

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

MICHAEL JORDAN,)
)
Plaintiff,)
) 10 C 340
vs.)
) Judge Feinerman
JEWEL FOOD STORES, INC., and SUPERVALU INC.,)
)
Defendants.)
_____)
)
JEWEL FOOD STORES, INC., and SUPERVALU INC.,)
)
Third-Party Plaintiffs,)
)
vs.)
)
TIME INC. and VERTIS, INC.,)
)
Third-Party Defendants.)
_____)
)
TIME INC.,)
)
Third-Party Counter-Plaintiff,)
)
vs.)
)
JEWEL FOOD STORES, INC., and SUPERVALU INC.,)
)
Third-Party Counter-Defendants.)

MEMORANDUM OPINION AND ORDER

In 2009, when Plaintiff Michael Jordan was inducted into the Naismith Memorial Basketball Hall of Fame, Third-Party Defendant Time Inc. published a *Sports Illustrated Presents* commemorative issue devoted to celebrating his career. Doc. 77-1 at 2-3. Time asked

numerous businesses, including Defendant/Third-Party Plaintiff Jewel Food Stores, Inc., to design a page for the issue “with some play on words or design that is specific to Michael Jordan.” Doc. 102 at ¶ 29. Jewel paid nothing for the opportunity, but did agree to stock and sell the issue at special displays by the checkout counters of its grocery stores. Doc. 101 at ¶ 15. Jewel’s internal copywriter created a message, and its marketing vendor, Third-Party Defendant Vertis, Inc., designed the graphics. Doc. 102 at ¶¶ 31, 32, 34. Jewel’s page and the issue’s cover are reproduced at the end of this opinion.

The page features a pair of basketball shoes spotlighted on the hardwood floor of a basketball court. The number Jordan wore for most of his tenure with the Chicago Bulls (23) appears on the tongue of each shoe, with the following message positioned above:

A Shoe In! After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan’s elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was “just around the corner” for so many years.

Beneath the text is Jewel’s logo, which features its registered trade name “Jewel-Osco” in large, underlined print. Beneath the logo, in smaller font, is Jewel’s slogan: “Good things are just around the corner.” Jewel operates about 175 grocery stores in the greater Chicago area—hence the reference to Jordan being Jewel’s “fellow Chicagoan.” The page mentions no specific Jewel product or service; Jewel does not sell basketball shoes.

Displeased with this unsolicited salute, Jordan sued Jewel in the Circuit Court of Cook County, claiming that Jewel had improperly used his identity without authorization. The complaint alleges violations of the Illinois Right of Publicity Act, 765 ILCS 1075/1 *et seq.*; the Lanham Act, 15 U.S.C. § 1125(a); the Illinois Consumer Fraud and Deceptive Trade Practices

(considering survey evidence in applying the second prong of the *Central Hudson* test for determining the validity of restrictions on commercial speech). The matter need not be considered here, however, because no party submitted evidence of any such survey. *See Top Tobacco*, 509 F.3d at 383 (noting that the trademark plaintiff did not conduct a consumer survey to support its view regarding consumer confusion). Based on the evidence of record, including relevant pages from the commemorative issue and historical facts concerning the development and placement of Jewel's page, the far better view is that Jewel's speech is noncommercial.

C. Whether Further Briefing Is Necessary On Whether Jordan's Claims Can Proceed Given That Jewel's Page Is Noncommercial Speech

As for the implications of this holding for Jordan's claims, the parties offer little guidance. Jewel contends that the First Amendment's "protections include a complete defense to all of Jordan's claims in his amended complaint," Doc. 74 at 15, but its discussion is perfunctory. Jordan contends in a footnote that "[e]ven if Defendants' use of Jordan's identity were non-commercial, the First Amendment would not provide them with a complete defense," Doc. 100 at 13 n.5, but its submission is equally perfunctory. The court respectfully requests that Jordan and Jewel—and Time and Vertis if they would like—submit simultaneous briefs on whether the noncommercial status of Jewel's page conclusively defeats Jordan's claims. Those briefs should separately address the Lanham Act, Illinois Right of Publicity Act, Illinois Consumer Fraud and Deceptive Trade Practices Act, and common law unfair competition claims, and should be filed by February 27, 2012. Simultaneous response briefs may be filed by March 19, 2012.

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"It is not very often a superstar like Michael Jordan gets involved in a trademark related lawsuit," said David Lilenfeld, founder of Atlanta-based trademark law firm, Lilenfeld PC.