IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:21-cv-00251-BO

BERINGER COMMERCE, INC. d/b/a BLUE ACORN iCi, Plaintiff, v. FIN CAP, INC. d/b/a "BLUEACORN.CO," BLUE ACORN PPP, LLC, BLUE OAK FOREST, LLC, MICHAEL S. COTA, JIMMY FLORES, STEPHANIE HOCKRIDGE REIS, and NATHAN REIS, Defendants.	**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIVE RELIEF (Rule 65)**

NOW COMES Plaintiff BERINGER COMMERCE, INC. d/b/a BLUE ACORN iCi ("Blue Acorn iCi"), by and through undersigned counsel, and submits this Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunctive Relief ("Plaintiff's Motion") against Defendants FIN CAP, INC. d/b/a "BLUEACORN.CO," BLUE ACORN PPP, LLC, BLUE OAK FOREST, LLC, MICHAEL S. COTA, JIMMY FLORES, STEPHANIE HOCKRIDGE REIS and NATHAN REIS (collectively "Defendants") under Rule 65 of the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND

This is a trademark infringement, copyright infringement, cybersquatting, unfair competition, and unfair and deceptive trade practices action brought by Blue Acorn iCi against numerous individuals and corporate entities who are operating an infringing "Blue Acorn" business using unregistered names, logos, marks, and images that are nearly identical to Plaintiff's

1) registered trademark BLUE ACORN ICI; 2) copyright of the "blue acorn" image artwork; and 3) all associated intellectual property rights relating to Plaintiff's Blue Acorn Brand,[1] including the "blue acorn" name, used by Plaintiff since at least 2007 to promote its goods and services.

In 2020, Defendants established a business purporting to assist small businesses and contractors in obtaining loans through the federal Paycheck Protection Program ("PPP"). Defendants registered multiple websites and created marketing materials to promote their PPP business using 1) Plaintiff's "blue acorn" name; 2) a nearly identical "blue acorn" word logo to that of Plaintiff's "blue acorn" word logo; and 3) an exact copy of Plaintiff's Acorn Logo, which has been in use by Plaintiff since at least 2009.

Then, in March 2021, Defendants flooded the market with advertising, using these above-described infringing "blue acorn" name and marks in similar channels of commerce as Plaintiff's goods and services. Almost immediately, Defendants' widespread marketing caused significant, actual consumer confusion in the marketplace. Specifically, Defendants' numerous websites and social media presence, including an infringing YouTube video that has been viewed over 14 million times, have caused thousands of consumers to believe, mistakenly, that Blue Acorn iCi is associated with Defendants or is providing Defendants' PPP business. As a direct result, Blue Acorn iCi has been inundated with calls, complaints, emails, messages, and investigative inquires relating to Defendants' PPP business. Further, and as demonstrated in the Exhibits to the Verified Complaint, these communications have been rife with complaints, frustration, desperation, alarm, and concern about the quality and legitimacy of Defendants' services.

Exacerbating this problem is Defendants' utter failure to maintain any meaningful customer service line or personnel to handle the deluge of complaints and inquiries from

[1] Plaintiff incorporates the meaning of defined terms as stated in the Verified Complaint, and all references to exhibits are to the Exhibits to the Verified Complaint.

Defendants' customers. This has resulted in a truly overwhelming amount of communications that Blue Acorn iCi has been forced to handle throughout the day, resulting in significant interruption and impairment in its ability to conduct basic business affairs. In addition to the extreme burden this has placed on Plaintiff's business, the nature of the complaints has escalated to those of potential fraud, negligence, and misdirection of PPP loan funds. The collective impact of these events—including the significant, ongoing consumer confusion; volume of negative complaints about Defendants' services; Defendants' extremely poor or nonexistent customer service; and the concerning nature of complaints about Defendants' business—is causing, and will continue to cause, immediate and serious harm to Blue Acorn iCi's brand, goodwill, and business reputation.

In an attempt to address these serious issues of infringement, cybersquatting, unfair competition, and actual consumer confusion, Blue Acorn iCi sent two cease & desist letters outlining Defendants' blatant infringement and resulting losses to Blue Acorn iCi. Unfortunately, Defendants have continued their unauthorized use and promotion of infringing marks in the face of Blue Acorn iCi's superior intellectual property rights; their full knowledge of actual consumer confusion; and the serious harms to Blue Acorn iCi, further demonstrating that Defendants' conduct is done willfully and with the deliberate intent to trade on the goodwill of Blue Acorn iCi's long-standing Blue Acorn Brand.

Escalating consumer confusion, together with Defendants' failure and refusal to cure their conduct, has forced Blue Acorn iCi to file this action, seeking damages and the injunctive relief specifically set forth in Plaintiff's Motion. In support of this requested relief, Plaintiff incorporates the factual allegations set forth in the Verified Complaint in full, along with all Exhibits to the Verified Complaint, and requests that the Court take any and all action necessary to address the ongoing acts of infringement and immediate harm to Plaintiff resulting from Defendants' conduct.

LEGAL STANDARD

In considering a Motion for Temporary Restraining Order ("TRO") and Preliminary Injunctive Relief, the trial court evaluates four interrelated factors: "(1) the likelihood that the plaintiff will succeed on the merits; (2) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (3) the likelihood of irreparable harm to the defendant if the requested relief is granted; and (4) the public interest." *NaturaLawn of Am., Inc. v. W. Grp., LLC*, 484 F. Supp. 2d 392, 398 (D. Md. 2007) (citing *Rum Creek Coal Sales, Inc. v. Caperton,* 926 F.2d 353, 359 (4th Cir.1991)).

ARGUMENT

I. Likelihood of Success on the Merits

Plaintiff's Verified Complaint demonstrates a likelihood of success on the merits for Plaintiff's claims of trademark infringement, copyright infringement, and cybersquatting under federal and state law. Plaintiff will discuss each of these claims in turn.

A. Trademark Infringement

"To prevail on a trademark infringement claim, the plaintiff must show that it owns a valid and protectable mark, that the defendants used a 're-production, counterfeit, copy, or colorable imitation' of that mark in commerce without the plaintiff's consent, and that use of the mark is likely to cause confusion." *PGI Polymer, Inc. v. Church & Dwight Co.*, 2015 WL 5920013, at *3 (W.D.N.C. Oct. 9, 2015) (unpublished) (citing *Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 158 (4th Cir. 2014)); *see also* 15 U.S.C. § 1114(a); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 152 (4th Cir. 2012). The unauthorized use of a trademark infringes the trademark holder's rights if it is likely to confuse an "ordinary consumer" as to the source or sponsorship of the goods. *Anheuser–Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 318 (4th Cir. 1992).

A similar standard applies to trademark claims under the North Carolina Registered Trademarks Act. Specifically, N.C. Gen. Stat. § 80-11 requires a plaintiff to prove "(1) that it has a valid, [protectable] trademark; and (2) that the defendant's use of a colorable imitation of the trademark is likely to cause confusion among consumers." *Window Gang Ventures, Corp. v. Salinas*, No. 18 CVS 107, 2019 WL 1471073, at *18 (N.C. Super. Apr. 2, 2019).

Common law trademark rights, including those for unregistered marks, are acquired by the first use of the mark in connection with the sale of goods or services, and any subsequent and unauthorized use of the mark constitutes common law trademark infringement. *HCW Ret. & Fin. Servs., LLC v. HCW Emp. Ben. Servs., LLC*, No. 10 CVS 1447, 2015 WL 4238193, at *7 (N.C. Super. July 14, 2015) (quoting *Emergency One, Inc. v. Am. Fire Eagle Engine Co.*, 332 F.3d 264, 267 (4th Cir. 2003)).

In this case, the Verified Complaint and all exhibits show that 1) Plaintiff has valid, protectable trademark rights in BLUE ACORN ICI, the Acorn Logo, and the Blue Acorn Brand, which includes the "blue acorn" name (collectively, "Plaintiff's IP"); 2) Plaintiff's IP was established and in use prior to Defendants' use and publication; 3) Defendants have engaged in unauthorized use and publication of Plaintiff's IP in their widespread, nationwide marketing campaign and through their websites; and 4) their infringement is causing actual consumer confusion that is overwhelming Plaintiff's business.

1. Plaintiff Owns Valid and Protectable Trademark Rights in Plaintiff's IP

Plaintiff is the sole and exclusive owner of trademark rights in its registered mark BLUE ACORN ICI, Acorn Logo, and Blue Acorn Brand, which includes the "blue acorn" name, under federal and state law. Plaintiff's USPTO Registration of the BLUE ACORN ICI trademark (*see* **Exhibit C**) is *prima facie* evidence of its validity, ownership, and proper registration under The

Lanham Act, 15 U.S.C. § 1114, *et. seq*. As a result, Defendants bear the burden of overcoming this presumption of validity, but will not be successful in doing so since there is no evidence Defendants have any superior or original rights to any aspect of the name "blue acorn" for use in identifying and promoting their PPP business. At the earliest, Defendants' infringing use of the "blue acorn" name was in April 28, 2020 (*see* **<u>Exhibit G</u>**), which is insufficient to overcome the presumption. *La Michoacana Nat., LLC v. Maestre*, 2018 WL 2465478, at *2 (W.D.N.C. June 1, 2018) (unpublished) (citing *Rebel Debutante LLC v. Forsythe Cosmetic Grp., Ltd.*, 799 F. Supp. 2d 558, 569 (M.D.N.C. 2011)).

The same result applies to Plaintiff's trademark infringement claims relating to the Blue Acorn Brand, Acorn Logo, and "blue acorn" name under North Carolina law. Both statutory and common law trademark claims require proof of ownership. N.C. Gen. Stat. § 80-11. As explained by this Court in *La Michoacana*, 2020 WL 1233652, at *4:

> One of the bedrock principles of trademark law is that trademark or service mark ownership is not acquired by federal or state registration. Rather, ownership rights flow only from prior appropriation and actual use in the market." *Allard Enters. v. Advanced Programming Res., Inc.*, 146 F.3d 350, 356 (6th Cir. 1998) (quotation marks omitted). Thus, the first to appropriate and use a particular mark in a given market (the "senior" user) generally has priority to use the mark in that market to the exclusion of any subsequent or "junior" users. *Emergency One, Inc. v. Am. Fire Eagle Engine Co.*, 332 F.3d 264, 268 (4th Cir. 2003).

Since at least 2007, Blue Acorn iCi (through its Predecessors) created, marketed, and developed the "blue acorn" name to promote and identify its e-commerce business and Blue Acorn Brand, which is known throughout the United States and internationally. Since 2009, Blue Acorn iCi (through its Predecessors) created, marketed, and developed the Acorn Logo, which is exclusively used in connection with the Blue Acorn Brand. Thus, the Blue Acorn Brand generally, as well as the Acorn Logo and "blue acorn" name, are trademarks owned by Blue Acorn iCi who has the sole and superior right to use the same in commerce. Verified Complaint ("Compl.") ¶¶ 21–29; **Ex. A**.

2. Defendants' Use of Plaintiff's IP is Unauthorized

Defendants' use of the Blue Acorn Brand, Acorn Logo, and "blue acorn" name is unquestionably unauthorized. Not only did Defendants have constructive notice of Plaintiff's registered and common law trademarks, Blue Acorn iCi provided Defendants with actual notice of the same through two cease & desist letters in April and May 2021. Each of these letters requested immediate action by Defendants to cease all infringing activities and address the resultant consumer confusion. Unfortunately, Defendants made no attempt to modify their conduct, and their unauthorized infringing activity has continued. Compl. ¶¶ 114–23; **Exs. I–O**.

3. Defendants' use of the "Blue Acorn" Name and Acorn Logo is Causing Actual Confusion and Poses a High Likelihood of Continued Consumer Confusion

In analyzing likelihood of consumer confusion under The Lanham Act, courts examine the following well-known factors:

> (1) the strength or distinctiveness of the plaintiff's mark as actually used in the marketplace; (2) the similarity of the two marks to consumers; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities used by the markholders; (5) the similarity of advertising used by the markholders; (6) the defendant's intent; (7) actual confusion; (8) the quality of the defendant's product; and (9) the sophistication of the consuming public.

George & Co., LLC v. Imagination Entm't Ltd., 575 F.3d 383, 393 (4th Cir. 2009) (citing *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir.1984) and *Sara Lee Corp. v. Kayser–Roth Corp.,* 81 F.3d 455, 463–64 (4th Cir. 1996) ("*Pizzeria Uno/Sara Lee* factors")); *see also Variety Stores, Inc. v. Walmart Inc.*, No. 19-1601, 2021 WL 1171746, at *5 (4th Cir. Mar. 29, 2021).

Courts in North Carolina also apply the *Pizzeria Uno/Sara Lee* factors to analyze trademark infringement claims under state law. *See, e.g., Baker v. Bowden*, No. 16 CVS 235, 2016 WL 6652776, at *3 (N.C. Super. Nov. 10, 2016) (unpublished) (citing *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 930 (4th Cir. 1995)).

Since the relevant factors under North Carolina statutory and common law overlap with those under The Lanham Act, Plaintiff's evaluation of the likelihood of consumer confusion pursuant to the *Pizzeria Uno/Sara Lee* factors should be dispositive of all trademark claims.

i. Strength or Distinctiveness of Plaintiff's Marks in the Marketplace

The first *Pizzeria Uno/Sara Lee* factor—strength or distinctiveness of the marks—is "paramount in determining the likelihood of confusion since a consumer is unlikely to associate a weak or undistinctive mark with a unique source and consequently will not confuse the allegedly infringing mark with a senior mark." *Variety Stores, Inc.*, 888 F.3d at 661 (internal citation and quotation omitted). To measure the strength of mark, courts consider both the *conceptual* or *inherent* strength of the mark, as well as the *commercial* or *acquired* strength of the mark. *George & Co.*, 575 F.3d at 393.

> Conceptual strength is typically divided into five categories, which are given varying levels of protection based on the mark's distinctiveness: (1) fanciful; (2) arbitrary; (3) suggestive; (4) descriptive; and (5) generic. Commercial strength, on the other hand, considers the mark's strength in the marketplace and essentially mimics the inquiry into whether a descriptive mark has acquired secondary meaning, *i.e.*, that "in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself." *See Sara Lee*, 81 F.3d at 464.

Select Auto Imports Inc. v. Yates Select Auto Sales, LLC, 195 F. Supp. 3d 818, 831–32 (E.D. Va. 2016); *see also George & Co.*, 575 F.3d at 393.

Here, the BLUE ACORN ICI mark, the Acorn Logo, and the "blue acorn" name are arbitrary and distinctive. In general, arbitrary marks are ones that consist of common words and designs that do not suggest or describe the parties' services. In other words, there is nothing inherent to Blue Acorn iCi's services that relate to the color "blue," and its services have nothing to do with actual acorns. As such, Blue Acorn iCi's marks are inherently distinctive, which garners "the greatest protection against infringement." *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 315 (4th Cir. 2017); *Variety Stores*, 888 F.3d at 662.

Furthermore, Plaintiff's registration of BLUE ACORN ICI (*see* **Ex. C**) constitutes a presumption of validity and distinctiveness in the mark. 15 U.S.C. § 1115(a).

As to the mark's commercial or acquired strength, the United States Court of Appeals for the Fourth Circuit has identified the following six factors as relevant to the mark's degree of consumer recognition in the marketplace: "(1) plaintiff's advertising expenditures; (2) consumer studies linking the mark to the source; (3) the plaintiff's record of sales success; (4) unsolicited media coverage of the plaintiff's business; (5) attempts to plagiarize the mark; and (6) the length and exclusivity of the plaintiff's use of the mark." *Johnson & Morris PLLC v. Abdelbaky & Boes, PLLC*, No. 16 CVS 6151, 2016 WL 5923662, at *5 (N.C. Super. Oct. 11, 2016) (unpublished) (citing *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 125 (4th Cir. 1990) (citation and internal quotations omitted)); *see also Variety Stores*, 888 F.3d at 663. "No factor is determinative and all factors need not be favorable for the plaintiff to prevail." *Johnson & Morris*, 2016 WL 5923662, at *5.

Here, the evidence before the Court, including the materials attached as **Ex. B** to the Verified Complaint, establishes strong commercial or acquired strength in the marketplace based on these factors. Plaintiff's IP has been exclusively used and cultivated by Blue Acorn iCi (and its

Predecessors) since at least 2007. Blue Acorn iCi has offered these services through its websites, "blueacornici.com" and "blueacorn.com," and other public channels of commerce in connection with its e-commerce services. As a result of Blue Acorn iCi's continuous and prominent promotion of the Blue Acorn Brand over at least the past fourteen (14) years, Blue Acorn iCi and has developed distinct, identifiable, and recognized marks to identify its services. Compl. ¶¶ 19–29.

As of today, Blue Acorn iCi provides services to over 169 clients throughout the United States and generates approximately 64 million dollars in annual revenue. Blue Acorn iCi expends approximately $630,000.00 annually toward the promotion and advertising of the Blue Acorn Brand and associated services. Compl. ¶¶ 17–18.

Finally, but perhaps most importantly, Defendants' blatant infringement of Plaintiff's IP, including its use of an exact copy of the Acorn Logo, shows that Defendants have intentionally plagiarized Plaintiff's marks.

As a whole, these factors present a high degree of inherent, acquired, and commercial strength of Plaintiff's IP in the marketplace.

ii. Similarity of the Goods or Services the Marks Identify

In evaluating the second factor, courts consider whether the goods or services of the parties are similar. This is relevant because consumer confusion will be more likely if the parties' goods or services are sufficiently related such that consumers attribute them to a single source. *Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc.*, 227 F. App'x 239, 244 (4th Cir. 2007); *Combe Inc. v. Dr. Aug. Wolff GmBH & Co. KG Arzneimittel,* 382 F. Supp. 3d 429, 458 (E.D. Va. 2019), *aff'd*, No. 19-1674, 2021 WL 1384750 (4th Cir. Apr. 13, 2021). Moreover, under Fourth Circuit authority, the goods or services do not need to be identical or in direct competition for confusion to be likely. *George & Co.*, 575 F.3d at 397.

While the underlying product or services provided by the parties is not the same, the underlying concern that consumers will attribute them to a single source is squarely at issue here.

First, both Plaintiff and Defendants operate a web-based business and market and sell their services online. Blue Acorn iCi's trademark registration for BLUE ACORN ICI covers, *inter alia*, "[a]ssistance, advisory services and consultancy with regard to business planning [and] business management." **Ex. C**. Blue Acorn iCi also offers e-commerce payment processing services. Compl. ¶ 15. Furthermore, companies similar to Blue Acorn iCi have offered PPP assistance to their clients, further conflating the parties' goods and services in the marketplace.

Like Blue Acorn iCi, Defendants "Blue Acorn PPP" business provides business planning and management services by assisting businesses "to apply for low-interest private loans for their payroll and other costs." Compl. ¶ 58, **Ex. G**. In addition, like Blue Acorn iCi's payment processing services, Defendants' PPP business is a SaaS offering that makes financial transactions more accessible to busy professionals. Based on these similarities, thousands of consumers have been sufficiently confused by Defendants' use of the "blue acorn" name in concluding that Blue Acorn iCi is the source of Defendants' goods and services. *See* **Ex. F**. Accordingly, this factor weights in favor of Blue Acorn iCi.

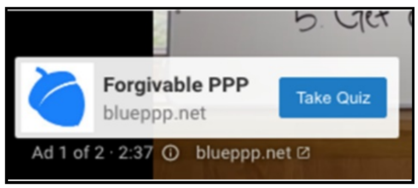
iii. Similarity of the Two Marks to Consumers

In general, the third *Pizzeria Uno/Sara Lee* factor—similarity of the marks to consumers—compares the appearance of the marks in assessing the potential for confusion. *Rosetta Stone*, 676 F.3d at 152. In this case, a visual comparison of Defendants' "Blue Acorn" word logo ("Infringing Mark") depicted below, and Plaintiff's "Blue Acorn" word logo, shows they are unmistakably and confusingly similar.

Defendants' Infringing Mark	**Plaintiff's Mark**

Both images depicted have the same use of blue coloring, the same font style, the same lack of capitalization, the same font contrast between the "blue" and the "acorn," and the same emphasis or bold typeface of the word "acorn." *Rosetta Stone*, 676 F.3d at 152; *La Michoacana*, 2018 WL 2465478, at *2.

The potential for confusion with respect to its "Acorn Logo" is even more pronounced given Defendants' blatant use of an exact copy of Blue Acorn iCi's Acorn Logo as shown below:



Despite the glaring similarities in the parties' marks, Defendants may attempt to argue that their use of the Infringing Mark is slightly different than Blue Acorn iCi's updated logo:

However, any such attempt will be unavailing for at least three reasons. First, Plaintiff's updated Blue Acorn logo with the letters "iCi" attached to the end does not in any diminish the evident, continued similarity between Plaintiff's registered BLUE ACORN ICO mark in name, font, color, emphasis, and capitalization. Marks may be confusingly similar in appearance despite the addition, deletion, or substitution of letters or words. *See, e.g.*, *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).

Second, Plaintiff has ***not*** abandoned the original "Blue Acorn" logo and continues to use and publish this mark.

Third, the addition of "iCi" has in not in any way prevented consumer confusion. Consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *See, e.g., Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered."). Thus, in sum, the third *Pizzeria Uno/Sara Lee* factor weighs heavily in favor of Blue Acorn iCi.

iv. Similarity of Advertising

In evaluating the fourth *Pizzeria Uno/Sara Lee* factor, courts consider the similarity of the media used for marketing and channels of trade, as well as the appearance and content of the parties' advertising. *CareFirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263, 273 (4th Cir. 2006). A "finding of similarity of advertising requires some degree of overlap among the parties' outlets and customer bases, but the two need not be identical". *Select Auto Imports*, 195 F. Supp. 3d at 837 (internal quotations and citations omitted).

A search on Google for Plaintiff as "blue acorn ici" produces one of Defendants' infringing websites as the first result, Compl. ¶ 99. *See, e.g., Tropical Nut & Fruit Co. v. Forward Foods. LLC*, No. 3:13-CV-131, 2013 WL 2481521, at *3 (W.D.N.C. June 10, 2013) (unpublished) (finding a similarity of advertising where search engine produces information about both parties). Further, both Blue Acorn iCi and Defendants spend significant portions of their marketing budget advertising to businesses and self-employed individuals seeking businesses management advice and financial assistance, as further detailed with respect to factor (v) below. In sum, this fourth *Pizzeria Uno/Sara Lee* factor also weighs in favor of Blue Acorn iCi.

v. Similarity of Facilities

This factor considers the similarity of the classes of consumers purchasing the parties' products and the context in which they make their purchases. *Renaissance*, 227 F. App'x at 244-45; *Tools USA & Equip. Co. v. Champ Frame Straightening Equip. Inc.*, 87 F.3d 654, 661 (4th Cir. 1996) (referring to this factor as "the similarity of [the] retail facilities and trade channels used to market the two lines of products"); *vonRosenberg v. Lawrence*, 412 F. Supp. 3d 612, 650 (D.S.C.), *enforcement granted in part*, 429 F. Supp. 3d 175 (D.S.C. 2019).

Here, both parties market their products to small businesses and self-employed individuals throughout the United States across a wide variety of industries. Consumers of both parties are looking for assistance to compete with larger companies and rely primarily on the parties' web-based presence to do so. Specifically, Blue Acorn iCi assists small business with direct-to-consumer deliveries and marketing, payment processing, ecommerce site development and other services that enable small businesses and solo entrepreneurs to compete against larger brands. Compl. ¶ 14. As a result, Blue Acorn iCi's web-based presence and longstanding Blue Acorn Brand has been co-opted by Defendants to push their product to small businesses and entrepreneurs nationwide. Accordingly, the fifth *Pizzeria Uno/Sara Lee* factor weighs in Blue Acorn iCi's favor.

vi. Defendants' Intent

This sixth factor analyzing the defendant's intent is of critical importance and is often dispositive of the element of consumer confusion as a presumption. As explained by the Fourth Circuit, "[t]he presumption that intentionally copying someone else's mark causes a likelihood of confusion arises from the recognition that one who tries to deceive the public should hardly be allowed to prove that the public has not in fact been deceived." *Shakespeare Co. v. Silstar Corp. of Am.,* 110 F.3d 234, 239 (4th Cir. 1997) (citing *Osem Food Indus. Ltd. v. Sherwood Foods, Inc.*, 917 F.2d 161, 165 (4th Cir. 1990)); *see also Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 258 (2d Cir. 1987); *vonRosenberg*, 412 F. Supp. 3d at 651 (recognizing that a defendant's intent to confuse is strong evidence of a likelihood of confusion). In addition, even if a defendant's infringement was initially done in good faith, continued or ongoing infringement after receiving notice of actual confusion and demand to cease infringing activities constitutes willful and intentional infringement. *Lone Star*, 43 F.3d at 937.

Here, the evidence before the Court clearly demonstrates intentional infringement. Defendants' willful, knowing, and intentional infringement is demonstrated by 1) their blatant copying and use of the Acorn Logo; 2) Defendants' evident design of the Infringing Mark to look nearly identical to Blue Acorn iCi's name logo; and 3) Defendants' continued use of the Acorn Logo and Infringing Mark after receiving each cease & desist letter. Compl. ¶¶ 114–23; **Exs I–O.**

These facts demonstrate Defendants' evident intent to willfully and knowingly build their business on the back of Blue Acorn iCi's Blue Acorn Brand, using marks that are nearly identical, and in the case of the Acorn Logo wholly identical, to Plaintiff's IP. As a result of Defendants' evident willful, bad faith, and intentional infringement, consumer confusion should be presumed. *Osem,* 917 F.2d at 165.

vii. Actual Confusion

In the Fourth Circuit, evidence of actual confusion is considered "the most important" of the *Pizzeria Uno/Sara Lee* factors. *George & Co.*, 575 F.3d at 398. This is because evidence of actual consumer confusion "is patently the best evidence of likelihood of confusion." *Tools USA*, 87 F.3d at 660 (internal quotation and citation omitted); *see also Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 464 F. Supp. 2d 495, 502 (E.D. Va. 2006), *aff'd on other grounds*, 507 F.3d 252 (4th Cir. 2007).

Thus, where consumers are shown to be actually confused about the source of the parties' goods and services, such "evidence is entitled to substantial weight as it provides the most compelling evidence of likelihood of confusion." *Lone Star*, 43 F.3d at 937. In fact, the Fourth Circuit Court of Appeals has emphasized that where actual confusion exists, this factor is "paramount" and characteristically dispositive of the analysis in Plaintiff's favor. *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 804 (4th Cir. 2001); *Sara Lee*, 81 F.3d at 467.

Here, indisputable evidence of significant actual consumer confusion is before the Court. As detailed throughout the Verified Complaint and attached exhibits, Blue Acorn iCi's business activities have been increasingly overwhelmed with calls, emails, complaints, and other electronic communications from consumers who mistakenly believe that Blue Acorn iCi is affiliated with, or the same company as, Defendants. An astounding **86.9%** of Blue Acorn iCi's website-generated communications are related to Defendants' PPP business. In other words, **only 13.1%** of these contacts relate to Blue Acorn iCi's actual, legitimate business activities. Likewise, the number of incoming calls to Blue Acorn iCi has been dominated by Defendants' customers. Compl. ¶¶ 85–95; **<u>Ex. F</u>**.

In addition, Blue Acorn iCi's employees have been inundated with constant calls throughout the day from Defendants' irate customers who have been unable to reach Defendants by phone, email, website, or any other manner. Many of these customers are desperate and continue to call Blue Acorn iCi even after being advised that it has no association whatsoever to Defendants or their PPP business. *Id.*

Blue Acorn iCi's employees have also been individually contacted by Defendants' customers through their own personal social media platforms, including direct messages sent through Facebook, Twitter, and Instagram. To date, a total of **134** social media engagements have been initiated by Defendants' customers. Moreover, because Defendants' infringement and nationwide marketing has only increased, the volume of actual consumer confusion has truly overwhelmed Blue Acorn iCi's business activities and is unsustainable. *Id.*

In addition to confusion by Defendants' customers, Blue Acorn iCi has also been contacted by various agencies, including the Better Business Bureau, the State of Tennessee Consumer Affairs, and the Commonwealth of Massachusetts, relating to investigations prompted by consumer complaints and/or potential fraud. As a result, Blue Acorn iCi has been forced to retain counsel to address the confusion directly with these agencies and explain that it has no connection whatsoever to Defendants' PPP business. Due to the serious nature of these investigations, the impact of apparent confusion about the source of Defendants' services had reached a critical point. Compl. ¶¶ 103–11; **Exs. F & H**. Thus, taking all evidence of actual, substantial, and unmitigated consumer confusion together, the factor of actual confusion alone supports Plaintiff's trademark infringement claims, as well as its need for immediate injunctive relief.

viii. Quality of the Defendants' product

As demonstrated by the content of consumers' concerns attached as **Ex. F** to the Verified Complaint, concerns relating to the quality of Defendants' services are serious in nature. Consumers are not only dissatisfied with Defendants' PPP services, they are irate with the lack of ability to communicate with Defendants through phone, email, or any other manner. In addition, a recent YouTube post identifies Defendants' business as a "SCAM" and cautions consumers: "*Don't give your info*!" Other consumers have identified Defendants' business as a scam and have raised concerns about the misdirection of federal PPP funds to bank accounts other than the consumers' bank accounts. In addition, the Commonwealth of Massachusetts is currently investigating potential loan fraud as it relates to incarcerated individuals obtaining PPP loans through Defendants' services. Compl. ¶¶ 103–11; **Exs. F & H**.

Overall, the nature of these complaints and concerns paints a tremendously poor picture of the quality of Defendants' products and services, which is mistakenly imputed to Blue Acorn iCi as a direct result of Defendants' intentional infringement. As such, this seventh *Pizzeria Uno/Sara Lee* factor weighs in favor of Blue Acorn iCi.

ix. Sophistication of consuming public

As to the eighth *Pizzeria Uno/Sara Lee* factor, Defendants' services, by their very nature, are intended to simplify the PPP loan process for businesses and self-employed individuals who do not have the financial knowledge or time available to complete the PPP process themselves. As such, this ninth *Pizzeria Uno/Sara Lee* factor also weighs in favor of Blue Acorn iCi.

In total, the evidence before the Court demonstrates a clear showing of consumer confusion on all relevant factors, including strong and indisputable evidence of intentional infringement and actual confusion. *George & Co.*, 575 F.3d at 393; *Rosetta Stone*, 676 F.3d at 152. As such, Blue Acorn iCi has demonstrated a likelihood of success on the merits for trademark infringement under The Lanham Act and North Carolina law, warranting immediate injunctive relief.

B. Copyright Infringement

The elements for stating a copyright infringement claim are straightforward. Plaintiff must show that (1) it owned a valid copyright; and (2) that Defendants copied original elements of its copyrighted work. *Louis Vuitton*, 464 F. Supp. 2d at 506 (citing *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 660 (4th Cir. 1993)); *see also Stockart.com, LLC v. Caraustar Custom Packaging Grp., Inc.*, 240 F.R.D. 195, 197–98 (D. Md. 2006) (citing *Hotaling v. Church of Jesus*

Christ of Latter–Day Saints, 118 F.3d 199, 203 (4th Cir.1997) ("There is no question that the unauthorized distribution of a copyrighted work constitutes copyright infringement.")).

1. Plaintiff Owns a Valid and Protectable Copyright in the Acorn Logo

Establishing the element of validity consists of three sub-elements: "(1) originality, (2) copyrightability, and (3) compliance with statutory formalities." *Custom Dynamics, LLC v. Radiantz LED Lighting, Inc.*, 535 F. Supp. 2d 542, 551 (E.D.N.C. 2008) (citing 4 Nimmer on Copyright § 13.01[A])).

Here, the elements of copyrightability and compliance with statutory formalities are easily shown. First, the Acorn Logo is used by Plaintiff in its advertising, **Ex. B**, which is "clearly copyrightable." *Id*. Second, Plaintiff has satisfied the statutory requirements by applying to register its copyright in the Acorn Logo, and following a first refusal, serving notice of to the Copyright Office of this suit contemporaneously with this action, **Ex. C**. *See* 17 U.S.C. § 411(a); 37 C.F.R. § 202.5(b)(1).

Third and finally, Blue Acorn iCi's Acorn Logo is original and demonstrates creative authorship in its original design. By way of background, the term "original" consists of two components: independent creation and sufficient creativity. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). First, the work must have been independently created by the author, *i.e.*, not copied from another work. *Id*. Second, the work must possess sufficient creativity. *Id.*; 37 C.F.R. § 202.10(a) (stating "to be acceptable as a pictorial, graphic, or sculptural work, the work must embody some creative authorship in its delineation or form").

Here, the requirement of independent authorship is met. As detailed in the Verified Complaint, Blue Acorn iCi (through its Predecessors) independently created the Acorn Logo, which has continuously been in public use since its creation. In addition, the Acorn Logo was not copied from any other work, but was designed and drawn by Blue Acorn iCi, through its Predecessors. Compl. ¶¶ 25–25.

Finally, as to the element of creative authorship, the Acorn Logo meets the low threshold established by the United States Supreme Court in *Feist*. In fact, "[o]nly a modicum of creativity is necessary." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. at 345. Thus, while there can be no copyright where "the creative spark is utterly lacking or so trivial as to be virtually nonexistent," "the requisite level of creativity is extremely low; even a slight amount will suffice." *Id*. at 345, 349. As such, "the vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be." *Id.* (quoting 1 M. Nimmer & D. Nimmer, Copyright § 1.08 [C] [1] (1990)); *see also Universal Furniture Int'l, Inc. v. Collezione Eur. USA, Inc.*, No. 1:04CV00977, 2007 WL 2712926, at *4 (M.D.N.C. Sept. 14, 2007), *aff'd sub nom.*, 618 F.3d 417 (4th Cir. 2010), *as amended* (Aug. 24, 2010) ("[C]opyright protection is available even if the quantum of originality is minimal.") (internal quotation and citation omitted).

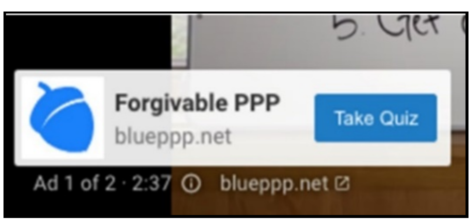
As described in greater detail in the Request for Reconsideration, **Ex. C**, the Acorn Logo easily meets the *Feist* standard for creative authorship in color, size, angle, shape, and internal use of negative space, among other unique qualities of design. These elements were designed as a matter of artistry and are not mere imitations of images available in the public domain. Furthermore, the Acorn Logo is not a slavish copy of an acorn found in nature, but rather is an expression of an idea with a sufficient level of creativity to be copyrightable. *Id*. at 345; *Sunset Lamp Corp. v. Alsy Corp.*, 698 F. Supp. 1146, 1151 (S.D.N.Y. 1988) (stylized design of intertwined banana leaves on a lamp base were not mere imitations of nature but were copyrightable); *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 765 (2d Cir. 1991) (arrangement of roses contained a sufficient "dash of originality" for copyright protection); *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 101 (2d Cir. 1999) (flower design was more than "simply the depiction of a flower as it would appear in nature," but was "an artistic rendering that has its own unique qualities" and was entitled to copyright protection); *Home Legend, LLC v. Mannington Mills, Inc.*, 784 F.3d 1404, 1410 (11th Cir. 2015) (maple wood flooring designs were not "highly creative," but were "creative enough to hurdle the low bar of copyrightable originality").

In light of these illustrative cases, and following the holding in *Feist*, Blue Acorn iCi's unique, stylized Acorn Logo sufficiently satisfies the "originality" element for establishing a protectable copyright.

2. Defendants Copied the Acorn Logo

The second element of a copyright infringement claim is plainly met in this case. As shown in the Verified Complaint and exhibits attached as **Ex. G**, Defendants made an identical copy of the Acorn Logo and used that copy in its advertising materials, including the YouTube video promoting Defendants' PPP service, which has been viewed over 14 million times.

A side-by-side comparison confirms unquestionable copying of the Acorn Logo.

Defendants' acorn logo	**Plaintiff's Acorn Logo**
	

Defendants' copying and use of the Acorn Logo is unauthorized and clearly demonstrates intentional copyright infringement, warranting injunctive relief, damages, and Defendants' profits. 17 U.S.C. § 504.

C. Cybersquatting

In addition to their widespread infringing activity, Defendants are also in violation of the Anticybersquatting Consumer Protection Act ("ACPA"). Under the ACPA, Defendants will be liable for cybersquatting if, without regard to the goods or services of the parties, one or more of the Defendants (i) has a bad faith intent to profit from use of the Plaintiff's mark; and (ii) registers, traffics in, or uses a domain name that is identical or confusingly similar to that mark. 15 U.S.C. § 1125(d). For purposes of this action, the ACPA framework can be distilled to the following two elements: (i) that Defendants' use of "blueacorn.co," "getblueacorn.com" and other related domain names constitutes trademark infringement; and (ii) that Defendants have a bad faith intent to profit from use of the websites using the infringing marks. *Eurotech, Inc. v. Cosmos Eur. Travels Aktiengesellschaft*, 213 F. Supp. 2d 612, 623 (E.D. Va. 2002).

These elements are addressed in turn.

1. Defendants' Websites Constitute Trademark Infringement

As thoroughly discussed above, each of Defendants' websites infringe upon Plaintiff's original, superior rights in and to BLUE ACORN ICI, the "blue acorn" name, and Blue Acorn Brand. Specifically, the registered domain names for "blueacorn.co" and "getblueacorn.com" each contain the "blue acorn" name, which constitutes a facial infringement of Plaintiff's trademark rights. Moreover, both "blueacorn.co" and "getblueacorn.com" contain the following Infringing Mark, which Defendants have used liberally to promote their PPP business:

blueacorn™

For the reasons addressed in Section I(A) above, which is incorporated here in full, Defendants' use and promotion of the Infringing Mark shown above is confusingly similar to

Plaintiff's registered trademark and well-established Blue Acorn Brand. As a result, consumers visiting the websites used by Defendants mistakenly believe that the above mark is attributable to Plaintiff, resulting is significant, actual consumer confusion. Such circumstances are the essence of a trademark infringement claim. Accordingly, Plaintiff has demonstrated a likelihood of success on the merits of its trademark infringement claim, and therefore, the first element of their cybersquatting claim under the ACPA is likewise met.

2. Defendants Have a Bad Faith Intent

In evaluating the "bad faith" element under the ACPA, courts in the Fourth Circuit look to the following nine (9) nonexclusive factors: (a) the trademark rights of the defendants in the offending domain name; (b) whether the domain name contains the legal name of the defendants; (c) prior use of the domain name in connection with a *bona fide* business; (d) defendants' *bona fide* noncommercial use of the mark; (e) defendants' intent to divert customers; (f) defendants' offer to sell the domain name; (g) defendants' provision of false registration information; (h) defendants' registration of multiple similar domain names; and (i) the strength of Plaintiff's mark. *Retail Servs., Inc. v. Freebies Pub.*, 247 F. Supp. 2d 822, 828 (E.D. Va. 2003), *aff'd sub nom. Retail Servs., Inc. v. Freebies Publ'g*, 364 F.3d 535 (4th Cir. 2004).

In applying these factors, the Fourth Circuit has explained:

> The first four [factors] suggest circumstances that may tend to indicate an absence of bad-faith intent to profit from the goodwill of a mark, and the others suggest circumstances that may tend to indicate that such bad-faith intent exists. However, "[t]here is no simple formula for evaluating and weighing these factors. For example, courts do not simply count up which party has more factors in its favor after the evidence is in." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 234 (4th Cir. 2002). In fact, because use of these listed factors is permissive, "[w]e need not . . . march through" them all in every case. *Virtual Works, Inc. v. Volkswagen of Am., Inc.*, 238 F.3d 264, 269 (4th Cir.2001). "The factors are given to courts as a guide, not as a substitute for careful thinking

> about whether the conduct at issue is motivated by a bad faith intent to profit." *Lucas Nursery & Landscaping*, 359 F.3d at 811.

Lamparello v. Falwell, 420 F.3d 309, 319–20 (4th Cir. 2005).

Here, the majority of ACPA factors strongly demonstrate the element of bad faith. First, with respect to factor (a) listed above, Defendants do not have any longstanding or registered trademarks or other intellectual property rights in their domain names "blueacorn.co" and "getblueacorn.com." *See Citigroup, Inc. v. Chen Bao Shui*, 611 F. Supp. 2d 507, 511–12 (E.D. Va. 2009).

Second, addressing factor (b), each of Defendants' domain names contain the words "blue acorn" with only small alterations and such names do not refer to or include the legal name of Defendants prior to March, 2021, when Defendants formed Blue Acorn PPP, LLC. Notably, from April, 2020 to March, 2021, during the majority of Defendants' infringing use of Plaintiff's IP, no legal entity was established incorporating the "blue acorn" phrase. *See* **Ex. E**.

Third, turning to factors (c) and (d), Defendants' domain names are unquestionably commercial in nature and no non-commercial use by the Defendants has been identified in the public domain. Defendants have not engaged in prior use of the disputed domain names "blueacorn.co" and "getblueacorn.com" in connection with a *bona fide* offering of any goods or services prior to their registration of the domain names. To the contrary, the evidence before the Court shows that Blue Acorn iCi's domain names "blueacorn.com" (registered January 1, 2004) and "blueacornici.com" (registered August 23, 2018) were created and maintained long before Defendants started their PPP business. Thus, at the time Defendants registered their domain names in 2020 and 2021, Blue Acorn iCi's prior use of the "blue acorn" name in connection with its e-commerce business was well-established and distinctive.

Fourth, concerning factor (h), Defendants created and registered at least two interconnected domain names and several associated social media sites, which further confirms their bad faith intent. These indisputable acts demonstrate that Defendants intentionally traded on the existing brand value of "Blue Acorn" to divert customers to itself for profit. They also show that Defendants had no reasonable grounds to believe their use of the domain names was fair or otherwise lawful or that they made any effort to register domain names that were non-infringing.

Fifth, concerning factors (e) and (i) and overarching the overall intent of bad faith, Defendants' actual knowledge of Plaintiff's preexisting and superior intellectual property rights in the Blue Acorn Brand is apparent. The strength of Blue Acorn iCi's marks is addressed throughout this memorandum. Defendants unquestionably had prior knowledge of Blue Acorn iCi's Acorn Logo since they made an exact copy of the Acorn Logo and used it liberally to promote their business. Defendants' bad faith intent is further confirmed by their creation and use of a "blue acorn" brand logo that is almost identical to Blue Acorn iCi's logo, using the same use of blue coloring, font style, lack of capitalization, font contrast between the "blue" and the "acorn," and the same emphasis or bold typeface of the word "acorn." As such, Defendants cannot plausibly deny their knowledge of Blue Acorn iCi's superior trademark and copyright rights at the time Defendants registered their domains. *Citigroup, Inc.*, 611 F. Supp. 2d at 511–12; *Eurotech, Inc.*, 213 F. Supp. 2d at 626.

Finally, Defendants' continued use and promotion of the infringing material after receiving two cease & desist letters further demonstrates that Defendants' conduct is done willfully and with the deliberate intent to trade on the goodwill of Plaintiff's intellectual property rights. As a result, the specific ACPA factors, as well as the "big picture" arising from Defendants' evident disregard for Plaintiff's intellectual property rights strongly supports the element of bad faith. *See Citigroup, Inc.*, 611 F. Supp. 2d at 511–12; *Eurotech, Inc.*, 213 F. Supp. 2d at 626; 15 U.S.C. § 1125(d).

II. Irreparable Harm to Plaintiff and Need For Injunctive Relief

In the Fourth Circuit, where a plaintiff demonstrates the likelihood of confusion—the "key element" in a trademark infringement action—a presumption of irreparable injury is generally applied. *PGI Polymer*, 2015 WL 5920013, at *4 (quoting *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 273 (4th Cir. 2002); *see also Lone Star*, 43 F.3d at 938 (recognizing that irreparable injury regularly flows from infringement as it causes a substantial likelihood of confusion and loss of control of business reputation); *Rebel Debutante*, 799 F. Supp. 2d at 579–80 (upholding presumption of irreparable injury); *Wynn Oil Co. v. Am. Way Serv. Corp.*, 943 F.2d 595, 608 (6th Cir. 1991).

The same presumption generally applies for copyright infringement, cybersquatting, and trademark infringement claims made under North Carolina law. *See Scotts Co.*, 315 F.3d at 273; *Fairbanks Cap. Corp. v. Kenney*, 303 F. Supp. 2d 583, 589–90 (D. Md. 2003); *Asia Apparel, LLC. v. Ripswear, Inc.*, No. 3:02-CV-469, 2004 WL 3259009, at *3 (W.D.N.C. Sept. 17, 2004), *aff'd sub nom.*, *Asia Apparel, LLC v. Cunneen,* 118 F. App'x 782 (4th Cir. 2005); *Splitfish AG v. Bannco Corp.*, 727 F. Supp. 2d 461, 467–68 (E.D. Va. 2010); *DMARCIAN, INC., Plaintiff, v. DMARCIAN EUROPE BV, Defendant.*, No. 1:21-CV-00067-MR, 2021 WL 2144915, at *25 (W.D.N.C. May 26, 2021) (unpublished); 17 U.S.C.A. § 502; N.C. Gen. Stat. § 66–154(a).

Moreover, injunctive relief is routinely awarded in the Fourth Circuit where willful or deliberate acts are involved. *See, e.g., Scotts Co.*, 315 F.3d at 273; *Meineke Car Care Centers, Inc. v. Catton*, 2010 WL 2572875, at *3 (W.D.N.C. June 24, 2010) (unpublished) (citing *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 379 (3rd Cir. 1992)).

Here, Blue Acorn iCi has presented a strong case of likelihood of confusion, including significant actual confusion in the marketplace involving thousands of calls and other communications from Defendants' customers who mistakenly believe Blue Acorn iCi is associated with Defendants' PPP business due to Defendants' widespread infringement and cybersquatting.

Blue Acorn iCi has also presented a strong case of willful and intentional infringement, which is evidenced by Defendants' blatant copying of Blue Acorn iCi's Acorn Logo and "blue acorn" word logo, as well as Defendants' total failure and refusal to address their ongoing infringement and cybersquatting following two cease & desist letters.

Finally, even if Blue Acorn iCi had not presented strong evidence of actual consumer confusion and intentional infringement, there is overwhelming evidence to demonstrate the harm to Plaintiff, including the reputational harm to its Blue Acorn Brand.

As outlined extensively in the Verified Complaint, Blue Acorn iCi has been inundated with incessant calls, emails, and other communications from angry customers of Defendants. Instead of operating Blue Acorn iCi's own lawful business, its employees have been forced to expend significant time and resources attempting to handle the deluge of misdirected customer complaints relating to Defendants' PPP business. Blue Acorn iCi has attempted to address these communications and complaints directly with consumers; however, it cannot continue to do so given the surge in Defendants' advertising (and commensurate confusion) and the serious nature of consumers' complaints.

Unfortunately, Defendants' pattern of failing to respond to their own customers and failure to maintain a monitored email address and/or dedicated customer service line has only exacerbated the significant business interruption caused by consumer confusion. Additionally, the extremely poor quality of Defendants' business and customer service is causing significant reputational harm to Blue Acorn iCi since confused customers mistakenly associate Blue Acorn iCi with the extremely poor quality of Defendants' customer service. Moreover, Blue Acorn iCi has no control over such qualitative perceptions and cannot protect its long-standing Blue Acorn Brand, which it has developed since at least 2007. These are the precise circumstances warranting injunctive relief. *See Mon Cheri Bridals, LLC v. P'ships*, No. 3:15-CV-00021-FDW-DC, 2015 WL 3509259, at *6 (W.D.N.C. June 4, 2015) (unpublished) (finding that plaintiff has no adequate remedy at law where defendants continue to operate infringing websites because plaintiff cannot control the quality of what appears to be its products in the marketplace).

Such immediate, actual reputational harm is heightened by the nature of consumer concerns relating to potential fraud and/or misdirection of funds, as well as investigations from governmental agencies. The serious nature of these concerns present an unacceptable threat of reputational harm to Blue Acorn iCi's business and the goodwill associated with its Blue Acorn Brand, which will only continue as long as consumers continue to mistakenly associate Blue Acorn iCi with Defendants' PPP business. Such reputational harms alone justify the finding of irreparable harm. *See, e.g., Merrill Lynch Pierce, Fenner and Smith v. Bradley*, 765 F.2d 1048, 1055 (4th Cir. 1985) (where the failure to grant preliminary relief creates the possible loss of goodwill, the irreparable injury prong is satisfied); *Arkansas Best Corp. v. Carolina Freight Corp.*, 60 F. Supp. 2d 517, 520 (W.D.N.C. 1999) (holding that defendants' infringement presents an undeniable threat to plaintiffs' reputation and goodwill, which creates imminent irreparable harm).

Furthermore, this case represents the existence of both *forward* and *reverse* infringement. In other words, not only are consumers confused in believing that Defendants' services originate from, or are affiliated with, Blue Acorn iCi's services, Defendants' conduct is causing consumers to believe, mistakenly, that Blue Acorn iCi's services originate with, or are otherwise connected to, Defendants' PPP business. *See, e.g., Fisons Horticulture, Inc. v. Vigoro Indus., Inc.*, 30 F.3d 466, 474 (3d Cir. 1994). The confluence of both forward and reverse infringement increases the likelihood of continued consumer confusion and compounds the harm to Plaintiff. *Id*.

Thus, in sum, the profound degree of actual consumer confusion; the likelihood of continued consumer confusion; the willful and intentional nature of Defendants' infringing activity; and the high degree of ongoing harm to Blue Acorn iCi, including its ability to conduct its own business affairs and serious reputational harm, demonstrates that there is no adequate remedy at law to address the irreparable damage associated with Defendants' ongoing infringement, cybersquatting, and unfair competition. Defendants should be held accountable for their blatant disregard for Blue Acorn iCi's rights in any lawful manner allowed by this Court.

III. PUBLIC INTEREST

Granting injunctive relief to address trademark and copyright infringement and consumer confusion is well within the public interests. *See S & R Corp.*, 968 F.2d at 379; *Bowe Bell & Howell Co. v. Harris*, 145 F. App'x 401, 404 (4th Cir. 2005); *PGI Polymer*, 2015 WL 5920013, at *4 ("Preventing trademarks from being used deceptively protects the public and serves the public interest."); *Splitfish*, 727 F. Supp. 2d at 469; *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, No. 1:04CV00977, 2005 WL 2427898, at *10 (M.D.N.C. Sept. 30, 2005) (unpublished).

Here, the great degree of actual confusion that has occurred strongly supports the public interest in preventing further confusion and deception by Defendants in the marketplace. *Toolchex, v. Trainor*, 634 F. Supp. 2d 586, 594 (E.D. Va. 2008); *Mon Cheri Bridals*, 2015 WL 3509259, at *6 ("[T]he public interest supports the issuance of a permanent injunction . . . to prevent consumers from being misled by Defendants' products."); *Meineke Car Care Centers*, 2011 WL 4829420, at

*4 (holding that where defendants' "use of [plaintiff's] trademark is likely to confuse the public, it is in the public's interest for the Court to grant [plaintiff's] motion for preliminary injunction").

IV. Balance of Hardships

Defendants have continued their infringement and cybersquatting activities willfully, intentionally, and with actual knowledge of Blue Acorn iCi's original and exclusive rights to the "blue acorn" name, Blue Acorn Brand, and Acorn Logo. While Blue Acorn iCi presumes Defendants may incur costs associated with the need to re-brand their PPP business and address the volume of consumer confusion at play, such costs could have been avoided entirely if Defendants had refrained from obvious infringement of Blue Acorn's long standing Blue Acord Brand when they started their business in 2020. *See Arkansas Best Corp.*, 60 F. Supp. 2d at 520 (noting that the losses to defendant's recently incorporated business were *di minimus* compared to plaintiff's long-standing business).

In addition, Defendants' infringement and cybersquatting activity has continued even after receiving two cease & desist letters detailing the degree of actual consumer confusion that has occurred and continues to occur at an alarming rate, resulting in significant reputational loss and business interruption to Blue Acorn iCi. As such, any harm to Defendants though the grant of injunctive relief is self-inflicted and far outweighed by the harms to Blue Acorn iCi. *See S & R Corp.*, 968 F.2d at 379 (noting that the defendant's difficulties were brought upon himself and that such "self-inflicted harm is far outweighed by the immeasurable damage done [plaintiff] by the infringement of its trademark."); *Am. Dairy Queen Corp. v. YS & J Enters., Inc.*, No. 5:14-CV-151-BR, 2014 WL 1327017, at *4 (E.D.N.C. Apr. 2, 2014) (unpublished) (noting that defendants' financial loss and burden through the grant of injunctive relief is "self-inflicted"); *IHOP Corp. v. Langley*, No. 5:08-CV-168-BO, 2008 WL 1859340, at *1 (E.D.N.C. Apr. 11, 2008) (unpublished)

("Any harm resulting from the cessation of Defendant capitalizing on Plaintiffs' success is not harm recognized under the law.").

CONCLUSION

For the reasons set forth above, Blue Acorn iCi requests that the Court grant its Motion for Temporary Restraining Order and Preliminary Injunctive Relief to preclude Defendants from engaging in ongoing trademark infringement, copyright infringement, cybersquatting, unfair competition, and deceptive trade practices, and to remedy ongoing and future consumer confusion.

RESPECTFULLY SUBMITTED this 10th day of June, 2021.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTIVE RELIEF** has been filed with the Clerk for the United States District Court, Eastern District of North Carolina, using the electronic filing system of the Court and that the foregoing was served upon the following persons by depositing a copy of the same in the United States Mail in an envelope, postage prepaid, addressed as follow:

- ✓ By placing a copy, contained in a first-class, postage paid wrapper, into a depository under the exclusive custody of the United States Postage Service, addressed to the parties as indicated below:

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This the 10th day of June, 2021.

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