert, allowing the insert to interface between the denture and the abutment.




19. A dentist or patient using LOCATOR® can securely pop a denture in and out of the patient's mouth with relative ease, resulting in an improved experience for patients who might otherwise use conventional removable dentures that rely on dental adhesives and only remain in place for short periods of time. Once installed, LOCATOR® is simple to maintain, including through convenient replacement of component parts as they wear out over time.

20. LOCATOR® comes in a range of retention strengths and works with implants installed at a variety of angles. Each Insert Color Mark is associated with a different combination of retention strength and permissible angulation.

B. Zest's Leading LOCATOR® Brand

21. Through Zest's extensive promotion, LOCATOR®'s distinctive visual aesthetic has become instantly recognizable among dental professionals and a critical part of Zest's brand.

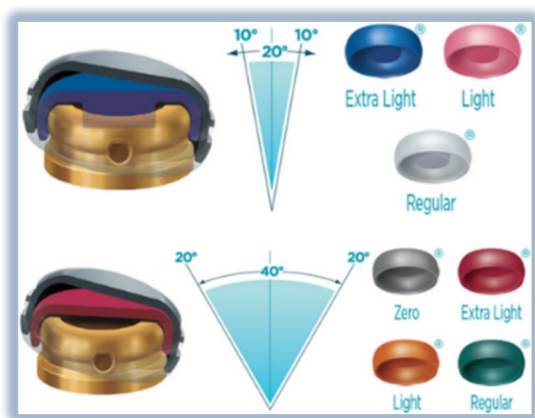
22. Zest's LOCATOR® Insert Color Marks are central to that aesthetic, and Zest, through an affiliate, has registered them on the Supplemental Register maintained by the U.S. Patent and Trademark Office:

Insert Color	Registration Number
	4,622,637
	4,622,638
	4,622,639
	4,618,873
	4,618,874
	4,618,875
	4,618,876

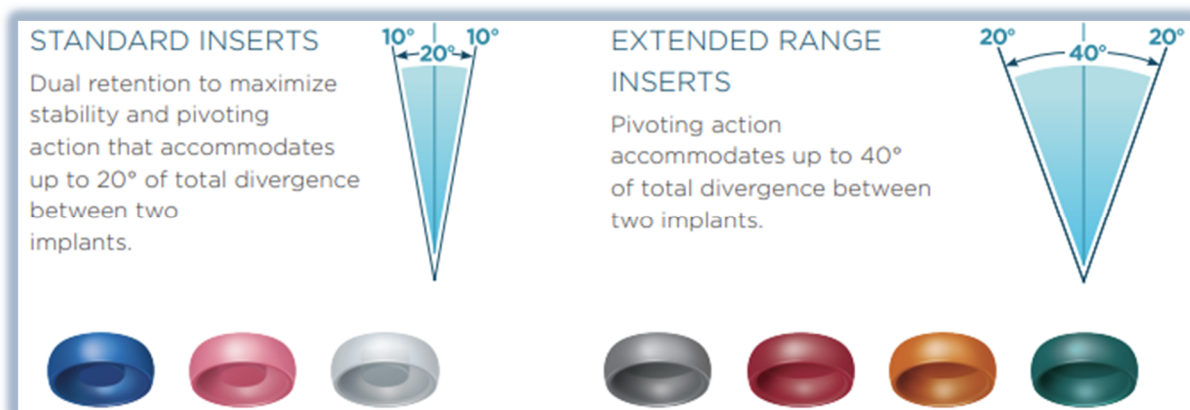
23. These Insert Color Marks correspond to the various retention strengths available for LOCATOR® inserts. The array of retention strengths enables patients to enjoy a high quality LOCATOR® solution customized to accommodate a range of differently-angled implants as well

as a range of tension options, which make a denture more secure or easier to remove. The customizability of LOCATOR® inserts is the product of variations in the inserts' mechanical properties. The Insert Color Marks themselves do not affect LOCATOR®'s retention strength or ability to accommodate implants installed at different angles. Zest uses the distinctive colors because they are easily recognizable and set LOCATOR® apart from the rest of the competition.

24. Since it introduced the Insert Color Marks, Zest has consistently used and promoted the marks. For decades, Zest has featured the Insert Color Marks prominently in all major LOCATOR® advertisement campaigns, including in magazines, brochures, presentations, and online. An example advertisement and training manual are below:



Website Advertisement










Technique Manual

25. To protect its LOCATOR® brand, Zest also limits third parties' use of its Insert Color Marks. In addition to its direct sales, Zest permits several dozen domestic and international distributors to resell its LOCATOR® products subject to contractual limitations on their right to use the Insert Color Marks.

C. Zest's Distribution Arrangement With Biomet

26. With its affiliates, Biomet is a large seller of denture attachment and other dental products in the United States. Its advertisements and product offerings reach thousands of dentists across the country. While it was a subsidiary of Zimmer Biomet Holdings, Inc., Biomet was, for many years, a Zest distributor authorized to use the Insert Color Marks for purposes of marketing and selling LOCATOR®.

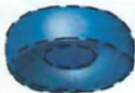


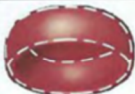


27. Biomet recorded millions of dollars in revenue from LOCATOR® sales through its extensive distribution network. A 2015 example of a Biomet order sheet is set forth below:

Catalog Numbers		
Description	Qty.	Catalog No.
 Replacement Male, 5 lbs. (Clear)	4	LOCRMW
 Replacement Male, Light Retention, 3 lbs. (Pink)	4	LOCRMP
 Replacement Male, Extra Light Retention, 1.5 lbs. (Blue)	4	LOCRMB
 Extended Range Replacement Male, 4 lbs. (Green)	4	LOCRMG
 Extended Range Replacement Male, 2 lbs. (Orange)	4	LOCRMO
 Extended Range Replacement Male, Light Retention, 1 lb. (Red)	4	LOCRMRR
 Non-Retentive Replacement Male, Zero Retention, (Gray)	4	LOCRMGY

28. On September 2, 2016, Zest entered into the Distribution Agreement with Biomet, which was the last distribution agreement between the parties.

29. Under the Distribution Agreement, Biomet agreed that its use of Zest's LOCATOR® Insert Color Marks was limited to reselling and promoting LOCATOR® products.

Specifically, the Distribution Agreement restricted Biomet’s right to use a set of “Trademarks,” defined to mean “the marks set forth on Exhibit B,” as “may be amended from time to time by Zest.” DA § 1. Exhibit B incorporated each of the Insert Color Marks in this definition:

<u>Exhibit B</u> <u>Trademarks</u>			
CHAIRSIDE	LOCATOR	ZEST	RTX
FTX	SATURNO	ZAAG	ZEST ANCHOR
LOCATOR RTX	LOCATOR FTX	ZEST DENTAL SOLUTIONS	
DURATEC			
			
			
			

Id., Ex. B. Pursuant to the Distribution Agreement, Zest granted Biomet “during the term of th[e] Agreement a non-exclusive, nontransferable, limited, terminable license . . . to [] use the Trademarks solely in connection with the advertising and promotion of Products obtained from Zest [t]hereunder.” *Id.* § 2.1.

30. In the Distribution Agreement, Zest further circumscribed this limited license by requiring that Biomet “use the Trademarks only in the manner specified by Zest,” “use the Trademarks in a manner consistent with Zest’s trademark usage guidelines,” and “provide Zest with a reasonable opportunity to review and approve all marketing and collateral materials relating to [Zest’s] Products [] for purposes of compliance with Zest’s branding specifications.” *Id.* §§ 2.3, 6.2.

31. In addition to these restrictions, Biomet consented to restrictions on its use of the Insert Color Marks following the termination of the Distribution Agreement. Pursuant to Section 17.5, “[a]ll of the terms and provisions of th[e] [Distribution] Agreement intended to be observed and performed by the parties after the termination [t]hereof, including Sections 9, 10, 11, 13, 14, 15 and 17 shall survive such termination and continue thereafter in full force and effect in accordance with their terms.”

32. In one of these surviving provisions, Section 13.5, Biomet agreed that “[u]pon expiration or termination of th[e] [Distribution] Agreement, all rights granted to [Biomet] [t]hereunder shall cease and [Biomet] shall refrain from further use of the Trademarks,” including the Insert Color Marks. There were no territorial limitations to this provision.

33. In the event of “any breach by [Biomet] of its representations, warranties or obligations under th[e] [Distribution] Agreement,” Biomet undertook in another surviving provision to “indemnify Zest . . . from any and all Losses,” meaning “any and all liabilities, claims, actions, damages, losses, penalties fines, cost[s] and expenses, including reasonable attorneys’ fees.” *Id.* §§ 9.1, 9.3.

34. During the term of the Distribution Agreement, between 2016 and 2021, Biomet sold millions of dollars' of Zest's LOCATOR® products using Zest's Insert Color Marks, including as part of a collection of dental products Biomet called "OverdenSURE."

D. While Negotiating With Zest, Biomet Secretly Agreed To Distribute Knock-Offs Of The Insert Color Marks

35. Beginning in February 2020, well in advance of the expiration of the Distribution Agreement, Zest and Biomet began to negotiate the terms of a new distribution agreement.

36. On August 31, 2021, three days before the expiration of the Distribution Agreement, the parties reached an agreement in principle. The new arrangement would have entitled Biomet to discounts on LOCATOR® products in exchange for an exclusivity provision prohibiting Biomet from creating, marketing, or selling products that competed with Zest's LOCATOR® products for a period of five years.

37. Unbeknownst to Zest, Biomet was in parallel secretly negotiating a separate agreement with a Spanish company called Terrats Medical Sociedad Limitada ("Terrats") that manufactures knock-off dental products. Among Terrats's offerings is a knock-off product suite called DESSLoc that not only competes unfairly with LOCATOR® but uses the entire look and feel of the LOCATOR® product suite—including the Insert Color Marks—to do so. Terrats advertises DESSLoc as "100% compatible" with genuine LOCATOR® products.

38. Under their arrangement, Terrats would supply Biomet with knock-off products that used Zest's LOCATOR® Insert Color Marks, and Biomet, in turn, would distribute the knock-offs throughout the United States. Biomet used Zest's Insert Color Marks to develop its version of Terrats's knock-offs without Zest's knowledge or permission, in breach of its obligation to use the Insert Color Marks "only in the manner specified by Zest." *Id.* § 6.2.

39. On September 2, 2021, while Zest remained unaware of Biomet's partnership with Terrats, the Distribution Agreement between Zest and Biomet terminated.

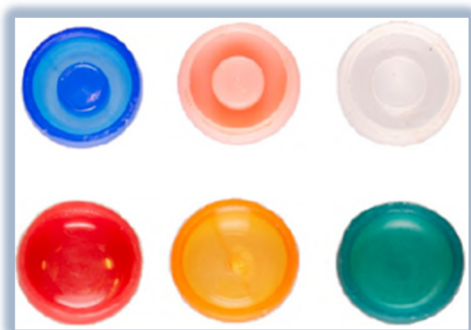
40. Following termination of the Distribution Agreement, and in reliance on its August 31, 2021 agreement in principle with Biomet, Zest allowed Biomet, on an interim basis, to continue marketing and selling Zest products that were stockpiled in Biomet's inventory as of the termination of the Distribution Agreement and abstained from invoking its right to the immediate return of that inventory.

41. On September 3, 2021, Zest sent Biomet a draft distribution agreement that reflected the terms to which the parties had agreed, with the understanding that Biomet would work in good faith to expeditiously finalize the agreement.

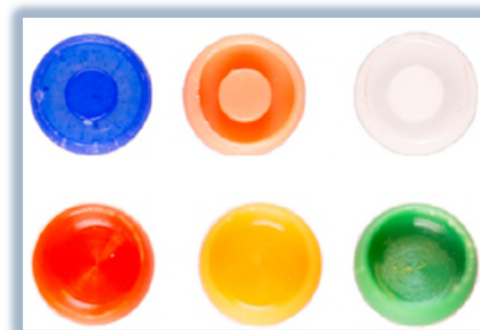
42. On December 2, 2021, Biomet repudiated the parties' exclusivity agreement, and the parties abandoned further discussions.

E. Biomet Breaches The Distribution Agreement By Marketing And Selling Knock-Offs Of The Insert Color Marks

43. After Biomet disavowed its agreement in principle with Zest, it immediately transitioned to marketing and selling Terrats's DESSLoc knock-offs, which plainly "use" Zest's Insert Color Marks:



LOCATOR®



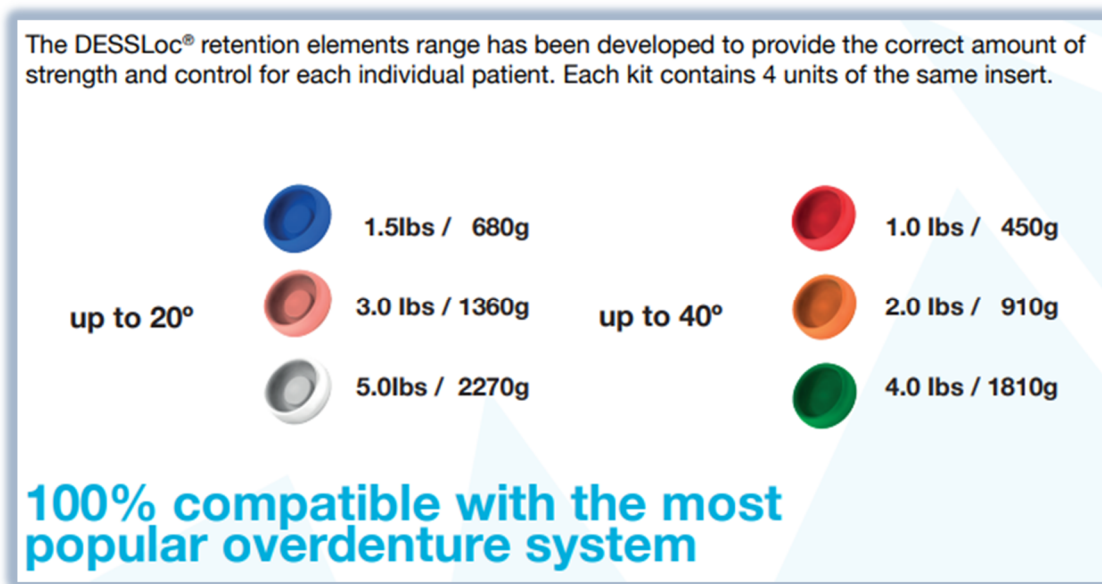
DESSLoc

Terrats’s imitation colors purportedly correspond to the same retention strengths and inserts accommodating implants installed at the same range of angles as the matching LOCATOR® Insert Color Marks.

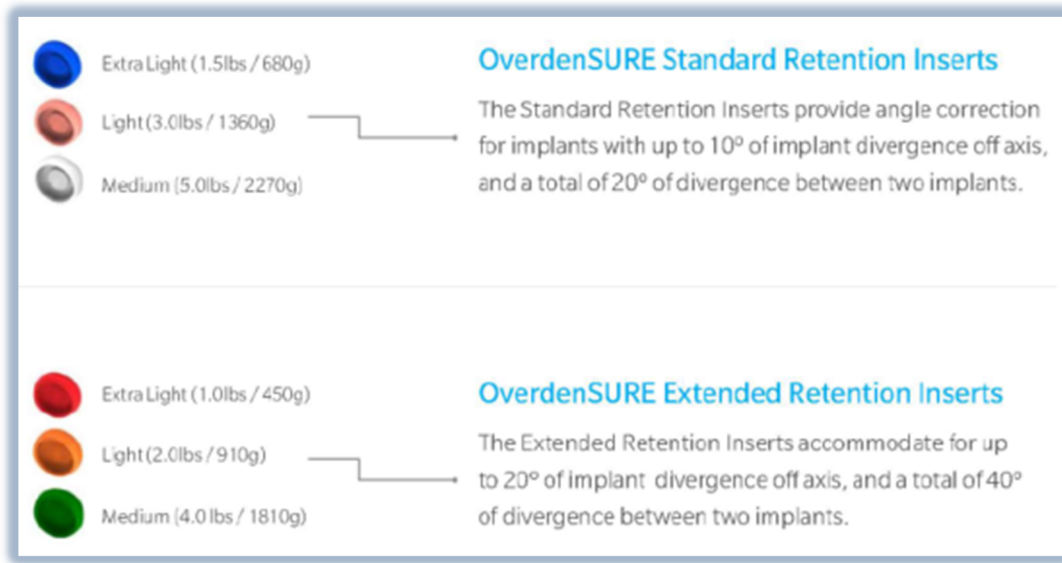
44. On its website, Terrats proclaims in bold type that “DESSLoc® [is] 100% compatible with Locator®”:



Its product catalog advises that its inserts using Zest’s LOCATOR® Insert Color Marks are “100% compatible with the most popular overdenture system”:



45. In December 2021, Biomet began actively using the Insert Color Marks by offering Terrats's knock-off LOCATOR® inserts to its substantial audience of denture attachment purchasers as part of the same "OverdenSURE" collection in which it previously offered Zest's authentic LOCATOR® inserts:



46. Through sleight of hand, Biomet disguised the termination of its status as a distributor of authentic Zest LOCATOR® products by continuing to distribute a product list for its new knock-off inserts that uses the Insert Color Marks in order to evoke the product lists it used to sell LOCATOR® prior to termination:

3.4 mmP Restorative Platform	
Description	Item #
1.0 mmH	MLOA001
2.0 mmH	MLOA002
3.0 mmH	MLOA003
4.0 mmH	MLOA004
5.0 mmH	MLOA005
6.0 mmH	MLOA006

4.1 mmP Restorative Platform	
Description	Item #
1.0 mmH	LOA001
2.0 mmH	LOA002
3.0 mmH	LOA003
4.0 mmH	LOA004
5.0 mmH	LOA005
6.0 mmH	LOA006

LOCATOR Abutment Components	
Description	Item #
Replacement Housing Kit	LORHK
Standard Replacement Insert - White (4-pack)	LARMS*
Extra Light Retention Insert - Blue (4-pack)	LAELM*
Light Retention Replacement Insert - Pink (4-pack)	LLRMS*
Extended Range Inserts - Green (4-pack)	LAERM
Extra Light Retention Extended Range Insert - Red (4-pack)	LELARM
Replacement Housing	LOAH*
Block-Out Spacer (20-pack)	OBS14*
Impression Coping (one time use)	LAIC1
Laboratory Analog	LALA1

* Included with each LOCATOR Abutment; Also included with each Replacement Housing Kit (LORHK)

LOCATOR Abutment Tools	
Description	Item #
Core Tool/Abutment Driver (3-in-1 instrument)	LCTDR1
Insert Extraction Tool	LOAS397*
Abutment Driver Tip Short (24 mmL)	LOADT4
Abutment Driver Tip Large (30 mmL)	LOADT9
0.05 in/1.25 mm Hex Driver Tip 24 mmL - used with LCTDR1	RASH4
0.05 in/1.25 mm Hex Driver Tip 30 mmL - used with LCTDR1	RASH9

*Part of the Core Tool/Abutment Driver LCTDR1.

2020 Biomet LOCATOR® Product List

Certain Implant Systems			
Collar Height	Seating Surface		
	3.4 mm	4.1 mm	5.0 mm
1.0 mm	ODS-CERT301	ODS-CERT401	ODS-CERT501
2.0 mm	ODS-CERT302	ODS-CERT402	ODS-CERT502
3.0 mm	ODS-CERT303	ODS-CERT403	ODS-CERT503
4.0 mm	ODS-CERT304	ODS-CERT404	ODS-CERT504
5.0 mm	ODS-CERT305	ODS-CERT405	ODS-CERT505
6.0 mm	ODS-CERT306	ODS-CERT406	ODS-CERT506

Tapered Screw Vent® Implant System			
Collar Height	Seating Surface		
	3.5 mm	4.5 mm	5.2 mm
1.0 mm	ODS-TSV301	ODS-TSV401	ODS-TSV501
2.0 mm	ODS-TSV302	ODS-TSV402	ODS-TSV502
3.0 mm	ODS-TSV303	ODS-TSV403	ODS-TSV503
4.0 mm	ODS-TSV304	ODS-TSV404	ODS-TSV504
5.0 mm	ODS-TSV305	ODS-TSV405	ODS-TSV505
6.0 mm	ODS-TSV306	ODS-TSV406	ODS-TSV506

External Hex Implant System			
Collar Height	Seating Surface		
	3.4 mm	4.1 mm	5.0 mm
1.0 mm	ODS-EXHEX301	ODS-EXHEX401	ODS-EXHEX501
2.0 mm	ODS-EXHEX302	ODS-EXHEX402	ODS-EXHEX502
3.0 mm	ODS-EXHEX303	ODS-EXHEX403	ODS-EXHEX503
4.0 mm	ODS-EXHEX304	ODS-EXHEX404	ODS-EXHEX504
5.0 mm	ODS-EXHEX305	ODS-EXHEX405	ODS-EXHEX505
6.0 mm	ODS-EXHEX306	ODS-EXHEX406	ODS-EXHEX506

	Impression Coping Qty 1	ODS-IC01
	Impression Coping Qty 4	ODS-IC04
	Impression Coping Qty 10	ODS-IC10
	Analog Qty 1	ODS-AA01
	Analog Qty 4	ODS-AA04
	Analog Qty 10	ODS-AA10
	Retention Kit 20° Qty 1 Set	ODS-RIK2001
	Retention Kit 20° Qty 2 Sets	ODS-RIK2002
	Retention Kit 40° Qty 1 Set	ODS-RIK4001
	Retention Kit 40° Qty 2 Sets	ODS-RIK4002
	Blue Retention Insert 20° Qty 4	ODS-RI2004
	Pink Retention Insert 20° Qty 4	ODS-RI2004
	Clear Retention Insert 20° Qty 4	ODS-RI2004
	Red Retention Insert 40° Qty 4	ODS-RI4004
	Yellow Retention Insert 40° Qty 4	ODS-RI4004
	Green Retention Insert 40° Qty 4	ODS-RI4004
	Retention Housing Cap Qty 1	ODS-RH01
	Retention Housing Cap Qty 4	ODS-RH04
	Retention Housing Cap Qty 10	ODS-RH10
	Blockout Spacer Qty 20	ODS-BS020
	Abutment Driver	ODS-DRVR
	Removal and Insertion Tool	ODS-IRTOOL

2021 Biomet DESSLoc Product List

47. Biomet distributed these marketing materials to purchasers throughout the United States, using the Insert Color Marks to encourage the purchase of Biomet’s LOCATOR® knock-offs directly from Biomet’s website.

48. For a year and a half after the Distribution Agreement had ended, Biomet continued to use the Zest Insert Color Marks and thereby continued a false association with Zest’s successful brand.

Overdenture Attachments
OverdenSURE® Removable Attachment System Abutments for Certain Implants

Collar Height	Certain Implant System		
	3.4 mm	4.1 mm	5.0 mm
1.0 mm	ODSA-CERT301	ODSA-CERT401	ODSA-CERT501
2.0 mm	ODSA-CERT302	ODSA-CERT402	ODSA-CERT502
3.0 mm	ODSA-CERT303	ODSA-CERT403	ODSA-CERT503
4.0 mm	ODSA-CERT304	ODSA-CERT404	ODSA-CERT504
5.0 mm	ODSA-CERT305	ODSA-CERT405	ODSA-CERT505*
6.0 mm	ODSA-CERT306	ODSA-CERT406	ODSA-CERT506*

Retention Kit ODS-RIKIT2001 not included, please order separately. Available only in the U.S. *Available October, 2022.

Collar Height	Certain Implant System		
	3.4 mm	4.1 mm	5.0 mm
1.0 mm	ODS-CERT301	ODS-CERT401	ODS-CERT501
2.0 mm	ODS-CERT302	ODS-CERT402	ODS-CERT502
3.0 mm	ODS-CERT303	ODS-CERT403	ODS-CERT503
4.0 mm	ODS-CERT304	ODS-CERT404	ODS-CERT504
5.0 mm	ODS-CERT305	ODS-CERT405	ODS-CERT505*
6.0 mm	ODS-CERT306	ODS-CERT406	ODS-CERT506*

Retention Kit ODS-RIKIT2001 Included. Available in all geographies except the US. *Available October, 2022.

OverdenSURE Tools and Accessories

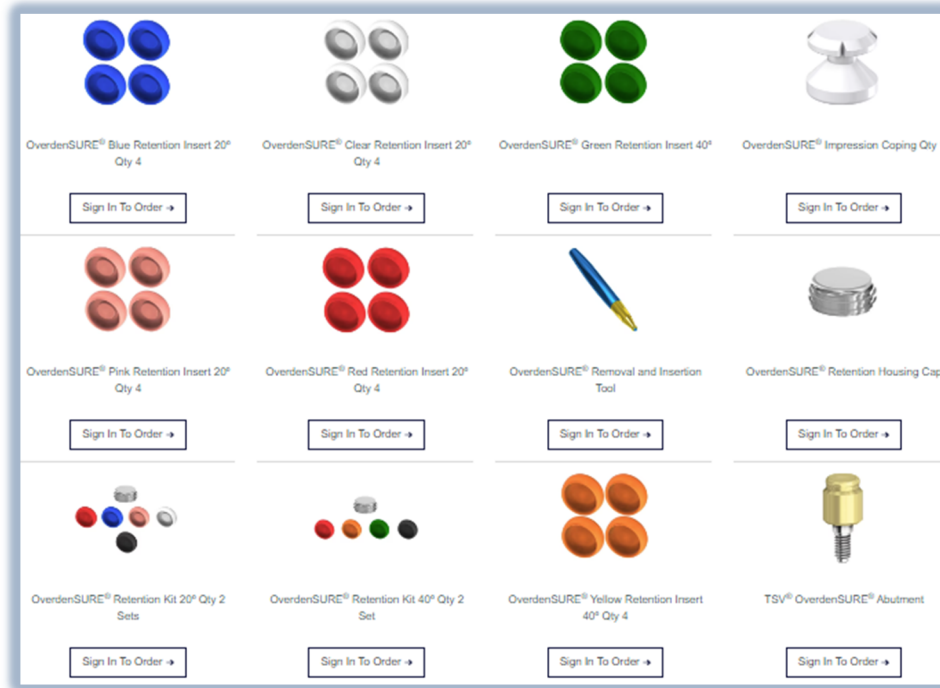
Impression Coping Qty 1	ODS-IC01
Impression Coping Qty 4	ODS-IC04
Impression Coping Qty 10	ODS-IC10
Analog Qty 1	ODS-AA01
Analog Qty 4	ODS-AA04
Analog Qty 10	ODS-AA10
Retention Kit 20° Qty 1 Set	ODS-RIKIT2001
Retention Kit 20° Qty 2 Sets	ODS-RIKIT2002
Retention Kit 40° Qty 1 Set	ODS-RIKIT4001
Retention Kit 40° Qty 2 Sets	ODS-RIKIT4002
Blue Retention Insert 20° Qty 4	ODS-RIB2004
Pink Retention Insert 20° Qty 4	ODS-RIP2004
Clear Retention Insert 20° Qty 4	ODS-RIC2004
Red Retention Insert 40° Qty 4	ODS-RIR4004
Yellow Retention Insert 40° Qty 4	ODS-RIY4004
Green Retention Insert 40° Qty 4	ODS-RIG4004

OverdenSURE Tools and Accessories

Retention Housing Cap Qty 1	ODS-RH01
Retention Housing Cap Qty 4	ODS-RH04
Retention Housing Cap Qty 10	ODS-RH10
Blockout Spacer Qty 20	ODS-BS020
Abutment Driver	ODS-DRVR
Removal and Insertion Tool	ODS-IRTOOL

March 2023 Biomet DESSLoc Product List

Despite the termination of its license from Zest, and in breach of Section 13.5 of the Distribution Agreement, Biomet’s advertisements continued to prominently use Zest’s LOCATOR® Insert Color Marks in an effort to convert its sizable base of former LOCATOR® customers into DESSLoc customers without them ever realizing that a change had occurred:



F. Zest Defends The LOCATOR® Brand

49. Zest responded quickly to the threat to its brand from DESSLoc products. On February 18, 2022, Zest commenced a trademark, trade dress, and unfair competition action against DESSLoc's manufacturer, Terrats, in the United States District Court for the Southern District of California to prevent Terrats from significantly expanding its U.S. distribution of knock-offs, including through its partnership with Biomet. *Zest Anchors, LLC v. Geryon Ventures, LLC*, No. 3:22-cv-230-TWR-NLS (S.D. Cal.).¹ Zest also named Geryon Ventures, LLC ("Geryon"), Terrats's U.S. agent, representative, and distributor, as a defendant. Zest's requests for permanent injunctive, monetary, and other relief remain pending.

¹ The case is now captioned *Zest Anchors, LLC v. Geryon Ventures, LLC*, No. 3:22-cv-230-TWR-SBC (S.D. Cal.).

50. On March 7, 2022, Zest moved the District Court for a preliminary injunction prohibiting Terrats and Geryon (collectively “DESS”) from using imitations of LOCATOR®’s overall appearance and from using imitations of Zest’s LOCATOR® Insert Color Marks.

51. On July 18, 2022 the Court granted Zest’s requested preliminary injunction prohibiting DESS and persons acting in concert or participation with DESS from using imitations of LOCATOR®’s overall appearance. On April 5, 2023, the United States Court of Appeals for the Ninth Circuit affirmed the District Court’s grant of a preliminary injunction against the use of LOCATOR®’s overall appearance. *Zest Anchors, LLC v. Geryon Ventures, LLC*, Nos. 22-55704, 22-55778 (9th Cir.). DESS subsequently stipulated to a preliminary injunction prohibiting DESS and persons acting in concert or participation with DESS from using imitations of Zest’s Insert Color Marks.

52. While the appeal was pending, on August 29, 2022, Biomet moved to intervene in Zest’s dispute with DESS. The District Court granted intervention on September 23, 2022.

53. On September 26, 2022, Biomet filed several claims against Zest in the District Court, including two challenging Zest’s protection of its Insert Color Marks and confirming that Biomet intends to continue exploiting Zest’s Insert Color Marks in violation of the Distribution Agreement: (1) a petition for a declaration that the Insert Color Marks are invalid as trademarks and (2) a petition to cancel the Insert Color Marks’ trademark registrations. Before the District Court, Biomet repudiated its obligations under the Distribution Agreement, contending that it has no “relevant, ongoing obligations relating to any prior license” of Zest’s Insert Color Marks.

54. On May 9, 2023, Zest filed a counterclaim against Biomet for breach of the Distribution Agreement in the Southern District of California action. Zest acknowledged that the “Distribution Agreement contains a mandatory New York forum selection clause. Zest

nonetheless wishes to pursue its contract law remedies in this forum in the interest of judicial efficiency and for the convenience of the parties, particularly given the factual overlap among the parties' claims. In the event [Biomet] notifies Zest that it wishes to enforce the New York forum selection clause, Zest will voluntarily dismiss this claim and re-file it in a new proceeding in New York."

55. On May 25, 2023, Biomet demanded that Zest re-file its breach of contract claim in New York. Accordingly, Zest has filed this action to enforce the Distribution Agreement's prohibition on Biomet's exploitation of Zest's Insert Color Marks.

G. Biomet's Breaches Of The Distribution Agreement Have Harmed Zest

56. Biomet's use of Zest's iconic LOCATOR® Insert Color Marks to market knock-offs of Zest's products while purporting to negotiate a renewed distribution agreement with Zest in good faith breached Section 6.2 of the Distribution Agreement. Biomet neither sought nor obtained specific permission to use Zest's trademarks to create a competing product, as Section 6.2 requires.

57. Biomet's continued use of Zest's LOCATOR® Insert Color Marks to market and sell LOCATOR® knock-offs breaches Section 13.5 of the Distribution Agreement.

58. Biomet's development, marketing, and sale of LOCATOR® knock-offs using Zest's Insert Color Marks has substantially harmed Zest. As a result of Biomet's breaches of the Distribution Agreement, Zest has suffered damages including, without limitation, the lost value of the license Biomet was required to obtain from Zest in order to use the Insert Color Marks, the loss of sales consummated by Biomet as a result of Biomet's breaches, and the harm, which cannot be fully compensated by damages, to Zest's reputation and goodwill in its LOCATOR® product suite caused by Biomet's misuse of the Insert Color Marks.

COUNT ONE
Breach Of Contract – Section 6.2

59. Zest repeats and realleges paragraphs 1 through 58 as if fully set forth herein.
60. Zest and Biomet entered into and are parties to the Distribution Agreement.
61. The Distribution Agreement is a valid and enforceable contract by which Zest and Biomet agreed, *inter alia*, that Zest would sell to Biomet and Biomet would purchase from Zest LOCATOR® products using Zest’s Insert Color Marks.
62. Zest performed, or has been excused from performing, all conditions, covenants, and promises that it was obligated to perform under the Distribution Agreement, including by selling to Biomet LOCATOR® products using Zest’s Insert Color Marks.
63. Pursuant to Section 6.2 of the Distribution Agreement, Biomet “will use the [Insert Color Marks] only in the manner specified by Zest.”
64. Biomet has materially breached Section 6.2 of the Distribution Agreement by using Zest’s Insert Color Marks without authorization to develop during the term of the Distribution Agreement a knock-off of Zest’s LOCATOR® products.
65. As a direct, natural, and proximate result of Biomet’s material breaches of the Distribution Agreement, Zest has suffered damages, including, without limitation, loss of the value of the license Biomet was required to obtain from Zest in order to use the Insert Color Marks, loss of sales consummated by Biomet as a result of Biomet’s breaches, and the harm, which cannot be fully compensated by damages, to Zest’s reputation and goodwill in its LOCATOR® product suite caused by Biomet’s misuse of the Insert Color Marks.
66. Zest is entitled to compensation as a result of the harm it has suffered due to Biomet’s material breaches of the Distribution Agreement, including indemnification pursuant to Section 9.3 of the Distribution Agreement, which requires Biomet to “indemnify Zest . . . from

any and all any and all [liabilities, claims, actions, damages, losses, penalties, fines, costs and expenses, including reasonable attorneys' fees] incurred by [Zest] based upon or arising out of [] any breach by [Biomet] of its representations, warranties or obligations under th[e] [Distribution] Agreement.”

67. Zest therefore seeks judgement against Biomet and damages and reasonable attorneys' fees in an amount to be determined at trial

COUNT TWO
Breach Of Contract – Section 13.5

68. Zest repeats and realleges paragraphs 1 through 67 as if fully set forth herein.

69. Zest and Biomet entered into and are parties to the Distribution Agreement.

70. The Distribution Agreement is a valid and enforceable contract by which Zest and Biomet agreed, *inter alia*, that Zest would sell to Biomet and Biomet would purchase from Zest LOCATOR® products using Zest's Insert Color Marks.

71. Zest performed, or has been excused from performing, all conditions, covenants, and promises that it was obligated to perform under the Distribution Agreement, including by selling to Biomet LOCATOR® products using Zest's Insert Color Marks.

72. Pursuant to Section 13.5 of the Distribution Agreement, “[u]pon expiration or termination of this Agreement . . . all rights granted to [Biomet] hereunder shall cease and” Biomet is obligated to “refrain from further use of the” Insert Color Marks.

73. The Distribution Agreement expired or terminated on September 2, 2021 after Zest and Biomet failed to reach a new distribution agreement. Pursuant to Section 17.5 of the Distribution Agreement, the provisions of Section 13.5 survived expiration or termination.

74. Biomet has materially breached Section 13.5 of the Distribution Agreement by using Zest's Insert Color Marks without authorization upon or following the expiration or

termination of the Distribution Agreement. Among other things, Biomet has advertised, sold, and prepared for advertising and sale OverdenSURE-branded DESSLoc products using Zest's Insert Color Marks.

75. As a direct, natural, and proximate result of Biomet's material breaches of the Distribution Agreement, Zest has suffered damages, including, without limitation, loss of the value of the license Biomet was required to obtain from Zest in order to use the Insert Color Marks following the termination of the Distribution Agreement, loss of sales consummated by Biomet as a result of Biomet's breaches, and the harm, which cannot be fully compensated by damages, to Zest's reputation and goodwill in its LOCATOR® product suite caused by Biomet's misuse of the Insert Color Marks.

76. Zest is entitled to compensation as a result of the harm it has suffered due to Biomet's material breaches of the Distribution Agreement, including indemnification pursuant to Section 9.3 of the Distribution Agreement, which requires Biomet to "indemnify Zest . . . from any and all any and all [liabilities, claims, actions, damages, losses, penalties, fines, costs and expenses, including reasonable attorneys' fees] incurred by [Zest] based upon or arising out of [] any breach by [Biomet] of its representations, warranties or obligations under th[e] [Distribution] Agreement."

77. Zest therefore seeks judgement against Biomet and damages and reasonable attorneys' fees in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Zest respectfully demands judgment in its favor as follows:

- a. An award to Zest of its actual, compensatory, and direct damages in an amount to be determined at trial, together with pre- and post-judgment interest at the rate then prescribed by law;
- b. An award to Zest of its reasonable attorneys' fees, costs, and expenses incurred in this litigation; and
- c. An award to Zest of such other and further relief as the Court deems just and proper.

Dated: July 13, 2023

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By: /s/ Michael J. Garvey

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