No. 23-757

IN THE

Supreme Court of the United States

RELISH LABS LLC, *et al.*,

Petitioners,

v.

GRUBHUB INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

In a case for trademark infringement under the Lanham Act, the key question is whether a likelihood of confusion exists between the senior user's trademark and the allegedly infringing mark. Courts assess likelihood of confusion with a flexible test that considers multiple, non-exclusive factors. *Select Comfort Corp. v. Baxter*, 996 F.3d 925, 933–34 (8th Cir. 2021). The likelihood of confusion test "is an equitable balancing test" where "no single factor is dispositive." *Barbecue Marx, Inc. v. 551 Ogden, Inc.*, 235 F.3d 1041, 1044 (7th Cir. 2000). Courts "may assign varying weights to each of the factors in different cases." *Id.* A district court's determination on this "factbound inquiry" is entitled to the deferential clear error standard on appellate review. *Peoples Fed. Sav. Bank v. People's United Bank*, 672 F.3d 1, 10 (1st Cir. 2012).

A district court's denial of a motion for a preliminary injunction in a trademark infringement case is entitled to "great deference," and is reviewed for abuse of discretion. *DM Trans, LLC v. Scott,* 38 F.4th 608, 617 (7th Cir. 2022).

The appropriate questions in considering this petition, therefore, should be:

1) Should a district court's factual findings on the question of likelihood of confusion on a motion for preliminary injunction be disturbed in the absence of clear error?

2) Is a district court's written decision denying a motion for a preliminary injunction required to include detailed findings and conclusions on every factor in the multi-factor likelihood of confusion balancing test?

CORPORATE DISCLOSURE STATEMENT

Respondent Grubhub Inc. is a wholly owned subsidiary of Just Eat Takeaway.com N.V. Takeaway.com Group B.V. owns 100% of the shares in Respondent Takeaway.com Central Core B.V.

PARTIES TO THE PROCEEDINGS

Petitioners here, appellants below, are Relish Labs LLC and The Kroger Co.

Respondents here, appellees below, are Grubhub, Inc. and Takeaway.com Central Core B.V.

RELATED PROCEEDINGS

Grubhub Inc. and Takeaway.com Central Core B.V. v. Relish Labs LLC and The Kroger Co., No. 1:21-cv-05312, U.S. District Court for the Northern District of Illinois. Order denying motion for preliminary injunction entered May 25, 2022.

Grubhub Inc. and Takeaway.com Central Core B.V. v. Relish Labs LLC and The Kroger Co., No. 22-1950, U.S. Court of Appeals for the Seventh Circuit. Judgment affirming the District Court's decision entered Sept. 12, 2023. Denial of request for rehearing and rehearing en banc entered Oct. 11, 2023.

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INTRODUCTION

Grubhub filed a complaint for declaratory judgment that its trademark does not infringe or dilute Home Chef's trademark rights, and does not constitute unfair competition under federal and state law. Home Chef counterclaimed, asserting trademark infringement and related claims against Grubhub, and filed a routine motion for a preliminary injunction. The District Court denied the motion because it found—after considering the Seventh Circuit's standard likelihood of confusion factors—that Home Chef failed to demonstrate that it was likely to succeed on the merits of its claims. On review, the Court of Appeals for the Seventh Circuit affirmed, finding that the District Court did not abuse its discretion in denying the extraordinary remedy of a preliminary injunction. The case is set to proceed to discovery and toward adjudication on the merits, which will be based on a full evidentiary record rather than the limited record available to the District Court on the preliminary injunction motion.

There is nothing remarkable about the proceedings below, and there is no issue that merits this Court's review. Home Chef's petition for certiorari rests on factually and legally flawed premises.

First, contrary to Home Chef's argument, the District Court and the Court of Appeals considered all of the likelihood of confusion factors. As the Seventh Circuit explained, Home Chef's appeal "boil[ed] down to mere disagreement with the

district court's weighing of the [likelihood of confusion] factors." App. 37a. The District Court is afforded broad discretion—both in its consideration of the factual question of likelihood of confusion and whether to award the drastic remedy of a preliminary injunction—and Home Chef's disagreement with the District Court's assessment provides no basis for relief. That is true even when a district judge disagrees with a magistrate judge's report and recommendation. That the District Judge here sustained objections to the Report and Recommendation does not in any way change the Circuit Court's or this Court's standard of review.

Second, there is no circuit split for this Court to resolve. Absent clear error, appellate courts across the country uniformly defer to a district court's factual findings on the question of likelihood of confusion, and on the appropriateness of denying a motion for a preliminary injunction. That is precisely what the Seventh Circuit did here when it declined to disturb the District Court's denial of Home Chef's motion for a preliminary injunction.

Even if there were an issue of trademark law for this Court to address (and there is not), this case is not an appropriate vehicle for doing so. There has been no discovery in this case to date, and Home Chef's petition comes to the Court on a limited preliminary injunction record. Any review of how lower courts consider and weigh the likelihood of confusion factors should be based on a full evidentiary record following a trial on the merits.

Grubhub respectfully requests that the petition for certiorari be denied.

STATEMENT OF THE CASE

I. Factual Background

A. Grubhub's Business and Branding

Founded in 2004, Grubhub is a leading online food-ordering and delivery marketplace that operates across the United States and connects millions of diners with restaurants through its website and mobile application. App. 3a–4a. Grubhub owns numerous United States trademark registrations covering the GRUBHUB name and stylized variations, which it has used since it launched in 2004 (long before Home Chef was founded in 2013). App. 2a; Br. of Plaintiffs-Appellees at 2–3, *Grubhub, Inc. et al. v. Relish Labs LLC et al.*, No. 22-1950 (7th Cir. Aug. 5, 2022), ECF No. 15.

On June 15, 2021, Grubhub was acquired by the Netherlands-based company, Just East Takeaway.com ("JET"). App. 4a. JET owns many food-ordering and delivery services worldwide. At the time of the acquisition, JET was already using its "Jet House Mark" (shown below), *id.*, which it first adopted in June 2014, around the same time Home Chef publicized the Home Chef Home Mark. *See* App. 58a.

JET House Mark

To help underscore the relationship between JET's companies in different countries, some of which have different brand names, JET combines the JET House Mark with the brand names of its local subsidiaries and affiliates. Br. of Plaintiffs-Appellees at 5, *Grubhub, Inc. et al.*, No. 22-1950 (7th Cir. Aug. 5, 2022). Consistent with that business practice, after the completion of its acquisition of Grubhub, JET adopted trademarks that combined the well-known GRUBHUB word mark (the "Grubhub House Logo") and SEAMLESS word mark (the "Seamless House Logo"), which is a subsidiary of Grubhub, with the JET House Mark to bring it in line with its global branding (as shown below). App. 4a–5a; Br. of Plaintiffs-Appellees at 4, *Grubhub, Inc. et al.*, No. 22-1950 (7th Cir. Aug. 5, 2022).

Grubhub House Logo Seamless House Logo

Grubhub unveiled the new Grubhub House Logo in July 2021. App. 5a. Since then, Grubhub has invested millions in rebranding its print and electronic materials across all of its platforms and with its tens of thousands of restaurant partners. *Id.* Between the July 2021 unveiling of the Grubhub

House Logo and the filing of Home Chef's motion for a preliminary injunction, Grubhub processed over 72 million orders under the Grubhub House Logo. *Id.*

B. Home Chef's Business and Branding

Home Chef was founded in 2013 and delivers meal kits with pre-portioned ingredients and recipes. App. 2a. In 2018, Home Chef merged with Kroger, which operates supermarkets under various different brands. Home Chef's products are now sold in Kroger stores and through Kroger's website and mobile application. *Id.*

HC Home Mark

Home Chef Home Logo

Starting in June 2014, Home Chef began using its "Home Chef Home Mark." Home Chef later registered the logo in the United States, both alone and with the words HOME CHEF. App. 3a. Home Chef has spent more than $450 million on marketing and advertising using the Home Chef Home Logo to distinguish itself as an alternative to restaurant takeout. *Id.*

II. Procedural History

A. The District Court Proceedings

In September 2021, Home Chef sent a "cease and desist" communication to Grubhub demanding Grubhub stop using all forms of the JET House Mark. App. 61a. Grubhub filed a lawsuit on October 7, 2021, seeking a declaratory judgment that the Grubhub House Logo does not infringe the Home Chef Home Logo or Home Chef Home Mark. *Id.*

Home Chef filed counterclaims for trademark infringement. On November 3, 2021, Home Chef filed a motion for a preliminary injunction. App. 62a. On April 8, 2022, the Magistrate Judge issued a non-binding Report and Recommendation ("R&R") recommending a finding that the Grubhub House Logo was likely to cause confusion with Home Chef's trademarks, and recommending that the District Court grant Home Chef's motion for a preliminary injunction. App. 133a–134a. On May 6, 2022, Grubhub filed Objections to the R&R. On May 25, 2022, the District Court sustained each of Grubhub's objections, rejected the Magistrate Judge's recommendations, and issued an order denying Home Chef's motion for preliminary injunction. App. 39a–40a.

The District Court explained that it denied Home Chef's motion for preliminary injunction because "Home Chef [had] not met its burden of making a strong showing of a likelihood of success on the merits" of its trademark infringement counterclaim. App. 54a. The District Court explained that "[a] preliminary injunction is a

drastic remedy which is 'never to be indulged except in a case clearly demanding it'" and that the "ultimate decision in weighing and balancing [the preliminary injunction factors] requires a high degree of discretion on the part of the district judge." App. 52a (citing *Barbecue Marx,* 235 F.3d at 1044 and *Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 314 (7th Cir. 1994)). In its review of the R&R, the District Court considered the Seventh Circuit's likelihood of confusion factors:

> 1. the similarity between the marks in appearance and suggestion;
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> 2. the similarity of the products;
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> 3. the area and manner of concurrent use;
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> 4. the degree and care likely to be exercised by consumers;
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> 5. the strength of the plaintiff's mark;
>
> 6. any actual confusion; and
>
> 7. the intent of the defendant to 'palm off' his product as that of another.

App. 53a–54a (*citing Autozone, Inc. v. Strick*, 543 F.3d 923, 929 (7th Cir. 2008)). The District Court explained that, under Seventh Circuit precedent, "[w]hile no single factor is dispositive, the three most important factors are 'the similarity of the marks, the intent of the defendant, and evidence of actual confusion.'" App. 54a (*quoting Eli Lilly & Co. v. Nat. Answers, Inc.*, 233 F.3d 456, 462 (7th Cir. 2000)).

Grubhub objected to the R&R's analysis of each of these three factors. The District Court sustained Grubhub's objections and found that "all [three factors] favor Grubhub." App. 54a.

The Magistrate Judge had found that the other four factors favored Home Chef, and the District Court adopted the R&R's analysis of those four factors—to which Grubhub did not object—because it found that the Magistrate Judge had not clearly erred in its analysis on those factors. The District Court balanced all seven factors and concluded that the four factors to which Grubhub did not object "would not change the Court's conclusion that Home Chef has not met its burden of showing a strong likelihood of success on the merits" as is required for a motion for preliminary injunction. App. 54a n.2; *see Protect Our Parks, Inc. v. Buttigieg*, 10 F.4th 758, 763 (7th Cir. 2021). Accordingly, the District Court rejected the R&R and denied Home Chef's motion for preliminary injunction. App. 59a.

B. The Seventh Circuit Proceedings

On September 12, 2023, the Court of Appeals for the Seventh Circuit unanimously affirmed the District Court's decision, holding that the District Court did not clearly err in concluding that Home Chef failed to demonstrate a likelihood of success on the merits. App. 1a–2a.

The Seventh Circuit reviewed the District Court's denial of Home Chef's motion for a preliminary injunction for abuse of discretion, under which legal conclusions are reviewed *de novo* and factual findings are reviewed for clear error. App. 7a

(citing *Life Spine, Inc. v. Aegis Spine, Inc.*, 8 F.4th 531, 539 (7th Cir. 2021)). The Seventh Circuit noted that, absent errors, a District Court's decision denying a motion for a preliminary injunction is afforded "great deference." App. 7a (*quoting Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020)).

Whether consumers are likely to be confused is a question of fact, and thus, the Seventh Circuit reviewed the District Court's analysis of the likelihood of confusion factors under the deferential, clear error standard. App. 10a (*citing Rust Env't & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1216 (7th Cir. 1997)). The Seventh Circuit noted that a finding of fact is clearly erroneous only if the reviewing court has a definite and firm conviction that a mistake has been committed; if a district court's evaluation of the evidence is plausible, the Court of Appeals may not reverse the decision, even if it would have weighed the evidence differently. App 11a (*citing Rust Env't & Infrastructure*, 131 F.3d at 1216).

The Seventh Circuit first found that the District Court did not clearly err in comparing the Grubhub House Logo (rather than the JET House Mark) to the Home Chef Home Logo for purposes of the likelihood of confusion analysis. App. 11a. The record evidence showed that consumers rarely, if ever, interacted with the JET House Mark by itself. Rather, the JET House Logo is almost always locked up with the GRUBHUB word mark (to form the Grubhub House Logo), or is otherwise encountered in a context that leaves no doubt that the consumer

is interacting with Grubhub's services (such as on Grubhub's website, with clear GRUBHUB branding). App 12a–13a.

Turning next to the District Court's analysis of the seven likelihood of confusion factors, the Seventh Circuit acknowledged that a district court "may assign varying weight to each of the factors depending on the facts presented," and that Home Chef disputed the District Court's determinations on the similarity of the marks, the defendant's intent, and actual confusion. App 14a. The Seventh Circuit reviewed the District Court's analyses of these factors in turn, and also considered the strength of the marks because Home Chef has discussed the strength of the Grubhub word mark at all levels of review, App. 21a–22a, and ultimately concluded that the District Court did not clearly err, either in its assessment of the individual likelihood of confusion factors or in its weighing of the factors; the Seventh Circuit similarly concluded that the District Court did not abuse its discretion in denying the preliminary injunction. App. 36a–37a.

First, the Seventh Circuit reviewed the similarity of the marks and found that the Grubhub House Logo is "neither 'virtually identical' to the Home Chef house design nor used to promote 'virtually identical' products and services," and that the record "is sparse, at best" with evidence that Grubhub will overwhelm the market and create an association between Home Chef and Grubhub. App. 20a.

As part of its review of the similarity of the marks, the Seventh Circuit also reviewed the District Court's decision not to give substantial weight to a non-final determination from the United States Patent and Trademark Office ("USPTO") that found that the JET House Mark (not the Grubhub House Logo) was confusingly similar to the Home Chef Home Mark. The Seventh Circuit agreed with the District Court that the non-final office action was a preliminary determination, that the USPTO did not consider the marks at issue in this case, and, in any event, there was no conclusive determination as to the registrability of the JET House Mark. App. 20a. Thus, the Seventh Circuit found that the District Court did not clearly err in finding that Home Chef failed to show the similarity of the marks favored a finding of likelihood of confusion. App. 20a–21a.

Second, the Seventh Circuit reviewed the strength of Grubhub's mark. App. 21a. Here, the Seventh Circuit found that both Home Chef and Grubhub have invested millions in advertising and sold billions of dollars' worth of goods or services. App. 23a–24a. The Seventh Circuit found it "hard to see how the [Home Chef] Home Mark (let alone the [Home Chef] Home Logo, which prominently features the HOME CHEF brand name) is at risk of being so overwhelmed by Grubhub's use of the Grubhub House Logo that consumers are likely to begin associating Home Chef's products with Grubhub." App. 23a–24a. The Seventh Circuit acknowledged that it was not its role to weigh the evidence anew, and it was not convinced that the District Court clearly erred when it found Home

Chef failed to demonstrate that consumers would be confused between Home Chef and Grubhub's products and services. App. 24a.

Third, the Seventh Circuit reviewed the actual confusion factor, and considered two social media comments that Home Chef alleged were evidence of actual confusion, as well as Grubhub's consumer perception surveys showing no confusion. App. 25a–26a. After a thorough review of the survey's parameters, the District Court credited Grubhub's consumer perception survey evidence, which demonstrated no confusion. App. 29a and 42a–47a. Upon review, the Seventh Circuit found no clear error in the District Court's analysis of Grubhub's consumer perception survey and that there was no clear error in crediting the survey. App. 32a. The Seventh Circuit also agreed with the District Court's decision to afford Home Chef's two social media comments little weight because the authors were "not actually confused by the marks" and recognized that the "corporations were distinct." App. 26a. The Seventh Circuit found the District Court's weighing of Home Chef's actual confusion evidence against Grubhub's expert survey evidence was plausible and that the District Court did not clearly err in finding that the actual confusion factor did not support a likelihood of confusion. App. 33a.

Fourth, the Seventh Circuit evaluated Grubhub's intent, acknowledging that intent is "essentially irrelevant" in the reverse confusion context where the alleged infringer is not palming off or attempting to create confusion. App. 34a. The Seventh Circuit agreed that there was no evidence that Grubhub was

culpable or deliberately disregarded Home Chef's marks, App. 35a, but did find that the District Court erred in concluding that the intent factor weighed against a likelihood of confusion because intent can only bolster a likelihood of confusion finding, or be neutral. App. 36a. Accordingly, the Seventh Circuit found this factor to be "at best neutral and, therefore, of minimal value in the likelihood of confusion analysis." *Id.*

As to the remaining three factors—the similarity of the products, the area and manner of concurrent use, and the degree of care likely to be exercised by consumers—the Seventh Circuit recognized that they were not disputed and that they weighed in favor of a finding of likelihood of confusion. *Id.*

Having reviewed the District Court's factual determinations on each of the likelihood of confusion factors, the Seventh Circuit next reviewed the District Court's weighing of the factors. The Seventh Circuit found that the District Court addressed both the disputed and undisputed likelihood of confusion factors, and appropriately exercised its discretion to give weight to the factors it found to be most salient and significant. App. 37a. In the Seventh Circuit's view, Home Chef's argument "boil[ed] down to mere disagreement with the district court's weighing of the factors." *Id.* The Seventh Circuit concluded that the District Court's finding that Home Chef failed to establish a likelihood of success on the merits was not clearly erroneous. *Id.*

On October 11, 2023, the Seventh Circuit denied Home Chef's motion for rehearing and rehearing en

banc. App. 136a. On January 9, 2024, Home Chef filed a petition for a writ of certiorari.

REASONS FOR DENYING CERTIORARI

I. There Are No Legal Issues That Warrant This Court's Review

A. A District Court's Fact Finding on Likelihood of Confusion Is Entitled to Great Deference

The Lanham Act provides a cause of action for infringement to a trademark owner against another that uses a mark that "is likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. §§ 1114, 1125. Each federal circuit court has developed a set of factors to help assess likelihood of confusion. *See* 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 24:30 (5th ed. 2024); *Pignons S.A. de Mecanique de Precision v. Polaroid Corp.*, 657 F.2d 482, 487 (1st Cir. 1981) (establishing the eight *Pignons* factors for likelihood of confusion); *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (establishing the eight factor *Polaroid* test for likelihood of confusion); *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 463 (3d Cir. 1983) (establishing the ten factor *Lapp* test for likelihood of confusion); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984) (establishing the seven factor *Pizzeria Uno* test for likelihood of confusion); *Streamline Prod. Sys., Inc. v. Streamline Mfg., Inc.*, 851 F.3d 440, 453 (5th Cir. 2017) (applying the eight factor "digits of confusion" test for likelihood of confusion); *Frisch's Restaurants v. Elby's Big Boy*,

670 F.2d 642, 648 (6th Cir. 1982) (establishing the eight factor *Frisch* test for likelihood of confusion); *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1330 (7th Cir. 1977) (establishing the seven factor *Helene Curtis* test for likelihood of confusion); *SquirtCo. v. Seven-Up Co.*, 628 F.2d 1086, 1090 (8th Cir. 1980) (establishing the six factor *SquirtCo* test for likelihood of confusion); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979) (establishing the eight factor *Sleekcraft* test for likelihood of confusion); *King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1089–90 (10th Cir. 1999) (establishing the six factor *King of the Mountain* test for likelihood of confusion); *Frehling Enters., Inc. v. Int'l Select Group, Inc.*, 192 F.3d 1330, 1335 (11th Cir. 1999) (establishing the seven factor *Frehling* test for likelihood of confusion).

Although each federal circuit articulates the factors in a slightly different way, this Court has recognized that "the factors are not fundamentally different" and any differences amount to "[m]inor variations in the application of what is in essence the same legal standard" (*i.e.*, likelihood of confusion). *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 139, 154 (2015).

Regardless of which specific factors courts consider, assessing likelihood of confusion is not a rigid formula to be applied in a singular manner. *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1030 (9th Cir. 2010) ("The [likelihood of confusion] factors are not a scorecard, a bean-counter, or a checklist."). An

inflexible application of the multi-factor test would defy its very purpose, because "[n]o mechanistic formula or list can set forth in advance the variety of factors that may contribute to the particular marketing context of an actor's use." Restatement (Third) of Unfair Competition § 21 (Am. L. Inst. 1995). Courts have recognized that "[t]his flexible, context-specific, and relative-rather-than-mechanical approach makes sense because the general function of the likelihood-of-confusion factors is to guide the finder of fact towards considerations generally thought to be material to the consuming public's understanding of product source or affiliation." *Select Comfort Corp.*, 996 F.3d at 934.

Indeed, courts across the country have recognized that that the likelihood of confusion test "is an equitable balancing test" where "no single factor is dispositive . . . and courts may assign varying weights to each of the factors in different cases." *Barbecue Marx,* 235 F.3d at 1044 (7th Cir. 2000); *see also Peoples Fed. Sav. Bank*, 672 F.3d at 10 (1st Cir. 2012) ("A proper analysis takes cognizance of all eight factors but assigns no single factor dispositive weight."); *Hamilton Int'l Ltd. v. Vortic LLC*, 13 F.4th 264, 272 (2d Cir. 2021) ("[T]he District Court also correctly recognized that application of these non-exhaustive factors is not a mechanical process, and depending on the complexity of the issues, the court may have to take still other variables into account." (internal quotation marks omitted)); *Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 280 (3d Cir. 2001) ("None of these factors is determinative in the likelihood of confusion analysis

and each factor must be weighed and balanced one against the other."); *George & Co. LLC v. Imagination Ent. Ltd.*, 575 F.3d 383, 393 (4th Cir. 2009) ("Not all of these factors are of equal importance."); *Future Proof Brands, L.L.C. v. Molson Coors Beverage Co.*, 982 F.3d 280, 298 (5th Cir. 2020) ("[A] finding of a likelihood of confusion 'need not be supported by a majority' of the [factors]."); *Leelanau Wine Cellars, Ltd. v. Black & Red, Inc.*, 502 F.3d 504, 515 (6th Cir. 2007) ("In applying these factors, the court has cautioned that they 'imply no mathematical precision, but are simply a guide to help determine whether confusion is likely.'"); *Select Comfort Corp.*, 996 F.3d at 933 (8th Cir. 2021) ("We have repeatedly emphasized that no one factor is controlling and different factors will carry more weight in different settings."); *Fortune Dynamic,* 618 F.3d at 1030 (9th Cir. 2010) ("This eight-factor analysis is 'pliant,' illustrative rather than exhaustive, and best understood as simply providing helpful guideposts."); *Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013) ("The importance of any particular factor in a specific case can depend on a variety of circumstances, including the force of another factor."); *Yellowfin Yachts, Inc. v. Barker Boatworks, LLC*, 898 F.3d 1279, 1289 (11th Cir. 2018) ("[W]e do not decide which party is favored by each factor, tally up the score, and hold in favor of the party with the most points. We apply the factors holistically.").

This highly fact-dependent analysis turns upon the district courts' weighing of unique factual evidence, and is the reason that prior decisions addressing likelihood of confusion often have

"limited precedential value." *Eclipse Assocs. Ltd. v. Data Gen. Corp.*, 894 F.2d 1114, 1117 (9th Cir. 1990). Because the "factors are not exclusive," every factor is not probative or even relevant in every case, and district courts have discretion to consider probative evidence that does not neatly fit within the factors. *PlayNation Play Sys., Inc. v. Velex Corp.*, 924 F.3d 1159, 1169 (11th Cir. 2019); *Leelanau Wine Cellars,* 502 F.3d at 515 (6th Cir. 2007) ("Given the fact-specific nature of trademark infringement actions, not all of the eight factors will be relevant in every case."); *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 215 (3d Cir. 2000) ("[T]he *Lapp* test is a qualitative inquiry. Not all factors will be relevant in all cases.").

Additionally, this highly contextual, fact-driven analysis of likelihood of confusion is reflected in the deferential, clear error review standard that federal circuits apply. Under the deferential standard of review, "[i]f the district court's account of the [likelihood of confusion] evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Rust Env't & Infrastructure*, 131 F.3d at 1216 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)). Thus, even "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

The clear error standard of review reflects the "belief that[,] because appellate courts never are in a

better position [to evaluate the factual record] than the district court, and often are in a worse one, '[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.'" *Rust Env't & Infrastructure*, 131 F.3d at 1216 (7th Cir. 1997) (quoting *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1428 (7th Cir. 1985), *certiorari denied*, 475 U.S. 1147 (1986)); *Hamilton Int'l Ltd.*, 13 F.4th at 277 (2d Cir. 2021) ("It is axiomatic, of course, that '[c]lear error review mandates that we defer to the District Court's factual findings."); *Georgia-Pacific Consumer Prods. LP v. Myers Supply, Inc.*, 621 F.3d 771, 775 (8th Cir. 2010) ("If there are two permissible views of the evidence, 'the fact-finder's choice between them cannot be clearly erroneous.'" (quoting *Anderson*, 470 U.S. at 574)); *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1135 (9th Cir. 2006) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, we may not reverse even though . . . as the trier of fact, we would have weighed the evidence differently."); *Inwood Labs, Inc. v. Ives Labs, Inc.*, 456 U.S. 844, 857 (1982) ("An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction."). This view is consistent with this Court's statements that, when a reviewing court applies the clearly erroneous standard to factual findings, appellate courts must keep in mind their function is not to decide factual issues anew. *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 123 (1969).

The Seventh Circuit's review of the District Court's likelihood of confusion analysis on Home Chef's motion for preliminary injunction is consistent with these principles of appellate review, and the District Court properly engaged in a fact-intensive review and balancing of the evidence in analyzing likelihood of confusion.

B. The District Court Conducted a Proper Likelihood of Confusion Analysis, and the Seventh Circuit Appropriately Deferred to the District Court's Factual Findings

1. The District Court Properly Analyzed and Weighed All of the Likelihood of Confusion Factors

Contrary to Home Chef's assertions, the District Court below properly applied the flexible, fact-dependent likelihood of confusion test and found that Home Chef failed to establish entitlement to a preliminary injunction. The District Court conducted its likelihood of confusion analysis upon review of Grubhub's objections to the Magistrate Judge's R&R. When a party objects to a magistrate judge's report and recommendation, a district court reviews all contested portions of the decision *de novo*. Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C).[1] On *de novo* review, "the magistrate

[1] In contrast, where there is no objection filed to a magistrate judge's report and recommendation, a district court "need only satisfy itself that there is no clear error on the face of the record in order to accept [those portions of the R&R]." Fed. R. Civ. P. 72(b) advisory committee note; *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999) ("If no objection or only par-

judge's report and recommendation carries no presumptive weight, and the district court may accept, reject, or modify the report, in whole or in part." 1 Practice Before Federal Magistrate Judges § 17.13 (2023); Fed. R. Civ. P. 72(b)(3). This *de novo* review "implies[] the district court's consideration of the [disputed facts] must be independent and based upon the [evidence] before the court." *Ekokotu v. Fed. Express Corp.*, 408 Fed. Appx. 331, 336 n.3 (11th Cir. 2011) (*quoting LoConte v. Dugger*, 847 F.2d 745, 750 (11th Cir. 1988). Ultimately, it is the district court judge, not the magistrate judge, who "retains final authority over determination of the dispositive motion[s]." *Adkins v. Mid-Am. Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill. 1992).

After Grubhub timely objected to the R&R, the District Court reviewed the disputed portions of the R&R *de novo* and sustained all of Grubhub's objections. App. 42a. The District Court also reviewed the factual findings supporting the uncontested portions of the R&R, and found that "it does not appear that the R&R's analysis of those factors is clear error," but, in any event, those factors "would not change the Court's conclusion that Home Chef has not met its burden of showing a strong likelihood of success on the merits." App. 54a n.2. In other words, after reviewing the contested portions *de novo* and sustaining Grubhub's objections, the District Court weighed all of the likelihood of confusion factors (both contested and uncontested) and concluded that "Home Chef has not

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tial objection [to an R&R] is made, the district court judge reviews those unobjected portions for clear error.").

made a sufficiently strong showing of a likelihood of success on the merits." App. 59a.

The record thus directly contradicts Home Chef's argument that the District Court impermissibly evaluated only a subset of factors by "choosing not to consider four factors . . . [and] ignor[ing] their corresponding evidence, weighing, and ensuing balancing." Pet. 20. The Seventh Circuit appropriately rejected that argument, and acknowledged that "the district court did address the undisputed factors." App. 37a.

2. The Seventh Circuit Applied the Correct Deferential Standard of Appellate Review

The Seventh Circuit's role on appeal was to review the District Court's analysis and conclusions concerning whether Home Chef was likely to succeed on the merits of its trademark infringement claim. The District Court's analysis of the likelihood of confusion factors "is a question of fact and is reviewed under the clearly erroneous standard." *Rust Env't & Infrastructure*, 131 F.3d at 1216.

The Seventh Circuit concluded that the District Court appropriately "reviewed the record and used its discretion to give weight to the factors it found most salient and significant." App. 37a. The Seventh Circuit also stated, based on its own review of the record and analysis of the likelihood of confusion factors, that it could not conclude "on this record that the district court's determination that

Home Chef did not satisfy its burden to establish a likelihood of success on the merits was clearly erroneous." *Id.*

The Seventh Circuit held that Home Chef's arguments on appeal amounted to nothing more than a disagreement with the District Court's weighing of the likelihood of confusion factors, and the District Court's ultimate conclusion. *Id.* Home Chef is now asking this Court to do the exact same thing—to disturb well-grounded factual findings and to second guess the trier of fact based on the spurious argument that the District Court did not analyze all of the likelihood of confusion factors. Home Chef's argument that this Court must step in because "three sequential decisions analyzed differing combinations of factors and evidence, applying different legal standards" is simply wrong. Pet. 27. Among other things, it ignores the relevant standards of review (of both the District Court's *de novo* review of the R&R and the Seventh Circuit's abuse-of-discretion review of the District Court's decision). Although Home Chef may prefer the Magistrate Judge's R&R recommending the entry of a preliminary injunction, the review process (both at the District Court and Court of Appeals levels) played out precisely as intended under the Federal and Appellate Rules. The District Court's findings that Home Chef failed to demonstrate a likelihood of success on the merits and its denial of Home Chef's motion for preliminary injunction was well-supported, and the Seventh Circuit properly found that those determinations were well within the

District Court's discretion and were not clearly erroneous.

C. There Is No Circuit Split on the Standard of Review for the Likelihood of Confusion

The purported circuit split that Home Chef describes in its brief is illusory. Home Chef categorizes the federal circuits' standards of review into three categories: clearly erroneous, *de novo*, or a combination of the two. Pet. 22. Although different circuits may attach different labels to the standard of review of likelihood of confusion, all circuits consider likelihood of confusion to be a fact-finding exercise, and defer to a district court's factual findings absent clear error.

The First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all review the likelihood of confusion factors and the resulting balancing of the factors under the clearly erroneous standard. *See* McCarthy, *supra*, §23:73; *Bos. Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 15 (1st Cir. 2008) ("The determination as to whether a likelihood of confusion exists is a question of fact, which we review only for clear error."); *Sabinsa Corp. v. Creative Compounds, LLC*, 609 F.3d 175, 182 (3d Cir. 2010) ("Factual findings concerning the likelihood of confusion are reviewed for clear error"); *Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 154 (4th Cir. 2014) ("Likelihood of confusion is an 'inherently factual issue,' and we 'review [ ] district court determinations regarding [it] under a clearly erroneous standard."); *Nat'l Bus. Forms & Printing, Inc. v. Ford Motor Co.*, 671 F.3d 526, 532

(5th Cir. 2012) ("Likelihood of confusion is a question of fact that we review for clear error."); *Rust Env't & Infrastructure*, 131 F.3d at 1216 (7th Cir. 1997) ("Likelihood of confusion is a question of fact and is reviewed under the clearly erroneous standard."); *ConAgra, Inc. v. George A. Hormel, & Co.*, 990 F.2d 368, 371 (8th Cir. 1993) ("[T]he likelihood of confusion is a factual question that we review for clear error."); *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 874 n.2 (9th Cir. 2014) ("We review for clear error the district court's conclusion regarding the likelihood of confusion as well as the district court's application of the likelihood confusion factors to the facts of the case."); *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1227 (10th Cir. 2007) ("In this circuit, likelihood of confusion is a question of fact, . . . which we review for clear error."); *PlayNation Play Sys.*, 924 F.3d at 1165 (11th Cir. 2019) ("We review for clear error both a district court's ultimate decision on likelihood of confusion and its findings on each factor."). The Seventh Circuit's decision in this case appropriately adheres to this standard of review and is consistent with the approach of its sister circuits.

The Second and Sixth Circuits take substantively similar, deferential approaches, although the standards are characterized differently. These circuits review the individual likelihood of confusion factors for clear error, and the ultimate determination of likelihood of confusion *de novo*. *Starbucks Corp. v. Wolfe's Borough Coffee, Inc.*, 588 F.3d 97, 105 (2d Cir. 2009) ("In the trademark context, we review the district court's determinations as to each separate factor in

Polaroid's multifactor test . . . for clear error, while the court's ultimate balancing of those factors is a matter of law subject to *de novo* review."); *Leelanau Wine Cellars*, 502 F.3d at 515 (6th Cir. 2007) ("In reviewing the district court's decision on the issue of a likelihood of confusion following a bench trial, we examine any relevant factual findings for clear error . . . . Whether a likelihood of confusion exists is a mixed question of law and fact subject to *de novo* review.").[2]

Home Chef's argument that the Second and Sixth Circuits' approach creates an "important, recurring, and outcome determinative" circuit split is wrong and unsupported. Pet. 2. All of the federal circuits—including the Second and the Sixth—apply a deferential standard of review to the question of likelihood of confusion. Home Chef's argument that the Second and Sixth Circuits' review of the ultimate weighing of the factors *de novo* creates inconsistent and unpredictable outcomes is unfounded. Both the Second and Sixth Circuit, like all of the other

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[2] The DC Circuit has not formally adopted a likelihood of confusion test, let alone a standard of appellate review of likelihood of confusion. *See Klayman v. Jud. Watch, Inc.*, 6 F.4th 1301, 1319 (D.C. Cir. 2021) ("This circuit 'has yet to opine on the precise factors courts should consider when assessing likelihood of confusion,' but we have referred approvingly to the 'multi-factor tests' of our sister circuits."). The Federal Circuit does not review claims of trademark infringement. Rather it is the reviewing court of the Trademark Trial and Appeal Board's administrative determinations on the registration of trademarks. *See* 15 U.S.C. § 1071(a)(4) ("The United States Court of Appeals for the Federal Circuit shall review the decision from which the appeal is taken on the record before the United States Patent and Trademark Office.").

circuits, give due deference to district courts' fact finding.

For instance, in *Hamilton International Ltd. v. Vortic LLC*, the district court duly applied the Second Circuit's likelihood of confusion test, known as the *Polaroid* test, and found no likelihood of confusion between the plaintiff's watches and the defendant's refurbished watches using plaintiff's watch parts. *See* 13 F.4th at 267. On appeal, the Second Circuit reviewed the district court's determinations on each confusion factor for clear error, noting that the defendant's arguments on the factors amounted to "disagreement with the District Court's credibility determinations" and that "[c]lear error review mandates that [the reviewing court] defer to the District Court's factual findings." *Id.* at 277. The Second Circuit accordingly gave due deference to the district court's findings and affirmed because it found no clear error. The Second Circuit further held that the district court correctly applied the law to conclude that there was no likelihood of consumer confusion. *Id.* at 279.

Hamilton International reflects the Second Circuit's deferential treatment of district courts' determinations on likelihood of consumer confusion. *See also Nat'l Organics, Inc. v. Nutraceutical Corp.*, 426 F.3d 576, 578 (2d Cir. 2005) ("The district court's finding on each factor is reviewed with considerable deference."); *Cadbury Beverages, Inc. v. Cott Corp.*, 73 F.3d 474, 478 (2d Cir. 1996) ("In trademark infringement cases, the district court's findings with regard to each of the *Polaroid* factors 'are entitled to considerable deference,' even on appeals from

summary judgment."); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 873 (2d Cir. 1986) ("Turning to an application of the *Polaroid* test, we must stress at the outset that the district court's detailed findings on each of the *Polaroid* factors are entitled to considerable deference."); *Sly Mag., LLC v. Weider Publ'ns L.L.C.*, 346 F. App'x 721, at *2 (2d Cir. 2009) (recognizing the need to give "considerable deference to the district court's . . . predicate factual findings underlying the analysis of each *Polaroid* factor," and affirming the district court's finding of no likelihood of confusion between the marks).

The Sixth Circuit similarly applies a deferential standard of review of district courts' fact finding. *See, e.g., Wynn Oil Co. v. Am. Way Serv. Corp.*, 943 F.2d 595, 603 (6th Cir. 1991) ("Although the statement of Wynn's counsel casts some doubt on the district court's finding, the deferential standard of review tips the scales in favor of upholding the finding.").

Home Chef's petition acknowledges that the different likelihood of confusion tests across circuits does not create a circuit split because all of the tests "meet the same statutory legal standard." Pet. 2. Yet, Home Chef complains that different circuits emphasize different factors of their various tests, which purportedly yields different results and wastes appellate resources. Pet. 21. But Home Chef does not cite a single example of how the nominally different standards of review create different outcomes or inconsistent applications of the Lanham Act across circuits, let alone how any nominal

differences in the standards of review are any different from the federal circuits' differing likelihood of confusion factors, which all address the same ultimate legal conclusion. Home Chef itself recognizes that the question it now presents has been repeatedly denied for certiorari since at least 1982 (because, in Grubhub's view, there is no substantive split requiring resolution) yet has not explained what has changed over that 42-year period to now require this Court's review. Pet. 25.

II. This Case Is a Poor Vehicle for Addressing the Questions Presented

Even if there were an issue appropriate for this Court's review (and there is not), this case would be a poor vehicle to consider the questions presented.

First, the District Court's and Seventh Circuit's review of the factual record and ultimate conclusions adhered to the applicable standards of review. As discussed above, the District Court properly reviewed the contested portions of the R&R under the *de novo* standard and the uncontested portions for clear error. In turn, the Seventh Circuit properly reviewed the District Court's factual findings for clear error. Home Chef fails to identify a legal deficiency in either of these decisions that would warrant this Court's intervention.

Second, this case comes before this Court on an appeal of the Seventh Circuit's review of the District Court's rejection of a magistrate judge's R&R on a motion for preliminary injunction. There has been no discovery in this case, and the factual record has

not yet been fully developed. This Court's consideration of the appellate standard of review on likelihood of confusion would be more appropriate on a fully developed factual record, following a trial on the merits.

Indeed, in the case below, the Seventh Circuit emphasized that its "conclusion is based on the record before [it] at the preliminary stage" and that it did "not intend to suggest that Home Chef's [theory of confusion is] necessary futile to the extent that it can be supported with sufficient evidence if and when the case proceeds." App. 15a n.5. Home Chef will have the opportunity to develop the factual record through discovery and to pursue its trademark infringement claims (however meritless they may be). This Court has previously declined to grant certiorari to address questions about the standard of review for the likelihood of confusion test where the factual record had not yet been fully developed. *See Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642 (6th Cir. 1982), *cert. denied*, 459 U.S. 916, 916–17 (1982); *Scandia Down Corp.*, 772 F.2d 1423 (7th Cir. 1985), *cert. denied*, 475 U.S. 1147 (1986). It should do the same here.

Third, the procedural posture of this case makes it a particularly poor vehicle to address the appellate standard of review for the likelihood of confusion test. The likelihood of confusion analysis was conducted in the context of a motion for a preliminary injunction, which is an "extraordinary and drastic remedy" where the movant must

demonstrate a strong showing of likelihood of success on the merits. *Goodman v. Ill. Dep't of Fin. & Pro. Regul.*, 430 F.3d 432, 437 (7th Cir. 2005); *see also Tully v. Okeson*, 977 F.3d 608, 613 (7th Cir. 2020) ("A movant's showing of likelihood of success on the merits must be 'strong.'").

A district court's denial of a motion for a preliminary injunction is reviewed for abuse of discretion and the district court's ultimate decision is entitled to "great deference." *See DM Trans*, 38 F.4th at 617 (7th Cir. 2022); *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 33 (1st Cir. 1998) ("On appellate review of the grant or denial of a preliminary injunction, the deferential standard of 'abuse of discretion' applies to judgment calls, by the district court, such as those that involve the weighing of competing considerations."); *Brenntag Int'l Chem., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999) ("We review appealable interim orders, including the grant or denial of a motion for a preliminary injunction, with considerable deference."); *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 813 (3d Cir. 1989) ("When reviewing the grant of a preliminary injunction, we accord deference to the judgment of the district court 'because of the infinite variety of situations which may confront it.'"); *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 357 (4th Cir. 2021) (holding that district court's preliminary injunction determination "is entitled to deference by the court of appeals" and that the "deference should be even greater when the district court *denies* a preliminary injunction."); *Blue Bell Bio-Med. v. Cin-Bad, Inc.*,

864 F.2d 1253, 1256 (5th Cir. 1989) ("The denial of a preliminary injunction is left to the discretion of the district court, and will be disturbed only upon an abuse of that discretion."); *Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997) ("This court reviews a challenge to the grant or denial of a preliminary injunction under an abuse of discretion standard and accords great deference to the decision of the district court."); *TCF Nat'l Bank v. Bernanke*, 643 F.3d 1158, 1162 (8th Cir. 2011) ("We review the district court's grant of a preliminary injunction for abuse of discretion, giving deference to the discretion of the district court."); *Preminger v. Principi*, 422 F.3d 815, 820 (9th Cir. 2005) ("Our review [in the preliminary-injunction context] is limited, affording the district court's decision considerable deference."); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) ("We review the district court's decision to deny a preliminary injunction for abuse of discretion" that "commands that we give due deference to the district court's evaluation of the salience and credibility of testimony, affidavits, and other evidence."); *BellSouth Telecoms., Inc. v. MCIMetro Access Transmission Servs., LLC,* 425 F.3d 964, 968 (11th Cir. 2005) ("We begin our review by noting how deferential it is . . . . Appellate review of such a [preliminary injunction] decision is very narrow." (internal quotation marks omitted)).

This deferential standard means that the reviewing court cannot "substitute [its] judgment for that of the district court." *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1011 (7th Cir.

2005); *see also Maxim's Ltd. v. Badonsky*, 772 F.2d 388, 391 (7th Cir. 1985) (noting that the court of appeals standard of review of a preliminary injunction motion "is a deferential one" and the reviewing court may not "replace the district court's judgment with [its] own."); *Leaders of a Beautiful Struggle*, 2 F.4th at 357 (4th Cir. 2021) ("This deference . . . reflects a commitment by appellate courts not to second-guess a district court's remedial discretion absent special circumstances."); *Demery v. Arpaio*, 378 F.3d 1020, 1027 (9th Cir. 2004) (noting that the circuit court "will not second guess whether the [district] court correctly applied the law to the facts of the case, which may be largely undeveloped at the [preliminary-injunction] stages of litigation"); *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002) (noting that, because "[t]he expedited nature of preliminary injunction proceedings often creates not only limits on the evidence available but also pressure to make difficult judgments without the luxury of abundant time for reflection," such determinations "are the district court's to make and we will not set them aside unless the district court has abused its discretion in making them").

The great deference afforded to district court judges in their determinations on motions for preliminary injunctions, combined with the deference afforded to the district court's factual determinations in assessing likelihood of confusion, create a double layer of deference that makes this case a poor vehicle for this Court to address the standard of review. Because, as noted above, Home

Chef will have an opportunity to press its claims, there is no need for this Court to review the lower courts' likelihood of confusion analyses at this stage to determine if the Seventh Circuit appropriately deferred to the District Court's conclusion that Home Chef failed to make a strong showing of likelihood of success on the merits of its claims.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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