

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13-CVS-558

SCI NORTH CAROLINA FUNERAL)
SERVICES, LLC; CAROTHERS)
HOLDING COMPANY, LLC)

Plaintiffs,)

v.)

MCEWEN ELLINGTON FUNERAL)
SERVICES, INC.; MCEWEN)
FUNERAL HOME, INC.; MCEWEN)
FUNERAL SERVICES, INC.; and)
CARL M. ELLINGTON, JR.,)

Defendants.)

TEMPORARY RESTRAINING ORDER

1. **THIS MATTER** is before the Court on Plaintiffs’ Motion for Temporary Restraining Order (the “Motion”). The Court held a hearing on Plaintiffs’ Motion on January 11, 2013, at which all parties were represented by counsel. After considering Plaintiffs’ Motion and Memorandum in Support, the arguments made by counsel at the hearing, and the applicable statutes and case law, the Court **GRANTS** Plaintiffs’ Motion finding as follows:

I. Background Information

2. Plaintiffs are North Carolina limited liability companies that own and operate a number of funeral homes offering funeral services in and around Charlotte, North Carolina.

3. Defendant Carl McEwen Ellington, Jr. (“Ellington”) is a former shareholder in McEwen Funeral Services, Inc. (“MFS”) (not to be confused with Defendant McEwen Funeral Services, Inc. which was only recently registered with the North Carolina

Secretary of State) a corporation that started offering funeral services in the Charlotte area in the early 1900s.

4. On July 24, 1986, the McEwen family, including Ellington, entered into a Capital Stock Purchase Agreement (“Stock Agreement”) and Asset Purchase Agreement with Plaintiffs for the sale of MFS. Those agreements explicitly covered the sale of MSF’s trademarks and trade names and provided that “[MFS] owns the common law and exclusive right to the trade name ‘McEwen Funeral Service’ in the trade area in which such name is utilized in the Corporations business” (Vr. Compl. 2 (alteration in original).) The Stock Agreement also provides that “the Seller, at Closing . . . will sell, transfer, convey and deliver to [Plaintiffs] . . . all of the assets . . . of the Seller . . . (including . . . trademarks [and] trade names including all trade names under which the Seller does business)” (Vr. Compl. 2 (alterations in original).)

5. Since the sale of MFS to Plaintiffs, Plaintiffs have owned and operated funeral homes in the greater Charlotte area that offer funeral services to customers using the *McEwen* mark. Recently, Ellington has registered a funeral home with the North Carolina Board of Funeral Service under the trade name *McEwen Ellington Funeral Services*. Ellington also registered the following corporations with the North Carolina Secretary of State: *McEwen Ellington Funeral Services, Inc.*; *McEwen Funeral Home, Inc.*; and *McEwen Funeral Services, Inc.* Defendants also appear to have opened funeral home operations at a location previously used by Plaintiffs, erected a sign on that location using the name *McEwen Ellington Funeral Services*, and, according to Plaintiffs, have contracted for advertising to be run under the *McEwen Ellington Funeral Services* name in the Charlotte Observer on January 12-13, 2013.

6. On December 7, 2012, Plaintiffs mailed Ellington a letter stating that Plaintiffs own and operate five funeral homes in North Carolina containing the name *McEwen* and advised Ellington that he should withdraw his registration of the marks listed above.

II. Standard of Review

7. A temporary restraining order may be granted

if (i) it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (ii) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required.

N.C. R. Civ. P. 65(b).

8. The Court can not enter a temporary restraining order "except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." *Id.* at (c).

9. North Carolina common law protects corporations trade names:

It is well settled that an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purpose of deception, or even when innocently used without right, to the detriment of another; and this right, which is in the nature of a right to a trade-mark, may be sold or assigned.

Blackwell's Durham Tobacco Co. v. American Tobacco Co., 145 N.C. 367, 374, 59 S.E. 123, 127 (1907).

10. The key to succeeding in a common law trademark case is showing that there is a likelihood of confusion if the alleged infringing party were allowed to use the protected

mark. When evaluating whether a mark holder has shown a likelihood of confusion, a court should consider the following factors:

1) the strength or distinctiveness of the mark; 2) the similarity of the two marks; 3) the similarity of the goods/services the marks identify; 4) the similarity of the facilities the two parties use in their businesses; 5) the similarity of the advertising used by the two parties; 6) the defendant's intent; and 7) actual confusion.

Wachovia Bank & Trust Co. v. Crown Nation Bancorporation, 835 F. Supp. 882, 886 (W.D.N.C. 1993) (citing *Pizzeria Uno v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984)).

“[T]hese factors are not like elements of an offense, where each one must be met before the plaintiff has proven its case,” but rather “are simply guides to the ultimate question of ‘likelihood of confusion.’” *Id.*

11. In trademark infringement cases, the United States Court of Appeals for the Fourth Circuit has held that “a presumption of irreparable injury is generally applied once the plaintiff has demonstrated a likelihood of confusion” *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 273 (4th Cir. 2002).

III. Analysis

12. Plaintiffs have shown, for the purposes of this Motion, that: 1) Plaintiffs' mark has been used in the funeral service industry since the early 1900s, 2) Plaintiffs have used the mark continuously since they purchased the mark from MFS in 1986, 3) Plaintiffs' mark is distinctive, 4) Plaintiffs' mark (*McEwen*) and Defendants' use of the trade name *McEwen Ellington Funeral Services* is similar, 5) Plaintiffs and Defendants both operate in the funeral services industry and offer similar products and services, 6) Plaintiffs' mark is used to identify the services that the parties provide to the public, 7) Defendants are opening their competing business in a location that was formerly used by Plaintiffs to

provide similar funeral home services, 8) Defendant Ellington was a shareholder in MFS when MFS sold its assets, including its trademarks, to Plaintiffs in 1986, and 9) Defendants will be advertising under their trade name during the weekend of January 12-13, 2013.

13. Based on the facts shown by Plaintiffs, the Court concludes that Plaintiffs have sufficiently demonstrated a likelihood of confusion because: Plaintiffs' mark is distinctive, the marks in question appear to be similar, the goods and services provided by the parties are identical, the parties use similar facilities, the parties advertising is similar, and Defendant Ellington has registered and operated under the challenged marks with the intent to cause confusion among the consuming public.

14. The Court also concludes that Plaintiffs have shown a likelihood of success on its claims by demonstrating that it has a valid trademark, that the use of its mark is in the same geographic area as the alleged infringer, and that Defendants' use of a similar mark is likely to cause confusion among customers.

15. The Court further notes that Defendants were provided with notice of the Court's hearing on Plaintiffs' Motion and were allowed to present alternative arguments to those made by Plaintiffs at the hearing and in their Motion.

16. For the above stated reasons, the Court concludes that irreparable injury will result absent Court intervention, and that injunctive relief is proper under Rule 65(b) of the North Carolina Rules of Civil Procedure.

17. Therefore, the Court **ORDERS** that Defendants and their officers, directors, employees, agents, representatives, and those persons acting in concert or participation with Defendants, are immediately restrained and enjoined from any and all activities that

are likely to cause confusion with Plaintiffs' rights in the MCEWEN mark, including using, in advertising, marketing, or promotion, or as any part of the name of a funeral services business in the greater Charlotte area, the MCEWEN mark. Defendants are thus prohibited from using the names *McEwen Ellington Funeral Services*, *McEwen Funeral Home, Inc.*, *McEwen Funeral Services, Inc.*, or any other similar mark, word, name, symbol, or slogan that incorporates the MCEWEN mark or is likely to cause confusion with the MCEWEN mark. Any and all uses or proposed uses by Defendants of the MCEWEN mark or any similar mark, including in signs, advertisements, or promotions materials, in connection with funeral services in the greater Charlotte area, are strictly prohibited.

18. It is further **ORDERED** that security in the amount of ten thousand dollars (\$10,000) be given by the Plaintiffs for the payment of such costs and damages as may be incurred or suffered by the Defendants should it later be determined that they have been wrongfully enjoined or restrained.

19. A hearing will be held in Courtroom 6370 of the Mecklenburg County Courthouse on January 17, 2013, at 10:00 A.M., or as soon thereafter as is convenient for counsel, on why Defendants should not be preliminarily enjoined from using the name *McEwen Funeral Services* or any similar name to Plaintiffs' trademark.

20. This Temporary Restraining Order shall become effective upon Plaintiffs' posting of the required security, and will remain in effect for ten (10) days, or until the Court enters an order for preliminary injunction following its hearing on January 17, 2013, whichever is earlier.

SO ORDERED, this the 11th day of January 2013.

/s/ Calvin E. Murphy
Calvin E. Murphy
Special Superior Court Judge