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precluded the mark from being considered strong for likelihood of confusion purposes. The court also found that the defendant's use of its "well-known Cranium house mark [and] purple brain logo" "lessen the possibility that the marks are so similar as to cause confusion."⁶⁴⁷

Extensive third-party use of similar marks and geographic separation played significant roles in another court's decision to deny a preliminary injunction sought by the owner of the federally registered 24 HOUR FITNESS mark for fitness centers against the operators of a competitive business using the 24/7 FITNESS mark.⁶⁴⁸ There were several considerations that weighed in the plaintiff's favor, including the court's finding that "the [parties'] marks are similar enough in appearance and message to weigh towards a possibility of confusion,"⁶⁴⁹ as well as anecdotal and survey evidence of actual confusion.⁶⁵⁰ The court, however, strained mightily to conclude that confusion was unlikely. With respect to the strength of the plaintiff's mark, the court found that the "hundreds of millions of dollars in national advertising" undertaken by the plaintiff was balanced by the mark's lack of inherent distinctiveness, the relative absence of advertising by the plaintiff targeted towards the New York City market in which the defendants (but not the plaintiff) operated, and "various hotel websites advertising a '24 hour fitness center.'"⁶⁵¹ As to the competitive proximity of the parties' services, the court declined to accord much weight to the presence of 600 members of the plaintiff's clubs already resident in New York City, and additionally concluded that the plaintiff's intent to co-brand a planned New York City location rendered its expected entry into that market a "neutral" factor.⁶⁵² Finally, the plaintiff's evidence of actual confusion was also found unconvincing because the anecdotal instances described by the plaintiff's employees were of limited volume compared to the plaintiff's overall sales, and because of the "compelling" criticisms of the plaintiff's survey by the defendants' counter-expert.⁶⁵³ With the court concluding that the defendants had adopted their mark in good faith despite their

647. *Id.* at 459.

648. *See* 24 Hour Fitness USA, Inc. v. 24/7 Tribeca Fitness, LLC, 447 F. Supp. 2d 266 (S.D.N.Y. 2006), *aff'd*, No. 06-4183-CV, 2007 WL 2576692 (2d Cir. Sept 6, 2007).

649. *Id.* at 275.

650. *See id.* at 278-82.

651. *See id.* at 272-74.

652. *See id.* at 276-77.

653. *See id.* at 278-82.

failure to conduct a trademark availability search beforehand,⁶⁵⁴ the fate of the plaintiff's motion was sealed.

Finally, the successful efforts of one group of defendants to de-identify themselves from a franchise system helped ward off a preliminary injunction brought by the former franchisor.⁶⁵⁵ The mark at the heart of the system was GANDOLFO'S NEW YORK DELICATESSEN for restaurant services. When the parties' relationship ended, the defendants continued operations under the G'S DELI mark; they also transitioned away from the plaintiff's trade dress, purchased new uniforms, printed new menus and changed the items described in them, removed all training materials provided by the franchisor, and began offering services such as catering not available from the franchisor.⁶⁵⁶ Rejecting the franchisor's requested relief, which apparently contemplated the termination of the defendants' entire operations, the court concluded against this evidentiary backdrop that the franchisor had failed to demonstrate a likelihood of success on the merits of its infringement claims.⁶⁵⁷

(6) Unlikelihood of Confusion: As a Matter of Law

A defendant moving for summary judgment of noninfringement premised on the theory that there is an absence of evidence supporting the plaintiff's case obviously can face an uphill battle. Nevertheless, a number of defense motions for judgment as a matter of law did succeed, including those in cases challenging parodies of plaintiff's marks.⁶⁵⁸ In one case, for example, the plaintiff owner of the LOUIS VUITTON mark for various luxury goods sued the purveyors of pet beds and related items bearing the designation CHEWY VUITON and featuring a trade dress at least reminiscent of that of the plaintiff.⁶⁵⁹ Observing that "it is undisputed that Plaintiff possesses a strong and widely recognized mark," the court concluded that the mark's fame actually weighed in the defendants' favor: "The fact that the real Vuitton name, marks and trade dress are strong and recognizable makes it unlikely that a parody—particularly one involving a pet chew toy and bed—will be confused with the real

654. *See id.* at 282-86.

655. *See* Gandolfo's Deli Boys, LLC v. Holman, 490 F. Supp. 2d 1353 (N.D. Ga. 2007).

656. *See id.* at 1360-61.

657. *See id.* at 1361.

658. *See, e.g.,* Burnett v. Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962, 972-74 (C.D. Cal. 2007) (dismissing challenge to "distasteful and bizarre, even outrageous and offensive" parody of plaintiff's mark for failure to state a claim).

659. *See* Louis Vuitton Malletier S.A. v. Haute Diggity Dog LLC, 464 F. Supp. 2d 495 (E.D. Va. 2006), *aff'd*, 507 F.3d 252 (4th Cir. 2007).