

CODY Z. WINCHESTER (7197)
JARED L. CHERRY (11534)
PHILLIPS WINCHESTER, LLC
4001 South 700 East, Suite 500
Salt Lake City, Utah 84107
Tel: (801) 935-4932
Fax: (801) 935-4936
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

EVERMORE PARK, LLC, a Delaware
Limited Liability Company,

Plaintiff,

v.

TAYLOR SWIFT, an individual, **TAS
RIGHTS MANAGEMENT, LLC**, a
Tennessee Limited Liability Company, and
TAYLOR NATION, LLC, a Tennessee
Limited Liability Company,

Defendants.

Civil Action No.: 2:21-cv-00069

Honorable Magistrate Judge Daphne A. Oberg

MOTION FOR PRELIMINARY INJUNCTION

Table of Contents

I. RELIEF REQUESTED..... 1

II. PRELIMINARY STATEMENT 1

III. STATEMENT OF FACTS 3

 a. Evermore’s Trademark Rights..... 3

 b. Defendants’ Adoption of the Evermore Trademark. 4

 c. Defendants’ Adoption and Use of the EVERMORE Trademark Has Caused Actual Confusion. 7

IV. ARGUMENT 8

 a. Legal Standard. 8

 b. Evermore is Likely to Succeed on the Merits of its Infringement Claims.. 9

 i. Evermore’s Trademarks Are Valid and Provide Prima Facie Evidence of Evermore’s Exclusive Rights. 9

 ii. Defendants Have Used the EVERMORE Trademark Without Evermore’s Consent and Declared Their Intent to Expand Their Unauthorized Use..... 10

 iii. Defendants’ Actions Are Likely to Cause and Have Already Caused Confusion in the Marketplace. 12

 1. The Marks are Identical. 12

 2. Defendants had Constructive Knowledge and Likely had Actual Knowledge of Plaintiff’s Rights in the EVERMORE Trademark. 13

 3. There is Evidence of Actual Confusion. 15

 4. The Goods and Services are Identical..... 16

 5. The Degree of Consumer Care is Low for Inexpensive Goods and Less Significant than Other Factors..... 18

 6. The EVERMORE Trademark is Strong. 19

 c. Defendants’ Use of the Evermore Trademark for Identical Goods and Services Will Cause Irreparable Harm to Plaintiff. 20

 d. The Threatened Injury to Plaintiff Outweighs Any Harm the Injunction May Cause Defendants. 22

 e. An Injunction Will Not Adversely Affect the Public Interest. 23

V. CONCLUSION..... 23

Table of Authorities

Cases

Audi v. D’Amato, 341 F. Supp.2d 734 (E.D. Mich. 2004)..... 22

Audi v. D’Amato, 469 F.3d 534 (6th Cir. 2006)..... 22

Bad Ass Coffee Co. of Haw., Inc. v. JH Nterprises, LLC, 636 F. Supp.2d 1237 (D. Utah 2009)..... 21, 22

Basis Int’l Ltd. v. Research in Motion Ltd., 827 F. Supp.2d 1302 (D.N.M. 2011)..... 18

Dreamwerks Prod. Grp., Inc. v. SKG Studio, 142 F.3d 1127 (9th Cir. 1998) 16

Harris Research, Inc. v. Lydon, 505 F. Supp.2d 1161 (D. Utah 2007)..... 23

Hornady Mfg., Inc. v. Doubletap, Inc., 746 F.3d 995 (10th Cir. 2014) 12, 19

John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc., 588 F.2d 24 (2d Cir. 1978) 21

Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482 (10th Cir. 1987) 12

King Candy Co. v. Eunice King’s Kitchen, Inc., 496 F.2d 1400 (C.C.P.A. 1974)..... 20

King of the Mountain Sports, Inc. v. Chrysler Corp., 185 F.3d 1084 (10th Cir. 1999) 12, 19

Kodiak Cakes LLC v. Continental Mills, Inc., 358 F. Supp.3d 1219 (D. Utah 2019)..... 23

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234 (10th Cir. 2001) 9

Sally Beauty Co. v. Beautyco, Inc., 304 F.3d 964 (10th Cir. 2002) 12, 16

Skullcandy, Inc. v. Filter USA, Inc., Case No. 2:18-cv-00748, 2019 U.S. Dist. LEXIS 104393 (D. Utah June 21, 2019)..... 9

Tri-State Generation & Transmission Ass’n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986) 21

Tsunami Softgoods, Inc. v. Tsunami Int’l, Inc., Case No. 2:00CV738K, 2001 WL 670926 (D. Utah Jan. 19, 2001) 22

Utah Lighthouse Ministry v. Foundation for Apologetic Information and Research, 527 F.3d 1045 (10th Cir. 2008)..... 13

Statutes

15 U.S.C. § 1057..... 17

15 U.S.C. § 1072..... 13

15 U.S.C. § 1115..... 3, 10

15 U.S.C. § 1127..... 11

Treatises

2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:11 19

2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:76 20

4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:20 12

4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:95 18

5 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 26:31 17

I. RELIEF REQUESTED

Pursuant to Fed. R. Civ. P. 65, Plaintiff respectfully seeks a preliminary injunction enjoining Defendants from using the EVERMORE Trademark (i) in connection with the specific items of apparel covered by U.S Trademark Registration No. 4,720,740 and (ii) in connection with the live entertainment services covered by U.S. Trademark Registration No. 5,597,168.

II. PRELIMINARY STATEMENT

Evermore has invested \$37,000,000.00 in the creation and promotion of Evermore Park and the EVERMORE Trademark.¹ This investment includes nearly \$1,000,000.00 spent in advertising expenditures, direct labor costs for advertising, and acquisition of the domain name *evermore.com*.² As a result of this investment, Evermore has attracted wide recognition for its innovative and unique approach to entertainment.³ To cite one example, a video about Evermore Park created by *Buzzfeed's* “Bring Me” amassed 25,000,000 views and generated 65,000 comments.⁴ Prior to Defendants’ announcement of the *Evermore* Album, the first result of a Google search for the term “Evermore” pointed to *evermore.com*, and subsequent results on the first page related to Plaintiff’s social media accounts and other information about Plaintiff.

Despite Evermore’s well-known rights in the EVERMORE Trademark, Defendants adopted the EVERMORE Trademark on December 10, 2020, in connection with the release of Defendants’ *Evermore* Album. The impact on Evermore was immediate. Information about Defendants’ *Evermore* Album immediately displaced information about Evermore in Internet

¹ ECF No. 2-1, Dec. of Ken Bretschneider at ¶ 2, PageID 37.

² ECF No. 2-1, Dec. of Ken Bretschneider at ¶ 3, PageID 37-38.

³ ECF No. 2, at ¶ 24, PageID 6.

⁴ Available at <https://www.facebook.com/buzzfeedbringme/videos/2158614870839140>.

searches for “Evermore.” Traffic to *evermore.com* surged with users seeking information about Defendants. Guests at Evermore Park questioned staff members about the relationship between Plaintiff and Defendants. Direct associations between Plaintiff and Defendants appeared on social media, including a tweet from the Utah Office of Tourism, telling users to “[k]now the difference” between Plaintiff and Defendants.

Efforts to contain the Covid-19 pandemic have been crippling for businesses like Evermore, which welcome large crowds of people. The pandemic has put Evermore into a struggle for survival—a fact that Defendants know well and are deliberately exploiting. Defendants’ public responses to this lawsuit focus on Evermore’s financial duress, and in both written and telephonic communications, Defendants have made clear that they intend to prey on Evermore’s financial duress to misappropriate the EVERMORE Trademark, repeatedly emphasizing that Evermore can ill afford protracted litigation with one of the world’s wealthiest entertainers. While Defendants enjoy their place at the top of the music charts and the attendant revenue, Evermore is left struggling to maintain relevance in the face of a deluge of information related to Defendants’ misappropriation of the EVERMORE Trademark.

Evermore seeks a narrow injunction, covering only the specific goods and services recited in U.S. Trademark Registration Nos. 4,720,740 and 5,597,168. Evermore recognizes that a preliminary injunction is an extraordinary remedy and that any relief should be narrowly tailored to mitigate against irreparable harm while the litigation proceeds. For the reasons outlined below, Evermore is entitled to this narrow relief, and in the absence of such relief, Evermore will suffer irreparable harm to its reputation and may be forced to close its doors permanently.

III. STATEMENT OF FACTS

a. Evermore’s Trademark Rights.

1. Evermore is the owner of record of the registrations for the EVERMORE Trademark at issue in this motion and shown in the table below. ECF No. 2-2, PageID 42 and PageID 48.

Evermore Trademark Registrations at Issue in this Motion			
Trademark	Reg. No.	Reg. Date	Goods and Services
EVERMORE	4,720,740	4/14/2015	Int.’1 Class 25: Coats; Dresses; Hats; Jackets; Pants; Shirts; Shoes; Shorts; Socks; Sweaters.
EVERMORE	5,597,168	10/30/2018	Int.’1 Class 41: Entertainment services in the nature of live visual and audio performances by an actor; Entertainment services in the nature of augmented reality attractions; Providing theme park services.

2. These registrations are “prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant’s ownership of the mark, and of the registrant’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration.” 15 U.S.C. § 1115(a).

3. Evermore has expended: (i) \$406,835.00 in advertising and promoting the EVERMORE Trademark; (ii) \$300,000.00 to purchase the domain name *evermore.com*, and (iii) \$228,587.00 in direct labor costs for advertising and promoting the EVERMORE Trademark. ECF No. 2-1, Dec. of Ken Bretschneider at ¶ 3, PageID 37-38.

4. Since opening its doors in 2018, to date, Evermore Park has provided its entertainment services to 142,784 guests. ECF No. 2-1, Dec. of Ken Bretschneider at ¶ 4. PageID 38.

5. Evermore offers clothing items bearing the EVERMORE Trademark. Some examples of clothing items bearing the EVERMORE Trademark are shown below. ECF No. 2-1, Dec. of Ken Bretschneider at ¶ 5, PageID 38.

EVERMORE Hoodie



EVERMORE T-Shirt



EVERMORE Hat



b. Defendants' Adoption of the Evermore Trademark.

6. On December 10, 2020, Taylor Swift released the *Evermore* Album.

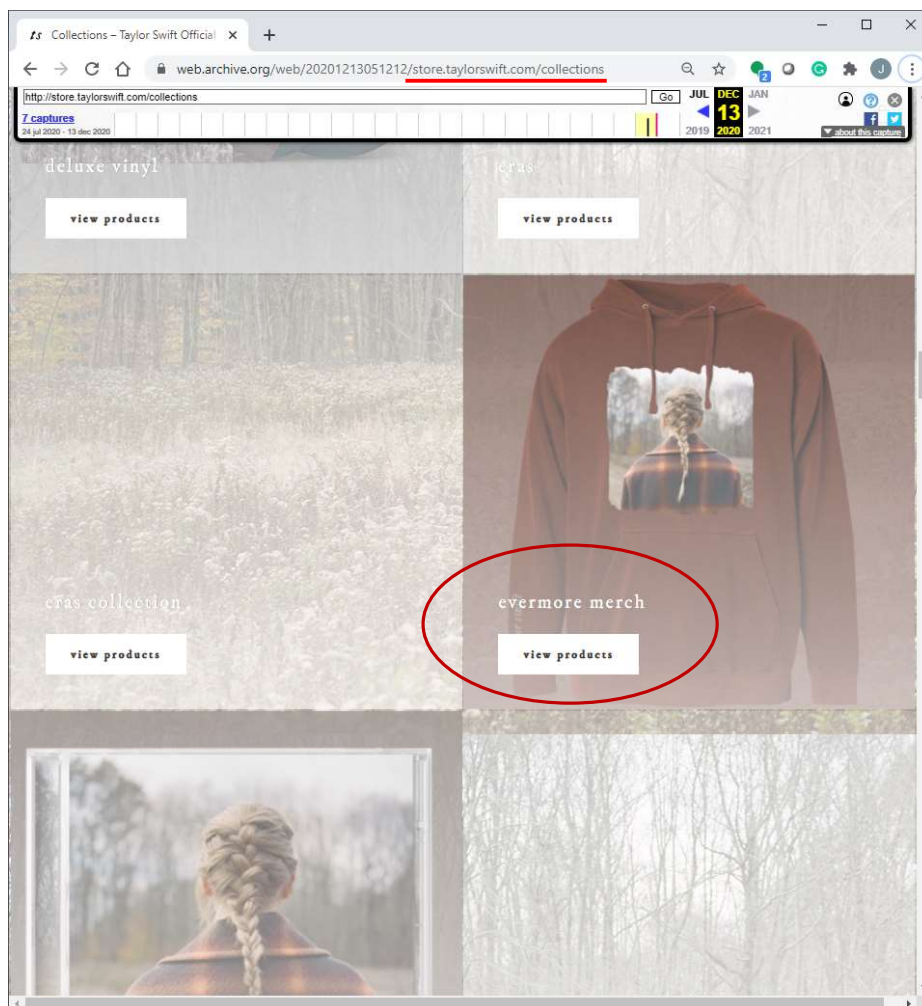
7. The *Evermore* Album includes a song titled *Evermore* and 14 additional songs, six (6) of which include explicit lyrics. The explicit versions of the *Evermore* Album are provided with the “parental advisory” warning shown below.



8. On December 11, 2020, or shortly thereafter, the website operated by Taylor Nation, LLC, *store.taylorswift.com*, began offering “evermore merch,”⁵ at the address: <https://store.taylorswift.com/collections/evermore-merch>.

9. *Archive.org* created a cached version of Defendants’ “collections” webpage on December 13, 2020, a copy of which is shown below.

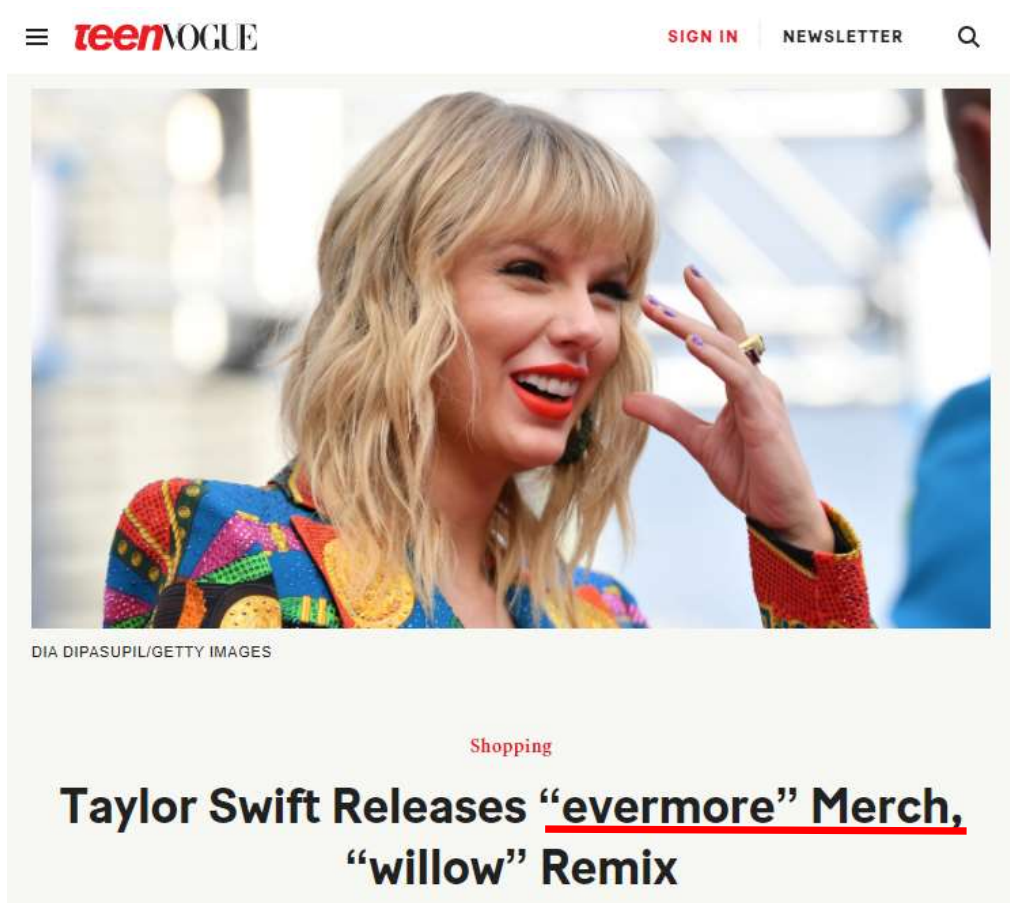
⁵ Defendants removed the “evermore merch” pages after Plaintiff sent the cease and desist letter attached to the Complaint as Exhibit D, ECF No. 2-4, PageID 51-59; however, all of the same products remain available.



10. The text in the bottom right corner of the screen that appears when a user hovers the mouse over the “view products” button on the “evermore merch” section is enlarged below, and shows “evermore-merch” in the URL (underlining added).



11. On December 13, 2020, *Teen Vogue* reported on Defendants’ release of “‘evermore’ Merch,” as shown in the following screen capture (underlining added).



12. Defendants’ “evermore merch” collection includes items of apparel, such as hoodies, pullovers, sweaters, shirts, hats, and socks. ECF No. 2 at ¶ 40, PageID 11-13.

c. Defendants’ Adoption and Use of the EVERMORE Trademark Has Caused Actual Confusion.

13. Visitors to Evermore Park asked staff members whether the *Evermore* Album was the result of a collaboration between Evermore and Taylor Swift or some other type of relationship. ECF No. 2-5, Dec. of Andrea Measom at ¶ 2, PageID 60.

14. On the day that Taylor Swift announced the *Evermore* Album (*i.e.*, December 10, 2020), web traffic on Evermore Park’s website, *evermore.com*, spiked 330.4% in comparison to traffic on the previous day (*i.e.*, December 9, 2020). ECF No. 2-6, Dec. of Jaren Tolman at ¶ 3, PageID 63.

15. Users on social media made direct association between Taylor Swift and Evermore Park. ECF No. 2, at ¶ 70, PageID 21. For example, a tweet from the official account of Utah Office of Tourism⁶ is shown below.



IV. ARGUMENT

a. Legal Standard.

In the Tenth Circuit, a “party seeking a preliminary injunction must satisfy a four-factor test in order to be awarded such temporary relief. The requesting party must demonstrate (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if

⁶ Available at https://twitter.com/VisitUtah/status/1337125429769957376?ref_src=twsrc%5Etfw.

issued will not adversely affect the public interest.” *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234 (10th Cir. 2001).⁷

Evermore satisfies each of these factors.

b. Evermore is Likely to Succeed on the Merits of its Infringement Claims.

Plaintiff has sued Defendants for trademark infringement under the Lanham Act (15 U.S.C. § 1125)⁸ and is likely to succeed on these claims. “To adequately state a claim for trademark infringement under the Lanham Act, plaintiffs must allege that: (1) they own a valid, protectable mark; (2) the defendant used the trademark in commerce without plaintiff’s consent; and (3) the defendant’s use of the trademark creates a likelihood of confusion.” *Skullcandy, Inc. v. Filter USA, Inc.*, Case No. 2:18-cv-00748, 2019 U.S. Dist. LEXIS 104393, at *13 (D. Utah June 21, 2019). Still, “[d]espite the other required elements, the central inquiry in a trademark infringement case is the likelihood of consumer confusion.” *Id.* at *14. Evermore establishes all three elements.

i. Evermore’s Trademarks Are Valid and Provide Prima Facie Evidence of Evermore’s Exclusive Rights.

Evermore’s federal registrations for the EVERMORE Trademark⁹ are “prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant’s ownership of the mark, and of the registrant’s exclusive right to use the registered

⁷ “A TRO and a preliminary injunction share the same standard.” *In-N-Out Burgers v. Chadders Rest.*, Case No. 2:07-cv-394, 2007 U.S. Dist. LEXIS 47732, at *6 (D. Utah June 29, 2007).

⁸ This motion addresses only Plaintiff’s claims related to Plaintiff’s federally registered trademarks and does not rely on Plaintiff’s claims for common law trademark infringement or unfair competition under Utah Code § 70-3a-402.

⁹ This motion is limited to Defendants’ use of the EVERMORE Trademark on articles of clothing covered by U.S. Trademark Registration No. 4,720,740 and entertainment services covered by U.S. Trademark Registration No. 5,597,168. Evermore owns additional trademark registrations for the EVERMORE Trademark.

mark in commerce on or in connection with the goods or services specified in the registration subject to any conditions or limitations stated therein” 15 U.S.C. § 1115(a). Any challenge to the validity of Evermore’s trademark rights falls on Defendants to prove.

ii. Defendants Have Used the EVERMORE Trademark Without Evermore’s Consent and Declared Their Intent to Expand Their Unauthorized Use.

Defendants’ adoption of the EVERMORE Trademark was undertaken without Plaintiff’s consent, and indeed, without Plaintiff’s knowledge.

Despite Defendants’ denials,¹⁰ there can be no dispute that Defendants have used the EVERMORE Trademark in connection with their “evermore merch” collection. This fact is established by Defendants’ website (SOF at ¶¶ 8-10) and was the subject of an article titled *Taylor Swift Releases “evermore” Merch, “willow” Remix*, in *Teen Vogue* Magazine. SOF at ¶ 11. The article states:

Taylor’s new evermore merch selection also includes a hunter green “life was a willow” long sleeve t-shirt, socks with the words “tolerate it,” and an aptly titled “fancy sh*t” mug. You can check out her entire collection here, or shop some of our favorite picks below!

Available at <https://www.teenvogue.com/story/taylor-swift-evermore-merch-willow-remix> (emphasis added).

Defendants’ “evermore merch” collection includes articles of apparel that are specifically covered in U.S. Trademark Reg. No. 4,720,740. SOF at ¶¶ 1, 12. Evermore sells shirts, hoodies, and hats under the EVERMORE Trademark, including the specifically illustrated examples shown above. SOF at ¶ 5. The “evermore merch” offered by Defendants is “counterfeit” under

¹⁰ See ECF No. 2-10, PageID 82 (Defendants’ counsel falsely claiming that “contrary to the assertion in your letter, the ‘merch’ on Ms. Swift’s website only contains pictures of Ms. Swift or album lyrics and is not identified as an ‘evermore’ collection. Even the URL where this merch is available makes no mention of ‘Evermore’”).

the definition provided in the Lanham Act. *See* 15 U.S.C. § 1127 (“A ‘counterfeit’ is a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.”).

Ms. Swift, like many other artists, commonly promotes new albums through live performances. A listing of Ms. Swift’s live performances associated with her prior albums would be too lengthy to reproduce, but, to provide one example, Ms. Swift recently performed a song from her *Folklore* album¹¹ at the Academy of Country Music Awards on September 18, 2020. Ms. Swift’s first live performance from the *Folklore* album generated substantial publicity, with more than 12,000,000 views on YouTube.¹² Further, Ms. Swift has recently toured to promote her albums *Red*, *1989*, and *Reputation*. Ms. Swift announced a tour to promote her album *Lover* in 2020,¹³ but performances were cancelled due to the Covid-19 pandemic.

It is all but certain¹⁴ that Ms. Swift will offer live entertainment performances under the EVERMORE Trademark, particularly as restrictions related to Covid-19 are expected to begin to lift later this year. Each time Ms. Swift performs songs from the *Evermore* Album, it will create headlines, just as Ms. Swift’s performance of a song from her *Folklore* album did, and create additional Internet content with which Evermore will be forced to compete. Such performances will fall within the literal scope of U.S. Trademark Reg. No. 5,597,168, and such performances

¹¹ Ms. Swift’s *Folklore* album was released on July 24, 2020, and is the album released by Ms. Swift prior to the *Evermore* Album.

¹² Available at <https://www.youtube.com/watch?v=orXAg5dIMa8> (showing 12,361,177 views as of Feb. 6, 2021).

¹³ See announcement of Tour on Taylor Swift’s Instagram Page, available at <https://www.instagram.com/p/B2hAIEcjv5J/>.

¹⁴ To the extent Defendants contend they will *not* offer live entertainment services using the EVERMORE Trademark, there is no harm to Defendants in granting the relief requested by this motion. *See Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135–36 (9th Cir. 1986) (“If the defendants sincerely intend not to infringe, the injunction harms them little; if they do, it gives [movant] substantial protection of its trademark.”).

meet the definition of “counterfeit” under the Lanham Act.

iii. Defendants’ Actions Are Likely to Cause and Have Already Caused Confusion in the Marketplace.

The Tenth Circuit has identified a number of factors relevant to determining whether a likelihood of confusion exists: (1) the degree of similarity between the marks; (2) the intent of the alleged infringer in using the mark; (3) evidence of actual confusion; (4) similarity of products and manner of marketing; (5) the degree of care likely to be exercised by purchasers; and (6) the strength or weakness of the mark. *Sally Beauty Co. v. Beautyco, Inc.*, 304 F.3d 964, 972 (10th Cir. 2002) (citing *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1089-90 (10th Cir. 1999)). But “[o]bviously, the best evidence of a likelihood of confusion in the marketplace is actual confusion.” *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1487 (10th Cir. 1987). Actual confusion is exactly what we have here.

1. The Marks are Identical.

There can be no dispute that Defendants are using Plaintiff’s identical mark (*i.e.*, EVERMORE). This fact weighs heavily in Plaintiff’s favor because “[t]he similarity of the marks is the first and most important factor.” *Hornady Mfg., Inc. v. Doubletap, Inc.*, 746 F.3d 995, 1001 (10th Cir. 2014). *See also King of the Mountain Sports*, 185 F.3d at 1090 (“In both confusion of source and confusion of sponsorship cases, the similarity of the marks factor constitutes the heart of our analysis”); 4 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (“MCCARTHY”) § 23:20 (5th ed.) (“Cases where a defendant uses an identical mark on competitive goods hardly ever find their way into the appellate reports. Such cases are ‘open and shut’ and do not involve protracted litigation to determine liability for trademark infringement.”).

Based on Defendants’ response to Plaintiff’s demand letter, Plaintiff anticipates that

Defendants will claim that Defendants' mark is TAYLOR SWIFT EVERMORE ALBUM, for which Defendants have filed intent-to-use trademark applications, and argue that the marks are "clearly dissimilar."¹⁵ The relevant mark, however, is the mark Defendants are actually using (*i.e.*, EVERMORE). The fact that Defendants filed the applications on an intent-to-use basis, rather than applications based on actual use in commerce, shows that Defendants have made no use of the TAYLOR SWIFT EVERMORE ALBUM mark. The mark at issue in these applications does *not* appear on the *Evermore* Album and is *not* used to promote the "evermore merch" collection. Any arguments based on the dissimilarity of the EVERMORE Trademark and a mark that Defendants *may* use cannot diminish Defendants' liability for the mark that they *actually* use.

2. Defendants had Constructive Knowledge and Likely had Actual Knowledge of Plaintiff's Rights in the EVERMORE Trademark.

"Registration of a mark on the principal register provided by [the Lanham Act], shall be constructive notice of the registrant's claim of ownership thereof." 15 U.S.C. § 1072. At all times relevant to this matter, Plaintiff's EVERMORE Trademark has been on the principal register. Accordingly, there can be no dispute that Defendants had, at the very minimum, constructive knowledge of the EVERMORE Trademark.

"Evidence that the alleged infringer chose a mark with the intent to copy, rather than randomly or by accident, typically supports an inference of likelihood of confusion." *Utah Lighthouse Ministry v. Foundation for Apologetic Information and Research*, 527 F.3d 1045, 1055 (10th Cir. 2008). Numerous similarities between Plaintiff's use of the EVERMORE

¹⁵ ECF 2-10, PageID 79-80 ("Your client's alleged trademark 'EVERMORE' is clearly dissimilar from 'TAYLOR SWIFT EVERMORE ALBUM.'").

Trademark and Defendants' use of the EVERMORE Trademark point to actual knowledge and copying by Defendants. Those similarities include:

- a. Copying Evermore's use of unique descriptions (*i.e.*, "escapism," "epic tales," etc.);¹⁶
- b. Copying multiple elements from the Evermore album cover art in the *willow*¹⁷ music video (*i.e.*, a large tree, an opening in the trunk of the tree, the prominent roots, the purple leaves, etc.);¹⁸ and
- c. Filing intent-to-use trademark applications including the EVERMORE Trademark for each item advertised for sale on *evermore.com*,¹⁹ including oddly specific items, such as "ornamental cloth patches"²⁰ and "three-dimensional plastic ornaments."²¹

Finally, Plaintiff's use of the EVERMORE Trademark was widely publicized, and a simple search on Google.com or other search engine leads immediately to information about Plaintiff.

ECF No. 2-1, Dec. of Ken Bretschneider at ¶ 9, PageID 41. Although Plaintiff has not yet engaged in discovery on the extent to which Defendants had actual knowledge of Plaintiff's rights, it will strain credulity if Defendants claim that neither they nor any of their agents

¹⁶ Compare ECF No. 2 at ¶ 22, PageID 5 (Ken Bretschneider describing "escapism" associated with Evermore); ECF No. 2 at ¶ 36, PageID 11 (noting references to Evermore's "epic tales"); with ECF No. 2-3, PageID 50 (Taylor Swift writing with regard to the *Evermore* Album: "I loved the escapism I found in these imaginary/not imaginary tales. I loved the ways you welcomed the dreamscapes and tragedies of epic tales of love lost and found.").

¹⁷ *Willow* is the first song on the *Evermore* Album.

¹⁸ Compare ECF No. 2 at ¶ 59 (depicting Ms. Swift emerging from an opening in the trunk of a large tree with prominent and exposed roots and purple leaves) with ECF No. 2 at ¶ 60 (depicting a large tree with prominent and exposed roots, purple leaves, and a door in the trunk on the cover art of the CD of Evermore's original score).

¹⁹ ECF No. 2 at ¶ 52 (identifying applications for TAYLOR SWIFT EVERMORE ALBUM filed by TAS Rights Management LLC for each item shown on *evermore.com*) and ¶ 53 (showing screen capture from *evermore.com*), PageID 8 and 16-17.

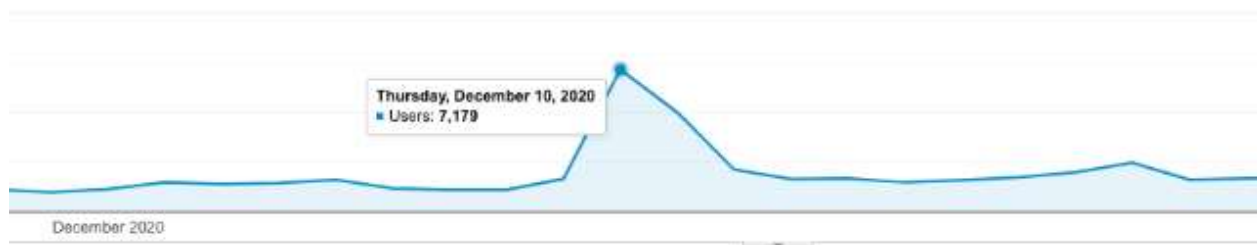
²⁰ Trademark Application Serial No. 90/371,763.

²¹ Trademark Application Serial No. 90/371,730.

conducted a search for the term “Evermore” prior to releasing the *Evermore* Album and launching the “evermore merch” collection. Further, it will strain credulity if Defendants argue that neither they nor their agents conducted a search for trademark registrations of record at the USPTO prior to filing eight (8) trademark applications including the term EVERMORE.²²

3. **There is Evidence of Actual Confusion.**

Actual confusion resulting from Defendants’ adoption of the EVERMORE Trademark began immediately as evidenced by the sudden and dramatic increase in traffic to *evermore.com*. Although Evermore had done nothing that would explain a dramatic surge in traffic,²³ a surge in traffic accompanied Defendants’ announcement of the *Evermore* Album. The spike in traffic shown below speaks powerfully and objectively to the obvious fact that thousands of individual Internet users seeking information about Ms. Swift’s new album flocked to *evermore.com*. The spike in traffic was short lived, as the torrent of materials related to the *Evermore* Album appeared and pushed content related to Evermore farther down in search engine results.



Users on social media immediately began making comparisons between Plaintiff and Defendants. For example, a tweet from the Utah Office of Tourism told users to “[k]now the difference” between Plaintiff and Defendants. SOF at ¶ 15. Guests at Evermore Park

²² ECF No. 2 at ¶ 44, PageID 14-15.

²³ ECF No. 2-6, Dec. of Jaren Tolman at ¶ 5, PageID 63.

specifically inquired about the relationship between Plaintiff and Defendants. SOF at ¶ 13.

The phenomenon of a larger and more powerful junior user (*i.e.*, Ms. Swift) infringing the rights of a smaller and less powerful prior user (*i.e.*, Evermore) is known as “reverse confusion.” Cases addressing “reverse confusion” make clear that the more powerful junior user is *not* free to infringe the prior rights of a lesser known senior user:

[W]e note that if this were an ordinary trademark case rather than a reverse infringement case — in other words if DreamWorks [the better known infringer] had been there first and Dreamwerks [the lesser known, senior user] later opened up a business running entertainment-related conventions — there would be little doubt that DreamWorks would have stated a case for infringement sufficient to survive summary judgment. The reason for this, of course, is that a famous mark like DreamWorks SKG casts a long shadow. Does the result change in a reverse infringement case because the long shadow is cast by the junior mark? We think not.

Dreamwerks Prod. Grp., Inc. v. SKG Studio, 142 F.3d 1127, 1130 (9th Cir. 1998) (internal footnote omitted). The Ninth Circuit further explained that “[w]hile it is somewhat unusual for a famous mark to defend its very existence against a much lesser known mark, [the more powerful junior user] is in no different a position than any other new company which must ensure that its proposed mark will not infringe on the rights of existing trademark holders.” *Id.*

If the roles of the parties were reversed, and Defendants, with their fame and clout, were the “existing trademark holders” pursuing claims against a smaller junior user, the evidence of confusion would be the proverbial “nail in the coffin.” The same result must follow here, despite Defendants’ undeniable fame.

4. The Goods and Services are Identical.

The greater the similarity between the parties’ products, and similarity as to how they market those products, “the greater the likelihood of confusion.” *Sally Beauty Co.*, 304 F.3d at 974. Plaintiff and Defendants both offer clothing under the EVERMORE Trademark, and Defendants almost certainly will offer live entertainment services under the EVERMORE

Trademark.

Both Plaintiff and Defendants rely heavily on the Internet and social media to market their respective goods and services. This is precisely why the deluge of information about Defendants that is displacing information about Plaintiff is so harmful to Plaintiff.

Defendants argue that Plaintiff's use is geographically limited based on arguments made by Plaintiff in the prosecution of the EVERMORE Trademark and because Plaintiff's goods bearing the EVERMORE Trademark are sold at Evermore Park.²⁴ Defendants' arguments ignore the well-established fact that "the owner of a Principal Register registration has superior rights throughout the United States. That is, a federally registered mark has nationwide protection regardless of the territory in which the registrant actually used the mark." 5 MCCARTHY § 26:31. *See also* 15 U.S.C. § 1057 ("Contingent on the registration of a mark on the principal register provided by this chapter, the filing of the application to register such mark shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect . . .").

Defendants also ignore the fact that visitors to Evermore Park come from across the country. Indeed, the Utah Office of Tourism is the author of the tweet that tourists should "know the difference" between Plaintiff and Defendants. SOF at ¶ 15.

Further, Defendants ignore the fact that Defendants conduct substantial business and generate substantial revenue in this jurisdiction. To cite one example, Ms. Swift's "1989 World Tour" included a concert in Salt Lake City, and the average cost of a ticket, \$326, "tops all Utah Jazz games in that timespan, as well as concerts by One Direction, Justin Bieber, George Strait and many others."²⁵ Thus, even if Plaintiff's use of the EVERMORE Trademark were limited to

²⁴ ECF No. 2-10, PageID 81-82.

²⁵ *See* <https://seatgeek.com/tba/music/ticket-prices-for-taylor-swift-in-salt-lake-city/>.

Utah—which it is not—Defendants’ arguments are unavailing because they also conduct business in Utah.

5. The Degree of Consumer Care is Low for Inexpensive Goods and Less Significant than Other Factors.

“[T]he effect of purchaser care, while relevant, will be less significant than, or largely dependent upon, the similarity of the marks at issue in that confusingly similar marks may lead a purchaser who is extremely careful and knowledgeable about the instrument that he is buying to assume nonetheless that the seller is affiliated with or identical to the other party.” *Basis Int’l Ltd. v. Research in Motion Ltd.*, 827 F. Supp.2d 1302, 1309 (D.N.M. 2011).

With regard to clothing items bearing the EVERMORE Trademark, this factor favors Plaintiff because “the price level of the goods or services is an important factor in determining the amount of care the reasonably prudent buyer will use.” 4 MCCARTHY at § 23:95. The cost of the clothing sold by both parties under the EVERMORE Trademark is relatively low, and none of the recognized classes of specialized consumers are relevant. Further, the use of the identical mark for identical goods “may lead a purchaser who is extremely careful and knowledgeable about the instrument that he is buying to assume nonetheless that the seller is affiliated with or identical to the other party.” *Basis Int’l*, 827 F. Supp.2d at 1309.

The cost of Ms. Swift’s live entertainment is admittedly significant; however, the similarity of the services has already led consumers to question whether the *Evermore* Album is a collaboration between Plaintiff and Defendants. SOF at ¶ 13. Defendant’s likely use of the identical mark (*i.e.*, EVERMORE) for identical services (*i.e.*, live entertainment) is likely to cause and has already caused confusion, and thus favors Plaintiff.

6. The EVERMORE Trademark is Strong.

The Tenth Circuit requires consideration of two factors regarding the relative strength of a mark: “(1) Conceptual Strength: the placement of the mark on the spectrum; and (2) Commercial Strength: the marketplace recognition value of the mark.” *King of the Mtn. Sports*, 185 F.3d at 1093 (internal quotations omitted). “Under the conceptual strength prong, the categories in descending order of strength, are: fanciful; arbitrary; suggestive; descriptive; and generic.” *Id.* Commercial strength is “the marketplace recognition value of the mark.” *Hornady*, 746 F.3d at 1007-1008. The factors courts consider in determining strength of the mark are “(1) the length and manner of the mark’s use, (2) the nature and extent of advertising and promotion of the mark, and (3) the efforts made to promote a conscious connection, in the public’s mind, between the mark and a particular product.” *Id.*

“Arbitrary marks comprise those words, symbols, pictures, etc., that are in common linguistic use but which, when used with the goods or services in issue, neither suggest nor describe any ingredient, quality or characteristic of those goods or services.” 2 MCCARTHY at § 11:11. The EVERMORE Trademark is an “arbitrary” mark because it does not describe clothing or entertainment services. “Arbitrary” marks are considered “conceptually strong.”²⁶ Accordingly, the “conceptual strength” prong favors Evermore.

Plaintiff’s EVERMORE Trademark is also commercially strong due to Evermore’s substantial and long-standing investment in the mark. Plaintiff has used the EVERMORE Trademark to promote its goods and services since at least 2014. Plaintiff’s investment in Evermore Park exceeds \$37,000,000.00, and includes nearly \$1,000,000.00 in direct costs

²⁶ *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372 (Fed. Cir. 2005) (holding VEUVE, meaning “widow” in English, is “an arbitrary term as applied to champagne and sparkling wine, and thus conceptually strong as a trademark”).

associated with promoting the EVERMORE Trademark. SOF at ¶ 3. Plaintiff's efforts have resulted in tremendous publicity, with just one video about Evermore Park accumulating 25,000,000 views.²⁷ Despite the ongoing impact of the Covid-19 pandemic, Evermore has welcomed 142,784 guests to Evermore Park. SOF at ¶ 4.

Plaintiff's extensive efforts to promote the EVERMORE Trademark have resulted in a strong connection in the minds of the public between Evermore and the EVERMORE Trademark. As a result, the "commercial strength" prong also weighs in Plaintiff's favor.

Defendants' argument, made in response to Evermore's demand letter,²⁸ that the EVERMORE Trademark is weak, is both self-serving and inadequate:

Even weak marks are entitled to protection against subsequent registration or use by another for a very closely similar mark on closely competitive goods or services. As the predecessor court to the Federal Circuit remarked: "Confusion is confusion. The likelihood thereof is to be avoided, as much between 'weak' marks as between 'strong' marks, or as between a 'weak' and a 'strong' mark."

2 MCCARTHY at § 11:76 (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 1401 (C.C.P.A. 1974)).²⁹

c. Defendants' Use of the Evermore Trademark for Identical Goods and Services Will Cause Irreparable Harm to Plaintiff.

The injury Plaintiff stands to suffer in the event this Court does not grant an injunction will be difficult to quantify and may result in Plaintiff being forced to close its doors

²⁷ Available at <https://www.facebook.com/buzzfeedbringme/videos/2158614870839140>.

²⁸ ECF No. 2-10, PageID 83.

²⁹ See also *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 959 (7th Cir. 1992) ("Whether a mark is weak or not is of little importance where the conflicting mark is identical and the goods are closely related."); *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1208 (9th Cir. 2000) ("In *Brookfield*, we noted that in situations in which the appearance of the conflicting marks and the services provided are almost identical, 'the strength of the mark is of diminished importance in the likelihood of confusion analysis.' We underline that conclusion here.") (internal citations omitted).

permanently. A plaintiff satisfies the irreparable harm requirement by demonstrating that there is “a significant risk of experiencing harm that cannot be compensated after the fact by monetary damages.” *Bad Ass Coffee Co. of Haw., Inc. v. JH Nterprises, LLC*, 636 F. Supp.2d 1237, 1248 (D. Utah 2009). It is well recognized that “[a] threat to trade or business viability may constitute irreparable harm.” *Tri-State Generation & Transmission Ass’n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) (citing *John B. Hull, Inc. v. Waterbury Petroleum Prods., Inc.*, 588 F.2d 24, 28–29 (2d Cir. 1978) (holding possibility of going out of business is irreparable harm)).

Plaintiff is struggling to keep its doors open in the face of the worst pandemic in a century, and the additional costs of trying to compete with Defendants for placement on search rankings may spell doom for the company.

In addition, Defendants’ actions have caused Plaintiff to lose control of its reputation and identity, which is irreparable. As popular as Ms. Swift may be, she is not without her detractors. Even if Ms. Swift were universally admired and her use of the EVERMORE Trademark is entirely positive,³⁰ that would still not provide a defense to trademark infringement, and any such argument reflects a misunderstanding of trademark law.

Plaintiffs argue that Defendant’s contention that Plaintiffs are receiving a benefit from Defendant’s promotion of its trademark constitutes a misunderstanding of trademark law. The Court agrees. The Court finds that the loss sustained by a trademark holder from the unauthorized use of its trademarks is the loss of the trademark holder’s ability to control its reputation. In the context of trademark litigation, grounds for irreparable harm include loss of control of reputation, loss of trade, and loss of goodwill, regardless of whether the infringer is putting the mark to a good or favorable use. As the *Liquid Glass Court*^[31]

³⁰ Counsel for Defendants responded to Evermore’s cease and desist letter by stating that Defendants refused to discontinue use of the EVERMORE Trademark, claiming “[i]f anything, your client’s website traffic has actually increased as a result of the release of Ms. Swift’s recent album which, in turn could only serve to *enhance* your client’s mark.” ECF 2-10, PageID 81 (emphasis in original).

³¹ *Liquid Glass Enter. v. Porsche AG*, 8 F. Supp.2d 398, 406 (D.N.J. 1998).

stated “while imitation is the sincerest form of flattery, it is equally true, especially in the context of trademark litigation, that flattery will often get you nowhere.”

Audi v. D’Amato, 341 F. Supp.2d 734, 746 (E.D. Mich. 2004) (internal citation and quotation marks omitted), *aff’d* 469 F.3d 534, 545 (6th Cir. 2006). This Court has similarly stated:

If another person infringes a trademark, that person borrows the owner’s reputation, whose quality no longer lies within the owner’s control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use. There is injury regardless of whether the authorized use to which the marks are put is a better use, the same use, or a worse use. In addition, potential damage to reputation constitutes irreparable injury for the purposes of granting a preliminary injunction in a trademark case.

Tsunami Softgoods, Inc. v. Tsunami Int’l, Inc., Case No. 2:00CV738K, 2001 WL 670926, at *5 (D. Utah Jan. 19, 2001) (internal quotation marks, alterations, and citations omitted).

Evermore’s ability to control the messaging of the Evermore brand and how its goods and services are sold and perceived has been and will be compromised. For example, some potential customers of Evermore Park may be offended by Ms. Swift’s vulgar and profane lyrics³² and derive a negative perception of Evermore. This is the exact type of irreparable injury this Court has recognized as warranting injunctive relief. *See In-N-Out Burgers*, 2007 U.S. Dist. LEXIS 47732, at *9 (finding irreparable harm based on threatened injury to In-N-Out’s control over product quality); *Tsunami Softgoods*, 2001 WL 670926, at *5 (“potential damage to reputation constitutes irreparable injury for the purpose of granting a preliminary injunction in a trademark case”).

d. The Threatened Injury to Plaintiff Outweighs Any Harm the Injunction May Cause Defendants.

When evaluating the balance of harms, courts consider whether the harm the defendant might suffer is “self-inflicted” or avoidable. *Bad Ass Coffee*, 636 F. Supp.2d at 1251. Indeed,

³² SOF at ¶ 7.

when a party “knowingly takes actions that increase the potential for harm if an injunction is ordered against them, courts give those harms little weight in the balancing test.” *Id.*

Evermore stands to suffer great harm if Defendants are permitted to continue offering goods and to begin offering live entertainment under the EVERMORE Trademark. Defendants, on the other hand, stand to suffer comparatively little harm by stopping their merchandise campaign and plans, if any exist, for live performances. Further, any harm that Defendants may suffer is of their own making. Defendants chose to adopt the EVERMORE Trademark despite Evermore’s well-established and existing rights.

Accordingly, this factor weighs in favor of granting injunctive relief to Plaintiff.

e. An Injunction Will Not Adversely Affect the Public Interest.

“Infringement and dilution of trademarks are inherently contrary to the public interest.” *Harris Research, Inc. v. Lydon*, 505 F. Supp.2d 1161, 1169 (D. Utah 2007). Maintaining the *status quo* in which Defendants do not offer live entertainment services under the EVERMORE Trademark and restoring the *status quo* in which Defendants do *not* offer clothing under the EVERMORE Trademark during the course of this litigation will reduce confusion within the marketplace. “While public interest favors intermarket competition, that competition must be fair. Public interest in fair competition dictates that Defendant should not be allowed to profit off the efforts of Plaintiff in achieving its commercial success. Public interest also disfavors allowing competition at the expense of customer confusion.” *Kodiak Cakes LLC v. Continental Mills, Inc.*, 358 F. Supp.3d 1219, 1236 (D. Utah 2019).

V. CONCLUSION

For the foregoing reasons, Evermore respectfully requests that this Court grant its request for a preliminary injunction, and enjoin Defendants from using the EVERMORE Trademark to

promote or sell the articles of clothing enumerated in U.S. Trademark Reg. No. 4,720,740 and offering “live entertainment services” as set forth in U.S. Trademark Reg. No. 5,597,168 until the parties have had the opportunity to litigate this case.

Dated: February 16, 2021

JARED L. CHERRY
PHILLIPS WINCHESTER

By: /s/ Jared L. Cherry
Attorney for Plaintiff