

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CROWN PONTIAC, INC., dba)	
Crown Pontiac Nissan,)	
Crown Pontiac-Nissan,)	
)	
)	
Plaintiff,)	Case No. CV-02.C-1001-S
)	
vs.)	
)	
)	
THOMAS BALLOCK,)	
Defendant.)	
)	

MOTION TO DISSOLVE PRELIMINARY INJUNCTION

Defendant Thomas Ballock hereby moves to dissolve the preliminary injunction issued by this Court on May 8, 2002, prohibiting him from using plaintiff Crown Pontiac's name in the text, domain name, or meta tags of his websites on the Internet. In support of this Motion, defendant submit a memorandum of law, proposed order, the declaration of Thomas Ballock and attached exhibits, and the declaration of Paul Alan Levy.

DATED: June 10, 2002

David Gespass
Gespass & Johnson
3600 Clairmont Ave.
Birmingham, Alabama 35222
(205) 323-5966

Of Counsel:

Amanda Frost, D.C. Bar # 467425
Paul Alan Levy, D.C. Bar # 946400
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009

(202) 588-1000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CROWN PONTIAC, INC., dba)	
Crown Pontiac Nissan,)	
Crown Pontiac-Nissan,)	
)	
)	
Plaintiff,)	Case No. CV-02.C-1001-S
)	
vs.)	
)	
)	
THOMAS BALLOCK,)	
Defendant.)	
)	

**MEMORANDUM IN SUPPORT OF
MOTION TO DISSOLVE PRELIMINARY INJUNCTION**

On February 25, 2002, defendant Thomas Ballock created a website describing his unhappy experiences as a customer of plaintiff Crown Pontiac, Inc ("Crown"). Attorneys for Crown submitted written papers seeking to enjoin operation of the website and then presented evidence and argument at the April 30, 2002, hearing on this matter. Ballock did not submit any written argument and was not represented by counsel during those proceedings. On May 8, 2002, this Court issued a preliminary injunction that required Ballock to remove any reference to Crown from websites under his control.

Ballock has now retained counsel. He files this motion to request the Court to reconsider the important First Amendment concerns necessarily raised by such an injunction, which operates as a prior restraint on his First Amendment right to engage in consumer commentary. In addition, Ballock asks this Court to reexamine the evidence and legal arguments because Crown has not met its burden of showing that it is likely to prevail on the merits or that it will

suffer an irreparable injury without an injunction.

At the very least, the injunction should be modified to permit Ballock to continue posting his commentary about Crown on a website that does not use Crown's name in the domain name. The Internet is not just a vehicle for commercial advertising, as Crown's arguments suggest, but also serves as a public forum on which all viewpoints can be heard. Prohibiting individuals like Ballock from discussing the quality of a trademark holder's goods and services effectively silences consumers by excluding their commentary from the Internet.

BACKGROUND

A. Factual Background

1. The Ballocks' Dispute With Crown

On January 31, 2002, Thomas Ballock and his wife, Patricia Ballock, purchased a 2002 Maxima GLE from Crown Pontiac-Nissan, a dealership located in Hoover, Alabama. Patricia Ballock requested a Maxima GLE with a sunroof, but the salesman at Crown Pontiac suggested that Crown simply install a sunroof on a car that did not have one originally. The Ballocks assumed that the sunroof would be under the general warranty issued by Nissan for the car. However, after the sunroof was installed they learned that Nissan's new car warranty would not cover any damage to the car resulting from the installed sunroof. In addition, the appearance of the installation was unsatisfactory with the Ballocks. The Ballocks returned the car to the dealer to have the deficiencies repaired, but were not happy with the result. Declaration of Thomas Ballock ("Ballock Decl."), attached as Exhibit A, ¶¶ 12-13.

On February 22, 2002, Mrs. Ballock received a letter from Crown Pontiac's attorney demanding that she pick up the car or pay storage charges. She sought to revoke her purchase,

and arbitration has now begun as required by the purchase contract. Ballock Decl. ¶ 14.

2. Ballocks' Creation of the www.crownpontiacnissan.com Website

On February 25, 2002, Thomas Ballock obtained the domain name "crownpontiacnissan.com," and a few days later he added content to that site. Ballock Decl. ¶ 15. The site consisted of two parts. Id. ¶ 17. The first part, entitled "My Dreadful Experience," described the Ballocks' unhappy experience as customers of Crown, and he updated it to chronicle the subsequent events concerning the website. Id. Ballock also posted correspondence from Crown's lawyer, a copy of the complaint filed in this case, and his comments regarding those documents. Id. The second part, entitled "Arbitration: Bad for Consumers" was devoted to discussing the pitfalls of arbitration for consumers, and included a number of links to arbitration-related articles and commentary. Id. In both parts, he advised consumers on how to protect themselves when dealing with Crown specifically and when purchasing cars generally. Id.

Ballock went to great effort to disassociate his website from Crown. Ballock Decl. ¶ 18; see also Printout of Ballock's website, attached hereto as Exhibit B. Appearing in bold print at the top center of the website was the statement: "**This website is not in any way affiliated with Crown Pontiac-Nissan, Crown Nissan or with any automobile dealer or manufacturer.**" On the top of the web page was the statement "**I shall not recommend doing business with Crown Pontiac-Nissan to anybody -- Thomas Ballock.**" Ballock then launched into a discussion entitled "My Dreadful Experience." Crown is referred to throughout the website in the third person. Ballock Decl. ¶ 18 & Exhibit B.

Originally the website contained a link to Crown's own website, preceded by the

statement "If you've reached this website by mistake and wish to visit Crown's website, click here." The purpose of that link was to allow any user who reached the site in error to quickly proceed to Crown's official website. Ballock removed it after Crown informed him that it objected to the inclusion of that link in the website. Ballock Decl. ¶ 19.

In addition to the "crownpontiacnissan" website, Ballock referred to Crown in several other websites in the form of banner boxes which linked to a bulletin board commentary. Ballock Decl. ¶ 29.

Ballock's purpose in creating the website was to publicize what he believed to be Crown's unfair treatment of his wife and himself and to provide the public with information regarding Crown's practices, the warranty issues with aftermarket sunroofs, his experience with arbitration, and his communications with Crown's attorneys. Ballock Decl. ¶ 16. He chose the domain name "crownpontiacnissan" because that name best described what the site was about. Id. ¶ 20. His site contain information of interest to any current or future patron of Crown, and thus he wanted to choose a domain name that would be retrieved by an Internet search engine when searching for sites concerning Crown. Id.

For that same reason, Ballock incorporated Crown's name into the meta tags for his site. Ballock Decl. ¶ 21. Meta tags are a form of HTML code that are invisible to ordinary website visitors (except visitors that look directly at the underlying code), but which are used by many search engines to determine which sites are responsive to a search. Ballock chose the following meta tags for his site: 1) Crown Pontiac-Nissan; 2) Crown; 3) Pontiac; 4) Nissan; 5) car dealer; 6) automobile; 7) arbitration; and 8) car buying. He chose these meta tags because they best describe the subject of his website and thus he concluded that any Internet user interested in

those subjects might also be interested in his website. Id.

Ballock also registered his website with two Internet search engines, Google and DMOZ.org. Ballock Decl. ¶ 22. He chose Google because it is the most popular search engine, and he chose DMOZ.org because other search engines rely on its database. Id.

B. Procedural Background

Crown's attorney, John Galese, wrote to Ballock on April 17, 2002. Ballock Decl. ¶ 30. In that letter, Crown informed Ballock that it had become aware of the www.crownpontiacnissan.com website. Mr. Galese stated that the website violated various laws and demanded that Ballock "cease and desist" his use of the website or face a lawsuit. Id. In response, Ballock made modifications to his site, such as removing the hyperlink to Crown's official website, but he did not take down the website as Crown demanded.

On April 24, 2002, Mr. Galese arrived at Ballock's place of business with a copy of Crown's complaint and Crown's motion for a temporary restraining order and preliminary injunction. Ballock Decl. ¶ 31. It appears that Crown had originally sought to obtain a temporary restraining order without notifying Ballock, but the Court required that Ballock be served with Crown's motion. See Transcript of April 30, 2002 Hearing at 19:3-20:5.

The complaint claimed that Ballock had violated the Anticybersquatting Consumer Protection Act, the Federal Trademark Dilution Act of 1995, and the Lanham Trademark Act, as well as violations of Crown's common-law rights to its trade name. The complaint did not state that Crown has a registered trademark in its name. A search of the Trademark Electronic Search System, <http://tess.uspto.gov/bin/gate.exe?f=tess&state=s3j4po.1.1>, a register of "more than 3 million pending, registered and dead federal trademarks," revealed that Crown's name is not a

registered mark. See Declaration of Paul Alan Levy ("Levy Decl."), attached as Exhibit C

Crown sought a temporary restraining order and preliminary injunction because it claimed it would otherwise be irreparably harmed by Ballock's website, which it believed was confusing potential customers and diverting them from reaching Crown's official website. See Crown's Motion for Temporary Restraining Order and Preliminary Injunction ("Pl's Mot.") at 4. Crown's evidence of customer confusion came from the hearsay statement in the affidavit of Roger Roper, Crown's general manager, that an unnamed customer had informed him that she had "initially believed" Ballock's website to be Crown's official website, though Mr. Roper did not state how long her initial belief lasted. See Affidavit of Roger Roper ("Roper Aff."), attached as Exhibit A to Pl's Mot. Crown produced no evidence of loss of customer sales over the Internet or other disruption to its business that it attributed to Ballock's website. Crown argued that the injunction should be granted because it was likely to prevail on its claim that Ballock's website infringed on its trademark and violated the Anticybersquatting Consumer Protection Act. See Pl's Mot. 4-8. In addition, Crown asserted that Ballock would not be harmed by an injunction. Pl's Mot. at 5. Although Crown recognized that Ballock had a First Amendment right to express his views about Crown, it did not explain how he would do so without using Crown's name in his website. Pl's Mot. at 5.

On April 29, 2002, Ballock was informed by a clerk for this Court that there would be a hearing on the matter the next day. Ballock Decl. ¶ 31. Ballock attended the hearing alone. Id. He had not read all of Crown's papers because he had been confused about the nature of the hearing. Id.; see also Transcript of April 30, 2002 Hearing ("Hearing Tr.") 3:3-4. Two of Crown's lawyers attended the hearing and presented evidence and argument on behalf of their

client.

Robert Roper, Crown's General Manager, was the first witness to testify at the April 30th hearing. His affidavit, attached to Crown's motion for a preliminary injunction, served as his direct testimony. In cross-examination by Ballock, Mr. Roper confirmed that the Ballocks had never requested that he purchase the website or otherwise offer anything in exchange for the website. Hearing Tr. 5:22-6:4. Mr. Roper also testified that he had seen the disclaimer on the top of Ballock's website when he visited that site. Hearing Tr. 6:14-18. He did not provide any additional proof of customer confusion or loss of sales or other harm from Ballock's website.

On May 8, 2002, this Court issued an order preliminarily enjoining Ballock from "acquiring, utilizing or operating any website using the trade name Crown Pontiac-Nissan or any confusing variant thereof, in text or domain name(s) intended to, or having the effect of, diverting traffic from Crown Pontiac, Inc.'s web sites, including without limitation any site found at the URL <http://www.crownpontiacnissan.com>." Order, dated May 8, 2002. The Order appears to prohibit Ballock from using the name "Crown Pontiac" not just in the domain name and meta tags, but also the text of any website that he operates. The Order states that he is not precluded from publicizing his disputes with and criticism of Crown Pontiac "so long as he does not utilize Plaintiff's mark or any derivation of Plaintiff's domain names to divert Internet traffic from Plaintiff's web site." Id. at 2. However, if Ballock refers to "Crown Pontiac" by name in his website, even without including its name in the meta tags or domain name of his site, the website could be called up by a user entering "Crown Pontiac" in a search engine. Ballock Decl. ¶ 33. This is especially likely for a search using the Google search engine -- currently the most popular search engine -- which retrieves websites based on the words in their text, not just in

their meta tags. Id. Because Ballock feared that referring to Crown by name in his website would be viewed as "diverting" Internet users from Crown's official website and thus would constitute a violation of the injunction, he removed the www.crownpontiacnissan.com site from the Internet completely and no longer discusses Crown Pontiac Nissan by name on any site on the Internet. Id.

Subsequent events confirmed Ballock's fear that the injunction could be interpreted as preventing him from using the name "Crown Pontiac" in any website. After taking down his website in response to the injunction, Ballock created a new website with the domain name <http://www.hoovernissandealersucks.com>. Ballock Decl. ¶ 34. Originally, he had posted on that website a hyperlink to www.google.com. Id. Even though he had removed the www.crownpontiacnissan.com website from the Internet, Google had nonetheless kept his site (with others) in its cache of archived pages. Id. Ballock had not requested that Google store the site in its cache; Google apparently did as part of its regular practice. Id. If the search term "crown pontiac nissan" was entered into the Google search engine, Google retrieved Ballock's website from its cache. Id. In other words, although Ballock's website no longer existed under the domain name www.crownpontiacnissan.com, it could still be retrieved under Google's domain name.

Ballock received a letter, dated May 13, 2002, from Crown's lawyer informing him that Crown considered the Google cache of archived pages to be in violation of the injunction. Ballock Decl. ¶ 35 & May 13, 2002 letter from John Galese to Thomas Ballock, attached as Exhibit 7 to Ballock's Affidavit. The letter demanded that he "take affirmative steps with Google, and other similar sites, to cause the removal" of the website from Google's cache, which

Crown's lawyers believed to be a "violation of [Crown's] rights and the Court's injunction." Id. As a result, Ballock wrote Google informing them of Crown's demand. Id. & Exhibit 8.

Ballock has since added to the content on the <http://www.hoovernissandealersucks.com> site. Ballock Decl. ¶ 36. On that website, he briefly describes his experiences with a Hoover, Alabama car dealer and his dissatisfaction with the arbitration system, but, as is arguably required by the injunction, he does not mention Crown's name in the domain name, meta tags, or text. Id. Ballock cannot express himself on the new website as he would like because he cannot properly and fully state his frustrations and unhappiness with Crown Pontiac Nissan without using its name. Id. His inability to name Crown also prevents him from warning other consumers about Crown's conduct. Id.

ARGUMENT

Injunctive relief is an extraordinary remedy that should be granted only if the Plaintiff produces evidence sufficient to demonstrate: 1) a substantial likelihood of prevailing on the merits; 2) irreparable injury absent the granting of the requested relief; 3) that the threatened injury outweighs the possible damage that the proposed injunction may cause the restrained party; and 4) that the injunction is not adverse to the public interest. Horton v. City of Augustine, 272 F.3d 1318, 1326 (11th Cir. 2001). Crown's evidence and legal argument do not satisfy this standard.

This Court should lift the injunction because it operates as a prior restraint on Ballock's First Amendment right to engage in consumer commentary and because the circumstances here do not justify such a sweeping restriction on Ballock's speech rights. In addition, Crown failed to demonstrate that it is likely to prevail on the merits or that it will suffer irreparable injury

without an injunction. At the very least, this Court should modify the injunction to permit Ballock to continue posting consumer commentary about Crown Pontiac on a website that does not incorporate Crown Pontiac's name into the domain name.

I. THE PRELIMINARY INJUNCTION SHOULD BE REVERSED AS AN IMPERMISSIBLE PRIOR RESTRAINT AGAINST SPEECH PROTECTED BY THE FIRST AMENDMENT.

The preliminary injunction should be lifted because it is a prior restraint on Ballock's speech rights. The Supreme Court has repeatedly held that injunctions barring defendants from speaking, printing, or broadcasting statements about topics of public concern are prior restraints that require the most extraordinary justifications before they may be approved. New York Times v. United States, 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931). When an injunction is entered based on a finding of likelihood of success in establishing illegal speech, instead of a final adjudication, it is a prior restraint subject to strict First Amendment scrutiny. Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993); see also Carroll v. Commissioners of Princess Anne, 393 U.S. 175 (1968). The law is clear and unequivocal – prior restraints are not permitted except in the most exceptional circumstances, involving “a grave threat to a critical government interest or to a constitutional right.” Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996). No such circumstance is present here, and thus the preliminary injunction should be lifted.

Consumer commentary, such as the commentary on Ballock's website, is core speech protected by the First Amendment. In Bose Corp. v. Consumers Union, 466 U.S. 485, 499 (1984), the Supreme Court applied the New York Times standard to a libel action brought by a manufacturer claiming that a consumer group had maligned its product. Many other cases have

similarly treated discussions of a company's products as speech protected by the First Amendment. Semco v. Amcast, 52 F.3d 108, 111-114 (6th Cir. 1995); Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1119-1121 (8th Cir. 1999). Ballock's website commentary is wholly mysterious without reference to Crown Pontiac by name, and thus his use of Crown Pontiac's mark is part and parcel of his First Amendment right to comment on its goods and services. This speech is fully protected by the First Amendment.

Furthermore, it is not just the website generally, but also Ballock's use of Crown Pontiac's trademark in his domain name and meta tags, that constitutes protected speech. The courts have repeatedly held that the use of trademarks constitutes speech within the protection of the First Amendment. E.g., Bad Frog Brewery v. New York State Liquor Authority, 134 F.3d 87, 94-97 (2d Cir. 1998); ACLU of Georgia v. Miller, 977 F.Supp. 1228, 1233 (N.D. Ga 1997). Use of a trademark in a domain name is analogous to the use of a trademark in the title of a creative work, to which the courts give First Amendment protection because it is part of the author's expression, calling attention to the content of the work in question. E.g., Twin Peaks Production v. Publications Int'l, 996 F.2d 1366, 1379 (2d Cir. 1993); Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989). Similarly, Ballock's use of Crown's mark in his website's domain name serves to communicate to web users that his site contains information about Crown.

No court has ever declared illegal the use of a trademark to discuss or criticize the trademarked goods as long as speaker makes clear that the trademark holder is not the source of that criticism. Such use of a trademark name falls within the core of speech that is protected by the First Amendment and, as has long been recognized, that use is permitted under trademark law. See Calvin Klein Cosmetics Corp. v. Lenox Laboratories, 815 F.2d 500, 503 (8th Cir.

1987); Pebble Beach Company v. Tour 18 I Limited, 155 F.3d 526, 545-46 (5th Cir. 1998). As

Professor Thomas McCarthy, author of a treatise on trademarks, explains:

Use of a mark in a purely communicative, non-trademark setting should be permitted or else trademark law could be used as a tool to stifle unwelcome discussion The Restatement takes the position that in cases where the trademark owner alleges injury to reputation from a non-trademark purely communicative use of its mark, trademark law, whether in the form of traditional infringement or dilution, should not apply . . . Non-trademark uses, which do not involve a use to identify another's goods, services or business, . . . are unlikely to have a diluting effect. In most instances, such uses are intended to refer back to the original trademark owner and serve to confirm rather than undermine the associational significance of the mark.

5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 31:148 (4th ed. 1999).

II. PLAINTIFF IS NOT LIKELY TO SUCCEED IN SHOWING THAT BALLOCK'S WEB SITE INFRINGES PLAINTIFF'S TRADEMARK.

Under section 32 of the Lanham Act, trademark infringement is the "use in commerce . . . of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services" that is "likely to cause confusion, or to cause mistake, or to deceive" "without the consent of the registrant." 15 U.S.C. § 1114(1)(a). Crown cannot prevail because 1) its name is not a "registered mark"; 2) Ballock did not "use" the Crown's name "in commerce"; 3) Ballock's use of Crown's name was not "in connection with" the sale or distribution or advertising of goods or services; and 4) his use of Crown's name was not likely to cause confusion.

1. Crown's Mark is Not a Registered Mark.

As a threshold matter, Crown does not have a registered trademark in its name and therefore cannot succeed in a trademark infringement claim under the Lanham Act. Section 32

of the Lanham Act prohibits the use of a "registered trademark" without permission of that trademark's "registrant." 15 U.S.C. § 1114(1)(a). Crown does not assert that it registered its name and a search of the Trademark Electronic Search System, a database of registered trademarks, reveals that Crown's name is not a registered mark. See Declaration of Paul Levy ("Levy Decl."), attached as Exhibit C. Because Crown did not register its mark, it cannot sue Ballock for trademark infringement under the Lanham Act. See Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992); Basile S.p.A. v. Basile, 899 F.2d 35, 37 n.1 (D.C. Cir. 1990) ("Basile's registration is a predicate to its protection under the Lanham Act.") see also Pearson Industries, Inc. v. Pet Friendly, Inc., 33 F.Supp.2d 1322, 1325 (M.D.Ala 1999).¹ If this Court agrees, it need go no further in its analysis to conclude that Crown cannot obtain a preliminary injunction against Ballock for infringement under section 32 of the Lanham Act.

2. The Mark Was Not Used by Ballock "In Commerce."

Assuming Crown's name was a registered trademark, its mark was not infringed because Ballock did not make "use" of it "in commerce." Ballock's website was non-profit and non-commercial, and he established that website only for the purpose of expressing his grievance with Crown and educating consumers about the pitfalls of purchasing a car from a possibly unscrupulous dealer. Ballock Decl. ¶ 16; Hearing Tr. 21:13. At the April 30th hearing, this Court expressed concern because it had found no evidence of commercial motive for Ballock's

¹ A few district courts have held registration is not a prerequisite to protection against infringement under section 32(1) of the Lanham Act, Prudhomme v. The Procter & Gamble Co., 800 F. Supp. 390, 395 (E.D. La. 1992); LeLong v. Dana Perfumes, 138 F. Supp. 575 (N.D. Ill. 1955). According to these courts, unregistered marks can be protected if they are "distinctive" or have acquired a secondary meaning. Id. Crown has not made such a showing. In any case, these cases are at odds with the statutory language of section 32 of the Lanham Act, which applies only to the use of a "registered mark."

website, and Crown's attorneys responded that this Court did not need to find such a commercial motive to find a violation of the Lanham Act.² That assertion is incorrect.

When the Lanham Act was passed in 1946, it created a civil action against “any person who shall, in commerce” commit any infringing act. 15 U.S.C. § 1114(1). The statutory phrase “in commerce” was understood to extend to the full reach of Congress’ commerce power, so that, for example, suit could be brought based on infringing goods manufactured abroad and then sold in the United States. Steele v. Bulova Watch Co., 344 U.S. 280, 283 (1952). However, as the Supreme Court emphasized in Circuit City Stores v. Adams, 532 U.S. 105 (2001), statutory provisions that include the word “commerce” do not necessarily reach to the full breadth of the commerce power, but must be construed as commanded by each particular statute. Id. at 1308-1310 (holding that term “involving commerce” extended to full reach of Commerce Clause, but “engaged in commerce” did not).

The 1962 amendments to the Lanham Act, 76 Stat. 773, changed the structure of the claim for trademark infringement, to require that the defendant make a “use in commerce” of the plaintiff’s trademark. 15 U.S.C. § 1114(1)(a). In 1988, Congress defined the phrase “use in commerce” with the express purpose of limiting its scope to use in the ordinary course of trade. “The term ‘use in commerce’ means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark.” Section 45(a) of the Act, 15 U.S.C. §

² THE COURT: I am troubled by it because on the present record I cannot find that there is any commercial or profit motivation on the part of the defendant. Am I required to do that, Mr. Galese?

MR. GALESE: No, sir.
Hearing Tr. 22: 16-20.

1127(a). As Congress explained, “Amendment of the definition of ‘use in commerce’ [in section 45 of the Lanham Act] is one of the most far-reaching changes the legislation contains. . . . The committee intends that the revised definition of ‘use in commerce’ be interpreted to mean commercial use which is typical in a particular industry.” Sen. Rep 100-515, 100th Cong., 2d Sess. 44 (1988), reprinted in 1988 US Code Cong. Ad. News 5577, 5607 (emphasis added). Thus, “[t]he act’s purpose, as defined in Section 45, is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct.” Colligan v. Activities Club of New York, Ltd., 442 F.2d 686, 692 (2d Cir. 1971); accord Chance v. Pac-Tel Teletrac, 242 F.3d 1151, 1157 (9th Cir. 2001).

Without “use in commerce,” there is no violation of section 32 of the Lanham Act. In the cases cited above, the courts found no Lanham Act violation because, even though the “commerce” invoked by the plaintiffs was within Congress’ commerce power, the particular “use in commerce” was not within the narrower statutory language. So, here, the fact that Ballock’s website might be “in commerce” in the constitutional sense does not support a finding that plaintiff’s trademarks were “used in commerce.”

Although the requirement of “commercial” activity in the “ordinary course of trade” does not preclude application of the Lanham Act to the activities of non-profit organizations that use trademarks to raise money or sell goods or services, that was not Ballock’s intention here. For example, in United We Stand America v. United We Stand America New York, 128 F.3d 86 (2d Cir. 1997), a national political party brought an infringement action against a former state affiliate that was using the “United We Stand” name to solicit political contributions; the court held that this use was sufficiently “use in commerce” to support application of the Lanham Act.

Id. 92-93. But repeated solicitation of funds for the use of a defendant, using the plaintiff's trademarked name, is a far cry from this case, where nothing on the website solicited funds or business for Ballock.

Similarly, in Planned Parenthood v. Bucci, 42 U.S.P.Q.2d 1430 (S.D.N.Y. 1997), aff'd mem, 152 F.3d 920 (2d Cir. 1998), Bucci was an anti-abortion activist who registered the name www.plannedparenthood.com and then used the site to promote sales of the book "The Cost of Abortion," which could be purchased online from the website, and to advertise the author's speaking engagements. Id. 1432-33. The court repeatedly relied on the sales effort for the book, as well as the defendant's other fund-raising activities, in finding the requisite "use in commerce." Again, these facts are poles apart from the facts here, because Ballock's website does not attempt to sell any goods or services. Thus, unless any discussion of a commercial trademark holder is sufficient to make the underlying discussion commercial, there is no sound analogy to Planned Parenthood in this case.

3. The Mark Was Not Used By Ballock "In Connection" With the Sale, Distribution, or Advertising of Goods or Services.

Likewise, Ballock's use of the Crown Pontiac Nissan name was not "in connection" with the sale, distribution, or advertising of goods or services. Ballock created the web site to describe his unhappy experience with Crown Pontiac and to warn other consumers about how to avoid the problems he encountered. His web existed solely as a piece of consumer commentary; it did not advertise any product or otherwise solicit business for himself or anyone else.

Nonetheless, Crown argues that Ballock's use of "crown pontiac" in his web site satisfies this requirement because, it claims, the "use of a mark is in connection with the sale, offering for sale, distribution, or advertising of goods or services if the use of the trade name 'is likely to

prevent some Internet users from reaching plaintiff's own Internet web site.'" Pl's Mot. at 6. As explained in more detail below, Ballock's site is not likely to prevent Internet users who wish to reach Crown Pontiac's home page from doing so because search engines produce descriptions of sites that allow consumers to distinguish Crown's official site from Ballock's protest site.

See Exhibits 3 (Yahoo! Search) and 4 (Google Search) to Ballock's Decl. Any reasonable user searching for Crown Pontiac-Nissan's official site will read the description of Ballock's site ("This web site is not in any way affiliated with the Crown Pontiac-Nissan automobile dealership, nor with any automobile dealer or manufacturer. . . ") and the description of Crown's official site ("Home Page"), see Exhibit 3 to Ballock's Decl., and be able to identify Crown's site as the "official site" immediately.

Even if users simply type in "www.crownpontiacnissan.com" under the assumption that this domain name is Crown Pontiac's official site, they will immediately realize that they have not reached the official site and will engage in a search for that site because of the prominent disclaimers on that site. Moreover, potential customers are no more inconvenienced by reaching Ballock's site than they would be if that site didn't exist. For example, if customers type in "www.crownpontiacnissan.com" today, with the injunction in place, they will reach a page with an error message and will still need to commence a new search to find Crown's official web site.

Plaintiff's web site is no different from the thousands, perhaps millions, of other consumer commentary web sites. For example, a search for "Burger King" produces Burger King's official web sites, as well as a web site described as "Burger King . . . The Burger King Lie As Advertized . . . Comments on ads that do not match what is delivered" and a web site entitled "MurderKing.Com" sponsored by People for the Ethical Treatment of Animals. See

Exhibit 10 to Ballock's Decl. (results of Google search for "Burger King"). Consumer commentary sites necessarily discuss the product they criticize, and thus a search for that product retrieves those sites. If Ballock's website violates the Lanham Act simply because it might "divert" Crown's customers, then any website containing consumer commentary would similarly "prevent some Internet users" from accessing the official site of a product. Such a reading of the Act would eviscerate the First Amendment right to engage in consumer commentary of trademarked goods and services.

4. Ballock's Web Site Does Not Create a Likelihood of Confusion About Whether Plaintiff is the Source of the Site.

"[T]he general concept underlying likelihood of confusion is that the public believe the '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); Frehling Enterprises, Inc. v. International Select Group, 192 F.3d 1330, 1338 (11th Cir. 1999) (discussing significance of potential consumer confusion about source). Thus, trademark law does not protect against any kind of confusion, but only confusion about source. West Point Mfg. Co. v. Detroit Stamping Co., 222 F.2d 581, 590 (6th Cir. 1955) (emphasis added). "All of [the] legitimate trademark purposes derive ultimately from the mark's representation of a single fact: the product's source. It is the source denoting function which trademark laws protect, and nothing more." Anti-Monopoly v. General Mills Fun Group, 611 F.2d 296, 301 (9th Cir. 1979); Smith v. Chanel, 402 F.2d 562, 566-569 (9th Cir. 1968) (explaining how confining trademark law to this function best serves consumers' and companies' interests).

Nothing on Ballock's web site could possibly lead readers to believe that Crown was the source of that site. The reader is informed, in bold type across the top of the page "**This web**

site is not in any way affiliated with Crown Pontiac-Nissan, Crown Nissan, or with any automobile dealer or manufacturer." See Exhibit B. Also at the very top of the page, Ballock wrote: "**I shall not recommend doing business with Crown Pontiac-Nissan to anybody.**" The title to the page is "My Dreadful Experience." Id. The text of the page describes Mr. Ballock's unhappy experience with Crown Pontiac-Nissan. Id. Nowhere does the web site purport to speak for Crown Pontiac. In short, visitors to the web site are immediately and forcefully made aware that the web site is the creation of an unhappy customer, and not Crown Pontiac itself. See Bally Total Fitness Holding Corp. v. Faber, 29 F.Supp.2d 1161, 1163-64 (D.C. Cal. 1998) (concluding that "no reasonable consumer" would believe that a web site critical of plaintiff was sponsored by plaintiff).

Crown's own evidence establishes that Ballock's web site clearly was not affiliated with Crown and that customers realized this. Plaintiff's only evidence of confusion comes from the affidavit of Robert Roper, General Manager of Crown Pontiac, who stated: "I received word from a customer that, while attempting to locate Crown's Internet web site, she came upon the site of "www.crownpontiacnissan.com" and initially believed that it was a site created by Crown." Roper Aff. 2. As that very sentence makes clear, the customer figured out for herself that the web site was not created by Crown, and there is no evidence that her "initial belie[f]" lasted more than the few seconds it took to begin reading the description or content of Mr. Ballock's web site. Because Crown produced no evidence that customers who read Mr. Bollack's web site remained confused about whether Crown was the sponsor of that site, it has not demonstrated that the site creates confusion. See The Network Network v. CBS, 54 USPQ2d 1150, 1155 (C.D. Cal. 2000) ("There is a difference between inadvertently landing on a website

and being confused."); see also Choice Hotels International v. Kaushik, 147 F.Supp.2d 1242, 1254 (M.D. Ala. 2000) (finding no confusion where evidence of confusion came from "vague" testimony about unnamed customers' confusion).

Plaintiff argues that users may mistakenly access Ballock's web site rather than the official site, and this may discourage or dissuade prospective buyers from continuing to search for plaintiff's official home page. Pl's Mot. at 6. As any Internet user knows, however, search engines typically produce hundreds of responses to each query, and Internet users are accustomed to searching through those responses for the site they are seeking. See, e.g., Bally Total Fitness Holding Corp. v. Faber, 29 F. Supp.2d 1161, 1165 (C.D. Cal. 1998) (defendant's use of Bally's mark in his website "does not significantly add to the large volume of information that the average user will have to sift through in performing an average Internet search."); Teletech Customer Care Management (California), Inc. v. Tele-Tech Co., Inc., 977 F.Supp. 1407, 1410 (C.D. Cal. 1997) (noting that average search can result in 800 to 1000 "hits"). Ballock's site is simply another "hit" that users would receive in an Internet search for the official site.

Simply running a search for "Crown Pontiac" on well-known search engines, such as Yahoo! and Google, demonstrates that Ballocks' web site does not create confusion. The results of an April 18, 2002, Google search for "crown pontiac nissan" are attached as Exhibit 4 to Ballock's Declaration. The Google search engine informs the reader that it has produced the top ten of 18,000 responsive sites. The first site listed, www.carsdirect.com/hom, describes itself as "Instant Pricing, Photos, Reviews . . ." and instructs readers to "Learn more about FACTORY REBATES & FACTORY INCENTIVES!" The second hit is the home page for Crown's official

site, entitled "Home Page--Crown Pontiac-Nissan." Indented under that hit is a third hit, also for Crown's official site, entitled "Crown Pontiac Nissan -- an automobile dealership in Birmingham." Bollack's site is the fourth hit. The text underneath the title states "A . . . I shall not recommend doing business with Crown Pontiac-Nissan to anybody. Thomas Ballock." and "Description: A web site recounting personal experience with Crown Pontiac-Nissan, Inc. . ." Underneath is an indented hit for Ballock's site, which states "This web site is not in any way affiliated with Crown Pontiac Nissan automobile dealership."

An April 18, 2002, search performed with Yahoo's search engine, attached as Exhibit 3 to Ballock's declaration, produces similar results with similar descriptions of Ballock's site and the official site. No reasonable Internet user could read these descriptions and believe that Ballock's site is the official Crown Pontiac website.

Accordingly, Ballock's website cannot be equated with the website at issue in Planned Parenthood, a case that Plaintiff repeatedly cites to support its claim that Ballock's website violates the Lanham Act. In Planned Parenthood, a Catholic radio station established the website www.plannedparenthood.com. A user accessing the home page of that site sees the words "Welcome to the PLANNED PARENTHOOD HOME PAGE!" Planned Parenthood, 42 U.S.P.Q.2d 1430, *3-*4 (S.D.N.Y. 1997). The rest of the web page consists of the cover of a book entitled "The Cost of Abortion" and information about the book and the book's author. Because the website did not disassociate itself from the plaintiff organization, as Ballock's web site does, a real possibility of confusion existed.

The facts of Jews for Jesus v. Brodsky, 993 F. Supp. 282, 309 (D.N.J. 1998), the only other case plaintiff cites to support its claim of customer confusion, also differ significantly from

the facts of this case. Plaintiff in that case admitted that his intent was to divert Internet users searching from the official "Jews for Jesus" website to his website. Jews for Jesus, 993 F.Supp. at 304. In line with his express intent, the website did not immediately and clearly disassociate itself from the Jews for Jesus organization: The disclaimer stating that the website was not sponsored by Jews for Jesus came at the very bottom of the page; the eight lines preceding that disclaimer left the site's relationship with the Jews for Jesus organization ambiguous. Id. at 291. Finally, plaintiff in that case produced three affidavits by individuals who stated they had become confused when they inadvertently accessed the defendant's Internet site while attempting to reach the Jews for Jesus organization. Id. at 304. Although it is questionable whether defendant's website violated the Lanham Act, plaintiff in that case did manage to produce some evidence of confusion, and the case undoubtedly creates a closer question.

Moreover, although plaintiff admits that Ballock has a First Amendment right to express his views about Crown, see Pl's Mot. at 4, its interpretation of trademark law leaves him no room to do so. Any web site that Ballock operates for the purpose of criticizing plaintiff will repeatedly mention plaintiff's name, and thus the site will come up as a "hit" when plaintiff's name is typed into a search engine. Ballock could not do more than he has already done to make clear that his site is not affiliated with plaintiff. Not only does the site itself say so explicitly, in bold letters, at the very top of the first page, but the description of the site that comes up in a list of "hits" also makes clear that the site is not plaintiff's official site. Yet according to plaintiff, the site will nevertheless divert its customers. If Ballock's site creates confusion under the Lanham Act, then that Act would likewise prohibit all Internet consumer commentary. Such a construction of the Act direct conflicts with consumer's exercise of their First Amendment

speech rights, and thus should be avoided.

Recognizing that consumers have a right to engage in consumer commentary, courts have held that critical websites may use a mark to discuss or criticize trademarked goods and services. Ballock's website is similar to the websites at issue in Northland Insurance Companies v. Blaylock, 115 F. Supp.2d 1108 (Minn. 2000) and Bally Total Fitness, both cases in which consumers were permitted to continue operating such websites. The facts of Northland Insurance are almost identical to this case. A disgruntled patron of Northland Insurance obtained the domain name "northlandinsurance.com" and posted his criticism of Northland on that site. The site did not display an explicit disclaimer, but nonetheless made clear that it was not sponsored by Northland itself. The court denied plaintiff Northland Insurance's motion for a preliminary injunction, concluding that defendant's website would not create any sustained consumer confusion because it was self-evidently not sponsored by Northland Insurance. In addition, the court held that even if consumers suffered some momentary confusion when searching for Northland Insurance's official website, this did not satisfy the standard for a finding of trademark infringement. Although "initial interest confusion" can be the basis of an infringement action when defendant attempts to "bait" away customers and "switch" them to its own product, it is not evidence of infringement where defendant has no commercial interest in the matter. See Northland Insurance, 115 F. Supp.2d at 1119-1120. Because Ballock is not a competing car dealer seeking to divert car buyers to his dealership, his use of Crown's name in his meta tags is entirely proper. See, e.g., Niton Corp. v. Radiation Monitoring Devices, Inc., 27 F. Supp.2d 102 (D. Mass. 1998); Bihari v. Gross, 119 F. Supp.2d 309 (S.D.N.Y. 2000). Bally also concerned a disgruntled customer's critical web site. The court in that case

concluded that the defendant's site would not cause confusion because defendant's critical message, combined with the prominent posting of the word "unauthorized" at the top of his site, would ensure that "the reasonably prudent user would not mistake [defendant's] site for Bally's official site." 29 F. Supp.2d at 1164. Like the defendants in Bally and Northland Insurance, Ballock's website is clearly a critical website by a disgruntled customer that no reasonable Internet user could mistake as being sponsored by the trademark holder.³

Ballock inserted Crown's name in his metatags precisely so that his site is retrieved when an individual searches the Internet for information about Crown's products and services. Ballock Decl. ¶ 20, 21. Crown erroneously assumes that Internet users wish to find only a business' official site when they enter that business' name into a search engine, and thus will be confused if their searches produce additional results. In fact, users frequently wish to find all the information they can on a company they are thinking of patronizing, and thus are searching not just for the official site but for any site that will provide them of that information. Far from being "confused" by the results of a search for "Crown Pontiac" that produced both the official site and commentary sites, Internet users will be grateful to have additional information about the dealership at their fingertips.

³ In dicta in a footnote, the court stated that actual confusion might result if an individual uses a registered trademark as its domain name. Bally, 29 F. Supp.2d at 1165 n.2. The court's basis for that conclusion was that in "cybersquatter" cases like Panavision, there is a high likelihood of consumer confusion. . ." Id. In Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1327 (9th Cir. 1998), and other cybersquatter cases, the defendant's use of the domain name is intended to divert and confuse consumers searching for the official website. That is not the case here, and Crown has no evidence that Ballock intended to divert its customers to his website. Ballock used Crown's name to alert Internet users who were seeking information about Crown, and thus his use of its name in his websites domain name was permissible. See, e.g., Northland Insurance, 115 F. Supp.2d 1108.

III. CROWN IS NOT LIKELY TO PREVAIL ON ITS CLAIM UNDER 15 U.S.C. § 1125(d).

Crown gives little argument, and produces even less evidence, as to why it is likely to prevail on its claim that Crown violated the Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d). Ballock does not fit the "classic" cybersquatter profile. He has not registered multiple domain names and attempted to sell them to the highest bidder. In Northland Insurance, the court denied plaintiff's motion for an injunction in part because it concluded that the cybersquatting statute was not intended to target use of domain names to criticize a trademark holder. 115 F. Supp.2d at 1125. Likewise, because Ballock used Crown's name in his domain name to criticize Crown, rather than with the intention of selling the site to Crown, he is not "cybersquatting" as defined under that statute.

To prevail, Crown must show that Ballock used, registered, or trafficked in the domain name with a bad faith intent to profit from the sale of the domain name. 15 U.S.C. § 1125(d)(1)(A). Crown's argument that Ballock acted in bad faith rests entirely on the unsupported assertion in Mr. Roper's affidavit that Ballock's site "was apparently created in an effort to force Crown to pay an unjustified amount of money to his wife to settle her claim." Roper Aff. at 2. During the April 30th hearing, Mr. Roper said that the basis for his belief was that Mr. Ballock "states that on his website." Hearing Tr. 5:9. Ballock's website contained no such statement. The website described Ballock's experience with Crown, instructed customers about their rights as consumers, and warned them to avoid being forced into arbitration. See Exhibit B. On that website, Ballock explained that his purpose in establishing the web site was to: 1) "relate his personal experiences with Crown Nissan"; 2) "Voice personal criticisms of Crown Nissan's business practice"; and 3) "Promote public awareness -- to allow the public to

benefit from my experience, as a layman, with issues including new car buying, dealing with lawyers, and arbitration." Exhibit B, at 2. Ballock's statement on another portion of his website that he was seeking "just resolution" of his complaint with Crown Pontiac is not evidence that Ballock was using the website to force Crown to pay him an "unjustified amount of money."

Moreover, during the April 30th hearing, Ballock expressly denied that his purpose in creating the website was to force plaintiff to resolve its dispute with his wife. See Hearing Tr. 16:8-13. Crown admits that Ballock never asked for money to take down the website or otherwise used the website as a bargaining tool. Hearing Tr. 5:22-25 - 6:1-4; 16:8-25 - 17:1-7. Because Crown produced no evidence of bad faith, it has not established a likelihood of prevailing on this ground.

IV. CROWN FAILED TO DEMONSTRATE THAT IT WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION.

To obtain a preliminary injunction, plaintiff must show that it will suffer irreparable injury if it does not obtain the relief it is seeking. As stated above, Crown has no produced no evidence of customer confusion, or even a loss of Internet sales, in the two months that Crown's website was operational.

Even if there were evidence of injury, however, such injury could not serve as a basis for prior restraint on Ballock's speech rights. After all, the leaflets disseminated about the realtor in Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), were directed at hurting the plaintiff's business, but the Supreme Court nevertheless held that the injunction was an impermissible prior restraint: "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants the use of the injunctive power of a court." 402 U.S. at 419. Cf. NAACP v. Claiborne

Hardware Co., 458 U.S. 886 (1982) (advocacy of economic boycott of local merchants fully protected by First Amendment).

As Professor McCarthy explains, Crown's remedy from such an injury is to exercise its own speech right, not to silence Ballock:

The main remedy of the trademark owner is not an injunction to suppress the message, but a rebuttal to the message. As Justice Brandeis long ago stated, "If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."

5 McCarthy, § 31:148 at 31-216.

IV. BALLOCK HAS SUFFERED IRREPARABLE INJURY AS A RESULT OF THE INJUNCTION

Although Crown has shown no injury at all as a result of the operation of Ballock's website for two months, Ballock has been irreparably injured as a result of the injunction's restrictions on his First Amendment rights, and continues to be injured every day the injunction stays in place. As a result of the injunction, Ballock can no longer discuss Crown by name in any website. Although he has created a new website, www.hoovernissanddealersucks.com, in which he describes his experiences without using Crown's name, that website is no replacement for his ability to engage in consumer commentary about Crown. Without naming Crown, Ballock cannot fully express himself, and other consumers cannot benefit from his experience. As the Eleventh Circuit has recognized, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." The News-Journal Corp. v. Foxman, 939 F.2d 1499, 1513 (11th Cir. 1991) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). Because Ballock is suffering irreparable injury to his speech rights, and Crown has shown no evidence of injury at all from the operation of Ballock's website, the injunction should

be lifted.

V. THE PUBLIC INTEREST FAVORS LIFTING THE INJUNCTION.

"[T]he public interest is always served in promoting First Amendment values and in preserving the public domain from encroachment." Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1276 (11th Cir. 2001). The public benefits from the consumer commentary such as that posted by Ballock, and consequently is injured when deprived of that commentary. The Internet is not preserved for advertising by business alone, but rather is a unique forum on which the public can find a wide range of opinions and views. As a result of the injunction, consumers who search for "crown pontiac nissan" cannot access Ballock's site, and are not able to read and evaluate his criticism of the dealership or his advice to consumers on how to avoid the problems he faced. Silencing Ballock removes information from the public domain and deprives interested consumers from accessing relevant information.

VI. EVEN IF THIS COURT DOES NOT LIFT THE INJUNCTION, IT SHOULD MODIFY THE INJUNCTION TO PERMIT BALLOCK TO CONTINUE DISCUSSING HIS EXPERIENCES WITH CROWN ON A WEBSITE WITH A DIFFERENT DOMAIN NAME.

Even if this Court chooses not to lift the injunction altogether, it should narrow the injunction to permit Ballock to continue to express his views about plaintiff under a different domain name. Injunctions must be narrowly crafted to comply with the general rule against prior restraints of speech. Id. at 778; Consumers' Union v. General Signal Corp., 724 F.2d 1044, 1053 (2d Cir. 1983); Better Business Bureau v. Medical Directors, 681 F2d 397, 404-405 (5th Cir. 1982). "Restrictions imposed on deceptive commercial speech can be no broader than reasonably necessary to prevent the deception." FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 43-44 (D.C. Cir. 1985), citing In re RMJ, 455 U.S. 191, 203 (1982); see also

Castrol v. Pennzoil, 987 F.2d 939, 949 (3d Cir. 1993). Under this Court's order, Ballock was preliminarily enjoined from "acquiring, utilizing or operating any website using the trade name Crown Pontiac-Nissan or any confusing variant thereof, in text or domain name(s) intended to, or having the effect of, diverting traffic from Crown Pontiac, Inc's web sites, including without limitation any site found at the URL <http://www.crownpontiacnissan.com>." Order of May 8, 2002. As a result of this order, Ballock was compelled to remove his website from the Internet and to cease all commentary about plaintiff's services and goods on the Internet. At the very least, the Order should be clarified so that Ballock can continue to post his experience with plaintiff on a website with a different domain name.

In any case, it is not clear that this Court intended its order to prohibit Ballock from discussing Crown on a website under a different domain name. At the April 30th hearing, when discussing whether Ballock's operation of the site with the domain name www.crownpontiacnissan.com should be enjoined, this Court stated: "Incidentally, you can exercise your right to free speech by using your own domain name and talking about -- saying anything you want to say about Crown Nissan, can't you?" Hearing Tr. 12:8-11. Even Crown's attorneys appeared to seek to enjoin only Bollack's use of the domain name, and not any discussion of Crown. Crown's attorney engaged in the following exchange with Ballock during the hearing:

- Q. Mr. Ballock, do you know anything that would prevent you physically from posting whatever negative comments you have about my client on "ballock.com."
- A. No.
- Q. Or any other Web site that doesn't have my client's trade name and trademark as its domain name?

A. No.

Hearing Tr. 20:6-12.

However, because the Order prohibits use of Crown's mark in the text as well as the domain name of a web site, Ballock cannot continue to post his experiences with Crown unless the Order is clarified. Indeed, that appears to be Crown's reading of the injunction. After the injunction was issued and Ballock had taken down his website, he received correspondence from Crown claiming that he was in violation of the injunction because his website continued to exist in Google's cache of archived websites that are stored under a different domain name. Ballock Decl. ¶¶ 34, 35 & Exhibit 7 to Ballock's Decl. In that letter, Crown appeared to take the position that if Ballock's complaints about Crown could be called up in an Internet search for the terms "crown pontiac nissan," then he was in violation of the injunction, even if the website was stored under a different domain name and did not include Crown's name in its meta tags. Id. As a result, Ballock has been forced to remove any mention of Crown from any website he operates, lest that website be considered in violation of the injunction.

CONCLUSION

As stated above, Ballock's website neither infringes a trademark in violation of the Lanham Act nor violates the Anticybersquatting Consumer Protection Act. The injunction causes Ballock irreparable harm by denying him his right to free speech and injures the public by depriving interested consumers in information on Crown. Crown has shown no evidence of injury as a result of the operation of Ballock's website for the two months prior to the issuance of the injunction. For those reasons, the injunction should be dissolved.

DATED: June 10, 2002

Respectfully submitted,

David Gespass
Gespass & Johnson
3600 Clairmont Ave.
Birmingham, Alabama 35222
(205) 323-5966

Of Counsel:

Amanda Frost, D.C. Bar # 467425
Paul Levy, D.C. Bar # 946400
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CROWN PONTIAC, INC., dba)	
Crown Pontiac Nissan,)	
Crown Pontiac-Nissan,)	
)	
)	
Plaintiff,)	Case No. CV-02.C-1001-S
)	
vs.)	
)	
)	
THOMAS BALLOCK,)	
Defendant.)	
)	

PROPOSED ORDER

Defendant's Motion to Dissolve the Preliminary Injunction is GRANTED.

Chief United States District Judge U.W. Clemon

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendant Thomas Ballock's Motion to Dissolve the Preliminary Injunction has been served on the party listed below by first-class mail, postage pre-paid, this 10th day of June, 2002:

John M. Galese
Galese & Ingram
300 First Commercial Bank Bldg.
800 Shades Creek Parkway
Birmingham, Alabama 35209

David Gespass