UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

Plaintiff,

v. Case No. 1:19-cv-00729-EAW

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

Defendants.

DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND IN SUPPORT OF MOTION TO DISMISS OR STAY

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The defendant submits this Memorandum of Law in opposition to the Motion for Temporary Restraining Order filed by Plaintiff Stephen E. Barnes, as a shareholder, director, and officer of and on behalf of Cellino & Barnes, P.C., (hereafter "the plaintiff" or "Mr. Barnes"), and in support of the defendant's Motion to Dismiss.

PRELIMINARY STATEMENT

Earlier this year, Anna Marie Cellino formed a law firm with her two daughters, Jeanna and Annmarie. They named their firm Cellino & Cellino LLP. This name accurately reflected the firm's ownership and satisfied New York Rule of Professional Conduct 7.5(b), which prohibits a lawyer from practicing law using a "name that is misleading as to the identity of the lawyer or lawyers practicing" in the firm or a "name containing names other than those of one or more lawyers in the firm." Cellino & Cellino LLP was managed by talented, experienced attorneys. Anna Marie has more than thirty-eight years of experience as a practicing lawyer. Jeanna and Annmarie have been recognized for achieving outstanding results for their clients.

Anna Marie is married to Ross Cellino, a named partner in the firm of Cellino & Barnes, P.C. As reported widely in the media, Ross Cellino and his law partner, Stephen Barnes, are parties to a contentious legal dispute. Mr. Cellino filed an action in New York State Supreme Court, Erie County (Justice Deborah A. Chimes) to dissolve Cellino & Barnes, P.C. Mr. Barnes has opposed Mr. Cellino's dissolution application.

Anna Marie, Jenna, and Annmarie Cellino have never practiced law with Cellino & Barnes, P.C. They are not parties to the Cellino & Barnes, P.C. dissolution proceeding. But as a "leverage play" in his dissolution dispute, Mr. Barnes decided to file this baseless federal case against his law partner's wife and children.

Mr. Barnes's request for relief in this case is truly remarkable: He asks the Court to prevent three lawyers from practicing law under their own names. The New York Disciplinary Rules—and the caselaw interpreting them—precludes his request for relief. Mr. Barnes's contention that a firm managed by Anna Marie, Jeanna, and Annmarie Cellino is somehow "confusingly similar" to Cellino & Barnes, P.C. is supported by no competent evidence, and it defies common sense. If there ever were a case of non-confusion, this is it. Mr. Barnes is clearly not working with a firm called "Cellino & Cellino," and Anna Marie Cellino is not working with Mr. Barnes. Consumers of legal services can understand that fact based on even a cursory review of media reports.

But due to recent changes, the Court need not even reach the merits of this dispute. Why? Anna Marie, Jeanna, and Annmarie have decided to be the "adults in the room." They wish to serve their clients, and not consume judicial resources with Mr. Barnes's squabble. The Cellino women have decided to reconstitute their firm under a new name: "The Law Offices of Anna Marie Cellino LLP." The firm will use a new phone number. The firm is also revamping its marketing materials and billboards. The Cellino women have no interest in engaging in Mr. Barnes's frivolous gamesmanship. Cellino Decl. ¶¶ 9-18.

The Court should deny Mr. Barnes's motion for a temporary restraining order and cancel all preliminary injunction proceedings. In light of the defendant's name change, phone number change, and marketing modifications, Mr. Barnes's allegations of irreparable harm are unquestionably moot. And even without these changes, Mr. Barnes cannot show likelihood of success on the merits or a balancing of hardships in his favor.

The Court should also dismiss this case in its entirety for at least two independent reasons. First, in light of the defendant's name and marketing changes, Mr. Barnes's case is

moot, and the Court therefore lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Second, in filing this derivative action, purportedly on behalf of Cellino and Barnes P.C., Mr. Barnes violated two Status Quo Orders entered by Justice Chimes in the dissolution proceeding (Hilliker Decl., Exs. 3-4), and he failed to satisfy conditions precedent under Federal Rule of Civil Procedure 23.1 for bringing a derivative claim. Justice Chimes's Status Quo Orders required Mr. Barnes to seek State Court approval before commencing any litigation on behalf of Cellino & Barnes, P.C. He failed to seek such approval, and as a result, he cannot proceed derivatively in this forum.

If the Court does not dismiss this case in its entirety now, it should stay the case, pending resolution of the Cellino & Barnes State court dissolution proceeding. If Cellino & Barnes is dissolved, Mr. Barnes will be unable to proceed with this derivative case on Cellino & Barnes's behalf.

SUMMARY OF RELEVANT FACTS

I. THE FORMATION OF CELLINO & CELLINO LLP

In April 2019, Anna Marie Cellino formed a law firm with her two daughters, Jeanna Cellino and Annmarie Cellino. They named their firm "Cellino & Cellino LLP." This name accurately reflected the firm's ownership—two partners in the firm have the last name of "Cellino." Cellino Decl. ¶¶ 6-7.

Anna Marie Cellino is an experienced lawyer. She began her legal career in 1981. She practiced as an attorney with National Fuel Gas Distribution Corporation for five years, and later joined the company's management team. While in management, she continued to provide guidance on legal issues. She rose to the position of President of National Gas Fuel Distribution Corporation in 2008, where she continued to provide advice on legal matters. Jeanna Cellino has

been practicing personal injury law for approximately six years. She is a well-respected personal injury attorney in Buffalo and a member of the "Million Dollar Advocates Forum," a legal membership organization that includes attorneys who have secured $1 million dollar verdicts or settlements for clients. She has also received recognition as a "Rising Star" by Super Lawyers. Annmarie Cellino was admitted to the New York bar in 2015, and she has been successfully practicing in the Buffalo area ever since. Cellino Decl. ¶¶ 4-5.

Anna Marie Cellino is married to Ross Cellino, a partner in the firm of Cellino & Barnes, P.C. Ross Cellino is not an attorney with Cellino & Cellino LLP. He has never practiced as an attorney with Cellino & Cellino LLP. Anna Marie, Jeanna, and Annmarie Cellino have never practiced with Cellino & Barnes, P.C. Cellino Decl. ¶ 8.

When Anna Marie, Jeanna, and Annmarie Cellino formed Cellino & Cellino LLP, they understood that they were required to use the name "Cellino" as part of their firm name under New York Rule of Professional Conduct 7.5(b). They chose a name that complied with that rule and which reflected the membership of their firm. Cellino Decl. ¶¶ 6-7. Not only was the name Cellino & Cellino not confusing, the firm also never wanted to be confused with Mr. Barnes.

II. THE SEPARATE CELLINO & BARNES DISSOLUTION ACTION AND JUSTICE CHIMES'S STATUS QUO ORDER

In May 2017, Ross Cellino filed a dissolution proceeding against Cellino & Barnes, P.C. and Stephen Barnes in New York State Supreme Court, Erie County. In sum, Mr. Cellino seeks dissolution of the firm under Business Corporation Law § 1104 based on insurmountable deadlock and irreconcilable differences with Mr. Barnes. Mr. Barnes has opposed Mr. Cellino's petition for dissolution. Hilliker Decl. ¶¶ 2-4 and 7.

The parties in the Cellino & Barnes dissolution proceeding conducted discovery from 2017 to 2018. Discovery is now closed. The dissolution action is currently scheduled for trial in early August 2019 before Justice Chimes. Hilliker Decl. ¶¶ 12-13.

On May 15, 2017 and August 15, 2017, Justice Chimes entered two Status Quo Orders, which gave the Court approval/veto authority over corporate actions of the firm. Justice Chimes entered these orders as a result of, among other things, Mr. Barnes's unilateral termination of an employee he viewed as loyal to Mr. Cellino. Hilliker Decl. Exs. 3-4. In her August 15, 2017 Status Quo Order, which clarified and expanded her May 15, 2017 Order, Justice Chimes ruled, in relevant part: "Order is hereby clarified to be a status quo order as it ***pertained to the operating of the firm***, and that neither party is to act outside of that Order. If ***either party finds that there is a need to change the status quo, their recourse is the petition of the Court and not to take matters in their own hands***." Hilliker Decl., Ex. 4, p. 2 (emphasis added). The Status Quo Orders preclude Mr. Barnes from taking any action, including legal action, on behalf of Cellino & Barnes, P.C. without first seeking Justice Chimes's consent. Hilliker Decl. ¶¶ 15-18.

On May 1, 2019, Mr. Barnes's counsel wrote to Justice Chimes, seeking permission to file a motion in the dissolution proceeding to enjoin Ross Cellino and his wife and daughters (Anna Marie, Jeanna, and Annmarie) from practicing law under the name of "Cellino & Cellino LLP." Significantly, in this letter submission, Mr. Barnes's counsel did ***not*** seek permission from Justice Chimes to file an action in Federal Court on behalf of Cellino & Barnes, P.C. Hilliker Decl., Ex. 8. During a Court conference on May 23, 2019, Justice Chimes denied Mr. Barnes's request to file a motion in State Court to restrain/enjoin Ross Cellino and/or his family from using the name "Cellino & Cellino LLP." During that conference, 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. Hilliker Decl. ¶¶ 24-28. In sum, although Mr. Barnes sought to use the State Court to enjoin Ross Cellino's family members, Mr. Barnes never petitioned the Court as required by the Status Quo Orders for permission to commence a federal lawsuit on behalf of Cellino & Barnes.

III. THIS FEDERAL COURT ACTION

Two weeks after the conference with Justice Chimes, Mr. Barnes filed this action, purportedly on behalf of Cellino & Barnes, P.C. He seeks injunctive relief and monetary damages for Cellino & Barnes, P.C. In his Complaint, he alleges that it would have been "futile" to seek Mr. Cellino's consent to proceed with this action. *See* Complaint, Dkt. 8, ¶¶ 130-37. Mr. Barnes does not plead that he sought Justice Chimes's permission to file an action on behalf of Cellino & Barnes, P.C., nor does Mr. Barnes plead that he sought any exception to Justice Chimes's Status Quo Orders. *Id*.

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND CANCEL ALL PRELIMINARY INJUNCTION PROCEEDINGS

A. The Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction is Moot, and the Plaintiffs Cannot Establish Irreparable Harm

To succeed on his motion for a temporary restraining order and preliminary injunction, Mr. Barnes must prove: (1) a likelihood of success on the merits; (2) irreparable harm; (3) a balance of hardships tipping in his favor; and (4) that the public interest would not be disserved by the issuance of injunctive relief. *See, e.g., Rush v. Hillside Buffalo, LLC*, 314 F. Supp. 3d 477, 484 (W.D.N.Y. 2018). Proof "of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Id.* The same principle applies to temporary restraining orders. *Id.*; *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7,

22 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.") (citation omitted, emphasis in original). A request for preliminary injunctive relief becomes moot when the defendant ceases the conduct that purportedly gives rise to irreparable injury. *Gemmological Institute, Inc. v. Independent Gemological Labs, Inc.*, No. 00 CIV. 4897(LAK), 2000 WL 1278179 (S.D.N.Y. Sept. 7, 2000) (denying preliminary injunction due to voluntary cessation of alleged trademark infringement).

The Court should deny Mr. Barnes's motion for a temporary restraining order and preliminary injunction (and cancel all preliminary injunction proceedings) because he cannot establish irreparable harm. His entire argument/theory in support of preliminary relief is moot.

As discussed in the accompanying declaration of Anna Marie Cellino, Cellino & Cellino LLP has been reconstituted under a new name: "The Law Offices of Anna Marie Cellino LLP." Anna Marie Cellino has changed the firm's phone number, and she is revamping marketing materials and billboard advertisements. Cellino Decl. ¶¶ 11-16. The conduct cited by Mr. Barnes as requiring preliminary injunctive relief is no longer at issue. There is no risk of irreparable injury, and the request for preliminary relief is moot. *See Singh v. Carter*, 185 F. Supp. 3d 11, (D.D.C. 2016) (denying preliminary injunction when "[n]one of the[] harms that the plaintiff claims he will suffer … are both certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.") (citation omitted)**.**

Indeed, each specific item of challenged conduct has been addressed. Mr. Barnes contends that the name "Cellino & Cellino LLP" is confusingly similar to "Cellino & Barnes, P.C." Proposed Temporary Restraining Order, Dkt. 4-48, p. 1. That baseless allegation is moot

because the defendant is practicing law under a different name. Mr. Barnes contends that the phone number used by Cellino & Cellino LLP (888-2020) may mislead consumers of legal services. *Id*. at p. 2. Mr. Barnes is clearly wrong, but the issue is moot because the defendant is now using a new phone number which does not consist of any "888" combination. Mr. Barnes contends that the defendant's website, CellinoLaw.com, constitutes "cybersquatting" and is confusingly similar to Cellino & Barnes, P.C. *Id*. This frivolous allegation is also moot. CellinoLaw.com is still under construction. When that website goes live, its pages will feature the name "The Law Offices of Anna Marie Cellino" and the pictures of the female attorneys that manage the firm. The website will identify the firm's new phone number and employ new advertising. Cellino Decl. ¶ 16. There can be no confusion.

On the record before the Court, it is beyond reasonable dispute that Mr. Barnes cannot establish irreparable harm. The conduct that purportedly gives rise to irreparable injury is no longer in controversy.

B. <u>The Plaintiff Cannot Establish Likelihood of Success on the Merits</u>

Even if Mr. Barnes's motion for preliminary injunctive relief presented a ripe controversy (it does not), his motion would still fail because he cannot show a likelihood of success on the merits, and the equities clearly weigh in the defendant's favor.

Personal names are not inherently distinctive. As a result, they are subject to trademark protection "only if, through usage, they have acquired distinctiveness and secondary meaning." *Pirone v. MacMillan*, 894 F.2d 579, 584 (2d Cir. 1990) (quoting *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 104 (2d Cir. 1985)). The standard for proving infringement is exceedingly high where, as here, a defendant used her own name to practice her chosen profession, such as the law. *See, e.g., Tillery v. Leonard*, 437 F.Supp.2d 312, 322 (E.D.P.A. June 9, 2006) (denying

plaintiff's motion for preliminary injunction, in trademark and cybersquatting action, against his former firm for maintaining a website that included his last name with those of other members of the firm); see *also Tartell v. South Florida Sinus and Allergy Center, Inc.*, 790 F.3d 1253, 1259 (11th Cir. 2015) (noting an elevated standard for establishing trademark requirements for use of names in professions where use of personal names is traditional).

The defendant is comprised of three attorneys: Anna Marie Cellino and her two daughters, Jeanna and Annmarie, all of whom share the surname "Cellino." Cellino Decl. ¶ 3. New York Rule of Professional Conduct 7.5(b) prohibits firms from operating under names that do not include the surname of at least one current or former member of the firm, and does not allow the replacement of the surname with first names, initialisms, translations of surnames, or abbreviations of surnames. *See Topic: Law Firm Name: Use of Lawyer's First Name as Firm Name*, NY Eth. Op. 1152 (May 17, 2018) (collecting opinions). The defendant is, and was, required to use "Cellino" as part of the firm's name. Accordingly, Mr. Barnes cannot show likelihood of success on the merits because enforcing the alleged "trademark" would cause the exact harm recognized in *Tillery*: it would unreasonably restrict Anna Marie, Jeanna, and Annmarie Cellino from practicing law under their own surnames, and thereby hinder the creation and operation of the defendant as a law firm.

The plaintiff is also unable to show a likelihood of success on the merits because there is limited overlap between the plaintiff's and the defendant's firm names. The defendant was clearly not using, in any fashion, the name "Cellino & Barnes." Only the surname "Cellino" appeared in the firm's name. In a similar dispute, the Central District of California denied Milbank Tweed Hadley & McCloy LLP's motion for a preliminary injunction against "Milbank Holding Corporation" because the plaintiff was unlikely to show that it had trademark rights to

the name "Milbank," such that it could prevent individuals who bear that name from starting companies containing the name "Milbank." *See Milbank Tweed Hadley & McCloy LLP v. Milbank Holding Corp*., No. CV 06-187-RGK (JTLX), 2007 WL 1438114 (C.D. Cal. Feb. 23, 2007) (holding that law firm failed to show that the name "Milbank," specifically, had acquired a significant secondary meaning, as opposed to "Milbank Tweed").

II. COURT SHOULD DISMISS THIS CASE IN ITS ENTIRETY

A. The Court Should Dismiss This Case Under Federal Rule 12(b)(1) Because the Controversy is Moot

A case becomes moot, and an Article III court is therefore deprived of jurisdiction, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *New York City Employees' Retirement System v. Dole Food Co., Inc.*, 969 F.2d 1430, 1433 (2d Cir. 1992) (quoting *Blackwelder v. Safnauer*, 866 F.2d 548, 551 (2d Cir. 1989)). "Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Gottfried v. Medical Planning Services, Inc.*, 280 F.3d 684, 691 (6th Cir. 2002) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 n.22 (1997)).

When a case becomes moot, the "case or controversy" requirement of Article III is no longer satisfied, and the courts no longer have jurisdiction to consider the merits. Thus, "mootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination." *Louglin v. U.S.*, 393 F.3d 155, 169 (D.C. Cir. 2004).

Even when the "Article III threshold has been crossed, adjudication still may be refused on avowedly discretionary grounds." 13B Charles Alan Wright & Arthur R. Miller, *Federal*

Practice and Procedure § 3533.1 (3d ed. 2019). In addition to the constitutional aspect of mootness, courts recognize "a mélange of doctrines relating to the court's discretion in matters of remedy and judicial administration." *In re AOV Industries, Inc.*, 792 F.2d 1140, 1147 (D.C. Cir. 1986) (quoting *Chamber of Commerce v. United States Department of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)). Thus, even if not subject to dismissal on Article III "case or controversy" grounds, "[d]eterminations of mootness in this latter sense cannot be cabined by inflexible, formalistic rules, but instead require a case-by-case judgment regarding the feasibility or futility of effective relief should a litigant prevail." *Id.* at 1147-48. Among the "mélange" of discretionary mootness doctrines is the "voluntary cessation" doctrine. Under that concept, a defendant's discontinuance of alleged unlawful conduct moots an action if the defendant demonstrates that the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

Already, LLC v. Nike, Inc. is on point. *Id*. There, Nike sued Already for trademark infringement based on Already's shoe design, and Already countersued to cancel Nike's mark. After several months of litigation, Nike issued a "Covenant Not to Sue," which promised not to raise any trademark or unfair competition claims against Already for shoe designs which might infringe on Nike's mark. *Id.* at 88-89. The Supreme Court held that Nike's covenant mooted Already's counterclaim because it made clear that any alleged unlawful conduct by Nike—*i.e.*, suing Already to protect an allegedly invalid mark—was not reasonably expected to recur. *Id.* at 94-95. Thus, there was no longer a live controversy among the parties because Already's only cognizable injury was eliminated. *Id.* at 100.

In this case, the defendant's position is analogous to Nike's position in the *Already* case. To be clear, the defendant continues to deny that the "Cellino & Cellino LLP" name, "888-2020"

phone number, and any of the defendant's marketing, infringes on the plaintiff's marks or is otherwise unlawful. Nonetheless, to avoid wasteful and burdensome litigation, the defendant has voluntarily ceased the allegedly infringing activities. The defendant has changed its name, changed its phone number, and changed its marketing. In addition, the defendant's principal has voluntarily agreed not to resume use of the "Cellino & Cellino LLP" name until after a decision is reached in the concurrent dissolution proceeding. Cellino Decl. ¶ 18. Much like Nike's covenant not to sue, the defendant's agreement to discontinue use of the allegedly infringing name eliminates the plaintiff's only cognizable injury and there is no longer a live controversy.

At best, the plaintiff may argue that the short time during which the defendant allegedly infringed its mark, and the possibility of infringing the mark after conclusion of the dissolution proceeding, presents a live controversy capable of redress. Upon any reasonable "case-by-case judgment regarding the feasibility or futility of effective relief," there is no basis to continue this litigation pending a hypothetical. This is not a situation in which the parties have litigated for any appreciable amount of time, and stand to lose any progress made. No efficiency would be gained from maintaining this proceeding to redress a fleeting and ultimately inconsequential alleged wrong, based on speculation that at some future time, depending on the decision of another tribunal, a live controversy could later be revived.

As in *Already*, the defendant's voluntary cessation of the alleged unlawful activity, combined with its promise to continue that cessation until the outcome of the dissolution proceeding, moots the plaintiff's present claims. The claims should be dismissed.

B. The Court Should Dismiss This Case Because the Plaintiff Failed to Satisfy Conditions Precedent to a Derivative Suit and Violated a State Court *Status Quo* Order

Derivative actions are brought by shareholders to vindicate the corporation's rights. "On the one hand, derivative actions are not favored in the law because they ask courts to second-guess the business judgment of the individuals charged with managing the company. On the other hand, derivative actions serve the important purpose of protecting corporations and minority shareholders against officers and directors who, in discharging their official responsibilities, place other interests ahead of those of the corporation." *Bansbach v. Zinn*, 1 N.Y.3d 1, 8, 801 N.E.2d 395 (N.Y. 2003). To balance those considerations, Business Corporation Law § 626 requires the "Plaintiff to secure the initiation of such action by the board." Federal Rule 23.1 requires the same.

Where, as here, the plaintiff failed to make such a demand, the complaint should be dismissed. *Marx v. Akers*, 88 N.Y.2d 189, 202, 666 N.E.2d 1034 (1996) (holding that "failure to make a demand regarding the fixing of executive compensation was fatal to that portion of the complaint challenging that transaction."); *Scalisi v. Fund Asset Manag*., 380 F.3d 133, 142 (2d Cir. 2004) (applying Maryland law) (granting motion to dismiss for failure to allege futility of demand); *Halpert Enterprises, Inc. v. Harrison*, 362 F. Supp. 2d 426, 428 (S.D.N.Y. 2005) ("defendants' motion to dismiss the amended complaint is granted because plaintiff has failed to allege with the required particularity that it would have been futile for plaintiff to have made a demand on the Board that J.P. Morgan Chase & Co. itself bring this litigation.").

Mr. Barnes will no doubt attempt to argue that the demand requirement is excused based on futility. That argument has no merit, however, since Mr. Barnes failed to plead that he made a demand to the State Court for permission to proceed with a derivative action.

To overcome a motion to dismiss for failure to plead demand futility, a plaintiff must have alleged "with particularity that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgement in approving the transaction." *Goldstein v. Bass*, 138 A.D.3d 556, 556–57, 31 N.Y.S.3d 15, 17 (1st Dep't 2016). As a result of the underlying dissolution proceeding, recognizing that the 50/50 shareholders—Mr. Barnes and Ross Cellino—are likely to disagree on any decisions for the corporation, the State Court exercised its power to take over decision making for Cellino and Barnes in 2017. Hilliker Decl. ¶¶ 6-9, Exs. 3-4.

The most recent Status Quo Order expressly states, "Order is hereby clarified to be a status quo order as it ***pertained to the operating of the firm***, and that neither party is to act outside of that Order. If ***either party finds that there is a need to change the status quo, their recourse is the petition of the Court and not to take matters in their own hands***." Hilliker Decl., Ex. 4, p. 2 (emphasis added).

The entire purpose of Status Quo Orders was a recognition that in cases of disagreement, one co-owner could unilaterally and lawfully take action on behalf of Cellino and Barnes would effectively, and unfairly, override the disagreement of the other co-owner. Accordingly, the Orders required a petition to the Court in the event of disagreement on matters that varied from the day-to-day handling of the business. The Status Quo Orders expressly prohibits the parties from acting unilaterally as Mr. Barnes has done here. Filing a trademark infringement action on behalf of Cellino & Barnes—such as the one presently pending before this Court— "changes the status quo" thereby requiring Mr. Barnes to "petition [] the Court and not to take matters in [his] own hands." Hilliker Decl., Ex. 4, p. 2.

Under these unique circumstances, Justice Chimes is the decision maker and the tiebreaker on issues that would otherwise be decided by the Board. Accordingly, Mr. Barnes was required to make a demand upon Justice Chimes or to plead with particularity under Federal Rule 23.1 why it would be futile to make a demand upon Justice Chimes. He has plead neither. The complaint should therefore be dismissed. *Halpert Enterprises*, 362 F. Supp. 2d at 428.

III. IN THE ALTERNATIVE, THE COURT SHOULD STAY THIS ACTION PENDING RESOLUTION OF THE CELLINO & BARNES LLP DISSOLUTION PROCEEDINGS

Federal Courts recognize the practicality of staying an action where there is "significant overlap among the issues to be decided in this action and those likely to be decided [in another forum]." *Pike Co., Inc. v. Tri-Krete Ltd.*, 349 F. Supp. 3d 265, 281 (W.D.N.Y. 2018) (staying the proceeding until the parallel arbitration concluded). If the Court does not dismiss this case now (it should), the case will unquestionably become moot if Justice Chimes dissolves Cellino & Barnes. That dissolution trial is scheduled for August 6, 2019. Hilliker Decl., Ex. 7.

One discretionary ground for mootness dismissal arises when the court lacks remedial capacity—in other words, when "changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Gator.com v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (quoting *West v. Secretary of the Department of Transportation*, 206 F.3d 920, 925 n.4 (9th Cir. 2000)). For example, in an action for injunctive relief against a corporation which dissolves during the pendency of the action, the court can no longer deliver the relief sought. *See Miccosukee Tribe of Indians of Florida v. Southern Everglades Restoration Alliance*, 304 F.3d 1076, 1081-82 (11th Cir. 2002) (citing *Dow Jones & Co., Inc. v. Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001)). Conversely, it follows that if a plaintiff

corporation dissolves during the pendency of an action, a court cannot afford relief to a non-existent entity.

If Cellino & Barnes is dissolved by Justice Chimes as a result of the August 2019 trial, Cellino & Barnes will cease to exist. Mr. Barnes will have no capacity to sue on Cellino & Barnes's behalf. All of the claims advanced in Mr. Barnes's complaint will be moot. It is neither prudent nor efficient for the parties and this Court to expend resources on a trademark litigation before the conclusion of the dissolution proceeding. As discussed above, the defendant's name and marketing changes should end all preliminary injunction proceedings. There is no justification for immediacy in the underlying action, and no harm will be incurred by Mr. Barnes, if a stay is granted. The State Court dissolution proceeding may in fact be determinative of whether any claims continue to exist for litigation here.

CONCLUSION

For the reasons discussed above, and in the accompanying declarations, the Court should:

(1) deny Mr. Barnes's motion for a temporary restraining order;

(2) deny Mr. Barnes's motion for a preliminary injunction and cancel all preliminary injunction proceedings;

(3) dismiss this action in its entirety;

(4) in the alternative to dismissal, stay the action, pending resolution of the Cellino & Barnes dissolution proceeding.

Dated: June 21, 2019
Buffalo, New York

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