

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF ILLINOIS EASTERN DIVISION

GRUBHUB INC., and
TAKEAWAY.COM CENTRAL CORE B.V.,
Plaintiffs,

v.

THE KROGER CO. AND
RELISH LABS LLC,
Defendants.

CASE NO.: 1:21-cv-05312

Judge Charles R. Norgle

ORDER

Plaintiffs' objections [72] to the Report and Recommendation of the Magistrate Judge are sustained; the Report and Recommendation [57] is rejected; and Defendants' motion for preliminary injunction [17] is denied. Considering these rulings Plaintiffs' motion for leave to file reply [74] is denied because it is moot.

MEMORANDUM OPINION

Before this Court is Plaintiffs', Grubhub Inc., and Takeaway.com Central Core B.V ("JET") (collectively, "Grubhub"), objections to the Magistrate Judge's Report and Recommendation (Dkt. 57) ("the R&R") to grant Defendants', Relish Labs LLC and The Kroger Co.'s (collectively "Home Chef"), motion for preliminary injunction. This matter was referred to the Magistrate Judge who issued the R&R, specifically recommending this Court grant the motion for preliminary injunction. Dkt. 57. In response, Grubhub issued written objections. Dkt. 72. Having reviewed the R&R, Grubhub's objections, and the extensive briefing on this motion, this Court is unpersuaded that Home Chef met its burden in establishing the need for a preliminary

injunction, and therefore rejects the Magistrate Judge’s recommendation and denies the motion for preliminary injunction.

I. MARKS IN QUESTION

The Court adopts and incorporates the factual findings of the R&R; however, the Court refers to the marks in question as follows:



“JET House Mark”



“HC Home Mark”



“Grubhub House Logo”



“Home Chef Home Logo”

Grubhub has also combined the JET House Mark with the Seamless brand name to create the following logo:



“Seamless House Logo”

Dkt. 40 ¶19. Use of the Seamless House Logo will discontinue. Dkt. 56 at 9:14-16.

II. DISCUSSION

a. Review of Grubhub’s Objections to The Report and Recommendation.

Pursuant to 28 U.S.C. § 636(b)(1), the Court must conduct a *de novo* determination of those portions or recommendations of the R&R to which Grubhub objects. The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. *Id.* Thus, the Court begins with addressing Grubhub’s objections.

Grubhub objects to the recommendation to grant Home Chef’s motion for preliminary injunction raising four specific objections. First, the R&R erroneously rejects Grubhub’s consumer

perception surveys. Second, the R&R improperly relies upon a non-final USPTO decision that considered the JET House Mark and not the Grubhub House Logo. Third, the R&R fails to recognize that the use of the well-known GRUBHUB name in the Grubhub House Logo distinguishes that mark from the Home Chef Home Logo and makes confusion unlikely. Fourth, the R&R erroneously credits, as evidence of actual confusion, two anonymous social media posts inquiring about similarities between the Grubhub House Logo and the Home Chef Home Logo. The Court sustains each objection.

i. Objection 1 – Erroneous Disregard of Consumer Perception Surveys.

Grubhub retained survey researcher Hal Poret to conduct surveys to assess whether Grubhub’s use of the Grubhub House Logo causes consumer confusion between Grubhub and Home Chef under reverse and forward theories of confusion.¹ Dkt. 46-3. Both studies were in the standard “Eveready” survey format, “in which respondents are shown the trademarks at issue and questioned to determine if they make a mistaken mental connection to the other party’s mark.” Dkt. 46-3 ¶7; see 6 McCarthy on Trademarks and Unfair Competition § 32:173.50-174 (4th ed. 1999) (noting Eveready surveys are the “gold standard” in cases involving strong marks and are a “widely accepted” format to prove the likelihood or non-likelihood of confusion.) Poret opines that his survey results “powerfully demonstrate” that Grubhub’s use of the Grubhub House Logo does not create a likelihood of confusion with Home Chef or its mark under either the reverse or forward confusion theory. Dkt. 46-3 ¶¶12, 14.

The R&R found that Poret’s surveys, though admissible, were entitled to little weight for five reasons, concluding (1) the reverse confusion survey did not use the proper universe of consumers; (2) the surveys failed to accurately reflect the actual marketplace conditions; (3) the

¹ Trademark confusion is often discussed in terms of two different theories of confusion: “forward confusion” and “reverse confusion.” See Sands, Taylor & Wood Co. v. Quaker Oats Co., 978 F.2d 947 (7th Cir. 1992)

methodology used to question the survey respondents amounted to a “memory test;” (4) the surveys failed to use control groups; and (5) due to the limited time for which the parties’ logos coexisted, the lack of actual confusion is “less salient” or even “irrelevant” when determining whether there is a likelihood of confusion. Dkt. 57 at 41-45.

Grubhub has objected to that weighing of the survey evidence. Dkt. 72 at 2; 4-9. The Court sustains that objection. The survey evidence produced by Grubhub (and, to a lesser extent, the failure of Home Chef to produce survey evidence to the contrary) is entitled to much more weight than was afforded it. In both the forward confusion and reverse confusion surveys, none of the hundreds of respondents were confused, demonstrating that confusion is unlikely. Dkt. 46 at 3 ¶¶11, 13. Survey evidence showing confusion of less than 10% weighs strongly against a finding of infringement. Henri’s Food Prod. Co., Inc. v. Kraft Inc., 717 F.2d 352, 358-59 (7th Cir. 1983). The Court does not, as some courts have, draw the negative inference that Home Chef failed to offer survey evidence because such evidence would have been unfavorable to its claim. See e.g. Planet Hollywood (Region IV), Inc. v. Hollywood Casino Corp., 80 F. Supp. 2d 815, 884 (N.D. Ill. 1999), opinion clarified, No. 96 C 4660, 1999 WL 1186802 (N.D. Ill. Dec. 9, 1999). However, Home Chef’s failure to offer any significant evidence of actual confusion (as discussed in more detail below) – either directly or through surveys – demonstrates a lack of proof by Home Chef on the important element of actual confusion. Badger Meter, Inc. v. Grinnell Corp., 13 F.3d 1145, 1153 (7th Cir. 1994) (noting while failure to prove any actual consumer confusion militates against a finding of the likelihood of such confusion, it is ultimately a question for the finder of fact.) The absence of sufficient proof of any actual confusion when coupled with marks that are not dead-on similar is a blow to Home Chef’s infringement claim.

The R&R unduly criticized the universe of survey respondents in the reverse confusion survey. Respondents for a reverse confusion study should be drawn from a universe consisting of the customer base of Home Chef. See, e.g., Citizens Fin. Grp., Inc. v. Citizens Nat. Bank of Evans City, 383 F.3d 110, 120-21 (3d Cir. 2004). Here, the universe of respondents questioned was a subset of the entire Home Chef customer base universe. The survey didn't question any respondents outside Home Chef's customer base universe; the set of Home Chef customers "who used, or planned to use, an online or in-app service for delivery of home meal preparation kits or ready-to-eat meals" may also include Home Chef customers "who make in-store purchases or who purchase heat-and-eat meals would;" and Home Chef customers "who make in-store purchases or who purchase heat-and-eat meals" may not be any more (or less) susceptible to confusion. In other words, nothing suggests the survey asked the wrong people, that the survey did not ask the people who the R&R said it should have, or that the results would be any different if it did. While the survey is not perfect, it captured a sufficiently broad swath of Home Chef's customers, and therefore is a probative measure of the effect of the Grubhub House Logo on consumer behavior. Am. Nat'l Ins. Co. v. Am. Nat'l Inv. Advisors, LLC, No. 11-cv-4016, 2014 WL 6613342, at *16 (N.D. Ill. Nov. 21, 2014) (survey evidence "need not be perfect" to be admissible and considered).

The R&R's criticism of the surveys' simulation of marketplace conditions is not erroneous because it is correct that the surveys did not account for how consumers react to: (1) Home Chef's use of the HC Home Mark without the Home Chef brand name; (2) Home Chef's sales of its products in Kroger grocery stores; and (3) Grubhub's use of the Seamless House Logo. However, "the closer the survey methods mirror the situation in which the ordinary person would encounter the trademark, the greater the evidentiary weight of the survey results." Bobak Sausage Co. v. A & J Seven Bridges, Inc., No. 07 C 4718, 2010 WL 1687883, at *5 (N.D. Ill. Apr. 26, 2010).

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