

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

PHELAN HOLDINGS, INC.,

Plaintiff,

v.

Case No: 2:11-cv-392-FtM-DNF

WENDYS INTERNATIONAL, INC.,
JOHN DOES, JANE DOES and ABC
COMPANIES,

Defendants.

_____ /

ORDER

This cause comes before the Court upon the Report and Recommendation filed by United States Magistrate Judge Elizabeth A. Jenkins on July 3, 2012 (Doc. 41). In the Report and Recommendation, Judge Jenkins recommends that the Court grant in part and deny in part Defendant Wendy's International, Inc.'s ("Defendant") Motion for Partial Dismissal of Plaintiff's Complaint, filed on December 9, 2011 (Doc. 17). Neither party has objected to the Report and Recommendation and the time to do so has expired.

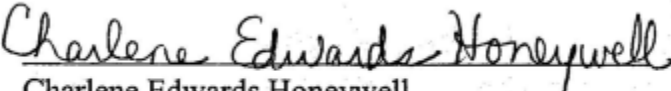
The Court is in agreement with the Magistrate that Plaintiff Phelan Holdings, Inc.'s ("Plaintiff") claims for Federal Trademark Infringement (Count I), Federal Trademark Counterfeiting (Count III), Florida Trademark Infringement (Count VIII), and Unjust Enrichment (Count XII) should be dismissed with leave to file an amended complaint. Doc. 41, pp. 4-11. Indeed, the need to amend Counts I, III, and VIII arises because of Plaintiff's incorrect citations. Additionally, Plaintiff's claim of Florida Misappropriation (Count XIII) should be dismissed with prejudice because Florida does not recognize misappropriation as an independent cause of action imposing liability for Defendant's unauthorized use of Plaintiff's trademark. *Id.*,

p. 10. Thus, after careful consideration of the Report and Recommendation of the Magistrate Judge, in conjunction with an independent examination of the court file, the Court is of the opinion that the Magistrate Judge's Report and Recommendation should be adopted, confirmed, and approved in all respects.

Accordingly, it is hereby **ORDERED and ADJUDGED**:

1. The Report and Recommendation of the Magistrate Judge (Doc. 41) is adopted, confirmed, and approved in all respects and is made a part of this order for all purposes, including appellate review.
2. Defendant Wendy's International, Inc.'s Motion for Partial Dismissal of Plaintiff's Complaint (Doc. 17) is **GRANTED in part and DENIED in part**:
 - A. Counts I, III, VIII, and XII are dismissed with leave to amend.
 - B. Count XIII is dismissed with prejudice.
3. Plaintiff Phelan Holdings, Inc. is granted leave to file an amended complaint within **FOURTEEN (14) DAYS** from the date of this Order.

DONE and ORDERED in Fort Myers, Florida on July 23, 2012.


Charlene Edwards Honeywell
United States District Judge

Copies furnished to:
Counsel of Record
U.S. Magistrate Judge Elizabeth Jenkins