

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

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|--|---|--------------------------------|
| ALVIS COATINGS, INC., and ALVIS, INC., | ) |                                |
|  | ) |                                |
| Plaintiffs,                            | ) |                                |
|  | ) |                                |
| v.                                     | ) | Civil Action No. 3:04-CV-482-K |
|  | ) |                                |
| ALAN TOWNSEND and LINDA TOWNSEND,      | ) |                                |
|  | ) |                                |
| Defendants.                            | ) |                                |

**DEFENDANTS’ RESPONSE IN OPPOSITION TO  
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

A preliminary injunction against speech is an exceptional remedy that is justified only in extremely rare circumstances. Even then, it must be narrowly tailored to avoid proscribing any speech beyond what is necessary. Here, Alvis seeks a broad injunction against “misappropriation” “likely to cause confusion, deception, or mistake or appropriate the goodwill and reputation of Alvis.” That injunction would be impermissibly vague in that it would not inform the Townsends precisely what is prohibited. Indeed, although they would be in danger of contempt, the Townsends could reasonably understand that such an injunction would not prohibit any of their current speech.

This is because the Townsends’ speech does not cause confusion, deception, or mistake. Nor does it appropriate Alvis’s goodwill. To the contrary, the Townsends precisely identify Alvis and criticize it. Alvis has never presented any evidence that a consumer would be confused by Alvis’s website. And none could. The domain name *spraysiding.com* is unlikely to confuse Internet users because it is different from any of Alvis’s enforceable trademarks. And if anyone were confused about the domain name, the website’s content would immediately alleviate the confusion. The use of Alvis’s marks in the Google search engine is not confusing because, like the Townsends’ commentary as a whole, it merely uses the marks to identify the subject of commentary, not to promote any goods or services.

More important, the injunction Alvis seeks would be unconstitutional. The Townsends’ speech is fair use consumer commentary, carved out of trademark law and protected by the First Amendment. The Fourth Circuit has expressly approved the use of trademarks in consumer criticism such as the Townsends’, recognizing that commentary would be pointless without the use of trademarks to identify the company about which one is speaking. Moreover, an injunction against the Townsends’ free speech would cause harm much greater than any economic harm Alvis alleges.

Alvis fails to provide any evidence of legally cognizable harm. But such harm, even if proved, would be vastly outweighed by the infringement of the Townsends' free speech rights. Clear, controlling case law holds that a potential First Amendment violation outweighs virtually any other potential harm alleged at the preliminary injunction stage, including irreparable economic harm.

Thus, this Court should deny Alvis's motion for a preliminary injunction. An injunction would infringe the Townsends' First Amendment rights on behalf of a company that faces no legally cognizable harm and is pursuing claims it cannot win.

**I. A PRELIMINARY INJUNCTION RESTRAINING SPEECH IS A RARE, EXTRAORDINARY, AND EXCEPTIONAL REMEDY.**

A preliminary injunction is an extraordinary remedy granted only sparingly and when clearly demanded by the circumstances. *See MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (“[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.”) (quotation marks omitted); *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 814 (4th Cir. 1991) (the grant of a preliminary injunction “represents the exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it”).

Preliminary injunctions barring speech are even more exceptional because they risk infringing First Amendment rights. Prior restraints on speech are “the most serious and the least tolerable infringement on First Amendment rights,” *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976), and the injunction is the most onerous form of prior restraint. *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 764 (1994) (“Injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances.”); *Metropolitan Opera Ass’n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int’l Union*, 239 F.3d 172, 177 (2d Cir. 2001) (Whereas a general ordinance may be disobeyed and challenged upon attempted enforcement, “[a]n injunction

must be obeyed until modified or dissolved, and its unconstitutionality is no defense to disobedience.”). Therefore, there is a heavy constitutional presumption against such injunctions:

[T]he gagging of publication has been considered acceptable only in “exceptional cases.” Even where questions of allegedly urgent national security, or competing constitutional interests are concerned, we have imposed this “most extraordinary remedy” only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

*CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, Circuit Justice) (citations, brackets, and quotation marks omitted); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (“Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.”). Thus, injunctions against speech rarely issue and, when they do, they are scrutinized carefully and rarely survive appeal. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (holding that even the lower court’s *factual findings* about the nature of speech are subject on appeal to “an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression”); *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 567 (1995) (same); *see also CPC Int’l., Inc. v. Skippy Inc.*, 214 F.3d 456, 463 (4th Cir. 2000) (vacating injunction in part “because it raises serious First Amendment concerns”); *Taubman Co. v. Webfeats*, 319 F.3d 770 (6th Cir. 2003) (reversing preliminary injunction against noncommercial, critical website); *Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001) (vacating preliminary injunction against publication of novel); *Metropolitan Opera*, 239 F.3d at 177 (vacating preliminary injunction as an overly vague prior restraint on speech).

## **II. THIS COURT SHOULD DENY ALVIS’S MOTION BECAUSE A PRELIMINARY INJUNCTION WOULD CONSTITUTE A PRIOR RESTRAINT AGAINST NON-COMMERCIAL FAIR USE THAT CAUSES NO LEGALLY COGNIZABLE HARM.**

The preliminary injunction analysis is based on four factors: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the

defendant if the relief requested is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest. *Newsom*, 354 F.3d at 254. The plaintiff bears the burden of proving that each of the factors supports granting the injunction. *Direx*, 952 F.2d at 812. And that burden is heightened in an attempt to enjoin speech. *Org. for a Better Austin*, 402 U.S. at 419 (“Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint.”); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir.1996) (“In the case of a prior restraint on pure speech, the hurdle [for justifying a preliminary injunction] is substantially higher: publication must threaten an interest more fundamental than the First Amendment itself.”).

When one party alleges the infringement of First Amendment rights, the preliminary injunction analysis changes in another way as well. The question of First Amendment rights goes to the merits of the case, and even a temporary First Amendment violation constitutes irreparable harm of the highest order. Accordingly, where a party alleges that a government agency is causing irreparable harm by violating the First Amendment, the Fourth Circuit evaluates the merits of the case before considering any other factor, and this analysis often resolves the preliminary injunction question. *See Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 254-55 (4th Cir. 2003) (“In this case, the irreparable harm that Newsom has alleged is inseparably linked to his claim of a violation of his First Amendment rights. Determination of irreparable harm thus requires analysis of Newsom’s likelihood of success on the merits, and we turn to this question first.”); *see also Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Pub. Sch.*, 373 F.3d 589 (4th Cir. 2004); *Mom N Pops, Inc. v. City of Charlotte, N.C.*, 162 F.3d 1155, \*1 (4th Cir. 1998) (unpublished) (“[I]n this case the irreparable harm Mom N Pops alleges is inseparably linked to its claim of a violation to its First Amendment freedom of speech. . . . Therefore, to properly address Mom N Pops’ claim of irreparable injury, we must first determine Mom N Pops’ likelihood of

succeeding on the merits of its claims.”). The same analysis applies when the First Amendment violation is alleged as a defense. *See Taubman*, 319 F.3d at 778 (“When, as here, a preliminary injunction would infringe upon a constitutional right, the likelihood of success on the merits is often the determinative factor.”). A party who is likely to suffer a First Amendment violation, whether the plaintiff or the defendant, is likely to succeed on the merits and faces a greater likelihood of irreparable harm than the opposing party.

**A. Alvis Is Not Likely to Succeed on the Merits.<sup>1</sup>**

**1. Alvis Is Not Likely to Succeed on Its Trademark Claims.**

**a. The Townsends’ Speech Is Protected by the First Amendment and Is Not Barred by Trademark Law.**

As discussed in the Townsends’ Dismissal Memorandum and Reply Memorandum, Alvis is not likely to succeed on its trademark claims because the Townsends’ speech is protected by the First Amendment and is not barred by trademark law. A trademark’s purpose is to identify the source of goods or services used in commerce. A junior user infringes the trademark when he uses it in a way that creates a likelihood of confusing consumers about the source of goods or services: “[T]he general concept underlying likelihood of confusion is that the public believe that the mark’s owner sponsored or otherwise approved of the use of the trademark.” *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir. 1988) (quotation marks omitted). On the other hand, the Lanham Act does not bar “the tarnishment impact that can flow from an unfavorable communicative statement about a product or its maker, using the trademark as an identifier of the product or company.” 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 31:148 (4th ed. 1999) (citing Restatement of the Law: Unfair Competition). As discussed in the Townsends’ Dismissal

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<sup>1</sup>To avoid unnecessary repetition in this section, the Townsends incorporate arguments from their Memorandum in Support of Motion to Dismiss (“Dismissal Mem.”) and their Reply to Plaintiffs’ Opposition to Defendants’ Motion to Dismiss (“Reply Mem.”).

Memorandum, such *noncommercial* speech is expressly exempted from trademark law. Dismissal Mem. 13-16; *see also CPC*, 214 F.3d at 462 (holding that trademark law applies only to commercial speech, and consumer commentary is not commercial speech because it does not propose a commercial transaction). And it is protected by the First Amendment. *See* Dismissal Mem. 13-16; *CPC*, 214 F.3d at 463 (“Throughout most of the web site the trademark SKIPPY is used as part of editorial and historical commentary. As such it is a protected form of expression.”).

The Townsends’ website uses Alvis’s marks to identify the object of criticism. The Fourth Circuit has expressly held that such use for consumer commentary is entitled to First Amendment protection from trademark law:

It is important that trademarks not be transformed from rights against unfair competition to rights to control language. Such a transformation would diminish our ability to discuss the products or criticize the conduct of companies that may be of widespread public concern and importance. Much useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark.

*CPC*, 214 F.3d at 462 (quoting Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1710-11 (1999)) (citations and quotation marks omitted); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (holding that engaging “openly and vigorously in making the public aware of respondent’s real estate practices” and attempting to influence his conduct were “not fundamentally different from the function of a newspaper”).

This protection necessarily extends not just to commentary itself, but also to titles of works and advertisements. Imagine allowing people to use Burger King’s trademarks to write a book critical of the company, but disallowing them from using the words “Burger King” in the title or in commercial advertisements for the book. What would the publisher say to promote the book? “Read our fabulous book about a fast food company—but you’ll have to go to a bookstore and open the book to the first page to see which company!” *CPC* forbids precisely this kind of “language

control.” Similarly, imagine barring the publisher from using the words “Burger King” on Google or other Internet search engines. Such a holding would cripple both the publisher’s and its potential audience’s ability to find each other on the Internet. Accordingly, *CPC* protects not only the Townsends’ commentary on their website, but also their use of the term “spray siding” in their domain name and of Alvis’s marks in Google AdWords. Without using descriptive words in their domain name and on Google, the Townsends would be unable to inform people what their website is about. And people who seek information such as that offered by the Townsends would be significantly hampered in finding it.

For these reasons, even if Alvis were able to apply trademark law to the Townsends’ website and to show some likelihood of confusion, such confusion is a permissible because it stems from fair use. The Supreme Court recently considered whether a finding of confusion bars a fair use defense and emphatically held it does not. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, No. 03-409, Slip Op. at 9-10, 543 U.S. \_\_\_, 2004 WL 2804921, at \*6-8 (2004). At least some confusion must be compatible with fair use because the Lanham Act requires the plaintiff to prove a likelihood of confusion and authorizes fair use without suggesting that the defendant must prove the use does not cause confusion. *Id.* at 5-6, 2004 WL 2804921, at \*4. If courts are to take seriously the Lanham Act’s express authorization of fair use, 15 U.S.C. § 1115(b)(4), for purposes such as reporting, commentary, and parody, then they must permit some degree of confusion as a result. For example, initial confusion inheres in parody and some forms of commentary. To hold that those forms of communication are barred if they cause confusion would, for all practical purposes, outlaw them in violation of the Lanham Act.

Alvis argues that this motion for preliminary injunction does not implicate the Townsends’ First Amendment rights because it is an action to enforce private property rights. *See Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction (“P.I. Mem.”)* 20-21 (citing

*Interbank Card Ass'n v. Simms et al.*, 431 F. Supp. 131, 133 (M.D.N.C. 1977)). That assertion contradicts both Fourth Circuit and Supreme Court law. Not only is an injunction government action; it is government action even *more* constitutionally suspect than an ordinance. *See Madsen*, 512 U.S. at 765 (requiring “more stringent application of general First Amendment principles” to injunctions than to ordinances). And *CPC* expressly held that an injunction implicates the defendant’s First Amendment rights in a trademark case. *See CPC*, 214 F.3d at 461 (“The First Amendment prohibits not only statutory abridgment but also judicial action that restrains free speech.”) (citing *Madsen*, 512 U.S. at 765; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n.67 (1982); *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 184 (1968)).<sup>2</sup>

**b. Alvis Lacks Enforceable Trademarks in the Terms It Attempts to Control.**

Alvis is also not likely to succeed on most of its trademark claims because it cannot meet its burden of proving that it has a trademark in the term “spray on siding.” *See Retail Servs., Inc. v. Freebies Publ’g*, 364 F.3d 535, 542 (4th Cir. 2004) (at common law, the burden is on the plaintiff to prove a trademark’s validity). As discussed in the Townsends’ Reply in support of their motion to dismiss, and as the U.S. Patent and Trademark Office (“PTO”) has repeatedly ruled, “spray on siding” is a generic or, at best, descriptive term which cannot be protected or registered as a trademark. Reply Mem. 6-9. It is *a fortiori* that the term “spray siding,” which defendants use for their domain name, is also generic or descriptive at best, and hence not protectable. *See also Retail Servs.*, 364 F.3d at 538 (holding that a generic mark is entitled to no protection because it “neither

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<sup>2</sup>Alvis also cites *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972). To the extent that *Tanner* is relevant, it actually assists the Townsends. The plaintiffs in *Tanner* won a lower-court injunction forcing a property owner to allow them to pass out leaflets on the owner’s private property. The case is inapposite in that no court considered enjoining the pamphleteers’ speech or activity. However, the case bolsters the point that an injunction constitutes government action that implicates constitutional rights. The Supreme Court rejected the injunction because it violated the property owner’s Fifth and Fourteenth Amendment rights. *Id.* at 570.

signifies the source of goods nor distinguishes the particular product from other products on the market”); *id.* (“[I]f a business were permitted to appropriate a generic word as its trademark, it would be difficult for competitors to market their own brands of the same product. Imagine being forbidden to describe a Chevrolet as a ‘car’ or an ‘automobile’ because Ford or Chrysler or Volvo had trademarked these generic words.”) (quotation marks omitted). Accordingly, PTO has repeatedly **rejected** use of the term “spray on siding” as a trademark. PTO uses the term to describe a general class of products, *see* Levy Aff., Ex. B, and has denied Alvis’s attempt to register the term, finding it merely descriptive. *See id.*, Ex. E.<sup>3</sup> Indeed, the Supreme Court has held that when a company elects to identify its products with a descriptive term, it assumes the risk of any resulting confusion. *See KP*, Slip Op. at 9, 543 U.S. \_\_\_, 2004 WL 2804921, at \*6; *see also Retail Servs.*, 364 F.3d 535 (affirming judgment that *freebie.com* did not infringe even the *registered* trademark FREEBIES because the latter is generic).

**c. Alvis Cannot Meet Its Burden of Showing a Likelihood of Confusion.**

Alvis is not likely to succeed on its trademark claims because it cannot meet its burden of showing a likelihood of confusion. The Fourth Circuit uses seven factors to weigh the likelihood of confusion: (a) the strength or distinctiveness of the mark; (b) the similarity of the two marks; (c) the similarity of the goods/services the marks identify; (d) the similarity of the facilities the two parties use in their businesses; (e) the similarity of the advertising used by the two parties; (f) the defendant’s intent; and (g) actual confusion. *See Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1527 (4th Cir. 1984). Some courts also consider the degree of care exercised by consumers. *See Therma-Scan, Inc. v. Thermoscan, Inc.*, 295 F.3d 623, 638 (6th Cir. 2002). Each of the factors

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<sup>3</sup>Additionally, the term “spray on siding” is commonly used generically by the press and by other providers of spray on siding products. *See Reply Mem.*, Exs. F & G.

weighs against Alvis.

First, Alvis's marks are not distinctive. Alvis does not have a valid trademark in the generic or descriptive term "spray on siding," *see supra* § II.A.1.b., and the other portion of Alvis's registered trademark, "Alvis," is simply a surname. Surnames are weak marks. *Brennan's, Inc. v. Brennan's Restaurant, L.L.C.*, 360 F.3d 125, 132 (2d Cir. 2004). As for the second through fifth factors, there is no similarity between marks, goods and services, facilities, or advertising because the Townsends do not use separate marks, do not offer or advertise goods and services, and are not in business. Sixth, the Townsends' intent, rather than to confuse consumers about the source of goods and services, is to identify Alvis clearly and engage in protected consumer commentary about the company. In addition, because spray on siding is an expensive and unusual purchase, consumers are likely to exercise care in buying it and are accordingly unlikely to be confused. *See Therma-Scan*, 295 F.3d at 638.

As for the seventh factor, Alvis's proffer of just two examples of actual confusion—even if that is what they were—weighs strongly against a finding of likely confusion. *See Petro Stopping Ctrs, L.P. v. James River Petroleum*, 130 F.3d 88, 95 (4th Cir. 1997) (“[T]he company’s failure to uncover more than a few instances of actual confusion creates a presumption against likelihood of confusion in the future.”). Moreover, the examples fail to prove actual confusion. First, Alvis cites a Utah dealer who accidentally provided the Townsends’ domain name in an advertisement. P.I. Mem. 8-9 & Ex. G. The dealer clearly was not confused about which website was Alvis’s. In the same advertisement in which he posted the Townsends’ domain name, he also posted Alvis’s domain name in larger, bold typeface. For all that appears in the record, either he or a newspaper employee simply mistyped Alvis’s domain name once. One typo by a dealer or newspaper copyist does not demonstrate consumer confusion as to the origin of goods and services. Moreover, the Utah dealer is Alvis’s own franchisee, and information about why and how the dealer’s

advertisement came to include this information, how long it was there, and what impact it may have had, is uniquely within Alvis's own control. Counsel for the Townsends have attempted to interview the Utah dealer, but he refused to elaborate without speaking to Alvis's attorneys first. That Alvis has simply reprinted a cached version of the advertisement, without introducing more evidence or making the dealer available for cross-examination, strongly suggests that such evidence would not favor Alvis.

Second, Alvis cites a potential contract with Rex Jones to become an Alvis dealer but does not provide any probative evidence of confusion. Alvis submits only the speculation and hearsay of Robert Turner, who declares that the Joneses "stumbled upon" the Townsends' website when seeking Alvis's. *See* P.I. Mem., Ex. B. Turner is wrong and has mistaken disagreement for confusion. Marcia Jones declares that she was not confused about what she viewed on the Internet. *See* Reply Mem., Ex. H. She sought and found information from third parties about Alvis, and she was never confused about its sponsorship. *See id.* Moreover, she and Rex Jones were potential dealers, not consumers. Thus, showing confusion on their part would not show actual confusion on the part of a consumer.

In an attempt to circumvent its deficiency on every factor discussed above, Alvis relies on *People for Ethical Treatment of Animals v. Doughney*, 263 F.3d 359 (4th Cir. 2001) (hereinafter "PETA"). But that case is inapposite. There, the defendant used PETA's precise trademark as his domain name and conceded that his use was confusing. He also conceded that he used the mark "in commerce" because he linked directly to over 30 commercial operations and attempted to sell the domain name. The content of his website did not cure the confusion created by his domain name because he did not prominently disclaim affiliation with PETA or link to PETA's website. The Court found that users would be confused by his website until they read enough to perceive that it was parody. *Id.* at 365-67.

In contrast, the Townsends do not link directly to any commercial operations, and they have never attempted to sell a domain name. Their domain name does not use any Alvis trademarks, much less Alvis's *precise* marks. Thus, it is highly unlikely that a user will mistakenly access the Townsends' website. See *Entrepreneur Media, Inc. v. Smith*, 279 F.3d 1135, 1146-47 (9th Cir. 2002) (finding that the domain *entrepreneurpr.com* was not confusingly similar to plaintiff's ENTREPRENEUR mark and noting that, in the Internet context, "consumers are aware that domain names for different Web sites are often quite similar . . . and that very small differences matter"). Moreover, the website's critical content could never be mistaken as having been produced by Alvis, and the website prominently disclaims affiliation with Alvis and links to Alvis's website. Therefore, even if a user seeking Alvis's website were to access the Townsends' accidentally, it is impossible that she would give up on seeking Alvis's site due to "anger, frustration, or a belief that [it] does not exist." *PETA*, 263 F.3d at 366. She need only click on a prominently displayed link to reach it.

In fact, the Townsends' website may well have *increased* traffic to Alvis's. Surely users who search for general information on spray siding and users who hear of this lawsuit in the media, if they view the Townsends' website first, will also click on the Townsends' link to Alvis's website—both to explore the object of the Townsends' criticism and to see whether the company offers a rebuttal. Alvis has likely collected website usage statistics that would indicate whether and how the Townsends' site has impacted the number of visitors to Alvis's. That evidence is solely within Alvis's control, and the fact that Alvis has not supplied it suggests that it would be unfavorable to the company. In short, the company has provided **no evidence** that the Townsends' website has prevented users from visiting Alvis's or caused any other consumer confusion, and its failure even to attempt such a showing is fatal on a preliminary injunction.

Finally, the Townsends' use of Google Adwords is not confusing as a matter of law. In *Government Employees Insurance Co. v. Google, Inc.*, No. 1:04-CV-507, (E.D. Va. filed May 4,

2004), GEICO alleged that the use of GEICO's trademarks in Google Adwords by GEICO's competitors infringes GEICO's rights in the marks. When a person uses Google to search the Internet for the term "GEICO," the search engine will list not only GEICO's website, but also those of GEICO's competitors who have purchased AdWords consisting of GEICO's marks. Although Alvis relied on an early opinion in that case refusing to dismiss the complaint, P.I. Mem. 10, the trial judge has granted partial summary judgment in favor of Google, ruling in open court that the use of trademarks in Google AdWords does not create a likelihood of confusion. *See* Stefanie Olsen, *Google Wins in Trademark Suit with Geico*, CNet News.com, Dec. 15, 2004, at [http://news.com.com/Google+wins+in+trademark+suit+with+Geico/2100-1024\\_3-5491704.html](http://news.com.com/Google+wins+in+trademark+suit+with+Geico/2100-1024_3-5491704.html).<sup>4</sup> There is no reason to think that a consumer will be confused about the origin of GEICO's goods and services merely by viewing a listing of insurers that includes GEICO. And if the use of Google AdWords by *competitors* is not confusing, then use by critics and commentators cannot be confusing either.

In fact, the only record evidence on this point, the declaration of Marcia Jones, states that such search results are plainly **not** confusing. *See* Reply Mem. Ex. H. When a user searches the Internet for Alvis's marks, she naturally expects to find not only Alvis's website, but also third-party websites that discuss Alvis. Rex and Marcia Jones sought precisely such information. *See id.* And their story illustrates precisely the need for commentators and critics to be able to use trademarks both in their commentary and in their advertisements of it.

## **2. Alvis Is Not Likely to Succeed on its Tortious Interference Claim.**

To prevail on a claim for tortious interference with prospective economic advantage, Alvis

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<sup>4</sup>The court has not issued an opinion yet. The Townsends represent the ruling as best they understand it from the press and will seek to file a supplemental memorandum when a written opinion becomes available.

must prove that (1) the Townsends unjustifiably induced a third party to refrain from entering into a contract with Alvis; and (2) the contract would have ensued but for the interference. *Cameron v. New Hanover Mem'l Hosp., Inc.*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917 (1982). Alvis is not likely to succeed on its tortious interference claim because it has failed even to plead the above facts, much less to support them with evidence.

Alvis's only evidence on the point is the speculation and hearsay of an Alvis employee, Robert Turner, regarding a purported contract with Rex Jones. P.I. Mem. 36-37 & Ex. B. But Rex and Marcia Jones's own declarations, based on personal knowledge, flatly contradict Turner's. Reply Mem., Exs. H & I. The couple's declarations show that they were not close to signing a deal with Alvis and that they would never have contracted with Alvis without first researching the company and viewing previous work done with its products. *See id.* Marcia Jones actively sought out information about Alvis from third parties. *See id.*, Ex. H. Moreover, the Joneses based their decision not to contract with Alvis not only on the Townsends' website, but also on several other factors, including (1) reports about Alvis on WRAL-TV in Raleigh; (2) the evasive responses they received from an Alvis dealer; (3) concerns about the constraints of being an Alvis dealer; and, perhaps most important, (4) dissatisfaction with a house they viewed to which Alvis Spray on Siding had been applied. *See id.*, Exs. H & I. Alvis cannot show that the Townsends interfered with Alvis's potential contract with the Joneses or that the contract would have ensued but for the Townsends' website.

**B. The Balance of Harms Favors the Townsends.**

The balance of harms in this case emphatically favors the Townsends. An injunction would restrain their speech in violation of the First Amendment: "[T]he Supreme Court has explained that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Newsom*, 354 F.3d at 261 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976));

*see also Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002) (same). And such harm clearly outweighs an economic injury. Alvis’s purported economic harm, even if it were incalculable and irreparable, does not compare to the harm that flows from abridging free speech. *See CBS*, 510 U.S. at 1317-18 (holding that preliminary injunction barring CBS from airing footage from the inside of a meat packing plant presented circumstances so extraordinary as to merit a stay of the order by a single Supreme Court Justice, notwithstanding the plant’s claims of serious, irreparable economic harm, because the injunction caused “intolerable” First Amendment harm); *id.* at 1317 (explaining that preliminary injunctions against speech are typically improper even when national security or competing constitutional interests are at stake). Thus, when one party’s free speech rights are at stake, courts necessarily err on the side of assuming that the likelihood of irreparable harm to that party is greater. *See Taubman*, 319 F.3d at 778 (dissolving preliminary injunction against a gripe site and holding that “due to the Free Speech concerns present, we find the potential for irreparable harm to [defendant] more likely”).

Moreover, Alvis would not be harmed by a denial of the preliminary injunction. The company is not harmed by a court’s refusal to enforce trademark rights that the company lacks and which would be unconstitutional if enforced. *Cf. Newsom*, 354 F.3d 261 (“Jouett is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which, on this record, is likely to be found unconstitutional.”). And the company is not harmed where there is no likelihood of confusion. *Taubman*, 319 F.3d at 778. Indeed, the company’s purported harm is wholly speculative. Alvis’s only factual support for alleged harm is Turner’s hearsay and speculation about a contract with the Joneses, P.I. Mem. 20, and the Joneses’ own declarations show that Turner is wrong. *See supra* § II.A.2.

**C. The Public Interest Is Served by Upholding First Amendment Rights, Not by Denying Them.**

The public interest is better served by protecting the First Amendment right to engage in consumer commentary than by stifling such speech at the behest of a company that does not even own trademarks in some of the terms it is attempting to control. *See Newsom*, 354 F.3d at 261 (“Surely, upholding constitutional rights serves the public interest.”) (citing *Homans v. Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) (“[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression.”)); *Taubman*, 319 F.3d at 778 (dissolving preliminary injunction against gripe site and holding that “due to the Free Speech concerns present, we find . . . that the public would be negatively impacted[] should we *not* dissolve the injunctions”) (emphasis in original).

### **III. THIS COURT SHOULD NOT GRANT THE RELIEF REQUESTED EVEN IF ALVIS WERE TO PREVAIL ON THIS MOTION.**

Even if this Court were to find that Alvis should prevail on a motion for a preliminary injunction, the Court should not grant the relief that Alvis requests. That relief would be unconstitutionally vague and overbroad.

Even an injunction against illegal speech must be narrowly tailored to proscribe only as little speech as possible. *CPC*, 214 F.3d at 462 (“The injunction against Skippy is not narrowly tailored to remedy specific violations of the 1986 order. As such it implicates serious First Amendment concerns.”); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43-44 (D.C. Cir. 1985) (“Restrictions imposed on deceptive commercial speech can be no broader than reasonably necessary to prevent the deception.”) (citing *In re RMJ*, 455 U.S. 191, 203 (1982)). Alvis’s proposed relief violates that mandate in several ways.

First, Alvis’s request that this Court order the Townsends to refrain from misappropriating Alvis’s marks in a manner “likely to cause confusion deception or mistake or appropriate the goodwill and reputation of Alvis,” Plaintiffs’ Motion for Preliminary Injunction (“P.I. Mot.”) 1-2,

is question-begging and vague. It gives the Townsends no direction as to precisely what they may and may not do. Such an injunction would impermissibly “chill” the Townsends’ speech by placing them under the threat of contempt penalties without informing them what might trigger the penalties. *See Metropolitan Opera*, 239 F.3d at 174, 176-77 (vacating injunction on “harassing,” “threatening,” “fraudulent,” and “defamatory” speech).

Second, Alvis requests that this Court order the Townsends to cease using domain names that are even more different from Alvis’s marks than *spraysiding.com* and which are thus even less likely to cause confusion. P.I. Mot. 2. Even if this Court were to determine that the use of *spraysiding.com* causes a likelihood of confusion and is not fair use protected by the First Amendment, there is no reason to reach the same conclusion about *sprayedonreview.com*, *sprayedon.com*, and *georgia-spray.com*. Moreover, because Alvis has not provided any argument to support enjoining those terms, it clearly has not met its burden of persuasion on the four preliminary injunction factors. To enjoin speech about which Alvis has not even provided argument, much less carried its burden, would be flatly unconstitutional. Finally, to enjoin the Townsends from all advertising that uses Alvis’s marks on Google, P.I. Mot. 2-3, rather than to enjoin only specific uses found to be confusing, would directly infringe speech in violation of *CPC*.

If this Court grants Alvis’s motion, it must craft the injunction as narrowly as possible to comply with the general rule against prior restraints on speech. *See CPC*, 214 F.3d 463 (vacating injunction on website and remanding for an injunction that would “prohibit only illegal conduct and nothing more”) (citing *Madsen*, 512 U.S. at 765); *see also Westchester Media v. PRL USA Holdings, Inc.*, 214 F.3d 658, 674 (5th Cir. 2000) (“[C]ourts in trademark cases have a responsibility to tailor the relief to the violation, a responsibility that includes consideration of disclaimers.”); *Consumers’ Union v. General Signal Corp.*, 724 F.2d 1044, 1053 (2d Cir. 1983); *Better Bus. Bur. v. Med. Dirs.*, 681 F.2d 397, 404-05 (5th Cir. 1982). The Townsends argue that nothing on their website site

renders it “commercial” or confusing for trademark purposes. But if the Court disagrees in some respect, it should issue a narrow injunction forbidding only those portions of the website that it finds both commercial and impermissibly confusing.

### **CONCLUSION**

For above reasons, this Court should deny Alvis’s motion for a preliminary injunction.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned counsel certifies that on this 16th day of December, 2004, he caused to be served by United States Mail, first class postage prepaid, the foregoing *Response in Opposition to Plaintiffs' Motion for Preliminary Injunction* on the following:

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December 16, 2004