

Downwinders

reducing toxic air pollution in north texas *at risk*

October 24, 2006

BY TELECOPIER: 214-812-6032

Mr. David P. Poole
Executive Vice President - General Counsel
TXU
1601 Bryan St., 6th Floor
Dallas TX 75201-34111

Re: Your threat of Lanham Act litigation

Dear Mr. Poole:

We write in response to your letter of the 11th, which threatens to sue Downwinders at Risk because of a float that we created and displayed on a Dallas city street outside the building where the candidates for governor were debating in a TV studio. The float depicted Governor Rick Perry kissing a dirty smokestack. Emblazoned on the smokestack were the logos of several of Texas's worst polluters, including TXU.

As I'm sure you understand, we are a non-profit organization comprised of a diverse group of grassroots citizens dedicated to reducing toxic industrial air pollution in North Texas. We were surprised to read your claim that TXU shares this objective.

In educating the public regarding matters having a profound effect on air pollution, we built the float that you reference in your letter.

We were pleased to learn that TXU has no objection to our engaging in the political debate on these issues. However, your threat of litigation because of the use of TXU's logo on the float, along with the logos of several other companies responsible for pollution, is of great concern. In this regard, we note that the name of TXU is registered as a trademark along with its logo, and so we assume your threat extends to any use of your name to identify one of the companies we want to criticize.

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As anyone who has ever dealt with Downwinders at Risk knows, we pride ourselves in engaging in a robust public debate on these issues of great public concern in a proper and lawful, if occasionally humorous, manner. Apparently TXU either does not have any sense of humor or does not believe that the nature and extent of its activities should be part of the public debate. If that is so, shame on TXU.

Your assertion of trademark infringement is without merit, but you probably knew that before you sent your letter. First of all commercial use is an indispensable element of any claim under the trademark laws. For infringement you would have to show "use in commerce . . . in connection with the sale, offering for sale, distribution or advertising of goods or services" under section 32(1) of the Lanham Act. For dilution you would have to overcome the noncommercial use defense as set out in Section 43(c) of the Lanham Act. I'm sure you know that Downwinders is not a commercial venture, and by parading its float down Young Street and displaying the float at a rally, Downwinders was not engaged in any conduct regulated by the trademark laws. Further, in order for TXU to have a viable claim of infringement it would have to allege that Downwinders' float caused confusion regarding the placement of its trademark on the float. Surely TXU doesn't believe the use of its mark on the float would lead a reasonable person to believe that it supports Downwinders' message, any more than TXU's fellow polluters also identified on the smokestack. What is more, both infringement and dilution claims are subject to the defense of fair use.

Finally, and hopefully putting an end to the threats in your letter, the First Amendment of the Constitution of the United States protects Downwinders' right to speak on these matters of public concern, and to use TXU's trademark to identify the target of their complaints.

Mr. Poole, we recognize that TXU has unlimited resources which it may employ at any time to attempt to silence criticism. If TXU wishes to file suit, then it should do so with the understanding that any such suit will be vigorously defended. We have engaged Paul Alan Levy, a nationally known trademark specialist from Public Citizen Litigation Group in Washington, and Michael F. Linz, a well-known civil litigator from Dallas. Any further correspondence or discussions about this matter should be conducted with them. Their contact information is provided at the end of this letter.

We will not be silenced. Hopefully TXU will rethink its stance and issue a prompt retraction of its threats.

Sincerely yours,



Merle Roten



Becky Bornhorst

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