

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

NOBLR, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 19-1314-RGA-SRF
)	
NOBL INSURANCE LLC,)	REDACTED VERSION
)	
Defendant.)	

REPORT AND RECOMMENDATION

I. INTRODUCTION

Presently before the court in this trademark infringement action is plaintiff Noblr, Inc.’s (“Noblr” or “plaintiff”) motion for a preliminary injunction.¹ (D.I. 8) Defendant Nobl Insurance LLC (“Nobl” or “defendant”) opposes the motion. (D.I. 21) For the following reasons, I recommend that the court deny plaintiff’s motion for a preliminary injunction.

II. BACKGROUND

Noblr was founded on November 1, 2017 and began offering personal automobile insurance through its beta launch in Colorado in January 2019. (D.I. 10 at ¶¶ 3, 12) On May 6, 2019, Noblr officially launched in Colorado. (D.I. 40, Ex. E at 80:22-81:9) Noblr began selling auto insurance in Texas in October 2019. (*Id.* at 37:7-10) Noblr intends to offer its insurance nationally. (11/8/19 Tr. at 6:22-7:7)

Noblr’s business model allows its customers to obtain lower auto insurance rates based on factors including smooth driving, not texting while driving, driving on roads with lower accident rates, and driving at times of day when drivers are statistically less likely to have

¹ The briefing and other filings associated with the pending motion for a preliminary injunction are found at D.I. 9, D.I. 10, D.I. 11, D.I. 21, D.I. 34, D.I. 35, D.I. 39, D.I. 40, and D.I. 41.

accidents. (D.I. 10 at ¶ 13) Noblr sells insurance directly to consumers via its website, mobile applications, and over the phone through its reciprocal exchange model. (*Id.* at ¶¶ 7, 8) Policyholders may become members of the Noblr Reciprocal Exchange (“the Exchange”), which is funded by member premiums, surplus contributions, third-party capital,² and underwriting profits. (*Id.* at ¶ 8) The Exchange allocates a portion of its surplus to individuals through Subscriber Savings Accounts (“SSAs”), which are accessible to members who opt to leave the Exchange. (*Id.*)

Noblr is the parent company of Noblr Risk Management, LLC (“NRM”) and Noblr Insurance Services, LLC (“NIS”). (D.I. 10 at ¶ 10) NRM manages the Exchange through underwriting, claim management, and marketing. (*Id.* at ¶ 9) NIS acts as an agency for policies underwritten by third-party insurance companies that do not meet the guidelines of the Exchange. (*Id.* at ¶ 11) Noblr intends to offer homeowners, renters, motorcycle, personal umbrella, pet, life, health, and commercial insurance through NIS, which is licensed nationwide. (*Id.* at ¶ 14)

Noblr advertises and offers its insurance services under the “NOBLR” mark. (D.I. 10 at ¶¶ 16, 21, 26) In conjunction with the launch of its website, Noblr applied for its word mark on November 21, 2017. The word mark issued under Trademark Registration No. 5,758,565 on May 21, 2019. (D.I. 1 at ¶ 4; D.I. 10 at ¶¶ 21, 22; Ex. D) Noblr applied to register a stylized version of the mark in March 2019:

noblr

² Noblr’s investors include White Mountains Insurance Group, Third Point Reinsurance, and Hudson Structured Capital Management. (D.I. 10 at ¶ 15)

(D.I. 10 at ¶ 23; Ex. E) Noblr’s website explains that the Noblr name is derived from the saying “noble is the word, but nobler still, the deed,” which reflects its business model because it rewards safe drivers for their driving habits. (*Id.* at ¶ 17; Ex. C) Noblr estimates that, since its beta launch in January 2019, more than [REDACTED] people have visited its website and it has spent more than [REDACTED] on advertising services and other promotional efforts. (D.I. 10 at ¶¶ 18-19)

Defendant Nobl is a Delaware limited liability company in the insurance business. (D.I. 7 at ¶ 10) Nobl previously operated under the name Cyber-Insur, LLC, which was formed in Michigan on February 8, 2018. (*Id.* at ¶ 25) Cyber-Insur, LLC converted to a Delaware LLC on September 4, 2018 and changed its name to Nobl Insurance LLC on May 7, 2019. (*Id.* at ¶¶ 25-26) Days before changing its name, Cyber-Insur, LLC applied to register the “NOBL” word and design marks:

nobl.

(D.I. 7 at ¶ 27; D.I. 11, Exs. 2-3) Nobl’s applications are currently suspended due to the pendency of a prior-filed potentially conflicting application for “NOBLE INSURANCE STORE.” (D.I. 35, Ex. 14 at NOBLR0001241-42; Ex. 15 at NOBLR0001262-63)

Nobl owns the website located at www.noblinsurance.com and maintains a LinkedIn page. (D.I. 7 at ¶ 28) On its website, Nobl represents itself as “a new type of insurance company” and advertises an insurance product for cryptocurrency called “noblCRYPTO.” (D.I. 11, Exs. 4-5) Nobl’s website also anticipates future offerings including noblAUTO, noblFLOOD, and noblCROP. (*Id.*, Ex. 6) Nobl confirms that “[b]oth Defendant and Plaintiff

are offering automobile insurance to sophisticated consumers than [sic] plan to use mobile based software to monitor their driving behavior so that they can receive discounted auto insurance.”

(D.I. 21 at 10) Nobl specifically distinguishes its auto insurance offering from that of State Farm, explaining that “Defendant’s auto program . . . is solely based upon a mobile platform that is already a higher value and better price than the State Farm program.” (*Id.*)

On June 27, 2019, Noblr became aware of Nobl’s use of the “NOBL” mark on LinkedIn. (D.I. 10 at ¶ 28) Counsel for Noblr sent a cease and desist letter to Nobl the following week, notifying Nobl of its mark. (*Id.* at ¶ 29; Ex. F) On July 12, 2019, Nobl responded that it found no likelihood of confusion between its mark and Noblr’s mark. (*Id.* at ¶ 32; Ex. I) Three days after Nobl responded to Noblr’s cease and desist letter, Noblr sued Nobl for trademark infringement and unfair competition under the Lanham Act. (D.I. 10 at ¶ 33; D.I. 1)

III. LEGAL STANDARD

“A preliminary injunction is an extraordinary remedy . . . which should be granted only in limited circumstances.” *Holland v. Rosen*, 895 F.3d 272, 285 (3d Cir. 2018) (quoting *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1426-27 (3d Cir. 1994)). To prevail on a motion for a preliminary injunction, the movant must show “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As a threshold matter, the movant must satisfy the two “most critical” factors by “demonstrat[ing] that it can win on the merits . . . and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). If the first two factors are satisfied, the “court then considers the remaining two factors and determines in

its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.” *Id.* (concluding that, “to require a moving party to prevail on all factors reads out balancing when not all factors favor that party.”).

IV. ANALYSIS

A. Likelihood of Success on the Merits

To prevail on its claims for trademark infringement and unfair competition under the Lanham Act, Noblr must first show that Nobl’s mark will cause a likelihood of confusion. *See A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000); *see also Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708-09 (3d Cir. 2004). Courts within the Third Circuit analyze the following factors for directly competing goods or services³ (the “Lapp factors”):

- (1) the degree of similarity between the owner’s mark and the alleged infringing mark;
- (2) the strength of the owner’s mark;
- (3) the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase;
- (4) the length of time the defendant has used the mark without evidence of actual confusion arising;
- (5) the intent of the defendant in adopting the mark;
- (6) the evidence of actual confusion;
- (7) whether the goods, competing or not competing, are marketed through the same channels of trade and advertised through the same media;
- (8) the extent to which the targets of the parties’ sales efforts are the same;

³ The parties do not dispute that the Lapp factors govern the analysis regarding likelihood of confusion. (D.I. 9 at 6-7; D.I. 21 at 5)

(9) the relationship of the goods in the minds of consumers, whether because of the near-identity of the products, the similarity of function, or other factors; and

(10) other facts suggesting that the consuming public might expect the prior owner to manufacture both products, or expect the prior owner to manufacture a product in the defendant's market, or expect that the prior owner is likely to expand into the defendant's market.

A & H Sportswear, 237 F.3d at 215. On balance, these factors favor Noblr's position that Nobl's mark presents a likelihood of confusion.

1. Degree of similarity

Under the first Lapp factor, the court must assess "the degree of similarity between the owner's mark and the alleged infringing mark." *A & H Sportswear*, 237 F.3d at 215. The marks in the present case are alike in appearance due to the similar spelling, the nearly-identical lowercase, rounded font, and the use of a red background with white writing:⁴

noblr nobl.

It is well-established that the marks need not be identical to create a likelihood of confusion. *See McLean v. Fleming*, 96 U.S. 245, 253 (1877) ("[E]xact similitude is not required to constitute an infringement" if "the form, marks, contents, words, or the special arrangement of the same . . . is such as would be likely to mislead one in the ordinary course of purchasing goods"); *Jews For Jesus v. Brodsky*, 993 F. Supp. 282, 296 (D.N.J. 1998) ("Marks are confusingly similar if ordinary consumers are likely to conclude that they share a 'common source, affiliation,

⁴ During the preliminary injunction hearing, Mr. Tolman testified that Brandon Grotesque was the preferred font for use on Noblr marketing. (11/8/19 Tr. at 35:12-20) Mr. Brown testified that Nobl used the Brandon Grotesque font on its brand guidelines. (*Id.* at 133:23-134:5) Counsel for Noblr represented that the companies also share a color scheme. (*Id.* at 155:4-10)

connection or sponsorship.”). “Marks may be confusingly similar in appearance despite the addition, deletion, or substitution of letters or words.” Trademark Manual of Examining Procedure § 1207.01(b)(ii) (Oct. 2018) (citing cases). For example, courts have held that the following marks are confusingly similar despite some differences in the spelling and arrangement of the words: BASEBALL AMERICA / BASEBALL AMERICANA;⁵ NEWPORT / NEWPROT;⁶ SUPERCUTS / SUPER CLIPS.⁷ 4 McCarthy on Trademarks and Unfair Competition § 23:55 (5th ed.). The United States Patent and Trademark Office (the “PTO”) recognized the similarity of the “NOBLR” and “NOBL” marks during prosecution of the Nobl mark, stating that “the evidence submitted by the protester is relevant and may support a reasonable ground for refusal” to register the mark in response to a letter of protest by Noblr. (D.I. 35, Ex. 14 at NOBLR0001240) Therefore, the one-letter difference between the marks at issue in the present case does not preclude a finding of sufficient similarity.

The marks are also nearly identical in meaning and pronunciation because they are both derived from the word “noble.” (D.I. 9 at 10; D.I. 7 at ¶ 29) Noblr’s website explains the origins of its name as follows: “So why ‘Noblr?’ There are quite a few sayings that allude to the fact that ‘noble is the word, but nobler still, the deed.’ If you’re actually doing the deed of being a good driver, we think you’re a pretty noble person. Or as we like to say, you’re a Noblr driver.”

(D.I. 10, Ex. C at 1) Similarly, Nobl admits in its answer “that its mark NOBL is pronounced

⁵ *Baseball Am., Inc. v. Powerplay Sports, Ltd.*, 2004 WL 1942057, at *4 (T.T.A.B. 2004) (concluding that, because the marks were alike visually and aurally, and were similar in connotation, the marks “create similar overall commercial impressions.”).

⁶ *Lorillard Tobacco Co. v. Cal. Imports, LLC*, 886 F. Supp. 2d 529, 535 (E.D. Va. 2012) (observing that the only difference between NEWPROT and NEWPORT was the transposition of the “O” and “R,” and the marks were otherwise “virtually indistinguishable.”).

⁷ *Supercuts, Inc. v. Super Clips*, 18 U.S.P.Q.2d 1378, 1990 WL 302729, at *3 (D. Mass. Oct. 26, 1990) (concluding that the marks were confusingly similar because they shared the designation “SUPER,” and “CLIPS” and “CUTS” sound alike and “suggest the cutting of hair.”).

like the word ‘noble.’” (D.I. 7 at ¶ 29) Nobl’s co-founder and CEO, Brandon Brown, testified that one of the messaging platforms of the “NOBL” mark “was around nobility and honor and straight talking.” (D.I. 35, Ex. 11 at 37:6-7) A sampling of cases suggests that more significant discrepancies in pronunciation and word origin than those presented in the instant case can result in a likelihood of confusion: DRAMAMINE / BONAMINE,⁸ HERITAGE / HERMITAGE,⁹ and HO HOs / YOYOs¹⁰ were each found to present a likelihood of confusion. 4 McCarthy on Trademarks and Unfair Competition § 23:23 (5th ed.). Thus, the “NOBL” and “NOBLR” marks are sufficiently similar to support a finding of likelihood of confusion.

Nobl argues that Noblr should be judicially estopped from arguing that the marks are sufficiently similar as to create a likelihood of confusion because Noblr previously argued that its mark was dissimilar from the “NOBEL” and “NOBEL INSURANCE SERVICES” marks during prosecution of the “NOBLR” mark. (D.I. 21 at 1-2) Specifically, Noblr argued during prosecution that the pronunciation of “NOBLR” is substantially different from that of “NOBEL”:

These dissimilarities would lead a consumer encountering all three marks to compare the differences, ultimately negating any likelihood of confusion. Here, a consumer is faced with the very different pronunciation of the marks NOBLR, NOBEL and NOBEL INSURANCE SERVICES, which lead the consumer to focus on the different endings, rather than the similar beginning portions of the marks.

⁸ *G. D. Searle & Co. v. Chas. Pfizer & Co.*, 265 F.2d 385, 387 (7th Cir. 1959), *cert. denied*, 361 U.S. 819 (1959) (finding a likelihood of confusion where the marks “contain the same number of syllables; they have the same stress pattern . . . the last two syllables of Dramamine and Bonamine are identical,” and the “d” and “b” sounds and “m” and “n” sounds are “acoustically similar.”).

⁹ *Drexel Enters., Inc. v. Hermitage Cabinet Shop, Inc.*, 266 F. Supp. 532, 538 (N.D. Ga. 1967) (finding that the two marks were confusingly similar because they were identical but for a single letter positioned in the middle of the word, and they lacked graphic or phonetic distinction); *Drexel Enters., Inc. v. Hermitage House Furniture, Inc.*, 309 F. Supp. 1389 (D.S.C. 1970).

¹⁰ *Interstate Brands Corp.*, 2000 WL 187204 (T.T.A.B. 2000) (concluding that both marks were similar in sound because they rhymed).

(D.I. 21, Ex. A at 3) Nobl also points to portions of Noblr’s website suggesting a distinction between “noble” and “NOBLR”: “Saving you money is noble. Giving you the power to help drive your own rate is Noblr.” (D.I. 21, Ex. B at 1)

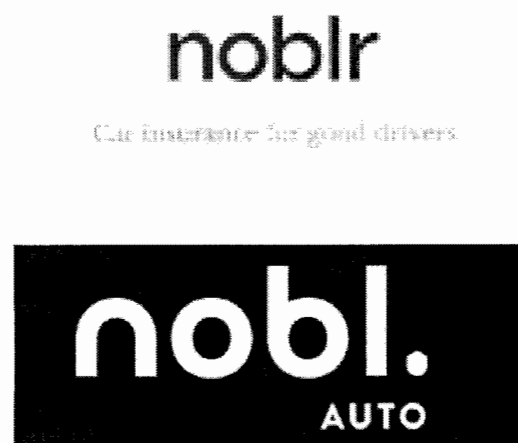
The facts before the court do not amount to judicial estoppel. Noblr’s representations to the PTO during prosecution were based on differences in the pronunciation of “NOBLR” and “NOBEL,” as well as the different endings of the marks. (D.I. 21, Ex. A at 3) Here, however, the “NOBL” and “NOBLR” marks have similar pronunciations because they are both derived from the same root word “noble.” In this context, “NOBLR” represents the comparative version of “NOBL.” (D.I. 7 at ¶ 29) In contrast, “NOBLR” and “NOBEL” are not derived from the same root word.¹¹ The pronunciation of the two marks is also distinct because the second syllable of “NOBEL” receives emphasis, whereas the first syllable is stressed in both “NOBL” and “NOBLR” (or “noble” and “nobler”).

The Third Circuit’s decision in *Freedom Card, Inc. v. JPMorgan Chase & Co.* is not sufficiently analogous to warrant a different result. 432 F.3d 463 (3d Cir. 2005). In *Freedom Card*, the Third Circuit held that UTN was precluded from arguing a likelihood of confusion based on inclusion of the word “freedom” in a mark because UTN had previously argued before the PTO that marks containing the word “freedom” were sufficiently prevalent to suggest that nobody had the exclusive right to use the word “freedom.” *Id.* at 476. UTN thus presented conflicting arguments regarding the same word to obtain its mark and to subsequently challenge another mark. In contrast, Noblr’s efforts to distinguish “NOBLR” from “NOBEL” do not

¹¹ “Nobel” is defined as “an international prize given each year for achievements in literature, physics, chemistry, medicine, economics, and world peace.” *See* Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/nobel>. The award is named after Alfred Bernhard Nobel, a Swedish engineer, manufacturer, and philanthropist. *See* <https://www.dictionary.com/browse/nobel>.

preclude it from arguing that “NOBLR” and “NOBL” are too similar. Unlike “NOBLR” and “NOBL,” “NOBEL” is not derived from the word “noble.”

Nobl also highlights differences between how the marks are shown in commerce. (D.I. 39 at 14-15) However, these differences do not lessen the likelihood of confusion between the marks. Differences in the parties’ domain names – www.noblr.com and www.noblinsurance.com – do not reduce the level of confusion among consumers because both parties are associated with insurance. For the same reason, differences in the design, layout, and color scheme of the parties’ websites are unlikely to eliminate consumer confusion.¹² Both parties’ websites identify the associated products and/or services to include car insurance:



(D.I. 10, Ex. A at 6; D.I. 11, Ex. 6)

Nobl cites a decision from the District of Massachusetts in *Alta Vista Corp., Ltd. v. Digital Equipment Corp.* to support its position that the differences in the appearance of the parties’ websites would reduce or eliminate confusion among consumers. 44 F. Supp. 2d 72, 76

¹² During the preliminary injunction hearing, counsel for Nobl elicited testimony from Nobl’s witness, Brandon Brown, explaining that the version of the “NOBL” mark used in commerce has a shield symbol at the end. (11/8/19 Tr. at 116:16-23) Nobl presented no argument in either its briefing or during the hearing to suggest that the presence of the shield symbol would reduce the likelihood of confusion among consumers.

(D. Mass. 1998). But the parties' websites in *Alta Vista* showed that the plaintiff's business was a literary agency, and the defendant's business was an Internet search service. *Id.* In contrast, Noblr and Nobl's websites show that both companies advertise car insurance. (D.I. 10, Ex. A; D.I. 11, Ex. 6) Considering the aesthetic and phonetic similarities of the parties' marks as used in commerce and the overlap between the parties' planned insurance offerings, the degree of similarity between the marks weighs in favor of a finding of likelihood of confusion.

2. Strength of mark

a. Conceptual strength

The second Lapp factor assesses both the conceptual and commercial strength of the owner's mark. *See A & H Sportswear*, 237 F.3d at 215. The conceptual strength of a mark is determined by the classification of the mark into one of four categories: (1) generic; (2) descriptive; (3) suggestive; and (4) arbitrary or fanciful. *Id.* at 221. On this spectrum, generic marks (such as "DIET CHOCOLATE FUDGE SODA") receive no trademark protection, and arbitrary or fanciful marks (such as "KODAK") receive the highest level of trademark protection. *Id.* at 221-22. Arbitrary or fanciful marks "bear no logical or suggestive relation to the actual characteristics of the goods." *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 296 (3d Cir. 1986). A suggestive mark "suggest[s] rather than describe[s] the characteristics of the goods," and "imagination, thought or perception [is required] to reach a conclusion as to the nature of goods." *Id.* at 296, 298 (quoting *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 295 F. Supp. 479, 488 (S.D.N.Y. 1968)).

The conceptual strength of Noblr's mark weighs in favor of a finding of likelihood of confusion because the mark falls between the arbitrary and suggestive classifications. Noblr argues that its mark is arbitrary and fanciful because it is not spelled like a known word and it

does not describe anything about the insurance underwriting services provided by Noblr. (D.I. 9 at 11) Although “NOBLR” is not a word in the English language, it is derived from the actual word “nobler” and describes—albeit in the abstract—the characteristic of Noblr’s insurance services that allows drivers with good or “nobler” driving habits to obtain lower insurance rates. In this regard, the “NOBLR” mark is unlike purely arbitrary marks such as “XEROX” or “KODAK.” *See A & H Sportswear*, 237 F.3d at 223. Nonetheless, “NOBLR” is not an actual word or combination of words in the nature of a suggestive mark such as “COPPERTONE.” *Id.* at 221.

Nobl identifies several marks using the letters “NOB” in support of its position that extensive use by third parties, particularly those in the insurance industry, weakens Noblr’s mark. (D.I. 39 at 16-17) Although the extensive use of a term in the market at issue, and more broadly in other markets, may weaken the mark, *see A & H Sportswear*, 237 F.3d at 223, the evidence before the court does not amount to extensive use by third parties. For example, the “NOBEL” mark does not weaken Noblr’s mark because it has a different meaning, pronunciation, and spelling. *See* § IV.A.1, *supra*. “Nobel” is a proper noun referring to an award named after a Swedish scientist, and it is not derived from the word “noble.” Nobl also cites the marks “NOBLE WEST INSURANCE SERVICES” and “NOBLE INSURANCE STORE & Design,” as well as three domain names for insurance companies using the word “Noble” on their websites. (D.I. 39 at 16-17) Nobl’s own case authorities demonstrate that this limited usage by third parties is not enough to amount to significant weakening of Noblr’s mark. *See Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 259 (5th Cir. 1980) (citing seventy-two third-party registrations of the “Domino” mark); *Armstrong Cork Co. v. World Carpets, Inc.*, 597 F.2d 496, 505 (5th Cir. 1979) (citing eighty-five different carpet companies using the word

“World” in their businesses); *Am. Heritage Life Ins. Co. v. Heritage Life Ins. Co.*, 494 F.2d 3, 13 (5th Cir. 1974) (citing eleven insurance companies having the word “Heritage” in their corporate names).

Although a categorization between suggestive and arbitrary indicates that the “NOBLR” mark is strong, the mark’s self-laudatory nature reduces its strength. The “NOBLR” mark’s allusion to nobility is in the same vein as self-laudatory marks such as “Sure,” “Super Duper,” or “Miracle,” which are weakened even if the marks are otherwise arbitrary or suggestive. *See A & H Sportswear*, 237 F.3d at 222 (citing *Procter & Gamble Co. v. Johnson & Johnson, Inc.*, 485 F. Supp. 1185, 1196 (S.D.N.Y. 1980); *S.M. Flickinger Co., Inc. v. Beatrice Foods Co.*, 174 U.S.P.Q. 51, 56 (T.T.A.B. 1972)). Noblr’s counsel acknowledged that the “NOBLR” mark “could be potentially deemed to be self-laudatory.” (11/8/19 Tr. at 156:13-15) Even so, other factors that could conceivably weaken the “NOBLR” mark, including widespread use in commerce, are not supported by the present record for the reasons previously discussed. *See ProFoot, Inc. v. MSD Consumer Care, Inc.*, 2012 WL 2262904, at *8 (D.N.J. June 14, 2012) (concluding that “ProFoot” was a conceptually neutral mark because it was suggestive, it was widely used in other markets, and it was self-laudatory). On balance, the conceptual strength of the “NOBLR” mark weighs slightly in favor of finding a likelihood of confusion.

b. Commercial strength

The focus of the commercial strength inquiry is on consumer recognition of the mark. *See A & H Sportswear*, 237 F.3d at 224. Evidence of money spent on advertising and increased sales figures are among the factors to be considered, “[a]lthough evidence of money spent does not automatically translate into consumer recognition.” *Id.* “Merely setting forth the amount of

money spent on advertising, while certainly relevant, does not suffice alone . . . to demonstrate a strong mark.” *Primepoint, L.L.C. v. PrimePay, Inc.*, 545 F. Supp. 2d 426, 438 (D.N.J. 2008).

The commercial strength of Noblr’s mark is neutral. The evidence of record shows that Noblr has spent about [REDACTED] on advertising in less than a year of operation. (D.I. 10 at ¶ 19; 11/8/19 Tr. at 29:16-33:6; PHX 22) Yet Noblr presents no evidence of actual sales figures to establish “an association in the minds of consumers between the mark and the provider of the services advertised under the mark.” *Componentone, L.L.C. v. Componentart, Inc.*, 2008 WL 4790661, at *12 (W.D. Pa. Oct. 27, 2008) (internal quotation marks and citations omitted). The present record lacks direct evidence, such as consumer surveys, to show consumer recognition of the “NOBLR” mark. *See Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 283 n.10 (3d Cir. 2001) (citing cases observing that customer surveys are a useful and direct method of demonstrating whether a mark has achieved a secondary meaning). Noblr’s CEO, Mr. Tolman, testified extensively regarding Noblr’s efforts to monitor customer satisfaction with its insurance product. (11/8/19 Tr. at 42:17-47:8) However, Noblr has not surveyed consumers to assess the strength of its mark. (*Id.* at 69:5-9)

In the absence of sales figures or consumer surveys, and in light of the fact that Noblr has used its mark for only a few months within a limited geographic scope, the present record does not support a finding that Noblr’s mark is commercially strong. (D.I. 40, Ex. E at 33:7-11, 36:20-37:10; 11/8/19 Tr. at 28:1-24) For these reasons, the combined conceptual and commercial strength of Noblr’s mark weighs slightly in favor of a finding of likelihood of confusion.

3. Care and attention of consumers

Under the third Lapp factor, the court must assess “the price of the goods and other factors indicative of the care and attention expected of consumers when making a purchase.” *A & H Sportswear*, 237 F.3d at 215. “The degree of caution used by . . . ordinary consumers (or ‘reasonably prudent buyers,’ as they are often called) depends on the relevant buying class.” *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 293 (3d Cir. 1991). The standard of care exercised by the reasonably prudent purchaser is equal to that of the least sophisticated consumer in the class. *Id.*

Noblr contends that its customers purchase insurance through the Noblr website, Noblr’s mobile application, or by phone as average members of the public seeking low-price insurance coverage. (D.I. 9 at 12) According to Noblr, this factor is neutral because the degree of care exercised by consumers in selecting their car insurance does not extend to the name of the insurer, or to an association made between brand names. (*Id.*)

In response, Nobl contends that this factor weighs against a finding of likelihood of confusion. (D.I. 21 at 7) According to Nobl, auto insurance customers exhibit great care and attention in choosing insurance because it is a significant expense, and Noblr’s own website suggests that Noblr customers are “smart drivers.” (*Id.*, Ex. D)

This factor weighs against a finding of likelihood of confusion. Car insurance is a significant expense for the average member of the driving public. (11/8/19 Tr. at 49:20-50:14) Noblr is new to the market and requires its customers to have a minimum of seven years of driving experience. (*Id.* at 69:19-70:5) Thus, Noblr’s customers must take affirmative steps to switch insurance providers. Because Nobl has not yet entered the market and has no immediate

plans to offer car insurance,¹³ the likelihood that potential Noblr customers would instead become customers of Nobl is negligible.

4. Length of time mark used with no actual confusion

The fourth Lapp factor assesses “the length of time the defendant has used the mark without evidence of actual confusion arising.” *A & H Sportswear*, 237 F.3d at 215. Initially, the parties agreed that this factor was neutral because Nobl has not entered the market and is not yet licensed to sell its insurance products under the “NOBL” mark. (D.I. 35, Ex. 13 at 3; D.I. 9 at 12-13; D.I. 21 at 4) In its most recent submission, however, Nobl contends that this factor weighs against a finding of likelihood of confusion because both parties are new entrants in the insurance industry. (D.I. 39 at 18)

The evidence of record unambiguously establishes that Nobl has not yet entered the market.¹⁴ A visit to Nobl’s homepage at www.noblinsurance.com reveals that Nobl’s cryptocurrency insurance is “Coming Soon” and its car insurance is “Under Development.” Mr. Brown’s testimony during the preliminary injunction hearing confirms that Nobl plans to launch its cryptocurrency policies in January 2020, but Nobl has not yet applied for or obtained licenses to sell insurance in any state. (11/8/19 Tr. at 102:21-23; 135:20-136:6) Because Nobl does not currently offer its insurance products for sale, consumers have not yet had an opportunity to confuse Nobl’s insurance offerings with the insurance offered by Noblr. This factor weighs against a finding of a likelihood of confusion.

¹³ Mr. Brown testified that Nobl does not intend to launch an auto insurance product anytime soon, and it may never offer auto insurance. (11/8/19 Tr. at 105:24-106:6; 107:3-5) Nonetheless, Nobl’s website represents that its auto insurance product is “Under Development.” (D.I. 11, Ex. 6)

¹⁴ In contrast, Nobl’s briefing alludes to “existing” cryptocurrency insurance offerings, (D.I. 39 at 13), and states that “[b]oth Defendant and Plaintiff are offering automobile insurance,” (D.I. 21 at 10; 11/8/19 Tr. at 143:8-145:5).

5. Nobl's intent in adopting the mark

The fifth Lapp factor requires the court to evaluate the intent of the defendant in adopting the mark. *See A & H Sportswear*, 237 F.3d at 215. “[E]vidence of intentional, willful and admitted adoption of a mark closely similar to the existing mark[] weighs strongly in favor of finding [a] likelihood of confusion.” *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 721 (3d Cir. 2004) (quoting *Checkpoint*, 269 F.3d at 286). As part of this inquiry, the court must consider “[t]he adequacy and care with which a defendant investigates and evaluates its proposed mark, and its knowledge of similar marks or allegations of potential confusion.” *Id.*

Noblr contends that Nobl's persistence in using the mark, even after Noblr objected to Nobl's use of the mark, supports a finding that Nobl made the deliberate choice to trade on the goodwill of Noblr's mark. (D.I. 9 at 13) Noblr alleges that Nobl's marketing materials suggest a conscious intent to offer products and services that are substantially similar to those offered by Noblr. (*Id.*) In response, Nobl cites an admission by Noblr's corporate representative that Noblr has no evidence of Nobl's bad faith. (D.I. 39 at 18)

The record does not support a finding that Nobl intended to adopt a mark similar to Noblr's mark at the time Nobl began its branding efforts. The evidence shows that Nobl performed a trademark search which did not reveal Noblr's existence. (11/8/19 Tr. at 113:2-13) Moreover, Mr. Brown's reaction after learning of Noblr's existence suggests that Nobl did not initially select the mark to piggyback off of Noblr's reputation and goodwill: “Did you read this? Noblr, WTF?” (*Id.* at 147:7-12)

Nonetheless, Nobl's persistence in using the mark after learning of Noblr's existence supports a finding of likelihood of confusion under the fifth Lapp factor. (D.I. 10, Exs. F, I) The similarity of the parties' products and corresponding marks, paired with Nobl's continued use of

the mark after Noblr notified Nobl of its objections, support a finding that Nobl intended to use a confusingly similar mark. (*Id.*; D.I. 35, Ex. 23 No. 3) “A defendant that ‘persisted in its plan’ to adopt a mark ‘after being warned of too close resemblance between’ its proposed mark and plaintiff’s mark is not ‘blameless[].’” *Kos*, 369 F.3d at 721 (quoting *Telechron, Inc. v. Telicon Corp.*, 198 F.2d 903, 908 (3d Cir. 1952)). This factor supports a finding of a likelihood of confusion.

6. Evidence of actual confusion

Under the sixth Lapp factor, the court evaluates evidence of actual confusion. *See A & H Sportswear*, 237 F.3d at 215. Noblr contends that confusion in the industry is inevitable once Nobl begins offering its products for sale, as demonstrated by an industry newsletter describing Noblr after stating: “And not to be confused with nobl. . . .” (D.I. 11, Ex. 8 at 5) In response, Nobl contends that Noblr presents no evidence of actual confusion, weighing against a finding of likelihood of confusion. (D.I. 21 at 8)

Because Noblr presented no evidence of actual confusion between the “NOBLR” and “NOBL” marks, this factor weighs against a finding of likelihood of confusion. Noblr cites an excerpt of the August 2019 issue of Coverager, an industry newsletter, acknowledging the similarity of the “NOBLR” and “NOBL” marks: “And not to be confused with nobl.” (D.I. 11, Ex. 8 at 5) This does not amount to evidence of actual confusion because the Coverager article does not actually mistake one company for the other. Instead, the Coverager article displays Noblr’s new landing page, followed by a separate discussion of Nobl’s anticipated product launch in 2020. (*Id.*)

This result is consistent with Third Circuit precedent. In *A & H Sportswear*, the Third Circuit addressed an article in a women’s fashion publication that actually confused the

plaintiff's Miraclesuit product with the defendant's Miracle Bra product, representing that the plaintiff's product was available for sale in the defendant's catalog. 237 F.3d at 226. The Third Circuit upheld the district court's finding of no actual confusion, even when the article was considered in conjunction with evidence that multiple professional swimsuit buyers expressed confusion between the defendant's Miracle Bra product and the plaintiff's Miraclesuit product, and the plaintiff's own public relations agents thought the plaintiff manufactured both the Miraclesuit and the Miracle Bra. *Id.* at 226-27. In contrast, the Coverager article identified by Noblr in the present case acknowledges the similarity between the "NOBLR" and "NOBL" marks without actually confusing the two insurance companies, and Noblr provides no further evidentiary support regarding its allegations of actual confusion. (D.I. 11, Ex. 8 at 5)

7. Marketing or advertising through the same channels

Under the seventh Lapp factor, the court examines "whether the goods, competing or not competing, are marketed through the same channels of trade and advertised through the same media." *A & H Sportswear*, 237 F.3d at 215. Noblr contends that the parties are marketing and advertising their services through their websites and social media accounts, including Facebook, LinkedIn, Twitter, YouTube, and Instagram. (D.I. 9 at 14) Nobl agrees that both parties offer their insurance services through the internet. (D.I. 21 at 8) However, Nobl contends that this factor is neutral because the global reach and uniformity of the internet is not truly a "channel of trade." (*Id.*)

This factor weighs in favor of a finding of likelihood of confusion. Nobl broadly states that the parties' marketing efforts occurred on the internet, but the record shows that the parties shared a marketing strategy focused specifically on particular social media networks, such as Facebook, LinkedIn, YouTube, and Instagram. Noblr's CEO, Gary Tolman, represents that

Noblr advertises on Facebook, YouTube, LinkedIn, and Instagram. (D.I. 10 at ¶ 16) Nobl's CEO, Brandon Brown, confirmed during his deposition that Nobl also advertises on social media. (D.I. 35, Ex. 11 at 56:19-57:14) Although Mr. Brown was unable to testify as to the specific social media platforms used to market Nobl, Nobl's homepage includes icons or shortcuts for LinkedIn, YouTube, Instagram, and Facebook, among others.¹⁵ (D.I. 11, Ex. 9) Noblr has adequately shown that its insurance is marketed through the same channels as Nobl's insurance.

8. Targets of the parties' sales efforts

The eighth Lapp factor requires the court to consider "the extent to which the targets of the parties' sales efforts are the same." *A & H Sportswear*, 237 F.3d at 215. Initially, the parties appeared to agree that they targeted the same consumers for potential sales. (D.I. 9 at 14; D.I. 21 at 8; D.I. 34 at 10) In its most recent brief, however, Nobl contends that "[b]oth parties target different consumers," without further elaboration or citation to the record. (D.I. 39 at 19)

This factor weighs in favor of a likelihood of confusion. Noblr sells auto insurance to consumers via its website. (D.I. 10, Ex. A) Nobl's website represents that it plans to offer cryptocurrency insurance and auto insurance as it prepares to enter the market. (D.I. 11, Ex. 6) Mr. Brown testified that Nobl's target market for car insurance includes "people who own automobiles." (11/8/19 Tr. at 145:20-24) Both parties target potential auto insurance customers shopping for insurance on the internet.

¹⁵ The shortcuts on the Nobl homepage also include Twitter, Reddit, and Medium.com, as well as a shortcut to an email address for Nobl's marketing group. (D.I. 11, Ex. 9)

9. Relationship of goods in consumers' minds

The ninth Lapp factor requires the court to consider “the relationship of the goods in the minds of consumers, whether because of the near-identity of the products, the similarity of function, or other factors.” *A & H Sportswear*, 237 F.3d at 215. “The question is whether the consumer might therefore reasonably conclude that one company would offer both of these related products.” *Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, 30 F.3d 466, 481 (3d Cir. 1994).

Nobl contends that the goods and services offered by the parties are substantially similar in this case because both parties market consumer insurance, including auto insurance. (D.I. 9 at 15) In response, Nobl contends that the targeted consumers are capable of distinguishing between the parties' apps because those customers “have a keen mind. They must have a driver's license and a smart phone.” (D.I. 21 at 8; D.I. 39 at 19)

This factor weighs in favor of a finding of likelihood of confusion. Nobl offers auto insurance using an online platform. (D.I. 10, Ex. A) Nobl's website shows that it plans to offer cryptocurrency insurance and auto insurance in the near future by way of its online platform. (D.I. 11, Ex. 6) These offerings are sufficiently related to lead to a likelihood of confusion regarding the relationship of the products in consumers' minds. *See Fisons*, 30 F.3d at 481. Courts have found that a company selling women's scarves and apparel may be confused with a company selling women's cosmetics and fragrances,¹⁶ a company selling liquor may be confused with a restaurant selling liquor,¹⁷ a company selling batteries and lamps was likely to be

¹⁶ *See Scarves by Vera, Inc. v. Todo Imports Ltd.*, 544 F.2d 1167, 1174-75 (2d Cir. 1976).

¹⁷ *See James Burrough Ltd. v. Sign of the Beekeeper, Inc.*, 540 F.2d 266, 276-77 (7th Cir. 1976).

confused with a company selling light bulbs and lamps,¹⁸ and a company selling pipes, tobacco, and bar accessories was likely to be confused with a company selling scotch whiskey.¹⁹

Accordingly, the relationship between a company selling auto insurance and a company planning to sell both cryptocurrency insurance and auto insurance is sufficiently close to lead to a likelihood of confusion. *See Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1230 (3d Cir. 1978).

10. Other

Under the tenth and final Lapp factor, the court considers “other facts suggesting that the consuming public might expect the prior owner to manufacture both products, or expect the prior owner to manufacture a product in the defendant’s market, or expect that the prior owner is likely to expand into the defendant’s market.” *A & H Sportswear*, 237 F.3d at 215.

In support of its motion, Noblr contends that consumers might assume the two companies have common ownership in which “NOBL” represents an economy product, “NOBLR” represents a standard product, and a future premium product may be called “NOBLST.” (D.I. 9 at 15; D.I. 34 at 11) Noblr further alleges that it is reasonable to believe Nobl might expand its offerings to overlap with Noblr’s offerings because both companies intend to offer auto insurance. (D.I. 9 at 16; D.I. 34 at 11)

In response, Nobl argues there can be no confusion because both parties are new entrants into the insurance market. (D.I. 21 at 9) According to Nobl, the public has no expectation that Noblr will expand its offerings, and Noblr acknowledges that it has no intention of offering cryptocurrency insurance. (D.I. 39 at 20)

¹⁸ *See Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 387 (7th Cir. 1976).

¹⁹ *See Alfred Dunhill of London, Inc. v. Kasser Distillers Prods. Corp.*, 350 F. Supp. 1341, 1364 (E.D. Pa. 1972), *aff’d*, 480 F.2d 917 (3d Cir. 1973).

This factor weighs in favor of a finding of likelihood of confusion because both parties are in the insurance industry, and it is commonplace for a single insurance company to sell multiple types of insurance coverage. (11/8/19 Tr. at 163:15-164:3) The record reflects that Noblr plans to expand its insurance offerings to include homeowners insurance, renters insurance, motorcycle insurance, personal umbrella insurance, pet insurance, life insurance, health insurance, and commercial insurance. (*Id.* at 40:2-15; D.I. 10 at ¶ 14) Nobl intends to offer car insurance, flood insurance, and crop insurance after first launching its cryptocurrency insurance. (D.I. 11, Ex. 6)

The parties' insurance offerings are also likely to overlap in consumers' minds on a more granular level because Noblr currently offers car insurance, and Nobl's website markets its planned launch of both cryptocurrency insurance and car insurance. (D.I. 10, Ex. A; D.I. 11, Ex. 6) Both parties' expressed intention to substantially expand their offerings suggests a chance of additional overlap in the future. Similarities between the parties' names, combined with the overlap between the parties' marketed offerings in the insurance industry, creates a significant likelihood that consumers will confuse the companies or assume that the companies operate under the same ownership.

11. Weighing the Lapp factors

For the foregoing reasons, seven of the ten Lapp factors weigh in favor of finding a likelihood of confusion, and the three remaining Lapp factors weigh against finding a likelihood of confusion. On balance, the Lapp factors weigh in favor of a finding of likelihood of confusion.

B. Irreparable Harm

The court's finding of a likelihood of success on the merits at § IV.A, *supra*, does not lead to a presumption of irreparable harm because such a presumption “deviates from the traditional principles of equity, which require a movant to demonstrate irreparable harm.” *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205, 216 (3d Cir. 2014). Thus, “the likelihood of irreparable injury may no longer be presumed from a showing of likelihood of success on the merits.” *Id.* (citing *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1242 (9th Cir. 2013)). Instead, a plaintiff must demonstrate a likelihood—not just a possibility—of irreparable harm in the absence of an injunction. *Id.* at 217 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

To satisfy the irreparable harm requirement, the plaintiff must demonstrate a significant risk of harm that cannot adequately be compensated by monetary damages. *See Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000). The “availability of money damages for an injury typically will preclude a finding of irreparable harm.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 n.4 (3d Cir. 2017). “Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill.” *Pappan Enters., Inc. v. Hardee's Food Sys., Inc.*, 143 F.3d 800, 805 (3d Cir. 1998) (citing *Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 195 (3d Cir. 1990)). A “critical aspect” of fact finding in this context is “drawing reasonable inferences from facts in the record.” *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 205 (3d Cir. 2014). The court may only grant a preliminary injunction when a plaintiff has made a clear showing of a likelihood of irreparable harm. *Groupe*, 774 F.3d at 204; *Reilly*, 858 F.3d at 179.

Noblr has not met its burden to show a likelihood of irreparable harm. The testimony of Noblr's witness, Mr. Tolman, shows Noblr has not yet suffered injury amounting to irreparable harm. During his October 16, 2019 deposition, Mr. Tolman acknowledged that he maintains control over the messaging of Noblr's brand. (D.I. 40, Ex. E at 36:13-20) Mr. Tolman admitted that Noblr "ha[d] not lost any policy sales as a result of any activity of defendant." (*Id.* at 39:9-12) When asked if Noblr would be harmed if Nobl's business fails, Mr. Tolman testified, "I don't believe that I've had any harm in the marketplace."²⁰ (11/8/19 Tr. at 53:11-12)

Noblr emphasizes that it is the likelihood of irreparable harm that matters, and not the existence of actual irreparable harm. (11/8/19 Tr. at 166:20-24) Noblr has nonetheless failed to meet its burden to produce evidence showing there is a non-speculative likelihood of irreparable harm. *See Ferring*, 765 F.3d at 219. Mr. Tolman associates the future likelihood of irreparable harm to Noblr with Nobl's entry into the marketplace:

Q. Do you consider the defendant to be a competitor of Noblr?

A. Potentially.

Q. Currently?

A. No, because it's my understanding they actually haven't gone into business.

²⁰ Mr. Tolman went on to suggest that Noblr has suffered harm in its relationship with its investors due to the pending litigation. (11/8/19 Tr. at 53:11-20) Mr. Tolman presented no evidence from Noblr's investors suggesting that they may withdraw their support of the company as a result of the litigation or Nobl's activities. *Cf. N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 296 F. Supp. 3d 442, 459 (E.D.N.Y. 2017), *aff'd*, 883 F.3d 32 (2d Cir. 2018) (finding potential investors' letters of intent conditioned on plaintiff retaining Division II status supported conclusion that potential loss of investors amounted to irreparable harm). Instead, Mr. Tolman anticipated questions he might receive from investors at a board meeting the following week. (11/8/19 Tr. at 53:11-20) The likelihood of irreparable harm must be "neither remote nor speculative, but actual and imminent." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)). Mr. Tolman's conjecture regarding the state of mind of Noblr's investors is not sufficient to establish irreparable harm.

Q. So plaintiff has not lost any policy sales as a result of any activity of defendant; is that correct?

A. I would agree with that.

(D.I. 40, Ex. E at 39:3-12; *see also* 11/8/19 Tr. at 76:2-24) However, the evidence before the court suggests that Nobl's launch is uncertain.

In August 2019, Nobl's website indicated that Nobl would launch its cryptocurrency insurance in 2019. (D.I. 11, Ex. 6) During the preliminary injunction hearing, Mr. Brown revised the anticipated launch date to January 2020. (11/8/19 Tr. at 102:21-23) As of December 2019, however, Nobl's homepage says Nobl's cryptocurrency insurance is "Coming Soon," without providing an anticipated launch date. *See* www.noblinsurance.com. Nobl's website has consistently represented that its auto insurance product is "Under Development." (*Id.*; D.I. 11, Ex. 6) Nonetheless, Mr. Brown testified that "we haven't done any development on our product whatsoever in order to actually build a product that we see for auto insurance," and he confirmed that "we haven't done any programming, no engineering, nothing has been done at all on auto," acknowledging that Nobl might never actually launch an auto insurance product. (11/8/19 Tr. at 106:4-14; 107:3-5)

Mr. Brown also testified that Nobl has not yet obtained regulatory approval, despite acquiring financing and retaining Ernst & Young to begin the regulatory approval process. (11/8/19 Tr. at 103:3-23) Although Mr. Brown represented that regulatory approval is nearly complete in the State of Illinois, he explained that it was the ex-insurance commissioner of Illinois who first alerted Nobl to the existence of Noblr in June 2019. (*Id.* at 103:3-23; 129:5-130:14) Mr. Brown did not explain why the ex-insurance commissioner would notify Nobl of Noblr's existence if the issue did not present a barrier to regulatory approval. Mr. Brown

confirmed that Nobl does not have a registered trademark in the United States, its trademark application is currently suspended in light of other applications, it is not currently licensed to sell insurance in any state, it has not applied for licensing nationwide, and it has not sold insurance in the United States. (*Id.* at 135:8-136:6) Because Mr. Tolman testified that irreparable harm to Noblr would likely occur once Nobl launches, and because the record before the court does not demonstrate a likelihood that Nobl will obtain the regulatory approval necessary to launch its insurance product, Noblr has failed to satisfy its burden of showing a likelihood of irreparable harm.

Nobl conflates the irreparable harm analysis with the likelihood of confusion analysis. Specifically, Noblr alleges that the likely confusion among consumers due to the similarities between the marks will result in a loss of sales to Noblr. (D.I. 9 at 16-17) Noblr further contends that it faces a greater risk to its ability to control its own reputation and goodwill because the marks are similar: “[T]he marks are confusingly similar, and if purchasers are confused about whether Nobl is associated with Noblr, Noblr will suffer harm if customers form negative impressions of Nobl that they then associate with Noblr.” (D.I. 34 at 12, 14) In his testimony, Mr. Tolman cited the similarity of the marks in support of his argument that Nobl is likely to benefit from Noblr’s advertising expenditures. (11/8/19 Tr. at 52:20-53:7) Noblr cannot establish a likelihood of irreparable harm based only on evidence supporting a likelihood of confusion between the marks. *See Ferring*, 765 F.3d at 216.

The evidence of record does not demonstrate that Noblr has a particular reputation among consumers, or that its brand is sufficiently recognized by consumers to generate goodwill. Mr. Tolman testified that Nobl’s presence in the market could affect Noblr’s consumer rating from AM Best: “And when I have discussions with AM Best, they will look at us, you know, how

they see us in the market. And if they believe there's any confusion in the market that is potentially writing a cryptocurrency policy, that could be damaging.” (11/8/19 Tr. at 56:4-14) Mr. Tolman's predictions of anticipated future discussions with a consumer rating agency are too speculative to support a finding of a likelihood of irreparable harm. *See Ferring*, 765 F.3d at 219 (concluding that Beltsos Declaration did not sufficiently demonstrate irreparable harm because it contained speculation that doctors would be less likely to prescribe the non-effective and non-preferred drugs in light of allegedly false statements made by another doctor). In this regard, Noblr's evidence supports no more than a possibility of irreparable harm. The Supreme Court has made clear that a “possibility” standard of irreparable harm is “too lenient” and is “inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22. As a result, a possibility of irreparable harm is insufficient, even where there is a strong likelihood of success on the merits. *Id.* at 21.

Noblr argues that “injunctive relief is permitted before the defendant makes any sales, so long as there is sufficient evidence to show that defendant has used or intends to use the infringing mark.” (D.I. 34 at 13) In support of this contention regarding the propriety of injunctive relief prior to market entry, Noblr cites *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1335-36 (E.D. Mo. 1996) and *PDK Labs, Inc. v. Proactive Labs, Inc.*, 325 F. Supp. 2d 176, 180 (E.D.N.Y. 2004), neither of which addressed a motion for a preliminary injunction. Because both cases analyzed pending motions to dismiss, the respective courts did not address the issue of irreparable harm or, more specifically, the loss of reputation or goodwill. The fact that a trademark infringement action may survive a motion to dismiss before sales of the allegedly infringing products are made says nothing about whether the “extraordinary remedy”

of a preliminary injunction is warranted. *Holland v. Rosen*, 895 F.3d 272, 285 (3d Cir. 2018) (quoting *Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1426-27 (3d Cir. 1994)).

Nobl also cites the Third Circuit's decision in *Citizens Financial Group, Inc. v. Citizens National Bank of Evans City*, which addressed a motion for permanent injunctive relief²¹ following a jury verdict:

A finding of infringement or the likelihood of confusion with the concurrent use of the infringed trademark implicitly signifies a loss of expectation and goodwill as well. The infringement amounts to borrowing the senior user's reputation and goodwill, which is an injury in and of itself, even without evidence of actual loss of goodwill.

383 F.3d 110, 131 (3d Cir. 2004). This decision predates by a decade the Third Circuit's decision in *Ferring*, which clarified that a finding of likelihood of confusion does not lead to a presumption of irreparable harm. *See Ferring*, 765 F.3d at 216-17. Accordingly, the court cannot conflate a finding of likelihood of confusion with a loss of goodwill or damage to reputation under the irreparable harm analysis. *Citizens Financial Group* is also factually distinguishable because the plaintiff and defendant were both banks operating in the same Pennsylvania marketplace, whereas Nobl has not yet entered the relevant insurance market and does not compete with Nobl in sales of insurance policies. *Citizens Fin. Grp.*, 383 F.3d at 113-15.

Because the evidence of record does not support a finding of irreparable harm, I recommend that the court deny Nobl's motion for a preliminary injunction. "[A] movant for

²¹ The Third Circuit has recognized that the distinction between the standards for preliminary and permanent injunctions is not significant. *See Ferring*, 765 F.3d at 215 n.9. "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987).

preliminary equitable relief must meet the threshold for the first two ‘most critical’ factors: it must demonstrate that it can win on the merits . . . and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief.” *Reilly*, 858 F.3d at 179. The court considers the remaining two factors only if the first two “gateway factors” are satisfied. *Id.* Consequently, the court need not reach an analysis of the balance of hardships and public interest.

IV. CONCLUSION

For the foregoing reasons, I recommend that the court deny Noblr’s motion for a preliminary injunction. (D.I. 8)

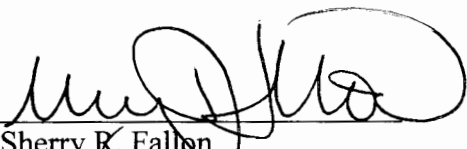
Given that the court has relied upon material that technically remains under seal, the court is releasing this Report and Recommendation under seal, pending review by the parties. In the unlikely event that the parties believe that certain material in this Report and Recommendation should be redacted, the parties shall jointly submit a proposed redacted version by no later than **January 2, 2020**, for review by the court, along with a motion supported by a declaration that includes a clear, factually detailed explanation as to why disclosure of any proposed redacted material would “work a clearly defined and serious injury to the party seeking closure.” *See In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (quoting *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994) (internal quotation marks omitted)). If the parties do not file a proposed redacted version and corresponding motion, or if the court determines the motion lacks a meritorious basis, the documents will be unsealed within thirty (30) days of the date the Report and Recommendation issued.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections

within fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). The objection and responses to the objections are limited to ten (10) pages each. The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the District Court. *See Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987).

The parties are directed to the court's Standing Order For Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the court's website, <http://www.ded.uscourts.gov>.

Dated: December 19, 2019



Sherry R. Fallon
United States Magistrate Judge