

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION**

Hilton Head Island Development Company,)
LLC and Coral Resorts, LLC,)
)
Plaintiffs,)
)
v.)
)
Joseph DuBois, Zach Naert, and)
Naert and DuBois, LLC,)
)
Defendants.)
_____)

Civil Action No.: 9-13-cv-3510-SB

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

Respectfully submitted by

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PRELIMINARY STATEMENT

The Defendants, Naert and DuBois, LLC, a South Carolina law firm, and Zach Naert and Joseph DuBois, attorneys at law (hereinafter collectively referred to as "Naert and DuBois" or "Defendants"), herein move to Dismiss the Amended Complaint (hereinafter "Complaint") filed by Plaintiffs, Hilton Head Island Development Company, LLC and Coral Resorts, LLC (hereinafter "Coral Resorts" or "Plaintiffs"), timeshare companies.

Plaintiffs have brought claims under the Lanham Act and South Carolina trademark and common law based upon the Defendants' alleged use of Plaintiffs' alleged service marks and other groups of words that may or may not be capable of being registered as federal trademarks in Defendants' Google AdWords and other search engines' hidden keywords.

However, Defendants are attorneys and a law firm and are not timeshare salespeople or a timeshare sales and marketing company in competition with Plaintiffs, such being timeshare companies. This is not the traditional consumer competition lawsuit over the use of trademarks as keywords in Google AdWords advertising. There is no plausible likelihood of confusion by consumers, which is an essential element of Plaintiffs' claims.

We are lawyers and a law firm that sue timeshare companies for frauds, ripoffs, and scams, and no consumers are confused that we are somehow timeshare salespeople or a timeshare and vacation sales and marketing company. That no consumers are confused is precisely the reason that Plaintiffs have filed the instant lawsuit. As Plaintiffs state in Paragraph 42 of the Complaint: customers find our law firm on the internet through our Google AdWords advertising; customers have concerns about Plaintiffs' timeshares and want to rescind their ownership; and Defendants represent such customers. Plaintiffs cry: not "fair"! (Compl. ¶ 55.) In sum, Plaintiffs want to prevent customers with claims of being ripped off, lied to, and scammed from finding legal representation with Defendants.

PROCEDURAL HISTORY

Plaintiffs filed a Complaint on December 17, 2013, seeking damages and injunctive relief for the alleged infringement of Plaintiffs' purported trade and service marks. (Compl. ¶ 25.) Plaintiffs served Defendants, personally, in time for Christmas on December 19, 2013.

Defendants filed a Motion to Dismiss and Memorandum of Law in Support of Defendants' Motion to Dismiss on January 6, 2014. Plaintiffs filed an Amended Complaint on January 27, 2014, to now include the muses of an "expert" and additional bad faith allegations.

The Complaint lies in four (4) causes of action: (1) False Designation of Origin/ Unfair Competition under the Lanham Act at 15 U.S.C. §§ 1117 and 1125(a)(1)(A); (2) False Advertising under the Lanham Act at 15 U.S.C. §§ 1117 and 1125(a)(1)(B); (3) Service Mark Infringement under S.C. Code Ann. § 39-15-1160, et seq; and (4) Injunctive Relief.

Contemporaneously with the filing of this Memorandum of Law in Support of Defendants' Motion to Dismiss Amended Complaint, Defendants filed a Motion to Dismiss Amended Complaint on the basis that the Complaint fails to set forth facts sufficient to constitute causes of action upon which relief may be granted and seeking the dismissal of the Complaint in its entirety, with prejudice, along with attorneys' fees, costs, and expenses associated with the same.

STATEMENT OF FACTS

For purposes of Defendants' Motion to Dismiss only, Defendants submit that the following facts, as set forth in the Complaint filed January 27, 2014, are undisputed:

1. Plaintiffs are timeshare companies on Hilton Head Island. (Compl. ¶¶ 1, 2, 9, 10, and 11.)
2. Joseph DuBois and Zach Naert are licensed attorneys in South Carolina and have operated Naert and DuBois, LLC, since on or about January 2, 2013. (Compl. ¶¶ 22 and 23.)
3. Defendants' primary practice area is timeshare litigation. (Compl. ¶ 24.)
4. Defendants advertise their legal services to victims of timeshare fraud, scams, and ripoffs by bidding on groups of words online in Google AdWords and other search engine campaigns. (Compl. Page 1, Nature of Case.)
5. Defendants' advertisements may, at times, appear in Google and other search engines as a result thereof. (Compl. Page 1, Nature of Case.)
6. Plaintiffs have been in business selling timeshares on Hilton Head Island for many years and have used their alleged trademarks, service marks, and/or other groups of words advertising Plaintiffs' products and services. (Compl. ¶¶ 13 - 16.)
7. Plaintiffs have very recently made application that many groups of words be registered as trademarks and service marks. (Compl. ¶¶ 19 - 21.)
8. Defendants did not request Plaintiffs' permission for use of said subject groups of words, and Plaintiffs did not affirmatively consent to the same. (Compl. ¶¶ 48 - 49).
9. Customers find our law firm on the internet, in part, through our Google AdWords advertising; customers have concerns about Plaintiffs' timeshares and want to rescind their ownership; and Defendants represent such customers. (Compl ¶42).
10. Plaintiffs fail to and cannot allege a single instance of actual customer confusion.

(Compl. ¶ 51).

11. Plaintiffs have paid an “expert” \$250.00 an hour to read a law review article and opine that if the expert did, at some point in time in the future, do an exploratory focus group survey, he believes there could be a likelihood that consumers could be confused. (Compl. ¶ 51, Exhibit “D”).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief can be granted. The purpose of such a motion is to test the sufficiency of the facts alleged in a plaintiff's complaint.

Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. While this standard does not require detailed factual allegations, a pleading that offers labels and conclusions, or a formulaic recitation of the elements of a cause of action will not do. Likewise, a complaint will not suffice if it tenders naked assertions devoid of further factual enhancement. Rather, to survive a Rule 12(b)(6) motion to dismiss, the factual allegations must be enough to raise a right to relief above the speculative level. The United States Supreme Court recently stated that to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Cyremthia Alexander v. Rite Aid Corporation, No. 4:11-cv-01406-RBH (D.S.C. Jan. 11, 2012) (citing Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999); Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (internal citations and quotations omitted)). In the instant lawsuit, Plaintiffs make conclusory legal assertions and allegations that are highly speculative containing no factual allegations to plausibly support the same, and Plaintiffs' Complaint should be dismissed in its entirety, with prejudice.

Despite that Plaintiffs hired an "expert" at \$250.00 an hour to read a law review article and opine that if he did in fact do an exploratory survey he could find that customers could be confused (Compl. ¶ 51, Exhibit "D"), a review of the same law review article by an individual with legal education will reveal that the expert has concluded the very opposite of the law review article. As the law review article states in its conclusion regarding any likelihood of confusion:

“[w]e document a considerable degree of confusion, but it is not the type of confusion recognized by current trademark doctrine.” (David J. Franklyn & David A. Hyman, Trademarks as Search Engine Keywords: Much Ado about Something?, Harv. J. L. & Tech., Vol. 26, No. 2, 57 (Spring 2013)). Upon information and belief, Plaintiff’s expert is confused and Plaintiffs’ counsel are intentionally attempting to confuse the Court.

ARGUMENT

**POINT I
PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF FOR
FALSE DESIGNATION OF ORIGIN/UNFAIR COMPETITION/FALSE ADVERTISING
UNDER 15 U.S.C. §§ 1117 and 1125(a)(1)(A)-(B)**

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(A)-(B). “To establish trademark infringement under the Lanham Act, a plaintiff must prove: (1) that it owns a valid mark; (2) that the defendant used the mark ‘in commerce’ and without plaintiff’s authorization; (3) that the defendant used the mark (or an imitation of it) ‘in connection with the sale, offering for sale, distribution, or advertising’ of goods or services; and (4) that the defendant’s use of the mark is likely to confuse consumers.” Rosetta Stone LTD v. Google, Incorporated, et al., 676 F.3d 144 (4th Cir. 2012) (citing 15 U.S.C. § 1114(a); quoting Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 259 (4th Cir. 2007); and quoting People for the Ethical Treatment of Animals v. Doughney, 263 F.3d 359, 364 (4th Cir. 2001)).

Plaintiffs fail to properly plead two (3) of the four (4) requirements of the Lanham Act.

A. The First Requirement of Lanham Act is Not Met: Plaintiffs Do Not Own Valid Trademarks in “coral resorts,” “coral reef,” “coral sands,” “island links,” and/or “Hilton Head Island Development Company LLC” and Plaintiffs’ Claims Should Therefore Be Dismissed

Upon information and belief, “coral resorts,” “coral reef,” “coral sands,” “island links,” port o’call,” and/or “Hilton Head Island Development Company LLC” are not valid and registered trademarks owned by Plaintiffs. However, Plaintiffs make the conclusory assertion that these groups of words are “capable of being registered as federal trademarks” and therefore “constitute trademarks for the purpose of 15 U.S.C. § 1125(a)” in their original Complaint. Plaintiffs’ conclusory legal assertions are devoid of factual or legal support in the Complaint. Plaintiffs fail to meet the first requirement to establish trademark infringement under the Lanham Act, which is that Plaintiffs own a valid trademark, and Plaintiffs’ claims should therefore be dismissed.

B. The Second Requirement of the Lanham Act is Not Met: Defendants Do Not Use Any of Plaintiffs’ Alleged Marks in Commerce Within the Meaning of the Lanham Act and Plaintiffs’ Claims Should Therefore Be Dismissed

Plaintiffs have further failed to meet the second requirement to establish trademark infringement under the Lanham Act, being that Defendants used trademarks in commerce and without Plaintiffs’ authorization. Plaintiffs allege that Defendants have used certain groups of words as hidden keywords in Google AdWords and other search engines. These groups of words are never seen by the public and are not produced in any advertising text of Defendants. (Compl. ¶ 40). Plaintiffs summarily conclude that such constitutes use in commerce within the meaning of the Lanham Act.

Defendants respectfully assert that, in these very limited circumstances of bidding on groups of words that may or may not be capable of being registered as federal trademarks as merely hidden keywords in Google AdWords and other search engine advertising, such does not

constitute use in commerce within the meaning of the Lanham Act. This is distinguishable from the finding in Allied Interstate LLC v. Kimmel & Silverman P.C., et al, No. 1:12-cv-042004 (S.D.N.Y. Aug. 12, 2013), discussed herein below, wherein Defendants' actions were found to constitute use in commerce. In Allied Interstate, Defendant Law Firm used Plaintiff Debt Collector's marks in advertising text and on Defendant's website. In the instant lawsuit, Defendants purportedly used Plaintiffs' marks and other groups of words as merely hidden keywords in Google AdWords and other search engine advertising, keywords that are never seen by the public and are indicative of nothing, causing absolutely no confusion to the consumer.

Finally, Defendants respectfully assert that Plaintiffs authorized Defendants' use of the above-described groups of words through Plaintiffs' negligence, delay, and bad faith, and that Plaintiffs are estopped from finally now asserting their claims. Plaintiffs wildly allege Defendants' use of the above-described groups of words as hidden keywords as early as January 2, 2013; registered just before filing this lawsuit the service marks for "Hilton Head Island Development Company" and "Coral Resorts" on November 8, 2013; and filed the instant lawsuit on December 17, 2013, in time to serve Defendants for Christmas.

Plaintiffs fail to meet the second requirement to establish trademark infringement under the Lanham Act, being that Defendants have used Plaintiffs' trademarks in commerce and without Plaintiffs' authorization, and Plaintiffs' claims should therefore be dismissed.

C. Third Requirement: Plaintiffs Appear to Have Sufficiently Alleged the Same in the Complaint to Meet the Standard to Overcome a Motion to Dismiss

Plaintiffs appear to have sufficiently alleged in the Complaint the third requirement to establish trademark infringement under the Lanham Act, that Defendants used the mark in connection with the advertising of services, distinguishable from the mark being used in commerce as defined by the Lanham Act and discussed herein above. For the purposes of this

Motion to Dismiss, Defendants will not contest the allegation that some or all of the above-referenced groups of words may constitute hidden keywords that are never seen by the public in Defendants' Google AdWords and other search engine campaigns.

D. The Fourth Requirement of the Lanham Act is Not Met: Plaintiffs' Conclusory Legal Assertions and Speculation of Consumer Confusion are Devoid of Factual and Legal Support and Plaintiffs' Claims Should Therefore Be Dismissed

The likelihood of confusion to consumers, the most important and fourth requirement to establish trademark infringement under the Lanham Act, is not met by Plaintiffs, and Plaintiffs' claims should therefore be dismissed. As in Allied Interstate, which resulted in the dismissal of Plaintiff Debt Collector's claims under a Motion to Dismiss analysis, Plaintiffs' specific factual allegations consist merely of quotations from Defendants' Google AdWords advertisements and allegations that Defendants' advertisements sometimes appear in search engine results. "A pleading that offers labels and conclusions, 'or a formulaic recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell A. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

In Allied Interstate, an allegedly disreputable debt collection company (hereinafter referred to as "Debt Collector") filed suit against a law firm representing people willing to stand up for their rights and hold Debt Collector accountable for its alleged violations of the law (hereinafter referred to as "Law Firm"). Allied Interstate v. Kimmel & Silverman P.C., et al., at *1-4. Allied Interstate appears to be the only case law on point where the Plaintiff trademark holder does not sue a business competitor or Google, but the Plaintiff trademark holder instead sues the law firm that represents victims of the trademark holder's alleged violations of the law.

The Law Firm in Allied Interstate not only used Debt Collector's trademarks in hidden keywords for Google AdWords as Defendants are accused of doing, but Law Firm also used

Debt Collector’s trademarks in the text of Law Firm’s Google AdWords advertisements and in the text and as metatags for Law Firm’s website. Id. at *2-3. Here, Plaintiffs have not alleged any use of Plaintiffs’ marks by Defendants in Defendants’ advertising text or in the text and/or as metatags for Defendants’ website. Plaintiffs have only alleged Defendants’ use of groups of words that may or may not be capable of being registered as federal trademarks as merely hidden keywords in Google AdWords advertising that are never seen by the public. (Compl. ¶ 40).

The Court in Allied Interstate examines the “plausibility of [Debt Collector]’s allegations of likelihood of confusion” finds that “[Debt Collector]’s generalized, conclusory assertions that [Law Firm]’s conduct constitutes a false designation of origin or association with [Debt Collector]’s mark that is likely to confuse consumers are not supported by plausible factual pleading” Id. at *11. Here, Plaintiffs’ conclusory assertions and implausible factual allegations likewise fail to meet the most important and fourth requirement to establish trademark infringement under the Lanham Act.

Although this list is not intended to be exhaustive or exclusive (see Pizzeria Uno Corp. v. Temple, 747 F.2d 1522, 1527 (4th Cir. 1984)), the Fourth Circuit

has articulated at least nine factors that generally are relevant to the ‘likelihood of confusion’ inquiry: (1) the strength or distinctiveness of the plaintiff’s mark as actually used in the marketplace; (2) the similarity of the two marks to consumers; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities used by the markholders; (5) the similarity of advertising used by the markholders; (6) the defendant’s intent; (7) actual confusion; (8) the quality of the defendant’s product; and (9) the sophistication of the consuming public.

Rosetta Stone LTD v. Google, Incorporated, et al., at 153 (quoting George & Co., LLC v. Imagination Entm’t Ltd., 575 F.3d 383, 393 (4th Cir. 2009). Moreover, the above-referenced “factors are not always weighted equally, and not all factors are relevant in every case.” Id. at

153 (quoting Louis Vuitton at 259-60). Defendants will address the applicability of each of the above-referenced nine (9) factors in turn:

(1) Plaintiffs' Marks are Generic, Weak, and Indistinctive

Plaintiffs allege that “coral resorts,” “coral reef,” “coral sands,” “island links,” port o’call,” and “Hilton Head Island Development Company LLC” are trademarks. (Compl. ¶ 28). Plaintiffs further allege that “Coral Resorts” and “Hilton Head Island Development Company” are registered service marks. (Compl. ¶¶ 19 – 20).

Defendants respectfully submit that the above-referenced groups of words are terribly generic, simple, common, weak, and indistinctive. Plaintiffs have failed to allege factual instances of Plaintiffs’ use of the above-referenced groups of words in any advertising text or Defendants’ website and failed and refused to note many others who may use the same groups of words in advertising text, websites, and as hidden Google AdWords keywords.

(2) The Use of Marks by Plaintiffs and Defendants are Entirely Dissimilar

Plaintiffs have failed to allege factual instances of Plaintiffs’ use of the above-referenced groups of words in the marketplace other than as hidden keywords in search engine advertising campaigns. However, Defendants are a law firm and lawyers offering legal services only and do not sell timeshares, are not timeshare sales people, and are not timeshare sales and marketing companies. Plaintiffs are timeshare sales people and companies. The use and alleged use of Plaintiffs’ marks and groups of words are entirely dissimilar and mutually exclusive.

(3) The Services of Plaintiffs and Defendants are Entirely Dissimilar and Mutually Exclusive

Plaintiffs are timeshare companies and Defendants are a law firm and its lawyers. The services of Plaintiffs and Defendants are entirely dissimilar and mutually exclusive.

(4) The Similarity of the Facilities Used by the Marketholders Appears Inapplicable

The parties' services are not in competition, and this factor appears to be inapplicable.

(5) The Advertising of Plaintiffs and Defendants are Entirely Dissimilar and Mutually Exclusive

Plaintiffs have, to this point, failed to note any information relating to any of Plaintiffs' Google AdWords advertising campaigns. However, Defendants are a law firm and lawyers offering legal services only. Plaintiffs are timeshare companies. The advertising of Plaintiffs and Defendants is entirely dissimilar and mutually exclusive.

(6) Defendants' Intend to Represent Individuals with Claims Against Timeshare Salespeople and Companies, Not Sell People Timeshares

Plaintiffs have failed to allege that Defendants intend to sell people timeshares. However, Defendants are a law firm and lawyers offering legal services only and do not and cannot sell timeshares.

(7) Consumers Are Not Actually Confused

Plaintiffs have failed to make any factual allegation relating to consumers actually being confused. Defendants respectfully assert that no consumers are actually confused and that there is no likelihood that consumers will confuse a law firm that sues timeshare companies for a timeshare company attempting to sell people timeshares.

(8) Defendants' Product Quality Speaks for Itself

Defendants respectfully assert that Plaintiffs' filing of the instant lawsuit speaks for itself. However, Plaintiffs speak to the same and have added the following information to their Complaint, Paragraph 42: customers find our law firm on the internet through our Google AdWords advertising; customers have concerns about Plaintiffs' timeshares and want to rescind

their ownership; and Defendants represent such customers. Otherwise, Defendants defer to Plaintiffs' explanation of the quality of their timeshares.

(9) The Consuming Public's Sophistication is Sufficient to Differentiate a Timeshare Company from Attorneys that Sue Timeshare Companies

Plaintiffs have failed to make any factual allegation relating to the sophistication of the consuming public or that any consumer has ever actually been confused. Defendants respectfully assert that no consumers are actually confused and that there is no likelihood that consumers will ever confuse a law firm that sues timeshare companies for a timeshare company attempting to sell people timeshares.

(10) Other Factors: Judicial Notice

Defendants respectfully submit that the Court may take judicial notice of certain information and motivations in the filing of the instant lawsuit against Defendants by Plaintiffs and Plaintiffs' counsel if and only if it is so proper in consideration of this Motion to Dismiss.

Plaintiffs assert that Defendants' Google AdWords advertising is likely to confuse consumers as to the origin of the advertisements. However, Plaintiffs' formulaic recitation of the elements of the cause of action along with labels and conclusions lacking plausible factual allegations are insufficient.

That Defendants' advertisement appears in certain search results is an indication of nothing and in no way indicates that the advertisement is sponsored by Plaintiffs. Moreover, Defendants' advertisements facially disassociate Defendants from Plaintiffs' business and actually pit Plaintiffs and Defendants as absolute opponents and juxtaposed as to their respective positions, being polar opposites, entirely distinguishable and dissimilar from each other and mutually exclusive.

Plaintiffs' generalized and conclusory assertions that Defendants' Google AdWords advertising constitutes a violation of the Lanham Act and is likely to confuse consumers are simply not supported by plausible factual pleadings in Plaintiffs' Complaint and should therefore be dismissed.

POINT II
PLAINTIFFS FAIL TO STATE A CLAIM FOR
SERVICE MARK INFRINGEMENT UNDER S.C. CODE § 39-15-1160, et seq.

S.C. Code Ann. § 39-15-1160(A)(1) provides that a person is liable in a civil action by a service mark registrant if the person uses, without the consent of the registrant, a reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the advertising of services if such use is *likely to cause confusion or mistake or to deceive as to the source of origin of the services*

S.C. Code Ann. § 39-15-1160(A)(2) provides that a person is liable in a civil action by a service mark registrant if the person reproduces, counterfeits, copies, or colorably imitates a mark and applies such service mark to a label, sign, print, package wrapper, receptacle, or advertisement intended to be used on or in conjunction with the sale or other distribution of the services. However, S.C. Code Ann. § 39-15-1160(B) makes clear that liability under S.C. Code Ann. § 39-15-1160(A)(2) does not entitle the registrant to recover profits or damages unless the acts complained of have been committed *with the intent to cause confusion or mistake or to deceive*.

Plaintiffs allege ownership of registered service marks for "Coral Resorts" and "Hilton Head Island Development Company" pursuant to registrations filed with the South Carolina Secretary of State on November 8, 2013, just before the filing of the instant lawsuit. (Compl. ¶¶ 19 and 20.) Plaintiffs further allege that Defendants have knowingly, intentionally, and in bad

faith purchased the Plaintiffs' registered service marks in internet search engine marketing campaigns with Google and other internet search engines. (Compl. ¶ 65.)

Plaintiffs allege that when their registered service marks are entered into internet search engines such as Google, a paid advertisement for Defendants' law firm sometimes appears, such advertisement being, after the relevant dates of registration of November 8, 2013: "Timeshare Attorney HHI, SC - Ripped off on Hilton Head Island?" (Compl. ¶ 37.)

Thus, the gravamen of Plaintiffs' cause of action pursuant to the South Carolina service mark infringement statutes is whether the Defendants' use of Plaintiffs' registered service marks was "likely to cause confusion or mistake or to deceive as to the source of origin of the services" and whether the use was done "with the intent to cause confusion or mistake or to deceive". S.C. Code Ann. § 39-15-1160(A)(1)-(2).

As set forth above, insofar as Plaintiffs are timeshare sales people and sales and marketing companies and Defendants are a law firm and its lawyers, Defendants respectfully assert that Plaintiffs' cause of action fails immediately on its face. Defendants respectfully assert that any ordinary, prudent person and internet user would be immediately aware that the Defendants' law firm is not affiliated with or sponsored by Plaintiffs' or any timeshare companies, but rather that Defendants are clearly attorneys that bring claims against timeshare companies. Moreover, Defendants submit that it would strain credulity that any internet user could conceivably believe that Plaintiffs' timeshare companies would be in any way connected with a law firm such as Naert and DuBois, LLC that seeks to assist people in legal representation for claims relating to being "ripped off," "lied to," and "scammed" by timeshare companies. (Compl. ¶ 40).

Thus, insofar as such is pled by Plaintiffs, under no scenario could the registered service marks alleged by Defendants be “likely to cause confusion or mistake or to deceive as to the source of origin of the services.” S.C. Code Ann. § 39-15-1160(A)(1). Moreover, under no scenario could such use by Defendants have been done “with the intent to cause confusion or mistake or to deceive.” S.C. Code Ann. § 39-15-1160(A)(2). The timing of Plaintiffs’ having registered two (2) service marks on November 8, 2013, having filed the instant lawsuit on December 17, 2013, yet having allegedly used Plaintiffs’ marks since January 2, 2013, in and of itself negates the allegation of Defendants’ intent to cause confusion or mistake or to deceive. Therefore, Plaintiffs’ cause of action based upon S.C. Code Ann. § 39-15-1160, et seq. should be dismissed.

**POINT III
PLAINTIFFS FAIL TO STATE A CLAIM FOR INJUNCTIVE RELIEF**

Plaintiffs have alleged (1) irreparable harm that will be suffered by Plaintiffs without injunctive relief; (2) that Defendants would not be harmed should they be so enjoined; (3) Plaintiffs’ likelihood of success upon the merits of their claims; and (4) that there is no adequate remedy at law.

Plaintiffs fail to support their allegations with any facts and rely wholly upon conclusory legal assertions. Plaintiffs further fail to address in any way the public interest requirement of injunctive relief, presumably because this factor does not favor Plaintiffs, as customers in the general public find our law firm on the internet through our Google AdWords advertising; the public and customers have concerns about Plaintiffs’ timeshares; customers want to rescind their timeshare ownership with Plaintiffs; and Defendants represent such customers. (Compl ¶42).

Defendants respectfully assert that it is absolutely in the public's interest that Defendants' not be enjoined. Moreover, based upon the Argument set out hereinabove, it appears that Defendants have no likelihood of success on the merits of their claims.

**POINT IV
PLAINTIFFS CAN NEVER SHOW HARM OR DAMAGES**

Plaintiffs curiously allege that they have been harmed and are suffering damages as a result of Defendants' representation of customers who click on our Google AdWords Advertisement for being "ripped off," "lied to," and "scammed". As Plaintiffs state, lawyers are held to a higher duty. (Compl ¶ 52).

Defendants respectfully assert that lawyers and law firms can never cause actionable harm or damage in fulfilling the higher duty rightfully required of them as attorneys by law and the South Carolina Rules of Professional Conduct, and that principal is highlighted by these particular Plaintiffs and counsel for Plaintiffs having filed this very lawsuit. Plaintiffs and this lawsuit are the epitome of and embody precisely why attorneys should be permitted to use trademarks and service marks as hidden keywords in search engine advertising.

CONCLUSION

As set forth above, Plaintiffs' claims fail primarily because Defendants' actions do not constitute use in commerce within the meaning of the Lanham Act and because there is no likelihood of consumer confusion. Moreover, Plaintiffs can never show actionable harm or damages. Plaintiffs' conclusory legal assertions and speculation of consumer confusion are devoid of factual and legal support. Plaintiffs' claims should therefore be dismissed.

Based on the foregoing, the Defendants respectfully submit that each and every claim in the Complaint be dismissed and any request for leave to replead be denied with prejudice. Defendants further request that attorneys' fees, costs, and expenses be awarded to Defendants,

that Plaintiffs and Plaintiffs' counsel be held in contempt of court, and for such other and further relief as this Court deems just, equitable, and proper.

CERTIFICATION

This is to certify that on February 10, 2014, a copy of the foregoing Motion to Dismiss and Memorandum of Law in Support of Defendants' Motion to Dismiss, on behalf of Defendants Naert and DuBois, LLC, Zach Naert, and Joseph DuBois, was electronically filed.

Notice of this filing will be sent by e-mail to all parties by the Court's electronic filing system as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

Respectfully submitted,

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February 10, 2014
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