UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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S&L, INC., Plaintiff, - vs. – AUSTRALIAN GOLD, INC., Defendant.	CIVIL ACTION NO. 05-CV-1217 (JS) (MLO) **MEMORANDUM OF LAW OF PLAINTIFF AND THIRD PARTY DEFENDANT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIMS AND THIRD-PARTY COMPLAINT AND FOR A JUDGMENT GRANTING DECLARATORY JUDGMENT ON THE PLEADINGS**
AUSTRALIAN GOLD, INC., Third Party Plaintiff, - vs. – LARRY SAGARIN AND JOHN DOES 1-10, Third Party Defendants.	

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PRELIMINARY STATEMENT

Plaintiff S&L Vitamins, Inc. ("S&L")[1] makes this motion under Fed. R. Civ. P. 56 for summary judgment on plaintiff's declaratory judgment complaint, and to dismiss the counterclaims of defendant Australian Gold, Inc ("AG"). S&L buys tanning lotion made by AG at retail tanning salons, in quantity, and hence these salons give S&L a favorable price. S&L then sells that merchandise on the Internet, truthfully describing it to consumers using the brand names and product descriptions on the bottles. Many consumers prefer good prices over the Internet to high prices in tanning salons. This is free enterprise. No law regulates or prohibits the purchase and sale of tanning lotion, on the Internet or elsewhere, regardless of quantity or where the seller purchased it. Nonetheless, S&L was forced to bring this declaratory judgment action following a year of saber-rattling by AG, which threatened to bankrupt S&L with baseless trademark, copyright and business tort litigation if it did not stop committing capitalism.

Trademark law, of course, is designed to protect consumers by preventing customer confusion, not to protect a manufacturer's inflated price structure and network of distributors by preventing truthful, accurate advertising and providing leverage via the expense of federal litigation. AG's claim that the S&L website could be confused with its own merely because S&L sells AG products is preposterous and supported by no evidence of actual confusion, no survey and no expert testimony. In addition, the emerging consensus in this Circuit is that search-engine advertising does not constitute "trademark use" that could give rise to infringement liability. Moreover, S&L's activities are protected under the first sale and nominative fair use doctrines, which permit the sale and advertisement of a trademark-protected product, without regard to the trademark owner's approval. Similarly, AG's dilution claims for

[1] The third party defendant, Larry Sagarin, is a principal of S&L, and AG asserts the same claims against both. For convenience, both are referred to collectively here as "S&L" or "plaintiff." Similarly, both the counterclaims and the third-party complaint will be referred to herein as the "counterclaims."

trademarks that are not famous, as required under the law, are baseless.

AG also claims that S&L interfered with the contracts between AG and its distributors. Yet after three years of investigation and litigation, there is no proof that S&L ever did business with a distributor; no proof that S&L was aware of specific distribution agreements with specific distributors as required by the law; and no proof that S&L owned, controlled or otherwise connived with affiliated retailers to induce distributors to sell to S&L. No proof, in short, that S&L ever bought tanning lotion from any but retail locations – sometimes a lot, but always legitimately. AG's allied claims of other various business torts suffer, as demonstrated below, from similar deficiencies. They are makeweights, artifacts of legal strategy premised on breaking a small business, economically, with meritless legal claims to destroy not only competition but an entire business sector.

No, almost two years after this action was filed, following a year of investigation and harassment of S&L by AG, AG has identified no facts to support its theories of liability. What AG does have to show is the identification of S&L's suppliers and the intimidation of some of them, via the threat of costly litigation, into cutting off S&L as a customer. AG has, however, failed to break the will of this small business to defend itself against these spurious claims, and remains standing to this day to seek vindication for its legal, productive activities that have only resulted in more, not fewer, sales of AG's products and more satisfied consumers who are more than capable of deciding how to buy tanning lotion all by themselves.

<u>STATEMENT OF FACTS</u>[2]

The basic facts of this case are familiar to the Court and are largely contained in the Court's Memorandum and Order dated March 30, 2006 (the "March 30 Order"); indeed,

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[2] The facts herein are taken from the Rule 56.1 statements filed in support of this motion, including a modest Supplemental Rule 56.1 Statement filed simultaneously with these papers, for which filing we request the Court's indulgence. The Court is doubtless aware that the significance of some facts may only become apparent once the in-depth legal analysis of a summary judgment is under way.

discovery has revealed virtually nothing new. In brief review, S&L sells products at discount prices over the Internet, including AG tanning lotions (the "Products"). S&L buys this merchandise in bulk, and hence at a discount, from retailers, i.e., retail tanning salons, only. Not **one** scrap of paper or word of testimony supports AG's claim that S&L bought AG Products from distributors. In fact, S&L never bought a single bottle of tanning lotion from an AG distributor. Not knowingly or unknowingly. Not once.

In early 2004, AG's counsel first sent a cease and desist letter to S&L, and was rebuffed. When AG resumed its threats about a year later, S&L filed this action for declaratory judgment. AG asserted counterclaims for trademark infringement, trademark dilution, state and federal unfair competition, false advertising, and tortious interference with contract and prospective economic advantage; it later amended its counterclaim to include copyright infringement. Some of AG's state law claims were dismissed by the March 30 Order.

AG claims that S&L's legal sale of these Products is "unauthorized" – as if some sort of approval[3] were required to sell tanning lotion – and that such sale amounts to "interference" with AG's distribution agreements, undermining its efforts to keep prices high for consumers. Giving AG every benefit of the doubt, it must have assumed when it pled its case, despite the lack of any evidence, that S&L was purchasing the Products from distributors. But the evidence shows that AG was simply purchasing them from retail salons at a good price, and reselling them below the

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[3] In an attempt to make these claims appear more serious, AG added paragraphs to its amended complaint laced with ominous sounding language about "safe" use of suntan lotion supposedly assured by its sale by tanning lotion employees as opposed to Internet retailers. In fact, the record shows that suntan lotion is not regulated by any agency. It is so benign that AG maintains no physician on staff nor does it employ even a single person with full-time responsibility for product safety; nor is AG aware of any injuries ever incurred by virtue of the "misuse" of suntan lotion. For that matter, AG admits, as it must, it really has no idea what happens at the retail level in terms of consumer interaction – it has no idea which retail tanning salon workers do and do not get training, which ones do and do not discuss "safety" issues with customers, what employee turnover in a tanning salon is, which tanning salon employees even speak English.

suggested price preferred by AG, though unsustainable in the free market. It is that free market that AG is really litigating against here, as a method of bankrupting any competition that threatens its business model, regardless of the merits of its claims.

LEGAL ARGUMENT

I. S&L IS ENTITLED TO SUMMARY JUDGMENT ON ITS COMPLAINT SEEKING A DECLARATORY JUDGMENT.

A. Summary Judgment Standard

Summary adjudication is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The rule is meant to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In considering a motion for summary judgment, a court must examine all the evidence in the light most favorable to the non-moving party, United States v. Diebold, Inc., 369 U.S. 654 (1962), but the moving party may discharge its burden of showing that no genuine issue of material fact exists by demonstrating that "there is an absence of evidence to support the non-moving party's case." Celotex, 477 U.S. at 325. This shifts the burden to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). In weighing evidence on summary judgment, the court does not make credibility determinations or weigh conflicting evidence. *See* T.W. Elec. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat a summary judgment motion. *See* Falls Riverway Realty, Inc. v. City of Niagara Falls, 754 F.2d 49, 57 (2d Cir. 1985). Summary judgment is appropriate if the evidence favoring the non-moving party is merely colorable or is not significantly probative. *See* Hill v. White, 190 F.3d 427, 431 (6th Cir. 1999). All these tests militate in favor of a grant of summary judgment here, as demonstrated below.

B. S&L's sale of the Products is protected by the first sale doctrine.

It is an application of hornbook law that S&L's sale of AG's products was wholly lawful according to the first sale exhaustion principle. As the Court wrote in its March 30 Order:

> [O]nce a trademark holder sells it product, it has already been rewarded for the goodwill and notoriety associated with its mark. After the first sale, a trademark holder exhausts his exclusive statutory right to control the product's distribution. The doctrine preserves an area for competition by limiting the producer's power to control the resale of its product … [and] defines an area of commerce beyond the reach of trademark law.

March 30 Order at 13-14 (internal quotations and citations omitted). The Court ruled, however, that at the pleading stage, it could not dismiss AG's claims because "AG alleges that S&L has done more than simply 'stock and display' the Products for sale." The Court then delineated specific allegations that, "if found to suggest an affiliation between S&L and AG, would render the first sale doctrine inapplicable." Id at 14-15. We demonstrate why AG has failed to prove any of those allegations, and cannot do so at trial, below.

C. None of S&L's actions suggests sponsorship or endorsement by AG.

Apparently aware that the first sale doctrine allows S&L to sell the Products and the nominative fair use doctrine allows S&L to truthfully advertise that it sells the Products, AG attempted to compile several small matters into a claim that S&L was somehow misleading customers into thinking it was "affiliated" with AG in some way in violation of the Lanham Act. These arguments were unconvincing at the pleadings stage; after their failure to develop evidence of any of them during discovery, they are simply inadequate as a matter of law.

i. Search engine advertising is not "trademark use" under the Lanham Act

The emerging rule in this Circuit is that the use of paid Internet advertising via the use of trademarks as search terms is not trademark use and cannot be the basis for an infringement clailm. The Second Circuit ruled, in 1-800 Contacts, Inc. v. WhenU.Com, Inc., 414 F.3d 400 (2nd Cir. 2005), that an "adware" vendor does not make a trademark "use in commerce" by selling keyword-triggered Internet advertisements. Applying this reasoning, the Southern District of New York found, in Merck & Co., Inc. v. Mediplan Health Consulting, Inc., 31 F. Supp.2d 425 (S.D.N.Y. 2006), that search term advertising was also not a trademark use. Wrote Judge Chin, regarding the defendant's purchase of ZOCOR, the trademark name of the plaintiff's drug, on search engines:

> Here, in the search engine context, defendants do not "place" the ZOCOR marks on goods, containers, displays, or associated documents, nor do they use the marks to indicate source or sponsorship. Rather, the marks are used only in the sense that a computer user's search of the keyword "Zocor" will trigger the display of sponsored links to defendants' websites. This internal use of the keyword "Zocor" is not use of the mark in the trademark sense . . . The sponsored link marketing strategy is the electronic equivalent of product placement in a retail store.
>
> . . . I conclude that defendants' purchase from Google and Yahoo of the right to have their websites displayed as "sponsored links" when a computer user searches the keyword "Zocor" does not constitute trademark use. Moreover, here defendants actually sell Zocor, albeit Zocor manufactured by Merck's Canadian affiliates. Hence, there was nothing improper – in a trademark sense – with their purchase of sponsored links tied to searches of the keyword "Zocor."

Id. at 427 (citations omitted; emphasis added). The logic is perfectly applicable here: S&L actually sells AG Products, albeit not through the distribution channel preferred by AG. "Hence, there was nothing improper – in a trademark sense – with their purchase of sponsored links tied to searches of the keyword[s]" that are AG trademarks.

Also within this Circuit, the Northern District of New York ruled as well, in Rescuecom Corp. v. Google, Inc., __ F. Supp. 2d __, 2006 WL 2811711 (N.D.N.Y. 2006) that search engine advertising is not a "trademark use" and an allegation of Lanham Act violations premised solely on such use cannot stand, writing:

> Even if plaintiff proved, as it alleges, that defendant is capitalizing on the good will of plaintiff's trademark by marketing it to plaintiff's competitors as a keyword in order to generate defendant's own advertising revenues, that plaintiff's competitors

> believed defendant is authorized to sell its trademark, or that Internet users viewing the competitors' sponsored links are confused as to whether the sponsored links belong to or emanate from plaintiff, none of these facts, alone or together, establish trademark use. In 1-800 Contacts, 414 F.3d at 410, the Second Circuit found that WhenU's "alleged effort to capitalize on an [Internet] user's specific attempt to access the 1-800 website" by causing a pop-up ad to appear when an Internet user accessed 1-800's website, was alone insufficient to show trademark use because "[a]bsent improper use of [a] trademark ... such conduct does not violate the Lanham Act." Although these facts may suffice to satisfy the "in commerce" and likelihood of confusion requirements at the pleading stage, without an allegation of trademark use in the first instance, they cannot sustain a cause of action for trademark infringement.

Id. at __, *5. Clearly the rule in this Circuit is that search engine advertising does not constitute actionable trademark use, the *sine qua non* of a Lanham Act claim.

AG, grasping at straws, claims next that S&L has copied photographs from the AG website, leading to consumer confusion. The evidence, however, is unrebutted that S&L arranged to take its own pictures of the Products for its website. AG utilizes this factually deficient claim as both part of its copyright and trademark counterclaims. But besides the inconvenient – for AG – fact that there is no proof of copying, nor evidence of secondary meaning in AG's bottles, there is simply no legal basis for suggesting that juxtaposing the name of a retailer that sells a product with an image of that product itself is an unlawful suggestion of "affiliation" that rises to the level of likelihood of confusion. If it were otherwise, every supermarket and department store circular would be a trademark infringement! This topic is discussed more fully in the argument regarding AG's copyright claims, below.

ii. S&L is entitled to summary judgment on AG's trademark infringement and unfair competition claims because there is no likelihood of confusion.

The Court's concern in its March 30 Order that a suggestion of "affiliation" could negate S&L's first-sale doctrine defense is a proper suggestion that the essence of a trademark claim, besides of course the junior user's actual use of the mark, is consumer confusion. Discovery having taken place in this matter, it can now be said with certainty that no proof of likelihood of confusion is present here. As an initial matter, AG has not produced a single incident of actual consumer confusion as to whether S&L is an "authorized" seller of the Products or is otherwise affiliated with AG. In the absence of evidence of actual confusion, the burden is on AG to bring forth evidence of a likelihood of confusion – but note that "it is certainly proper for the trial judge to infer from the absence of actual confusion that there was also no likelihood of confusion." Inc. Publishing Corp. v. Manhattan Magazine, Inc., 616 F. Supp. 370, 386 (S.D.N.Y.1985), citing McGregor-Doniger Inc. v. Drizzle Inc., 599 F.2d 1126, 1136 (2d Cir.1979). Here, AG cannot present evidence of a likelihood of confusion; AG has no such evidence. For instance, AG has presented no survey or other expert testimony on point. The courts in this Circuit have, logically, concluded that the "failure to offer a survey showing the existence of confusion is evidence that the likelihood of confusion cannot be shown." Essence Communications, Inc. v. Singh Industries, Inc., 703 F. Supp. 261 (S.D.N.Y.1988). See also E.S. Originals Inc. v. Stride Rite Corp., 656 F. Supp. 484 (S.D.N.Y. 1987), noting that the failure to conduct a survey was especially telling because the plaintiff had plenty of time to do so:

> Furthermore, it is significant that Stride Rite did not undertake a consumer survey, a failure which strongly suggests that a likelihood of confusion cannot be shown. This is especially true since this case was not tried on an emergency basis, and there was therefore ample opportunity to undertake such a survey.

Id. at 490 (citations omitted). This, of course, is perfectly analogous to the events here; this case has been ongoing for nearly two years, and AG has been aware of S&L's business for at least three years, because it sent its original cease and desist letter in January 2004. AG had "ample opportunity" to prepare a survey, and failed to do so. Because AG has not produced any evidence of actual confusion or a likelihood of confusion, plaintiff is entitled to summary judgment on AG's claims for trademark infringement.

S&L does not sell counterfeit goods, nor are the goods it sells adulterated or defaced in any way. AG has previously argued, however, that because S&L does not provide training in the use of the products, as AG would prefer, there is an issue of fact over whether the goods are "genuine." Alternatively, AG has suggested that, because AG wants to sell its suntan lotion via retail tanning salons, S&L's sale of suntan lotion over the Internet amounts to an actionable deficiency that goes to "quality control" and somehow amounts to infringement or dilution. Neither argument has merit. The facts of this case almost perfectly parallel the case of Matrix Essentials, Inc. v. Emporium Drug Mart, Inc., of Lafayette 988 F.2d 587 (5th Cir. 1993). In that case, the plaintiff, a hair care products manufacturer that wanted to restrict the sales of its products to hair salons, argued that a retailer's sale of its goods without "professional consultation" meant that the products were not genuine. The Fifth Circuit rejected that argument, distinguishing it from situations in which the seller's behavior caused a defect in the product that the consumer would be unable to detect.

> No customer who went to Emporium to buy Matrix products was confused or deceived as to whether they were getting a cosmetologist's consultation with their purchase. Though Matrix claims that an uninformed customer could mistakenly have bought the wrong product for his or her hair or scalp conditions and that this could potentially have damaged Matrix's consumer goodwill, we will not find a cause of action under the Lanham Act where, as here, there is no evidence of consumer confusion or deception.

Id at 591. The court placed great weight on the fact that, despite Matrix's heavy investment of time and money in training cosmetologists, there was a disconnection between those efforts and the consumers – exactly the same disconnection between tanning salons and consumers here:

> [A]lthough Matrix spends a great deal of time and money educating cosmetologists in the use and sale of its products, it does not require, monitor, or otherwise attempt to insure that consumers who purchase Matrix products in salons are assisted by a cosmetologist in selecting the proper Matrix product. Matrix products may be purchased in a salon either with or without a cosmetologist's advice. We cannot ignore the fact that if a pre-sale consultation is a necessary part, in Matrix's opinion, of a "genuine" Matrix product, then many of the sales that occur in salons are not sales of "genuine" Matrix products either. Thus, Matrix's use of professional hair care salons as its exclusive distribution channel seems more marketing-related than quality-related.

Id at 592. This is exactly the situation presented by this case. While AG may make training available in the use of its products, this training is offered not to consumers, but to salons; there is no evidence that consumers receive such instruction, and AG admits makes no effort to force salons to provide it to consumers or even monitor if they do. Indeed, it is not even clear that all salons, much less their employees, receive the training in question, obviously making it impossible for them to provide it to their customers. In short, AG's trademarks cover products, not services, and it cannot use the Lanham Act to stop consumers from buying AG lotions without paying for services that may or may not be delivered at salons, may or may not be executed competently, and which these consumers, by their actions, show they do not want.

D. S&L's use of AG s' trademarks is protected by the nominative fair use doctrine.

The lack of trademark use and the lack of likelihood of confusion combine to make a compelling pair of grounds for the Court to dismiss AG's trademark and unfair competition counterclaims. The nominative fair use doctrine, per the standard set forth in The New Kids on the Block v. News America Publishing Inc., 971 F.2d 302 (9th Cir. 1992), provides another basis. As summarized by the March 30 Order (at 15; internal quotations omitted):

> A commercial user who is not using someone else's mark to refer to his own product is entitled to a nominative fair use defense provide he meets the following three requirements: First, the product must be one not readily identifiable without the use of the trademark; second only so much of the mark may be used as is reasonably necessary to identify the product; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.

The Court, finding that the third prong above could not be adequately addressed at the pleadings stage, declined to apply the nominative fair use doctrine to dismiss AG's trademark claims. There is no question that consumers seeking the Products need to know them by name; nor is there any serious issue in this case about the quantum of the use, once the concept – that people sell brand name products by using the brand names, and frequently by showing pictures of those products as well – is acknowledged. And at this later juncture, as set forth in the previous section, AG can produce no proof in the record to show any suggestion of sponsorship or endorsement by AG of its sale of AG products rising to the level of likelihood of confusion.

AG nonetheless argues that S&L's infringe sits trademarks by use of the AG trademarks in metatags (invisible code[4] once used to affect search engine results). But S&L is entitled to advertise that it sells the Products. Highly instructive in the matter at bar is Playboy Enterprises, Inc. v. Welles, 279 F.3d 796 (9th Cir. 2002). There the defendant, a former *Playboy* magazine "Playmate of the Year," used the trademark PLAYMATE OF THE YEAR in metatags and online content. The Ninth Circuit observed, in language that is instructive here:

> There is simply no descriptive substitute for the trademarks used in Welles' metatags. Precluding their use would have the unwanted effect of hindering the free flow of information on the Internet, something which is certainly not a goal of trademark law.

Welles, 279 F.3d at 804. Similarly, here consumers would have no way to identify the products being sold by S&L were it not allowed to identify them by name, and consumers would be worse off being deprived of this information. As in Welles, "identifying them by name" is synonymous with using the Products in advertising – truthfully conveying to consumers what is being sold.

Thus, AG has also argued that S&L's use of AG's trademarks in sponsored links on Yahoo and other Internet search engines is misleading in some fashion. But this appears to conflate S&L's actions with those of Internet sellers that **falsely** use a competitor's trademarks to divert traffic to their sites. As has already been established, S&L is merely truthfully advertising that customers may obtain the Products at its website, just as Tori Welles had done, and is

[4] Some decisions seem to consider metatags in trademark cases with little regard for the factual question of whether they "do" anything at all; if they do not, they certainly cannot constitute trademark infringement. Metatags are understood by most website designers to have been obsolete since the late 1990's; major search engines, including Google, have been engineered to ignore them precisely because they are so easily manipulated by designers. Website owners nonetheless typically insist on their insertion. Goodman, "An End to Metatags (Enough Already, Part 1)," *Traffic: Search Engine Enlightment*, at http://www.traffick.com/article.asp?aID=102 (Sept. 2, 2002). For this reason alone, absent positive evidence proffered by the one claiming infringement of Internet user traffic wrongfully "diverted" by virtue of a defendant's metatags use, metatags should never be considered trademark use anyway. This standard of proof, based on the trademark owner's burden on summary judgment, should apply at the summary judgment stage, as set forth above.

squarely within the nominative fair use doctrine.

E. S&L is entitled to summary judgment on AG's claim for false advertising under the Lanham Act.

Defendant's counterclaim for false advertising under the Lanham Act suffers from the same defects as its other Lanham Act claims: lack of evidence – and S&L is entitled to summary judgment for that same reason. To prevail on a false advertising claim, "a plaintiff must demonstrate the falsity of the challenged advertisement, by proving that it is either (1) literally false, as a factual matter; or (2) implicitly false, i.e., although literally true, still likely to mislead or confuse consumers." McNeil-PPC, Inc. v. Pfizer Inc., 351 F. Supp.2d 226, 248 (S.D.N.Y. 2005).

AG has not identified any "literally false" statements made by S&L, so its claim would have to rest upon the notion that S&L's use of trademarks is "likely to mislead or confuse consumers." This, though, AG cannot demonstrate. As the Second Circuit noted in Johnson & Johnson * Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp., 960 F.2d 294, (2nd Cir. 1992) "extrinsic evidence" is needed for this purpose:

> It is not for the judge to determine, based solely upon his or her own intuitive reaction, whether the advertisement is deceptive. Rather, as we have reiterated in the past, "*[t]he question in such cases is – what* does *the person to whom the advertisement is addressed find to be the message?*" That is, what does the public perceive the message to be?

Id. at 297 (emphasis in original; citations omitted). Defendant here, as noted, has produced no such evidence, such as surveys, expert reports or proof of actual confusion. Moreover, it is insufficient merely to identify a potentially misleading statement; it "must be **material**." McNeil at 248 (emphasis added), citing, S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 238 (2d Cir.2001); National Basketball Assoc. v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir.1997); 4 McCarthy, *Trademarks & Unfair Competition* § 27:35 (requiring "some showing" that a misrepresentation was "material" and that would have "some effect on consumers' purchasing decisions"). AG has not proved and cannot prove a "material" misstatement. This failure is certainly understandable; it would be exceedingly difficult to demonstrate that consumers purchased a mundane consumer product such as tanning lotion from S&L because they mistakenly thought, contrary to the presentation on S&L's website, its domain name, its discount pricing, its sales of competing products, and its disclaimer, that S&L was an "authorized" AG retailer. Be that as it may, there is no proof here of likelihood of confusion, and S&L is entitled to summary judgment on AG's claims for false advertising under §1125(a) of the Lanham Act.

F. S&L is entitled to summary judgment on AG's claim for trademark dilution

AG argues that S&L's use of its trademarks constitutes "dilution" under the Federal Trademark Dilution Act ("FTDA"). Dilution occurs when a famous mark is used by a third party in a way that dilutes the mark's distinctive quality. Such a claim is simply inapplicable to the facts here. The Ninth Circuit in Welles addressed Playboy's assertion that Welles's uses of its marks constituted dilution. In finding that Welles had engaged in nominative fair use, the Seventh Circuit explained that there could be no dilution because nominative fair use "**by definition**, do[es] not dilute trademarks." Id. at 805 (emphasis added). The court explained:

> Uses that do not create an improper association between a mark and a new product but merely identify the trademark holder's products should be excepted from the reach of the anti-dilution statute. Such uses cause no harm . . . [W]e conclude that nominative uses are also excepted [from anti-dilution law]. A nominative use, by definition, refers to the trademark holder's product. It does not create an improper association in consumers' minds between a new product and the trademark holder's mark . . . **So long as a use is nominative . . . trademark law is unavailing.**

Id. at 806 (emphasis supplied). In sum, AG does not have, nor did it ever have, a legitimate, cognizable cause of action for trademark infringement or dilution. The law permitting S&L to sell the Products, and to advertise that it is doing so, is clear, unequivocal, settled, and well-known, and S&L's business is "beyond the reach of trademark law."

Furthermore, AG is not entitled to relief on its dilution claim under the Lanham Act because it cannot, on this record, prove one of the main elements of such a claim – "fame":

> In this Circuit, to sustain a claim under the FTDA, in addition to actual dilution, a plaintiff must show that the senior mark possesses both a significant degree of inherent distinctiveness and, to qualify as famous, a high degree of acquired distinctiveness. Although a plaintiff must show a preponderance of evidence on each element of a claimed violation of the FTDA in order ultimately to prevail on such a claim, the element of fame is the key ingredient. This is because, among the various prerequisites to an FTDA claim, the one that most narrows the universe of potentially successful claims is the requirement that the senior mark be truly famous before a court will afford the owner of the mark the vast protections of the FTDA.

Savin Corp. v. Savin Group, 391 F.3d 439, 449 (2nd Cir. 2004) (citations and internal quotations omitted). As a preliminary matter, to succeed here, AG would have to prove that **each and every trademark** it claims to be "famous" has a high degree of acquired distinctiveness and is, in fact, famous for purposes of the FTDA and entitled to protection under the FTDA. On this record, it cannot possibly do so. As the Southern District ruled in a recent case involving the COHIBA trademark for cigars – only one trademark, for an entire line of cigars, and where survey evidence and evidence of specific advertising expenditures for that mark were before the Court:

> As discussed above, the FTDA protects only those marks that have shown a substantial degree of fame. Very few trademarks qualify as famous marks. In particular, the fame required must exist in the general marketplace, not in a niche market. In TCPIP [Holding Co., Inc. v. Haar Communications, Inc., 244 F.3d 88 (S.D.N.Y. 2001)], the Second Circuit found that the mark "The Children's Place" was not famous under the FTDA standard despite the fact that its owner operated 228 retail stores in 27 states under the name, and had achieved sales of $280 million. The court found that while the evidence "shows considerable commercial success and growth, the aggregate sales under the mark since it originated . . . may well not equal the sales of Dupont, Buick, or Kodak in any given month."
>
> Cubatabaco has put forward no evidence showing that the renown of the COHIBA mark extended beyond premium cigar smokers in 1992 or at any other time. All survey evidence comes from premium cigar smokers, and the publicity received by the mark outside of publications such as *Smoke* and *Cigar Aficionado* has been extremely limited.

Empresa Cubana del Tabaco v. Culbro Corp., 2004 WL 602295 (S.D.N.Y. 2004) at *53. Here, AG has produced no evidence of the fame of its various product brand names, or even that the

AUSTRALIAN GOLD trademark itself has approached the level of investment, advertisement, market penetration necessary for a mark to be found to have acquired distinctiveness and to be famous under either the FTDA or New York's anti-dilution law. See, id. at *54, Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 973 F.2d 1033, 1049 (2d Cir. 1992) (state dilution standard essentially identical to that of the FTDA).

G. S&L is entitled to summary judgment on AG's counterclaims for common law trademark infringement under state law.

As noted above, AG fails to make out a case for trademark infringement under the Lanham Act. For the same reasons, S&L is entitled to summary judgment for AG's claims for trademark infringement under state law. As the Southern District recently noted, "The elements necessary to prevail on common law causes of action for trademark infringement and unfair competition mirror Lanham Act claims." Information Superhighway, Inc. v. Talk America, Inc., 395 F. Supp.2d 44, 56 (S.D.N.Y. 2005).

II. S&L IS ENTITLED TO SUMMARY JUDGMENT ON AG'S TORTIOUS INTERFERENCE COUNTERCLAIMS.

A. AG's's counterclaims for tortious interference with contract is unsupported by the facts.

S&L did not tortiously interfere with any contracts and should be granted summary judgment on this claim. In New York, the elements which a plaintiff must plead to state the cause of action for tortious interference with contract are (1) a valid contract between plaintiff and a third party; (2) AG's knowledge of this contract; (3) AG's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage. AG simply cannot prove most, or arguably any, of those points, based on the record it has made in this case.

AG's counterclaim for tortious interference makes much of its highly controlled (and highly profitable) distribution system, whereby it sells only to authorized distributors, which contractually may sell only to tanning salons. It is an unrebutted fact, however, that S&L purchased its lotions only from tanning salons, and not from distributors. These salons are not parties to the distributorship contracts at all, and hence the existence of these contracts is irrelevant to AG s' counterclaim; they simply were not breached by any party. AG attempts to circumvent this difficulty by professing what must be described as a religious or mystical belief that, contrary to all worldly evidence, S&L has been secretly controlling a salon. The uncontroverted[5] evidence, however, is that S&L does not control any salons, and that all transactions between S&L and its salon-suppliers are arms-length transactions.

Waking up to the fact that its original theory of this case – that S&L was secretly buying from distributors – was fatally flawed, AG changed horses in midstream, coming up with a new contract (not mentioned anywhere in its pleadings) that S&L supposedly tortiously interfered with: a "Premier Salon Agreement" ("PSA") between AG and one of S&L's suppliers, Yucatan Tanning. (S&L has purchased AG's products from other salons; AG did not identify any contracts it had with these salons.) While the existence of the Yucatan PSA is not disputed, it has no relevance to this case. Contrary to the representations of AG, this contract contains **no restrictions** on the types of customers to whom Yucatan could sell the Products.[6]

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[5] AG refuses to concede this fact in its response to S&L's Rule 56.1 statements. Rather than citing evidence to the contrary in its response, however, AG responds with legal argumentation and statements of belief. <u>See</u> Australian Gold's Response to S&L's Rule 56.1 statement ¶10 at 7. Of course AG is entitled to present legal arguments – but the Rule 56.1 statement is not the place for them. <u>See</u>, <u>Dejesus v. Village of Pelham Manor</u>, 282 F.Supp.2d 162, 166 fn. 2 (S.D.N.Y. 2003), <u>Renaldi v. Sears Roebuck and Co.</u>, 2001 WL 290374 (N.D.Ill 2001) at *2, fn. 3. AG's lack of candor in its responses to S&L's Rule 56.1 statements is troubling; for purposes of this motion, its contortions are illuminating.

[6] Defendants attempted to retroactively create new facts by suing Yucatan and entering into a stipulated injunction in which Yucatan "admitted" it was required to restrict its sales to salon customers; this "admission" – created just a few weeks ago as part of a stipulation of dismissal – is contradicted by all evidence in this case, including the testimony of Yucatan's own principal and the language of the contract itself, as set out in the Rule 56.1 statements. It certainly does not constitute a "judicial fact" that could be used against S&L. Therefore, even if the Yucatan contract were somehow germane to the allegation in the

Even assuming, *arguendo*, that a contract was breached as a result of S&L Vitamin's actions, AG cannot prove that S&L knew such a contract existed, and hence its actions do not satisfy this second prong of the tortious interference cause of action. It is not sufficient to allege merely general knowledge of the alleged existence of a distribution agreement between a plaintiff and a third party to impose legal liability on a defendant for tortious interference. A case involving remarkably similar facts and applying the appropriate legal standard is <u>John Paul Mitchell Systems v. Quality King Distributors, Inc. et al.</u>, 106 F. Supp.2d 462, 475. (S.D.N.Y. 2000). There, as here, a manufacturer claimed that an "unauthorized" distributor of its salon products was interfering with its distribution contracts. Considering the same sort of generalized allegations set forth here that unspecified distribution contracts were breached due to the AG's inducement, the court rejected the claim, writing as follows:

> [Plaintiff] will have a more difficult time proving that [defendant] knew that the only possible source of [the manufacturer's] product would be a distributor or salon violating its contract. Although [plaintiff] publicly states that it sells its products only through salons, this creates no legal obligation on its part to do so. From [plaintiff's]'s perspective, [defendant] may say that it only sells its product to distributors contractually bound to sell only to salons, but may in fact sell to distributors who have not made this contractual **commitment**. . . . Although this Court is satisfied by [plaintiff]'s representations that [plaintiff] did require such contracts from all distributors during the life of the [distributor] contract . . . [defendant] did not have [knowledge of] such sworn representations.

In other words, absent **specific** knowledge of **specific** distribution contracts that might be affected by its actual purchases of merchandise, there is no legal duty on a business such as S&L to curtail its legitimate commercial activities merely to avoid the risk that it might, theoretically, impinge on "some" contractual relationship. Any other holding would paralyze commerce and embroil the courts in every conceivable business relationship.

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counterclaims that S&L interfered with the contracts between AG and its distributors, AG's contract with Yucatan was not breached when Yucatan sold Products to S&L.

Similarly, in Matrix Essentials, Inc. v. Cosmetic Gallery, Inc., 870 F. Supp. 1237 (D.N.J. 1994), cited in John Paul Mitchell Systems, another "salon-only" manufacturer sought to enforce its distribution policy against third parties by asserting tortious interference with contract. There, too, the defendants had purchased the products in question in "authorized" salons and then resold them. The court in Matrix Essentials also required particular knowledge of the anti-diversion provisions of the distribution contracts in order to show actionable knowledge on the part of the defendants, writing, "We do not equate general knowledge of the Matrix distribution scheme to knowledge of the existence or contents of the salon agreements." Id. at 1247. Here, too, S&L may have had general knowledge that AG wished that its products would only be sold in salons, but it had no knowledge of the purportedly applicable terms of the purportedly applicable contracts, nor the identities of those party to such contracts. Even Yucatan – claimed by AG to be such a party – testified that it had no knowledge of the supposed provision in question![7]

Finally, even if AG's tortious interference claim could surmount all these obstacles, it and the rest of AG's claims fall upon the last, and perhaps most important, element: the existence of harm. At no time in this litigation has AG has presented any evidence, beyond conclusory allegations, that it suffered any harm as a result of S&L's actions. Indeed, S&L's action – that is, selling a manufacturer's products – is one which is ordinarily considered a **benefit**, not an injury, to the company. As the Court wrote in that John Paul Mitchell Systems, rejecting the tortious interference claim based on so-called "diversion," courts across the country "have been suspicious of the claim that disruption of these exclusive distribution arrangements causes any pecuniary injury . . ." 106 F. Supp.2d at 475, citing H.L. Hayden Co. v. Siemens Medical Sys.,

[7] Indeed, although AG's entire tortious interference claim is premised upon the notion that S&L had specific knowledge of the contracts, AG considered its lists of distributors to be confidential, and during this litigation has insisted that this information be marked Attorneys Eyes Only pursuant to a stipulated protective order and not shared with S&L. If AG keeps even the identities of its distributors confidential, S&L cannot possibly be charged with knowing the details of the contracts between the distributors and AG.

Inc., 879 F.2d 1005, 1024 (2d Cir. 1989), Graham Webb Int'l Ltd. Partnership v. Emporium Drug Mart, Inc., 916 F. Supp. 909, 918 (E.D. Ark. 1995) ("no basis for concluding that [any] lost sales would be greater than the increased revenue resulting from the availability of the product in ordinary retail outlets").

Even if S&L's behavior could theoretically have caused harm to AG, at the summary judgment stage a party must produce evidence to support its claims. S&L has asked repeatedly in discovery for evidence of damages; AG provided none. AG produced no expert report, no financial records, no evidence of lost sales, and no evidence that its distribution network was actually disrupted by S&L's actions. Indeed, the **only** numbers produced by AG at any point in this litigation is a vague chart entitled "Damages Worksheet," which appears to be a summary of money AG has spent in various categories related to its sales efforts. Nothing in the chart other than the caption "Allocated amounts for Internet abuse" indicates any connection between these numbers and this case. The line item for "lost customers" is entirely blank! There is none but the most speculative, self-serving connection between these numbers to S&L's actions. Rather, it appears that AG simply wrote down the total amount of money it spent on attempts to stifle competition from the Internet, and then attributed this entire sum to "damages" caused by S&L.

B. AG's counterclaim for tortious interference with prospective business relationships is unsupported by the facts.

None of S&L's actions constitute tortious interference with prospective business relationships. In New York, such a claim must contain evidence that "AG's conduct was motivated solely by malice or to inflict injury by unlawful means, beyond mere self-interest or other economic considerations." Shared Communications Services of ESR, Inc. v. Goldman Sachs & Co., 23 A.D.3d 162, 163 (1st Dept. 2005).

All of S&L's conduct is motivated by the prospect of economic gain, so AG can prevail only if it has evidence that S&L acted via wrongful means. In NBT Bancorp Inc. v. Fleet/Norstar

Financial Group, Inc., 87 N.Y.2d 614, 624 (1996), the New York Court of Appeals explained defined "wrongful means" as "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." There is no evidence that S&L used any of these wrongful means to interfere with AG's business relationships with its distributors; specifically, S&L has never misrepresented itself as a salon in order to obtain the Products. Nor has S&L made any other misrepresentation, to a distributor, salon, or customer. Hence, S&L is entitled to summary judgment on this count.

III. S&L IS ENTITLED TO SUMMARY JUDGMENT ON AG'S STATE LAW COUNTERCLAIMS.

A. S&L did not violate New York General Business Law §133

AG appears to try to convert New York General Business Law §133 into a general consumer protection statute. The scope of §133 is much narrower than that; as the District Court noted in U-Neek, Inc. v. Wal-Mart Stores, Inc., 147 F. Supp.2d 158, 176 (2001) (internal citations and quotations omitted):

> Section 133 protects tradenames from unlawful infringement by prohibiting the use of someone else's name, style or symbol as part of one's own name with an intent to deceive the public. To establish a claim under § 133, Plaintiff must show that Defendants used its name or symbol as part of Defendants' corporate, assumed or trade name for purposes of advertising with an intent to deceive. Plaintiff has not offered proof that Defendants are, in fact, assuming, adopting, or using Defendant's name to deceive or mislead the public.

S&L has never used any "corporate, assumed, or trade name" other than S&L, Body Source, Body Source Online, Source Pharmaceuticals, thesupplenet.com, and drillsandtaps.com. Needless to say, none of these terms are in any way connected to, similar to or amenable to confusion with AUSTRALIAN GOLD or any other AG trademark.

B. S&L is entitled to summary judgment on AG's Eleventh Count because it fails to state a recognized cause of action in New York.

To the extent that AG's counterclaim for conspiracy simply reiterates its earlier claim for tortious interference with business relations, it is duplicative. To the extent it attempts to raise an independent cause of action, S&L is entitled to summary judgment, because "a mere conspiracy to commit a [tort] is never of itself a cause of action." Alexander & Alexander of New York, Inc. v. Fritzen, 68 N.Y.2d 968, 969 (1986), quoting Brackett v. Griswold, 112 N.Y. 454, 467 (1889).

IV. S&L IS ENTITLED TO SUMMARY JUDGMENT ON AG'S COPYRIGHT COUNTERCLAIM.

A. AG is not entitled to relief on its claims for copyright infringement.

S&L has categorically denied using AG's product photographs, and AG, having no proof to rebut this denial, cannot meet its burden of proof. But AG also claims copyright ownership in the labels for its products, and specifically certain copyrights for which it provides proof of registration in "label artwork." AG is in the tanning lotion business, however,, not the label artwork business; it sells bottles of lotion, not pictures of the bottles. The Copyright Act, 17 U.S.C. §113(c), dispenses with AG's claim straightforwardly (emphasis added):

> In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, **copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles,** or in connection with news reports.

This section of the Copyright Act is exactly on point; defendant has reproduced artwork in its bottles ("useful articles") that are on sale, and now attempts to prevent the making of pictures of these articles in connection with advertisements. It may not do so. It is clear why Congress chose this path: Copyright is designed to give a monopoly to an author to protect creative expression, not to give a monopoly to companies selling goods and services. If a company could simply embed a copyrighted work in its packaging, it could prevent anyone it disapproved of from advertising those goods for sale, making a ban on advertising a ban on sales.

In short, this allegation is not truly about copyright; rather, it is yet another cynical attempt to use intellectual property law to stifle competition in the marketplace.[8] A useful and on-point analysis of claims of this nature was recently published on an online legal journal published by Public Citizen, the consumer "watchdog" organization founded by Ralph Nader. The author writes about a cease and desist letter that a company called Aquage sent to an online retailer. The facts recounted in the article[9] will sound familiar:

> California resident Jamie Olson . . . bought some shampoo made by a company called Aquage and put it up on eBay. Because consumers generally like to see what they are buying, the eBay listing includes a picture of the bottle that Olson took with her own camera.
>
> The company was not pleased. Olson soon received an email from a private investigator hired by SalonQuest, the maker of Aquage, demanding that she stop selling the products. The reason: "You are displaying copyrighted Aquage containers in your advertisements," which, according to the private investigator, is a "violation of SalonQuest's legal rights under the federal Copyright Act." Olson was given five days to "immediately remove all Aquage products from your Ebay offerings" and "confirm for us in writing your agreement to permanently discontinue all sales of Aquage products over the Internet or through any other form of mail order." In other words, displaying a picture of the company's product, according to the company, infringes its copyright in the product's packaging.
>
> Companies commonly claim that showing a picture of a product taken off a company's website for the purpose of reselling the product is an infringement of the company's copyright in the photograph. Google, for example, receives a lot of claims that pictures turned up by its Froogle shopping system infringe various copyrights, and Google adds the demand letters it receives to the database at Chilling Effects Clearinghouse. Many of these claims are not frivolous. Courts generally hold that a work need only be minimally creative to be copyrightable, and since most photographs involve at least some creative use of angles, lighting, and other

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[8] In fact, even where, unlike here, in a case where there was a prima facie copyright claim because the images themselves were for sale, descriptive images known as "thumbnail" images on the Internet were ruled to be fair use, not infringements. In <u>Kelly v. Arriba Soft Corp.</u>, 336 F.3d 811, 821 (9th Cir. 2003), the Ninth Circuit explained, "The thumbnails do not stifle artistic creativity because they are not used for illustrative or artistic purposes and therefore do not supplant the need for the originals. In addition, they benefit the public by enhancing information-gathering techniques on the internet."

[9] The facts on which the article purports to be based are not submitted as admissible, but merely to demonstrate the context for the legal and commercial analysis that follows. They may be treated as hypothetical.

> compositional elements, they are generally protected. Only the most uninspired of product photographs would be too unoriginal for copyright protection.
>
> To get around this problem, smart online sellers usually take their own pictures of the product and use those with their listings. This doesn't always work, however, because companies that think a photograph looks "too professional" will sometimes assume the picture was stolen. And other companies, like Aquage, claim to own a copyright in the underlying product, which would make any photograph of the product a copyright infringement.
>
> Aquage's bottle appears to be a regular shampoo bottle, not particularly distinctive other than the name on the label. Utilitarian objects like a shampoo bottle generally cannot be copyrighted, nor can purely textual material on a label. Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068 (9th Cir. 2000). Even if the bottle were copyrightable, taking a picture of it for purposes of resale would likely be considered fair use under copyright law. Cf. Ty, Inc. v. Publications Int'l Ltd, 292 F.3d 512 (7th Cir. 2002).
>
> Aquage also raises another claim commonly raised by companies trying to prevent online resale. It argues that it has contracts with its distributors limiting resale of products only to licensed vendors. Therefore, it claims that reselling its products is a breach of its contracts. But Olson never entered into a contract with Aquage. She just bought the shampoo at a store and is now trying to resell it. Aquage's contracts with its distributors doesn't give it the power to control the entire secondary market for its products.
>
> Even if a claim like Aquage's is without legal merit, however, many small online sellers who receive a threat like this would rather cut their losses and back down than risk a lawsuit. It's usually not worth hiring a lawyer when you are only hoping to make a few bucks off the sale in the first place. With threats alone, companies are thus able to control the secondary market.

Beck, G., *Consumer Law and Policy Blog*, "Company: Taking Pictures of Our Product Is Copyright Infringement," at http://pubcit.typepad.com/clpblog/2006/10/post.html (October 11, 2006). If this Court were to agree with AG that the use of photographs of its products could, under almost any set of facts, constitute copyright infringement, it would place an anti-competitive weapon in the hands of every trademark owner to unilaterally determine where, by whom, and at what price its products are to be sold. It would destroy the businesses not only of retailers such as S&L but of thousands of other legitimately doing business selling merchandise on websites such as eBay and the like. It can hardly be imagined that this was Congress's intention in passing the Copyright Act, especially in light of the plain language of §113(c).

i. **S&L is entitled to summary judgment on defendant's request for statutory damages under the Copyright Act.**

Finally, in Count XI of its amended counterclaim, AG asks for, *inter alia*, "statutory damages" pursuant to 17 U.S.C § 504. Having provided no evidence of actual copyright damages, AG's entire copyright claim rests on statutory damages. But even if AG were able to show that S&L infringed upon its copyrights, which it cannot, AG would still not be entitled to statutory damages under the law. Section 412 of the Copyright Act provides that

> no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for— (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

Here, AG's copyrights were not registered until June 2005, whereas its own copyright registrations list a publication date of April 2004 – far more than the three months before registration in the statute. Meanwhile, S&L's use of images of the bottles commenced well before June 2005. Hence, AG would not be entitled to statutory damages, regardless of any other factors, and S&L is entitled to summary judgment on this count.

V. S&L SHOULD BE GRANTED SUMMARY JUDGMENT ON ITS REQUEST FOR DECLARATORY JUDGMENT.

As noted above, there are no disputed issues of material fact related to S&L's activities related to Australian Gold, and thus S&L is entitled to summary judgment on AG's counterclaims. And because these claims are essentially mirror images, amplifications and, in some cases, fanciful expansions of the claims regarding which the Complaint seeks a declaratory judgment, this Court's ruling as to the counterclaims will necessarily amount to a ruling as to issues regarding which S&L seeks declaratory judgment.

In both cases, this Court should permit S&L to return to what is left of its litigation-ravaged but lawful, honest and productive business that supports two families – a business that

enhances AG's profits by selling AG's products to willing buyers who **choose** not to pay for dubious salon "services" unrelated to AG's trademarks, copyrights or distribution agreements – a business that AG should have, as a matter of fair play, just left alone, or competed with in the free market by reconsidering its obsolete distribution system, instead of seeking to destroy by litigation in the first place.

CONCLUSION

For all the reasons set forth above, this Court should grant plaintiff/counterclaim AG's motion for summary judgment.

Respectfully submitted,

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