UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LAS VEGAS SKYDIVING ADVENTURES LLC,

Plaintiff,

v.

GROUPON, INC.,

Defendant.

Case No.: 2:18-cv-02342-APG-VCF

Order (1) Granting Defendant's Motion for Summary Judgment; (2) Denying Plaintiff's Motion for Leave to File Late Objection; (3) Denying Plaintiff's First Motion for Reconsideration; and (4) Denying Plaintiff's Second Motion for Reconsideration

[ECF Nos. 91, 104, 105, 109]

Plaintiff Las Vegas Skydiving Adventures LLC (LVSA) sued Groupon, Inc. (Groupon) alleging antitrust violations, trademark infringement, and Nevada common law claims for misappropriation of commercial property and unjust enrichment. I previously granted in part Groupon's motion to dismiss, dismissing with prejudice LVSA's two antitrust claims. Groupon now moves for summary judgment on the three remaining claims. LVSA moves for reconsideration of my dismissal of its antitrust claims. LVSA also moves for reconsideration of Magistrate Judge Ferenbach's order that denied (1) its two motions to compel competent Federal Rule of Civil Procedure (FRCP) 30(b)(6) deponents and (2) its renewed motion for spoliation sanctions.[1] Lastly, LVSA moves for leave to file a late objection to Magistrate Judge Ferenbach's order denying its motion to strike a rebuttal expert report.

I grant Groupon's motion for summary judgment. Assuming that LVSA has a protectible ownership interest in the Fyrosity mark and that Groupon used the mark, LVSA's trademark infringement claim fails as a matter of law because Groupon's use does not give rise to a

[1] I treat LVSA's motion for Magistrate Judge Ferenbach to reconsider his ruling denying the three underlying motions as an objection to Judge Ferenbach's ruling.

likelihood of consumer confusion. And LVSA presents insufficient evidence of a substantial investment in the development of its property and of a benefit conferred on Groupon such that a reasonable jury could find common law appropriation or unjust enrichment, respectively. I also deny LVSA's motion for reconsideration of my order dismissing its antitrust claims. LVSA's new evidence does not alter my previous ruling that the parties do not compete in the same market and their services are not reasonably interchangeable.

My rulings on Groupon's motion for summary judgment and LVSA's motion for reconsideration of dismissal effectively moot the remaining discovery-related motions because no claims remain and these pending motions involve only the metadata dispute and do not relate to consumer confusion, investment in the mark, or benefits conferred. But even if claims remained, these discovery-related motions fail on the merits because none of Magistrate Judge Ferenbach's rulings was clearly erroneous or contrary to law. I therefore deny LVSA's motion for leave to file a late objection to Judge Ferenbach's ruling denying LVSA's motion to strike a rebuttal expert report, and I deny LVSA's motion for reconsideration of Judge Ferenbach's rulings denying two motions to compel and a renewed motion for spoliation sanctions.

I. BACKGROUND

LVSA "offers services to individuals who wish to have the experience of jumping out of an airplane while tethered to an experienced parachutist." ECF No. 97-1 at 3. It offers these skydiving services in and around Las Vegas, Nevada under the service mark "FYROSITY." *Id.*; ECF No. 1-1 at 2-3. Groupon provides discount vouchers for use with affiliated businesses, including skydiving services. ECF Nos. 91 at 9; 97 at 2. LVSA is not affiliated with Groupon. ECF No. 91-8 at 5.

In 2018, the Mesquite Airport Facebook profile shared a video originally posted on LVSA's Skydive Fyrosity Facebook profile. ECF Nos. 91-5 at 2; 97-1 at 3. The video congratulated one of LVSA's customers on her first tandem skydive with the company. *Id.* The Mesquite Airport profile captioned the share: "Closer to Vegas. Don't know if it's on Groupon," tagging Groupon's Facebook profile in the process. *Id.* Groupon then commented on the shared post, stating in relevant part: "Here is a link to all the skydiving Groupon deals from Vegas . . . . Hope you'll find something for you!" *Id.* at 3. Groupon's comment included a hyperlink to a page on Groupon's website that generates search results for the search term "skydive Fyrosity." *Id.*; ECF No. 91-7 at 2. Groupon's results page displays the search term "skydive Fyrosity" (1) in the search bar at the top of the page; (2) on the left side of the screen where a consumer can filter and refine their search and view "breadcrumbs" tracking current search criteria; and (3) below an advertisement banner but above the search results in a header that reads, "results for 'skydive Fyrosity.'" ECF No. 91-7 at 2. Below the header, some text reads: "No matching deals. You may also like . . . ." *Id.* Below that message, the page displays skydiving offers from other service providers in the area. *Id.* Shortly after Groupon commented on the shared Facebook video, LVSA's Skydive Fyrosity profile also commented, stating in relevant part, "Skydive Fyrosity is not on Groupon and will never be. . . . The link [s]hared by Groupon is MISLEADING! When you click you will not see Skydive Fyrosity deals!" ECF No. 91-5 at 3.

LVSA sued Groupon for antitrust violations, trademark infringement, and Nevada common law claims for misappropriation of commercial property and unjust enrichment. ECF No. 1. I dismissed LVSA's antitrust claims. ECF No. 30. LVSA bases its remaining claims on Groupon's Facebook comment containing the hyperlink and on the linked "skydive Fyrosity" results page on Groupon's website. ECF No. 91-8.

After discovery closed, LVSA moved to strike Groupon's rebuttal expert report, twice moved to compel competent FRCP 30(b)(6) deponents, and filed a renewed motion for spoliation sanctions. ECF Nos. 78; 84; 87; 96. Magistrate Judge Ferenbach denied all four motions. ECF No. 103.

Groupon now moves for summary judgment on LVSA's remaining claims of trademark infringement, misappropriation, and unjust enrichment. ECF No. 91. LVSA moves (1) for reconsideration of my order dismissing its antitrust claims under the Sherman Act; (2) for leave to file a late objection to Judge Ferenbach's order denying its motion to strike; and (3) for reconsideration of Judge Ferenbach's order denying its motions to compel and its renewed motion for spoliation sanctions. ECF Nos. 109; 104; 105.

II. ANALYSIS

A. Summary Judgment

Groupon argues in relevant part that LVSA's claims for trademark infringement, appropriation of commercial property, and unjust enrichment fail as a matter of law because LVSA did not provide evidence of consumer confusion, substantial investment in developing its mark, or conferral of a benefit on Groupon. LVSA responds generally that there are disputed facts and evidence of consumer confusion, and that Groupon failed to produce a competent FRCP 30(b)(6) witness such that more material facts could be disputed. Beyond its general assertion of disputed facts, LVSA does not rebut Groupon's arguments regarding the two common law claims.

Summary judgment is proper where a movant shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law."

Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The moving party bears the initial burden of informing the court of the basis of its motion and the absence of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). When the nonmoving party has the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325; *see also Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000) (stating that the moving party can meet its initial burden by "pointing out through argument . . . the absence of evidence to support plaintiff's claim").

Once the moving party carries its burden, the nonmoving party must "make a showing sufficient to establish the existence of [the disputed] element to that party's case." *Celotex*, 477 U.S. at 322. I view the evidence and reasonable inferences in the light most favorable to the nonmoving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

1. Trademark Infringement

Under the Lanham Act, "[t]o prevail on a claim of trademark infringement . . . a party must prove: (1) that it has a protectible ownership interest in the mark; and (2) that the defendant's use of the mark is likely to cause consumer confusion." *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1144 (9th Cir. 2011) (simplified). "The test for likelihood of confusion is whether a reasonably prudent consumer in the marketplace is likely to be confused as to the origin of the good or service bearing one of the marks." *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 935 (9th Cir. 2015). A reasonably prudent consumer is one who "exercise[es] ordinary caution," and that caution presumably increases where a buyer

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