

IJ is a libertarian public interest organization with a carefully cultivated reputation created over decades of work in the policy and media world, as well as the legal world. It has a reputation for extremely high quality non-partisan work which can and does reach across the aisle to partner with organizations such as the ACLU and NAACP. The “IJ” mark signifies Plaintiff as the source of very high standard legal, policy and education work.

On the other hand, Defendants, which have been using the name “IJ Review” and recently re-branded to the name “IJ” with full knowledge of IJ’s rights and growing actual confusion, operate a viral news website and social media pages and have a reputation for partisan viewpoints; Defendants can and do engage in discussions and commentary on electoral politics.

Most alarmingly, Defendants have now forayed beyond the website and social media setting and squarely entered the realm of partisan politics by agreeing to host the upcoming Republican candidate debate in New Hampshire on February 6, 2016 – thus ensuring that millions of American households will associate IJ’s mark (and thus IJ itself) with the political race. Defendants’ swiftly growing use of “IJ” is causing and will continue to cause actual confusion among the public and irreparable injury to Plaintiff, thus justifying issuance of preliminary injunction.

Absent immediate injunctive relief, Plaintiff will continue to incur irreparable harm such that money damages will not adequately compensate Plaintiff. Accordingly, Plaintiff requests that the Court grant this motion pursuant to Fed. R. Civ. P. 65 and order immediate injunctive relief prohibiting Defendants’ unlawful activities and the misuse of Plaintiff’s trademarks, reputation and goodwill, pending trial and final judgment in this matter.

II. FACTUAL BACKGROUND

A. About IJ

IJ is a not-for-profit organization with offices in the states of Virginia, Arizona, Florida, Illinois, Minnesota, Texas and Washington. Verified Complaint ¶ 8. IJ was founded in September 1991 as a non-partisan, non-profit public interest law and policy firm, which has as its goal limiting the size and scope of government power to ensure that all Americans have the right to control their own destinies as free and responsible members of society. *Id.* ¶ 9. IJ's services, while non-partisan, appeal to individuals and organizations with libertarian and conservative beliefs. *Id.* ¶ 24. However, several of IJ's core issues appeal to people of all political persuasions and require working in coalitions of politically diverse groups. *Id.* Thus, IJ's lack of association with any party is vital to carrying out IJ's mission. *Id.*

IJ combines cutting-edge litigation, sophisticated media relations, strategic research, boots-on-the-ground advocacy, public education and limited issue-specific legislative work to fight on behalf of those individuals who are denied their constitutional rights – in particular, First Amendment rights, school choice, economic liberty and private property rights. *Id.* ¶ 10. Through the end of 2014, IJ has litigated nearly 200 cases and has won four of the five cases it litigated before the U.S. Supreme Court. *Id.* ¶ 11. IJ has a legislative team working to make changes at the local and state government levels to pass pro-liberty legislation and defeat anti-liberty legislation. *Id.* ¶ 23. IJ's legislative activities include efforts to reform civil forfeiture, eminent domain, and occupational licensing laws. *Id.*

IJ is an active publisher of information, updates and commentary of interest to its followers. *Id.* ¶ 12. For example, IJ publishes several newsletters and weblogs that are distributed to tens of thousands of subscribers across the country. IJ disseminates research about laws and

policies through written and online publications. *Id.* ¶ 13-14. IJ is also involved in student education in support of its mission, such as the IJ Clinic on Entrepreneurship and three day “boot camp” conferences for law students interested in public interest litigation. *Id.* ¶ 20.

IJ is a charitable 501(3)(c) organization. *Id.* ¶ 4. IJ relies on individuals (86% of donations) and charitable foundations (14% of donations) to provide the resources needed to defend the rights of its clients and thousands of others like them. *Id.* ¶ 25. IJ has a \$20 million budget for fiscal year 2015. 8,000 donors supported IJ within the last 18 months, and over 24,000 unique donors have supported IJ since its inception. *Id.* IJ does “acquisition” mailings, where it writes directly to potential donors and describes its areas of interest and recent cases; its letterhead and mailings prominently include the IJ Marks. *Id.* ¶ 35. In 2014 alone, IJ sent close to 70,000 such pieces of mail. *Id.*

As a charitable organization, IJ must be organized and operated exclusively for exempt purposes set forth in the tax code, and may not be an “action organization,” i.e., it may not attempt to influence legislation as a substantial part of its activities and is absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. *Id.* ¶ 27. Public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate this prohibition and could result in denial or revocation of IJ’s tax-exempt status and the imposition of certain excise taxes. *Id.*

IJ adopted and began use of “IJ” by itself and in combination with other words and designs (the “IJ Marks”) as a trademark in connection with its activities and services in 1991, and has used the name continuously and without interruption to the present day. *Id.* ¶ 28. It is the

owner of all right, title and interest in and to three federal “IJ” formative registrations, which presently are valid and subsisting in law:

- U.S. Registration No. 3,830,071 – **IJ and Design** and U.S. Registration No. 3,830,075 - **INSTITUTE FOR JUSTICE IJ and Design** for “promoting public awareness through outreach and communication efforts of the need for protection of individual liberties”; “education services, namely, training policy activists, lawyers, law students and others to identify, and bring to public attention, issues and cases in which individual liberties are threatened and to determine the appropriate means for redress; educational research services in the area of individual liberties and social affairs; publication of documents in the fields of individual liberties, public law and social affairs”; “providing public interest legal services focused on the protection of individual liberties; legal research in the area of public law” with a date of first use in commerce of September 1991; and
- U.S. Registration No. 2,365,966 - **IJ INSTITUTE FOR JUSTICE CLINIC ON ENTREPRENEURSHIP and design** for “Public interest legal services,” with a date of first use in commerce of July 1, 1998.

Id. ¶ 29. IJ also has applied to register “IJ” in typed format for similar services. App. Ser. No. 86/544,485 (filed Feb. 24, 2015, first use in commerce of Sept. 1991). *Id.* ¶ 31.

Communications infuses everything that IJ does—litigation, activism, strategic research, and legislative work. *Id.* ¶ 12. IJ has spent over \$50,000 on advertisements for its “I am IJ” and “We are IJ” slogans in 2014-15. *Id.* ¶ 33. It has a significant communications department. IJ produces press releases about all of its activities. It organizes press conferences. It works with news reporters, editorial writers, investigative journalists, legal bloggers, and many other types of media and media personnel to disseminate news about IJ’s work and the areas of interest to IJ. It seeks television, newspaper, magazine, video, newsletter, website, blog, digital native news, and social media coverage. *Id.* ¶ 12. Staff members of IJ communicate with the media on a daily basis.² IJ also engages in significant original content creation, writing both opinion and news

² For example, IJ has been featured in The New York Times, The Wall Street Journal, The Washington Post, USA Today, Vox, NPR, Instapundit, National Review, American Spectator, Mashable.com, BusinessInsider.com, Jezebel.com, Vice.com, Salon.com, in articles by The Associated Press and columns by George Will, and in books. Representative selection of publications attached to the Complaint as Exhibit A show that the press, authors and

pieces writing for print and online sources as well as videos. And of course it writes the content for its own website and blogs, Facebook and other social media. IJ has won more than 40 awards for its media work, including many awards for its website and videos. *Id.* ¶ 13.

Since as early as 1998, IJ has maintained an active presence on the internet through its website <ij.org>, where it promotes its services, makes available publications and research, expands its donor base, and communicates in support of its mission. In the last year, the website had 529,000 unique users, totaling 1.18 million page views. *Id.* ¶ 17. IJ also maintains an active social media presence under its “IJ” marks on Twitter (tweeting under @ij), Facebook and YouTube pages, all of which show the IJ Mark prominently. *Id.* ¶ 18. IJ’s Facebook page has 126,579 page “likes,” or followers. *Id.* Its Twitter page is followed by in excess of 28,900 individuals or groups. *Id.* Its YouTube channel has over 15,000 subscribers and total views in excess of 5.3 million. *Id.* One recent video published by IJ, “Running a Food Truck Shouldn’t be this Hard,” has had almost 230,000 views. *Id.*

IJ produces items with the IJ logo to promote its brand, such as clothing that has been sold to the general public, distributed to staff, attendees of conferences, partners, donors, and friends of IJ generally. *Id.* ¶ 34. IJ operated the online “IJ Freedom Market” featuring, among other things, sales of branded IJ merchandise from February 2006 until June 2012. *Id.*

B. About Defendants

1. Defendants’ Activities

MGA and/or IMGE is the publisher of a viral news website and social media pages. *Id.* ¶ 39. The original website was founded in 2012 and called the “Independent Journal Review”, and frequently dubbed “IJ Review.” *Id.* As described in further detail below, as of September 2015,

other organizations have recognized and referred to Plaintiff as “IJ” since well before Defendants launched its service in 2012.

Defendants have re-branded its family of media and advocacy services as “IJ”, despite full knowledge of IJ’s claim of prior and superior rights. *Id.* (Defendants’ service is herein referred to as the “Independent Journal” to avoid confusion).

Independent Journal has a decided political right editorial slant, and has been commonly dubbed as “the conservative version of *Upworthy*” (a viral news website that repackages liberal-leaning content).³ *Id.* ¶ 41. Mr. Musser described The Independent Journal at the end of 2013 as, “seep[ing] into the edges of the conservative ecosystem as a place for news.” *Id.* The website has been ranked as one of the top “Conservative Websites” for 2015 by two noted web trafficking measurement services (No. 1 by Quantcast.com and No. 3 by Alexa). *Id.*

Independent Journal exercises editorial functions that clearly show a conservative/libertarian bias. *Id.* ¶ 42. For example, it maintains a category of articles chosen by its editorial staff called “Editor’s Choice” that largely regard political subjects and clearly are designed to appeal to individuals with conservative and/or libertarian beliefs – some of these articles directly address IJ’s core issues. *Id.* Independent Journal also regularly reports on legal issues, including many of the same issues that IJ litigates about such as First Amendment protection and school choice. *Id.* ¶ 44. Independent Journal is not only a viral news site – it also operates Facebook pages more akin to conservative online political communities or activism groups than a media information source. *Id.* ¶ 45. For example, the Facebook group “I Am Conservative” was recently re-branded to “IJ America” and describes its mission as: “We are joining together to give a real voice to Americans across the country. I think therefore IJ”. *Id.* The page features a profile picture of conservative President Ronald Reagan. *Id.*

³ MGA also is the parent company of IMGE, a digital agency that has worked with the Republican Governors Association and Karl Rove’s Crossroads GPS. MGA was founded by two Republican political consultants, former Tim Pawlenty adviser Phil Musser and Alex Skatell, a former staffer for the National Republican Senatorial Committee. Verified Complaint ¶ 40. IMGE – not MGA – is the owner of the trademark application for INDEPENDENT JOURNAL, U.S. Ser. No. 86/326,737 (filed July 2, 2014). *Id.* ¶ 6.

It cannot be disputed that, as a “news” organization, Independent Journal is permitted to engage in activities that are prohibited to IJ. *Id.* ¶ 46. For example, Independent Journal may publicly endorse, support or oppose political parties and candidates for political office; accept paid political advertising from certain candidates; support political fundraising; sell or rent mailing lists to certain political parties or candidates; and make contributions to a political organization. Moreover, as a for-profit entity, Independent Journal may sponsor debates that do not invite all qualified candidates, do not have an independent panel, do not cover a broad range of issues, do not give each candidate an equal opportunity to speak, and may indicate support for or opposition to any candidate, explicitly or through biased presentation of topics or questions. *Id.*; see “Election Year Activities and the Prohibition on Political Campaign Intervention for Section 501(c)(3) Organizations,” IRS FS-2006-17 (Feb. 2006).

Indeed, on June 17, 2015, Independent Journal announced that it would co-host a Republican candidate debate in New Hampshire on February 6, 2016. *Id.* ¶ 48. Independent Journal was included as a co-host due to the Republican National Committee’s requirement that debates include a “conservative media element.” *Id.* ¶ 49. Mr. Skatell, founder of Independent Journal, announced in connection with the debate, “New Hampshire voters are independent-minded, they love their country and just plain enjoy discussing politics, and that means New Hampshire is truly IJ country.” *Id.* ¶ 48.

2. MGA’s Use of “IJ”

Independent Journal started to refer to itself as “IJ Review” at its inception, which itself caused confusion with IJ. More recently, Independent Journal has steadily migrated toward the “IJ” moniker without the term “Review”. *Id.* ¶ 47. In August 2015, IJ learned that, with full knowledge of IJ’s rights, MGA re-branded itself “IJ”, along with an “IJ” logo. *Id.* ¶ 52.

In keeping with this announced brand change, Independent Journal changed its website domain name to <ij.com>, and on or about September 20, 2015, adopted the Twitter handle @IJdotcom. *Id.* ¶ 53. It adopted a slogan, “I think therefore IJ”; the Twitter handles @IJdotcom, @IJreview (according to the Twitter page, “the opinions and contributor vertical for @IJDOTCOM”), and @IJ_Politics (the “politics vertical of @IJDOTCOM”) and @IJ_LIFT (“a vertical of @IJDOTCOM that covers everything from Life, Inspiration, Family and Trends”); Facebook sites IJ Review and IJ Politics, IJ America, and IJ Lift; it sends emails with news summaries titled “IJ” and “IJ Wrap”; and has an online newsletter termed IJ Lift. *Id.* ¶ 47.

C. Confusion between IJ and Independent Journal

IJ has received numerous notices of instances of actual confusion showing that numerous individuals and organizations have been confused by Independent Journal’s use of “IJ Review” and, now, “IJ.” Among the many examples of confusion, for instance, Dan Alban, an attorney with IJ, reported that he has encountered this confusion on several occasions, such as one time at New Hampshire Liberty Forum in February 2014 when one of the conference organizers from the Free State Project assumed that he worked for Defendants’ “IJ Review” rather than for IJ. *Id.* ¶ 56. Mindy Menjou, a Research Editor for IJ, reported that several individuals in the broader liberty movement have asked her during in-person conversations if IJ publishes IJ Review. Consumers have been confused about emails that have appeared in their accounts – one wrote, saying of the emails, “I thought they were a little off the normal IJ topic. I read them thinking they were from you.” *Id.* Another individual wrote:

What’s going on with your IJR and it’s postings. [sic] In past three weeks I’ve received and thoroughly enjoyed your editors selection of mostly eye-popping videos. However it is a change in style...and wondering if I should hire same internet pr strategist/expert for my firm...I got impression that your posts had drifted afield from litigation issues (ie eminent domain) into generic hi, or low, libertarian political humor.

Id. Web search results also confuse consumers of IJ’s services: one IJ supporter asked IJ, “Do you know that there is an active ‘journal’ on the Net that could easily be trading on the Institute for Justice name recognition? They go by IJReview and I often click on them by mistake.” *Id.* Confusion has also occurred on social media: IJ has noticed many tweets on the Twitter service referring to Defendants using IJ’s Twitter handle @IJ. *Id.* More recently, IJ’s Assistant Director of Production and Design, Isaac Reese, reported about an individual stating that he loved “IJ’s” “Ted Cruz machine gun bacon video”, referring to a viral video featuring Ted Cruz that was published in August 2015 by Independent Journal.⁴ *Id.* Following the re-branding, a daily media update on campaign finance and political speech developments prepared by the Center for Competitive Politics⁵ incorrectly attributed one of Defendants’ articles to IJ, titling the blurb, “Institute for Justice: Americans’ Support for First Amendment Weakens During Times Of National Crisis (Infographic).” *Id.*

Not only may the ordinary consumer be confused, but the growing confusion also risks influencing actual and potential donors, who may attribute Independent Journal’s provocative and so-called “eye-popping” material to IJ. Indeed, the judiciary and legislative bodies, important audiences to whom IJ directs many of its services, may (even unconsciously) attribute Independent Journal’s activities – include hosting the Republican debate – to IJ and color their view of the organization. *Id.* ¶ 37.

⁴ This viral video evidently was part of a series by Independent Journal, also featuring videos of Republican Presidential candidate Representative Lindsey Graham putting his cell phone in a blender and Republican Presidential candidate Senator Rand Paul stuffing the tax code into a wood chipper. *See* <http://www.motherjones.com/politics/2015/08/ted-cruz-cooks-bacon-machine-gun>.

⁵ The Center made this error notwithstanding a high degree of familiarity with IJ and its mission. Indeed, IJ and the Center routinely file amicus briefs in support of each other when one organization is representing a party before the courts.

A. IJ Contacts MGA About Growing Confusion.

Concerned about this growing confusion, IJ's Managing Vice President Steven Anderson emailed MGA, Independent Journal and IMGE's Chief Financial Officer, Ryan Coyne, in February 2015.⁶ *Id.* ¶ 57. IJ asked Mr. Coyne to discuss with him possible ways to avoid confusion. *Id.* In his response, Mr. Coyne agreed to a call and admitted that he was aware of IJ through IMGE. *Id.* ¶ 58. Although Mr. Coyne and Mr. Anderson spoke via telephone on February 13, 2015, they were unable to resolve the issues. *Id.* ¶ 59. Twice in the next few months Mr. Anderson again emailed Mr. Coyne and asked if he had availability to resume the discussion. *Id.* ¶ 60, 61. Mr. Anderson did not receive any response to these emails. *Id.*

IJ retained legal counsel and, on the last day of August, 2015, sent a cease and desist letter to Independent Journal demanding that it stop all use of "IJ" as a mark, alone or as "IJ Review." *Id.* ¶ 62. IJ and Independent Review met on September 21, 2015, but were unable to resolve their issues. *Id.* Thereafter, Independent Journal made an offer that would allow it to keep using IJ as a mark. The confusion between the organizations is becoming so pervasive and damaging to IJ's brand, however, that IJ has no choice but to commence these proceedings. *Id.*

MGA's continued use and appropriation of IJ's marks violates federal trademark laws as well as Virginia statutory and common law. In August, and in the face of IJ's earlier objections about IJ Review, Independent Journal moved even closer to the IJ Mark. Given the severity of the confusion, the resulting injury to IJ's reputation and goodwill, and the scant window before the scheduled Republican debate, IJ is forced now to move for a preliminary injunction.

⁶ Mr. Coyne identifies himself as the CFO of IJ.com, Independent Journal, Media Group of America and IMGE in his LinkedIn profile. Verified Complaint ¶ 50.

III. LEGAL STANDARD

The traditional purpose of a preliminary injunction is “to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court’s ability to render a meaningful judgment on the merits.” *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 525 (4th Cir. 2003) (citation omitted), *abrogated on other grounds by eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). A decision to grant a preliminary injunction is within the sound discretion of the district Court. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011) (citing *WV Ass’n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009)).

A preliminary injunction is justified when the moving party “establish[es] that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted).

Under this test, Plaintiff clearly is entitled to a preliminary injunction for the ongoing trademark infringement by Defendants. Each element required for a preliminary injunction favors IJ. As shown below, IJ will likely prevail on the merits of its trademark claim. IJ is presumed to own its valid mark, it is clear that it will suffer irreparable harm without the injunction, the equities favor IJ, and the public interests are served by injunctive relief.

IV. ARGUMENT

A. Courts Routinely Grant Preliminary Injunctions in Similar Cases.

In trademark infringement cases such as the one at bar, courts routinely have granted preliminary injunctions. For example, in *Nat’l Rural Elec. Coop. Ass’n v. Nat’l Agric. Chem. Ass’n*, Civ. A. No. 91-1568(HHG), 1992 WL 477020, at *4 (D.D.C. Nov. 25, 1992), the court granted a preliminary injunction where the parties were both politically active organizations, and

each operated under the acronym “ACRE”. The court found that there was a significant degree of similarity between the marks, even though the designs used were different and even though the groups spelled out their full names in literature – orally, the marks were identical. Moreover, the target audiences of both entities were the same, including members of the farming community and members of Congress and there was considerable overlap in the issues they addressed. As shown below, there is little difference between this case and the instant case.

Similarly, the court in *New York State Electric & Gas Corp. v. U.S. Gas & Electric, Inc.*, 697 F. Supp. 2d 415, 433 (W.D.N.Y. 2010) granted a preliminary injunction where the marks in question, “NYSEG” and “NYG&E” were acronyms with similar letters used for overlapping services. In *Kadant, Inc. v. Seeley Machine, Inc.*, 244 F. Supp. 2d 19, 29 (N.D.N.Y. 2003), the court granted a preliminary injunction where the marks in question, “AES” and “APS”, sounded similar and differed by only one letter. A preliminary injunction was granted in *Specialty Measurements, Inc. v. Measurement Systems, Inc.*, 763 F. Supp. 91, 95 (D.N.J. 1991) where the marks in question, “SMI” and “MSI”, were acronyms consisting of the same letters. And, in *Diamonds Direct USA, Inc. v. BFJ Holdings, Inc.*, 895 F. Supp. 2d 752, 761 (E.D. Va. 2012), this court granted a preliminary injunction where the marks in question were identical.

B. IJ Is Likely to Prevail on the Merits of Its Claim.

To establish trademark infringement under the Lanham Act, the plaintiff must show: (1) that it owns a valid mark; (2) that the Defendants used the mark “in commerce”, without plaintiff’s authorization, and “in connection with the sale, offering for sale, distribution, or advertising” of goods or services; and (3) that the Defendants’ use of the mark is likely to confuse consumers. *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 152 (4th Cir. 2012) (internal citations omitted). Each of these factors favors Plaintiff.

1. Plaintiff Has Valid, Enforceable and Prior Rights in the IJ Marks.

Plaintiff is the owner of all right, title and interest in and to federal registrations for three IJ formative registrations, all of which presently are valid and subsisting in law. *See* Verified Complaint ¶¶ 29-31. These registrations are issued on the Principal Register, contain no disclaimers, and constitute a *prima facie* showing of the validity of the registered mark and of Plaintiff's exclusive right to use these marks on the goods and services specified in the registration. 15 U.S.C. § 1057(b). Each of these registrations has achieved incontestable status under Section 15 of the Lanham Act, 15 U.S.C. § 1065. Verified Complaint ¶ 30. Plaintiff currently has an application pending for IJ in typed format with a date of use of 1991. *Id.* ¶ 31.

Further, it is likely to be undisputed that Plaintiff has actual priority over Defendants' usage. Plaintiff's use of the IJ marks – starting in 1991 – predates Defendants' 2012 adoption and use by nearly two decades. *Id.* ¶¶ 29, 31. Thus, Plaintiff is likely to establish that it has valid protectable trademark interests in the IJ Marks and priority to these marks.

2. MGA Uses The IJ Mark In Commerce And Without Plaintiff's Authorization, and Uses The IJ Mark In Connection With The Sale, Offering For Sale, Distribution, Or Advertising Of Goods Or Services.

MGA cannot plausibly dispute that it is using the IJ Marks “in commerce” as defined in the Trademark Act, and that this use is without IJ's authorization. The Trademark Act defines “use in commerce” as all commerce that may be regulated by Congress. 15 U.S.C. § 1127. Traditionally, this is interpreted as interstate commerce within the United States and commerce between the United States and a foreign country. Use of a mark in connection with services means the mark must be displayed in the sale or advertising for the services, and the services must be “rendered in commerce.” *Id.*

MGA operates an advertising-supported, for-profit, news-gathering website in the United States, using the “IJ” and “IJ.” logos. *Id.* at ¶¶ 39, 47. The site includes hyperlinks to other for-

profit news websites. *Id.* at ¶ 41. MGA's recent switch to the <ij.com> domain name hinders consumers' access to IJ's website, accessible at <ij.org>. *Id.* at ¶¶ 54, 55. All this constitutes use of the mark in commerce. Under this Circuit's precedent, these facts are sufficient to demonstrate that MGA has used the IJ Marks in commerce and in connection with goods or services. *See People for Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 365-66 (4th Cir. 2001) (holding that the registration of the domain name PETA.org and the creation of a website called "People Eating Tasty Animals" were done in connection with goods and services, even though the owner of PETA.org did not sell any goods or services and instead, merely provided links to "commercial operations offering goods and services").

This use of the "IJ" mark is also unauthorized. Plaintiff never gave permission to MGA for such use, and in fact has explicitly objected to the use as violating its rights. Verified Complaint ¶¶ 57-62, 76.⁷ Accordingly, Plaintiff is also likely to establish that MGA's use of Plaintiff's marks is in commerce and unauthorized.

3. Defendants' Use of the IJ Mark Is Likely To Cause Confusion With Plaintiff's IJ Marks.

The heart of a successful claim for trademark infringement is a showing of likelihood of confusion. The "ultimate question" in determining whether a new mark infringes an existing mark is whether there exists a likelihood that an appreciable number of ordinarily prudent purchasers will be misled, or indeed simply confused, as to the source of the goods or services in question. *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 127 (4th Cir.1990) (quotation marks and citations omitted). In conducting this inquiry, courts apply a flexible test that considers the following nine factors:

⁷ Plaintiff reached out to MGA to resolve the dispute without involving the courts. Heedless of this warning, Independent Journal changed its marks to become more like Plaintiff's.

- (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 Defendants' intent;
- (7) actual confusion;
- (8) the quality of the Defendants' product; and
- (9) the sophistication of the consuming public.

George & Co. LLC v. Imagination Ent. Ltd., 575 F.3d 383, 393 (4th Cir. 2009). "This judicially created list of factors is not intended to be exhaustive or mandatory," *Rosetta Stone Ltd.*, 676 F.3d at 154, and "[n]ot all these [factors] are always relevant or equally emphasized in each case," *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984) (quotation marks and citation omitted). In "determin[ing] whether the Defendants' use is likely to cause confusion," a court must consider how "the two parties actually use their marks in the marketplace." *CareFirst of Maryland, Inc. v. First Care, P.C.*, 434 F.3d 263, 267 (4th Cir. 2006).⁸

a. The IJ Marks Are Strong and Distinctive.

Plaintiff's IJ Marks are strong and entitled to a broad scope of protection. The "strength" of a trademark is evaluated in terms of both "conceptual strength and commercial strength." *CareFirst of Md., Inc.*, 434 F.3d at 269. "Measuring a mark's conceptual or inherent strength focuses on the linguistic or graphical 'peculiarity' of the mark considered in relation to the product, service, or collective organization to which the mark attaches." *Id.* (citation omitted).

The incontestable registrations owned by IJ give rise to a conclusive presumption that the mark is distinctive. *See* 15 U.S.C.A. § 1115(b) ("To the extent that the right to use the registered

⁸ For the purposes of this motion, the quality of the defendant's product is irrelevant and will thus not be addressed. This element generally "applies in 'situations involving the production of cheap copies or knockoffs of a competitor's trademark-protected goods.'" *George & Co. LLC*, 575 F.3d at 399 (quoting *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 467 (4th Cir. 1996)).

mark has become incontestable ..., the registration shall be conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce.”).

Even for IJ's common law rights in the IJ Mark, the evidence shows that the mark is inherently distinctive. The first step is to place the mark into “one of four categories of distinctiveness: (1) generic; (2) descriptive; (3) suggestive; or (4) arbitrary or fanciful.” *George & Co. LLC*, 575 F.3d at 394. Suggestive, fanciful and arbitrary marks such as “IJ” are “inherently distinctive” and entitled to the highest level of protection. *Id.*

The second step considers the mark's commercial strength, “a concept similar to the ‘secondary meaning’ inquiry considered in evaluating a mark's validity.” *George & Co. LLC*, 575 F.3d at 395.⁹ As the Fourth Circuit explained in *CareFirst of Maryland, Inc.*, this inquiry “looks at the marketplace and asks ‘if in fact a substantial number of present or prospective customers understand the designation when used in connection with a business to refer to a particular person or business enterprise.’ ” 434 F.3d at 269 (quoting *Food Fair Stores, Inc. v. Lakeland Grocery Corp.*, 301 F.2d 156, 160–61 (4th Cir. 1962)). Courts also consider “the frequency of prior use of the word in other marks, particularly in the same field of merchandise or service.” *Pizzeria Uno Corp.*, 747 F.2d at 1530–31.

In making the decision on commercial strength, courts also consider “the length and manner of the mark's use, . . . the nature and extent of advertising and promotion of the mark, and . . . the efforts made to promote a conscious connection, in the public's mind, between the mark and a particular product [or service].” *Hornady Mfg. Co. v. Doubletap, Inc.*, 746 F.3d 995,

⁹ The Ninth Circuit has held that, because commercial strength is an evidence-intensive inquiry, it is unnecessary to consider it at the preliminary injunction stage. See *Network Automation, Inc. v. Advance Sys. Concepts, Inc.*, 638 F.3d 1137, 1150 (9th Cir. 2011). Regardless of whether this Court chooses to consider commercial strength, IJ has produced sufficient evidence to demonstrate that the IJ Mark is commercially strong.

1008 (10th Cir. 2014). IJ has used the IJ Marks continuously and without interruption for over twenty years in connection with a wide variety of services, including educational, publishing, and policy driven services. Verified Complaint ¶ 28. Indeed, federal courts have found that the use of a mark for shorter periods of time is evidence of commercial strength. *See Hornady Mfg. Co.*, 746 F.3d at 1008 (noting that 17-year history of use was evidence of commercial strength). Plaintiff spends approximately \$50,000 from 2014-15 in advertisements featuring its IJ Mark. Verified Complaint ¶ 33; *see also SunEarth, Inc. v. Sun Earth Solar Power Co.*, No. C 11-4991 CW, 2013 WL 4528539, at *3, 14 (N.D. Cal. Aug. 23, 2013) (finding plaintiff's mark was strong in part due to its long-term advertising efforts, in which it spent approximately \$66,000 per year).

Plaintiff's significant promotional activities and the unpaid publicity that surrounds Plaintiff's activities, including several high-profile arguments before the Supreme Court, ensure that members of the public routinely are exposed to Plaintiff's IJ Marks; and that Plaintiff's activities over the years have resulted in widespread awareness and recognition of Plaintiffs and the IJ Marks. Verified Complaint ¶ 33. Accordingly, IJ's marks are strong marks and entitled to a broad scope of protection.

b. The Marks are Perceived as Similar to Consumers, and Are Used on Related Services.

The Fourth Circuit has referred to factors 2 through 5 as the “similarity” factors: the similarity of the two marks to consumers; the similarity of the goods or services that the marks identify; the similarity of the facilities used by the markholders; and the similarity of advertising used by the markholders. *See Sara Lee Corp.*, 81 F.3d at 465. As shown below, these factors all also favor Plaintiff’s request for a preliminary injunction.

(i) The Marks Used by Plaintiffs and Defendants are Legally Identical.

Beginning with the similarity of the marks to consumers, the “overall test under this factor is whether there exists a ‘similarity in appearance and sound which would result in confusion.’ ” *Petro Stopping Ctrs., L.P. v. James River Petroleum*, 130 F.3d 88, 94 (4th Cir. 1997) (quoting *Pizzeria Uno Corp.*, 747 F.2d at 1534). Arbitrary arrangements of letters such as “IJ” have generally been given a wide scope of protection, based on the premise that it is more difficult to remember a series of such letters than it is to remember words, figures, phrases, or syllables. *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, (Fed. Cir. 1990) (finding TMS confusingly similar to TMM); *CAE, Inc. v. Clean Air Eng’g, Inc.*, 267 F.3d 660, 684 (7th Cir. 2001) (“The CAE mark is an unpronounceable set of letters and thus falls into the category of letter marks generally accorded broader trademark protection because ‘it is more difficult to remember a series of arbitrarily arranged letters than it is to remember words, figures, phrases or syllables.’”) (quoting J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:33 (4th ed. 1998-2015))). The difficulty of remembering multiple-letter marks makes the likelihood of confusion between such marks, when similar, more probable. McCarthy, *supra*. As discussed above in Section IV(A), in cases such as *Nat’l Rural Elec. Coop. Ass’n*, 1992 WL

477020, at *4; *N.Y. State Elec. & Gas Corp.*, 697 F. Supp. 2d at 433; *Kadant, Inc.*, 244 F. Supp. 2d at 29; and *Specialty Measurements, Inc., Inc.*, 763 F. Supp. at, 95, preliminary injunctions were granted in cases of identical or highly similar acronyms.

To state the obvious, “IJ” and “IJ” are identical marks in every way – sound, appearance, and meaning. The Defendants originally appropriated Plaintiff’s IJ mark in its entirety and added the generic term “Review” to it. Since August 2015, MGA has dropped the “Review” portion of its name and merely uses “IJ” and in the case of its logo, merely added a “.” to the mark.

MGA also uses IJDOTCOM as a mark and has changed its domain name from <ijreview.com> to <ij.com> – a virtually identical domain to <ij.org>.¹⁰ The marks – even when Independent Journal used the term “Review” with “IJ” – share the same dominant term: “IJ”, which makes confusion more likely.¹¹ Given that these marks are arbitrary arrangement of letters and consumers are charged with imperfect memories, confusion is very likely.

(ii) The Services of Plaintiff and Defendants are Identical or, at Least, Highly Related.

Similarity of the services offered is measured “with respect to each party’s actual performance in the marketplace.” *CareFirst of Md., Inc.*, 434 F.3d at 272. The parties’ offerings do not have to be identical for a court to find that they are similar. *See Pizzeria Uno Corp.*, 747

¹⁰ The evidence of similarity in this case is more than enough to establish that Independent Journal’s use of the IJ Mark in its domain name is sufficiently similar to be confusing. *See, e.g., Volvo Trademark Holding AB v. Volvospare.com*, 703 F. Supp. 2d 563, 568 (E.D. Va. 2010) (holding that volvospare.com has as its dominant term VOLVO, which was confusingly similar to the VOLVO mark); *Cardservice Int’l, Inc. v. McGee*, 950 F. Supp. 737 (E.D. Va. 1997) (holding that use of “Card Service” alone and in domain name cardservice.com “exactly duplicates” plaintiff’s mark Cardservice); *see also Audi AG v. D’Amato*, 469 F.3d 534, 543 (6th Cir. 2006) (noting that, “with respect to domain names, addition of characters along with the mark ‘does not eliminate the likelihood of confusion’” and holding that <audisport.com> was confusingly similar to AUDI) (citation omitted); *Specialty Vehicle Acquisition Corp. v. Am. Sunroof Corp.*, No. 07-13887, 2008 WL 2795834, at *5 (E.D. Mich. July 18, 2008) (holding that ASCusa.com was confusingly similar to ASC).

¹¹ It is “a settled principle of trademark law” that the “dominant part of a mark may be given extra weight on the issue of likelihood of confusion[.]” *Pizzeria Uno Corp.*, 747 F.2d at 1530; *see also Volvo Trademark Holding AB*, 703 F. Supp. 2d at 568 (“[T]he allegedly infringing domain name does not need to be identical to the registered mark. Rather, the ‘dominant or salient portions’ of the domain name must be sufficiently similar.”) (quoting *Lone Star Steakhouse & Saloon, Inc.*, 43 F.3d at 936).

F.2d at 1535 (finding that a business that offered “Italian cuisine, and full bar, in a sit-down restaurant” and a business that offered “drive-through and counter service for Mexican fast food” were sufficiently similar to weigh in favor of finding infringement); *cf. Lamparello v. Falwell*, 420 F.3d 309, 315 n.3 (4th Cir. 2005) (noting that, while a parody political site did not offer services similar to the site parodied, “this would be a different case” had the parody site offered views “subtly different from those of” the original site under the same mark).

In this case, the services at issue are identical and/or highly related. Both Plaintiff and the Defendants operate in news dissemination, education and policy fields. Verified Complaint ¶¶ 9-10. Plaintiff’s actions and publications are regularly featured in publications of national reach and recognition. *Id.* ¶ 15-16. IJ also promotes its work through its website and social media, among other media. *Id.* ¶ 17-18.

Defendants also operate websites and social media pages aimed, at least in part, at influencing political beliefs and policies. *Id.* ¶¶ 41-46. It also disseminates news stories it thinks will be interesting to the general public. Both parties’ websites appear cheek by jowl when “IJ” is searched on popular search engines. Both publish videos on Youtube; operate Twitter accounts with almost identical names (@ij; @ijdotcom; @ij_politics; @ij_lift) have Facebook pages with “IJ” logos. *See id.* ¶¶ 18, 47, 54. The services are overlapping and – at least – highly related.

Thus, Defendants’ use of an identical mark to promote closely related, complementary services and activities mandates a finding of likely confusion. *See Eurotech, Inc. v. Cosmos European Travels Aktiengesellschaft*, 213 F. Supp. 2d 612, 622-23 (E.D. Va. 2002) (finding a likelihood of confusion where Plaintiff offered travel information and Defendants offered travel tours, both using the dominant term “Cosmos”).

c. Plaintiff and Defendants Use a Common Marketing Channel.

Plaintiff and Defendants use at least one identical marketing channel—the Internet—to attract the same potential consumers of their services. In particular, Plaintiff operates a website under the domain name <ij.org>. To no one’s surprise, a search for “IJ” on common search engines will bring up both parties’ websites close together. Verified Complaint ¶ 54.¹²

Under Fourth Circuit law, “a domain name is more than a mere internet address. It also identifies the internet site to those who reach it, much like ... a company’s name identifies a specific company.” *Virtual Works, Inc. v. Network Solos., Inc.*, 106 F. Supp. 2d 845, 847 (E.D. Va. 2000), *aff’d sub nom, Virtual Works, Inc. v. Volkswagen of Am., Inc.*, 238 F.3d 264 (4th Cir. 2001); *Cardservice Int’l, Inc.*, 950 F. Supp. at 743, *aff’d*, 129 F.3d 1258 (4th Cir.1997) (holding *cardservice.com* infringes CARD SERVICE). The “special nature of the Internet” and how “domain names function . . . may also heighten the potential for confusion.” *Wash. Speakers Bureau, Inc. v. Leading Authorities, Inc.*, 33 F. Supp. 2d. 488, 499 (E.D. Va. 1999). Consumers who are unsure about an organization’s domain name “will often guess” and “may well believe” a domain name belongs to the “trademark holder, despite contrary evidence on the website itself.” *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1177-78 (9th Cir. 2010) (quoting *Cardservice Int’l*, 950 F. Supp. at 741).

The holder of a domain name should give up that domain name when it is “an intuitive domain name” that belongs to another. *See Washington Speakers Bureau*, 33 F. Supp. 2d at 499 (holding <washingtonspeakers.com>, <washington-speakers.com>, <washington-speakers.net>, and <washington-speakers.net> infringed common law mark WASHINGTON SPEAKERS

¹² MGA operated a website under <ijreview.com>, but recently – and in the face of IJ’s direct warnings – changed to the more similar domain name <ij.com>. MGA’s efforts to move to the IJ brand name also prompted its change to the Twitter handle “@ijdotcom” as well as @ij_politics, and @IJReview, “the opinions and contributor vertical for @IJDOTCOM” and Facebook sites. These are extremely similar to IJ’s own website domain name (ij.org), Twitter handle (@ij) and other social media offerings.

BUREAU). As the court stated: “These facts of Internet life make it somewhat more likely that consumers seeking [plaintiff] on the web will find [Defendants’] website advertising similar services and become confused.” Consumers looking for information regarding Plaintiff are likely to have (and have had) their attention diverted by the activities of Defendants and operation of <ij.com>. As was the case in *Cardservice*, consumers seeking IJ’s services or knowledge about the organization “are likely to assume” that <ij.com> is in fact the place to look, given the special nature of the Internet and domain names. *See Cardservice Int’l*, 950 F. Supp. at 741 (finding sufficient evidence of confusion where “Cardservice International’s customers who wish to take advantage of its internet services but do not know its domain name [were] likely to assume that “cardservice.com” belongs to Cardservice International”). Moreover, there is no functional difference between an intuitive domain name and an intuitive Twitter handle or Facebook page – both are likely to be seen by consumers as the location for a specific organization – in this case, IJ.

There is also no doubt that Independent Journal and IJ often appeal to the same “type” of consumer – those who are interested in public policy and legal issues and, often, those holding conservative/libertarian viewpoints. Verified Complaint ¶ 24. There is no doubt that IJ is a libertarian organization and champions many issues, such as school choice, eminent domain and asset forfeiture, that are also commonly held by other center right individuals and groups. Independent Journal has been known since its inception as a right-leaning media outlet, founded by Republican strategists and openly affiliated with a conservative digital media consulting company. *Id.* ¶ 40. Many of its articles have a conservative/libertarian slant. *Id.* ¶ 42. It has been reported that Independent Journal is co-hosting the Republican debate as the “conservative media element.” *Id.* at 49. It regularly reports on topics of interest to its readership—the same topics

that are the subject of IJ's legal, education and policy services. *See generally id.* ¶¶ 10, 44.

Clearly, the targeted "customers" of these services overlap. However, the Court need not find that Independent Journal is a right-leaning organization to find such an overlap – any consumers that are interested in legal and policy issues and who encounter Independent Journal are likely to be confused, no matter their political leanings.

d. The Defendants' Intent

The intent of a junior user is relevant if the junior user intended to capitalize on the good will associated with the senior user's mark." *CareFirst of Md., Inc.*, 434 F.3d at 273. Because IJ has not yet taken discovery in this case, it is unknown what Defendants' intent was in adopting and then moving even closer to IJ's mark. At the very least, Defendants acted recklessly in moving to and expanding its IJ brand in August 2015, despite being on notice of IJ's objections and actual confusion in the marketplace. The most Defendants could fairly argue is that this factor is neutral in the context of this motion.

e. Evidence of Actual Confusion Shows that Confusion Between the Marks is Likely.

Although proof of actual confusion is not necessary to show a likelihood of confusion, evidence of actual confusion is "often paramount in the likelihood of confusion analysis." *George & Co. LLC*, 575 F.3d at 393 (quoting *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 804 (4th Cir.2001)). As the Fourth Circuit has explained: "If the strength of the senior mark is the alpha of infringement analysis, then evidence of actual confusion is surely the omega; where the defendant in an infringement case has elected to use a mark similar to that of a competitor's distinctive mark, and, as a result, has actually confused the public, our inquiry ends almost as soon as it begins." *Sara Lee Corp.*, 81 F.3d at 467 (holding L'EGGS and LEG LOOKS

confusingly similar based on testimony of six women, evidence of store personnel confusion and anecdotal evidence).

As described in Section II(B), *supra*, IJ has already documented meaningful evidence of consumer confusion. Individuals who have been confused come from various groups, including the general public as well as IJ's supporters and donors. Professor Thomas McCarthy stated that "given the proper factual setting, even just a few instances of actual confusion can provide very persuasive evidence of how and why confusion can occur." J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 23:14 (4th ed. 1998-2015). Indeed, Plaintiff's verified complaint documents more than eight instances in which persons reported being confused about the source of material that Independent Journal distributed, *see* Verified Complaint ¶ 56, which is greater than the "four or five" instances of confusion found sufficient in *Cardservice*. *See Cardservice Int'l*, 950 F. Supp. at 741. The Eleventh Circuit also has noted that when goods are inexpensive, it is difficult to obtain actual confusion evidence. In one such case, only four instances of actual confusion were found sufficient to support a finding of actual confusion. *AmBrit, Inc. v. Kraft, Inc.*, 805 F.2d 974 (11th Cir. 1986), *op. superseded by* 812 F.2d 1531 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Here, where the services of the parties are offered for no cost to the consumer, the instances of reported confusion are more than sufficient to show a much broader likelihood of confusion. This factor weighs strongly in Plaintiff's favor.

f. Both Sophisticated and Unsophisticated Consumers Are Confused.

As noted above, actual confusion has occurred, and that alone is "often paramount" when determining the likelihood of confusion. *Lyons P'ship, L.P.*, 243 F.3d at 804. Barring an unusual

case, consumer sophistication will only be a key factor when the relevant market is not the at-large public. *Sara Lee Corp.*, 81 F.3d at 467.¹³

Here, both Plaintiff and Defendants direct their services to the public at large—the sophisticated and the unsophisticated alike – who are looking for information on political, policy and social issues, or are seeking to become involved in such activities. The very nature of political activism and discourse generally requires organizations to target broad audiences, particularly when the organizations focus on grassroots or viral efforts. *See Verified Complaint* ¶ 55. Both parties use the Internet to provide information to the general public as well as sophisticated consumers of their services. And even if the market in question is deemed to be only “sophisticated” consumers of political, policy, and social issues, these are precisely the consumers who have been confused by Independent Journal’s use of IJ’s marks. *See id.* This indicates that confusion is likely and this factor weighs strongly in Plaintiff’s favor.

In summary, the Court should find that Plaintiff has a valid, strong mark and has demonstrated a likelihood of confusion. The mark used by Plaintiff and Defendants is identical; the services and activities to which the marks are attributed by both parties are substantially similar; and the marketing channels used by the parties are the same. Confusion is inevitable from the Defendants’ use of the IJ Mark and operation of <ij.com>.

B. IJ Is Being Irreparably Harmed By Defendants’ Infringement.

There is a likelihood—in fact, almost a certainty—of irreparable harm to IJ in this case. *See Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 346 (4th Cir. 2009)

¹³ This factor plays a major role in the Fourth Circuit, and generally only arises in connection with discrete markets involving high-dollar investments purchased by trained professionals. *See, e.g. Perini Corp.*, 915 F.2d at 127-28 (remanding because the district judge made “no inquiry into the sophistication of the ordinary consumer of construction services” who may well be “a highly trained procurement professional whose sensitivity is heightened by the responsibility of sensibly spending millions of dollars”).

(stating likelihood of irreparable harm standard), *vacated on other grounds*, 559 U.S. 1089 (2010), *reinstated in relevant part*, 607 F.3d 355 (4th Cir.2010). Furthermore, “a presumption of irreparable injury is generally applied once the plaintiff has demonstrated a likelihood of confusion, the key element in an infringement case.” *Diamonds Direct USA, Inc.*, 895 F. Supp. 2d at 752 (citations omitted); *accord*, *Reynolds Consumer Products, Inc. v. Handi-Foil Corp.*, No. 1:13-CV-214, 2014 WL 3615853, at *12 (E.D. Va. July 18, 2014) (“[T]his Court has continued to find that ‘irreparable harm is generally applied once the plaintiff has demonstrated a likelihood of confusion, the key element of an infringement case’”).¹⁴

Actual and irreparable injury is occurring and is likely to continue unless and until enjoined by this Court. Defendants are using an identical trademark to designate related services. This has resulted in actual confusion and a loss of control by Plaintiff over the use of the IJ designation. *Toolchex, Inc. v. Trainor*, 634 F. Supp. 2d 586, 591-92 (E.D. Va. 2008)(holding that “[a] party may prove that it was irreparably injured by showing that its customers were actually confused by the defendant’s allegedly infringing activity”).

This injury is particularly acute because IJ is strictly prohibited from engaging in activities that Defendants may freely perform, such as engaging in the political process by supporting candidates and engaging with parties, such as the forthcoming Republican debate. Verified Complaint ¶ 51. IJ’s stellar reputation as a non-partisan organization that does not involve itself with partisan or election issues is likely to be severely damaged if consumers believe that it sponsors or is affiliated with a viral news organization such as Independent Journal that is deeply involved in partisan – currently Republican party – politics. Such injury cannot be

¹⁴ *But see Pro-Concepts, LLC v. Resh*, No. 2:12CV573, 2013 WL 5741542, at *21 (E.D. Va. Oct. 22, 2013) (holding that, following *Winter*, 555 U.S. at 9 (2008), “the Court should not rely on a presumption of irreparable injury based on the likelihood that Resh’s actions—whether intentional or not—are likely to confuse or mislead Pro-Concepts’ customers”). Regardless of *Winter*’s effect, if any, on the presumption of harm in the Fourth Circuit, Plaintiff has demonstrated sufficient facts to establish irreparable harm.

reversed once individuals falsely believe that IJ is engaging in the sort of activities and “shock” journalism that Defendants routinely perform. IJ may be targeted with governmental inquiries, and the judiciary, legislators, clients and supporters may be confused about IJ’s services when seeking information about the organization. *Trainor*, 634 F. Supp. 2d at 591–92. (holding that “[a] party may prove that it was irreparably injured . . . by demonstrating the ‘possibility’ of a ‘risk to [the party’s] reputation’” (quoting *Lone Star Steakhouse & Saloon, Inc.*, 53 F.3d at 939)).

Moreover, it is likely that such harm will continue to develop as Defendants’ services grow in notoriety – for example, if Independent Journal were to be permitted to sponsor the Republican debate on February 6, 2016 under the brand name “IJ”. Millions of Americans will see “IJ” plastered in advertisements, paraphernalia, on backdrops, and on-air chiron. “IJ” will be on TV, print, and social media outlets throughout the country. Many of them will think “IJ” refers to Plaintiff – either because they already know of IJ, or because they later encounter IJ. And, they undoubtedly will question IJ’s integrity and reputation in this highly politicized environment. If consumers continue to be confused over the source or affiliation between Plaintiff and Defendant, this is likely to harm Plaintiff’s superior credibility with consumers, clients, the judiciary and legislators.

C. The Balance of Equities Decidedly Favors Plaintiff.

There can be no question that the balance of equities decidedly favors Plaintiff, especially given the high likelihood of success on the merits. The injury to reputation and probable loss of goodwill to Plaintiff; the actual confusion caused by Defendants’ activities; and the harm to the public as a result of Defendants’ blatantly infringing activities outweighs the costs that Defendants will incur if prohibited from using the IJ designation until the Court reaches a final decision on the merits. The immediacy of this need is acute, since MGA is hosting the

Republican debate in less than three months and IJ cannot wait for a final resolution of this case to avoid lasting damage. Verified Complaint ¶ 62.

Plaintiff is not seeking to stop Defendants from conducting business or operating a website under another name, such as “Independent Journal”. Plaintiff simply seeks to stop Defendants’ infringing use of Plaintiff’s IJ trademarks, trade names, reputation and goodwill. The fact that Defendants re-branded to the IJ name alone and began operation of the <ij.com> domain less than two months ago indicates that it can reverse course quickly and adopt a non-confusingly similar name. Plaintiff brought its rights in the IJ Marks to Defendants’ attention more than nine months ago. Accordingly, Defendants have proceeded to expand use of the infringing name for the last months at its own peril.

D. The Injunction Is in the Public Interest.

The two aims of trademark law are to “protect the public from deceit” and to protect “investment from its misappropriation by pirates and cheats.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 782 n.15 (1992) (Stevens, J. concurring) (citing S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946)); *see also AMP Inc. v. Foy*, 540 F.2d 1181, 1185–86 (4th Cir.1976) (stating the purpose of a trademark is to protect the public from confusion about “the identity of the enterprise from which goods and services are obtained”). Thus, the public interest is served when the courts “prevent[both] consumers from being confused” and “trademarks from being used deceptively[.]” *Toolchex, Inc.*, 634 F. Supp. 2d at 594. Here, IJ has established that its mark is being misappropriated and that actual confusion will continue to grow if MGA is permitted to proceed with use of IJ’s mark. The principal public policy aim of trademark protection is served by enjoining Defendants from using the IJ Mark, and this factor tips decidedly in Plaintiff’s favor.

IV. CONCLUSION

All of the factors warranting the issuance of a preliminary injunction are present in this case. Accordingly, Plaintiff's motion for a preliminary injunction should be granted. A proposed order granting Plaintiff's requested relief is attached.

Respectfully submitted,

By: 

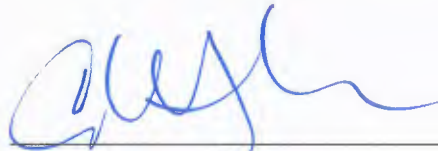
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of October, 2015, a true and correct copy of the foregoing Memorandum in Support of Plaintiff's Motion for Preliminary Injunction was hand delivered to the Clerk of Court, and was issued for service with the Complaint and Summons:

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