

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

FIRST PREMIER BANK, PREMIER
BANKCARD LLC, AND PREMIER
NEVADA, LLC,

Plaintiffs,

v.

ODYSSEAS PAPADIMITRIOU AND
EVOLUTION FINANCE, INC.,

Defendants.

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Case 4:14-cv-04055-LLP

**Memorandum in Support of Defendants' Motion to Dismiss
and Opposition to Plaintiffs' Preliminary-Injunction Motion**

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Dated: August 7, 2014

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INTRODUCTION

This lawsuit is a transparent attempt by First Premier, a credit-card company, to silence constitutionally protected information and commentary about its controversial products at CardHub—an independent website whose only purpose is to help consumers learn about and compare credit cards online.

First Premier is infamous for having offered subprime credit cards with low credit limits, high annual interest rates (as high as 79%), and high up-front fees—as high as \$170 in fees for \$250 of credit. Its cards have been the object of sustained criticism by Congress, federal regulators, consumer groups, and the press. One First Premier card recently received the dubious distinction of “America’s worst credit card” from Consumer Reports.

In an effort to intimidate CardHub, First Premier asks this Court to award \$5,000,000 in damages and an injunction ordering CardHub to remove all content about its credit cards from the website. There is good reason to believe that First Premier has successfully used threats of similar litigation to silence virtually every other credit-card-comparison site on the Internet. Asked to justify this lawsuit, a First Premier executive would say only that the company “needs to retain control of its product”—meaning, presumably, that its product can’t survive unless consumers are kept in the dark.¹

To that end, First Premier invokes federal trademark law, complaining about the fact that its name appears in information and reviews displayed at CardHub. But First Premier and CardHub aren’t competitors. CardHub doesn’t even sell credit cards. And CardHub never uses First Premier’s marks to identify the source of any products sold by CardHub (because CardHub

¹ Nikhil Hutheesing, *How to Protect Yourself from Credit Card Bullies*, Fox Business, Aug. 5, 2014, available at <http://fxn.ws/1nwTYiN>.

doesn't sell *any* products). First Premier's invocation of trademark law, in other words, is a category error.

But even setting aside the fundamentals of trademark law, the short answer to First Premier's lawsuit is that the First Amendment completely bars its improper attempt to silence non-commercial consumer commentary. First Premier can't sue to stop speech that it dislikes on CardHub any more than it could sue the *Washington Post* or the *Argus Leader* for the same thing.

First Premier therefore fails to state a claim upon which relief can be granted. To discourage future attempts to use litigation to stifle legitimate commentary, and to ensure that CardHub can continue to publish information for its readers, this Court should deliver a swift end to this litigation.

STATEMENT

A. Papadimitriou establishes Evolution Finance and CardHub as credible, unbiased sources of consumer information about credit cards.

Odysseas Papadimitriou is the founder and Chief Executive of Evolution Finance, the parent company of CardHub.com and WalletHub.com. Papadimitriou Decl. ¶ 1. These websites help consumers learn about and compare credit cards and other financial products and services. *Id.* at ¶¶ 6–8. Papadimitriou and CardHub are frequently cited as reliable sources by major media outlets including the *New York Times*, the *Wall Street Journal*, *CNBC*, *Forbes*, and *Consumer Reports*.²

² See, e.g., Schultz, *Be Wary of Credit Cards with No Spending Limits*, *New York Times*, Dec. 1, 2010, available at <http://nyti.ms/1rEjpGx>; Johnson, *Consumers Warned on Deferred-Interest Cards*, *Wall Street Journal*, Dec. 27, 2012, available at <http://on.wsj.com/1t09DyD>; Clifford, *Best Credit Cards for Small-Business Owners in 2013*, *CNBC*, June 7, 2013, available at <http://cnb.cx/1jY4Db4>; Mayer, *Should You Sign Up for A Store's Credit Card?*, *Forbes*, Dec. 5, 2013, available at <http://onforb.es/1uk5Yxe>; Horymski, *Traveling Abroad? Save Money by Changing Money*, *Consumer Reports*, May 16, 2013, available at <http://bit.ly/1nBPdbQ>.

While working for Capital One from 2000 to 2008, Papadimitriou became disenchanted with the credit-card industry. *Id.* at ¶¶ 3–5. He came to believe that consumers lacked a credible source for credit-card information, reviews, and comparisons. *Id.* At that time, credit-card-comparison websites were little more than “advertising billboards” for credit-card companies, and lacked robust editorial standards. *Id.* In 2008, Papadimitriou left his job at Capital One and founded Evolution Finance, determined to create resources that would empower consumers to make better personal-finance decisions. *Id.*

In the years since its founding, Evolution Finance has established two consumer-oriented personal finance websites, CardHub and WalletHub. *Id.* at ¶¶ 7–12. CardHub focuses on credit cards while WalletHub provides information about a wide variety of financial products and services. *Id.* at ¶ 11. The nonprofit Consumer Action rated CardHub as one of the best credit-card-comparison websites in the nation. *Credit Card Comparison Site Survey*, Consumer Action News, Fall 2012, *available at* <http://bit.ly/cons-action>.

CardHub is built around a database of over 1,200 credit cards. Papadimitriou Decl. ¶ 8. The database includes information such as the interest rate, fees, and rewards for each card. Visitors to CardHub can search for and compare credit cards in the database based on various criteria. *Id.* CardHub also allows users to post their own experiences and to rate each credit card between one and five stars. *Id.* CardHub averages these ratings to give each card a star rating that is featured prominently next to each card’s listing. *Id.* The reviews and ratings are generated entirely by CardHub’s users. *Id.* at ¶ 10.

Just like a newspaper or magazine, CardHub relies on advertisers to support the site. Like most credit-card-comparison websites, advertising on CardHub primarily takes the form of affiliate advertising. *Id.* at ¶ 14. Credit-card companies that decide to become advertisers pay CardHub a commission for each credit-card application completed by an individual who clicks

an “Apply Now” link on CardHub. *Id.* at ¶ 22. In return, advertisers’ cards are given priority placement on certain pages throughout CardHub. *Id.* at ¶ 14.

CardHub has firm editorial standards modeled after the editorial policies at newspapers and other media outlets that, like CardHub, rely on advertising revenue. *Id.* at ¶ 15, Ex. 2. These policies allow CardHub’s editors to operate free of advertiser influence. *Id.*

CardHub takes extra care to ensure that users understand which cards are offered by affiliates and which are not. Every affiliate card is clearly labeled “Sponsored Card” and the details page for every card in the CardHub database includes the following disclaimer:

Ad Disclosure: Certain offers originate from paying advertisers, and this will be noted toward the top of the page using the designation “Sponsored Card,” when applicable. Advertising may impact how and where products appear on this site (including, for example, the order in which they appear). At CardHub we try to list as many credit card offers as possible and currently have more than 1,200 offers, but we do not make any representation of listing all available offers.

Regardless of advertiser status, none of the information on CardHub constitutes a referral or endorsement of the respective issuer by us, or vice versa. Furthermore, it is important to note that the inclusion of non-sponsored cards on CardHub does not indicate that issuer’s involvement with the site. Information is displayed first and foremost for helping consumers make better credit card decisions.

Id. at ¶ 17, Ex. 3.

To ensure that CardHub’s users understand the relationship between CardHub and the credit cards that it catalogs, every link from CardHub to a credit card’s website brings users first to a special page that informs them they are leaving the CardHub site and are being redirected to the credit-card company’s site. *Id.* at ¶ 18, Ex. 5. This page also warns users to “[d]ouble-check [the] card’s details.” *Id.* This is reinforced by CardHub’s “about” page, which is easily accessible from every page within the CardHub site. The about page states: “Card Hub is not a credit-card company, nor are we the front for any credit-card company. We are, however, committed to

helping each and every Card Hub customer make better financial decisions regarding the cards in their wallets.” *Id.* at ¶ 13, Ex. 1.

B. First Premier markets its subprime credit cards with low credit limits and unusually high fees and interest rates.

Plaintiffs First Premier Bank, Premier Bankcard, and Premier Nevada (collectively, First Premier) issue subprime credit cards to consumers with bad credit. Cmplt. ¶ 10. The cards offered by First Premier frequently have low credit limits, high upfront fees, and high interest rates. Kim, *Six Worst Credit Cards*, ABC News, Oct. 31, 2012, available at <http://abcn.ws/1rTyQrK>; Veneziani, *The Bank with the 79% APR Has a Long, Long History of Abuse*, Business Insider, Oct. 22, 2009, available at <http://read.bi/1nIatg1>.

In 2007, then-New York Attorney General Andrew Cuomo won a \$4.5 million settlement against First Premier for deceptive marketing practices. First Premier had advertised that its cards had no upfront fees, yet when customers signed up for and received the cards, they found that various fees—often totaling more than half the credit limit—were already on the card. The experience of one customer, interviewed by the *New York Times*, was representative:

Mel Nielsen of Saratoga Springs, N.Y., was among the customers whose complaints led the attorney general to take action against the bank. Mr. Nielsen said that his credit rating was bad after his photocopying business failed in the late 1980s and that he applied for two Premier Bank cards in 2001.

“I thought, here is a chance, perhaps, to rebuild my credit,” Mr. Nielsen said. But when he received the cards, Mr. Nielsen said, he found that First Premier had charged him about \$170 in upfront fees to obtain \$250 in credit on each card. Mr. Nielsen said he used the cards twice, for charges of \$21 and \$31, before canceling them. But he said that late fees and other charges eventually increased his debt to \$491 on one card and \$526 on another.

Sullivan, *Bank to Pay \$4.5 Million to Settle Suit over Cards*, New York Times, Aug. 16, 2007, available at <http://nyti.ms/1nDIxtJ>.

In 2010, Consumer Reports dubbed a First Premier card “America’s worst credit card,” warning its readers that:

First Premier’s card now advertises a \$25 to \$95 processing charge (which fluctuates by the minute, depending on when you click on the card's website). What’s worse is that when you drill deeper into the fine print, you'll find a \$75 annual fee and an APR of 23.9 percent to 59.9 percent on purchases and cash advances (again, depending on when you visit the site). So you could face a minimum of \$100 or a maximum of \$170 in fees in the first year for a card with only a \$300 initial credit limit. Other fees include an \$11 charge for expediting bill payment over the phone and a credit-limit increase fee equal to 50 percent of the increase. So for every \$100 that First Premier increases your credit limit it charges you \$50.

America’s Worst Credit Card, Consumer Reports, Nov. 2010, available at <http://bit.ly/1qEnlHB>.

C. First Premier enters into a short-lived agreement to purchase advertising on CardHub.

First Premier credit cards have been a part of the CardHub database since shortly after the site was founded. Papadimitriou Decl. ¶ 19. As it does for most major credit cards in America, CardHub listed the rates, fees, and terms of First Premier’s cards. *Id.* at ¶ 20.

On June 15, 2008, First Premier and Evolution Finance entered into an Internet Marketing Agreement “whereby [CardHub would] insert Banners” for First Premier cards onto the CardHub site. *Id.* at ¶ 21; Cmplt. Ex. 3. As part of this advertising agreement, First Premier provided CardHub with banner ads, credit-card images, marketing bullet points, and a special tracking hyperlink. Papadimitriou Decl. ¶ 22. When clicked, this special hyperlink recorded on First Premier’s servers that the visitor had come from CardHub. *Id.* If the visitor signed up for a card, CardHub would receive an \$8.50 commission from First Premier. *Id.*

Shortly after signing the advertising agreement, First Premier was criticized by consumer groups and the media for offering a card with an interest rate of 79.9%. *Bank Offers Credit Card with 79.9% APR*, CBS News, Dec. 18, 2009, available at <http://cbsn.ws/1nNNWA2>. The “bloated” interest rate was intended to “skirt[] new regulations intended to curb abusive

practices.” *Id.*; see also Veneziani, *The Bank with the 79% APR Has a Long, Long History of Abuse*, Business Insider, Oct. 22, 2009, available at <http://read.bi/1nIatg1>.

Applications for First Premier cards from CardHub dwindled, and on January 3, 2011, First Premier cancelled its advertising agreement with CardHub. Papadimitriou Decl. ¶ 24; Cmplt. Ex. 5. In keeping with the advertising agreement, CardHub removed all of the banner ads, credit-card images, marketing bullets, special tracking links, and other media that had been given to CardHub as part of the agreement. Papadimitriou Decl. ¶ 25. The CardHub page for every First Premier card was restored to the basic, non-affiliate data that is kept about every major credit card in America. *Id.* The affiliate-tracking hyperlink was replaced with a standard link to First Premier—the same link that a visitor might find on Google or another search engine when searching for “First Premier.” *Id.*

D. Claiming trademark infringement, First Premier demands that CardHub remove “all references to First Premier Bank” from its database of all major credit cards.

On July 8, 2011, First Premier wrote to Papadimitriou demanding that CardHub “immediately remove from your website any mention of the Avention credit card, and any and all references to First Premier Bank.” Cmplt. Ex. 5. The letter claimed that CardHub’s use of the First Premier name was both “false advertising pursuant to Section 43(a)(1)(B) of the Lanham Act” and trademark infringement “proscribed pursuant to Section 32 of the Lanham Act.” *Id.* The letter referenced the advertising agreement but did not suggest that the agreement restricted Evolution Finance’s use of the First Premier mark. *Id.*

Papadimitriou responded on July 11 that as “a product directory of all major credit-card offers... we need to refer to the different cards using their actual names.” Papadimitriou Decl. Ex. 7. Papadimitriou offered to provide a special disclaimer and trademark notice for each First Premier page on CardHub. *Id.* First Premier reconsidered its demands, and on July 22 asked

Papadimitriou to “deactivat[e] all links to PREMIER or First PREMIER Bank.” *Id.* at Ex. 8. While Papadimitriou felt “very strongly that using [the] card names falls under . . . fair use,” he complied with the company’s request to remove the links. *Id.* at ¶ 31, Ex. 7.

To remove the links from the credit-card details pages requested by First Premier, CardHub’s engineers created a special case in the website’s code that hid the links from visitors to the site but preserved the links for CardHub’s data entry team so they could regularly update the card information. *Id.* at ¶ 31.

On August 29, 2012, First Premier demanded the removal of a different set of “unauthorized links,” this time from a CardHub partner site, MyFico.com. Cmpl. Ex. 6; Papadimitriou Decl. ¶ 32. Papadimitriou replied that “[o]ut of good will for the partnership that we had,” he would comply with First Premier’s “unreasonable request.” Papadimitriou Decl. Ex. 9.

First Premier sent Evolution Finance another letter on November 20, 2012, accusing them of “unethical business practices” and demanding that they take down a different set of “unauthorized links,” this time from CardHub’s comparison tool. Cmpl. Ex. 7. Papadimitriou reiterated that he would take down the links “out of good will” but took issue with First Premier’s assertion that the links “create[] the impression that cardhub.com is affiliated with PREMIER.” Papadimitriou Decl. Ex. 10 (“In the same way that Yelp.com or Google.com does not create an impression that it is affiliated with any of the restaurants that it has on its database, CardHub.com does not create ANY impression that we are affiliated with First Premier.”); Cmpl. Ex. 7.

As a result of these repeated demands, Papadimitriou began to suspect that “First Premier is trying to directly or indirectly prevent credit-card comparison and review websites, like

CardHub.com, from listing their products” and warned First Premier that “the CFPB and the general public would not be happy if they found out.” Papadimitriou Decl. Ex. 10.

E. First Premier brings this lawsuit, seeking to suppress information about its credit cards on CardHub.

In early 2014, CardHub updated its website to make the site easier to view on handheld devices such as phones and tablets. *Id.* at ¶ 34. In the process, CardHub’s engineers unintentionally discarded the special code that had been set up to hide links to First Premier’s cards. *Id.*

On April 10, 2014, First Premier filed this lawsuit against Papadimitriou and Evolution Finance, alleging breach of contract and unfair competition under both the Lanham Act and the common law. Cmpl. First Premier accuses Papadimitriou of “intentionally misappropriating PREMIER’s goodwill and engaging in unfair competition . . . intended to wrongfully enrich Defendants and to deliberately and willfully injure PREMIER in wanton disregard of PREMIER’s rights and Defendants’ legal obligations,” and requests damages of “no less than \$5,000,000.” Cmpl. ¶ 57. First Premier’s contract claim relies on a clause in the now-terminated advertising agreement requiring CardHub to remove First Premier’s advertisements—specifically, to “remove, ‘turn off’ or make inactive all Banners and Links as soon as possible after Bankcard notifies it to do so,” and “[u]pon the effective date of termination of this Agreement,” to “remove all Banners from all websites maintained by Operator and/or . . . cease sending e-mails promoting Bank’s credit card products.” Cmpl. Ex. 3 at 5–6. In an effort to reach information that goes beyond the long-since-discarded advertising, First Premier relies on a hyper-literal reading of “Banner,” defined by the contract as “a graphic message and any other information that appears on the computer screen when accessing the Operator’s Website, or a

graphic message that appears in a Link, ‘pop-up’ advertisement or exit console, promoting the Bank’s credit card products or directing Traffic to PREMIER’s Website.” *Id.* at 2.

The same day, First Premier asked the Court for a preliminary injunction barring Evolution Finance from, among other things:

Placing on the Accused Website or any other website that is directly or indirectly owned, operated or controlled by Defendants graphic messages and any other information that appears in the screen when accessing that website, or a graphic message that appears in a link, “pop-up” advertisement or exit console appearing on such website that promotes First PREMIER’s credit card products, directs Internet users to websites where persons can apply for First PREMIER’s credit card products or directs Internet traffic to PREMIER’s websites.

Mot. for Prel. Inj. at 2.

Within days of learning of the lawsuit, Papadimitriou had the links removed. Papadimitriou Decl. ¶ 35. CardHub continues to maintain basic information about First Premier’s cards, just as it does for every major credit card—just as it did before First Premier advertised on CardHub. *Id.* Papadimitriou suspects that First Premier is trying to pressure CardHub and other credit-card comparison websites into removing First Premier cards from their sites, “mak[ing] it harder for consumers to learn about First Premier cards.” Papadimitriou Decl. ¶ 37. Some of CardHub’s competitors have already removed important details about First Premier cards from their listings—many have removed First Premier cards altogether. Papadimitriou Decl. ¶ 38; Ex. 11. When asked about the reason for bringing this lawsuit, a spokesperson for First Premier told Fox News that the “company needs to retain control of its product.” Nikhil Hutheesing, *How to Protect Yourself from Credit Card Bullies*, Fox Business, Aug. 5, 2014, available at <http://fxn.ws/1nwTYiN>.

STANDARDS OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), a complaint “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678. An “unadorned, the-defendant-unlawfully-harmed-me accusation” does not withstand a motion to dismiss. *Id.*

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In order to succeed on its motion for a preliminary injunction, First Premier “must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *Id.* at 20. Motions for injunctive relief that seek to proscribe speech protected by the First Amendment are subject to an even higher standard, and must be narrowly tailored to achieve a legitimate government purpose. *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 184 (1968).

ARGUMENT

I. The First Amendment bars First Premier’s attempt to silence protected speech.

Through this lawsuit, First Premier attempts to use trademark and unfair-competition law to silence protected consumer criticism of its controversial credit cards. CardHub uses First Premier’s trademarked product names to identify the subject matter of pages that list information and consumer reviews regarding First Premier’s credit cards. Because the information and reviews are fully protected by the First Amendment, and because the trademark and unfair-competition laws cannot encroach upon the zone protected by the First Amendment, First Premier’s lawsuit fails to state a claim upon which relief may be granted. Indeed, if courts were to allow suits like First Premier’s to proceed, any company dissatisfied with a bad review of its

products or services—whether in a website, or in a printed newspaper or magazine—would be able to bring an infringement action to halt publication of the unwanted review.

It is well-established that consumer commentary is core speech protected by the First Amendment, *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), and that the First Amendment fully applies to Internet communications, *Reno v. ACLU*, 521 U.S. 844 (1997). More specifically, the federal appellate courts have uniformly held that websites like CardHub—which publish commentary about a mark-holders’ products rather than compete with them—are protected against attempts to silence that commentary through the trademark and unfair competition laws. *See, e.g., Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 423–25 (1st Cir. 2007); *Bosley Medical Inst., Inc. v. Kremer*, 403 F.3d 672, 679–80 (9th Cir. 2005); *Lamparello v. Falwell*, 420 F.3d 309, 313 (4th Cir. 2005); *TMI, Inc. v. Maxwell*, 368 F.3d 433 (5th Cir. 2004); *Taubman v. WebFeats*, 319 F.3d 770 (6th Cir. 2003); *CPC Int’l v. Skippy, Inc.*, 214 F.3d 456, 462 (4th Cir. 2000).

As these courts have recognized, “it is important that trademarks not be ‘transformed from rights against unfair competition to rights to control language.’” *CPC Int’l*, 214 F.3d at 462 (quoting Mark Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1710–11 (1999)). “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.” *Id.* “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.” *New Kids on the Block v. News America Publ’g, Inc.*, 971 F.2d 302, 307 (9th Cir. 1992).

To guard against improper intrusion into the zone of protected speech, courts strictly limit the reach of trademark law to protection of the *source-identifying* function of trademarks. “[T]rademarks are not merely descriptive; they answer the question ‘Who made it?’ rather than

“What is it?” *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1216–17 (11th Cir. 2000); accord *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900–01 (9th Cir. 2002) (“It is the source-denoting function which trademark laws protect, and nothing more.”). Because First Premier’s marks are used only descriptively in Evolution Finance’s websites, the First Amendment would prevent enforcement of the trademark law here, even if it otherwise applied. “When unauthorized use of another’s mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark right.” *Id.* at 900 (quoting *Yankee Publ’g, Inc. v. News Am. Publ’g, Inc.*, 809 F. Supp. 267, 276 (S.D.N.Y. 1992)).

Courts also strictly foreclose any application of unfair-competition law to noncommercial speech, which is fully protected by the First Amendment. Speech is commercial in nature if it does “no more than propose a commercial transaction.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *United States v. United Foods*, 533 U.S. 405, 409 (2001); see also *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87 (2d Cir. 1998) (commercial use of a trademark is entitled to intermediate First Amendment protection). The use of First Premier’s marks on Evolution Finance’s websites, however, is entirely noncommercial. Because Evolution Finance’s websites do “not offer any products for sale”—and therefore do not use First Premier’s trademarks to sell products, let alone products that could be confused with First Premier’s—there is “no reason to deny full First Amendment protection” to Evolution Finance. *CPC Int’l*, 214 F.3d at 462–63.

That Evolution Finance’s websites are supported by advertising does not transform the commentary published on these sites into commercial speech any more than the sale of advertisements in the *New York Times* or the *Argus Leader* transforms the political opinion columns or product reviews in those newspapers into commercial speech. *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970 (10th Cir. 1996). “It is well settled that a speaker’s rights

are not lost simply because compensation is received.” *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 801 (1988); *cf. New York Times v. Sullivan*, 376 U.S. 254, 265–66 (1964) (according full First Amendment protection to a paid advertisement in a newspaper). In *Universal Communication Systems*, for example, a company brought a trademark dilution claim against Lycos, the operator of an Internet message board on which anonymous users had made critical comments about the company. 478 F.3d 413. Even though Lycos “derives advertising revenues from the use of its web sites,” the First Circuit held that the trademark dilution claim could not survive, not only as a matter of trademark law, but also “because of the serious First Amendment issues that would be raised by allowing [the company’s] claim.” *Id.* at 423; *see also Cardtoons, L.C.*, 95 F.3d at 971–73. The same serious First Amendment issues prevent First Premier’s claims from going forward here.

II. First Premier’s trademark claims have no basis in existing law.

In addition to the First Amendment, the unfair-competition claims fail for several independent reasons. To prevail on an unfair-competition or trademark-infringement claim under the Lanham Act and common law, First Premier must show that the mark was “use[d] in commerce,” that such use is “likely to cause confusion,” and that First Premier is “likely to be damaged by such act.” 15 U.S.C. § 1125(a). First Premier has not sufficiently pled—and cannot show—any of these essential elements.³

For starters, there is no basis for First Premier’s repeated invocation of trademark law to intimidate Evolution Finance into taking down hyperlinks to First Premier’s webpage. “Trademark law does not permit [a company] to enjoin persons from linking to its homepage

³ “[T]he facts supporting a suit for infringement and one for unfair competition are substantially identical.” *First Nat. Bank in Sioux Falls v. First Nat. Bank S. Dakota, SPC, Inc.*, 655 F. Supp. 2d 979, 1001 (D.S.D. 2009) (Piersol, J.) (quoting *Heaton Dist. Co. v. Union Tank Car Co.*, 387 F.2d 477 (8th Cir. 1967)).

simply because it does not like the domain name or other content of the linking webpage.” *Ford Motor Co. v. 2600 Enterprises*, 177 F. Supp. 2d 661, 664 (E.D. Mich. 2001). A hyperlink is by its very nature the sort of referential, descriptive fair use protected by law. 15 U.S.C. § 1125(c)(3)(A).

More fundamentally, First Premier’s legal theories are out of step with contemporary law governing the Internet. Technological change has driven substantial changes in trademark law over the last two decades. In 1996, Congress carved out specific statutory exemptions to trademark dilution liability for fair use such as “advertising or promotion that permits consumers to compare goods or services” and “identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.” 15 U.S.C. § 1125(c)(3). Recognizing the important goal of protecting companies and individuals that provide forums for protected speech, Congress also enacted the Communications Decency Act of 1996, which specifically immunized websites like CardHub—that is, websites that rely on user-generated content—against liability for consumer commentary. 47 U.S.C. § 230(c)(1). To be sure, some earlier decisions—including those from the Eighth Circuit—took a different view from the policy that Congress has furthered in recent years. *See Mut. of Omaha Ins. Co. v. Novak*, 836 F.2d 397 (8th Cir. 1987) (finding that parody t-shirts featuring the phrase “Mutant of Omaha” constituted trademark infringement); *Anheuser-Busch, Inc. v. Balducci Publications*, 28 F.3d 769 (8th Cir. 1994) (holding that parody mock ad for “Michelob Oily” constituted trademark infringement). But these cases were decided when the Internet was still in its infancy and before Congress reshaped the law to protect just the type of noncommercial, fair use at issue here.⁴

⁴ The facts here also materially differ from *Mutual of Omaha* and *Anheuser-Busch*. Both cases involved parodies of trademarked names and logos—and the (sometimes confusing) imitation that parody necessarily entails. 836 F.2d 397; 28 F.3d 769. In this case, Evolution Finance uses First Premier’s marks *descriptively*—fair use that is explicitly protected by statute. 15 U.S.C. § 1125(c)(3)(A).

This lawsuit is an attempt to circumvent these statutory developments—as well as the First Amendment—to silence consumer criticism of First Premier’s controversial credit cards. This Court should not allow First Premier to use trademark law to quiet its critics.

a. *The complaint alleges no cognizable trademark injury.*

First Premier’s trademark claims all fail because the complaint does not allege any cognizable trademark injury. Trademark injury arises from an improper use of a mark to denote the source of similar products sold by others—or, in the case of dilution, to denote the use of a similar mark on dissimilar goods. The use of trademarks solely to identify the subject matter of consumer commentary on a website, therefore, is not a use against which the trademark laws are designed to protect. “Any injury to [First Premier] ultimately arises from its being criticized on the [CardHub] website.” *Universal Communication Sys.*, 478 F.3d at 423; *see also Bosley*, 304 F.3d at 680 (“Any harm to Bosley arises not from a competitor’s sale of a similar product under Bosley’s mark, but from Kremer’s criticism of their services. Bosley cannot use the Lanham Act either as a shield from Kremer’s criticism, or as a sword to shut Kramer up.”). As far as the trademark laws are concerned, it does not matter whether the criticism directed at the markholder is considered legitimate or illegitimate—or even whether it is true or false. To the contrary, “if the injury alleged is one of critical commentary, it falls outside trademark law, whether the criticism is warranted or unwarranted.” *Universal Communication Sys.*, 478 F.3d at 424.

b. *Because Evolution Finance has not used the First Premier mark for commercial purposes, trademark laws are not implicated.*

Second, the trademark laws do not extend to noncommercial use. Recognizing the limits that the First Amendment imposes, both the language of the trademark statutes and the decisions construing those laws limit the application of trademark law to noncommercial speech. Under the Federal Trademark Dilution Act, “any noncommercial use of the mark . . . shall not be

actionable under this section.” 15 U.S.C. § 1125(c)(3)(C). Similarly, an infringement claim may be brought against use of the mark only “in connection with the sale, offering for sale, distribution, or advertising of any goods or services.” 15 U.S.C. § 1114(1)(a). “[T]he core notion of commercial speech is that it does no more than propose a commercial transaction.” *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 1017 (9th Cir. 2004). The question of commercial use boils down to whether the defendant’s use of the plaintiff’s mark was “in connection with the sale of goods or services,” and more specifically, “whether [the defendant] offers *competing* services to the public.” *Bosley*, 304 F.3d at 679 (emphasis in original). Under that test, consumer criticism does not constitute commercial use. *Id.* (“Kremer is not Bosley’s competitor; he is their critic. His use of the Bosley mark is not in connection with a sale of goods or services—it is in connection with the expression of his opinion *about* Bosley’s goods and services.”) (emphasis in original).

On the question of commercial use, this case is materially indistinguishable from *Universal Communication Systems*. As discussed above, in that case, UCS claimed that Lycos diluted UCS’s trade name in violation of trademark law by permitting users on one of Lycos’s financially oriented message boards to engage in critical discussions about UCS. The court held that although Lycos derived advertising revenues from its websites and was indisputably “a commercial venture,” its use of the plaintiffs’ trademark to facilitate users’ commentary was not “‘commercial’ in the relevant sense under trademark law.” *Universal Communication Sys.*, 478 F.3d at 424. Although Lycos “might profit by encouraging others to talk about” UCS and the other companies discussed on its message boards, the court explained, “neither that speech nor Lycos’s providing a forum for that speech is the type of use that is subject to trademark liability.” *Id.*

Were the courts to hold otherwise, any publication that both displays advertising and publishes critical commentary about a markholder’s products or services—as do almost all

newspapers and magazines, and many websites—would be engaging in commercial use subject to trademark liability. Speakers and publishers would be forced to work for free or pay their expenses out of their own pockets to have their speech protected.

c. First Premier has not alleged, and cannot show, any likelihood of confusion.

Independent of trademark injury and use in commerce, First Premier’s trademark claims fail as a matter of law because First Premier cannot show that CardHub’s use of the mark “is likely to cause confusion.” 15 U.S.C. § 1125(a); *Lovely Skin, Inc. v. Ishtar Skin Care Products, LLC*, 745 F.3d 877, 890 (8th Cir. 2014). The Eighth Circuit has developed a six-factor test for evaluating likelihood of confusion:

- (1) the strength of the owner’s mark;
- (2) the similarity between the owner’s mark and the alleged infringer’s mark;
- (3) the degree to which the products compete with each other;
- (4) the alleged infringer’s intent to “pass off” its goods as those of the trademark owner;
- (5) incidents of actual confusion; and
- (6) the type of product, its costs and conditions of purchase.

Id. at 887. The references to First Premier’s trademarks on CardHub “cannot mislead consumers into buying a competing product—no customer will mistakenly purchase [a credit card] from [CardHub] under the belief that the service is being offered by [First Premier]” and thus “[t]he dangers that the Lanham Act was designed to address are simply not at issue in this case.” *Bosley*, 403 F.3d at 679–80; *see also Parker v. Google, Inc.*, 422 F. Supp. 2d 492 (E.D. Pa. 2006).

There is simply no product for visitors to buy from Evolution Finance under the mistaken impression they are buying it from First Premier. The allegation that a careless consumer could mistakenly believe that there is an association between CardHub and First Premier does not

implicate trademark law.⁵ See *Taubman Co. v. Webfeats*, 319 F.3d 770, 776 (6th Cir. 2003) (“Under Lanham Act jurisprudence, it is irrelevant whether customers would be confused as to the origin of the websites, unless there is confusion as to the origin of the respective products.”). The “confusion” that First Premier alleges is not the “confusion” against which trademark law protects. “[T]rademark infringement protects only against mistaken purchasing decisions and not against confusion generally.” *Lang v. Ret. Living Pub. Co., Inc.*, 949 F.2d 576, 583 (2d Cir. 1991) (citing Restatement (Third) of Unfair Competition § 20 reporter’s note at 179); see also *Prestonettes, Inc., v. Coty*, 264 U.S. 359, 368 (1924) (“A trade-mark only gives the right to prohibit the use of it so far as to protect the owner’s good will against the sale of another’s product as his.”).

d. Evolution Finance’s use of First Premier’s marks constitutes fair use, non-trademark use, and nominative fair use.

Even if First Premier could demonstrate trademark injury, commercial use, and likelihood of confusion, its trademark claims would nevertheless fail because they cannot overcome the defenses of fair use, non-trademark use, and nominative fair use. *KP Permanent Make-Up v. Lasting Impression I*, 543 U.S. 111 (2004). CardHub does not use First Premier’s marks as a trademark—that is, CardHub does not use the marks to identify any product sold by Evolution Finance, but only as a descriptive term in consumer information and commentary.

The Lanham Act explicitly permits “[a]ny fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person’s own goods or services, including use in connection with . . . advertising or promotion that permits consumers to compare goods or services.” 15 U.S.C. §

⁵ Even if the type of confusion alleged by First Premier were within the aegis of trademark law, courts have applied a more rigorous confusion standard to trademark claims within the finance and banking industry because “consumers tend to exercise a relatively high degree of care in selecting banking services.” *First Nat. Bank in Sioux Falls v. First Nat. Bank, S. Dakota*, 153 F.3d 885, 889 (8th Cir. 1998), *aff’d* 655 F. Supp. 2d 979, 998 (D.S.D. 2009) (Piersol, J.).

1125(c)(3). “Where, as here, use of the mark, as ‘the only symbol reasonably available’ [to refer to a company’s products] ‘does not attempt to capitalize on consumer confusion or to appropriate the cachet’ of the mark holder, it fails to ‘implicate the source-identification function that is the purpose of trademark.’” *Int’l Stamp Art, Inc. v. United States Postal Serv.*, 456 F.3d 1270, 1277 (11th Cir. 2006) (quoting *New Kids on the Block*, 971 F.2d at 308).

Courts reach the same conclusion under the label of nominative fair use. *See Century 21 Real Estate Corp. v. Lendingtree*, 425 F.3d 211 (3d Cir. 2005); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 810 (9th Cir. 2003); *New Kids on the Block*, 971 F.2d at 307. Evolution Finance’s use of First Premier’s marks qualifies for this defense as well because First Premier’s products are not readily identifiable without the use of the trademarks, CardHub uses only so much of the marks as are reasonably necessary to identify First Premier’s products, and CardHub explicitly disclaims sponsorship or endorsement of First Premier’s cards. *Id.*

In sum, whether CardHub’s use “is viewed as a noncommercial use, as a nominative use, or in some other way,” *Universal Communication Sys.*, 478 F.3d at 425, First Premier’s trademark claims lack any basis in law.

e. The state-law unfair-competition claim meets the same fate.

The First Amendment likewise precludes First Premier’s state-law unfair-competition claim. *See Gitlow v. New York*, 268 U.S. 652 (1925). Even if the speech that First Premier is trying to prohibit weren’t protected by the First Amendment, First Premier still can’t show that there is a “likelihood of confusion,” as required by South Dakota law. *Gateway, Inc. v. Companion Products, Inc.*, 320 F. Supp. 2d 912, 924 (D.S.D. 2002) (“In South Dakota, the federal ‘likelihood of confusion’ test is applied to trademark infringement actions brought under state common law.”) (citing *Phipps Bros., Inc. v. Nelson’s Oil & Gas, Inc.*, 508 N.W.2d 885, 886 n. 2 (S.D. 1993)). Like their federal claims, First Premier’s common-law unfair competition claims fail as matter of law.

III. First Premier’s contract claims fail as a matter of law and common sense.

In a last-ditch effort to silence CardHub in the event that its trademark claims go south, First Premier asserts that an advertising contract terminated in 2011 grants the company a gag order over any reference to First Premier’s cards, on any of Evolution Finance’s websites, in perpetuity. Cmplt. 15–16. But First Premier’s contract theory fares no better than its trademark theory; it is at odds with the language of the contract, with common sense, with First Amendment principles, and with the obligation to allege a plausible theory of damages.

a. First Premier’s claim is unsupported by a plain reading of the advertising agreement.

First Premier’s contract arises out of the 2008 “Internet Marketing Agreement” between the parties, “whereby [Evolution Finance] will insert Banners on [CardHub], and/or send e-mails containing a text-link to PREMIER’s Website.” Cmplt. Ex. 3. The agreement dictated that First Premier would provide banner ads, credit-card images, and special tracking hyperlinks; CardHub would display the banners and images, and receive a commission for any visitor who completed a credit-card application from the special hyperlink. *Id.* First Premier’s claim relies entirely on the agreement’s seemingly broad definition of “Banner”:

“Banner” means a graphic message and any other information that appears on the computer screen when accessing the Operator’s Website, or a graphic message that appears in a Link, “pop-up” advertisement or exit console, promoting the Bank’s credit card products or directing Traffic to PREMIER’s Website.

Cmplt. Ex. 3 at 2.

The only sensible interpretation of this language, in context, is that it encompasses advertising material provided by First Premier, not straightforward information or consumer commentary. But, whatever its precise meaning, Evolution Finance satisfied its obligations under the contract when, “upon the effective date of termination of [the] Agreement” it “remove[d] all Banners from all websites maintained by [Evolution Finance] and/or . . . cease[d] sending emails

promoting Bank’s credit card products.” *Id.* at 6. Evolution Finance, that is, removed *all* of the banners, card images, and special links that had been provided by First Premier as “banners” under the agreement. Papadimitriou Decl. ¶ 25.

Now, years after the agreement’s termination, First Premier asserts that the agreement censors Evolution Finance from ever again using Premier’s name or linking to First Premier’s website. This claim defies common sense and a plain reading of the language of the contract. South Dakota law favors the application of common sense and common usage to terms of a contract that are unclear. *See LaMore Rest. Grp., LLC v. Akers*, 2008 S.D. 32, 748 N.W.2d 756, 765 (S.D. 2008) (“Apparent difficulties of enforcement due to uncertainty may disappear in the light of courageous common sense. Expressions that at first appear incomplete may not appear so after resort to usage.”) (quoting Restatement of Contracts (Second) § 362(b) (1981)). First Premier apparently accepted this plain reading of the agreement as well: The company acknowledged the terminated agreement in its July 8, 2011 letter asking Evolution Finance to remove any mention of First Premier, but did not suggest that the agreement required Evolution Finance to stop using the company’s marks. Cmplt. Ex. 5. Only after Papadimitriou pointed out that First Premier’s trademark claims were baseless did the company assert that the advertising agreement somehow prohibited any mention of First Premier on CardHub. Papadimitriou Decl. Ex. 8.

b. The First Amendment precludes First Premier’s interpretation of the advertising agreement.

In any event, as discussed above, the speech First Premier is trying to prohibit is protected by the First Amendment. The implicit waiver that First Premier reads into the agreement is, at best, indirect. Yet First Amendment rights may not be waived by contract absent clear and convincing evidence that the waiver was knowing, voluntary and intelligent. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *see George v. Black*, 732 F.2d 108 (8th Cir. 1984). A waiver of

First Amendment rights may also be held “unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *Davies v. Grossmont Union High Sch.*, 930 F.2d 1390, 1396 (9th Cir. 1991) (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)); *see generally* Alan Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 Cornell L. Rev. 261, 363 (1998). Under either the knowing-voluntary-and-intelligent-waiver approach or the public-policy approach, “it is the burden of” the party seeking to enforce a waiver of constitutional rights “to plead and prove that the agreement” overcomes these heightened standards. *Lynch v. City of Alhambra*, 880 F.2d 1122, 1128 (9th Cir. 1989). First Premier cannot come close to meeting that burden here, and this Court should decline the invitation to transform a garden-variety marketing agreement into a powerful and never-ending gag rule.

c. First Premier has not pled—and cannot show—that it was damaged by the alleged breach.

Finally, First Premier fails to plead facts that support its claim for damages resulting from the alleged breach of contract. Indeed, First Premier does not even have a *theory* of damages. Under South Dakota law, damages are an essential element of a breach-of-contract claim and the failure to plausibly allege or prove damages warrants dismissal. *Bowes Constr., Inc. v. S. Dakota Dep't of Transp.*, 2010 S.D. 99, 793 N.W.2d 36, 43 (S.D. 2010); *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, 796 N.W.2d 685, 694 (S.D. 2011). The facts alleged by First Premier—stripped of mere “recitals of the elements of a cause of action”—do not “allow[] the court to draw the reasonable inference” that First Premier suffered any damages from the alleged breach. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–679 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The best First Premier can do is speculate, without foundation, that the CardHub page “may trigger a review of PREMIER’s advertising by the CFPB as well as invite the scrutiny of

the Federal Reserve and the OCC.” Cmplt. Ex. 3 at 11. But South Dakota law does not recognize speculative damages. S.D. Codified Laws § 21-2-1; *Kunkel v. United Sec. Ins. Co. of N. J.*, 84 S.D. 116, 135, 168 N.W.2d 723, 733 (1969) (“It is fundamental that damages which are uncertain, contingent or speculative cannot be made the basis of recovery.”) First Premier’s “unadorned, the-defendant-unlawfully-harmed-me accusation” simply doesn’t withstand scrutiny under *Iqbal* and *Twombly*. 556 U.S. at 678; 550 U.S. 544.

IV. Alternatively, the Court should decline to exercise supplemental jurisdiction.

For all the reasons given above, First Premier’s complaint should be dismissed in its entirety. It is a transparent attempt to stretch the law of unfair competition and contract to squelch protected speech that the company dislikes. But if this Court has any lingering doubts about whether First Premier’s state-law claims are equally lacking in merit, it “may decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3)” once it has “dismissed all claims over which it has original jurisdiction,”—that is, once it has dismissed the federal unfair-competition claim. *Doe v. Lennox Sch. Dist. No. 41-4*, 329 F. Supp. 2d 1063, 1070 (D.S.D. 2003); *Jensen v. Jorgenson*, 2005 WL 2412379 (D.S.D. Sept. 29, 2005).

V. First Premier’s claims against Papadimitriou as an individual lack any basis in law.

At a minimum, the Court should dismiss the claims against Papadimitriou. As the founder and chief executive of Evolution Finance, Inc., Papadimitriou is protected by the corporate shield. There is a well-established “presumption that a corporation is a separate entity from its shareholders or officers and the party who wishes to pierce the corporate veil bears the burden of proving that there are substantial reasons for doing so.” *Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir. 1985). Where, as here, the dispute sounds in contract, “courts usually apply more stringent standards to piercing the corporate

veil... because the party seeking relief in a contract case is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity, and is expected to suffer the consequences of the limited liability associated with the corporate business form.” William M. Fletch, *Fletcher Cyclopedia of the Law of Private Corporations* ¶ 41.85 at 712 (1990 ed.). First Premier has not pled—and cannot show—any facts that would allow the Court to reasonably infer that the corporate veil should be pierced in this case. Accordingly, all claims against Papadimitriou as an individual should be dismissed.

CONCLUSION

The motion to dismiss should be granted, the plaintiffs’ motion for a preliminary injunction should be denied, and the complaint should be dismissed in its entirety.

Respectfully submitted,

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Dated: August 7, 2014

CERTIFICATE OF COMPLIANCE WITH LR 7.1(B)(1)

I hereby certify that my word processing program, Microsoft Word, counted 8,682 words in the foregoing brief, and is therefore in compliance with the type-volume limitations of Local Rule 7.1(B)(1).

/s/ Judith K. Zeigler

Judith K. Zeigler

August 7, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on August 7, 2014, I caused the foregoing document to be filed and served via this Court's CM/ECF system, through which all parties required to be served have been served.

/s/ Judith K. Zeigler

Judith K. Zeigler