

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

TRULIANT FEDERAL CREDIT UNION,

Plaintiff,

v.

SUNTRUST BANKS, INC., and
BB&T CORPORATION,

Defendants.

Civil Action No.: 19-CV-601

**BRIEF IN OPPOSITION TO
PLAINTIFF’S MOTION
FOR PRELIMINARY INJUNCTION**

INTRODUCTION

“The matter common to both marks [*i.e.*, TRU] is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.” – Plaintiff Truliant Federal Credit Union to the U.S. Patent and Trademark Office, June 13, 2019

The Court should deny Plaintiff’s motion for three independent reasons. *First*, Plaintiff cannot meet its burden of showing a clear likelihood of success because, in Plaintiff’s own words to the United States Patent and Trademark Office (“USPTO”), TRU- is “diluted” by thousands of co-existing marks, and confusion is unlikely. Moreover, Plaintiff’s motion uses the wrong legal standard, as evidenced by papers not showing any real world use. As used in the marketplace, the parties’ marks are plainly different:



Representative Branches and Plaintiff's Website

A screenshot of the Truiant Federal Credit Union website. The browser address bar shows "https://www.truiantfcu.org/". The website header includes the Truiant logo, navigation tabs for "PERSONAL" and "BUSINESS", and buttons for "Open an Account", "Apply for Loan", and "Need Help?". The main content area features a banner for "TRUism #68" with the text "The adventure should come after the auto loan, not during." and "Auto loan rates as low as 3.24% APR¹". Below the banner are four service tiles: "Important COVID-19 Information", "Explore Our Loan Options.", "Relief Programs for Business Owners", and "Meet With Us! Set an Appointment Online.". The footer includes contact information, social media icons, and a "LIFE IMPROVED™" slogan.

Planned TRUIST Branch and Defendant BB&T's Website



Personal Small Business Commercial Wealth About BB&T Contact Locations More Search

BB&T Banking Lending Retirement and Investing Insurance Online Access Login

TRUIST

COVID-19 response

Learn about branch updates, safer banking options, the SBA Paycheck Protection Program, and payment relief for home mortgage, home equity, auto loans, personal loans, and personal credit cards.

[Personal payment relief](#) [SBA Paycheck Protection Program](#) [COVID-19 and banking](#)

Truist Cares

\$25 million is on the way to provide aid for basic needs, medical supplies, and financial hardship across the nation.

Online Banking Login

User ID Password Show

[Log in](#)

[Reset your Password](#)
[Forgot user ID?](#)
[Online security measures](#)

Plaintiff’s motion depends on viewing the words in isolation, but the law is clear that “comparison of the texts of the two marks alone is insufficient if the marks have different appearances in the marketplace.” *CareFirst of Md., Inc. v. First Care, P.C.*, 434 F.3d 263, 271 (4th Cir. 2006). Courts must examine “how the two parties actually use their marks in the marketplace to determine whether the defendant’s use is likely to cause confusion.” *Id.* at 267.

Plaintiff concedes the only similarity is “TRU,” but this three-letter overlap is insufficient to warrant extraordinary relief. Over 7,460 federal registrations exist for TRU-marks (with over 500 in Class 36—financial and related services).¹ “TRU” is so widely used that no party can claim exclusive rights, and the proper outcome is for the myriad uses to continue to coexist. Again, Plaintiff made this *very argument* on June 13, 2019—*only four days before filing this action*. After the USPTO preliminarily rejected Plaintiff’s TRU2GO application based on the previously-registered mark TRU (also covering financial services), Plaintiff argued successfully that TRU was so common as to be *irrelevant* to the likelihood-of-confusion analysis:

It is noteworthy that the letters “TRU” are included in at least 32 live marks ... , and the letters “TRUE” are included in at least 340 live marks, in Class 036 alone....

The matter common to both marks [*i.e.*, TRU] is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.

¹ See Declaration of Rita Weeks (“Weeks”) ¶¶ 5-7 (USPTO registrations of “TRU-” marks); see also *Clear Def., LLC v. ClearDefense Pest Control of Greensboro, LLC*, No. 1:17-cv-01139, 2018 WL 5281912, at *1 n.1 (M.D.N.C. Oct. 24, 2018) (Schroeder, J.) (judicial notice of federal registrations).

Declaration of H. Forrest Flemming (“Flemming”) ¶ 2, Ex A, at 5.²

Plaintiff attempts to evade its admission and black-letter trademark law by arguing that the third-party use is outside of its “geographical field of membership.”³ But many TRU- marks are used nationally or regionally and overlap with Plaintiff’s branches. For example, Fifth Third Bank offers a TRULY SIMPLE credit card, MasterCard offers TRULY PRICELESS services, and Liberty Mutual has TRU Services; TRUGROCER Federal Credit Union has members nationwide.⁴ Moreover, while suggesting geographic limits, Plaintiff fails to disclose:

- Having customers in *all 50 states and the District of Columbia*. Murray Dep. 10:17-20; Flemming Ex. 18, DX19;⁵
- Sharing branches and ATMs with credit unions nationally, including 13 with TRU- names: TruEnergy, TruPartner, TrueCore, Trust, TruService, TruMark, TruGrocer, TruChoice, Truity, True Sky, TruWest, TruStone, and True North. Weeks ¶ 22;

² Plaintiff argued that “TRU” is “diluted”—and not perceived as “distinguishing source”—based on 32 registrations. In fact, *ten times* that amount, 320 TRU- marks, are registered for financial services. Weeks ¶ 8.

³ Brief in Support of Plaintiff’s Motion for Preliminary Injunction (“Brief”) at 11.

⁴ Weeks ¶¶ 9, 23, 50, 55 (collecting third-party marks). Fifth Third Bank operates over 1100 branches, including 52 in North Carolina. *Id.* ¶ 51(a). TruGrocer Federal Credit Union has branches in each continental time zone to cover its 30,000 nationwide members. *Id.* ¶ 25; *see also id.* ¶ 51(m) (Truly Priceless); ¶ 51(z) (TRU Services).

⁵ Deposition transcripts are referred to as “[Deponent] Dep.,” and cited excerpts are attached to the Flemming declaration. Deposition exhibits (“DX”) are collected sequentially in Flemming, Ex. 18.

- Touting, on its website, mortgage lending in states with other TRU- banks and credit unions in **Ohio** (TruPartner and TrueCore credit unions), **Florida** (Trustco and Trustmark banks), **Tennessee** (Trustmark, Truxton Trust, and Trust Federal Credit Union), **Georgia** (Trust Bank and Truxton Trust), **Virginia** (TruPoint and Trustar banks, and TruEnergy Federal Credit Union), and **North Carolina** (TruPoint Bank and Trust Federal Credit Union). *Id.* ¶ 48; and
- Extending membership privileges to “Partner Employers” with locations across the country. Flemming, Ex. 18, DX16; Weeks ¶¶ 10(d)(iii), 11.

Second, Plaintiff has not clearly demonstrated actual or imminent irreparable harm. Plaintiff speculates about *potential* harm based on words used alone, in plain, black text. But neither party uses its mark that way, devoid of branding such as distinct logos or color schemes. Almost a year after the TRUIST name was announced, Plaintiff posits only “potential loss,” Brief at 22, which is insufficient when in fact business has flourished.

Third, BB&T Corporation (“BB&T”) and SunTrust Banks, Inc. (“SunTrust”) (collectively, “Truist”) would suffer grave harm if enjoined, and the balance of equities tips demonstrably in its favor. Truist has invested about \$125 million in TRUIST, including approximately (i) \$7 million to create the name and branding;⁶ (ii) \$4 million to have the Truist name approved by shareholder and regulators;⁷ (iii) \$40 million to change operating

⁶ See Declaration of Declaration of Dontá Wilson (“Wilson”) ¶ 20; Declaration of Holmfridur Hardardottir (“Hardardottir”) ¶ 26.

⁷ Declaration of Mike Tisci (“Tisci”) ¶¶ 5, 20

systems so that Truist could use its legal name on the merger date;⁸ and (iv) \$75 million in direct community support and marketing expenses in the name of TRUIST. Wilson ¶¶ 41, 53, 60, 68, 75, 76. To replace TRUIST with a new name would require a shareholder vote and regulatory approvals, take 6-9 months, and cost another \$34 million.⁹

A preliminary injunction changing the status quo would cause irreparable harm to Truist’s reputation and goodwill, and to the TRUIST brand. After informing clients and the public that BB&T and SunTrust are “Now TRUIST,” switching would undermine those relationships.¹⁰ Truist has invested heavily in promoting TRUIST, which has substantial goodwill from over three billion opportunities to experience the brand. Wilson ¶ 89. Truist has rolled out the TRUIST brand across its markets, rebranded the Atlanta Braves stadium to TRUIST PARK, sponsored the Super Bowl Host Committee as TRUIST BANK, and announced its TRUIST FOUNDATION and TRUIST CARES initiative, which together have directed almost \$50 million to communities. Requiring Defendants to retract TRUIST would forfeit this goodwill, damage consumers’ perception of Truist’s competence and integrity, unsettle stakeholders and the public, and undermine Truist’s ability to succeed. Wilcox ¶¶ 18-20. Based on the brand damage, Truist could not easily switch back later once vindicated. Wilson ¶¶ 99-103.

⁸ See Declaration of Barbara Duck ¶¶ 6-18.

⁹ See Duck ¶¶ 19-25; Hardardottir ¶ 26; Wilson ¶¶ 60, 98; Tisci ¶¶ 19-21.

¹⁰ See Wilson ¶¶ 101-103; Declaration of Dr. Ronald Wilcox (“Wilcox”), Ex. 1, ¶¶ 22, 121-125, 138.

STATEMENT OF FACTS

I. The Merger of Equals, Name Development, and Announcement of TRUIST

On February 7, 2019, BB&T and SunTrust announced a planned “merger of equals.” Wilson ¶ 5. To reflect their equal contribution, they announced the combination would have a new name. *Id.* ¶ 7.¹¹ The agreement to use a new name was critical; neither company would have merged if the other’s name survived. *Id.*

BB&T and SunTrust wanted their new name to fit the values for which each was known, and to be appealing, distinctive, and memorable. *Id.* ¶¶ 9-10, 12, 15-17. They selected the leading branding company, Interbrand, to develop the name. *Id.* ¶ 8. Interbrand led an intensive, four-month process. *Id.* ¶ 12; Hardardottir ¶¶ 3-11. Interbrand heavily engaged the banks’ employees and clients. Wilson ¶¶ 12-13. Interbrand coined TRUIST from “altruistic,” which “strongly evokes ‘true,’” and suggested the mark based on the banks’ shared values, including “trust.” Hardardottir ¶¶ 6-10; Wilson ¶¶ 8, 14, 16-17. The Interbrand team working on TRUIST was unaware of Plaintiff before this lawsuit was filed. Hardardottir ¶ 22.

Using its proprietary “Name Gauge” research tool, Interbrand conducted extensive research. TRUIST performed exceedingly well on all metrics. Interbrand presented those results, and BB&T and SunTrust chose TRUIST because it was validated by client- and teammate-driven research. *Id.* ¶¶ 7-11; Wilson ¶¶ 15-17.

¹¹ Because the name needed BB&T shareholder approval, the banks wanted to announce it before the merger vote to eliminate having multiple expensive proxy mailings. *Id.* ¶ 11; *see also* Tisci ¶¶ 3-5.

Before moving forward, commercial trademark searches were ordered for TRUIST. Covering multiple classes, including Class 36 (financial services), the searches revealed many, co-existing entities using TRU- marks. Wilson ¶¶ 18-19. Neither Plaintiff nor its TRULIANT mark appeared in the search reports. *Id.*

On June 12, 2019, the banks revealed the TRUIST name at an employee celebration and then publicly announced it. *Id.* ¶¶ 22-23. The announcement received extensive national and local coverage and hundreds of thousands of impressions. *Id.* ¶¶ 23-26.

II. Shareholder and Regulatory Approval for the Merged Bank to Be TRUIST

BB&T's shareholders approved the merger and name change on June 30. *Id.* ¶ 28. Having engaged in substantial planning, the banks shifted to obtaining regulatory approval to use the name. Between June and November, the banks made filings with corporate authorities and regulators in 42 states, as well as with the Federal Reserve, the FDIC, Freddie Mac, and other federal authorities. Tisci ¶¶ 6-17.

Anticipating a fourth-quarter merger, BB&T undertook a massive effort, beginning in February 2019, to prepare for the post-merger conversion to TRUIST of both banks' consumer-facing operating systems. Duck ¶¶ 6-18. Over 4,500 people on 80 teams identified more than 1,100 required changes to convert to "TRUIST" (instead of the legacy names) for each business line and department, including risk management, payment and transaction processing, and information security. *Id.* ¶¶ 6-9. Changes were required for critical computer applications that generate bank forms and agreements, websites and mobile applications, and other key systems. *Id.* ¶¶ 9-17. Comprehensive testing was

required to confirm functionality. *Id.* ¶¶ 17-18. This cost about \$40 million and took more than six months. *Id.* ¶¶ 9, 18.

III. The Creation of the Unique TRUIST Logo and Color Scheme

After the TRUIST name was chosen, Interbrand began developing the logo, color scheme, and rollout plan. After five months, the banks selected the following logo:



Wilson ¶¶ 31-33; Hardardottir ¶¶ 12-21.

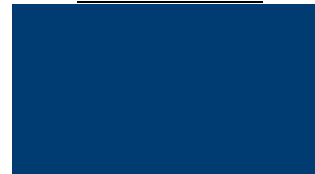
The TRUIST branding is distinctive, memorable, and unlike others in the financial industry. Wilson ¶ 34; Wilcox ¶¶ 12-13. The Ts in the logo mirror TRUIST, and represent “touch + tech” (with the square symbolizing “trust”), illustrating the brand’s guiding principle of “touch + tech = trust.” Wilson ¶ 34. The monogram is two Ts side by side (as a door) or, by optical illusion, one T on top of the other within a rounded square. *Id.* The logo is clear at every size, including digital formats. *Id.* ¶ 35.

In addition to the distinctive logo, Truist adopted a unique color—“Truist Purple.” Consistent with the merger of equals, it integrates the legacy brand colors:

BB&T Burgundy



SunTrust Blue



Id. ¶ 32; Hardardottir ¶¶ 15-16. Truist Purple “is unique and designed to stand out,” *id.* ¶ 16, and, depending on context, is either the background or the lettering color:



Wilson ¶ 33. Truist’s advertising, as in this billboard, highlights the heritage colors yielding Truist Purple (*id.* ¶ 64):



Before revealing this new visual branding to the public, Truist shared it with Plaintiff to demonstrate that the parties’ marks were distinct. Wilson ¶ 36. Those materials included this example of a typical future branch:



Plaintiff’s CEO conceded a lack of similarity with Truist’s new logo and color scheme, stating “we feel good about the fact that from a physical brand perspective it’s not as much similarity.” Flemming, Ex. 18, DX60; *see* Wilcox Ex. 1, ¶ 49 (“Truist’s distinctive visual identity allows consumers to distinguish its branches from those of its competitors.”).

IV. Truist Rolls Out the TRUIST Branding

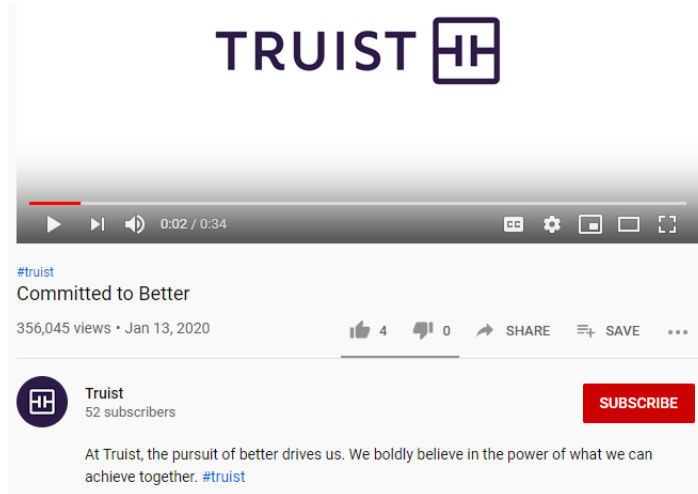
The merger closed on December 6, 2019; the merged bank officially became TRUIST on December 7. Wilson ¶ 38. Interbrand recommended not changing everything at once, but instead tying TRUIST to the well-known legacy bank names to transfer goodwill, followed by a phased rollout to build long-term recognition and additional goodwill in the TRUIST brand. Hardardottir ¶¶ 13, 23; Wilson ¶ 21.

The first rebranding phase linked the legacy banks with the TRUIST brand; materials highlighted that BB&T [or SunTrust] were “now TRUIST.” *Id.* ¶ 40; *see id.* ¶ 41 (client letter); Hardardottir ¶ 13. Truist used “BB&T [or SunTrust], Now Truist” in advertising, including websites and social media. Wilson ¶ 42. It sent emails and used voicemail greetings with “Welcome to BB&T [or SunTrust], Now Truist.” *Id.* ¶¶ 42-43.

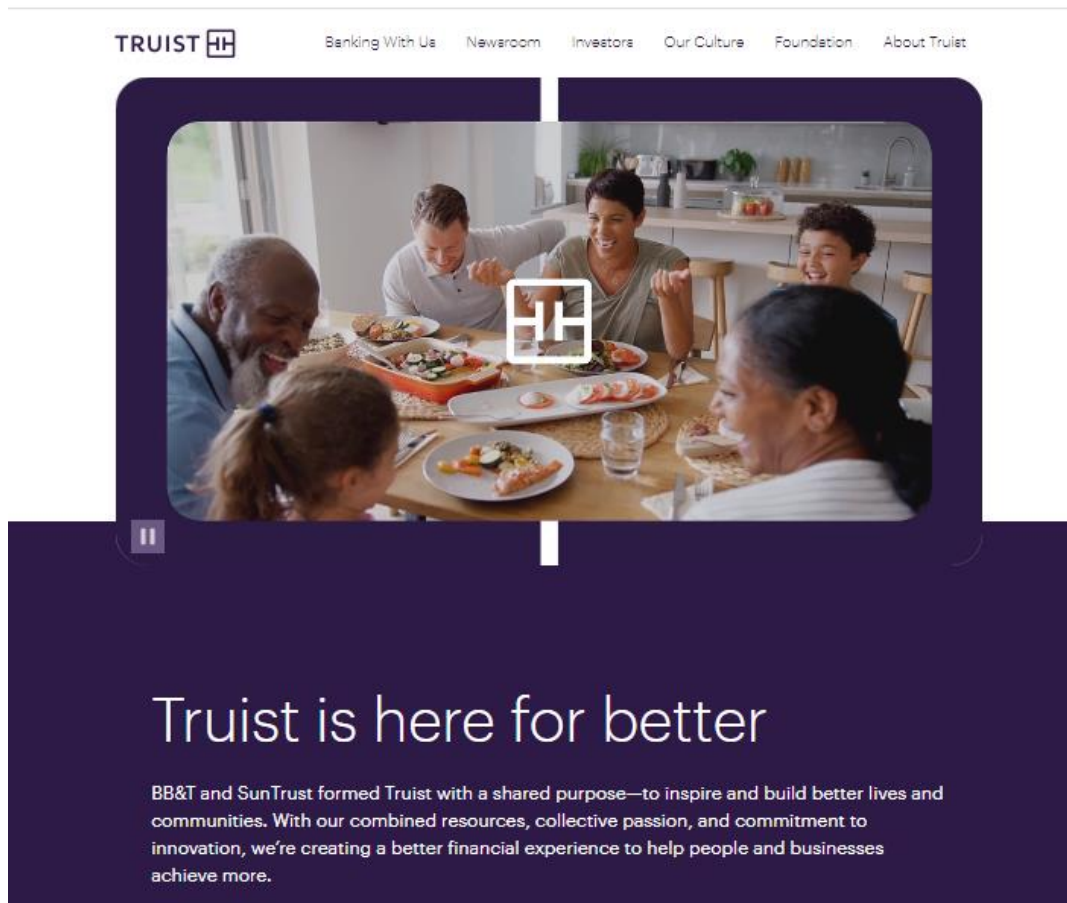


Truist consistently used the legacy names with TRUIST in public statements and with customers. *Id.* ¶¶ 44-46. Marketing linking the TRUIST name with BB&T and SunTrust, and related media coverage, generated over 1 billion impressions. *Id.* ¶ 39.

In January 2020, Truist publicly released TRUIST branding images. Wilson ¶¶ 47-53. A YouTube video, Committed to Better, has over 350,000 views, *id.* ¶ 50:

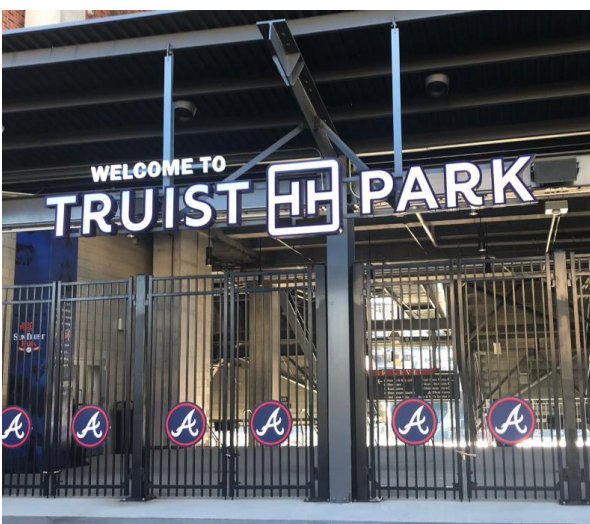


The Truist.com website was updated, *id.* ¶ 51:



Truist illuminated its new Charlotte headquarters with Truist Purple. *Id.* ¶ 52. The TRUIST branding announcement resulted in over 20 million impressions. *Id.* ¶ 53.

On January 14, Truist announced (with the Atlanta Braves) that SunTrust Park now would be TRUIST PARK. *Id.* ¶¶ 54-62. The announcement generated intense public interest and media coverage. *Id.* ¶ 55. Media have referred extensively to TRUIST PARK in connection with the Braves and other events. *Id.* ¶ 58. Rebranding is well underway—the main TRUIST signage is installed, and additional signage is in process. *Id.* ¶¶ 59-60.



Truist is responsible for the signage changes, which cost approximately \$5 million. *Id.* ¶ 60. Myriad Braves materials, including other sponsors' items, display the stadium name (e.g., tickets, programs, food and beverage packaging, team-branded merchandise, promotional items, video games, etc.), and commitments exist for them to use the TRUIST PARK name. Wilson ¶¶ 61-63.

In January, Truist sponsored the 2020 Super Bowl Host Committee. *Id.* ¶ 64. Truist promoted its sponsorship with prominent signage in the Miami area:



Id. Truist also promoted the sponsorship on widely-viewed social media pages. *Id.* ¶¶ 65-66. In addition, celebrity and influencers featured TRUIST on their social media. *Id.* ¶ 67. Truist spent over \$7.5 million promoting TRUIST branding in connection with the Super Bowl. *Id.* ¶ 68.

After the initial brand-unveiling “boom” in January, Truist sought to maximize the TRUIST brand in “echoes” in consumers’ minds. Hardardottir ¶ 24. When COVID-19 disrupted the 2020 marketing plan, Truist diverted \$25 million to community relief under its TRUIST CARES initiative. *Id.* ¶ 25; Wilson ¶¶ 73-87. Truist also ran a highly-visible ad supporting essential workers and reassuring small businesses (Wilson ¶¶ 80-83):

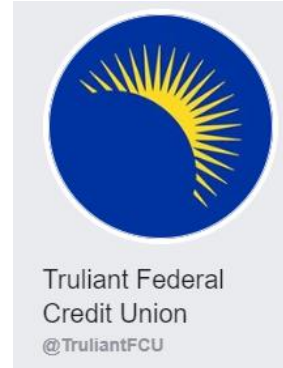


Truist’s guidelines suggest a “lockup of [the TRUIST] wordmark and monogram [logo] designed to be used together.” Wilson ¶ 35; *id.* at ¶ 92 (“In our marketing materials, TRUIST does not appear alone....”). Even if one element “is not used, ... other identity elements will make clear the source of the ... services.” Hardardottir ¶ 19. The TRUIST name already has achieved substantial brand recognition and awareness. Wilson ¶ 88 (over 60% unprompted recall); *see* Wilson ¶ 89 (3.4 billion opportunities to see TRUIST brand).

V. Plaintiff and The TRULIANT Mark

A. The TRULIANT Mark

Plaintiff’s public communications display “TRULIANT Federal Credit Union” in a blue-and-yellow color scheme with a “sunburst” logo:

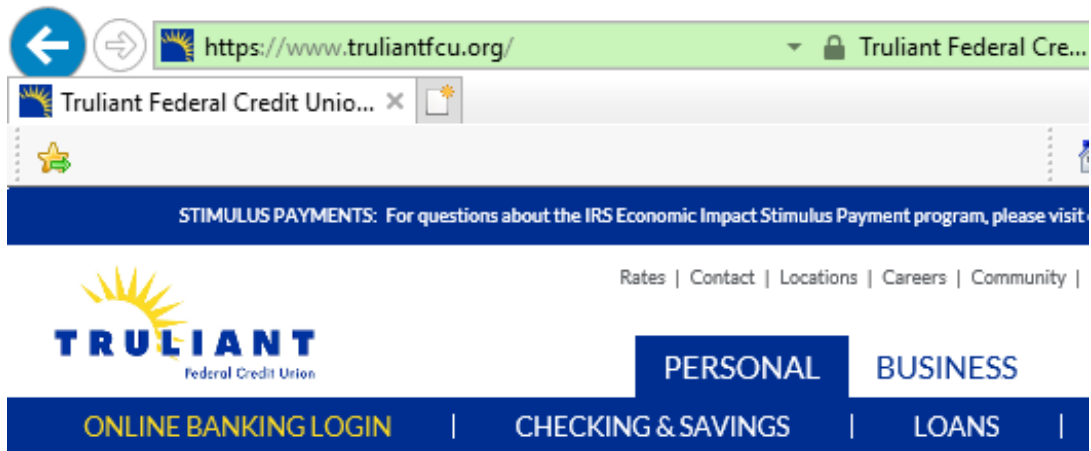


Flemming ¶¶ 28-29; Wilcox ¶ 11. This same branding appears on branches:





Flemming ¶ 30.¹² It also appears on Plaintiff’s website:



Flemming ¶ 32; Murray Dep. 112:2-3 (“every page”).

¹² Every branch has “Truiant Federal Credit Union” and the sunburst design on the building. Murray Dep. 111:15-20. On two branches, full branding is on the branch, but signage on the strip mall marquee has “Truiant.” *Id.* at 109:23-110:3.

B. Plaintiff's Advertising

For over a decade, Plaintiff's marketing has emphasized prominently that it is a credit union, and specifically *not* a bank. Murray Dep. 127:13-22 (“[S]ince 2009 ... it’s always had some place in all our advertising.”); Beeker Dep. 58:13-16 (“advertising communicating the differences between Truliant as a credit union and banks”); *id.* at 61:16-17 (Plaintiff’s promotional material “explaining differences between a credit union and bank”). “Federal Credit Union” is included in Plaintiff’s logo and appears in all marketing materials. *See* Murray Dep. 113:23-114:1 (“At some point there is a Truliant Federal Credit Union”).

Plaintiff’s website represents that “there are many ways Truliant differs from mainstream financial institutions,” and Truliant is “an alternative financial services provider.” Flemming, Ex. 23. A Truliant blog states that “Truliant is not a bank,” is “unlike a community bank or mega-bank,” and is not “bank-like.” *Id.* Ex. 24. Todd Hall, Plaintiff’s President/CEO, wrote that “[b]anks and credit unions are two very different animals.” *Id.* Ex. 25; *see* Flemming, Ex. 19 (“[T]he two types of financial institutions could not be more different.”). Plaintiff’s social media and ads reinforce that theme:





Flemming ¶¶ 21, 34-35 (other ads); *see* Fleming, Ex. 18, DX42 (“Unlike banks, we have no plans to merge”).

As Plaintiff’s marketing communicates, it differs from banks in important respects. Credit unions have membership criteria and “members.” Wilson ¶ 94; Wilcox ¶ 6. Credit unions interact differently with their customers. Fleming Ex. 18, DX60, at 3 (describing employees “engaging with people”); *id.* Ex. 19, at 16 (“personalized and less formal”). Over 90% of Plaintiff’s members understand and appreciate the difference between banks and credit unions. *See* Beeker Dep. 84:14-19 (DX55); *see also* Wilcox Ex. 1, ¶¶ 88-95.

C. Plaintiff Services a Broad Geographic Area

Although Plaintiff’s pleadings describe a modest “footprint” in counties in North and South Carolina and Virginia, Plaintiff has customers in *all 50 states*. Murray Dep. 10:17-20; *see also id.* at 38:1-2 (“We’ve been in business since 1952 with 250,000 members that could have lived anywhere over the years.”). With 700 employees, Plaintiff is “one of the larger credit unions in the country.” Murray Dep. 13:10-12, 131:2-3.

Plaintiff’s members in all 50 states get “emails and mailings ... if they do not opt out.” Murray Dep. 30:6-11, 33:3-4 (members “receive our advertising directly”); Beeker Dep. 23:17-25:3 (emails and direct mail); *id.* at 46:17-44:3 (“all states”). Plaintiff’s business partners can get the same material for their employees. *See* Murray Dep. 33:5-7.

By stating that “none of the banks or credit unions [using TRU-] ... has a branch in the various counties encompassing Truliant’s geographical field of membership,” Brief at 11, Plaintiff ignores that it has members nationwide, and that:

- Through the CO-OP Shared Branch Network (“CO-OP”), members can use “more than 6,000 locations coast to coast”¹³ “with access to thousands of surcharge-free ATMs worldwide.” Weeks ¶ 10(b). Plaintiff participates to “provid[e] access” (Murray Dep. 54:6-19) and “convenience” (*id.* at 55:1-9), as well as “member retention through nationwide reach” (*id.* at 55:10-18) and “incremental revenue from guest visits” (from credit unions whose members use Truliant). *Id.* at 55:20-56:12; *id.* at 71:6-10 (“We are very convenient for our members, it appears. So if you’re in Los Angeles and you want to do a transaction on the Truliant account, they certainly have options.”); Flemming, Ex. 18, DX27 (2019 transactions at non-Truliant branches: \$53 million in deposits and \$21 million of withdrawals);
- Plaintiff’s website offers home loans in seven states, including Florida, Tennessee, Ohio, and Georgia. Weeks ¶ 10(e);
- Plaintiff’s membership extends to employees of over 1,200 “Business Partners” with locations from California to New York, and Florida to Michigan. *Id.* ¶ 10(d)(iii); *see* Flemming, Ex. 18, DX17. Plaintiff’s charter covers employees who “work in” 13 states outside of the footprint. *Id.*, DX18. Employees also are covered

¹³ Flemming, Ex. 18, DX22. Under NCUA rules, Plaintiff’s ownership interest in the CO-OP means that these other branches are considered a *Truliant* “service facility.” Murray Dep. 49:18-50:11 & DX21.

if “supervised from” or “paid from” certain locations. Thus, an employer’s employees “paid from” Richmond cover dozens of states. *See* Murray Dep. 21:6-25 (Vistar in 20 states), 22:24-23:7 (Roma in over 10 states);

- Plaintiff’s members nationwide can use Truliant Insurance Services and Truliant Financial Advisors. *See* Murray Dep. 79:3-15 (insurance “available outside of the Truliant footprint as well as inside”); *id.* at 85:4-8 (planning “available to all members regardless of where they live”). Third-party insurers use the TRULIANT mark to solicit its members nationally. *Id.* at 99:15-21; Fleming, Ex. 18, DX33;
- Indicative of Plaintiff’s nationwide scope, a 2019 Harland Clarke program to test members’ response to Plaintiff’s promotion resulted in home equity line changes in 12 states, and preferred line of credit changes in 36 states. *Id.*, DX31; and
- 49,187 members, or almost 20%, are outside of Plaintiff’s footprint. Weeks ¶ 13.

In markets where Truliant members live, work, go to school, or travel, consumers are inundated with TRU- branding for banks and credit unions, including:

TruEnergy Federal Credit Union	TruBank
TruChoice Federal Credit Union	Trustar Bank
TruService Community FCU	Trustone Financial FCU
TruGrocer Federal Credit Union	True North Federal Credit Union
TruNorth Federal Credit Union	Trustco Bank
TrueCore Federal Credit Union	Trust Bank
TruMark Financial Credit Union	The Trust Bank
Trust Federal Credit Union	Trustmark National Bank
TruPartner Credit Union	Truxton Trust
TruWest Credit Union	TruPoint Bank
Truity Credit Union	TruStar Federal Credit Union
TruSky Credit Union	TrustTexas Bank

Weeks ¶¶ 23-48. Additionally, national and regional TRU- branded entities offer financial services in Plaintiff’s area, including:

Truly Simple	Tru Services
Truebridge Capital Partners	TrueBook
TruNorth Advisors	True North Title
Trust Company of North Carolina	Truealty
TrustTree Financial	TruGrit Partners
True Fiduciary	True Touch Consulting
TrustBuilers	True Cost to Own
TruCash	True Market Value
TruTap	True Help
TrueLink	TrueConnect
True Blue	TrueCredit
True Name	Truluma
Truly Priceless	Trupo
True Line of Credit	Trustmark
TruView	Trustmark
Trustly	TrustToken
Trustcore	TrustWay Insurance
True Capital Management	TrueAccord
True Financial	TruAssure
Tru-Svc	Truebill
TruVestments	TruFinancials
TruInsure	Trupanion
TruStage	Trupoint Tax Service
TruOptions	TruPath Credit
Trusted Choice	

Id. ¶¶ 50-51. In fact, Plaintiff is familiar with TruStage, which offers a wide range of insurance products to members of credit unions *nationally*. *Id.* ¶ 51(w). A location search on TruStage’s website includes Plaintiff’s branches in the results. *Id.* It is plain why Plaintiff represented to the USPTO that TRU- is “diluted” and “not likely to be perceived by purchasers as distinguishing source.”

ARGUMENT

The “extraordinary and drastic remedy” of a preliminary injunction is inappropriate because Plaintiff cannot meet its burden of a “clear showing” on all four elements: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent an injunction; (3) the balance of the equities favors an injunction; and (4) an injunction is in the public interest. *N.C. State Conference, of the NAACP v. McCrory*, 156 F. Supp. 3d 683, 697 (M.D.N.C. 2016) (Schroeder, J.) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). “It is also not enough that [Plaintiff] show[s] a grave or serious question for litigation; [it] must make a ‘clear’ demonstration [it] will ‘likely’ succeed on the merits.” *McCrory*, 156 F. Supp. 3d at 697. “It is not enough for a plaintiff to satisfy some factors but not others; ‘each preliminary injunction factor [must] be satisfied as articulated.’” *Johnson v. Jessup*, 381 F. Supp. 3d 619, 638 (M.D.N.C. 2019) (Schroeder, J.) (quoting *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013)). Because Plaintiff fails to “clearly show” any of these elements, let alone all four, its motion should be denied.

I. Plaintiff Is Unlikely to Succeed on the Merits

Plaintiff’s motion rests solely on claimed rights in the TRULIANT *word* mark, admitting it “has not brought suit for infringement of its logo.” Brief at 14. That strategic decision is a telling, tacit admission that the words together with logos, which clearly are very different, are not confusingly similar. Plaintiff’s fatal problem, however, is that the law clearly requires marks be viewed as they appear in the marketplace. This includes the logos, colors, and other branding associated with the marks, as well as in the context in

which they actually are used. Indeed, *Plaintiff does not even argue that TRULIANT and TRUIST with full branding are likely to be confused.*

To succeed on the merits, Plaintiff must prove a “likelihood of confusion” exists between the parties’ respective marks. *See, e.g., Petro Stopping Ctrs., L.P. v. James River Petroleum, Inc.*, 130 F.3d 88, 90-91 (4th Cir. 1997) (Petro Stopping Center and Petro Travel Plaza unlikely to be confused with Petro Card). This inquiry includes the following 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.

Swatch AG v. Beehive Wholesale, LLC, 739 F.3d 150, 158 (4th Cir. 2014). As the Fourth Circuit has emphasized, this examination does not take place in isolation. A likelihood of confusion exists only “if ‘the defendant’s *actual practice* is likely to produce confusion in the minds of consumers’” *CareFirst*, 434 F.3d at 267 (emphasis added); *see also Radianc Found., Inc. v. NAACP*, 786 F.3d 316, 323 (4th Cir. 2015). When considered in marketplace context, these factors preclude a finding that Plaintiff is likely to succeed.

A. Plaintiff’s TRULIANT Mark Is Weak

“The strength of a mark is the degree to which a consumer in the relevant population, upon encountering the mark, would associate the mark with a unique source. The ‘strength’ of the trademark is evaluated in terms of its conceptual strength and commercial strength.” *CareFirst*, 434 F.3d at 269. Plaintiff’s mark is both conceptually and commercially weak.

1. Marks Beginning With TRU Are Conceptually Weak

Only days before the Complaint, Plaintiff represented to the USPTO that the prefix TRU is “not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.” Flemming, Ex. 1, at 5. The Fourth Circuit confronted this same situation in *Petro*, where the plaintiff argued to the USPTO that “because of the wide use and registration of PETRO as part of [third-party] trademarks, ‘the term ‘Petro’ is ... extremely dilute[d] and entitled to a weak scope of protection.’” 130 F.3d at 94. Like here, plaintiff reversed course in litigation and argued “precisely the opposite proposition,” but the Court held the plaintiff to its “own words.” *Id.*; see also *Freedom Card., Inc. v. JP Morgan Chase & Co.*, 432 F.3d 463, 476 (3d Cir. 2005) (it matters not whether Plaintiff’s prior position is viewed “as judicial estoppel, an admission, waiver, or simply hoisting [Plaintiff] by its own petard....”); *Atl. Nat’l Bank v. Atl. S. Bank*, No. CV208-147, 2010 WL 5067416, at *5 (S.D. Ga. July 29, 2010) (“[N]o bank has the exclusive right to use the term.... [Plaintiff] admitted as much in its statements to the [USPTO].”).

Despite its admission, Plaintiff now argues that TRULIANT is “coined,” and therefore “conceptually” strong. Brief at 10. Whether combining two common words, TRUE and RELIANT,¹⁴ is fanciful, suggestive, or otherwise is debatable,

but this designation does not resolve the mark’s conceptual strength.... [T]he frequency of prior use of [text] in other marks, particularly in the same field of merchandise or service, illustrates the marks’ lack of conceptual strength.... [A] weak trademark is one that is often used by other parties.

¹⁴ A Truliant press release says that TRULIANT is based on “true” and “reliant.” Beeker Dep. 102:19-103:4.

CareFirst, 434 F.3d at 270 (“If the CareFirst mark were truly a distinctive term, it is unlikely that so many other businesses in the health care industry would independently think of using the same mark or variations of it.”).

In addition to third-party *use*, extensive third-party TRU- *registrations* demonstrate weakness as a matter of law. As the Fourth Circuit noted,

The frequency with which a term is used in other trademark registrations is indeed relevant to the distinctiveness inquiry under the first likelihood of confusion factor. This is especially true when the number of third-party registrations is great. For example, in *Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 259-60 (5th Cir. 1980), the court found it impossible to dismiss evidence of seventy-two third-party registrations [of “domino”].... Specifically, third-party registrations are relevant to prove that some segment ... has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.

Petro, 130 F.3d at 93-94.¹⁵ Over 7,460 “TRU-” marks are federally registered, including hundreds for financial services. This is powerful evidence that TRU is conceptually weak. *See, e.g., Valador, Inc. v. HTC Corp.*, 241 F. Supp. 3d 650, 662 (E.D. Va.) (“[C]onceptual strength ... decreases as the number of third-party registrations increases.”), *aff’d*, 707 F. App’x 138 (4th Cir. 2017); *see also Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc.*, 227 F. App’x 239, 243 (4th Cir. 2007) (“[E]vidence of third-party use of mark

¹⁵ Plaintiff is not the only entity to use, or own a registration, for TRULIANT. Exactech owns a registration for TRULIANT for orthopedic and surgical implants, which are promoted and used across the country, including in Plaintiff’s footprint. *See Weeks* ¶¶ 56-58. TRULIANT HEALTH SYSTEMS is a regional behavioral health provider in South Carolina and Georgia. *Id.* ¶ 59.

in unrelated markets—although not as persuasive as use within the same product class—indicates a mark’s lack of conceptual strength.”).

2. TRULIANT, By Itself, Does Not Have Commercial Strength

TRULIANT is just one mark in a crowded field, and “evidence of extensive third-party use also demonstrates that [TRU-] lacks commercial strength.” *CareFirst*, 434 F.3d at 270; *accord Petro*, 130 F.3d at 93 (“Petro” weak because 117 third-party federal registrations, including 63 in the same field); *EndoSurg Med., Inc. v. EndoMaster Med., Inc.*, 71 F. Supp. 3d 525, 549-50 (D. Md. 2014) (ENDOSURG “weak” because ENDO prefix “used by many other business[es]”); *see also* 4 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 23:48 (“*McCarthy*”) (5th ed. 2019) (“If the common element of conflicting marks is a word that is ‘weak’ then this reduces the likelihood of confusion. A portion of a mark may be ‘weak’ in the sense that such portion ... *is in common use by many other sellers in the market.*” (emphasis added)).

Plaintiff argues that TRULIANT is commercially strong, but no marketing materials use *only TRULIANT alone*.¹⁶ Plaintiff uses other brand indicia with TRULIANT, including “Federal Credit Union,” its sunburst logo, or other distinctive material, such as the colors and tagline. Murray Dep. 111:15-20, 112:7-11, 113:23-114:1 (“At some point there is a Truliant Federal Credit Union”). Indeed, Plaintiff’s brand guidelines specify a “lock up” so that TRULIANT typically appears coupled with FEDERAL CREDIT UNION and the

¹⁶ In response to an interrogatory seeking the amount spent on “materials bearing only the TRULIANT Word Mark,” Plaintiff responded that it does not “track” that information. *See* Flemming, Ex. 21, at 1.

sunburst. Flemming, Ex. 18, DX42. Because Plaintiff has not used TRULIANT *standing alone* for any “length” of time, and because its use of TRU- is anything but “exclusive,” the mark is weak. *See CareFirst*, 434 F.3d at 270 (“Most of this evidence, however, does not involve [the word mark] standing alone.”); *Arrow Distilleries, Inc. v. Globe Brewing Co.*, 117 F.2d 347, 351 (4th Cir. 1941) (finding no infringement as a matter of law based in part on weakness as documented by third-party use). Plaintiff’s own research shows low awareness levels of the TRULIANT name, even in the Triad market. Beeker Dep. 69:24-71:25 (top-of-mind less than 5%) & DX53 (18.76% unaided awareness among members, and 15.01% for non-members).

Plaintiff’s argument that TRULIANT is strong because “none of the banks or credit unions [using TRU- names] ... has a branch in the various counties encompassing Truliant’s geographical field of membership,” Brief at 11,¹⁷ is off the mark both legally and factually. As a legal matter, third-party uses, even in different geographic regions, are relevant. *See Amstar*, 615 F.2d at 259 (“We do not believe that such extensive third-party use and registration of ‘Domino’ can be so readily dismissed” as “remote as to goods or geography; small, obscure and localized; or used only in shipments to the trade.”); *see also CareFirst*, 434 F.3d at 270 (although *CareFirst* in mid-Atlantic states, court relies on “extensive third-party use ... in many parts of the country” to find the mark “lacks commercial strength”); *Coryn Grp. II, LLC v. O.C. Seacrets, Inc.*, No. CIV. WDQ-08-2764, 2011 WL 862729, at

¹⁷ Ms. Beeker’s affidavit lists the third-party banks and credit unions as having “branches” outside of Truliant’s footprint, but she does “not have a way of knowing” where those third parties have customers or members. Beeker Dep. 115:6-8.

*11 (D. Md. Mar. 10, 2011) (whether use is “geographically remote” goes “to the weight of the third-party use evidence, not its relevance”).

Factually, Plaintiff admits the relevance of all third-party use because 20% of members are outside its area, and it considers “banks and credit unions outside of Truliant’s footprint” to be “competitors for Truliant members ... located outside of the Truliant footprint.” Murray Dep. 131:15-132:2. Plaintiff’s marketing firm, in an analysis for Plaintiff, defined “financial services” to include credit unions and investment firms outside the footprint. Flemming, Ex. 18, DX44. Plaintiff is aware of (but has not taken action against) TruPoint in Asheville, which until recently had a loan production office in Winston-Salem. *Id.* at 104:6-105:4 (DX58). Plaintiff has over 500 customers in the counties where TruPoint has branches. Weeks ¶ 29(d). Plaintiff ignores countless national companies providing financial services in Plaintiff’s footprint. Weeks ¶¶ 49-50. In fact, when Truliant mistakenly was contacted by someone seeking information about Trulia, Plaintiff took no action demonstrating concern about other “TRU” marks. Beeker Dep. 105:19-106:24 & DX59. Moreover, unlike a local car dealership,¹⁸ Plaintiff’s geographical reach is hardly limited to its own branches; it has customers in all 50 states, nationwide “shared branches” and ATMs, and other activities in a broader geography. And, of course, members of geographically remote credit unions do use Plaintiff’s services.

¹⁸ Plaintiff argues that third-party use in “a different location ... is not relevant.” Brief at 11 (citing *Select Auto Imps. Inc. v. Yates Select Auto Sales, LLC*, 195 F. Supp. 3d 818, 833-34 (E.D. Va. 2016)). In that case, the car dealer’s single location was limited to only DC area customers; Plaintiff operates in a broader area (with members nationally)—its members use branches and ATMs elsewhere, and people from elsewhere use Plaintiff’s facilities.

B. TRULIANT and TRUIST Are Dissimilar In Actual, Marketplace Use

Plaintiff’s argument that TRULIANT and TRUIST should be assessed in isolation—without other branding or context—runs afoul of Fourth Circuit law. “To determine whether two marks are similar, [the court] must examine the allegedly infringing use in the context in which it is seen by the ordinary consumer.” *CareFirst*, 434 F.3d at 271 (although “bare text of the two is similar, ... the likelihood-of-confusion analysis looks to actual use” so “a comparison of the texts of the two marks alone is insufficient if the marks have different appearances in the marketplace”). As the Fourth Circuit held:

The statutory standard for infringement does not depend on how closely a fragment of a given use duplicates the trademark, but on *whether the use in its entirety creates a likelihood of confusion*. In making that determination, we must examine the allegedly infringing use *in the context in which it is seen by the ordinary consumer*.

Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316, 319 (4th Cir. 1992) (emphasis added); *accord Swatch*, 739 F.3d at 160 (“The appearance of the mark in commerce is the relevant inquiry....”); *George & Co., LLC v. Imagination Entm’t Ltd.*, 575 F.3d 383, 393 (4th Cir. 2009) (issue is whether “actual practice is likely to produce confusion”).¹⁹

Viewed in commercial context, either as “BB&T [or SunTrust], Now Truist” and/or with the TRUIST logo, the parties’ marks are dissimilar.

¹⁹ The Fourth Circuit has rejected the proposition “that courts in this Circuit must apply a lower threshold for similarity of marks when the parties’ products are more similar.” *Swatch*, 739 F.3d at 160.



See Wilson ¶ 92. The differences are stark: they look and sound different, and have very different connotations. See *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 318-19 (4th Cir. 2017) (color, font, additional words, and symbols make marks “highly distinguishable”). Plaintiff’s TRULIANT mark has with a sunburst logo and blue-and-yellow color scheme; it is formed from “true” and “reliant” to convey reliability, and pronounced tru-LIE-ant. In contrast, TRUIST is purple and has a distinctive double T logo; it is derived from “altruistic” to convey a message of trust, and pronounced tru-IST. Wilson ¶¶ 91-2 (look, sound, and connotation differences); Wilcox ¶ 10-13 & Ex. 1, ¶¶ 32-52.

The differences become more stark in the actual marketplace with “different brand imagery and messaging.” *Id.* ¶ 9 & Ex. 1 ¶¶ 19-20, 53-77. Plaintiff’s branches, website, app, and other advertising materials do not use “TRULIANT” alone; they always have colors that Plaintiff claims are “a unique brand identifier” (Beeker Dep. 34:2335:1), and either “Federal Credit Union” or the sunburst design. In fact, Plaintiff is “required in some way to always say ‘federal credit union.’” Murray Dep. 115:1-4; *see also id.* 113:23-114:1 (“At some point there is a Truliant Federal Credit Union”); *id.* at 114:12-19 (“there’s always going to be that part”). Plaintiff uses a “Life Improved” tagline, which is “intrinsically associated with the Truliant brand.” Beeker Dep. 33:3-11. The Truliant logo

has awareness even among non-members, and “effectively communicat[es]” Truliant’s brand. *Id.* at 64:16-21, 77:10-19.

In contrast, TRUIST commonly is used with well-known BB&T and/or SunTrust branding and/or the TRUIST logo and colors. Wilson ¶ 31 (“Visual branding elements ... make a name more memorable...”); *id.* at ¶ 92 (describing branded materials).²⁰ As the Fourth Circuit observed, “[i]f one of two similar marks is commonly paired with other material, that pairing will serve to lessen any confusion that might otherwise be caused by the textual similarity between the two marks.” *CareFirst*, 434 F.3d at 271; *accord Swatch*, 739 F.3d at 160 (“[A]ccompaniments to marks and the manner in which they are presented ... can significantly reduce the likelihood of confusion between two similar marks.”); *Valador*, 241 F. Supp. 3d at 664 (“Notably, plaintiff relies exclusively on a comparison of the *texts* of the two marks, but plaintiff does not—and cannot—contest that the marks have different appearances in the marketplace.”). Moreover, consumers in a crowded marketplace “are more likely to focus on the differences between the two.” *CareFirst*, 434 F.3d at 271. In the crowded field of TRU- marks, the differences between the marks and branding are clear to consumers. Wilson ¶ 93 (“common term”); Wilcox ¶ 16 & Ex. 1, ¶¶ 81-87; 2 *McCarthy* § 11:85 (“In such a crowd, customers will ... have learned to carefully pick out one from the other.”).

²⁰ See Murray Dep. 138:7-19 (only items without these were a Guilford Merchant Association sponsorship and YouTube screens before video starts).

Plaintiff contends, without support, that “TRU” is the dominant portion of the parties’ respective marks and should be accorded more weight in the analysis. Brief at 12. But the Fourth Circuit in *Swatch* rejected the argument that three letters in one word, like “SWA-,” should be weighed more heavily, holding that “the phrase ‘dominant portion’ ... refer[s] to the non-generic *words* in multiword marks” and SWATCH therefore has no “dominant” portion. 739 F.3d at 159 (emphasis added) (“We compare whole words, not parts.”); *see also* Wilcox Ex. 1, ¶19.

Moreover, everyone—*Plaintiff included*—agrees that TRU is “diluted,” which makes it a poor candidate to be “dominant.” *See* Wilcox ¶ 16. Courts in this Circuit actually afford *less* weight to commonly-used elements. For example, in *EndoSurg*, the parties’ marks shared the prefix ENDO, but had different suffixes (SURG and CURE vs. MASTER), as well as “dissimilar” logos. 71 F. Supp. 3d at 550. The court found the similarity factor to “weigh[] heavily against Plaintiffs” because without the shared ENDO prefix—a term the plaintiffs could not “appropriate ... for their exclusive use”—the marks were just “not similar enough.” *Id.* Similarly, in *Petro*, the Fourth Circuit held that the parties’ marks—PETRO STOPPING CENTER and PETRO TRAVEL PLAZA versus PETRO CARD—“present entirely different appearances” and “marked differences” based on color schemes and content other than the weak term “Petro.” 130 F.3d at 94.

Tellingly, the USPTO examiner reviewing pending TRUIST applications, *without considering any additional context*, did not cite Plaintiff’s TRULIANT mark as presenting a likelihood of confusion. As the Fourth Circuit has found, such USPTO approval is

significant. *See OBX-Stock, Inc. v. Bicast, Inc.*, 558 F.3d 334, 342 (4th Cir. 2009) (“[Q]uick progress through the PTO weighs in favor of validity. This reasoning also applies to the progress of a trademark application for inclusion on the Principal Register.”).

C. The Parties’ Services Differ in the Marketplace

Plaintiff argues this factor favors it because the parties offer similar services (*i.e.*, loans, credit cards, and checking and savings accounts). Brief at 15. By focusing only on that high-level similarity, Plaintiff ignores the Fourth Circuit’s admonition that, as with the similarity of marks, “we measure the similarity of services with respect to each party’s actual performance in the marketplace.” *CareFirst*, 434 F.3d at 272.

The parties position their services to the public quite differently. In Plaintiff’s words, “*From the outside, credit unions and banks seem similar ... [, but] under the surface, the two types of financial institutions couldn’t be more different.*” Flemming, Ex. 19, at 2 (emphasis added). Plaintiff requires membership, actively markets itself as different from “banks,” and has built its reputation by distinguishing its credit union from larger banks. Wilcox ¶ 15 & Ex. 1, ¶¶ 20, 63-71. In fact, all but 9% Plaintiff’s members surveyed differentiated between Plaintiff and banks. Beeker Dep. 84:14-19; see Flemming, Ex. 18, DX55.

In contrast, TRUIST links its identity to its well-known legacy banks, BB&T and SunTrust. In words and descriptions, TRUIST holds itself out as a bank.



In research commissioned by Plaintiff, no consumer asked to name a “credit union” named BB&T or SunTrust. Fleming, Ex. 18, DX 53, at 102.

Plaintiff cannot have it both ways. “Each party’s actual performance in the marketplace” overlaps some, but the services are different. Dr. Wilcox, a distinguished University of Virginia professor, notes that “[c]onsumers generally perceive credit unions ... as institutions that are different from banks.” Wilcox ¶ 6; *see* Beeker Dep. 66:15-20, 67:10-24 (75-80% of non-Truliant members never have been credit union members).

D. The Parties’ “Facilities” Are Different

Plaintiff mistakenly argues that this factor favors it because “both companies offer their services through branches and mobile banking platforms.” Brief at 16. By focusing exclusively on *categories* of facilities, Plaintiff ignores what those facilities actually look like and their impact on consumers. *See Petro*, 130 F.3d at 95 (“Besides the sale of fuel, the two parties’ services and facilities differ in virtually every respect.”). Consumers visiting “facilities,” like those below, and encountering extensive and distinctive branding, are highly unlikely to confuse the two. *See* Wilcox Ex. 1, ¶¶ 39, 49.



Plaintiff’s generalities do not comport with commercial reality. Only Plaintiff’s members (and members of other credit unions) use Plaintiff’s non-profit services, which lessens possible confusion. Visitors to Plaintiff’s branches are greeted personally. Plaintiff’s advertising drills these differences home. Truist customers cannot withdraw money from their accounts at Plaintiff’s branches. Consumers encountering TRUIST banking services will understand those services originate from a bank, not a credit union. *Id.* ¶¶ 19-21, 88-113. The marketplace context is nothing like a retail store where a consumer mistakenly could purchase the wrong drink or gum. *Id.* at ¶¶ 102-105.

While both parties offer financial services “through branches and mobile platforms” (Brief at 3), they are not the same branches or mobile platforms, and are easily distinguished. Put differently, the parties’ services are not in marketplace proximity. They are not offered side-by-side on a shelf, in the same mobile app, on the same website, or in the same physical locations. This lack of marketplace proximity lessens likely confusion. *See Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 263 (4th Cir. 2007) (confusion unlikely because plaintiff’s “products are sold exclusively through its own stores or its own boutiques within department stores”); *Swatch*, 739 F.3d at 161

(confusion unlikely where “both parties’ internet sales were limited to their own brand websites”).

Consumers also might conduct some business by phone, but callers to Plaintiff’s customer service number are greeted with Plaintiff’s full word mark: “Welcome to TRULIANT FEDERAL CREDIT UNION.” Callers to Truist’s customer service number hear: “Thank you for calling BB&T, now Truist.” Flemming ¶¶ 37-38. Moreover, the Fourth Circuit specifically has rejected the position that these isolated uses carry weight: “This argument [regarding press accounts or word-of-mouth use] is unpersuasive.... In considering the appearance of a mark for purposes of the likelihood-of-confusion analysis, we must weigh more heavily the predominant manner in which the contemporary public perceives the mark.” *CareFirst*, 434 F.3d at 271 n.4.

E. Plaintiff Ignores the Content of Its Advertising

Plaintiff argues both companies advertise through digital, print, outdoor, radio and television ads, and sponsorships. Brief at 2, 17. Putting aside that being true for virtually every significant enterprise, Plaintiff’s argument—focusing on the same advertising *categories*, but ignoring the advertising itself, and how consumers perceive it—misapprehends the likelihood-of-confusion analysis. Content matters because consumers read or hear it. As the Fourth Circuit stated, “In comparing advertising, we look at *a variety of factors*: the media used, the geographic areas in which advertising occurs, the *appearance of the advertisements*, and *the content of the advertisements*.” *CareFirst*, 434 F.3d at 273 (emphasis added); *accord Valador*, 241 F. Supp. 3d at 667 (“Despite this clear

guidance, plaintiff argues that the parties use similar advertising because they all use the internet.... But in making this argument, plaintiff bucks circuit precedent instructing courts to consider the appearance and content of the parties' advertisements.”).

Even a cursory inspection of the parties' advertising strategies and materials reveals significant differences.



Flemming ¶ 36; Wilson ¶ 64; *see also* Wilcox Ex. 1, ¶¶ 19-20, 53-77. As reflected above, Plaintiff advertises that Truliant is “unlike banks.” In contrast, Truist makes clear it *is* a bank. Truist’s rollout emphasized the merger of BB&T and SunTrust, two extremely well-known banks. These “different visual styles and ... messaging ... communicat[e] two distinct brand identities to consumers,” obviating likely confusion. Wilcox Ex. 1, ¶77.

Similarly unavailing, Plaintiff contends that both parties use “sponsorships,” a common promotional tool. Truist’s most important sponsorships have been the Miami

Super Bowl Host Committee and the Atlanta Braves stadium. These endeavors—making full use of TRUIST branding—are very different than any sponsorships Plaintiff can cite. *Valador*, 241 F. Supp. 3d at 667 (“[T]he parties have not engaged in similar modes of advertising” in part because they “spend vastly different sums on their advertisements.”).

F. The TRUIST Mark was Selected in Good Faith, Leveraging BB&T and SunTrust, Not Plaintiff’s Mark

Plaintiff concedes an absence of evidence of bad faith intent. Brief at 17. In fact, Truist selected and adopted TRUIST in *good* faith. Far from trading off Plaintiff’s mark, Truist selected a unique mark reflecting the legacy banks’ values. Wilson ¶ 10.

Without knowing of TRULIANT, Interbrand conceived of and proposed TRUIST; it was derived from “altruistic” and evoked “true,” and it reflected the guiding brand principle: “touch + tech = trust.” *Hardardottir* ¶ 6. Interbrand put the name through rigorous, empirical testing. *Id.* ¶¶ 7-10. Once TRUIST was identified, commercial trademark searches were ordered; the results did *not* include TRULIANT. Plaintiff’s CEO *concedes* that Truist developed a distinctive visual identity. *Flemming*, Ex. 18, DX60. To assist with transferring goodwill to TRUIST, Truist routinely refers to the legacy banks in public communications. Wilson ¶¶ 21, 92. It strains credulity that Truist would spend millions with the world’s leading brand agency to develop a new, unique name tied to its legacy organizations if it wanted to trade on Plaintiff’s goodwill.

Plaintiff argues that Truist’s “actual knowledge” of the existence of Truliant Federal Credit Union “supports a finding of intent to infringe.” Brief at 17. But the Fourth Circuit has expressly rejected that view of the law. *See, e.g., George*, 575 F.3d at 398

("[K]nowledge of another's goods is not the same as an intent to mislead and to cause consumer confusion."). Instead, the relevant question is whether defendant "intended to capitalize on the good will associated with the senior user's mark." *CareFirst*, 434 F.3d at 273. No such intent exists here.

Putting aside Truist's evidence of *good* faith, the absence of *bad* faith means this factor weighs in Truist's favor. *See, e.g., George*, 575 F.3d at 397-98 ("intent factor militate[s] against a finding of a likelihood of confusion" where the plaintiff "presented no meaningful evidence that [defendant] wished to capitalize on [plaintiff's] trademark"). As the Fourth Circuit declared, "[w]hen the [defendant's] intent is something other than piggybacking off a mark holder's success by tricking consumers into purchasing his goods instead, the other factors must be evaluated in light of that intent and purpose." *Radiance*, 786 F.3d at 324.

G. Financial Services Consumers Exercise a High Degree of Care

Consumer care has two elements: (i) whether relevant consumers are a limited group; and (ii) the degree of care relevant consumers exercise. *See Shakespeare Co. v. Silstar Corp. of Am., Inc.*, 110 F.3d 234, 242 (4th Cir. 1997) ("the sophistication of buyers" and "how they examined the [goods] and what inspection they did before buying" in finding that factor "strongly favored" a finding of no likelihood of confusion). Missing the mark, Plaintiff points to this factor as "neutral" because consumers are not "highly trained professionals or experts." Brief at 19-20. In fact, this factor strongly favors Truist because consumers exercise "a high degree of care in choosing banking services," and are "more

likely to notice what, in other contexts, may be relatively minor differences in [the] name[s].” *Freedom Card*, 432 F.3d at 477; *see* *Wilson* ¶¶ 95-97; *Wilcox* ¶ 16 & Ex. 1, ¶¶ 19, 81-87; *see also Perini Corp. v. Pirini Constr., Inc.*, 915 F.2d 121, 127 (4th Cir. 1990) (“Although no one factor is dispositive of the ‘likelihood of confusion’ inquiry, the sophistication and expertise of the usual purchasers can preclude any likelihood of confusion”).

Courts repeatedly have held that “[c]onsumers *undoubtedly* exercise a high degree of care in selecting banking and financial services and are likely to note differences in names.” *interState Net Bank v. NetB@nk, Inc.*, 348 F. Supp. 2d 340, 355 (D.N.J. 2004) (emphasis added). For instance, in *Flagstar Bank, FSB v. Freestar Bank, N.A.*, 687 F. Supp. 2d 811, 831 (C.D. Ill. 2009), the court explained:

The products and services offered by banks are widely accessible; however, banking customers engage in a profoundly different process than consumers of other widely accessible products such as cans of cooking spray in the grocery aisle or oil change services. Potential Flagstar customers must submit to credit checks before they are able to open a new bank account and must submit to intrusive questioning about personal finances as a part of the home loan process. Freestar Bank requires prospective customers to speak with a bank loan officer before obtaining a home loan. The services offered by the parties’ banks subject prospective customers to invasive and prolonged inquiries before the services are rendered. Customers do not carelessly sign themselves up for such investigative procedures, indicating that *banking customers exercise an elevated degree of care.*

(emphasis added). Other courts have been equally direct in terms applicable here:

Plaintiff’s argument underestimates the level of care and sophistication that customers use when choosing a bank. Opening a bank account or choosing a mortgagee is not an “impulse purchase.” To the contrary, customers ordinarily gather information before choosing a bank and make their decision based on substantive factors (other than a bank’s name). Because prospective

bank clients exercise a relatively high degree of care, they are more likely to recognize the difference between the banks.

Peoples Fed. Sav. Bank v. People's United Bank, 750 F. Supp. 2d 217, 225-26 (D. Mass. 2010) *aff'd*, 672 F.3d 1 (1st Cir. 2012); *accord Commerce Bancorp, Inc. v. BankAtlantic*, 285 F. Supp. 2d 475, 494 (D.N.J. 2003) (“[P]eople are especially selective in choosing their banking and financial services, and thus take great care in choosing such services...”); *Comerica Inc. v. Fifth Third Bankcorp*, 282 F. Supp. 2d 557, 571 (E.D. Mich. 2003) (“[C]ustomers exercise a high degree of care in choosing banking services....”).

Obtaining a mortgage or opening a checking account is not like buying a candy bar. A substantial difference exists between a “one shot purchase ... and initiating a continuing financial relationship.” *Citigroup Inc. v. City Holding Co.*, 171 F. Supp. 2d 333, 349 (S.D.N.Y. 2001). Consumers are savvy about financial decisions; they “exercise considerable care and pay close attention.” *Wilcox* ¶¶ 4-5 & Ex. 1 ¶ 21; *Wilson* ¶¶ 96-97; *see also Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 797 F. Supp. 891, 896 (D. Kan. 1992) (UNIVERSAL credit card not confusingly similar to UNIVERSAL MONEY CARD ATM card because “consumers do, in fact, exercise a high degree of care in choosing a credit card or ATM card”), *aff'd*, 22 F.3d 1527 (10th Cir. 1994). Consumers research financial decisions more thoroughly than “impulse purchases.” *Wilcox* ¶ 5 & Ex. 1, ¶¶ 102-105. The entire process is “time intensive.” *Id.* ¶ 5. At Plaintiff, that includes (i) a personal greeting; (ii) discussion of the consumer’s needs; (iii) determining membership eligibility; (iv) the consumer producing identification and a Social Security number, and consenting to a credit report; and (v) a membership application, as well as paperwork for other

products. Murray Dep. 112:12-25, 123:8-11, 124:1-9; Johnson Dep. 14:17-114:23, 15:4-12 (30-45 minute process). Plaintiff's employees are trained to get to know members. Sawyer Dep. 7:15-20.

H. Plaintiff's Actual Confusion Evidence Is Unpersuasive and Inadmissible

Truist is not aware of any actual confusion. Wilson ¶ 90. Plaintiff points to "anecdotal evidence" of confusion and "survey evidence." Brief at 18. In fact, neither supports its motion. And appropriately-designed survey evidence confirms the absence of any confusion.

1. Anecdotal Evidence

"[A]nalysis of evidence of actual confusion is fact-specific. Evidence of only a small number of instances or instances narrow in scope may be dismissed as de minimis." *Worsham Sprinkler Co. v. Wes Worsham Fire Prot., LLC*, 419 F. Supp. 2d 861, 879 (E.D. Va. 2006). As Professor McCarthy explains (4 *McCarthy* § 23:14):

Evidence of the number of instances of actual confusion must be placed against the background of the number of opportunities for confusion before one can make an informed decision as to the weight to be given the evidence. If there is a very large volume of contacts or transactions which could give rise to confusion and there is only a handful of instances of actual confusion, the evidence of actual confusion may receive relatively little weight.

a. The Purported Actual Confusion is De Minimis as a Matter of Law

Attempting to create evidence, Plaintiff twice instructed front-line employees in its 32 branches to look for evidence of confusion, and to report any incidents to management. Murray Dep. 125:16-21; Beeker Dep. 97:7-15 (June 2019 conference call); *id.* at 97:5-6 (January 2020 email). From that, Plaintiff's Brief identifies only 5 instances of purported

confusion. In discovery, Plaintiff produced emails and recorded calls purporting to evidence 25 additional instances of confusion. On April 22, Plaintiff's 30(b)(6) witness testified that Plaintiff was not aware of any other instances. Beeker Dep. 100:6-9.²¹

On May 14, one day before filing of this brief, Plaintiff produced an email to "all staff" sent on April 29. Employees were told "[i]t is key that we continue to identify and record" purported confusion, and to report "[i]f you recall any past instances of confusion that you haven't already reported...." Flemming Ex. 22 (TRULIANT00202099). In response to that email asking *everybody* for *everything* from *anytime*, Plaintiff produced only 10 emails, including many unrelated to customers or business.

Even if every purported instance in the past 11 months is credited, it is insufficient to establish likely confusion. Plaintiff has 258,000 members; they conduct millions of transactions per year. Truist has over 10 million account holders and processes over one hundred million transactions each month. *See* Tisci ¶¶ 13-14. Plaintiff's 40 reports equate to less than 0.0155% of Truliant members. This small amount of confusion is irrelevant as a matter of law. *See Petro*, 130 F.3d at 95 (Because "it is a significant commercial actor ... meager evidence of actual confusion is at best de minimis"); *Renaissance*, 227 F. App'x at 245-46 (in light of "large volume of sales" and "unsuccessful efforts to uncover additional examples of actual confusion," cited instances were de minimis); *Giant Brands, Inc. v. Giant Eagle, Inc.*, 228 F. Supp. 2d. 646, 656-57 (D. Md. 2002) (25 instances of actual

²¹ Ms. Beeker testified to the existence of a purportedly deleted email, which has not subsequently been produced. Beeker Dep. 99:19-100:9.

confusion over 324,000 transactions is de minimis); *Worsham*, 419 F. Supp. 2d at 879 (“Seven isolated instances of actual confusion [over 3,000 bids] do not establish the existence of actual confusion....”); *see also CareFirst*, 34 F.3d at 268 (“a confusion rate of 2 percent” was “hardly a sufficient showing of actual confusion”).

After 11 months of employee monitoring, that only 6-7 *Truist* customers may have contacted Plaintiff by mistake²²—most before the TRUIST branding took root—shows that consumers are *unlikely* to be confused. Most incidents concerned *Truliant* members who knew they were in a Truliant branch, intended to be there, and intentionally were transacting business with Plaintiff. As the Fourth Circuit explained on similar facts, “the company’s failure to uncover more than a few instances of actual confusion creates a presumption against likelihood of confusion.” *Petro*, 130 F.3d at 95.

b. Plaintiff’s Evidence Does Not Prove Actual Confusion

Moreover, Plaintiff’s employee anecdotes are not relevant “actual confusion,” or are entitled to little weight, for at least four reasons:

First, actual confusion must relate to “the defendant’s *use* of” its mark, as opposed to other factors. *Petro*, 130 F.3d at 91 (“To prove trademark infringement, a plaintiff must show ... that *the defendant’s use* of [its mark] creates a likelihood of confusion.” (emphasis added)); *see also* 15 U.S.C. § 1114(a). No deponent could identify a single instance of

²² Fleming, Ex. 18, DX1-3; Dkt. 30-6.

confusion resulting from TRUIST advertising or promotional material.²³ Instead, the incidents resulted from other elements (not at issue in this case),²⁴ in non-banking situations,²⁵ or when people erred because of newspaper or television “news reports.” Brief at 4; *see also* Mitchell Dep. 15:19-22 (“I believe he heard it on the news is what he told me.”); Mespelt Dep. 10:18-11:6 (“He didn’t tell me ... the exact news story of where he heard the information but he did indicate that he heard it from the news.”); Sostaita Dep. 9:24-10:5 (I “did not think Truiliant was involved in the merger from seeing any actual Truist bank signage,” but “just what I [saw] on TV.”); Lookabill Dep. 16:1-17 (“thoughts were based on the news coverage”). In fact, Plaintiff’s anecdotes are clustered around two newsworthy events: the TRUIST name announcement (*i.e.*, June-August 2019) and the

²³ *See* Johnson Dep. 10:25-11:9, 11:15-18; Perkins Dep. 7:16-8:8; Brogan Dep. 10:15-23; Seats Dep. 11:20-12:14; Sawyer Dep. 11:7-12; Mespelt Dep. 13:9-14. Yesterday’s documents include *one email* reporting Plaintiff’s member referencing a “commercial on tv yesterday,” which makes it the *only* incident among the forty. *See* Flemming, Ex. 22, TRULIANT00212089.

²⁴ Sawyer Dep. 12:21-13:1 (“I was going to say the most confusion I found is that our branch is located in the same parking lot with SunTrust” and “people will come into Truiliant to cash SunTrust checks because they just see the logo of the sun and think that we’re the same bank.”); Flemming, Ex. 20, TRULIANT00005142 (receptionist asks about name based on “sunburst logo on your name tag”); *id.*, TRULIANT00005143 (non-member backed out because BB&T had lower rate); *id.*, Ex. 22 TRULIANT00221092 (member wrote “Now Truist” next to sunburst logo).

²⁵ Ms. DeSieno describes somebody at a health fair. Flemming, Ex. 20, TRULIANT00005134. Mr. Sostaita was serving restaurant customers. Sostaita Dep. 12:13-21; *see* Flemming Ex. 22, TRULIANT 00121100 (job candidate call), TRULIANT00212094-98 (UPS package misdelivered to nearby location).

December merger and January branding launch (*i.e.*, January-March 2020).²⁶ The record shows intense media coverage of these two events. Wilson ¶¶ 23-24, 47, 53. Significantly, no confusion reports exist for September-December 2019, which reinforces that confusion would be minimal and transient, as opposed to lasting.

Moreover, confusion arising from news reports is irrelevant because it does not arise from use *by Truist*.²⁷ In *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1338 (E.D. Mo. 1996), this same shortcoming permeated the so-called confusion and the court denied the preliminary injunction motion:

The Court notes that each instance of alleged actual confusion presented by plaintiff arose solely from each individual’s reading of an article in the newspaper. Under the circumstances, th[e] value of such actual confusion towards evaluating the “likelihood of confusion” is questionable because these individuals did not view any advertisement or product with the CyberGold name. Unlike the print newspaper articles which these individuals read, the CyberGold advertisements, releases, demonstrations, and its presently operating website which were presented to the Court, all convey a more complete picture of the CyberGold name and its visual appearance.

Id. at 1342; *accord CareFirst*, 434 F.3d at 271 n.4 (“This argument [regarding press accounts or word-of-mouth use] is unpersuasive...”); *Sarkis’ Café, Inc. v. Sarkis in the*

²⁶ Plaintiff’s Brief references three people—two unnamed and none submitting declarations—who visited a branch or sent an email months before Truist’s branding release. Plaintiff does not include anything else collected in June-August 2019.

²⁷ *See In re Nationwide Mut. Ins. Co.*, 124 U.S.P.Q. 465, 465 (T.T.A.B. 1960) (“[A]nnouncements of ... prospective change of name ... do not show use...”); *see generally* TMEP § 1301.03(a) (“[T]he use of a mark in the announcement of a future service ... does not constitute use as a service mark.”).

Park, LLC, 12 C 9686, 2016 WL 723135, at *9 (E.D. Ill. Feb. 24, 2016) (“[A] jury could find that the confusion (to the extent any existed) was caused by the news reports recounting the negotiations between the parties ... rather than from the use of the marks themselves.”).

In fact, the context that Plaintiff claims caused confusion—“announcement that they planned to adopt Truist” (Brief at 4)—*no longer exists*, and is not reflective of how TRUIST is used *today* in the marketplace. *See* Lookabill Dep. 15:10-13 (“Well, the first week when everything come out, we had a lot of people come in and tell—you know, talking about the—on the news about the merger happening.”); *see also Duluth News-Tribune v. Mesabi Publ’g Co.*, 84 F.3d 1093, 1098 (8th Cir. 1996) (“[E]ven several isolated incidents of actual confusion that occur initially upon the creation of a potentially confusing mark are insufficient to establish a genuine issue of material fact as to the likelihood of confusion.”). Plaintiff never asked why these people made their remarks. *See, e.g.,* Johnson Dep. 19:7-12 (conceding “I do not” know why remark was made). For example, SunTrust customer Darrell Eury thought that “Truliant was the name that SunTrust was going with,” Burleson Dep. 10:3-11:16, and suggested that he heard the same news stories as others. Dkt. 30-6, Ex. C. (“Well, my understanding that um, when SunTrust and BB&T merges they gonna merge together.”)

In contrast, television commercials using the TRUIST mark have been running since early April in connection with the “TRUIST CARES” initiative. Wilson ¶ 80. Plaintiff’s employees testified to seeing the commercials “about every day now.” Mespelt Dep. 17:21-

18:5. Yet, despite over 120 million impressions for the TRUIST CARES campaign in April across all channels, Wilson ¶ 87, Plaintiff produced only one anecdote relating to that media.

Second, “trademark infringement protects only against mistaken purchasing decisions and not against confusion generally.” *Radiance*, 786 F.3d at 324; *accord Clear Defense*, 2018 WL 5281912, at *9 (“The type of confusion relevant ... is confusion among consumers...”); *Sterling Acceptance Corp. v. Tommark, Inc.*, 227 F. Supp. 2d 454, 464 (D. Md. 2002) (finding confusion not “affect[ing] the purchasing and selling of the goods or services in question” irrelevant), *aff’d*, 91 F. App’x 880 (4th Cir. 2004). Thus, courts require a plaintiff to “demonstrate the cause” of confusion; otherwise, it could be irrelevant “inattentiveness ... rather than actual confusion.” *Duluth News-Tribune*, 84 F.3d at 1098 (“misdirected mail and phone calls fail[] to raise a genuine factual dispute”). As the court in *Worsham* explained:

[T]he few instances of confusion shown by this record could well be the result of carelessness or inattention... [T]he owner of a trademark is not entitled to a guarantee against confusion in the minds of careless and indifferent buyers, and merely occasional cases of confusion or thoughtless error by very inattentive purchasers are of very little significance in trademark and unfair competition.

419 F. Supp. 2d at 881.

For many instances Plaintiff cites, the confusion was merely non-actionable “general confusion” stemming from friends and news reports, not confusion impacting a potential purchasing decision. *See, e.g.*, *Vazquez-Gonzalez* Dep. 8:16-25 (“someone else

had told her that we were merging”); Flemming Ex. 22, TRULIANT00212099 (unidentified “people” talking about employee’s job).

Third, “[i]nquiries about the relationship between an owner of a mark and an alleged infringer do not amount to actual confusion. Indeed, such inquiries are arguably premised upon a *lack* of confusion between the products....” *Nora Bevs., Inc. v. Perrier Grp. of Am, Inc.*, 269 F.3d 114, 124 (2d Cir. 2001); *accord Duluth*, 84 F.3d at 1098 (“The question ... indicates a distinction in the mind of the questioner, rather than confusion.”); *EndoSurg*, 71 F. Supp. 3d at 551-52 (“[I]nquiries regarding differences between products and whether companies were affiliated did not show confusion but indicated that customers had different source in mind.”); *Giant*, 228 F. Supp. 2d at 657 (“customer inquiries regarding the proposed takeover of the store” and “ask[ing] about a potential affiliation” not actual confusion). As one treatise describes:

A simple mental association with the senior mark is not sufficient to show confusion between the marks. Where consumers contact a company and ask whether it is associated with the alleged infringer such questions may not demonstrate the existence of actual confusion where they indicate that consumers are aware that there is a distinction between the two companies.

2 Anne Gilson Lalonde, *Gilson on Trademarks* (“*Gilson*”) § 5.04[a], at 5-79 (2019); *accord JL Beverage Co v. Beam, Inc.*, 899 F. Supp. 2d 991, 1005 (D. Nev. 2012) (denying preliminary injunction) (“[S]ome of the alleged evidence of confusion involves consumers noting that the two vodkas look alike.... Such evidence demonstrates a lack of confusion because it shows that [they] understood that [the two] are distinct products.”).

Plaintiff's anecdotes are replete with simple associations, or inquiries reflecting awareness of the separate entities. *See* Sostaita Dep. 20:9-15 (inquiry as to whether Truliant was involved); Flemming, Ex. 18, DX12 ("she asked if we were merging"); Brogan Dep. 9:12-18 (member not "presently confused," and not confused between the two institutions, but just noting purportedly similar names); Sostaita Dep. 12:13-13:7 (member was "busy in the restaurant" and "not engaged in any sort of banking transaction" when he misunderstood news report); Seats Dep. 11:20-23 (caller "remembered" BB&T and SunTrust and was not confused).

Fourth, Plaintiff made the choice not to seek consumer affidavits regarding these incidents, except from a friend of Plaintiff's President. Plaintiff's employees were not instructed to be "careful and not to be biased." Johnson Dep. 27:1-3. "[W]here the evidence of actual contemporaneous confusion is filtered through a plaintiff's employees or where people affiliated with the plaintiff proclaim their confusion, courts are rightly wary of the possibility of bias and view such evidence with skepticism." 2 *Gilson*, § 5.04[4][c], at 5-82–5-83. For instance, in *Vitek Systems, Inc. v. Abbott Laboratories*, 675 F.2d 190 (8th Cir. 1982), where "employees ... testified in effect, that customers had told them that they were confused by the similarity of the marks," the Court held that "the district court could refuse to credit the uncorroborated testimony of such interested persons." *Id.* at 193; *accord Checkpoint Sys., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 298 (3d Cir. 2001) ("[T]he District Court properly took into account the potential bias of [plaintiff's] employees"). In addition to the natural self-interest of responding to an employer's

request, courts reject cursory proclamations of customer confusion as “ambiguous at best and not credibly probative of the asserted confusion.” *Vitek Sys., Inc. v. Abbott Labs., Inc.*, 520 F. Supp. 629, 632 (E.D. Mo. 1981), *aff’d*, 675 F.2d 190 (8th Cir. 1982); *accord A&H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 227 (3d Cir. 2000) (employee reports properly “viewed it with great skepticism, given the interested sources and the inability to cross-examine the supposedly confused individuals”).

Moreover, “[c]ourts have recognized that actual confusion evidence from friends and family does not accurately represent the consuming public.” *Fuel Clothing Co. v. Nike, Inc.*, 7 F. Supp. 3d 594, 622 (D.S.C. 2014); *accord Valador*, 241 F. Supp. 3d at 669 (confusion of witness “who happens to be the CEO’s friend ... carries no weight”); *see Sostaita Dep. 19:4-12* (Truliant president’s friend). Here, employees were told that actual confusion was “a key component to Truliant’s case” and we “need your help,” but then management did nothing to follow up, including not seeking first-hand consumer reports. *Johnson Dep. 22:23-23:5*; *see Beeker Dep. 95:18-25*.

c. Plaintiff’s Own Actions Created Any Confusion

Plaintiff cannot identify the TRUIST mark as the source of confusion when Plaintiff took deliberate steps to create an association between itself and TRUIST. As soon as the TRUIST name was announced, Plaintiff rushed to publicize the lawsuit. Plaintiff issued press releases coinciding with court filings—even routine ones—and solicited reporters for

coverage. Fleming, Ex. 18, DX4, DX61; *id.*, Ex. 26.²⁸ It is hardly surprising that Plaintiff's steady TRULIANT v. TRUIST drum beat would generate isolated confusion among casual or inattentive observers. In other words, Plaintiff fostered an association via press releases and then asked its employees to find evidence of the association it deliberately created. This Court "is not required to give weight to the confusion created by" Plaintiff. *Vitek*, 675 F.2d at 194.²⁹

2. Survey Evidence Demonstrates No Actionable Confusion

"[S]urvey evidence clearly favors the defendant when it demonstrates a level of confusion much below ten percent." *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 n.15 (4th Cir. 1996); *see also CareFirst*, 434 F.3d at 268 ("[T]he survey only shows a confusion rate of 2 percent, hardly a sufficient showing of actual confusion."). Truist offers scientific consumer surveys from two, well-recognized experts who—unlike Plaintiff's expert—employed the generally-accepted "gold standard"³⁰ methodology for measuring

²⁸ Plaintiff also bid on keywords in an effort to ensure that consumers searching "Truist" online would be shown one of *Plaintiff's* advertisements. Murray Dep. 160:13-161:1; Kroustalis Dep. 6:22-7:7 ("This is a high priority").

²⁹ In *Vitek*, the Court did not give weight to purported confusion occurring when plaintiff's employee brought up the competitive product, which is similar to one of the instances here. See Brogan Dep. 9:8-15 (Truliant employee asked if "ready for the big change").

³⁰ *See Kroger Co. v. Lidl US, LLC*, No. 3:17-CV-480-JAG, 2017 WL 3262253, at *5 n.5 (E.D. Va. July 31, 2017) (noting opposing expert admitting that "Thomas McCarthy, who wrote the 'bible' on trademarks, calls the Eveready survey the 'gold standard'"); *Akiro LLC v. House of Cheatham, Inc.*, 946 F. Supp. 2d 324, 339 (S.D.N.Y. 2013) (*Eveready* format "is generally accepted and represents the 'gold standard' for cases involving strong marks"). Plaintiff's Complaint asserts that "the TRULIANT Mark has become exceedingly

confusion. These two *Eveready*-format surveys³¹ showed confusion at 3% or below, conclusively demonstrating consumers are unlikely to be confused by these marks.

a. Truist’s Forward-Confusion Surveys

Hal Poret has conducted more than 1,000 trademark surveys and been accepted as a survey expert by dozens of courts, including in the Fourth Circuit.³² Declaration of Hal Poret (“Poret”) ¶ 1, Ex. 1 at App’x A. In this case, Mr. Poret’s *Eveready* survey was designed to test what Plaintiff’s motion argues, namely “forward confusion,” *i.e.*, the extent to which *prospective Truist consumers* would mistakenly believe that Truist’s services are put out by, or affiliated with or sponsored by, Plaintiff. *Id.* ¶ 2. Mr. Poret surveyed people who “lived or worked in the geographic areas of North Carolina, South Carolina, and Virginia where Truist and Truiliant operate” and who “use the services of a bank.” *Id.* ¶ 7.

Respondents viewed an image of how Truist plans to use TRUIST branding on branches, and thus how it will be used in the real-world marketplace:

strong.” Dkt. 1 at 4; *see also* Dkt. 31 at 10 (“the TRULIANT mark is strong”). Truiliant also represented to the USPTO that it is “well-known.” Flemming, Ex. 1, at 5).

³¹ The format bears the “Eveready” name because it originates with a case involving that mark, *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366, 385-88 (7th Cir. 1976).

³² Courts in this Circuit have cited Mr. Poret’s surveys with approval. *See Booking.com B.V. v. U.S. Patent & Trademark Office*, 915 F.3d 171, 183 (4th Cir.), *cert. granted*, 140 S. Ct. 489 (2019); *Combe Inc. v. Dr. August Wolff GmbH & Co. KG Arzneimittel*, 382 F. Supp. 3d 429, 462-65 (E.D. Va.), *appeal filed*, No. 19-1674 (4th Cir. June 24, 2019); *Booking.com B.V. v. Matal*, 278 F. Supp. 3d 891, 918 (E.D. Va. 2017).



Poret ¶ 4; Wilson ¶ 36.

Respondents were asked the standard *Eveready* questions designed to measure confusion as to (i) *source* (“What company or financial institution do you think owns or operates the bank you were just shown, if you have an opinion?”), (ii) *affiliation* (“Do you think that the bank you were shown is affiliated with any other company or financial institution?” and, if so, “What other company or financial institution?”), and (iii) *sponsorship or approval* (“Do you think that the bank you were shown is sponsored or approved by any other company or financial institution?” and, if so, “What other company or financial institution?”). *Id.* ¶ 13. Anyone who mentioned Truiliant (regardless of spelling) was coded as “confused.”

Only 2% of respondents (4 of 203) “mistakenly identified Truiliant (or credit union services more generally) in response to any of the survey’s confusion questions.” Poret ¶ 14. Moreover, in a similarly-designed *Eveready* survey showing the TRUIST mark “on its own, in plane capital letters, without other content that would be seen in the marketplace,”

only 3% of respondents (6 of 197) were confused. *Id.*³³ As Mr. Poret explains, “[t]hese figures are well within the range of typical survey noise, negligible, and support a finding that there is no likelihood of confusion.” *Id.*³⁴ Mr. Poret’s opinion is consistent with the Fourth Circuit’s standard, where even higher confusion levels still “clearly favor[] the defendant.” *See, e.g., Sara Lee Corp.*, 81 F.3d at 467 n.15.

b. Truist’s Reverse-Confusion Survey

Plaintiff’s Brief is based entirely on a “forward confusion” analysis of likelihood-of-confusion. Even though Plaintiff never has mentioned “reverse confusion,” Dr. David Neal, another renowned consumer-behavior expert with surveys accepted by numerous courts,³⁵ designed and implemented a survey to test whether reverse confusion is likely. Reverse confusion considers whether prospective Truliant members mistakenly believe that Truliant’s services are put out by, affiliated with, or sponsored by, Truist. Neal ¶ 1.8.

Accordingly, Dr. Neal surveyed potential users of *Plaintiff’s* credit union services and, instead of showing a Truist branch, he showed respondents a *Truliant* branch:

³³ This format is not typical for federal court infringement litigation because it does not show the mark in marketplace context, but it is used in Trademark Trial and Appeal Board proceedings. *See* Poret ¶ 5.

³⁴ Because “gross” confusion levels fell well below the threshold, “it was unnecessary to run Control Groups, which only could have resulted in *lowering* the net confusion levels in the survey.” Poret, Ex. 1 at 16. Indeed “[n]ot using Control Groups in this instance simply means [Poret] conceded a result that is *most favorable* to Truliant—zero noise.” *Id.*

³⁵ Declaration of David Neal, Ph.D. (“Neal”) ¶ 2, Ex. 1.



Neal ¶¶ 2.1.1.1, 5.2. He also surveyed a “control” group, who were shown the same branch with the mark changed to RELIANT (*id.* ¶¶ 2.1.1.1, 5.2).³⁶



³⁶ A control filters out “noise,” *i.e.*, confusion not resulting from the tested mark, but for other reasons, Neal ¶ 7.5, and the control cell is subtracted from the test cell to identify net confusion. *Id.* ¶ 7.4. “The general principle for choosing an appropriate control is easily stated: It should share as many characteristics with the experimental stimulus as possible, with the key exception of the characteristic whose influence is being assessed.” Shari Diamond & Jerre Swann, *Trademark Law & Deceptive Advertising Surveys: Law, Science, and Design* 210 (2012).

Dr. Neal’s survey asked the standard *Eveready* questions to test for confusion; anyone mentioning “Truist,” “BB&T,” or “SunTrust” counted as “confused.” *Id.* ¶ 6.12. Even bending over backward by including “BB&T” and “SunTrust” responses (because only *one* person of 191 in the test group mentioned “Truist”), the total test group confusion was only 4.2% (8 of 191). *Id.* ¶¶ 7.2-7.3. A similar percentage purportedly was “confused” by the RELIANT control stimulus (4.3%, 8 of 184), making the “net confusion rate” *zero*. *Id.* Based on these net results, Dr. Neal concluded that “[r]everse confusion between the Plaintiff’s TRULIANT mark and the Defendants is unlikely.” *Id.* ¶ 8.1.1.

c. Plaintiff’s Survey Does Not Follow Generally Accepted Principles and Is Fatally Flawed

Plaintiff offered surveys from Professor Didow,³⁷ who eschewed generally-accepted methodology and designed fatally-flawed surveys that violate fundamental principles of survey science, including: (a) failing to replicate marketplace conditions; (b) lacking adequate controls; (c) asking leading and improper questions; (d) improperly coding respondents’ answers; (e) failure to conduct the in-person survey double blind; (f) failure to discourage guessing or providing a “don’t know” answer; (g) inadequate screening questions to ensure an appropriate universe; and (h) improper coding. These and other flaws are addressed in Defendants’ motion to exclude Dr. Didow’s testimony, and in the Declaration of Ran Kivetz, Ph.D. (“Kivetz”). Dr. Kivetz, a Columbia Business School

³⁷ Didow’s survey regarding TRU2GO is entirely irrelevant because Plaintiff’s motion is based only on its TRULIANT mark, and not TRU2GO or other marks. *See* Dkt. 30 ¶ 8; Brief at 2 n.1.

Professor with expertise in consumer behavior and survey methods, concludes “it is my professional opinion that the Didow Surveys violated almost *every single* principle and requirement of scientific surveys....” Kivetz ¶ 9. This brief highlights just two of the fatal flaws demonstrating that Didow’s surveys, like Plaintiff’s entire case theory, are contrary to Fourth Circuit law.

First, it is axiomatic that a confusion survey must closely replicate real-world marketplace conditions. *See 6 McCarthy* § 32:163 (“The closer the survey methods mirror the situation in which the ordinary person would encounter the trademark, the greater the evidentiary weight of the survey results.”); *Diamond & Swann, supra*, at 346 (“While the survey setting is necessarily artificial, the survey expert must make every reasonable effort to duplicate the marketplace conditions under which consumers are likely to encounter the mark at issue.”). The Didow surveys violate this principle in multiple ways, including by (a) showing both parties’ marks simultaneously even though they are rarely, if ever, encountered by a single consumer in close proximity in the real world; and (b) not showing the marks as they actually appear in the marketplace. *See Kivetz* ¶¶ 12-16.

Showing marks together in a survey when that is unrealistic in the marketplace is a fundamental flaw that causes courts to exclude or give little weight to a survey. *See, e.g., Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1147 (10th Cir. 2013) (*Squirt* format improper because “no evidence” that products “were sold side-by-side in stores”); *Pinnacle Advert. & Mktg. Grp., Inc. v. Pinnacle Advert. & Mktg. Grp., LLC.*, No. 18-CV-81606, 2019 WL 7376782, at *6 (S.D. Fla. Sept. 26, 2019) (excluding modified *Squirt* survey

because it did “not conclusively show how the Parties’ ordinary customers encounter the Parties’ marks in the actual marketplace”); *Kroger*, 2017 WL 3262253, at *5 (survey “flawed” because it “showed the logos back to back, without any intervening images or questions, despite the fact that consumers encounter [the parties’ products] in competing stores with long lapses in between”); *see also* Kivetz ¶ 12-13 & Ex. 1, ¶¶ 50-76.

Second, showing marks in a manner different from how they appear in the marketplace (*i.e.*, without colors, logos, and fonts) “constitutes a major methodological flaw and renders the results unreliable and uninformative.” *Id.* ¶¶ 14-16 & Ex. 1, ¶ 82-92. The *Valador* court excluded a survey similar to Dr. Didow’s because “it failed to replicate actual market conditions in which consumers might encounter the parties’ marks” when it showed “black-and-white images” of the marks “without any other styling, words, symbols or images that typically accompany the word ... in the marketplace.” 242 F. Supp. 3d at 454 & 462; *accord Water Pik*, 726 F.3d at 1145 (affirming exclusion of survey that “did not present the marks as they would appear to a consumer because both marks were shown in a typewritten format, divorced from packaging, and without any italics ... [or] logo”).

II. Plaintiff Has Not Met Its Burden of Establishing Irreparable Harm

The Fourth Circuit historically has held that “a presumption of irreparable injury is generally applied once the plaintiff has demonstrated a likelihood of confusion....” *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 273 (4th Cir. 2002); *accord Rebel Debutante LLC v. Forsythe Cosmetic Grp., Ltd.*, 799 F. Supp. 2d 558, 580 (M.D.N.C. 2011)

(Schroeder, J.).³⁸ This presumption has been called into question.³⁹ Even if it survives, however, it is easily rebutted. *See H. Jay Spiegel & Assocs., P.C. v. Spiegel*, 652 F. Supp. 2d 630, 636 (E.D. Va. 2008) (denying preliminary injunction, despite presumption, because “any harm Plaintiff will suffer going forward is speculative and difficult to quantify” while Defendant “would be immediately and severely harmed if the Court granted an injunction”).

“Irreparable harm is the irreducible minimum required for a preliminary injunction. But the mere existence of an irreparable harm is not enough; the Fourth Circuit has held that a plaintiff must make a clear showing of an irreparable harm that is both actual and imminent.” *Lulu Enters., Inc. v. N-F Newsite, LLC*, 85 U.S.P.Q.2d 1367, 1369 (E.D.N.C. 2007). Plaintiff does not claim that the TRUIST branding, with the logo and color,

³⁸ The Fourth Circuit has not decided *eBay*’s application to trademark cases, but it undermined *Rebel Debutante* in part, holding that “*eBay* applies to permanent and preliminary injunctions with equal force.” *Bethesda Softworks, L.L.C. v. Interplay Entm’t Corp.*, 452 F. App’x 351, 355 (4th Cir. 2011). One court in this Circuit since has held that *eBay* applies to trademark cases. *See Verisign, Inc. v. XYZ.com, LLC*, No. 1:14-cv-01749, 2015 WL 7430016, at *5 (E.D. Va. Nov. 20, 2015), *aff’d*, 848 F.3d 292 (4th Cir. 2017).

³⁹ Two Circuits have held that the irreparable harm presumption in a trademark case does not survive; others have implied that result. *See Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 216-17 (3d Cir. 2014); *Herb Reed Enters., LLC v. Fla. Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013); *see also Swarovski AG v. Bldg. #19, Inc.*, 704 F.3d 44, 54 (1st Cir. 2013) (“[T]here is no principled reason why *eBay* should not apply to a request for a preliminary injunction to halt trademark infringement...”); *Salinger v. Colting*, 607 F.3d 68, 78 n.7 (2d Cir. 2010) (“Although today we are not called upon ..., we see no reason that *eBay* would not apply with equal force to an injunction in any type of case”); *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1228 (11th Cir. 2008) (“[A] strong case can be made that *eBay*’s holding necessarily extends to the grant of preliminary injunctions under the Lanham Act”).

infringes; with TRUIST branding being implemented, the harm Plaintiff complains of, from the “announcement that they planned to adopt Truist” (Brief at 4), is *neither* actual nor imminent.

In the eleven months after the TRUIST name announcement, Plaintiff has not been harmed; in fact, it “has thrived.” Brief at 2. Plaintiff’s business is better today than in June 2019. *See* Murray Dep. 151:24-152:2; Flemming, Ex. 18, DX24, DX38. Plaintiff does not have evidence of past or future lost sales, revenue, customers, or business. Murray Dep. 162:18-20 (no lost customers); *id.* at 163:10-12 (no specific business lost); *id.* at 163:13-20 (no lost business opportunities); *id.* at 163:21-24 (no business or markets foreclosed); *id.* at 163:25-164:4 (no quantifiable expenses); *id.* at 165:8-14 (no valuation, or quantifiable loss, of goodwill); *id.* at 166:5-10 (no “other forms of damage or hardship”); Beeker Dep. 118:18-23 (not aware of anyone having negative Truist experience who reported it to others as Truiant). Nor does Plaintiff suggest that TRUIST services are inferior. Murray Dep. 149:19-150:1 (no quality evidence); *id.* at 150:2-5 (no “effort to research or investigate consumers’ opinions of Truist products or services”). Plaintiff’s CEO said “we don’t feel too bad about [the chance of confusion for] our members because they know us.” Flemming, Ex. 18, DX60 (speculating about “future ones”).

Plaintiff offers only speculation about the *potential* “loss of customers and erosion of goodwill.” Brief at 1, 22 (“potential loss of customers and loss of goodwill”). This “potential” harm is insufficient; “irreparable harm” must be “neither remote nor speculative, but actual and imminent.” *Direx Isr., Ltd. v. Breakthrough Med. Corp.*, 952

F.2d 802, 812 (4th Cir. 1991); *accord Northgate Assocs., LLLP v. NY Credit Funding I, LLC*, No. 1:08-cv-420, 2008 WL 3200630, at *9 (M.D.N.C. Aug. 5, 2008) (Schroeder, J.) (“Plaintiffs’ alleged irreparable harm thus remains contingent on future events which may or may not develop.”). Belying even remote harm, Plaintiff has not sent *any* communication to members attempting to ameliorate Plaintiff’s speculative concerns. Murray Dep. 177:10-15.

III. The Balance of Equities Tips Decidedly in Truist’s Favor

A preliminary injunction is an extraordinary remedy, and an equitable one; courts always must “balance the competing claims of injury and ... consider the effect on each party of the granting or withholding of the requested relief.” *Winter*, 555 U.S. at 24. Plaintiff argues “there is no harm to Defendants that would outweigh the *potential* harm to Truliant.” Brief at 22 (emphasis added). In fact, the balance of equities tilts decisively in *Truist’s* favor because Truist, “by contrast, would suffer significant financial harm.” *Yellowbrix, Inc. v. Yellowbrick Sols., Inc.*, 181 F. Supp. 2d 575, 581 (E.D.N.C. 2001); *accord Va. Polytechnic Inst. & State Univ. v. Hokie Real Estate, Inc.*, 100 U.S.P.Q.2d 1199, 1212 (W.D. Va. 2011) (denying preliminary injunction because it “would break the continuity of the business ... and force it to start all over in building a new brand name”).

If enjoined, Truist not only would have to develop and clear a new name and brand, but would forfeit the \$125 million spent investing in TRUIST, and changing systems and operations. Wilson ¶ 98; Duck ¶¶ 19-25. Truist already implemented the change to “Truist,” and would have to undo those changes. Before doing so, it would have to develop

a new name and obtain shareholder and regulatory approval. *See* Tisci ¶¶ 18-20. This process would take 6 to 9 months. *See* Duck ¶ 25. Diverting resources to a name change would delay the bank’s integration efforts, and the merger’s cost savings. Declaration of James Eckerle (“Eckerle”) ¶¶ 7-10.

An injunction requiring use of another name for banking transactions would create compliance issues and legal risks, including uncertainty regarding agreements and potential clouds on real property titles. Tisci ¶¶ 21-24. It also increases “the risk of a cybersecurity breach [and] financial accounting and reporting errors.” Eckerle ¶ 10. Truist cannot easily revert to a legacy name and then later—when it is established that the injunction was improvident—resume use of TRUIST. Far too many regulatory requirements and institutional systems changes are required to rebrand the nation’s sixth-largest bank. *See* Tisci ¶¶ 18-22; Duck ¶¶ 19-26.

But most damaging of all, requiring a name change would harm Truist’s reputation and damage the goodwill in the TRUIST mark. With the announcement in June and the name change in December 2019, Truist staked its reputation and goodwill on TRUIST, and followed through with a carefully-orchestrated roll out. Wilson ¶¶ 100-103. Changing course would harm Truist’s relationships with customers and public trust in the TRUIST brand. *Id.*; Hardardottir ¶¶ 26-27; Tisci ¶ 18; Wilcox ¶¶ 18-19 & Ex. 1, ¶¶ 121-25. It is not speculation, but a given, that Truist would suffer public relations damage and a loss of goodwill and brand equity. Wilson ¶¶ 100-103; Hardardottir ¶¶ 26-27; Wilcox ¶ 20 & Ex.

1, ¶¶ 126, 138. *see also Hokie*, 100 U.S.P.Q.2d at 1212 (even “temporary” relief would injure the defendant’s reputation in “the community”).

In *Spiegel*, the court declined to grant a preliminary injunction in a trademark infringement case when the balance of harms favored the defendant, holding:

[A]ny harm Plaintiff will suffer going forward is speculative and difficult to quantify. Defendant, on the other hand, would be immediately and severely harmed if the Court granted an injunction. An injunction would shut down his website and interrupt ongoing communications.... On balance, the harm to Defendant outweighs the harm to Plaintiff.

652 F. Supp. 2d at 636; *accord Wonder Works v. Cranium, Inc.*, 455 F. Supp. 2d 453, 459-60 (D.S.C. 2006) (denying preliminary injunction because “Defendant *would* be substantially harmed”). In *John Lemmon Films, Inc. v. Atlantic Releasing Corp.*, 617 F. Supp. 992 (W.D.N.C. 1985), the court denied a preliminary injunction for reasons equally applicable here:

Fear of confusion ... is insufficient evidence that irreparable harm will be suffered....

In contrast to the tenuous evidence of irreparable harm to the Plaintiff, the Defendant has presented strong evidence that it would suffer a substantial hardship if it were forced to abandon its use of the title ... at this date. If the Defendant were ordered to refrain from advertising and releasing its film with its present title, theaters contracted to show the film would be lost, prints of the film would have to be changed, and a new advertising campaign and strategy developed at considerable delay, expense, and embarrassment.

Id. at 996-97.

Plaintiff dismissively argues that all such harm is “self-inflicted.” Brief at 22-23.

But the Fourth Circuit has soundly rejected this precise argument:

[The balance of equities] is intended to ensure that the district court “choose[s] the course of action that will minimize the costs of being mistaken.” Thus, while cases frequently speak in the short-hand of considering the harm to the plaintiff if the injunction is denied and the harm to the defendant if the injunction is granted, the real issue in this regard is the degree of harm that will be suffered by the plaintiff or the defendant if the injunction is *improperly* granted or denied.

...[I]t is error for a district court to conclude that any harm that would be suffered by a defendant was self-inflicted and thus entitled to lesser weight in the balancing-of-the-harms portion of the preliminary injunction calculus.”

Scotts, 315 F.3d at 284, 285; *accord Wonder Works*, 455 F. Supp. 2d at 460-61.

Because the Court is not permitted to discount the far greater harm to Truist, Plaintiff cannot “clearly show” the balance of equities tips in its favor. *See Wilson-Cook Med., Inc. v. Wiltek Med., Inc.*, 927 F.2d 598 (4th Cir. 1991) (table) (affirming injunction denial in trademark case where “‘comparative harms’ were unevenly balanced”).

IV. Requiring Defendants To Change Names Is Not In the Public Interest

Plaintiff is not entitled to preliminary relief because it cannot clearly show “that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. A preliminary injunction is not in the public interest because, as noted in *Anheuser-Busch*, “trademarks are designed to protect consumers from being misled, not to further or perpetuate product monopolies.” 962 F.2d at 320. Yet Plaintiff is trying to assert broad, unprecedented rights in “TRU,” which fly in the face of its representation to the USPTO.

An injunction further disserves the public by increasing the risk of creating cybersecurity breach and financial reporting errors from delaying the bank’s integration. Eckerle ¶ 10. An injunction disrupting bank operations (particularly now with critical loan

programs in place) will not serve customers, third parties (e.g., sponsorship partners), shareholders, or the public (by virtue of liens and any potential cloud on title). “Direct effects on innocent third parties have frequently grounded courts’ denials of injunctions.” *SAS Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 388 (4th Cir. 2017).

V. Defendants Would Be Entitled to a Substantial Bond

“The court may issue a preliminary injunction ... only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). The bond’s purpose is to “create a fund from which all of plaintiff’s potential damage from an erroneous preliminary injunction can be compensated.” 5 *McCarthy* § 30:55; accord *Lab. Corp. of Am. Holdings v. Kearns*, 84 F. Supp. 3d 447, 465 (M.D.N.C. 2015) (“The bond is effectively ‘the moving party’s warranty that the law will uphold the issuance of the injunction.’” (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982))). Thus, “[w]hen setting the amount of security, district courts should err on the high side.” 5 *McCarthy* § 30:55.

Truist’s costs from an improper preliminary injunction would be (i) the \$125 million spent changing to TRUIST; (ii) \$34 million to change to a new name,⁴⁰ and (iii) \$27 million to adopt TRUIST again, if that even is possible. See *Wilson* ¶¶ 41,60; *Tisci* ¶¶ 5, 19-21;

⁴⁰ *Supra*, at 7 n.9. Because of the extraordinary harm, the Court should deny the motion because “if Plaintiff is unsuccessful on the merits, it is unlikely that Plaintiff would have the means to fund a bond that would adequately compensate Defendant for the loss caused by the injunction.” *Wonder Works*, 455 F. Supp. 2d at 460.

Duck ¶ 25. The resource diversion also would delay other integration activity, and create additional, substantial losses. Eckerle ¶¶ 7-10.

In addition to the expense, a second name change—no matter how well orchestrated—will extensively damage Truist’s reputation. It will damage customer relations. Wilson ¶¶ 98-104. It will damage sponsorship relationships. *Id.* ¶ 63. And it will damage Truist in the broader marketplace. *See* Wilcox ¶ 20 & Ex. 1, ¶¶ 22, 124-125; Hardardottir ¶ 26. The TRUIST branding rollout name has been well received. Wilson ¶¶ 88-89. The legacy banks’ goodwill will not transfer as well to a new name. *Id.* ¶¶ 100-103; Hardardottir ¶ 25.

Based on the expense of developing and converting to TRUIST, the cost of switching to another name (and back), and the even greater impact of an improvident injunction on merger integration, customer and sponsor relationships, and the goodwill built up in the TRUIST mark, a bond well into nine figures would be warranted if the Court grants preliminary relief.

CONCLUSION

For the foregoing reasons, Truist respectfully asks the Court to deny Plaintiff’s Motion for a Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d), and this Court's order on May 8, 2020 (Dkt. 43), this is to certify that the foregoing Brief in Opposition to Plaintiff's Motion for a Preliminary Injunction contains 16,000 words or less (excluding the caption, signature lines, and this certificate) as reported by the word processing software.

This 15th day of May, 2020.

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