IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 1:20-cv-01327-WJM-NYW

CO Craft, LLC dba Freshcraft,

Plaintiff,

v.

Grubhub, Inc.,

Defendant.

MOTION TO INTERVENE
BY LYNN SCOTT, LLC AND THE FARMER'S WIFE, LLC

Movants Lynn Scott, LLC and The Farmer's Wife, LLC (collectively "Movants") are plaintiffs and proposed class representatives in *Lynn Scott, LLC vs. Grubhub, Inc.*, No. 1:20-cv-06334, currently pending in the Northern District of Illinois. The proposed class before this Court did not previously include Movants. But on January 29, 2021, Plaintiff Freshcraft amended its proposed class definition to include Movants and other similarly situated restaurants. And on February 24, 2021, Freshcraft announced that it had settled these claims.

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, Lynn Scott and The Farmer's Wife now move for leave to intervene to protect their interests, including by conducting discovery into the adequacy of Freshcraft's representation of those interests and the fairness of the settlement negotiated on their behalf. In support of their motion, Movants state:

1. Lynn Scott and The Farmer's Wife own restaurants that were listed on Defendant Grubhub's platform without their consent.

2. On October 26, 2020, they filed a putative class action in the Northern District of Illinois, *Lynn Scott, LLC vs. Grubhub, Inc.*, No. 1:20-cv-06334, alleging that Grubhub violated the trademark prong of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), by using their names and logos without permission to suggest an affiliation that does not exist. *See* Exhibit A.

3. Movants' case was filed on behalf of more than 150,000 restaurants whose names and logos were similarly used on Grubhub's online platform without their permission.

4. When Movants filed *Lynn Scott*, they were not members of the proposed class in this case, which was proceeding under the false advertising prong of the Lanham Act and only included restaurants Grubhub falsely advertised were closed or not accepting online orders. Phrased alternatively, the *Lynn Scott* proposed class is significantly larger in both coverage and scope than the *Freshcraft* proposed class.

5. On January 29, 2021, Plaintiff Freshcraft amended its proposed class definition to include Movants and the 150,000 restaurants they are representing in the *Lynn Scott* case.

6. On February 24, 2021, Freshcraft announced it had reached a settlement that, if approved by this Court, would bind Movants and the restaurants they are representing in the *Lynn Scott* case.

7. Defendant Grubhub has represented that the parties' settlement discussions began in August 2020, at which point Movants were not part of Freshcraft's proposed class. Movants' claims therefore were unlikely to have been adequately represented in those negotiations.

8. It appears that, in violation of D.C.COLO.LCivR 3.2, Freshcraft failed to timely file a notice of related case.

9. Movants seek to intervene in this action to conduct discovery into the process by which Freshcraft settled their claims, and to otherwise protect their interest in the claims they are prosecuting in the *Lynn Scott* case.

WHEREFORE, Lynn Scott and The Farmer's Daughter respectfully requests leave to intervene in this matter pursuant to Rule 24 of the Federal Rules of Civil Procedure.

Conferral Statement

Pursuant to D.C.COLO.LCivR 7.1(a), counsel for Lynn Scott and The Farmer's Wife conferred with counsel for Freshcraft and Grubhub prior to bringing this motion. The respective parties spoke by telephone on March 18, 2021, but were unable to resolve the matter.

I. INTRODUCTION

Movants are restaurant owners who allege Grubhub violated the Lanham Act's trademark prong by using their names and logos to suggest an affiliation that does not actually exist. They filed suit in October 2020 on behalf of more than 150,000 popular local restaurants who were likewise added to the Grubhub platform without permission. Grubhub's unauthorized use of so many restaurants' names and logos has harmed local restaurants, who report they've since been blamed for negative customer experiences and suffered a variety of reputational and operational harms. But it has proven incredibly profitable for Grubhub: within months of adding these restaurants to its platform, Grubhub's value skyrocketed from $3 billion to $7 billion. Movants' case in the Northern District of Illinois, *Lynn Scott v. Grubhub*, seeks to force Grubhub to surrender its illicit profits to restaurants and stop using restaurants' names and logos without consent.

At the time Movants filed the *Lynn Scott* case, Grubhub was already negotiating a settlement to a smaller case filed before this Court by Plaintiff Freshcraft. Freshcraft had alleged Grubhub was engaged in a nationwide false advertising campaign to hurt competitors' business by falsely representing they were closed and not accepting orders. Freshcraft's proposed class definition was significantly narrower than Movants' proposed class: it included only restaurants that Grubhub falsely advertised as being closed or not accepting online orders when they were in fact open and accepting online orders.

Grubhub and Freshcraft have now finalized their settlement, but they are no longer just settling claims on behalf of their original class. They are now attempting to release the claims of Movants and their larger class as well. Movants accordingly request leave to intervene to safeguard their rights and those of the 150,000 restaurants they represent in *Lynn Scott*. Intervention will allow Movants to conduct discovery into Freshcraft's representation of its expanded class. That discovery will be critical to evaluating the procedural fairness of the parties' proposed settlement and will assist the Court in deciding whether Movants and their proposed class were adequately represented. If they were not, it may be appropriate to certify only Freshcraft's original class for settlement purposes and allow Movants to continue representing the larger class's interests in the Northern District of Illinois, as they have been doing since October of 2020.

II. BACKGROUND

A. May 2020 - Freshcraft files a false advertising case in this Court to stop Grubhub from falsely suggesting its competitors were closed

When Freshcraft filed this action last May, it alleged Grubhub is "knowingly employing a nationwide false advertising campaign to steer patrons to its partner restaurants by falsely declaring that its competitors are closed or not accepting online orders when they are in fact open for

business." (Compl., ECF No. 1, ¶ 1.) Freshcraft sought relief for a proposed class of similarly situated restaurants, which it defined as "All restaurants in the United States or its territories that Grubhub created landing pages for falsely advertising the restaurant as being closed or not accepting online orders when the restaurants were open and accepting online orders." (Id., ¶ 35.)

B. August 2020 – Freshcraft and Grubhub begin negotiating a class settlement

Even though Freshcraft's case has been pending for ten months now, Grubhub has never answered or otherwise responded to Freshcraft's complaint. Instead, the parties repeatedly requested that the Court extend Grubhub's deadline to file a responsive pleading and continue the case's initial scheduling conference. (*See* ECF Nos. 16, 22, 27, 31.) As Grubhub recently disclosed to Movants and the district court in Illinois, the parties were using that time instead to negotiate a class-wide settlement. (*See* Ex. C at 1 (2/25/21 Grubhub Reply).) According to Grubhub, the parties "began their settlement discussions in August 2020." (*Id.*)

C. October 2020 – Movants file a trademark case in Illinois to stop Grubhub from using popular restaurants' names and logos without their permission.

Movants filed their case in the Northern District of Illinois, where Grubhub is headquartered, on October 26, 2020. They filed suit not because Grubhub falsely advertised they were closed, but because Grubhub included their restaurants on its platform without permission and refused to stop even after Movants complained on multiple occasions. (*See* Ex. A.) And whereas Freshcraft's complaint focuses on the *false advertising* prong of the Lanham Act, Movants' complaint focuses on the *trademark* prong—namely, Grubhub's unauthorized use of their names and logos in a manner that causes customer confusion and suggests an affiliation where none exists. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353,

361 (3d Cir. 1997) ("the false advertising prong of the Lanham Act … is 'separate and distinct from the trademark infringement prong.'").

As Movants explain in their complaint, Grubhub's customers have been trained to expect that restaurants listed on Grubhub's platform are affiliated with Grubhub and that by ordering on Grubhub, they will receive "a direct line into the kitchen." (Ex. A, ¶ 1; *see also* ¶¶ 19-24.) But in an effort to attract new users and revive its sagging market valuation, Grubhub started adding popular local restaurants' names and logos to its platform without permission. (*Id.*, ¶¶ 2, 25-30.) By using those restaurants' names and logos, Grubhub suggested an affiliation that did not exist, reaped immediate financial dividends, and was able to sell its business to a European conglomerate for $7.3 billion. (*Id.*, ¶¶ 3, 31-33.) But the consequences for the restaurant whose names and logos were added to Grubhub's platform were quite the opposite. Customers who thought they were getting a "direct line into the kitchen," instead got a "suboptimal diner experience," and understandably blamed the restaurants they thought had partnered with Grubhub to provide accurate, reliable, and timely service. (*Id.*, ¶¶ 4-5, 46-62.) The end result for restaurants like those owned by Movants is significant damage to their hard-earned reputations, loss of control over their customers' dining experiences, loss of control over their online presence, and reduced consumer demand for their services. (*Id.*, ¶¶ 5, 63-79.)

Movants brought their claims on behalf of a significantly larger class than the one alleged by Freshcraft. They seek to represent "[a]ll restaurants included without their permission on Grubhub, Seamless, LevelUp, AllMenus, MenuPages, or any other part of the Grubhub online platform"—a proposed class that consists of well over 150,000 restaurants. (*Id.*, ¶¶ 97, 100.) And whereas the Freshcraft case is only seeking to stop Grubhub from falsely representing restaurants

are closed, Movants are seeking to stop Grubhub from including any unaffiliated restaurants on its platform, regardless of the context. (*Id.*, ¶¶ 7, 112.) Movants also seeks an order requiring Grubhub to disgorge all profits it earned by using restaurants' names and logos without authorization, and to compensate restaurants for the reputational harm its conduct has caused. (*Id.*, ¶¶ 7, 111.)

D. January 2021 - Freshcraft amends its class definition to include Movants; the same day, Grubhub moves to stay Movants' Illinois case

On January 29, 2021, Grubhub moved to stay Movants' case in the Northern District of Illinois. (*See* Ex. B.) Earlier that same day, Freshcraft had expanded its proposed class definition to cover Movants and the other 150,000 restaurants that were included on Grubhub's platform without consent. (ECF No. 35-1, ¶ 34.) Grubhub cited that amended class definition as proof that Movants' case was duplicative. (Ex. B at 1-2, 3, 6.)

The blackline version that was filed along with Freshcraft's amended complaint shows that its *only* substantive change is to the proposed class definition. (ECF No. 35-2.) Freshcraft's complaint still alleges that all class members similarly suffered from a nationwide false advertising campaign that falsely declared they were closed or not accepting online orders. (*Id.*, ¶¶ 1, 3, 39.) But Freshcraft's new proposed class definition now matches Movants' case instead of Freshcraft's case. It no longer covers only restaurants "that Grubhub created landing pages for falsely advertising the restaurant as being closed or not accepting online orders when the restaurants were open and accepting online orders." (*Id.*, ¶ 34.) Instead, it covers all restaurants added to Grubhub's platform without their permission, or as Freshcraft put it, all restaurants "that were listed or otherwise included by Grubhub on Grubhub platforms that did not have an unterminated contract, partnership, or other agreement to be listed or otherwise included on Grubhub platforms." (*Id.*)

E. February 2021 – Freshcraft and Grubhub announce they've negotiated a settlement on behalf of the newly alleged class

Movants have opposed Grubhub's motion to stay their case. The Northern District of Illinois has yet to issue a ruling, but the day before Grubhub filed its reply brief, Grubhub and Freshcraft filed a notice of settlement in this case. (ECF No. 36.) The terms of that settlement have not been disclosed, but Grubhub and Freshcraft have stated they intend to ask the Court to certify its recently expanded class for purposes of settlement rather than the narrower class alleged in Freshcraft's original complaint. (*Id.* at 2.)

III. ARGUMENT

A. Intervention as of right is necessary to protect Movants' interests in claims that could be compromised by a class settlement.

This Court has previously explained that intervention as a matter of right should be permitted under Rule 24(a) if:

(1) the application is timely,

(2) the applicant claims an interest relating to the property or transaction which is the subject of the action,

(3) the applicant's interest may be impaired or impeded, and

(4) the applicant's interest is not adequately represented by existing parties."

Guardians v. Jewell, No. 1:15-CV-02026-WJM, 2016 WL 660123, at *1 (D. Colo. Feb. 18, 2016) (quoting *Elliott Indus. Ltd. P'ship v. B.P. Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005)). Each of these four factors are satisfied here.

1. Movants' request is timely.

Like the intervenors in *Guardians*, Movants acted quickly after learning the grounds for intervention. 2016 WL 660123 at *2 (finding applications timely where all were filed within three

months). Freshcraft expanded its proposed class definition to encompass Movants on January 29, 2021, and announced it had settled that class's claims on February 24, 2021. (ECF Nos. 35, 36.) Movants filed their request less than three weeks later.

2. Movants have an interest in the subject of this action.

When Freshcraft filed this action, Movants were not members of its proposed class and were unlikely to be affected by the case's outcome. (Compl., ECF No. 1, ¶ 35.) But Freshcraft is now asking the Court to certify a settlement class that includes Movants and the 150,000 restaurants they represent in the Northern District of Illinois. (ECF No. 36 at 2.) Movants therefore have an interest in the subject of this action. *See Elliott*, 407 F.3d at 1103 ("[Intervenor], as an unnamed member of the putative class and as a litigant in [a related] state court action, has a sufficient interest … to justify intervention").

3. Movants' interest may be impaired or impeded by a class settlement.

If the Court approves Freshcraft's proposed settlement, Movants and the restaurants they represent in *Lynn Scott* will be bound by that settlement and their claims will be released. Even if Movants were to opt-out, their ability to obtain adequate relief in the *Lynn Scott* case would be severely compromised. Grubhub's conduct was directed at a large class of over 150,000 restaurants. By suggesting to consumers that Grubhub had an affiliation with so many popular local restaurants, Grubhub reaped tremendous profits that should now be disgorged and turned over to the restaurants. But if most of those restaurants' claims are released in this matter, Movants will likely be unable to obtain disgorgement of all of Grubhub's ill-gotten gains, as they are currently attempting to do in *Lynn Scott*. *See Ross v. Convergent Outsourcing, Inc.*, 323 F.R.D. 656, 661–62 (D. Colo. 2018) (granting intervention where "proposed intervenors would be bound

by the terms of the settlement agreement and it would affect the proposed intervenors' potential recovery").

4. Movants' interests are not adequately represented

To justify intervention, a movant "must show only the possibility that representation may be inadequate." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010). Here, there are several indications Freshcraft may not have adequately represented Movants' interests when it settled their claims.

Freshcraft filed its case on behalf of a limited class of restaurants Grubhub falsely advertised as closed but is settling on behalf of a much larger class of all 150,000 restaurants that have been included on Grubhub's platform without permission. Freshcraft began negotiating with Grubhub on behalf of the narrower class in August 2020. (*See* Ex. C at 1.) It was only after Plaintiffs filed their broader case in the Northern District of Illinois that Freshcraft expanded the scope of its representation and negotiated a settlement of those claims. (*See* Ex. A; ECF No. 35-1, ¶ 34.) As Judge Brimmer pointed out in *Ross*, these are classic indicia of a potential "reverse auction" which call the adequacy of Freshcraft's representation into serious question. *Ross*, 323 F.R.D. at 660-61, 662 (granting intervention where "the proposed settlement agreement significantly broadens the class that plaintiff initially sought to represent … and provides for the release of similar claims in numerous pending class actions").

Also concerning is Freshcraft and Grubhub's decision not to inform the Court about Movants' case. D.C.COLO.LCivR 3.2(a) required the parties to file a related-case notice identifying the *Lynn Scott* case, but neither party did so—even as the two parties cooperated to seek a stay of that very case in the Northern District of Illinois. *See PTW Energy Servs., Inc. v.*

Carriere, No. 19-CV-01436-REB-NYW, 2019 WL 3996874, at *11 (D. Colo. Aug. 23, 2019) ("the failure to file the required notice suggests that Plaintiff is attempting to avoid scrutiny"); 4 *Newberg on Class Actions* § 13:60 (5th ed.) (discussing reverse auctions: "courts are wary when they are not informed of pending related cases during the settlement approval process").

And Freshcraft's willingness to settle on such a large scale before Grubhub even filed a responsive pleading, and without conducting any formal discovery, may be yet another indication that it failed to adequately represent class Movants' interest. *See id.* ("Factors that raise suspicions include a quick settlement, settlement of the least well-developed case, or settlement with the least experienced plaintiffs' counsel.").

Movants are only required to make a "minimal showing" that Freshcraft's representation of their interests may be inadequate. *Ross*, 323 F.R.D. at 660-61, 662. They respectfully submit they have done more than that. The manner in which Freshcraft has settled Movants' claims raises serious questions that warrant further investigation and justify Movants' intervention in this action.

B. Movants also meet the requirements for permissive intervention.

As an alternative to intervention as of right under Rule 24(a), the Court also has discretion to permit Movants to intervene under Rule 24(b). *Guardians*, 2016 WL 660123, at *1. In exercising that discretion, the Court is required to consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. *Id.* Here, intervention is more likely to avoid delay rather than precipitate it. When the Court considers whether to approve the parties' proposed settlement, it will be required to consider the process by which the settlement is negotiated and whether Freshcraft adequately represented all class members during that process. Fed. R. Civ. P. 23(e)(2)(A)-(B); 4 *Newberg on Class Actions* § 13:2 (5th ed.). In *Ross*, when faced

with circumstances somewhat similar to these, Judge Brimmer was unable to grant preliminary approval because, "the Court need[ed] more information on the parties' course of conduct in reaching the proposed settlement." *Ross*, 323 F.R.D. at 661. "In order for the intervenors and the Court to evaluate whether there has been a reverse auction," the parties were ordered to "produce to intervenors discovery regarding meetings and communications between the parties' attorneys or representatives regarding any proposed settlement." *Id.* at 662. Here, Movants are proposing to conduct similar discovery now, well before a preliminary hearing is held, so the Court will have the benefit of that information at the hearing and will not need to unnecessarily delay proceedings.

Nor will Movants' intervention prejudice the adjudication of the existing parties' rights. Freshcraft has agreed to settle its individual claim against Grubhub and will remain free to do so even if Movants are permitted to intervene. The question now is not whether Freshcraft's rights have been infringed by Grubhub's conduct, but whether the parties' private settlement of that issue should be binding on absent class members—and if so, whether the class bound by the settlement should be extended to cover Movants and the 150,000 restaurants they represent in the Northern District of Illinois. That is an issue that the Court will need to resolve under Rule 23(e) regardless of whether Movants are permitted to intervene. Movants' presence will not prejudice the adjudication of those issues; to the contrary, Movants' intention is to work with the existing parties to develop a factual and legal record that will enable the Court and other absent class members to better assess whether the proposed settlement is the product of adequate representation. *See Malcolm v. Reynolds Polymer Tech., Inc.*, No. 17-CV-2835-WJM-KLM, 2018 WL 6695921, at *6 (D. Colo. Dec. 20, 2018) (granting permissive intervention where the movant's "input will not

prejudice adjudication of the original parties' rights, but instead is likely to make a significant and useful contribution to the development of the underlying factual and legal issues").

IV. CONCLUSION

Movants respectfully request that the Court permit them to intervene in this matter pursuant to Federal Rule of Civil Procedure 24(a) or Rule 24(b). Intervention is necessary to protect not only Movants' interests, but also those of more than 150,000 restaurants they represent in *Lynn Scott*.

Dated: March 18, 2021

Respectfully submitted,

/s/ *Andrew Swan*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 18, 2021, the foregoing was filed with the Clerk of Courts using the CM/ECF system, which will send notification of such filing to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ *Andrew Swan*
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