

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

STEPHEN E. BARNES, as a shareholder,
director, and officer of and on behalf of
CELLINO & BARNES, P.C., and

Plaintiff,

- v -

CELLINO & CELLINO, LLP, and
DOES 1 through **4**, inclusive,

Defendant.

Civ. Action No.:
19-cv-729

**MEMORANDUM OF LAW
IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR A
PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER AND
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Buffalo, New York
July 15, 2019

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Plaintiff Stephen E. Barnes (“Mr. Barnes”), as a fifty percent (50%) shareholder, director, and officer of, and on behalf of, Cellino & Barnes, P.C. (“C&B” or “Cellino & Barnes” or “Plaintiff”) submits this Memorandum of Law in further support of Plaintiff’s Motion for a Preliminary Injunction and Temporary Restraining Order (“TRO”), as well as in opposition to Defendant Cellino & Cellino, LLP (“C&C” or “Cellino & Cellino” or “Defendant”) Motion to Dismiss.

PRELIMINARY STATEMENT

In an apparent acknowledgement of its infringement on Cellino & Barnes’ intellectual property rights, Defendant represented to the Court that it: (a) reconstituted the firm under the new name “The Law Offices of Anna Marie Cellino LLP”; (b) will market a new phone number; and (c) is revamping its marketing materials and billboards (the “C&C Changes”). While the C&C Changes are a step in the right direction, and should be reduced to a stipulation and Order, the changes do not eliminate Defendant’s unfair competition and infringement on C&B’s intellectual property, nor are they permanent. For the following reasons, Plaintiff’s motion should be granted and Defendant’s motion denied.

First, the instant litigation has not been mooted by the C&C Changes. While C&C represented that it will make the C&C Changes, there is no covenant, contract, or Order in place to prevent Defendant from changing its mind and retroactively undoing the C&C Changes. Therefore, even assuming *arguendo* that the C&C Changes are sufficient, absent binding security preventing Defendant from reverting to its infringing tactics, this instant matter is not mooted.

Second, there remain substantial issues regarding Defendant’s law firm, its claimed changes, and the specifics of the purported “revamped” advertising, let alone the lingering irreparable harm done by Defendant’s marketing barrage. Defendant assembled a premeditated

arsenal of advertising and marketing weapons that were unleashed beginning on June 1, 2019, containing the same look and feel as Plaintiff's longtime branding strategy.

Defendant's explanation for its chosen name and strategy is belied by the advertising and marketing materials themselves. For example (and as shown below), Defendant commissioned a billboard on a local highway prominently displaying the "Cellino" name in large, bold letters, but relegating the law firm's chosen name to an almost imperceptible fine print at the bottom—at least to passing drivers. Defendant's proposed changes do little to alter the emphasis it placed on the "Cellino" name over the mini-script law firm name. Neither do the C&C Changes erase the clear intent of Defendant to misappropriate C&B's goodwill in originally publishing the billboards—for instance, the location of this billboard was not a random choice, but is located to the east and *before* Plaintiff's long-standing billboard (at least for westbound drivers).

Defendant's intent to unlawfully usurp the longstanding goodwill and reputation of Cellino & Barnes remains evident. Even after the C&C Changes, Defendant continues to: (a) advertise and emphasize the "Cellino" name separate and apart from "The Law Office of Anna Marie Cellino LLP"; (b) use a phone number ending in "2020"—despite a myriad of other number combinations—in an attempt to palm off C&B's prior mass marketing of its own "2020" numbers (854-2020, 454-2020, and 1-800-621-2020); and (c) use similar looking billboards, including the color scheme, format, and font Plaintiff has used for years.

If Defendant truly wanted to compete *fairly*, it would: (1) focus its advertising and marketing efforts on The Law Offices of Ann Marie Cellino; (2) create its own unique brand, refrain from prominently displaying the "Cellino" name, and stop relegating its law firm's name to near oblivion; (3) choose a telephone number disassociated with Plaintiff's historic number; and

(4) not publish billboards that are confusingly similar to C&B's. Its prior and current actions demonstrate a clear effort to palm off C&B's marketing by creating confusion in the marketplace.

Third, Defendant erroneously argues that Plaintiff failed to satisfy conditions precedent for bringing a derivative claim and violated Status Quo Orders entered by Justice Chimes in the simultaneous dissolution proceeding. These arguments are entirely without merit: (1) the Dissolution Proceeding is entirely irrelevant to this case; and (2) Plaintiff, in any event, satisfied all the necessary requirements in bringing the instant litigation.

As such, in addition to Ordering the temporary relief Defendant has conceded to, the Court should not stay the instant litigation pending the resolution of the State Court Dissolution Proceeding. Until C&B is dissolved—if indeed it will be dissolved—all parties have an obligation to proceed as though C&B will continue in existence. To do otherwise would be inequitable because the mere filing for dissolution does not create a *fait accompli*; moreover, Plaintiff has a constitutional right to adjudicate these matters and a legal right to the relief sought.

C&B presented unrefuted evidence of success on the merits and irreparable harm. Therefore, the Court should grant Plaintiff's motion in its entirety and deny Defendant's motion in its entirety.

SUMMARY OF CONTRARY PERTINENT FACTS

In May 2017, Ross Cellino filed a dissolution proceeding against Cellino & Barnes and Mr. Barnes in New York Supreme Court, seeking the dissolution of C&B pursuant to New York Business Corporation Law § 1104. (Berloth Decl. ¶3). Cellino & Barnes and Mr. Barnes have opposed Mr. Cellino's petition for dissolution. *Id.* at ¶4. The case is still pending. *Id.* at ¶5.

In its opposition to the instant pending motions, Defendant argues¹: “Mr. Barnes counsel did *not* seek permission from Justice Chimes to file an action in Federal Court on behalf of Cellino & Barnes, P.C. During a court conference on May 23, 2019, . . . Mr. Barnes’s counsel did *not request* the Court’s permission to file a separate action in Federal Court on behalf of Cellino & Barnes, P.C.” (Doc. 24-1 [D.’s Mem. L.] pp. 5-6 (emphasis in original)). The argument is erroneous, inapplicable, and ignores the factual circumstances of the Dissolution Proceeding.

During a conference with Justice Chimes on May 23, 2019, Plaintiff’s counsel expressly advised that Plaintiff intended to initiate separate legal proceedings against Defendant in Federal Court for trademark infringement and unfair competition due to Defendant’s announced intent to open the “Cellino & Cellino” law firm. (Berloth Decl. ¶¶ 12-16). In fact, the attorneys present at the May 23 conference, along with Justice Chimes, had an extensive discussion regarding which matters/issues would be subject to the Dissolution Proceeding versus which matters/issues would be subject to the Federal Court’s jurisdiction. *Id.* Neither the Court nor Mr. Cellino’s counsel raised any objections to the commencement of these Federal Court proceedings, whether based on Status Quo Orders or otherwise. *Id.*

For a full recitation of facts, Plaintiff respectfully refers the Court to the documents submitted herewith in further support of Plaintiff’s motion for injunctive relief and in opposition to Defendant’s motion to dismiss, including: the Declaration of Christopher M. Berloth, Esq., dated July 15, 2019; and the Declaration of Steve Barnes, dated July 15, 2019, with exhibits.

¹ Curiously, despite arguing that Mr. Cellino is not involved with Defendant, Defendant raises a ground in its motion for which it likely lacks standing to raise.

ARGUMENT

POINT I

DEFENDANT’S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE INSTANT LITIGATION IS NOT MOOTED BY THE C&C CHANGES.

Defendant sidesteps the merits of this case and seeks the extraordinary remedy of dismissal based solely upon the unsupported and non-specific representations that Defendant’s infringing conduct will discontinue. Defendant’s argument is unavailing and should be summarily denied.

First, Defendant has not overcome the “*formidable burden*” imposed by the United States Supreme Court:

a defendant claiming that its voluntary compliance moots a case bears the *formidable burden* of showing that it is *absolutely clear* the alleged wrongful behavior could not be reasonably expected to recur.

Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (quoting Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 190 (2000)) (emphasis added) (the “*Already Test*”). None of Defendant’s purported concessions have been reduced to an agreement or Court Order. Moreover, the C&C Changes are, by Defendant’s own admission, merely temporary. (A.M. Cellino Decl. ¶18).

Thus, there is nothing to prevent Defendant from changing its mind and the case is not mooted. See City of Mesquite v. Aladdin’s Castle, Inc., 455 U.S. 283, 289 (1982); see also Already, 568 U.S. at 91 (citing Aladdin’s Castle favorably).

Second, there remain substantial issues regarding Defendant’s conduct even after the C&C Changes. In acknowledging the current “case and controversy,” Defendant argues it has now been mooted because Defendant has temporarily agreed to change the name of its law firm and has agreed to make several non-specific changes to its marketing materials. (See A.M. Cellino Decl. ¶11). However, the “devil is in the details” of these statements. For instance,

- Ms. Cellino states, “[w]e will no longer market the phone number 888.2020”—there are two issues with this statement: (a) she does not say Defendant will *not use* 888-2020 and/or continue accepting calls from the number—this is of particular import as the 888-2020 billboards are still up; and (b) Defendant *does* intend to market the phone numbers 333-2020 and 259-2020, (see A.M. Cellino Decl. Exs. 2 & 3), which is an attempt to palm off C&B’s substantial prior marketing of its own “2020” numbers;
- Ms. Cellino states, “[o]ur website, CellinoLaw.com, is not yet active . . .” – insinuating Defendant still intends to continue to market under that domain name and the “Cellino” name separate from the law firm’s name; and
- Ms. Cellino states, “I changed our billboard design”—however, she does not explain why both the previous—and still in active use—billboards and current billboards both prominently feature the “Cellino” name, while relegating the firm’s name to an almost imperceptible small font (at least to passing motorists). Nor does she explain why the placement of Defendant’s billboard is so close in proximity to, and placed right before, Plaintiff’s billboard—at least to motorists traveling into Downtown Buffalo.

Simply put, the C&C Changes do not eliminate the case and controversy.

A. Defendant fails the Supreme Court’s *Already* Test as the C&C Changes have not been reduced to an agreement, Order, or other binding security.

Article III of the United States Constitution grants courts the authority to adjudicate “cases” and “controversies.” DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006). Defendant at least tacitly concedes there is a case and controversy here. Further, Defendant fails to even address, let alone refute, the evidence presented and arguments made by Plaintiff in its motion for a TRO/Preliminary Injunction.²

Instead, Defendant contends that because it has agreed to change the name of its law firm and somehow “revamp” its marketing and advertising materials, albeit only on a temporary basis, that somehow moots the entire case. Defendant fails both as a matter of proof and as a matter of

² Defendant’s argument is limited to simple statements, such as: “defendant continues to deny [its conduct] is otherwise unlawful.” (Doc. 24-1 [D. Mem. L], p. 17).

law to overcome its “formidable” burden. Thus, Defendant’s motion should be summarily denied, *and*, Plaintiff’s motion, for both temporary and preliminary injunctive relief, should be granted.³

In Already, the Supreme Court reaffirmed the “voluntary cessation doctrine,” reiterating that “[a] case becomes moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III—‘when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.’” Already, 568 U.S. at 91 (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982)). The Court cautioned, “that a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued.” Id.

Otherwise, a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all of his unlawful ends. Given this concern, our cases have explained that “*a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not be reasonably expected to recur.*”

Id. (citing Friends of the Earth, 528 U.S. at 190) (emphasis added).

Defendant has failed to meet its formidable burden.

1. Defendant’s Representations Have Not Been Reduced to an Agreement or Order.

It is axiomatic that in absence of a written agreement or Court Order a party is not bound by non-specific statements or representations made during litigation, nor are they readily enforceable. Here, Defendant seeks to moot Plaintiff’s entire case by representing it is making several changes, but Defendant has not provided any covenant or stipulated to an Order as to those representations, let alone provided the Court or Plaintiff with specifics of the same. Therefore,

³ Plaintiff submits, at the very least, the Court should award Plaintiff the temporary relief Defendant represents it will refrain from. Defendant’s withdrawal of that conduct demonstrates that the balancing of the equities balances in Plaintiff’s favor as Defendant can clearly exist and conduct its business with said relief in place whereas Plaintiff will be irreparably harmed absent the TRO and/or preliminary injunction.

Defendant failed to show “that it is absolutely clear” its alleged wrongful behavior could not occur in the future.

2. The Unlawful Conduct is Likely to Recur.

Even if the Declaration of Anna Marie Cellino could be deemed to constitute an agreement by Defendant to refrain from its unlawful conduct, the proposed changes set forth in the Declaration are *temporary*. (A.M. Cellino Decl. ¶18). Ms. Cellino states, “I agree not to use the name Cellino & Cellino LLP *until* Justice Chimes issues a dispositive decision” *Id.* (emphasis added). That is wholly insufficient to satisfy the heavy burden imposed by the *Already* Test.

Defendant’s representations do not show “that it is absolutely clear the allegedly wrongful behavior could not be reasonably expected to recur.” *Already*, 568 U.S. at 91. Rather, Defendant’s “concession” is merely an attempt to punt this litigation until a time when it may potentially be more convenient for Defendant to litigate these issues. This is consistent with Defendant’s repeated attempts to stay this matter until the Dissolution Proceeding is resolved.

Simply put, Defendant has not set forth a meritorious defense to Plaintiff’s motion for injunctive relief, but rather asks the Court to delay these proceedings until a time where the Dissolution Proceeding *may possibly* provide a defense for Defendant to assert. The function of the Courts is not meant to permit defendants to pick and choose to litigate certain matters at times most convenient to them and where they may or may not have obtained a potentially stronger position. Therefore, Defendant’s request is insufficient, inequitable, and should be denied.

B. There remain outstanding issues and disputes regarding trademark infringement and unfair competition even after the C&C Changes.

As set forth in full below, the C&C Changes do not eliminate the issues in dispute in this case. Simply put, Defendant is still unfairly competing with C&B and continues to infringe on C&B’s intellectual property and Plaintiff’s proof and arguments regarding irreparable harm are

still applicable and viable. Accordingly, Plaintiff respectfully refers the Court to, and hereby incorporates, the arguments set forth in “Point II.A” below. See infra.

POINT II

C&B IS ENTITLED TO A PRELIMINARY INJUNCTION AND TRO.

A. Plaintiff is likely to succeed on the merits as the C&C Changes do not eliminate Defendant’s infringement and unfair competition.

At the outset, it should be noted that nowhere in its opposition papers does Defendant: (a) contest that the C&B Marks are valid trademarks; or (b) contest or even address the *Polaroid* factors. Therefore, Defendant tacitly acknowledges and admits the validity and sufficiency of the proof and legal arguments submitted by Plaintiff in support of its motion.

Additionally, Plaintiff’s motion for injunctive relief remains viable and should be granted because (1) Defendant is still unfairly competing with C&B and infringing on C&B’s intellectual property despite the C&C Changes; (2) the legal authority and precedent cited by Plaintiff in its original motion papers remains uncontroverted by Defendant, whereas the few cases cited by Defendant in opposition are not only distinguishable, but actually support Plaintiff’s application; and (3) there is additional evidence of actual confusion between Defendant and Plaintiff that was not available at the time Plaintiff originally filed this motion, (see Barnes Decl. & Exs. 2 & 3).

1. Defendant is still unfairly competing with C&B and infringing upon C&B’s intellectual property.

The Lanham Act is clear:

Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device, *or any combination thereof*, . . . which[] is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is like to be damaged by such an act.

15 U.S.C. § 1125(a)(1) (emphasis added). Defendant’s advertising and marketing campaigns, even after the C&C Changes, still demonstrate Defendant’s attempt to palm off Cellino & Barnes’ mass spending and advertising efforts and capitalize off its good will and reputation. Defendant admittedly (i) still intends to emphasize, feature, and advertise the name “Cellino” separate and apart from its actual firm name, (ii) intends to continue to use a “2020” phone number because of the ever-present market recognition resulting from C&B’s years of marketing its own “2020” phone numbers, and (iii) continues to advertise and market itself through materials substantially similar to C&B—i.e. through similar billboards with a similar look and feel.

For the reasons set forth herein, Plaintiff’s motion for a TRO and preliminary injunction should be granted in its entirety.

- i. Defendant’s attempts to market the name “Cellino” separate and apart from Defendant’s full name is improper, infringing, and constitutes unfair competition.

Defendant’s name change, though welcome and what should have been done from the firm’s inception, is not the crux of Plaintiff’s case—despite Defendant’s attempt to make it seem as though it is. Rather, the main issue in this case is Defendant’s continued attempts to usurp Plaintiff’s bought and paid for success instead of developing its own independent brand strategy. Its motives are evident. Defendant continues to feature the “Cellino” name (not the new law firm name) and insists on using a “2020” telephone number (when it has the choice of a myriad of others). These actions, coupled with the “head start” Defendant has gotten from its initial infringement⁴, tells the real story.

Additionally, rather than addressing the legal authority on this matter, Defendant simply argues that “Cellino” is “their name” and they should be able to use it as they wish. However, that

⁴ Defendant’s original billboards remain unchanged or blackened out.

is not what the law says. Whether an infringer is a wine company, law firm, or some other business, there are restrictions on the use of surnames where a prior brand has been established and is protectable. See Taylor Wine Company, Inc. v. Bully Hill Vineyards, Inc., 569 F.2d 731 (1978).

TAYLOR WINE

The Taylor Wine matter—the seminal surname trademark cases in the Second Circuit—involved two wine companies—the plaintiff, Taylor Wine Co. (“Taylor Wine”), and the defendant, Bully Hill Vineyards, Inc. (“Bully Hill”)—owned and operated by members of the same “Taylor” family. 569 F.2d at 733. Bully Hill began marketing a new line of wines under its owner’s surname “Taylor.” Id. Taylor Wine commenced litigation in the Western District of New York, including for injunctive relief, to prevent Bully Hill from doing business under and advertising the “Taylor” surname. Id.

The Second Circuit largely affirmed, but modified, in part, this Court’s Order enjoining Bully Hill from using his last name “Taylor”,

or any colorable imitation thereof in connection with any labeling, packaging materials, advertising, or promotional materials for any of its products, from infringing plaintiff’s trademarks, and from continuing to engage in acts of unfair competition.

569 F.2d at 733. The Second Circuit noted, among other things, that Taylor Wine “spent almost ten million dollars in advertising its wine products under the Taylor name in the last ten years[.]” and that its trademarks had “come to be accepted by the consuming public as identifying the distinctive product of the Taylor Wine Company. Id.⁵

⁵ The factual circumstances of spending \$10 million on advertising and the “Taylor” trademarks “having come to be accepted by the consuming public pale in comparison to C&B’s more-than \$100 million marketing investment and mass, state and nation-wide consumer recognition.

The Taylor Court recognized the right of a person to use their surname, but explained there are limitations on such use, particularly where there is a prior use in the same space. Id. Ultimately, the Court held that even if a “second comer . . . evinces a genuine interest in establishing an enterprise in which his own skill or knowledge can be made known to the public,” the ability to use one’s surname shall still be limited and “*restricted.*” Id. at 735 (emphasis added). The Court further held that when confusion is likely “there must obviously be some limitation on an individual’s unrestricted use of his own name.” Id.

Ultimately, the Second Circuit held that Bull Hill could not “use the ‘Taylor’ name as a trademark” *despite the fact it was the owner’s surname.* Id. at 736. Rather, the Court limited Bully Hill’s use of the name “Taylor” such that “the defendant may show [his] personal connection” with his own company only by using his signature on advertisements and labels (and only with an adequate disclaimer). Id.

The same reasoning is applicable to the instant case. While Plaintiff concedes that Defendant has a limited and restricted right to use the “Cellino” name, that right is severely limited because of Plaintiff’s pre-existing and longstanding good will and registered trademarks.

Importantly, Cellino & Barnes is not asking this Court to go as far as the Second Circuit did in Taylor Wine. Plaintiff acknowledges the New York Rules of Professional Conduct require Defendant to use the surname of one of its attorneys in its firm name. However, New York law does not require Defendant to focus predominantly on and emphasize the name “Cellino” apart from Defendant’s full firm name. Indeed, the reasoning from Taylor Wine applies equally here *to prevent* such predominant use. Id.

In a vacuum—i.e. without looking to Defendant’s other marketing decisions such as telephone number use and similar billboards, etc.—Defendant’s advertising “The Law Office of

Anna Marie Cellino LLP” would not, in and of itself, infringe Cellino & Barnes’ intellectual property rights or constitute unfair competition. Emphasizing, featuring, and/or focusing solely on the “Cellino” name does infringe on Plaintiff’s rights and causes mass confusion between the two firms; it is an unlawful attempt to steal the success, good will, and positive reputation Plaintiff developed over decades.⁶ This is the very issue the Second Circuit dealt with in Taylor Wine.

Plaintiff is not asking for the Court to follow the exact, strict restrictions applied against use of a surname in Taylor Wine, but is asking this Court to recognize the distinction between the personal use of one’s name, versus the unlawful infringing use of a previously registered and established mark. Rather, Plaintiff submits that Defendant be restricted from (a) using confusingly similar names, including Cellino & Cellino, and (b) emphasizing and advertising “Cellino” separate and apart from the law firm’s actual name: “The Law Office of Anna Marie Cellino, LLP.” These are marketing efforts that cause confusion and palm off Cellino & Barnes’ good will.

To follow the edicts set out by the Second Circuit: “To the extent [Defendant] can exploit [its] own knowledge and techniques . . . [it] may do so with the limitations noted, if [it] *refrains from trading on the goodwill of the plaintiff company by competing unfairly.*” Id.

TILLERY, TARTELL, AND MILBANK

In Defendant’s opposition, other than regurgitating the elements for a TRO/Preliminary Injunction, Defendant cites a mere three cases for the proposition that Defendant is allowed to use its surname in an unrestricted fashion. (Doc. 24-1 [D.’s Mem. L.], pp. 13-14). At the same time,

⁶ As the instant papers are in reply—and because Plaintiff’s arguments as to secondary meaning and likelihood of confusion were well developed in Plaintiff’s original papers, and uncontroverted by Defendant—Plaintiff does not reiterate its argument here. Rather, Plaintiff respectfully refers the Court to its original motion papers. (Doc. 18 [P.’s Mem. L.], pp. 6-20).

Defendant fails to even address, let alone distinguish, any of the cases cited by Plaintiff in support of its motion, not even the controlling Taylor Wine case.

Moreover, not one of the cases cited by Defendant is inconsistent with Taylor Wine, all of them cite legal standards that actually support Plaintiff's position, and they are all factually distinguishable from the instant matter because they examine matters wherein the plaintiffs failed to establish that their names had established secondary meaning. See Tillery v. Leonard & Sciolla LLP, 437 F. Supp. 2d 312, 322 (E.D. Pa. 2006) ("Tillery is not likely to show his name has acquired a secondary meaning supporting the grant of trademark rights."); Tartell v. S. Florida Sinus & Allergy Center, Inc., 790 F.3d 1253, 1255 & 1258 (11th Cir. 2015) (ruling against the plaintiff because he "failed to present substantial evidence that his name had acquired secondary meaning in the minds of consumers[.]"); Milbank Tweed Hadley & McCloy LLP v. Milbank Holding Corp., 2007 WL 1438114 *4, 82 U.S.P.Q.2d 1583 (C.D. Cal. 2007) ("the Court finds that no reasonable jury could find that 'Milbank' has acquired secondary meaning.").

There can be no argument, and indeed Defendant has failed to submit one, that "Cellino & Barnes" failed to acquire secondary meaning. As such, Tillery, Tartell, and Milbank (collectively the "Defendant-cited Cases") are entirely distinguishable and do not contradict the well-settled Taylor Wine standard. In fact, the Defendant-cited Cases further support the idea that the Taylor Wine restriction on surname marketing is applicable to law firms.

In Tillery, an intellectual property law attorney (Tillery) sought injunctive relief against the defendant law firm, with which he was formerly a partner, claiming the defendant had several vestige references to a former domain name including the name "Tillery." Id. The district court denied the motion, finding that Tillery had not established a trademark use of his name, the name failed to acquire secondary meaning, and there was thus no likelihood of success. Id.

While Tillery involved a dispute between law firms and resulted in the Court denying the plaintiff's application for injunctive relief, the court did so in a way that furthers Cellino & Barnes' arguments. Id. The Tillery decision expressly discussed one of the seminal law firm cases—Suisman, Shapiro, Wool, Brennan, Gray, & Greenberg, P.C. v. Suisman, 80 U.S.P.Q.2d 1072, 2006 WL 387289 (D. Conn. 2006) (granting injunctive relief to the plaintiff law firm for claims brought under the Lanham Act)—and distinguished the Tillery facts from the circumstances in Suisman. See Tillery, 437 F. Supp. 2d at 322, n. 6. The Court noted:

In the case of a law firm, *a name or combination of names can acquire a secondary meaning* because it no longer designates the actual people who bear those names, but a separate entity that is a source of services. This is not the case where the plaintiff is an individual lawyer whose mark does not designate an entity separate from himself.

Id. (emphasis added). Tillery explicitly sets forth that law firm names are able to be protected under the Lanham Act, be it a single “name or a combination of names.” Id.

This is further supported by Milbank, wherein a New York based plaintiff/law firm commenced a lawsuit against a Los Angeles based defendant/real estate company that shared the “Milbank” name. See 2007 WL 1438114 at *4. The court ultimately held that the plaintiff did not establish secondary meaning in the name “Milbank.” Id. However, the Milbank court *did not* hold that a law firm *could not* establish that it acquired secondary meaning in the initial name in its title.

Id. Rather, in making its decision, the court explained its reasoning as follows:

One of the most important factors that Courts consider when analyzing secondary meaning is whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer. The most common and effective way to demonstrate actual association is by means of a survey. Although [plaintiff] indicated its intent to conduct such a survey to the Magistrate Judge in this action, no survey has been submitted to the Court. Consequently, the Court has no meaningful evidence of actual association.

Id. at *3 (internal citations and parentheticals omitted).

The Milbank plaintiff's failure to submit evidence demonstrating actual association, including failure to submit a survey, is entirely distinguishable from the instant case. Indeed, Plaintiff has trademark registrations that are entitled to a *prima facie* presumption of validity that it has demonstrated secondary meaning. Moreover, in an abundance of caution, Plaintiff still submitted evidence to satisfactorily demonstrate that both "Cellino & Barnes" and the "Cellino" portion of the C&B name acquired secondary meaning. Defendant failed to rebut this evidence.

In fact, C&B submitted a survey, which is the "most common and effective way to demonstrate actual association" and secondary meaning. Id. The results of the survey demonstrate, in pertinent part:

- Seventy percent (70%) of respondents had heard of Cellino & Cellino (the "Relevant Group")—tellingly, seventy-two percent (72%) of the respondents polled *before* C&C opened for business and started advertising on June 1, 2019, answered that they had heard of C&C;
- Of the Relevant Group eighty-eight percent (88%) answered that C&C was either "Attorney/Law/Legal" or "Personal Injury/Accident/Auto Injury Lawyers"; and
- When asked how they heard about Cellino & Cellino, the Relevant Group answered as follows:

	Total	Before June 1
TV/Television commercials	55%	54%
Advertising/Commercials (no source)	22%	23%
Radio Commercials	16%	15%
Billboards	12%	11%

(Doc. 4-17 [Bachwitz Decl. Ex. 3]).

During these questions, consumers were asked about "Cellino & Cellino" *not* "Cellino & Barnes", and yet, they still clearly answered the survey under the confused-impression that C&C was C&B. This is particularly evident as the poll results were largely conducted and completed *before* C&C started advertising and marketing itself to the public on June 1, 2019—yet, still the responses overwhelmingly demonstrate consumers' belief that they saw C&C advertisements.

This proves at least two things: (1) actual confusion exists between C&C and C&B;⁷ and, more importantly for this particular analysis, (2) the confusion consumers experienced was because they associate the “Cellino” name with both “C&B” and personal injury law. Stated another way, in questions regarding “Cellino & Cellino”—absent “Barnes”—consumers still associated the mark “Cellino” with C&B, the C&B Marks, law firms, personal injury law, and C&B’s advertisements. Thus, unlike Milbank, C&B submits evidence of actual association sufficient to demonstrate secondary meaning.

The secondary meaning is demonstrated even further by statements made by Mr. Cellino, such as:

- “Nobody calls a Harley Davidson ‘a Davidson,’” (Doc. 1 [V. Compl.], ¶116(e)); and
- “Cellino & Cellino, sound familiar? It should, it’s the same firm.” Id. at ¶121.

These statements clearly demonstrate that, in addition to the C&B name in its entirety, the “Cellino” portion of “Cellino & Barnes” has indisputably acquired secondary meaning and is a protectable mark. Thus, Defendant should be enjoined from infringing on it.

- ii. Defendant’s use of “2020” phone numbers is a clear attempt to capitalize off C&B’s prior marketing and advertising successes.

Defendant is not permitted to infringe upon C&B’s marks (854-2020, 454-2020, and 621-2020) and use confusingly similar “2020” numbers to unfairly compete. “Telephone numbers may be protected as trademarks, and a competitor’s use of a confusingly similar telephone number may be enjoined as both trademark infringement and unfair competition.” Dial-A-Mattress Franchise Corp. v. Page, 880 F.2d 675, 678 (2d Cir. 1989). Indeed, protection is available for phone numbers

⁷ Plaintiff has uncovered additional evidence of actual confusion following Defendant’s June 1, 2019 marketing launch. (See Barnes Decl. Exs. 2 & 3).

even where only the last four digits are the same. See Dial-A-Mattress, 880 F.2d at 678 (citing Chicago World’s Fair—1992 Corp. v. The 1992 Chicago World’s Fair Comm’n, Civ. No. 83 C 3424 (N.D.Ill. Aug 16, 1983) (LEXI, Genfed library, Dist file) (protecting use of telephone number 444-1992 against use of telephone number 434-1992 in context where “1992” had special significance))⁸; Future Lawn, Inc. v. Maumee Bay Landscape Contractors, LLC, 542 F. Supp. 2d 769 (N.D. Ohio 2008) (finding unfair competition resulting from the defendant’s use of “720-TURF” compared to the plaintiff’s various phone numbers ending in “TURF”).

Therefore, a telephone number is protectable so long as it is either inherently distinctive or acquired secondary meaning. See Dial-A-Mattress, 880 F.2d at 678; Cline v. 1888-Plumbing Group, Inc., 146 F. Supp. 2d 351, 362-63 (S.D.N.Y. 2001).⁹

In determining whether a telephone number is generic, a court looks at whether the number constitutes “a generic description of a class of products, or ‘genus[.]’” Cline, 146 F. Supp. 2d at 362. A mnemonic number—such as the 1-800-PLUMBING number in Cline—is capable of describing certain products. See generally id. However, it is axiomatic that a group of numbers, (such as 854-2020) cannot, without secondary meaning or advertising attached to it, describe goods or services. Therefore, a numeric number typically cannot be generic.

Similarly, a numeric number typically cannot be descriptive. “A mark is descriptive if it ‘tells something about a product, its qualities, ingredients or characteristics. It may point to a

⁸ Plaintiff has been unable to locate or obtain a copy of the decision in Chicago World’s Fair, Civ. No. 83 C 3424, but rather relies on the Second Circuit and Northern District of Ohio’s discussions of the decision in Dial-A-Mattress and Future Lawn respectively.

⁹ In making this analysis, it is essential to note the difference between a mnemonic telephone number (i.e. 1-800-LAWYERS) and a numeric telephone number (i.e. 716-854-2020). Mnemonic numbers pose a much more difficult analysis than numeric.

product's intended purpose, its function or intended use, its size, or its merit." *Id.* Again, a number such as 854-2020 is incapable of describing goods or services.

Thus, as Plaintiff's "2020" numbers are incapable of being descriptive or generic, they have to be categorized as arbitrary, fanciful, or suggestive (and likely not suggestive for the same reasons as above), and are therefore inherently distinctive.

This makes practical sense. A number such as 854-2020 has nothing that fundamentally connects it to personal injury law. Rather, the only reason Plaintiff's "2020" numbers are so recognizable, and indeed the reason they have a connection to personal injury law, is because Plaintiff undertook a more-than decade long marketing strategy to turn its law firm, including the "2020" numbers, into arguably the most recognizable law firm brand in history. The numbers, along with the jingle of which they are a part, have clear secondary meaning throughout New York.

C&B advertised the "2020" telephone numbers for well over a decade (Barnes Decl. ¶¶ 4-11), and many Western New Yorkers still sing the jingle with the old "2020" numbers included. In fact, the survey Plaintiff submits in support of its motion demonstrates that seven percent (7%) of the Relevant Group thought 854-2020, the C&B number, was still in use and also was Defendant's. (See Doc. 4-17 [Bachwitz Decl. Ex. 3]). Even if the "2020" numbers were not inherently distinctive, C&B clearly acquired secondary meaning for its "2020" numbers.

Therefore C&B is entitled to protection for its "2020" numbers so long as it shows a likelihood of confusion pursuant to the *Polaroid* Factors. See Future Lawn, 542 F. Supp. 2d 776-80 (finding a likelihood of confusion between 720-Turf and 843-TURF both as infringement of a service mark and for unfair competition). The majority of the *Polaroid* Factors here involve the same discussion and analysis as set forth in Plaintiff's original motion papers. (See Doc. 18 [P.'s

Mem. L.], pp. 7-20). Plaintiff only discusses those factors varying from the overall analysis: strength of the mark and similarity of the mark.

The “2020” numbers are strong marks because they are not generic or descriptive. See Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc., 15 F. Supp. 2d 389, 394 (S.D.N.Y. 1998) (explaining that arbitrary, fanciful, or suggestive marks are considered “strong” marks). Moreover, it is undeniable that there is substantial public recognition of the “2020” numbers. In fact, Cellino & Barnes still receives calls from consumers dialing the “2020” numbers. (Barnes Decl. ¶¶ 4-11). Indeed, the reason C&B continued to use the “2020” numbers all these years, despite mainly advertising the “888-8888” numbers, was to continue to capitalize off the residual goodwill still associated with the firm’s investment of scores-of-millions of dollars for its more-than-a-decade-long marketing of the “2020” numbers. See id.

As for similarity of the marks, the numbers speak for themselves: all end in “2020.” In Future Lawn, the defendant unsuccessfully argued that the marks 843-TURF and 531-TURF “are not similar because the marks are not identical, and that defendant displays its name . . . along with its phone number in all promotional and advertising materials.” 542 F. Supp. 2d 777. The Court explained: “[i]n taking into account what a consumer might remember, I must avoid mere side-by-side comparison. The issue is the ‘likelihood’ of confusion, not the mere ‘possibility’ of confusion among relevant consumers.” Id. The Court found:

For over eleven years in the Toledo region [plaintiff] has denominated its phone number with the term TURF. I find it quite likely that a customer with a general, vague, or hazy recollection of plaintiff’s advertising could understand [defendant’s] use of 720-TURF as another derivation of [plaintiff’s] mark. At the very least, persons seeking [plaintiff and defendant’s services] might assume [the parties] are somehow related, so that whichever TURF number they call, they are, ultimately reaching the same provider.

Id. at 778. The court held that “[t]his important factor weighs heavily in plaintiff’s favor.” Id.

The Future Lawn analysis can be applied directly here. For over a decade in the Buffalo region, Cellino & Barnes denominated its phone number with the numbers “2020.” It is quite likely that a client with a general, vague, or hazy recollection of C&B’s advertising could understand Defendant’s use of “2020” as another derivation of Cellino & Barnes’ mark. At the very least, persons seeking personal injury attorneys might assume Plaintiff and defendant are somehow related, so whichever “2020” number they call, they are, ultimately reaching the same provider.

This is the result Defendant hopes for. C&B has substantial residual goodwill remaining with the “2020” numbers. There is no reasonable reason Defendant is so adamant about retaining a “2020” number other than to market it alongside the “Cellino” name, capitalize off C&B’s goodwill, and get an instant jumpstart in the personal injury world. The combination of “Cellino” and “2020” is instantly recognizable in New York’s personal injury legal world. Such palming off should not be permitted.

iii. Defendant’s similar billboards add to the confusing similarity between the two firms.

Defendant, both in an unsworn legal brief, and in the Declaration of Anna Marie Cellino, states in cursory fashion, “[t]he firm is revamping its marketing materials and billboards.” (Doc. 24-1 [D.’s Mem. L.], pp. 7 & 12; see also AMC Decl. at ¶ 11). However, Defendant fails to provide any specificity or detail on what the “revamped” marketing or advertising will be, other than providing a letter to a radio station and a mock-up for a billboard, both of which raise more questions than answers. (See AMC Decl. Exs. 2 & 3). Specifically, the proposed billboards are substantially similar to C&B’s current billboards (as seen below), let alone all of Plaintiff’s prior billboard publications. (See Barnes Decl. Ex. 1).

The proposed billboard (as seen below) continues the prominence of the “Cellino” name, and relegates the changed name of Defendant’s law firm to an almost imperceptible (at least to

passing motorists) afterthought; and the phone number continues to include a “2020” number. Moreover, as seen below, it is still substantially similar to the C&B billboards—even in a side-by-side comparison, let alone viewing one and only recalling the other.



(A.M. Cellino Decl. Ex. 3).



(Barnes Decl. ¶13, Ex. 1).

The examination of these billboards supports that there remains a case and controversy and demonstrates that the voluntary cessation burden has not been overcome. For example, in her Declaration, Ms. Cellino states, “I do not want to be confused with Barnes or my husband, Ross Cellino.” AMC Decl. at ¶ 9. The billboards above belie that notion. Moreover, if that were the case, and Defendant were not seeking to unfairly compete or trade off the good will of Plaintiff, why would Defendant be so intent on featuring *both* the “Cellino” name *and* using “2020” numbers, when its full name is The Law Office of Anna Marie Cellino and there are so many other numeric combinations of telephone numbers?

C&B spent substantial effort and resources into marketing its own “2020” numbers (854-2020, 454-2020, and 621-2020) for well over decade (Barnes Decl. ¶¶ 4-11)—so much so that a large part of the Western New York public still sings the “C&B Jingle” ending with “call 845-2020” or “call 454-2020.” Indeed, C&B still accepts calls from “854-2020”, “454-2020”, and “621-2020” because the firm knew, even when it switched to primarily marketing “888-8888,” there would still be substantial residual calls to its “2020” numbers. Id. In fact, C&B continues to receive substantial calls to its “2020” numbers. Id.

The reason Defendant so fervently continues to market the name “Cellino” in conjunction with a “2020” number is because Cellino & Barnes made it famous and created mass consumer recognition that continues to this day. Defendant is not permitted to market its firm by palming off C&B’s gargantuan marketing efforts and capital investments.

In addition to the examples noted above, and without knowing its other advertising and marketing plans, Defendant acknowledges that its website—CellinoLaw.com—will continue to feature the Cellino name (not The Law Offices of Anna Marie Cellino).¹⁰ Moreover, Ms. Cellino does not indicate *who* owns the “www.CellinoandCellino.com” domain name or whether Defendant *ever* owned or was licensed to use the domain name, but simply says Defendant “is not the owner.” Id. at ¶ 17.

For a firm that purportedly does not want to be associated with and wants nothing to do with Cellino & Barnes, Defendant (a) implemented a marketing and advertising campaign virtually identical to Cellino & Barnes and (b) is working tirelessly to continue to advertise in a confusingly similar way. Plaintiff contends that each aspect of Defendant’s marketing and advertising is

¹⁰ Defendant incredibly asserts the case should be mooted because “CellinoLaw.com is still under construction,” but acknowledges it will still go “live.” (Doc. 24-1 [D.’s Mem. L], p. 13).

suspect and unfairly competing with C&B on their own. Nonetheless, viewing Defendant's advertising and marketing in its entirety, Defendant cannot credibly argue that it is doing anything but trying to capitalize off and palm off Cellino & Barnes success when it (a) continues to advertise primarily the name "Cellino" and not the *firm's* actual name; (b) adamantly insists on using a "2020" number, despite the plethora—indeed millions—of other telephone numbers in existence that are at least as easy to market; and (c) publishes billboard after billboard that follows the same format, font, layout, and even color scheme as pre-existing Cellino & Barnes billboards.

Therefore, there remains a case and controversy despite the C&C Changes.

POINT III

PLAINTIFF DID NOT VIOLATE ANY STATE COURT *STATUS QUO* ORDER.

Defendant erroneously argues that Plaintiff's pleadings are insufficient to bring an action pursuant to New York Business Corporation Law ("BCL") § 626. However, BCL § 626 provides, in a derivative action, "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board *or the reasons for not making such effort.*" (Emphasis added). This is also known as pleading that "it would have been futile for plaintiff to have made a demand[.]" Halpert Ents., Inc. v. Harrison, 362 F. Supp. 2d 426, 428 (S.D.N.Y. 2005). Plaintiff clearly satisfied this requirement. (See Doc. 1 [V. Compl.], ¶¶ 130-37).

However, Defendant wrongly comingles two different issues: the BCL's requirement that Plaintiff plead futility and a purported requirement that Plaintiff plead that it is in compliance with existing *Status Quo* Orders in the concurrent State Court Dissolution Proceeding. The Dissolution Proceeding is entirely irrelevant to the instant proceedings, and Defendant's argument fails for two reasons: (1) there is no requirement for Plaintiff to plead compliance with *Status Quo* Orders, and (2) more importantly, Plaintiff was not required to obtain consent under the *Status Quo* Orders.

While there is a clear connection between Defendant in this case and Mr. Cellino in the Dissolution Proceeding—and indeed, as Plaintiff contests, an impermissible level of involvement and commingling between Mr. Cellino and Defendant—it should be noted that Mr. Cellino, not Defendant, is the party to the Dissolution Proceeding. Yet, Mr. Cellino’s counsel neither raised nor filed any objection in the Dissolution Proceeding that Plaintiff purportedly “failed to seek permission” from the State Court to file the instant action.

The reason is self-evident: it was not needed. The *Status Quo* Orders were enacted to ensure that no party interfered with the day-to-day operations of Cellino & Barnes, P.C. and to preserve the operational “status quo” of the firm. The *Status Quo* Orders do not bar the initiation of this derivative action—which consequently Mr. Barnes has a statutory right to commence. BCL §626.

The fact that the *Status Quo* Orders do not bar the instant action is apparent by the factual circumstances present. On May 23, 2019, Mr. Cellino’s counsel—and *not* Defendant’s counsel—attended a conference with Justice Chimes and Plaintiff’s counsel. Mr. Cellino’s counsel witnessed, and partook in, the discussion whereby Plaintiff’s counsel detailed its intent to initiate the instant litigation against Defendant *in Federal Court*. (Berloth Decl. ¶¶ 12-16). Tellingly, despite Defendant’s arguments that the *Status Quo* Orders bar this suit, *neither the Court nor Mr. Cellino’s counsel raised any objection to Plaintiff’s commencing this action*, nor did they otherwise reference the *Status Quo* Orders as obstacles to the instant suit. *Id.*

Therefore, Defendant’s entire argument is meritless and should be denied and disregarded.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court (1) grant a preliminary injunction and TRO in Plaintiff’s favor and prevent Defendant from continuing to infringe upon its intellectual property and (2) deny Defendant’s cross-motion to dismiss in its entirety.

Dated: Buffalo, New York
July 15, 2019

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