NO. 22-2075

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

H&R BLOCK, INC. AND HRB INNOVATIONS, INC.,

Plaintiffs-Appellees,

v.

BLOCK, INC.,

Defendant-Appellant.

On Appeal From The United States District Court
For The Western District of Missouri
Hon. Nanette K. Laughrey

APPELLANT'S OPENING BRIEF

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June 17, 2022

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This is an appeal from a preliminary injunction in a trademark infringement case. The district court ordered Defendant Block, Inc. to reorganize its corporate structure or make other drastic changes to its business based on a finding that *third-party* discussions of its new corporate name might cause confusion with trademarks allegedly held by Plaintiffs H&R Block, Inc. and HRB Innovations, Inc. But trademark liability extends only to a *defendant's* confusing use of marks in the marketplace. Defendant does not use "Block" to market its finance app "Cash App" or its "Cash App Taxes" feature. Defendant's "gold-standard" *Eveready* survey thus unsurprisingly showed no confusion. The court legally erred in giving no weight to that survey while crediting third-party press and social media posts. And the court wrongly compared "H&R Block" with "Block" rather than with "Cash App" and "Cash App Taxes"—the actual brands used for Defendant's tax services.

Further, the district court abused its discretion in weighing the equities. The court presumed irreparable harm to Plaintiffs and improperly disregarded evidence rebutting that presumption and showing the irreparable harm an injunction would cause to Defendant's businesses, its customers, and the public interest.

The preliminary injunction warrants vacatur for all these reasons and also because it unconstitutionally restricts Defendant's protected speech.

Defendant respectfully requests 15 minutes of oral argument per side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Block, Inc. states that it is a publicly traded company on the New York Stock Exchange; it has no parent company; and, based on currently available public filings, no publicly-held company owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

The district court has original jurisdiction over the Lanham Act claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338, and has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a). The district court issued a preliminary injunction order on April 28, 2022, and Defendant timely filed a notice of appeal on May 18, 2022. This Court has jurisdiction to review the preliminary injunction order pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

1. Whether the district court committed legal error in ruling that Plaintiffs are likely to succeed on their trademark infringement claims because the court: (a) gave no weight to clear-cut survey evidence showing no confusion and instead relied on third-party references to Defendant that are divorced from marketplace conditions, and (b) compared the wrong marks.

Frosty Treats, Inc. v. Sony Comp. Entm't Am. Inc., 426 F.3d 1001 (8th Cir. 2005); *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622 (8th Cir. 1987); *Calvin Klein Cosmetics Corp. v. Lenox Lab'y Inc.*, 815 F.2d 500 (8th Cir. 1987); *Vitek Sys., Inc. v. Abbott Labs.*, 675 F.2d 190 (8th Cir. 1982).

2. Whether the district court abused its discretion in ruling that the equities weighed in favor of an injunction because the court: (a) presumed irreparable harm to Plaintiffs despite Defendant's rebuttal of such harm and Plaintiffs' own

admissions of the absence of confusion, (b) disregarded that the irreparable harm the preliminary injunction will cause to Defendant and its customers outweighs any interim harm to Plaintiffs, and (c) discounted the public interest served by maintaining Cash App Taxes as a competitive source of free tax services.

Iowa Utilities Bd. v. F.C.C., 109 F.3d 418 (8th Cir. 1996); *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438 (8th Cir. 1991); *Cellular Sales, Inc. v. Mackay*, 942 F.2d 483 (8th Cir. 1991); *Calvin Klein Cosmetics Corp. v. Lenox Lab'y Inc.*, 815 F.2d 500 (8th Cir. 1987).

3. Whether paragraph 2 of the preliminary injunction unconstitutionally restricts Defendant's protected speech.

Turning Point USA v. Rhodes, 973 F.3d 868 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 2421 (2021); *Blue Moon Ent., LLC v. City of Bates City, Mo.*, 441 F.3d 561 (8th Cir. 2006); *Coca-Cola Co. v. Purdy*, 382 F.3d 774 (8th Cir. 2004); *Anheuser-Busch, Inc. v. Balducci Publ'ns*, 28 F.3d 769 (8th Cir. 1994).

STATEMENT OF THE CASE

A. Defendant's Businesses And Addition Of Cash App Taxes

Defendant Block, Inc., previously known at the corporate parent level as Square, Inc., operates businesses that offer tools to empower individuals and small business owners who have historically faced barriers to participation in the economy. App.71; R. Doc. 39 ¶¶6-8. Defendant's businesses include Square (payment

processing and tools to empower businesses), Spiral (bitcoin/blockchain), TIDAL (music streaming and artist support), TBD (decentralized finance), and Cash App (financial services). App.71, App.73-75; R. Doc. 39 ¶¶6-8, 12-15.

Cash App first launched in 2013 as "Square Cash." App.92-93, App.164; R. Doc. 40 ¶4 & Ex. D. Since then, Cash App has "become a comprehensive suite of financial tools and products for tens of millions of active customers." App.92; R. Doc. 40 ¶4. Cash App's services have naturally expanded over the last few years to enable customers to transfer money, trade stocks and bitcoin, get a debit card, borrow money, and file taxes. App.92-93; R. Doc. 40 ¶4. It has been the #1 finance app in the Apple and Google app stores for the past five years, and tens of millions of consumers use it every month. App.94; R. Doc. 40 ¶¶8-9. Cash App offers all of these services under the same Cash App house mark and stylized dollar symbol green square logo. App.93, App.107-46; R. Doc. 40 ¶6 & Ex. B.

Cash App's name and logo are federally registered trademarks (App.101-04; R. Doc. 40 Ex. A), and have earned wide brand recognition (App.93-94; R. Doc. 40 ¶¶7, 9). The Cash App mobile application has been downloaded more than 100 million times and has 70 million active users annually. App.93-94; R. Doc. 40 ¶¶7.

Defendant added Cash App Taxes to its Cash App business after its November 2020 acquisition of the free tax service "Credit Karma Tax" from a company called Credit Karma, Inc. Defendant acquired this business after the Department of Justice ("DOJ") opposed the proposed purchase of Credit Karma by Intuit, owner of TurboTax. Concerned that Intuit's dominance in tax services would lessen competition for digital do-it-yourself ("DDIY") and free tax services, the DOJ required Intuit and Credit Karma to divest Credit Karma Tax. *See* 86 Fed. Reg. 22,708 (Apr. 29, 2021). The DOJ found that Defendant would be an appropriate entity to acquire Credit Karma Tax because it "w[ould] preserve competition in the market for DDIY tax preparation products" and would enable consumers to continue having a free tax-service option. *Id.*; *see* App.917; R. Doc. 114-2 ¶¶16-17. The DOJ based its assessment on Cash App's "marketing and customer-acquisition capabilities" and its understanding that Defendant would launch and advertise the newly acquired tax service as a feature of its established Cash App platform. 86 Fed. Reg. 22,708 (Apr. 29, 2021).

In acquiring Credit Karma Tax, Defendant entered into an Assurance with the New York Attorney General ("NYAG"). App.913-25; R. Doc. 114-2. Like the DOJ, the NYAG sought to ensure that taxpayers would have continued access to free tax-return services. To further this goal, the Assurance bars Defendant from selling Cash App Taxes until 2024. App.920; R. Doc. 114-2 ¶22. Defendant launched Cash

App Taxes as a feature of Cash App a year later, after expending significant resources to extract Credit Karma Tax from Credit Karma, integrate Credit Karma Tax into the Cash App mobile application, and rebrand Credit Karma Tax within Cash App as "Cash App Taxes." App.722, App.95-96; R. Doc. 93, at 226:16-18, R. Doc. 40 ¶¶13-15. By integrating Cash App Taxes into Cash App, Defendant enabled Cash App Taxes users to benefit from Cash App's well-established account structure, including its risk systems, privacy systems, data infrastructure, and client-server interactions. App.722; R. Doc. 93, at 226:13-15. That integration also enabled Cash App Taxes' customers to process any tax refunds they received by using Cash App's other financial services, including stock investment, bitcoin exchange, and peer-to-peer money transfer services. App.95-96; R. Doc. 40 ¶15. To access Cash App Taxes on the Cash App website or the Cash App mobile application, customers must first download the Cash App application. App.96; R. Doc. 40 ¶16. Cash App is not available in any brick-and-mortar retail stores or through any online marketplaces like Amazon or eBay.

B. Defendant's Change Of Corporate Name

In December 2021, Defendant announced a corporate name change at the parent level from "Square, Inc." to "Block, Inc." This name change reflected the growth of Defendant's portfolio to include a new and increasingly diverse set of

businesses and to evoke the fact that an increasing number of those businesses operate on the "blockchain." App.75-77; R. Doc. 39 ¶¶12-15, 17-22.[1]

Defendant uses "Block" solely as its corporate parent name and identity, and does not use its corporate name to brand, advertise, or sell its customer-facing products and services. App.75-76; R. Doc. 39 ¶18. Defendant chose not to use a "house mark" that unites all of its businesses under one corporate name and instead chose to use a "house of brands" model to allow its customer-facing brands to have identities distinct from its corporate name. *Id.* Just as "Bounty" paper towels and "Puffs" facial tissues have their own brand identities, separate from one another and from their corporate parent, Procter & Gamble, Block sought to separate "Cash App" (including Cash App Taxes) and "Square" from the parent company's name in the minds of their customers. App.76; R. Doc. 39 ¶19. For example, Defendant does not use the "Block" name or logo in its advertising for Cash App or Cash App Taxes, nor does it market, advertise, or otherwise refer to Cash App or Cash App Taxes as "Cash App by Block" or "Cash App Taxes by Block." *Id.*; *see* App.95-96; R. Doc. 40 ¶¶11, 15.

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[1] "Blockchain" refers to a database used to store information electronically, and is often used in connection with cryptocurrency. *See* Investopedia, *Blockchain Explained*, https://www.investopedia.com/terms/b/blockchain.asp (last updated Mar. 5, 2022).

Defendant instead uses the corporate name "Block" to communicate with investors, regulators, current and prospective employees, and the media, including on its corporate website (block.xyz) and social media platforms such as LinkedIn, Twitter, and Instagram. *See* App.640; R. Doc. 93, at 144:4-11, 19-21. Block's corporate name also appears in the legal "fine print" of the customer-facing businesses' websites, terms of services, and other legal documents when necessary. App.693-94, App.715; R. Doc. 93, at 197:17-198:25, 219:10-16.

C. The Proceedings Below

After Defendant announced its corporate name change in December 2021, Plaintiffs filed this action alleging trademark infringement and unfair competition under the Lanham Act and Missouri common law. App.17-45; R. Doc. 1. Plaintiffs allege that Defendant's "Block" name and Cash App logo are likely to cause confusion with H&R Block's name and green square branding, as shown below. R. Doc. 16, at 2; R. Doc. 17, at 29-30.

Cash App

Plaintiffs allege they own several trademarks that incorporate the word BLOCK, including H&R BLOCK, BLOCK ADVISORS, BLOCKWORKS, and BLOCK HAS YOUR BACK. *See* App.47-48; R. Doc. 16-1 ¶5. They have a

registered trademark for the use of a green square in connection with tax services. App.57-58; R. Doc. ¶20. Plaintiffs do not have a federally-registered trademark in the word BLOCK alone. App.555; R. Doc. 93, at 59:12; *see* App.40; R. Doc. 1 ¶¶59-60. Plaintiffs allege that they have common law trademark rights in the word BLOCK (alone) for income tax services. App.40. Even so, the word "Block" almost always appears "close by" distinct, source-identifying language such as "H&R Block." App.598-99; R. Doc. 93, at 102:3-103:7.

"[O]n the brink of tax season" (App.392; R. Doc. 76, at 19:2-6), Plaintiffs moved for a preliminary injunction prohibiting Defendant from "using Block, Inc." and from using Cash App's logo with Cash App Taxes. App.754; R. Doc. 93, at 258:10, 16-17. Plaintiffs' initial evidence consisted solely of social media posts discussing Defendant's corporate name change; none suggested a consumer had mistakenly used Cash App or Cash App Taxes or mistaken them for H&R Block's services. App.32-34; R. Doc. 16-1 ¶¶ 34-38.

In opposition, Defendant submitted a classic "*Eveready*" consumer confusion survey conducted by its expert witness, Wharton School professor Dr. Yoram ("Jerry") Wind. App.167-213; R. Doc. 42.[2] Dr. Wind's survey tested

[2] An "*Eveready*" survey is a survey using the methodology approved in *Union Carbide Corp. v. Ever-Ready Inc.*, 531 F.2d 366 (7th Cir. 1976). The leading treatise labels the "*Eveready*" survey the "gold standard" for assessing consumer confusion. 6 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:174 (5th ed. 2021).

how hundreds of potential consumers reacted to the Cash App logo and website, the Cash App Taxes logo and website, and the block.xyz homepage, and asked them whether they confused the Cash App name and logo, the Cash App Taxes webpage, or the Block corporate website with H&R Block. App.176-86; R. Doc. 42 ¶¶24-40. Dr. Wind selected these stimuli because they were "representative of how consumers might encounter the logos associated with [Defendant's] brands in the real world" and thus "were generalizable to all of [Defendant's] marks." App.177; R. Doc. 42 ¶26. Dr. Wind controlled for stimuli that did not include the color green, square or cube designs, or the name "Block." App.176-81; R. Doc. 42 ¶¶24-30.

Dr. Wind found that consumers do *not* confuse Cash App's name or logo, its Cash App Taxes website, or the website of its corporate parent, Block, Inc., with "H&R Block"; only a miniscule number of survey respondents—between 0% and 1%—were confused. App.187-90; R. Doc. 42 ¶¶41-46. Dr. Wind described this as "among the most clear-cut survey results of 'no confusion' that I have seen in over forty years of designing, conducting, and evaluating thousands of consumer surveys." App.171; R. Doc. 42 ¶6; *see* App.190; R. Doc. 42 ¶46. Defendant also submitted an expert declaration from Yale School of Management professor Dr. Ravi Dhar, which showed that no current or prospective customers experienced confusion in acquiring and using Cash App and Cash App Taxes. App.222-38; R. Doc. 43, at 7-23.

In reply, Plaintiffs submitted a survey by Sarah Butler, a Managing Director at NERA Economic Consulting, that showed respondents an article about Square's purchase of Credit Karma Tax, altered "Square" to "Block," and asked respondents if they remembered the article as being about H&R Block. App.286-87, App.289-90; R. Doc. 56 ¶¶34-38, 41-42. An earlier, "pilot" version of Ms. Butler's survey tested an article prominently mentioning "Cash App" and showed ***negative*** consumer confusion—only two respondents mentioned "H&R Block" in response to any question, and they were in the "control" group, meaning they did not see the altered version of the article that substituted "Square" with "Block." *See* App.419-20; R. Doc. 80-3 ¶¶20-21. Dr. Wind testified that he had "never used" a third-party media source as a survey stimulus and was not "aware of any instance in which such stimuli or survey has been accepted on the issue of confusion." App.417; R. Doc. 80-3 ¶14.

Plaintiffs also submitted an expert report from Wharton School professor Dr. David Reibstein, who opined, based on third-party media sources and *without* looking to Defendant's actual branding in the marketplace, that consumers would likely confuse Cash App with H&R Block. App.301; R. Doc. 58, at 6. Dr. Reibstein gave no basis for the view that mere exposure to media sources mentioning both the "Block" parent company and the "Cash App" business would cause consumers to associate the "Block" name with the separately-branded Cash App business, as Dr.

Dhar pointed out in rebuttal (App.466-68; R. Doc. 80-4 ¶¶3-8). Dr. Dhar also explained that the publications Dr. Reibstein cited were "aimed at investors and the business community, not the general consuming public," and thus are not a good proxy for the real-world marketplace conditions that consumers experience. App.469-70; R. Doc. 80-4 ¶¶11-12.

At the preliminary injunction hearing, the district court heard live testimony from three witnesses. Plaintiffs' CEO Jeffrey Jones gave extensive testimony in which he made several critical admissions. *First*, he admitted that Plaintiffs "ha[ve]n't identified a single customer" who was confused by Defendant's marketing. App.586-87; R. Doc. 93, at 90:19-91:3. *Second*, he conceded that Defendant's use of its "Block" name and logo on its "website is [not] confusing to a customer versus [H&R Block's] website." App.589, App.591; R. Doc. 93, at 93:17-18, 95:3-6. *Third*, he conceded that the Cash App name and logo are "not confusingly similar to the H&R Block name and green square logo." App.619; R. Doc. 93, at 123:5-12.

Defendant's General Counsel Chrysty Esperanza and Cash App's Head of Product and Business Owen Jennings also testified. *See* App.632-64, App.666-723; R. Doc. 93, at 136:19-168:13, 170:10-227:3. Ms. Esperanza explained that Defendant changed its corporate name because "the company had outgrown its initial product offering … and really diversified [its] different product lines," that it

had not sought to create any association with Plaintiffs, that it took Defendant "well over a year" to change its corporate name, and that changing the name again "would be a substantial hardship on the company, given the amount of time and effort and resources that we invested in the rebrand." App.642-43; R. Doc. 93, at 146:1-147:24. She also explained, as Mr. Jennings confirmed (*see* App.674; R. Doc. 93, at 178:1-5), that the company does not use "Block" as part of the branding of or promotional efforts for Cash App or Cash App Taxes (*see* App.639; R. Doc. 93, at 143:13-16). Mr. Jennings further testified that it "would be impossible" to separate the Cash App Taxes services from Cash App. *See* App.722; R. Doc. 83, at 226:2-25.

D. The District Court's Preliminary Injunction Order

The district court granted a preliminary injunction in an order entered after the April 18, 2022 tax-filing deadline. Add.1-67; R. Doc. 105. The order enjoins Defendant:

> 1. from using "Block, Inc.," or "Block," or a close variant, such as "Blocks," in connection with or in close proximity to Cash App Taxes or the green square Cash App Taxes logo. This means that Defendant cannot operate Cash App Taxes as a feature of Cash App or be linked to Cash App through a separate application so long as Cash App also refers to Block, Inc. It also means that Cash App Taxes cannot be owned by a legal entity with the word "Block" in it.
>
> 2. from publicly communicating through advertising, press releases, social media, on its websites, or other public tools, that it is associated with Cash App Taxes or any platform or internet

> function that contains or embeds Cash App Taxes or other brands or products associated with taxes or tax services. This preliminary injunction does not prevent Block, Inc. from communicating information to government regulators if required by law to do so.

Add.66-67; R. Doc. 105, at 65-66. The court noted the relevant factors for grant of a preliminary injunction in this Circuit (Add.16; R. Doc. 105, at 16 (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)), and ruled for Plaintiffs on each of them.

First, the district court ruled that Plaintiffs were likely to succeed on the merits. Add.17-55; R. Doc. 105, at 17-55. The court recited this Court's well-established nonexclusive list of factors for determining likelihood of confusion, *see SquirtCo. v. Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir. 1980), but in ruling for Plaintiffs, relied principally (Add.46-50; R. Doc. 105, at 46-50) on evidence that third-party media mentions of "Block" and "Cash App" *might*, *in the future*, cause consumer confusion as to Cash App's affiliation with H&R Block. In doing so, the court primarily relied on two "articles that appear to associate Block, Inc.'s Cash App with H&R Block." Add.46-50; R. Doc. 105, at 46-50. These were not "articles." Instead, they were merely Internet aggregations, generated by an automatic search function, of news headlines about H&R Block that also included headlines mentioning Defendant, including coverage of this lawsuit. Add.46-50; R. Doc. 105, at 46-50; *see* Add.73; Pls.' Ex. 46 (Reuters H&R Block Profile); Add.77;

Pls.' Ex. 50 (MarketScreener H&R Block Profile). The court also relied on unspecified social media posts by third parties that supposedly "reflected actual confusion." Add.47 n.18; R. Doc. 105, at 47 n.18.

The district court reviewed the parties' expert evidence briefly, without analyzing their differences in methodology and results. Add.50-51; R. Doc. 105, at 50-51. The court acknowledged Dr. Wind's and Ms. Butler's surveys, but summarily concluded that "the Parties' expert survey evidence does little to move the needle on the actual confusion analysis" because "the conclusions drawn from them, and the Parties' criticisms ... effectively cancel each other out at this stage." Add.51; R. Doc. 105, at 51.

The district court also credited in passing Plaintiffs' "reverse confusion" and "initial interest confusion" theories (Add.27, Add.48, Add.53, Add.65; R. Doc. 105, at 27, 48, 53, 65), which they had belatedly raised at the end of the preliminary injunction proceedings. Plaintiffs did not introduce any evidence in support of these theories, and the court cited none.

Second, the district court concluded that Plaintiffs would suffer irreparable harm absent an injunction. Add.55-60; R. Doc. 105, at 55-60. The court relied heavily on a presumption of irreparable harm and also on the testimony of H&R Block's CEO (Add.57; R. Doc. 105, at 57), but without acknowledging his concessions about the absence of confusion (*see supra*, at 11).

Third, the district court determined that the balance of hardships tips in Plaintiffs' favor. Add.60-63; R. Doc. 105, at 60-63. Without citation to any evidence, the court discounted as "overstated" Defendant's unrebutted evidence that it would suffer irreparable harm from a preliminary injunction, and instead assumed that a "sophisticated technology company" could "expeditiously separate a recently acquired tax preparation service from the Block, Inc. corporate structure." Add.62; R. Doc. 105, at 62.

Fourth, the district court concluded that the public interest in preventing confusion supported an injunction. Add.63-64; R. Doc. 105, at 63-64. The court cited the general interest in trademark enforcement, disregarding both the interest of Defendant's customers in continuing to use Cash App Taxes and the interest of the DOJ and the NYAG in promoting competition pending resolution of this case on the merits.

E. The Stay Orders

Defendant moved in the district court for a stay pending appeal (R. Doc. 113), submitting additional evidence showing that each possible form of compliance with the injunction would cause Defendant and its customers irreparable harm. Specifically, Owen Jennings (Cash App's Head of Product and Business) and Chrysty Esperanza (Block, Inc.'s General Counsel) offered detailed explanations for why extracting Cash App Taxes from Cash App, suspending Cash App Taxes,

selling or creating a new corporate subsidiary for Cash App, or changing Block's corporate name back to Square would each cause substantial irreversible harm. Add.78-81, App.995; R. Docs 123-1 & 123-2.

Mr. Jennings explained that building a new standalone taxes application would require at least eighteen months and cost "millions of dollars" to rewrite millions of lines of code, beta-test it to ensure the features work correctly and independently of Cash App, and submit it for Apple's and Google's approval. App.982-92; R. Doc. 123-1 ¶¶4-30; *see* App.722; R. Doc. 93, at 226:7-18. He also testified that shutting down Cash App Taxes in the meantime would irreparably harm Cash App Taxes' customers by disrupting ongoing tax returns and refunds from this year's tax season. *See* App.984-85; R. Doc. 123-1 ¶¶9, 30. Ms. Esperanza detailed why breaking out the Cash App business into a new, separate corporate subsidiary "would be time-consuming, costly, and complex, and would result in tremendous redundancies of effort and expense for the company, as well as for government regulators." App.996-98; R. Doc. 123-2 ¶¶2-10. Plaintiffs did not rebut any of this evidence.

The district court issued an order denying a stay pending appeal but granting an administrative stay as to only paragraph 1 of the injunction. App.1000-03; R. Doc. 126. Defendant filed a notice of appeal (App.980; R. Doc. 122) and motions

in this Court for a stay pending appeal and expedited appeal, which this Court granted (CA8 Doc. ID 5165466).

SUMMARY OF ARGUMENT

The district court's preliminary injunction flouts fundamental trademark principles, distorts the equities that plainly weigh against interim injunctive relief, and unconstitutionally restricts Defendant's speech to investors, the business media and prospective employees, among others. This Court rightly issued a stay pending appeal and now should reverse and/or vacate the injunction for any of several reasons.

I. The district court's likelihood-of-success ruling rests on a series of legal errors, each of which independently warrants reversal. The court legally erred by basing its likelihood-of-confusion determination on third-party media discussions of Defendant's "Block, Inc." corporate name instead of examining Defendant's use of the alleged marks in the marketplace, as required by black-letter trademark law. The court then erroneously gave no weight to Defendant's "gold-standard" *Eveready* survey evidence, which *did* test Defendant's branding and marketing and unambiguously showed consumers do not confuse it with "H&R Block." The court further erred in comparing the wrong marks by focusing on the similarity of the words "Block" and "H&R Block," rather than analyzing whether consumers will find Defendant's actual product—*i.e.*, Cash App and its wholly-integrated feature

Cash App Taxes—similar to Plaintiffs' "H&R Block"-branded services. And though the court stated in passing that "reverse confusion" and "initial-interest confusion" theories also supported injunctive relief, they fail for the same reasons as Plaintiffs' "forward confusion" theory and for lack of evidentiary support.

II. The district court abused its discretion in assessing the other preliminary injunction factors, which uniformly warrant vacatur of the injunction. The court failed to properly balance the injunction's particularized and irreparable harms to Defendant's business and First Amendment rights against the remote possibility that Plaintiffs will be injured in the future absent an injunction. Each of the alternative options that the district court identified for compliance with the injunction, if not impracticable, would be highly disruptive to Defendant's business, result in loss of goodwill and/or yield unrecoverable deadweight losses, thereby causing substantial irreversible harm to Defendant. The court also wrongly disregarded the profound public interest in promoting competition underlying Cash App Taxes' integration into Cash App, which both federal and state regulators recognized in supporting that integration.

III. In addition to the errors applicable to the entire injunction, paragraph 2 should be vacated for the independent reason that it unconstitutionally restricts Defendant's speech with its corporate audience, business media, and prospective employees on public forums. The district court did not find that these sophisticated

groups were likely to be confused by the enjoined speech (nor could it have, based on the record), and it failed to apply any level of First Amendment scrutiny.

STANDARD OF REVIEW

This Court reviews "a district court's ultimate ruling on a preliminary injunction for abuse of discretion," but reviews the "underlying legal conclusions de novo." *MPAY Inc. v. Erie Custom Computer Applications, Inc.*, 970 F.3d 1010, 1015 (8th Cir. 2020) (citation omitted). "A district court abuses its discretion when it bases its decision on a legal error or a clearly erroneous finding of fact." *Kennedy Bldg. Assocs. v. CBS Corp.,* 476 F.3d 530, 534 (8th Cir. 2007) (citation omitted).

In this Circuit, likelihood of confusion is an issue of fact, typically reviewed under the clearly erroneous standard. *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769, 773 (8th Cir. 1994) (citations omitted). But such review is "not so limited" where "the district court's conclusions are inextricably bound up in its view of the law." *Id.* (quoting *Calvin Klein Cosmetics Corp. v. Lenox Labs.*, 815 F.2d 500, 504 (8th Cir. 1987)) (conducting *de novo* review); *see Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 15 (1st Cir. 2008) (reversing preliminary injunction in trademark case; "[w]here the district court's analysis reveals a legal error, we address those conclusions de novo").

ARGUMENT

Courts consider the following factors in determining whether to issue a preliminary injunction: (1) the probability the moving party will succeed on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance of hardships; and (4) the public interest. *Dixon v. City of St. Louis*, 950 F.3d 1052, 1055 (8th Cir. 2020) (citation omitted). The district court legally erred on likelihood of success (*see infra* Part I), and abused its discretion in ruling in Plaintiffs' favor on the other three preliminary injunction factors (*see infra* Part II). In addition, the court erred in granting speech-restrictive relief in violation of the First Amendment (*see infra* Part III).

I. THE DISTRICT COURT'S LIKELIHOOD-OF-SUCCESS RULING RESTS ON LEGAL ERROR UNDER FUNDAMENTAL PRINCIPLES OF TRADEMARK LAW

A preliminary injunction "is an extraordinary remedy," *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003), and the burden of justifying this remedy is particularly "heavy" where, as here, the movant seeks "substantially the same relief it would obtain after a trial on the merits," *Dakota Indus., Inc. v. Ever Best Ltd.*, 944 F.2d 438, 440 (8th Cir. 1991) (citations omitted) (affirming denial of trademark preliminary injunction). Plaintiffs failed to meet this heavy burden, and the district court's ruling that Plaintiffs are likely to succeed on the merits rests on legal errors in violation of fundamental principles of trademark law and this Court's well-settled

precedents. These errors warrant reversal and/or vacatur of the injunction. *See, e.g.*, *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 n.3 (8th Cir. 1990) (reversing preliminary injunction where "the district court based its decision on an erroneous legal premise").

A. The District Court Erred In Finding Likelihood Of Confusion Based On Evidence Divorced From Marketplace Conditions

The Lanham Act bars only a defendant's actual uses of marks that cause consumer confusion. *See* 15 U.S.C. §§ 1114(1)(a), 1125(a); *see also KP Perm. Make-Up, Inc. v. Lasting Impression, Inc.*, 543 U.S. 111, 117 (2004) (plaintiff must show alleged infringer's "actual practice is likely to produce confusion in the minds of consumers"). Settled trademark law thus requires a plaintiff to show that "the ***defendant**'s* use of its own mark will likely cause confusion with plaintiff's mark," *Gruner + Jahr USA Publishing v. Meredith Corp.*, 991 F.2d 1072, 1074 (2d Cir. 1993) (emphasis added), in the actual "circumstances ***surrounding the purchase of the goods***," *Vitek Sys., Inc. v. Abbott Labs.*, 675 F.2d 190, 192 (8th Cir. 1982) (emphasis added; internal quotation marks omitted); *see id.* ("Similarity of the marks … must be considered as they are encountered in the marketplace.") (internal quotation marks omitted); *see also, e.g.*, *Select Comfort Corp. v. Baxter,* 996 F.3d 925, 933 (8th Cir. 2021) (stating "core inquiry" is "whether the relevant average consumers for a product or service are likely to be confused as to the source of a product or service or as to an affiliation between sources based on a defendant's

use"); *cf. Sensient Techs. Corp. v. SensoryEffects Flavor Co.*, 613 F.3d 754, 765 (8th Cir. 2010) ("[O]ur precedent is clear that we evaluate the impression the entire mark is likely to have on a purchaser exercising attention usually given by purchasers of such products.") (internal quotation marks omitted).

This Court has further required that a likelihood of confusion be "substantial," rather than "a mere possibility." *Vitek Sys.*, 675 F.2d at 192; *accord Tiffany & Co. v. Costco Wholesale Corp.,* 971 F.3d 74, 84 (2d Cir. 2020); *Springboards to Educ., Inc. v. Houston Indep. Sch. Dist.,* 912 F.3d 805, 812 (5th Cir. 2019); *Water Pik, Inc. v. Med-Sys., Inc.,* 726 F.3d 1136, 1150-51 (10th Cir. 2013); *Peoples Fed. Sav. Bank v. People's United Bank*, 672 F.3d 1, 9-10 (1st Cir. 2012). It is thus hornbook law that "[a]n injunction that is based on a finding that there is only a possibility of confusion will be reversed." 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:3 (5th ed. 2021).

Accordingly, Plaintiffs here bore the burden of showing that ***Defendant's*** use of its corporate parent name "Block" creates a likelihood of confusion among an appreciable number of ordinary users of Cash App Taxes under actual marketplace conditions. It is not enough to show merely hypothetical confusion from uses of the term "Block" outside of marketplace conditions, by third parties beyond Defendant's control. The district court legally erred in finding Plaintiffs' probable success in proving likelihood of confusion based on the record here.

1. The District Court Improperly Relied On Third-Party Media Sources As The Cause Of Confusion

Instead of focusing on consumer reactions to Defendant's actual branding in the marketplace, the court erroneously relied on ***third-party*** media sources "that appear to associate Block, Inc.'s Cash App with H&R Block." Add.46-48; R. Doc. 105, at 46-48. But such evidence, devoid of the market context in which the defendant uses its brand to sell goods and services, cannot establish likelihood of confusion. *See KP Perm. Make-Up*, 543 U.S. at 117; *Select Comfort*, 996 F.3d at 933; *Vitek Sys.*, 675 F.2d at 192.

For this reason, third-party media articles and third-party social media posts are not a legally recognized means of causing consumer confusion or creating liability for trademark infringement. *See, e.g.*, *Kibler v. Hall*, 843 F.3d 1068, 1078-79 (6th Cir. 2016) (no reasonable jury could find likelihood of confusion based solely on a few instances of social media confusion); *Two Hands IP LLC v. Two Hands Am., Inc.*, 563 F. Supp. 3d 290, 307 (S.D.N.Y. Sept. 28, 2021) (rejecting social media evidence where there was no evidence confusion had "any potential or actual effect on consumers' purchasing decisions"); *Fischer & Frichtel Custom Homes, LLC, v. Fischer Mgmt., LLC*, 2021 WL 1750174, *6 (E.D. Mo. May 4, 2021) ("observations of third parties" about potential confusion is not "evidence of actual confusion" but "merely point out the *possibility* of future confusion"); *Roederer v.*

J. Garcia Carrion, S.A., 732 F. Supp. 2d 836, 870 n.9 (D. Minn. 2010) ("Such calling to mind [in media mentions] does not equate to confusion for trademark purposes").

That is all the more true here because the media sources on which the district court relied do not suggest that *the authors or anyone else* confused Block, Inc. and H&R Block. The district court's two primary sources—Reuters Profile and MarketScreener (Add.46; R. Doc. 105, at 46)—do not have bylines; they simply use automated search algorithms to aggregate news headlines about H&R Block and Block, Inc. on the same webpage, as shown in the screenshot below:

Latest News

Jack Dorsey's Block to build an open bitcoin mining system

Block Inc Chief Executive Officer Jack Dorsey said in a tweet on Thursday that the fintech firm is building an open bitcoin mining system, as the newly re-branded company looks to expand beyond its payment business and into new technologies like blockchain.

25 days ago

Afterpay's $29 billion buyout by Block set to close after Spain nod

Australian buy now, pay later firm Afterpay Ltd said on Wednesday its $29 billion buyout by payments firm Block Inc, previously known as Square Inc, has received approval from the Bank of Spain, making the deal fully unconditional.

a month ago

Afterpay's $29 bln buyout by Block gets Bank of Spain nod

Buy now, pay later firm Afterpay Ltd said on Wednesday its $29 billion buyout by payments firm Block Inc, previously known as Square Inc, has received approval from the Bank of Spain, making the deal fully unconditional. (Reporting by Sameer Manekar in Bengaluru; Editing...

a month ago

H&R Block hires new top lawyer from cannabis producer Tilray

H&R Block Inc has recruited its new top lawyer from Tilray Inc, hiring Dara Redler, the Canadian cannabis producer's interim chief legal officer.

a month ago

Block, formerly Square, says public won't confuse name with H&R Block

Block Inc, the financial-services company formerly known as Square, has asked a Missouri federal court to throw out a trademark infringement lawsuit brought by tax-preparation giant H&R Block, arguing its new name won't confuse potential customers.

a month ago

Australia's Latitude offers $242 million for Humm's buy now, pay later business

Australian digital payments and lending firm Latitude Group Holdings Ltd on Thursday offered to buy Humm Group Ltd's consumer unit, including its buy now, pay later business, for A$335 million ($241.8 million).

a month ago

H&R Block sues Block, formerly Square, over new name

Tax preparation company H&R Block Inc on Thursday sued payment company Block Inc, previously called Square Inc, saying the new name infringed its trademarks

Add.73; Pls.' Ex. 46. Evidence like this is not probative of consumer confusion. It is a list of articles about different topics, including H&R Block, Block, Inc., and an

Australian company called "Latitude." And, in noting the existence of this lawsuit, the compilation reflects that "H&R Block" and "Block, Inc." are different companies.

The district court similarly misplaced reliance on a handful of social media posts as showing likelihood of confusion, even though the court found that "[t]hese posts, standing alone, have little probative value" and "many other posts [] do not reflect confusion." Add.47 n.18; R. Doc. 105, 47 n.18. The social media posts in evidence generally acknowledged that Block, Inc. and H&R Block are separate companies, as Defendant's expert Dr. Dhar explained. App.258-62; Doc. 43 ¶¶71-83; *see, e.g.*, App.35-36; R. Doc. 1, at 19-20 (cited in Add.13). Indeed, many social media posts ridiculed the idea of consumer confusion between Block, Inc. and H&R Block, such as the below:

App.268.15; R. Doc. 43, at 241.

The court attempted to justify its legal error by citing two cases involving third-party media coverage, but those cases are inapposite. Neither *Heaven Hill Distilleries, Inc. v. Log Still Distilling, LLC*, 2021 WL 5985253 (W.D. Ky. Dec. 16, 2021) (cited at Add.46-47; R. Doc. 105, at 46-47), nor *Museum of Modern Art v. MOMACHA IP LLC*, 339 F. Supp. 3d 361 (S.D.N.Y. 2018) (cited at Add.38, Add.50, Add.55; R. Doc. 105, at 38, 50, 55), supports the principle that media coverage that might cause confusion can substitute for evidence of actual confusion based on defendant's own marketing to consumers in the context of marketplace conditions.

In *Heaven Hill*—unlike this case—the defendants set out to ***sow public confusion*** that their bourbon was associated with bourbon created by their ancestor, and the court deemed relevant a news story that reflected the writer's confusion on that issue. 2021 WL 598253, at *27. That was nothing more than a corollary to the rule that, where the defendant intends to create trademark confusion, the court can assume the defendant succeeded. *Id.* at *24. But the court in *Heaven Hill* did ***not*** rule that such third-party statements could be the ***cause*** of consumer confusion, as the district court reasoned here (*see* Add.48-50; R. Doc. 105, at 48-50). And there is no evidence here that Block intended to sow confusion with H&R Block; the unrebutted evidence showed the opposite. *See* App.78; Doc. 39 ¶24 (Defendant

"never intended to trade off H&R Block's goodwill or reputation" and instead "sought to create [a] corporate identity that is unlike anything else").

Museum of Modern Art likewise provides no support for the district court's ruling that social media coverage could cause future customer confusion. That case concerned social media posts by ***defendant's own customers*** expressing confusion as to an association with the plaintiff. 339 F. Supp. 3d at 378-79. Here, in contrast, the court treated the third-party social media posts discussing the defendant as likely to ***cause*** confusion in the future, not as evidence of consumer confusion that already existed. These cases further underscore that the district court's ruling is unprecedented and erroneous.

The other cases on which the district court relied (Add.46-48; R. Doc. 105, at 46-48) are similarly off-point. They involve markedly different facts, such as intentional misappropriation of a trademark, strong evidence of actual confusion, or identical product or company names—none of which is present in this case. *See Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1446-56 (9th Cir. 1991) (significant evidence of actual confusion, including survey evidence showing 70% confusion); *SunAmerica Corp. v. Sun Life Assur. Co. of Canada*, 890 F. Supp. 1559, 1576 (N.D. Ga. 1994) (two companies called "Sun Life"; survey showed an "astounding" level of confusion); *Centaur Commc'ns, Ltd. v. A/S/M Commc'ns, Inc.*, 652 F. Supp. 1105, 1113 (S.D.N.Y. 1987) (two

publications with the exact same name ("Marketing Week"); court found it was impossible "to know whose publication" any mentions of "Marketing Week" referred to). And one appellate decision the court cited is directly at odds with the court's ruling, as it affirmed a district court's *rejection* of a Lanham Act claim in part because third-party evidence had "minimal" relevance when "contrasted against the glaring absence of evidence of any actual confusion in purchasing decisions in the time that the parties have co-existed." *Checkpoint Systems., Inc. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 298 & n.24 (3d Cir. 2001).

The district court's likelihood-of-confusion finding is thus erroneous as a matter of law.

2. The District Court Improperly Gave No Weight To Survey Evidence Showing No Confusion

In addition to its legal error in relying on third-party sources as a cause of likely confusion, the district court wrongly gave no weight to Defendant's "gold-standard" survey showing that Defendant's marketing and branding do ***not*** cause consumer confusion. The district court noted that "survey evidence is circumstantial rather than direct evidence of confusion." Add.50; R. Doc. 105, at 50. But, in the absence of direct evidence, this Court considers survey evidence "probably the most accurate evidence of actual confusion." *Woodsmith Publ'g Co. v. Meredith Corp.*, 904 F.2d 1244, 1249 (8th Cir. 1990). And here, Plaintiffs did not present direct evidence of actual confusion—their CEO Mr. Jones admitted that Plaintiffs

"ha[ve]n't identified a single customer" who was confused by Defendant's marketing. App.586-87; R. Doc. 93, at 90:19-91:3.

Dr. Wind's survey was thus "probably the most accurate evidence" before the district court. *Woodsmith*, 904 F.2d at 1249. It tested how hundreds of potential consumers reacted to the Cash App logo and website, the Cash App Taxes logo and website, and the block.xyz homepage. App.177-81; R. Doc. 42 ¶¶27-30. Dr. Wind unequivocally found that consumers do not confuse Cash App's name or logo, its Cash App Taxes website, or the website of its corporate parent, Block, Inc. with "H&R Block." Add.68-72; R. Doc. 42 ¶¶41-46. Even Plaintiffs conceded that Dr. Wind's survey was entitled to "some weight." App.961; R. Doc. 114-4, at 34.

Yet the district court wrongly gave it none, even though it found no errors in Dr. Wind's work (Add.50-51; R. Doc. 105, at 50-51). To do so, the district court reasoned that both sides' surveys "effectively cancel each other out." Add.51; R. Doc. 105, at 51. That was legal error; for just as it is wrong to hold that straw cancels out gold where equal weight is at issue, it is wrong to assume that Ms. Butler's survey could cancel out Dr. Wind's survey. Ms. Butler's survey was by design "devoid of market characteristics," *Calvin Klein*, 815 F.2d at 504, whereas Dr. Wind's survey tested potential consumers' responses to Defendant's marketing and found the results to be "among the most clear-cut survey results of 'no confusion' that I have seen in over forty years of designing, conducting, and evaluating

thousands of consumer surveys" (App.171; R. Doc. 42 ¶6). As this Court has explained, "[a] realistic evaluation of consumer confusion must attempt to recreate the conditions in which buying decisions are made," so that a fact finder can "try to determine … what a reasonable purchaser in market conditions would do." *Calvin Klein*, 815 F.2d at 504 (reversing preliminary injunction; holding court's in-camera visual inspection insufficient to support inference of likely consumer confusion). Only Dr. Wind's survey sought to do that.

No court of which Defendant is aware has ever endorsed a survey like Ms. Butler's that failed to test Defendant's actual branding, marketing, or packaging (*see* App.422-24; R. Doc. 80-3 ¶¶27-29). And this Court has rejected a survey comparable to hers that tested respondents' ability to "call to mind" the senior user's mark from seeing the junior user's mark. *Frosty Treats, Inc. v. Sony Comp. Entm't Am. Inc.*, 426 F.3d 1001, 1010 (8th Cir. 2005) (quoting 3 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:9 at 23-34 to 23-35 (4th ed. 2005)). Such surveys, this Court held, "are not probative of confusion" because they "fail[] to address the relevant inquiry, which is whether consumers are confused as to the existence of any sponsorship of or affiliation or association with [defendant's

product] by [plaintiff]." *Id.* (affirming summary judgment in favor of defendant). The district court made the same error here, in conflict with *Frosty Treats*.[3]

The district court further erred in disregarding Ms. Butler's initial "pilot" survey, which tested a respondent's reaction to a doctored article about Cash App and showed ***negative*** consumer confusion. App.419-20; R. Doc. 80-3 ¶¶20-21. As Dr. Wind explained, "even with the flaws in Ms. Butler's stimulus, ***no one*** who saw the altered article that said 'Block' identified 'H&R Block.' Only two respondents identified H&R Block in response to any question in the survey, and they were only in the control condition, making the net confusion level -2% (negative 2%)."

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[3] *See also Playtex Prods., Inc. v. Georgia-Pacific Corp.*, 390 F.3d 158, 168 (2d Cir. 2004) (Sotomayor, J.) (affirming summary judgment to defendant on trademark infringement and dilution claims, and holding survey irrelevant because stimulus did not replicate marks as presented and packaged in the marketplace); *Limited v. Macy's Merch. Grp. Inc.*, 2016 WL 4094913, *9 (S.D.N.Y. Aug. 2, 2016) (granting summary judgment to defendant where plaintiff's survey stimulus removed the defendant's logo and URL from website image shown respondents, depriving respondents of "context that they would unavoidably encounter in the actual marketplace"), *aff'd*, 695 F. App'x 633 (2d Cir. 2017); *Pinterest, Inc. v. Pintrips, Inc.,* 140 F. Supp. 3d 997, 1018 (N.D. Cal. 2015) (ruling survey irrelevant where it was "completely untethered from how [Defendant's accused use of the mark appears] now or has even been contemplated to [appear] in the future"); *Kargo Global, Inc. v. Advance Mag. Pub., Inc.*, 2007 WL 2258688, *11 (S.D.N.Y. Aug. 6, 2007) (excluding survey using unrepresentative snippets of marketing material as stimulus); *Juicy Couture, Inc. v. L'Oreal USA, Inc.*, 2006 WL 1012939, *25 (S.D.N.Y. Apr. 19, 2006) (survey that did not show actual cosmetic product in its packaging had no value); *WE Media, Inc. v. Gen. Elec. Co.*, 218 F. Supp. 2d 463, 474 (S.D.N.Y. 2002) (survey that "did not use pictures or advertisements that approximate what a potential customer would encounter in making her [purchase] choices" did not "provide support for [plaintiff's] case").

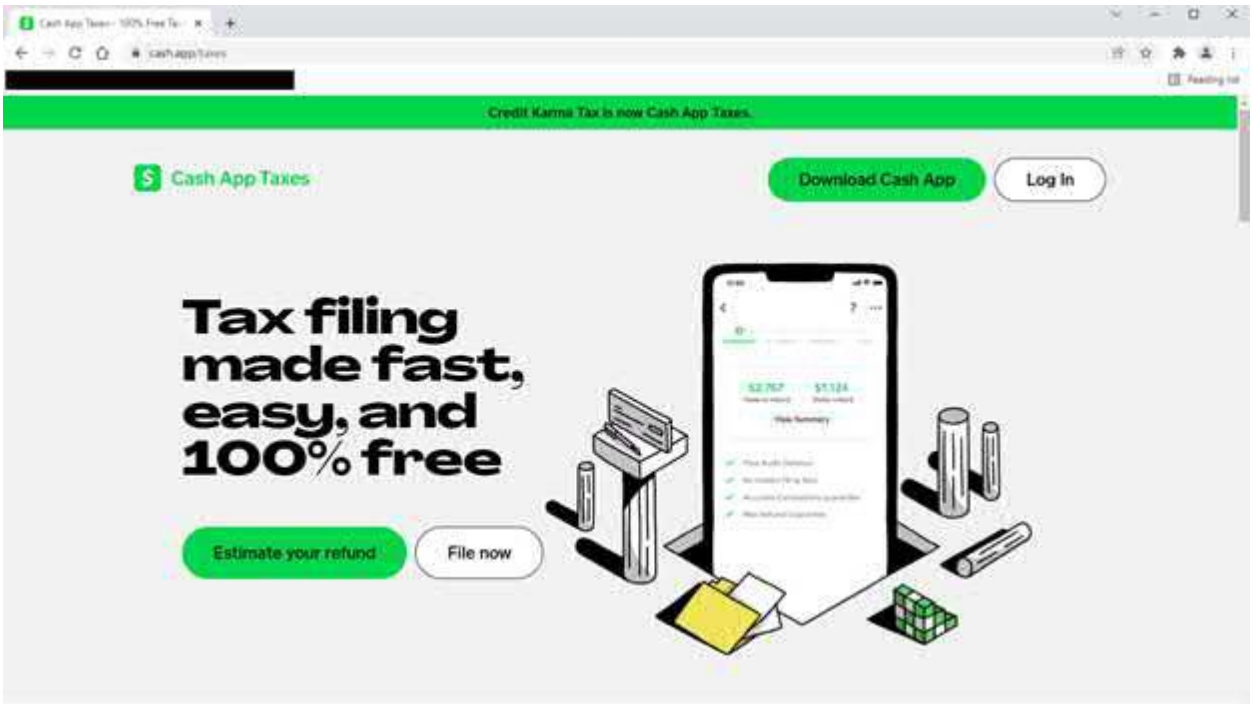
App.420; R. Doc. 80-3 ¶21 (emphasis in original). Ms. Butler then switched the stimulus for the final survey to an article that did not mention "Cash App" in the headline (or prominently feature it in the article) *and* changed the original headline to include the word "Block." App.417-19; Doc. 80-3 ¶¶12-17.

Given all of these legal defects, the court erred as a matter of law in equating Ms. Butler's survey with Dr. Wind's survey.

B. The District Court Compared The Wrong Marks

The district court disregarded precedent and committed an additional legal error in assessing the "similarity of the marks" factor for likelihood of confusion. The court concluded that, "here, the dominant feature of the competing trademarks is identical: 'Block.'" Add.35; R. Doc. 105, at 35. That was not the correct comparison. The court should have compared "H&R Block" with "Cash App" and "Cash App Taxes."

Although Plaintiffs use the "H&R Block" name to brand tax services, Defendant does not use the "Block" name or logo as branding for Cash App or Cash App Taxes, as shown by the screenshot of the Cash App Taxes website below:



App.96-97; R. Doc. 40 ¶18. Thus, the "Block" name and the "H&R Block" name, while similar in sight and sound in a vacuum, do not appear in the marketplace in a similar manner. *E.g.*, *Gen. Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627 (8th Cir. 1987) (affirming denial of preliminary injunction and explaining that "[t]he use of identical, even dominant, words in common does not automatically mean that two marks are similar"); *Everest Cap. Ltd. v. Everest Funds Mgmt., L.L.C.*, 393 F.3d 755, 761 (8th Cir. 2005) (affirming judgment of no trademark infringement where the terms "Everest Capital" and "Everest Investment Management" were found not confusing even though both use "the dominant word 'Everest'").

Further, Cash App, in which Cash App Taxes is integrated, has its own well-established and commercially strong brand and logo. It is used by more than 40

million customers every month and has been the number one finance app in the Apple App Store for the past five years, including years before Cash App Taxes was integrated into Cash App. *See* App.94, App.238-43; R. Doc. 40 ¶¶8-9, R. Doc. 43 ¶¶45-53. Thus, any incidental use of "Block" (*e.g.*, in terms of service or privacy notices) in connection with Cash App Taxes is in the context of the Cash App "house mark." That makes a difference, as a matter of law, because the relevant inquiry is whether the marks are distinguishable from each other in the marketplace, not in the abstract. *See Luigino's, Inc. v. Stouffer Corp.*, 170 F.3d 827, 831 (8th Cir. 1999) (affirming summary judgment of non-infringement because, even though marks shared an identical word, "[t]he use of different colors and typefaces, as well as the prominent display of the house marks convey perceptible distinctions between the products"); *Conopco, Inc. v. May Dep't Stores Co.*, 46 F.3d 1556, 1566-68 (Fed. Cir. 1994) (applying Eighth Circuit law to hold no likelihood of confusion, in part because of prominent logo placement on products' front); *Girl Scouts of U.S. of Am. v. Boy Scouts of Am.*, 2022 WL 1047583, *7 (S.D.N.Y. Apr. 7, 2022) (granting defendant summary judgment on trademark claim where, "[a]lthough the marks share similarity in the use of the term 'scouts'… they are readily distinguishable from one another in context").

Indeed, the district court legally erred in simply "assum[ing]" that consumers are likely to be confused after encountering the "Block" name in legal fine print

(App.880-81; R. Doc. 105, at 36-37), despite the undisputed evidence that Defendant does ***not*** use the parent corporation's name "Block" to brand or market Cash App or Cash App Taxes. The mere presence of a corporate name in such "fine print" is too trivial to give rise to a likelihood of confusion where, as here, the parties' branding is "clearly dissimilar." *Armstrong Cork Co. v. World Carpets, Inc.*, 597 F.2d 496, 504 (5th Cir. 1979) (reversing trademark infringement judgment and injunction, reasoning that Armstrong Cork Company's use of its new corporate name "Armstrong World Industries, Inc." and the term "World" in "fine print" were insufficient to create confusion with WORLD trademarks held by World Carpets, Inc.).[4] And the court improperly overlooked Dr. Dhar's unrebutted opinion that consumers are unlikely to associate the "Block" corporate name in legal notices with the Cash App service, which has its own distinct and widely-recognized branding. App.230-31; R. Doc. 43 ¶33.

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[4] The district court tried to distinguish *Armstrong* on the basis that the defendant there sought "merely to change its corporate name," whereas here "Defendant is using the name 'Block' and a green square logo to promote its brands, including Cash App and its new tax services." Add.24 n.13; R. Doc. 105, at 24 n.13. That distinction fails because in *Armstrong* the defendant's corporate name actually appeared on physical product labels (*see* 597 F.2d at 503), which is *not* the case here: Defendant does *not* use the "Block" name to promote Cash App Taxes to consumers (*see supra*, at 6-7).

C. The District Court's Initial Interest And Reverse Confusion Rulings Do Not Salvage Its Legal Errors

The district court's reference to "reverse confusion" or "initial interest confusion" theories (*e.g.*, Add.27; R. Doc. 105, at 27) does not cure its legal errors with respect to classic "forward confusion" discussed above (*see supra*, Part I.A-B). Those theories are unsupported by the record and do not apply here.

First, this Court has never endorsed a theory of reverse confusion, which some lower courts have ruled "occurs when a large junior user saturates the market with a trademark similar or identical to that of a smaller, senior user." *Eyebobs, LLC v. Snap, Inc.* 259 F. Supp. 3d 965, 973 (D. Minn. 2017) (citation omitted; alterations removed). To the extent that theory is cognizable in this Circuit, the district court wrongly found a likelihood of success on that theory where Plaintiffs submitted no evidence supporting the counterintuitive premise that consumers "are likely to believe erroneously that H&R Block is now part of Block, Inc." Add.48; R. Doc. 105, at 48. Moreover, the standard for reverse confusion is the same as for forward confusion insofar as Plaintiffs must prove a likelihood of consumer confusion in actual marketplace conditions. *See, e.g.*, *Eyebobs*, 259 F. Supp. 3d at 973 ("In both forward- and reverse-confusion cases, this Court must weigh the six '*SquirtCo* factors' in determining whether there is a likelihood of confusion[.]"). Plaintiffs' failure to do so (as explained *supra*, Part I.A) is thus fatal to its "reverse confusion" theory as well. *Eyebobs*, 259 F. Supp. 3d at 973 (denying preliminary injunction);

Mars Musical Adventures, Inc. v. Mars, Inc., 159 F. Supp. 2d 1146, 1152 (D. Minn. 2001) (granting summary judgment to defendant on reverse confusion claim where "Plaintiffs have offered no evidence of purchasing decisions that were affected by the confusion").

Second, although this Court has recognized initial interest confusion, it has cautioned that the doctrine has limited applicability where there are "careful, sophisticated consumers." *Select Comfort*, 996 F.3d at 937; *see id.* at 936 ("our general adoption of the theory of initial-interest confusion forecloses summary judgment where a question of fact exists as to the level of consumer sophistication"); *Sensient Techs.*, 613 F.3d at 766 (rejecting application of initial interest confusion as a matter of law where "customers are sophisticated and exercise a relatively high degree of care in making their purchasing decisions"). That is the case here. Plaintiffs conceded that "consumers may exercise heightened care when it comes to filing their taxes." App.962; R. Doc. 114-4, at 35. And the district court found "that customers selecting banks and financial services companies are likely to exercise a relatively higher degree of care." Add.51-52; R. Doc. 105, at 51-52. Although the court later stated that "underbanked" individuals may be "less likely to exercise a high level of care when choosing tax software" than other users of financial services, the court cited no evidence supporting that stereotyping of millions of Americans, and it contradicts the court's own findings that customers of the parties' services

"are likely to exercise a relatively higher degree of care." Add.52; R. Doc. 105, at 52. Plaintiffs did not submit—and the district court did not consider—any other evidence to support the theory.

Further, even initial interest confusion must rest on defendant's own uses, such as its advertising or packaging. *See Northland Ins. Cos. v. Blaylock*, 115 F. Supp. 2d 1108, 1119-20 (D. Minn. 2000) (noting that, "[i]n the instances where courts have found 'initial interest confusion,' the courts have also found that the defendant had a commercial incentive or motive in *using* plaintiff's mark to attract 'initial interest'") (emphasis added). It is not sufficient that someone looking at a news article may be momentarily confused—particularly when there is no evidence that such confusion is retained or is likely to affect a purchasing decision. *See, e.g.*, *Sensient Techs. Corp.*, 613 F.3d at 766 (affirming grant of summary judgment to defendant on initial interest confusion claim, and noting that, "[e]ven if the marks are almost identical, initial interest confusion is not assumed and must be proven by the evidence") (quoting 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:6 (4th ed.)); *Checkpoint Sys.*, 269 F.3d at 297 (affirming judgment for defendant on initial interest confusion claim, and holding "temporary" and "de minimis" evidence of confusion insufficient).

Given the undisputed record, neither reverse nor initial interest confusion can support the likelihood-of-success factor here.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ASSESSING THE OTHER PRELIMINARY INJUNCTION FACTORS

This Court should also vacate the preliminary injunction for the additional reasons that the district court abused its discretion in determining that: (a) Plaintiffs would suffer irreparable harm absent an injunction, (b) the balance of hardships favors Plaintiffs, and (c) the public interest favors an injunction. Properly analyzed, each of these three factors favors Defendant.

The evidence on each factor is detailed below. It bears noting at the outset, however, that the preliminary injunction here is a far cry from a typical trademark infringement injunction that might order a defendant to change its advertising, alter a minor aspect of its product design, or tinker with a jingle or slogan. Here, the injunction is both broad and vague, potentially requiring Defendant to change its corporate structure. Compliance with paragraph 1 would require Defendant to take the extreme step of either extracting Cash App Taxes from its Cash App application, suspending Cash App Taxes from operation, divesting itself of Cash App Taxes altogether in contravention of the NYAG assurance discussed above, spinning off Cash App into a new corporate entity, or even changing its parent corporate name back from "Block" to "Square"—all just to avoid the use of "Block" in Cash App's terms of service and similar legal fine print. Compliance with paragraph 2, moreover, would require Defendant to silence its protected public speech to shareholders, market analysts, and other non-customers, including potential

employees. These extraordinarily sweeping prohibitions ignore unrebutted evidence in the record that overwhelmingly counsels vacatur of the preliminary injunction here.

A. Plaintiffs Face No Irreparable Harm

The district court abused its discretion in concluding that Plaintiffs would be irreparably harmed absent a preliminary injunction. Add.55-60; R. Doc. 105, at 55-60. Plaintiffs did not provide any evidence of actual harm, such as actual confusion or lost sales. Although the court relied on the rebuttable statutory presumption of irreparable harm (Add.60; R. Doc. 105, at 60), the statutory presumption is insufficient to support the existence of irreparable harm on the undisputed record here.

To begin with, the district court's irreparable harm ruling rests on the same legal errors that underlie its determination that Plaintiffs showed likelihood of confusion—namely, the assumption that media coverage featuring the "Block" name and "Cash App" would cause customer confusion with Plaintiffs' marks *in the future*. *See* Add.57; R. Doc. 105, at 57. But just as such a theory is legally insufficient to show likelihood of confusion, it is an improper basis to find irreparable harm.

Moreover, the absence of any actual confusion or harm despite the passage of the 2021 tax season confirms that "the threat of this harm is too remote" to support

a preliminary injunction under this Court's precedent. *See Goff v. Harper*, 60 F.3d 518, 521 (8th Cir. 1995) (no irreparable injury where, "[e]ven assuming the harm alleged would be irreparable, the threat of this harm is too remote"). This Court has reversed preliminary trademark infringement injunctions where there is no evidence that the defendant "had caused any loss of sales to plaintiff's business." *Cellular Sales, Inc. v. Mackay*, 942 F.2d 483, 487 (8th Cir. 1991) (holding that plaintiff "has failed to establish that he will suffer absent the issuance of a preliminary injunction" where there was some evidence of actual confusion but "no sales records" substantiating lost sales). The same result is warranted here. Plaintiffs sought a preliminary injunction based on concern for the then-upcoming April "tax season" for 2021 taxes, but that tax season was "largely over" by the time the district court issued the injunction on April 28, 2022. Add.62; R. Doc. 105, at 62. Having identified no actual harm during the tax season that came and went while Plaintiffs' preliminary injunction motion remained pending, the district court had no basis to find a non-speculative threat of irreparable harm during the pendency of this case. The district court, at most, relied on the "possibility of a remote future injury," which is legally insufficient to support the existence of irreparable injury. *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982) ("The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat ….").

The district court also clearly erred insofar as it relied on possible confusion by employees, investors, regulators, and the media for which the record provides no support. Add.59; R. Doc. 105, at 59. The court noted that "[m]any Block, Inc. employees indicate on their LinkedIn profiles that they work for 'Cash App at Block' or 'Cash App (Block),'" and that this connection between Cash App and Block might confuse customers in the future. Add.38; R. Doc. 105, at 38. But the district court did not find that employees or prospective employees were likely to be confused or explain how an employee's LinkedIn profile could confuse a customer of a tax service; nor did it discuss possible confusion by investors or regulators or explain why such sophisticated audiences were likely to be confused. And the court's finding as to media confusion was legally erroneous as explained *supra*, Part I.A. Thus, while some courts have deemed confusion by non-purchasers relevant to the irreparable-harm inquiry (*see* Add.59; R. Doc. 105, at 59), the district court made no factual findings that would support such a ruling here.

B. The Balance Of Hardships Tips In Favor Of Defendant And Its Customers

The district court similarly abused its discretion in ruling that the balance of hardships favored a preliminary injunction. Add.60-63; R. Doc. 105, at 60-63. The court cited no particularized evidence of harm to Plaintiffs from maintaining the status quo pending resolution of the case on the merits. In contrast, Defendant showed that a preliminary injunction would irreparably harm Defendant's business,

including by disrupting millions of Cash App customers' access to important tax services. In particular, Defendant presented unrebutted evidence that the harm resulting from any and all alternative options for compliance with paragraph 1 of the injunction would be irreversible, whether it extracts Cash App Taxes from Cash App, shuts down Cash App Taxes for months or tries to sell it, reincorporates Cash App as a standalone corporate entity, or changes its name back from "Block" to "Square." The district court clearly erred in its cursory dismissal of these harms as "overstated" (Add.62; R. Doc. 105, at 62). And these harms outweigh any hypothetical future harms to Plaintiffs that, based on the recent tax season, may never occur. *See Brady v. Nat'l Football League*, 640 F.3d 785, 793 (8th Cir. 2011) (staying injunction where "[t]he district court gave little or no weight to the harm caused" by the injunction); *Stone Strong, LLC v. Stone Strong of Texas, LLC*, 2021 WL 4710449, *7 (D. Neb. Oct. 8, 2021) (considering defendant's "outstanding obligations to customers that would be disrupted by an injunction").

1. Forcing Defendant To Extract Cash App Taxes From Cash App Would Cause Irreparable Harm

The district court's assumption (Add.62; R. Doc. 105, at 62) that Defendant could easily extract Cash App Taxes from the Cash App application is clearly erroneous because it disregards unrebutted testimony that it would be "impossible for Cash App Taxes to be a separate application" from Cash App. As Cash App executive Mr. Jennings testified, customers signing up to use Cash App Taxes:

> have to go through the Cash App account sign-up and provision [their] account with Cash App credentials to use Cash App Taxes, so all of our risk systems, our privacy systems, our data infrastructure, the flows, the client-server interactions, all of that is Cash App. And that's what we've spent the past roughly 14 months working on was taking the functionality from Credit Karma Tax and hooking it up to Cash App.

App.722; R. Doc. 93, at 226:7-18. Mr. Jennings further explained that building a new, standalone mobile taxes application (while simultaneously maintaining Cash App Taxes to avoid disrupting service to existing customers) would be "commercially infeasible," because it would cost millions of dollars, take at least eighteen months, require hiring hundreds of new employees, and require burdensome regulatory approvals—all for an app that generates no revenues on its own. App.982-93; R. Doc. 123-1 ¶¶4-32; *see* App.95-96, App.99, App.722; R. Doc. 40 ¶¶15-16, 25, R. Doc. 93, at 226:3-28. Meanwhile, Cash App's tens of millions of users would lose access to an important free tax service. App.96, App.99; R. Doc. 40 ¶¶15, 25. It would also jeopardize the enormous investment Defendant made in integrating the Credit Karma Tax service into Cash App. App.95-96, App.99; R. Doc. 40 ¶¶15-16, 25. The district court was not free to substitute its assumption that Defendant "can expeditiously separate a recently acquired tax preparation service from the Block, Inc. corporate structure" (Add.62; R. Doc. 105, at 62) for the testimony of a witness with direct knowledge of the 14-month effort required to integrate Cash App Taxes into Cash App after transplanting it from Credit Karma, and the enormous effort that would be required to extract it again.

2. Forcing Suspension Or Sale Of Cash App Taxes Would Cause Irreparable Harm

The district court's suggested alternative—"suspending [Defendant's] Cash App Taxes feature during the pendency of [Defendant's] appeal" (App.1000; R. Doc. 126, at 1)—improperly overlooks the harm of disabling a service to which tax filers have entrusted sensitive financial information and that they depend on accessing while they await pending responses and refunds. As Mr. Jennings testified without rebuttal, customers who "have chosen to file their taxes late" or "have obtained extensions," and customers who "are depending on" Cash App Taxes "to be able to see and manage their tax refunds, tax forms, and tax-related data" need to use Cash App Taxes during the pendency of this case. App.984-85; R. Doc. 123-1 ¶¶4-30.

The resulting "potential loss of consumer goodwill qualifies as irreparable harm," because any consumer left in the lurch by these drastic changes may stop using Cash App Taxes altogether. *Iowa Utilities Bd. v. F.C.C.*, 109 F.3d 418, 426 (8th Cir. 1996). The concern is particularly acute where, as here, the loss of goodwill toward Cash App Taxes could also adversely affect downstream use of Cash App's other services. *See. E.g.*, *Metalcraft of Mayville, Inc. v. Toro Co.*, 848 F.3d 1358, 1368 (Fed. Cir. 2017) ("[T]he sales lost by Scag are difficult to quantify due to 'ecosystem' effects, where one company's customers will continue to buy that

company's products and recommend them to others.") (quoting *Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 641 (Fed. Cir. 2015)).

Contrary to the district court's suggestion (Add.62, App.1001), selling Cash App Taxes is not a viable alternative to suspending its operations. A forced divestiture of a service that is offered for free could saddle Defendant with an irreversible loss on the months of time and tens of millions of dollars it invested to purchase and integrate the Cash App Taxes service into Cash App in the first place. *See* 86 Fed. Reg. 22,711 n.1. Moreover, under Defendant's Assurance to the NYAG in connection with its acquisition of Credit Karma Tax, Defendant is prohibited from selling Cash App Taxes until the end of 2024. App.920; R. Doc. 114-2 ¶22. Defendant would obviously suffer irreparable harm from a forced years-long period in which it is unable to own Cash App Taxes while also being unable to sell it.

3. Forcing Cash App To Reincorporate As A New Corporate Entity Would Cause Irreparable Harm

Such irreparable harm cannot be avoided by the district court's suggestion that Defendant might create a new legal entity to own Cash App—even though that, too, would ultimately be owned by Defendant. Ms. Esperanza explained that any such reincorporation would be time-consuming, costly and complex, and it would result in tremendous redundancies of effort and expense for the company, as well as for government regulators. App.996; R. Doc. 123-2 ¶¶3-4. And the new company would need to initiate new compliance programs, enter or amend hundreds of

contracts, and comply with regulatory requirements in all fifty states. App.997-98; R. Doc. 123-2 ¶¶8-10. Any deadweight loss from such a process would be unrecoverable even if Defendant ultimately prevails on the merits.

4. Forcing A Change In Defendant's Corporate Parent Name Would Cause Irreparable Harm

Finally, the district court abused its discretion in suggesting that changing the Block corporate name back to "Square, Inc." may be "the least burdensome way to comply." App.1000; R. Doc. 126, at 1. That suggestion wrongly disregards the irreparable harm that Defendant would suffer from a second name change just months after undergoing a lengthy rebranding transition. *See, e.g.*, *First Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 163 F.R.D. 612, 615-16 (D. Kan. 1995) (Defendant would "face substantial harm if forced for the second time to [change its name again or] revert back to its former name after publicizing a name change.").

Indeed, changing Defendant's corporate name after a months-long rebrand is so plainly impossible as an interim measure that even Plaintiffs abandoned that request. App.975; R. Doc. 114-4, at 48. If Defendant were forced to spend millions of dollars to change its name now and promote that change, it would be irreversible, even if Defendant prevails at trial. *See GTE Corp. v. Williams*, 731 F.2d 676, 679 (10th Cir. 1984) (vacating injunction; "If [defendant] must change his trade name now, it is probably unrealistic to expect he would change the name back … if he won on the merits").

C. The Public Interest Disfavors An Injunction

The district court again abused its discretion by disregarding the powerful public-interest considerations weighing against a preliminary injunction when determining that the public has an interest in not experiencing trademark confusion. Add.63; R. Doc. 105, at 63. In particular, the court improperly ignored the tangible financial harms that millions of Cash App customers will face immediately if Defendant were forced to comply with the injunction. *See Calvin Klein*, 815 F.2d at 505 (reversing preliminary injunction; holding that district court erred in concluding public interest favored injunction where it failed "to consider the broader economic implications of its grant of the preliminary injunction, as is required").

The district court also improperly minimized the public interest in "avoiding monopolies and [] encouraging, not stifling, competition." *Id.* This was the core reason behind the DOJ's antitrust complaint against Intuit and Credit Karma and the NYAG investigation that led to Defendant's acquisition of Credit Karma Tax in the first place. As noted (*see supra*, at 4-5), Cash App Taxes became a Cash App feature in 2021 after the DOJ required the divestiture of Credit Karma, Inc.'s free tax service to avoid Intuit acquiring it, which the DOJ found would have reduced competition for DDIY tax-preparation services and resulted in "higher prices, lower quality, and reduced choice" for millions of consumers. 86 Fed. Reg. at 22,706. The NYAG similarly launched an investigation into the potential anticompetitive effects of the

proposed merger. App.916; R. Doc. 114-2 ¶8.[5] The NYAG noted that no other company apart from Credit Karma had successfully entered in the market "in over a decade." App.916; R. Doc. 114-2 ¶8. As a result, Credit Karma proposed a sale of its tax business to Defendant (then Square, Inc.) to be integrated into the Cash App platform. 86 Fed. Reg. at 22,706; R. Doc. 114-2 ¶11. Both the DOJ and NYAG concluded that Defendant's plans to integrate the new tax business into Cash App, which already had tens of millions of users, would promote competition for tax services. Fed. Reg. 22,708; App.917-18; Doc. 114-2 ¶¶18, 20.

As shown by the DOJ and NYAG proceedings, operating Cash App Taxes ***as part of Cash App***, with its sizable customer base, is the key to bolstering competition, lowering prices, and enhancing consumer choice as to free or DDIY tax services. The preliminary injunction runs contrary to these goals insofar as it effectively orders Cash App to remove the Cash App Taxes feature from its platform.

The district court clearly erred in suggesting that the public interest in competition can be served if Defendant operates Cash App Taxes "in a standalone app, separate from Cash App." Add.64; R. Doc. 105, at 64. It would take prohibitive time and expense to strip out Cash App Taxes from the Cash App platform. *See* App.722, App.819-20; R. Doc. 93, at 226:8-18; R. Doc. 99, at 20:15-21:8. It would

[5] The NYAG investigation is a matter of public record of which the Court can take judicial notice pursuant to Rule 201 of the Federal Rules of Evidence.

be commercially infeasible to operate a tax-service feature as a standalone product because, unlike Plaintiffs' products, it is a free service that does not generate revenue on its own. *See* App.722, App.96; R. Doc. 93, at 226:7-18, R. Doc. 40 ¶16. And under the NYAG Assurance, Defendant is prohibited until the end of 2024 from selling Cash App Taxes even if it could find a willing buyer for a free service that produces no revenue itself. App.920; R. Doc. 114-2 ¶22. Thus, the preliminary injunction, if left to stand, could eliminate the only new entrant into the DDIY tax-preparation market in over a decade, which would contravene the public interest. *See Dakota Indus.*, 944 F.2d at 441 ("the public's interest in being offered the widest range of merchandise in all price brackets would best be served by denying the injunction").

III. PARAGRAPH 2 OF THE PRELIMINARY INJUNCTION INDEPENDENTLY WARRANTS VACATUR ON FIRST AMENDMENT GROUNDS

Apart from the above errors and abuses of discretion that infect the entire injunction, paragraph 2 of the injunction unconstitutionally violates Defendant's First Amendment rights by restricting Defendant's protected speech, including communications to investors, the business media and prospective employees. Restrictions on speech outside the narrow context of commercial speech (*i.e.*, speech that proposes a commercial sale of goods or services) are presumptively unconstitutional as a prior restraint. *See, e.g.*, *Turning Point USA v. Rhodes*, 973

F.3d 868, 878 (8th Cir. 2020) (prior restraint on speech in public forums is presumptively unconstitutional), *cert. denied*, 141 S. Ct. 2421 (2021). Because prior restraints presumptively cause "immediate and irreversible" harm, *Neb. Press Ass'n. v. Stuart*, 427 U.S. 539, 559 (1976), courts in trademark cases "should tread cautiously when considering injunctive relief against future [speech]," *Anheuser-Busch*, 28 F.3d at 778.

Paragraph 2's restrictions extend far beyond supposedly infringing speech to also cover communications that the district court did not find were likely to cause confusion. Such speech includes Defendant's communications with its corporate audience, business media, or prospective employees on public forums. *See* Add.65-66; App.909-10.[6] The harm from forcing Defendant to forego non-infringing public communications with these groups would be irreparable, by definition. *Blue Moon Ent., LLC v. Bates City, Mo.*, 441 F.3d 561, 565 (8th Cir. 2006) (citation omitted) ("The loss of First Amendment freedoms, even for [a] short period …, may constitute an irreparable injury."). The district court failed to address these issues or apply any level of First Amendment scrutiny before issuing paragraph 2—a legal error warranting vacatur of that paragraph, even apart from the defects described

[6] The district court stated that confusion by these groups would be irreparable but did not find in the first place that they were likely to be confused. *See* Add.59; R. Doc. 105, at 59.

above. *See Coca-Cola Co. v. Purdy*, 382 F.3d 774, 790 (8th Cir. 2004) ("Provisions of an injunction may be set aside if they are broader than necessary ….") (citation omitted).

The district court also abused its discretion in ignoring the irreparably disruptive and impracticable effects its gag order would have on Defendant's business. As a public company, Defendant is ***required*** to share information with shareholders and prospective investors. Defendant would risk noncompliance with paragraph 2 every time it made a public statement about the operations of Cash App Taxes as part of Cash App, one of Defendant's largest businesses—even a statement as benign as "Cash App has a free tax filing feature." Silencing such statements would have an irreparable chilling effect that would "effectively prevent[]" Defendant from conducting parts of its business. *E.W. Bliss Co. v. Struthers-Dunn, Inc.*, 408 F.2d 1108, 1116 (8th Cir. 1969) (vacating injunction in such circumstances).

Paragraph 2 similarly restricts practically any recruitment of new employment talent, which now occurs almost exclusively on public forums such as websites and social media platforms. As the corporate entity with the legal authority and obligation to sign and enforce contracts with prospective employees, Defendant must be able to disclose its relationship with its businesses when recruiting prospective employees.

Further, restricting Defendant's speech with the members of the press covering Defendant's business implicates not only Defendant's right to speak but also the First Amendment rights of the press and the public to receive information on matters of public interest. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (the First Amendment "protects the right to receive information and ideas"); *Pratt v. Indep. Sch. Dist. No. 831, Forest Lake, Minn.*, 670 F.2d 771, 779 (8th Cir. 1982) (same).

In any case, Defendant's communications with its corporate audience, business media, and prospective employees are unlikely to cause confusion among these groups since they are sophisticated and familiar with Defendant. *See, e.g.*, *Kemp v. Bumble Bee Seafoods, Inc.*, 398 F.3d 1049, 1055 (8th Cir. 2005) ("Purchaser … sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care."). Indeed, the district court identified no evidence suggesting that these groups were likely to be confused, and the record contains none.

For all these reasons, Paragraph 2 should be vacated as it is not remotely "tailored to … [the] specific harm shown." *Rogers*, 676 F.2d at 1214.

CONCLUSION

The district court's order granting the preliminary injunction should be reversed and/or vacated.

Dated: June 17, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Pursuant to 8th Cir. R. 28A(h)(2), the undersigned further certifies that this brief has been scanned for viruses and is virus-free.

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June 17, 2022
Date

CERTIFICATE OF SERVICE

I, Kathleen M. Sullivan, a member of the Bar of this Court, hereby certify that on June 17, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Kathleen M. Sullivan