

Lester A. Perry (2571)
HOOLE & KING L.C.
4276 South Highland Drive
Salt Lake City, UT 84124
Tel. (801) 272-7556
Fax (801) 272-7557
lap@hooleking.com

Attorneys for Defendants

Deepak Gupta, *pro hac vice*
Gregory A. Beck
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
Tel. (202) 588-1000
Fax (202) 588-7795
dgupta@citizen.org

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Koch Industries, Inc.,

Plaintiff,

v.

John Does, 1-25,

Defendants.

*
*
*
*
*
*
*
*

Case No. 1:10-cv-01275 DAK

Judge Dale A. Kimball

**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO QUASH
SUBPOENAS, ISSUE PROTECTIVE ORDER, AND DISMISS COMPLAINT**

TABLE OF CONTENTS

Introduction.....	iii
Statement of Issues	iv
Statement of Facts	iv
Argument.....	1
I. Because the First Amendment protects anonymous speech, courts require notice and a preliminary showing before authorizing plaintiffs to unmask online speakers.	1
II. Because Koch has not made—and cannot make—the requisite preliminary showing, the Court should quash the subpoenas, issue a protective order, and dismiss the complaint.	6
A. Koch did not notify the defendants of the threat to their anonymity.	6
B. Koch failed to allege its claims with specificity.	6
C. Koch fails to state a claim upon which relief could be granted.	7
1. <i>Trademark and Unfair Competition</i> (Counts I, III, V)	7
2. <i>Cyberpiracy</i> (Count II)	11
3. <i>Computer Hacking and Contract Theories</i> (Counts IV and VI)	16
D. Koch has failed to provide an evidentiary basis for its claims.	23
E. The balance of the equities favors quashing the subpoenas and dismissing this action.	25
Conclusion.....	25

INTRODUCTION

Through this lawsuit, Koch Industries seeks to unmask the identities of its critics—environmentalists who used an elaborate spoof to bring public attention to Koch’s controversial role in influencing public opinion on the science of global climate change. The defendants created a press release purporting to announce a decision by Koch to stop funding organizations that deny the scientific consensus on climate change, and posted the release on a website (www.koch-inc.com) designed to look like Koch’s. Although the site was up for only a few hours—and not a single reporter was actually fooled by the joke—it succeeded in drawing additional media attention to Koch’s political activities.

Koch was not amused. It filed this lawsuit and, without attempting to provide the defendants with notice, sought to expose their identities by obtaining subpoenas directed to the company that hosted the website.

Although this case arises out of a harmless prank, it raises serious constitutional issues. The courts have universally held that speakers may not be stripped of their First Amendment right to engage in anonymous speech absent notice of the threat to that right and a preliminary showing by the plaintiff that the lawsuit has some merit. Koch has made no such showing. And because an examination of the complaint reveals that it states no viable claims, this Court should put a stop to Koch’s fishing expedition. The Court should (1) quash the subpoenas, (2) issue an appropriate protective order barring use or disclosure of any identifying information already obtained, and (3) dismiss the complaint for failure to state a claim upon which relief can be granted.

STATEMENT OF ISSUES

1. Discovery to Unmask Anonymous Speakers. Before authorizing subpoenas seeking to strip speakers of their First Amendment right to anonymity, courts require plaintiffs to make a preliminary showing that their complaint has merit. *See, e.g., Dendrite v. Doe*, 775 A.2d 756 (N.J. Super Ct. App. Div. 2001); *Doe v. Cahill*, 884 A.2d 451, 460, 461 (Del. 2005). Given Koch's failure to make such a showing here, should the Court quash the subpoenas and issue a protective order barring the disclosure of identifying information?

2. Dismissal for Failure to State a Claim. Do any of the theories alleged in Koch's complaint state a claim on which relief could be granted?

a. Trademark, Unfair Competition, and Cyberpiracy Theories: Given the absence of any commercial use of its trademark, can Koch state a claim for trademark infringement, unfair competition, or cyberpiracy (Counts I, II, III, and V)? *See Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045 (10th Cir. 2008).

b. Computer Hacking and Breach of Contract Theories: Given the absence of any economic damage, unauthorized access to a protected computer system, or a binding contract, can Koch state a claim for computer hacking or breach of contract (Counts IV and VI)? *See Cvent, Inc. v. Eventbrite, Inc.*, --- F. Supp. 2d ---, 2010 WL 3732183 (E.D. Va. 2010); *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

STATEMENT OF FACTS

1. Koch Industries, Inc. is an industrial conglomerate that describes itself as "one of the largest private companies in the world." Compl., Exh. B. Much of its business involves the production, transportation, and trading of oil, coal, and chemicals. Koch's in-

volvement in these industries makes it one of the country's largest polluters and a frequent target of criticism by environmentalists.¹

Aside from its industrial activities, a major focus of the company for decades has been its involvement in the political arena.² The company has spent tens of millions of dollars on lobbying and in support of politicians and groups that favor its political agenda. *Id.* Not surprisingly given its role as a major fossil-fuel producer, much of the company's political efforts focus on the issue of climate change. *See* Exh. 2. A recent Greenpeace report named Koch the "financial kingpin of climate science denial and clean energy opposition." Exh 2. Koch has funded foundations, think tanks, and political groups that question the scientific consensus concerning the impact of fossil fuels on the environment and that oppose climate-related legislation. *Id.* The Greenpeace report also highlighted the company's "dominant role in a high-profile national policy debate on global warming." *Id.* As the company states in its complaint, "[g]iven the size, strength, and extent of the company's operations, policy statements by Koch on current issues, including those related to environmental matters, receive tremendous public attention." Compl. ¶ 9.

Koch heavily relies on its corporate website as a platform for its "policy viewpoints." Compl. ¶ 13. The site prominently highlights the "Koch companies' perspectives

¹ *See* Political Economy Research Institute, *Toxic 100 Air Polluters*, March 2010, at http://www.peri.umass.edu/toxic_index/ (Exh. 1); GREENPEACE, KOCH INDUSTRIES: SECRETLY FUNDING THE CLIMATE DENIAL MACHINE, March 2010 (Exh. 2). (Pursuant to District of Utah Civil Rule 7-5(a)(2), all hyperlinked material is also attached as an exhibit to this memorandum.)

² *See* Jane Mayer, *Covert Operations*, *The New Yorker*, Aug. 30, 2010 (Exh. 3).

on current issues.”³ The company’s “ViewPoint” page on “Climate Controversies and Energy Needs” raises “questions” about whether global warming is caused by humans and whether the planet is “now entering a cooling cycle.”⁴ Periodic editorials on the site attributed to the company and its executives criticize the conclusions of climate scientists and the Obama administration’s approach to regulating greenhouse-gas emissions.⁵ Koch also uses its website to respond to its critics, describing Greenpeace as “irrational,” refuting “media attacks,” and decrying “climate extremists” who “are trying to shout down any and all dissenters.”⁶ The company has particularly taken issue with characterizations of its issue advocacy as “covert,” stating that it has always been open about its advocacy efforts.⁷

2. The defendants in this case are members of Youth for Climate Truth, a group of anonymous youth concerned about global climate change. The group conceived an elaborate hoax designed to spark discussion and bring public attention to Koch’s funding of climate-change denial. On December 10, 2010, the group issued a spoof press release announcing that Koch would “restructure its support for organizations that undertake climate change research and advocacy.” Compl. Exh. C. The release claimed that the com-

³ <http://www.kochind.com/Perspectives/> (Exh. 4).

⁴ <http://www.kochind.com/ViewPoint/climateEnergy.aspx> (Exh. 5).

⁵ See, e.g., *Going to Extremes*, July 1, 2009, at http://www.kochind.com/Perspectives/perspectives_detail.aspx?id=12 (Exh. 6).

⁶ <http://www.kochind.com/kochFacts/> (Exh. 7); *Blowing Smoke*, Jan. 1, 2010, at http://www.kochind.com/Perspectives/perspectives_detail.aspx?id=18 (Exh. 8).

⁷ [http://www.kochind.com/files/Response to Recent Media Attacks.pdf](http://www.kochind.com/files/Response%20to%20Recent%20Media%20Attacks.pdf) (Exh. 9).

pany would withdraw funding from groups “whose positions on climate change could jeopardize America’s continued global competitiveness in the energy and chemical sectors and Koch Industries’ ability to provide high-quality products and services to the American people.” *Id.* It also included a link to the Internet domain koch-inc.com, at which the group posted a website that was very similar to Koch’s official site except for its inclusion of a copy of the release. *Id.*, Exh. B. Within a few hours of the release, Koch had complained to the website’s host, Utah-based Bluehost.com, and the site had been taken offline.

Given the company’s outspoken views on climate change, reporters who saw the press release immediately recognized that it was a hoax. For example, the New York Times identified it as a “spoof,” noting on its website that “[t]he biggest suggestion that mischief was afoot” was that the company’s owners “have long thumbed their nose at environmental groups’ complaints.”⁸ The Hill quickly followed suit, calling the release a “phony.”⁹ As one reporter wrote: “By the time I reached the words climate change re-

⁸ Tom Zeller, Jr., *A Koch Industries Climate Change Spoof*, New York Times, Dec. 10, 2010, at <http://green.blogs.nytimes.com/2010/12/10/a-koch-industries-climate-change-spoof/> (Exh. 10).

⁹ Andrew Restuccia, *Koch Industries says press release on climate change is phony*, The Hill, Dec. 12, 2010, at <http://thehill.com/blogs/e2-wire/677-e2-wire/133121-koch-industries-denies-affiliation-with-phony-press-release> (Exh. 11).

search, I knew it couldn't be true."¹⁰ Three days later, the Economist reported on its website that, as far as it could determine, "no news organisation fell for the hoax."¹¹

The release did, however, accomplish its authors' objective of bringing attention to Koch's funding of climate-change denial. In the process of covering the spoof, for example, the New York Times discussed "broad-based support of climate change skepticism." Exh. 10. The Hill also noted criticisms by environmentalists against Koch "for its donations to groups that lobbied heavily to block climate legislation." Exh. 11. And Koch's decision to file suit in this case prompted a second round of discussion about the company's advocacy efforts.¹²

3. Eighteen days after the press release was issued, Koch filed suit against the release's anonymous authors "to redress Defendants' misappropriation of Koch's intellectual property and impersonation of Koch for the purpose of deceiving the public and promoting Defendants' agenda." Compl. ¶ 1. Specifically, the complaint alleges trademark infringement, cybersquatting, and unfair competition based on Koch's assertion that defendants' actions had "deceive[d] the public respecting Koch's true position on issues and

¹⁰ Kirsten Korosec, *The Greening of Koch Industries—Psych!*, BNET.com, <http://www.bnet.com/blog/clean-energy/the-greening-of-koch-industries-8212-psych/3415> (Exh. 12).

¹¹ *Koch-ups and conspiracies*, The Economist, Dec. 13, 2010, at http://www.economist.com/blogs/newsbook/2010/12/anti-business_protests (Exh. 13).

¹² See, e.g., Kate Sheppard, *Kochs Sue Over Climate Prank*, Mother Jones, Jan. 7, 2011, at <http://motherjones.com/blue-marble/2011/01/kochs-claim-climate-spoof-was-bad-business>, (Exh. 14); Brad Johnson, *Koch Sues: Claim That We Believe in Global Warming Damaged Our Reputation*, The Wonk Room, Jan. 7, 2011, <http://wonkroom.thinkprogress.org/2011/01/07/koch-denier-lawsuit> (Exh. 15).

respecting Defendants’ motives.” *Id.* The complaint also alleges hacking in violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (CFAA), and breach of contract based on defendants’ access to the company’s home page in violation of the site’s “Terms of Use.” *Id.* ¶¶ 35-37, 43-47. Although the complaint suggests that defendants illegally hacked into Koch’s website, it alleges only that the defendants visited the company’s *public* home page. *Id.* ¶ 36. Koch apparently considers this access “fraudulent” and “unlawful” because its Terms of Use—buried behind a small link at the bottom of its home page—did not authorize access to the site for the purpose of creating a spoof. *See* Compl. Exh. B (showing “Terms of Use” link).

The company then filed an *ex parte* motion for accelerated discovery, requesting authority to subpoena Bluehost.com and the defendants’ domain registrar, FastDomain. *See* Mem. in Supp. of Mot. for Accelerated Discovery, Dec. 29, 2010 (Doc. 5). In its memorandum supporting that motion, Koch relied on cases granting plaintiffs authority to conduct discovery into the identities of anonymous defendants, but did not inform the Court of the requirements imposed by those cases as a prerequisite to such discovery—including notice to the defendant, an initial evidentiary showing, and a balancing of the parties’ interests. *Id.* at 6-7. Nor did Koch attempt to satisfy those requirements. Although the motion contended that the defendants caused Koch “substantial harm,” the only actual damages alleged in the complaint, aside from the cost of bringing this action, was the “time and money” allegedly spent responding to an unidentified number of media inquiries. *Id.* at 2; Compl. ¶ 19. And although Koch asserted that “several online news sources reported

on the false press release, including the Economist and the New York Times,” it failed to mention that those sources correctly identified the press release as a spoof. Mem. at 3.

On January 3, 2011, this Court granted Koch’s ex parte motion. (Doc. 7). Koch then subpoenaed Bluehost.com and FastDomain, which apparently responded by immediately turning over identifying information to Koch.

In light of the disclosure that had apparently already taken place and the possibility of further disclosure, counsel for the anonymous defendants notified Koch’s counsel in writing on January 20, 2011, that any information obtained by means of the subpoenas was subject to a claim of First Amendment privilege. That letter further advised Koch’s counsel that Koch had an obligation to “promptly return, sequester, or destroy the specified information” and “must not use or disclose the information” until this Court has had an opportunity to adjudicate the privilege claim, and, if sustained, issue a protective order barring disclosure. Fed. R. Civ. P. 45(d)(2)(B); *see* Exh. 16 (letter from Deepak Gupta to Juliette White and Judith Powell).

ARGUMENT

I. Because the First Amendment Protects Anonymous Speech, Courts Require Notice and a Preliminary Showing Before Authorizing Plaintiffs to Unmask Online Speakers.

A. The right to engage in anonymous speech “is a well-established constitutional right. In fact, anonymous political speech is an especially valued right in this nation.” *Doe v. Shurtleff*, 2008 WL 4427594, at *5 (D. Utah 2008), *vacated on other grounds*, 2009 WL 2601458 (D. Utah 2009); *see Watchtower Bible and Tract Soc’y of N.Y. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999). From the literary efforts of Mark Twain to the authors of the Federalist Papers, “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” *Talley v. California*, 362 U.S. 60, 64 (1960). As the Supreme Court wrote in *McIntyre v. Ohio Elections Commission*:

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

514 U.S. 334, 341-42 (1995). “Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” *Id.* at 356.

This right to anonymous speech is fully applicable to speech on the Internet. *Shurtleff*, 2008 WL 4427594, at *5; *see In re Anonymous Online Speakers*, --- F.3d ----, 2011

WL 61635, at *2 (9th Cir. 2011). The Supreme Court has treated the Internet as a forum of preeminent importance because it provides any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997). “Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas,” and therefore “the constitutional rights of Internet users, including the First Amendment right to speak anonymously, must be carefully safeguarded.” *McMann v. Doe*, 460 F. Supp. 2d 259, 266 n.35 (D. Mass. 2006) (internal quotation omitted). In particular, courts have granted First Amendment protection to noncommercial websites, such as the website at issue here, set up solely for the purpose of criticizing or embarrassing corporations or institutions. *See, e.g., Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (holding that the First Amendment protected the gripe site “shopsatwillowbend.com” from a claim by the Shops at Willow Bend shopping mall); *SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1214-15 (W.D. Wash. 2010) (quashing a subpoena for identifying information about the owner of “salehoosucks.com”); *McMann*, 460 F. Supp. 2d at 266 (accord- ing First Amendment protection to the operator of the gripe site “paulmcmann.com” against defamation and privacy claims by homebuilder Paul McMann).

B. A court order, even if granted for a private party, is a form of state action and is thus subject to constitutional limitations. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1 (1948). An order to compel production of a per- son’s identity in a situation that threatens the exercise of fundamental rights “is subject to the closest scrutiny.” *NAACP v. Alabama*, 357 U.S. 449, 461 (1958); *see Bates v. City of*

Little Rock, 361 U.S. 516, 524 (1960). Abridgement of the right to speech, “even though unintended, may inevitably follow from varied forms of governmental action,” such as compelling the production of names. *NAACP*, 357 U.S. at 461. Rights may also be curtailed by means of private retribution following court-ordered disclosures. *Id.* at 462-63; *Bates*, 361 U.S. at 524.

Based on these principles, a growing consensus of courts has recognized that civil subpoenas seeking information regarding anonymous speakers raise First Amendment concerns. *See SaleHoo*, 722 F. Supp. 2d at 1214-15. These courts recognize that “[i]f Internet users could be stripped of [their] anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.” *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001). Accordingly, the courts have “outlined strict rules for allowing a subpoena that had the effect of unmasking the identity of anonymous online speakers.” *Shurtleff*, 2008 WL 4427594, at *6. Such rules serve the important purpose of “assess[ing] the viability of [a plaintiff’s] claims before casting aside [the speaker’s] anonymity, which once lost cannot be recovered.” *SaleHoo*, 722 F. Supp. 2d at 1215.

Although courts have adopted slightly different versions of the test, “[t]he case law . . . has begun to coalesce around the basic framework of the test articulated in *Dendrite*.” *Id.* at 1214 (citing *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001)). In *Dendrite*, a company sued four anonymous defendants who had criticized it on a Yahoo! bulletin board. 775 A.2d at 759-60. The court set out a five-part standard for evalu-

ating subpoenas that seek to identify anonymous Internet speakers, under which the court should:

1. **Give Notice:** Require reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena;
2. **Require Specificity:** Require the plaintiff to allege with specificity the speech or conduct that has allegedly violated its rights;
3. **Ensure Facial Validity:** Review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant;
4. **Require An Evidentiary Showing:** Require the plaintiff to produce evidence supporting each element of its claims; and
5. **Balance the Equities:** Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. at 760-61.

Other courts have adopted slight variations on *Dendrite*. In *Doe v. Cahill*, for example, the Delaware Supreme Court ruled that an elected official who sued over statements attacking his fitness to hold office could identify the anonymous online speakers only if he could put forward sufficient evidence to establish a prima facie case on all elements of a defamation claim within his control, including evidence that the statements were false. 884 A.2d 451, 460, 461 (Del. 2005). Under the *Cahill* standard, plaintiffs should only obtain the requested discovery if they can put forth at least enough evidence to survive a motion for summary judgment. *Id.* at 457. The District of Arizona applied *Cahill's* summary-judgment test in refusing to enforce a subpoena to identify the authors of postings criticizing the Best Western motel chain where the plaintiff did not present any evidence that the Doe defendants had written anything false. *Best Western Int'l, Inc. v. Doe*,

2006 WL 2091695 (D. Ariz. July 25, 2006). And in *McMann v. Doe*, the court relied on *Ca-hill* and *Best Western* in rejecting a lawsuit by a homebuilder against the anonymous operator of another critical website. 460 F. Supp. 2d 259. The court denied a motion for leave to subpoena the website's host, holding that the plaintiff had failed to state a claim for any cause of action that justified violating the defendant's First Amendment right to speak anonymously. *Id.* at 268.

Despite minor variations in the tests, each requires the essential step of ensuring that First Amendment rights are not trammelled unnecessarily by "consider[ing] the important value of anonymous speech balanced against a party's need for relevant discovery in a civil action." *In re Anonymous Online Speakers*, 2011 WL 61635, at *6. Thus, courts must, at a minimum, review a plaintiff's claims and the evidence supporting them to ensure that the plaintiff has a sufficient basis for piercing a speaker's anonymity.¹³

¹³ See also, e.g., *Pilchesky v. Gatelli*, --- A.3d ---, 2011 WL 17520 (Pa. Super. Ct. Jan. 5, 2011); *Mortgage Specialists v. Implode-Explode Heavy Indus.*, 999 A.2d 184 (N.H. 2010); *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); *Indep. Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp. 2d 249 (D. Conn. 2008); *London-Sire Records v. Doe 1*, 542 F. Supp. 2d 153 (D. Mass. 2008); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (Cal. App. 2008); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695 (N.Y. Sup. 2007); *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Sony Music Entm't v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999).

II. Because Koch Has Not Made—and Cannot Make—the Requisite Preliminary Showing, the Court Should Quash the Subpoenas, Issue a Protective Order, and Dismiss the Complaint.

A. Koch Did Not Notify the Defendants of the Threat to Their Anonymity.

When asked to subpoena anonymous Internet speakers, courts should ensure that the plaintiff has undertaken the best efforts available to notify the speakers that they are the subject of a subpoena, and then withhold any action for a reasonable period of time so that the defendants have time to retain counsel. *Cahill*, 884 A.2d at 461. The purpose of requiring notice to the anonymous defendants can be served only if defendants are allowed enough time to respond to plaintiff's showing of the basis for disclosure—ordinarily, at least as much time as would be allowed after receipt of a motion for summary judgment. In this case, Koch could easily have sought to provide notice through the web host, Bluehost.com, before seeking a subpoena. Although the defendants did ultimately learn of the lawsuit through the media, Koch's actions underscore the importance of the notice rule in general. Without such a requirement, plaintiffs cannot be counted on to provide reasonable notice to anonymous defendants, even when such notice would be extremely easy to give. In light of the lack of notice here, and the resulting lack of adversarial presentation preceding issuance of the subpoenas, this Court should view the propriety of Koch's subpoenas with skepticism.

B. Koch Failed to Allege Its Claims With Specificity.

The qualified privilege to speak anonymously requires a court to review a plaintiff's claims to ensure that the plaintiff has a valid reason for piercing a speaker's anonymity. *Dendrite*, 775 A.2d at 760. As an initial step, courts require plaintiffs to state their claims

with specificity—so that defendants know the exact speech or conduct alleged to be actionable and so courts can make an adequate preliminary assessment of merit. *Id.* Here, the bulk of Koch’s complaint asserts claims of trademark infringement, unfair competition, and cyberpiracy under the Lanham Act and state law—legal theories that each apply only to *commercial* speech or activity. Yet Koch’s complaint never specifies the conduct that Koch believes constitutes commercial use of its trademarks. Similarly, Koch’s claims under the Computer Fraud and Abuse Act and the common law of contract are premised on the notion that the defendants were parties to a contract governing the use of Koch’s website, but Koch never specifies whether or how the defendants manifested their assent to such a contract. Nor, despite the frequent reference to “trebled profits” in its complaint, does Koch ever specify what damages, if any, it allegedly suffered as a result of the defendants’ prank.

C. Koch Fails to State A Claim Upon Which Relief Could Be Granted.

The court should next review each claim asserted by plaintiffs to determine whether it is facially actionable. *Dendrite*, 775 A.2d at 760. Where, as here, the complaint shows that the plaintiffs are not entitled to any relief, no purpose is served by allowing discovery, and the Court should instead dismiss the complaint. And because subpoenas have already been issued here, the Court should also issue a protective order to bar the disclosure of identifying information that has been improvidently obtained.

1. Trademark and Unfair Competition (Counts I, III, and V)

Koch’s first, third, and fifth claims allege trademark infringement and unfair competition. Because trademark infringement “is a type of unfair competition,” these claims

“have virtually identical elements and are properly addressed together as an action brought under ... section 43 of the Lanham Act.” *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1050 (10th Cir. 2008). As the Tenth Circuit explained in *Utah Lighthouse*, a plaintiff seeking to invoke the Lanham Act “must show that the alleged infringer used the plaintiff’s mark ‘in connection with any goods or services’”—a threshold element “commonly described as the commercial use requirement.” *Id.* at 1051-52 (quoting 15 U.S.C. § 1125(a)(1)).

a. Koch cannot satisfy the Lanham Act’s commercial-use requirement because the defendants here used Koch’s trademark solely to make a political statement—not to sell goods or services in competition with Koch. Koch does not even suggest otherwise. On the contrary, Koch’s complaint is premised on defendants’ use of a website to advance a political agenda.

In *Utah Lighthouse*, both this Court and the Tenth Circuit rejected indistinguishable trademark and unfair-competition claims for the same reason. *Utah Lighthouse Ministry v. Discovery Computing, Inc.*, 506 F. Supp. 2d 889 (D. Utah. 2007) (Kimball, J.), *aff’d*, 527 F.3d 1045. The plaintiff there was an anti-Mormon entity known as the Utah Lighthouse Ministry (UTLM). UTLM sued a Mormon organization that had set up its own website designed to look like UTLM’s website and located at utahlighthouse.com. The imposter website—which contained no disclaimer that it was not associated with UTLM—was intended solely to parody and criticize UTLM’s negative views about the Church of Jesus Christ of Latter Day Saints, not to peddle goods or services. On appeal, the Tenth Circuit affirmed this Court’s conclusion that the plaintiff could not invoke the

Lanham Act because the defendants’ website was not commercial in any sense—it “provided no goods or services, earned no revenue, and had no direct links to any commercial sites.” *Id.* at 1052 (quoting *Utah Lighthouse*, 506 F. Supp. 2d at 897). That description applies equally to the spoof of Koch’s website.

The Tenth Circuit emphasized that the scope of the Lanham Act is strictly limited to its function of policing commercial competition for consumers’ benefit. “The Lanham Act is intended ‘to protect the ability of consumers to distinguish among competing producers,’ not to prevent all unauthorized uses.” *Id.* (quoting *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 774 (1992)). The Tenth Circuit therefore rejected the argument that it is sufficient for the use to be in connection only with the *trademark owner’s* sale of goods or services:

In our view, the defendant in a trademark infringement and unfair competition case must use the mark in connection with the goods and services of a *competing producer*, not merely to make a comment on the trademark owner’s goods and services. . . . Unless there is a *competing good or service* labeled or associated with the plaintiff’s trademark, the concerns of the Lanham Act are not invoked.

Id. at 1054 (emphasis added); see *Lang v. Ret. Living Publ’g Co., Inc.*, 949 F.2d 576, 582-83 (2nd Cir. 1991) (“[T]rademark infringement protects only against mistaken purchasing decisions and not against confusion generally.”) (internal quotations and citations omitted). Because Koch has identified no “competing good or service,” its Lanham Act claims fail.

b. As this Court has recognized, the Lanham Act’s commercial-use requirement is crucial because it ensures that trademark law is moored to Congress’s purpose of ensuring fair commercial competition and does not instead trample on “the First Amendment

rights of any citizen to comment and critique the mark holder.” *Utah Lighthouse Ministry*, 506 F. Supp. 2d at 896 (citing *Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005)); see also *Taubman*, 319 F.3d at 774.

The Supreme Court’s “First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992). This case implicates core political speech in that “highest, most protected position.” By contrast, “Congress intended Section 43(a) to extend only to false and misleading speech that is encompassed within the ‘commercial speech’ doctrine developed by the United States Supreme Court.” *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1274 (10th Cir. 2000) (citation omitted). Commercial speech is speech that 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), and so the use of a trademark is “commercial speech” for First Amendment purposes only when it “encourages consumers to enter into a commercial transaction by providing information [as to] the source of commercial goods or services.” Lisa P. Ramsey, *First Amendment Scrutiny on Trademark Law*, 61 S.M.U. L. Rev. 381, 396 (2008).

But here the defendants were “not engaged in selling anything but ideas.” *Lucasfilm Ltd v. High Frontier*, 622 F. Supp. 931, 934 (D.D.C. 1985); see also *Reddy Comms., Inc. v. Env’tl Action Found.*, 477 F. Supp. 936, 945-46 (D.D.C. 1979) (rejecting an energy company’s claim that an environmental group’s caricature of its service mark violated the

Lanham Act where the group did not use the mark in connection with the sale of any competing goods or services). Trademark law may not, consistent with the First Amendment, be used to police the marketplace of ideas.

c. In addition to its claims under the Lanham Act, Koch Industries has alleged unfair competition and trademark infringement under Utah law. The same First Amendment limitations govern these state-law claims. Consistent with those limitations, “Utah law governing unfair competition, infringement of a patent, trademark, or trade name requires ‘intentional business acts or practices,’ similar to the requirements of the Lanham Act.” *Utah Lighthouse*, 506 F. Supp. 2d at 902 (quoting U.C.A. § 13-5a-102 (4(a))). Just as Koch cannot satisfy the Lanham Act’s “commercial use” requirement, “similarly, Plaintiff’s state law claims are deficient in making the same showing.” *Id.* The Utah courts, moreover, have not expanded common-law unfair competition beyond “situations in which a company attempts to profit from the reputation of its competitor by selling one of its own products as that of its competitor or misappropriating a trademark belonging to its competitor.” *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1280 (10th Cir. 2000) (citing *Allen’s Prods. v. Glover*, 414 P.2d 93 (1966)). Based on respect for federalism, the Tenth Circuit and this Court have both indicated a reluctance to “expand Utah state law beyond [those] bounds.” *Id.*; see *Klein-Becker USA, LLC v. Home Shopping Network, Inc.*, 2005 WL 2265007, at *7 (D. Utah 2005).

2. Cyberpiracy (Count II)

Koch’s second claim alleges that the defendants have committed cyberpiracy in violation of the Anticybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d).

To establish liability under the ACPA, Koch must show that the defendants “used or registered the domain names with a bad faith intent to profit.” *Utah Lighthouse*, 527 F.3d at 1057. In the absence of such a profit motive—*i.e.*, where the use of a trademark constitutes “bona fide noncommercial or fair use,” 15 U.S.C. § 1125(d)(1)(B)(i)(IV)—the ACPA does not apply. *Utah Lighthouse*, 527 F.3d at 1058 (holding ACPA inapplicable where there was no “inference that the Defendants intended to profit”). The website here—which had no commercial purpose and was established solely to criticize Koch and to bring attention to its stance on climate change—therefore falls “beyond the scope” of the ACPA. *See Lamparello v. Falwell*, 420 F.3d 309, 318 (4th Cir. 2005) (quoting S. Rep. No. 106-140).

Congress designed the ACPA to “target a narrow class of cyber-squatters consisting of those who have the bad faith intent to profit, and not to tread on the rights of those with any other motives.” *Mayflower Transit, LLC v. Prince*, 314 F. Supp. 2d 362, 370 (D.N.J. 2004). The statute sets out a list of nine non-exclusive factors that “a court may consider” in determining whether the “bad faith intent to profit” standard is satisfied. 15 U.S.C. § 1125(d)(1)(B)(i). These factors attempt “to balance the property interests of trademark owners with the legitimate interests of Internet users and others” to engage in activities “such as comparative advertising, comment, criticism, parody, news reporting, fair use, etc.” *Lamparello*, 420 F.3d at 319 (quoting H.R. Rep. No. 106-412). The factors provided by the ACPA are “given to courts as a guide, not as a substitute for careful thinking” about the ultimate issue in a cybersquatting claim—“whether the conduct at issue is motivated by a bad faith intent to profit.” *Lucas Nursery & Landscaping, Inc. v.*

Grosse, 359 F.3d 806, 811 (6th Cir. 2004). Moreover, the factors “should be examined in tandem with the ‘safe harbor’ in the ACPA which provides that bad faith intent shall ‘not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was . . . lawful.’” *Mayflower Transit*, 314 F. Supp. 2d at 369 (quoting 15 U.S.C. § 1125(d)(1)(B)(ii)).

The “quintessential example of a bad faith intent to profit”—and the activity primarily targeted by the ACPA—is the act of “purchas[ing] a domain name very similar to the trademark and then offer[ing] to sell the name to the trademark owner at an extortionate price.” *Utah Lighthouse*, 527 F.3d at 1058. In addition, a bad faith intent to profit exists when “[a] defendant intend[s] to profit by diverting customers from the website of the trademark owner to the defendant’s own website, where those consumers would purchase the defendant’s products or services instead of the trademark owner’s.” *Id.* The absence of these motives “readily defeat[s] an inference that the Defendants intended to profit” and renders additional application of the ACPA factors unnecessary. *Id.* at 1058.

As in *Utah Lighthouse*, “[n]either of these purposes is evident here.” *Id.* at 1058. Koch does not allege that the defendants registered the koch-inc.com domain with the intent to sell it for profit. Nor does it allege that the defendants intended to profit by diverting customers from Koch’s own site. Indeed, such diversion would be impossible given that Koch’s official website does not sell anything to the public, and the spoof website, in the brief period that it was online, did not sell anything either. Where, as here, a website “offers an indirect critique [of the plaintiff] and lacks an overt commercial purpose,” the ACPA does not apply. *Id.*; see also *Lucas Nursery*, 359 F.3d at 810 (rejecting ACPA claim

where “[t]he paradigmatic harm that the ACPA was enacted to eradicate—the practice of cybersquatters registering several hundred domain names in an effort to sell them to the legitimate owners of the mark—[was] simply not present in any of [the defendant’s] actions”); *Northland Ins. Cos. v. Blaylock*, 115 F. Supp. 2d 1108, 1124 (D. Minn. 2000) (rejecting liability where the defendant did “not appear to fit the ‘classic’ cybersquatter profile”).

Koch alleges that the defendants profited from the site by “us[ing] Koch’s mark to call attention to and promote [their] agenda.” Compl. ¶ 26. Given that the defendants set up and operated the website anonymously, however, the only “agenda” that they could have promoted was the message implicit in the site itself—criticism of Koch’s funding of climate-change denial. To the extent that criticism of a company can be said to advance an “agenda,” the same could also be said of any website established for the purpose of criticism. But the Tenth Circuit in *Utah Lighthouse* held the ACPA inapplicable to such a site. 527 F.3d at 1058. Numerous other courts have held the same. *See, e.g., Lucas Nursery*, 359 F.3d at 810 (rejecting an ACPA claim against a dissatisfied customer who registered a domain containing the plaintiff’s trademark for the purpose of detailing complaints against the company); *Lamparello*, 420 F.3d at 313 (rejecting an ACPA claim against the owner of a website critical of Reverend Jerry Falwell); *TMI, Inc. v. Maxwell*, 368 F.3d

433, 438-39 (5th Cir. 2004) (holding ACPA inapplicable to noncommercial site designed “to inform potential customers about a negative experience with the company”).¹⁴

Moreover, defendants’ criticism of Koch implicates the larger issue of climate change, one of the most pressing scientific and political issues of the day and the subject of a debate in which Koch itself has eagerly engaged. To “call attention to and promote” an “agenda” regarding an important issue of public concern does not show a “bad faith intent to profit”—rather, it is the essence of purely political speech. Congress “left little doubt that it did not intend for [the ACPA] to impinge the First Amendment rights of critics and commentators.” *Lamparello*, 420 F.3d at 313. The inclusion of the “bona fide non-commercial or fair use” of a trademark as a factor for consideration is intended to “protect[] the rights of Internet users and the interests of all Americans in free speech.” *Id.* at 314 (quoting S. Rep. No. 106-140 (1999)).

Koch also vaguely suggests that defendants registered the domain name “to obtain funding for their activities.” Complaint ¶ 26. But the website does not solicit funding or provide any method by which donations could be made, and the defendants’ anonymity would in any event make donations impossible. Indeed, even if the defendants chose to make their identities public and Koch could show that, in some general way, defendants

¹⁴ See also *Mayflower Transit, L.L.C. v. Prince*, 314 F. Supp. 2d 362 (D.N.J. 2004) (no ACPA liability where registrant’s motive was to express dissatisfaction with mark owner); *Rohr-Gurnee Motors, Inc. v. Patterson*, 2004 WL 422525, at *5 (N.D.Ill. Feb. 9, 2004) (no bad-faith-intent-to-profit in claim against websites detailing consumer’s negative experiences with plaintiff); *Northland Ins. Cos. v. Blaylock*, 115 F. Supp. 2d 1108, 1124 (D. Minn. 2000) (rejecting ACPA claim against site criticizing unfair business practices).

hoped that publicity resulting from the spoof would allow them to raise money to fund their political activism on climate-change issues, such fundraising would not divert business from Koch's site or cause the company any other financial harm. It would thus not constitute the sort of "quintessential" cybersquatting that the ACPA prohibits. *Utah Lighthouse*, 527 F.3d at 1058. On the contrary, such fundraising would *itself* be a form of political speech, subject to the highest level of First Amendment protection. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) ("[S]olicitation of charitable contributions is protected speech.").

3. Computer Hacking and Contract Theories (Counts IV and VI)

The most creative legal theory in Koch's complaint alleges that the defendants have violated the Computer Fraud and Abuse Act (CFAA)—a criminal statute that penalizes those who hack into protected computer systems. Koch relies on 18 U.S.C. § 1030(g), which authorizes civil actions for loss or damage caused by such hacking. Although the CFAA imposes criminal and civil liability only upon a hacker who accesses a computer system "without authorization or exceeds authorized access," 18 U.S.C. §§ 1030(a)(2), 1030(a)(4), Koch appears to be claiming that the defendants here "exceeded authorized access" to Koch's website by breaching the site's Terms of Use. Complaint ¶ 36. In this way, Koch's CFAA theory piggybacks on its breach-of-contract theory, which posits that the defendants "agreed to" the Terms of Use merely "by using Koch's website." Compl. ¶ 45. Both theories lack a sound basis in law.

First, Koch has not plausibly alleged one of the five factors necessary to support a civil action under the CFAA. 18 U.S.C. §§ 1030(g), 1030(c)(4)(A)(i). Koch does not ex-

plain—and it is difficult to conceive—how the defendants’ short-lived spoof website could have caused the company to suffer cognizable “loss” or “damage” to its systems, let alone the requisite minimum \$5,000 in economic damages. See *Andritz, Inc. v. Southern Maintenance Contractor, LLC*, 626 F. Supp. 2d 1264, 1266-67 (M.D. Ga. 2009); *Garelli Wong & Assocs., Inc. v. Nichols*, 551 F. Supp. 2d 704, 709-11 (N.D. Ill. 2008).¹⁵

Second, Koch cannot plausibly allege that the defendants are guilty of gaining “unauthorized access” or “exceeding authorized access” to a protected computer system within the meaning of 18 U.S.C. § 1030. The defendants created a mockup of Koch’s site using information that Koch made “publicly available on the Internet, without requiring any login, password, or other individualized grant of access.” *Cvent, Inc. v. Eventbrite, Inc.*, --- F. Supp. 2d ----, 2010 WL 3732183, at *3 (E.D. Va. 2010). “By definition, therefore, [the defendants] could not have ‘exceeded’ [their] authority to access that data.” *Id.*

In *Cvent*, a federal district court recently rejected a strikingly similar attempt to stretch the CFAA to the use of publicly available information on a website. There, as here, the plaintiff sought to premise CFAA liability on its website’s Terms of Use, which provided that “No competitors or future competitors are permitted to access our site or information.” *Id.* But, as with Koch’s website, the defendant took “no affirmative steps” to prevent such access. *Id.* The site was “not password-protected, nor [were] users of the

¹⁵ The other threshold factors (impairment of medical treatment, physical injury, threats to public health or safety, damage to government systems used for certain important purposes, or damage affecting at least ten protected systems) are plainly inapplicable.

website required to manifest assent to the Terms of Use, such as by clicking ‘I agree’ before gaining access to the database. Rather, anyone ... [could] access and search [the] information at will.” *Id.* Like Koch’s website, the Terms of Use did “not appear in the body of the first page” of the website; instead “[t]he link to access the Terms [was] buried at the bottom of the first page.” *Id.*; see Complaint, Exh. B (showing first page of Koch’s website with “Terms of Use” link at bottom of page). Accordingly, the site was “not protected in any meaningful sense by its Terms of Use or otherwise.” *Id.* The court observed that the plaintiff’s claim was really a claim that a user with authorized access had *used* the information in an unwanted manner, not a claim of unauthorized *access* or exceeding authorized access. *Id.* Likewise, the majority of courts have concluded that such claims lie outside the scope of the CFAA. See *id.*; *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009); *Orbit One Commc’ns, Inc. v. Numerex Corp.*, 692 F. Supp. 2d 373, 383 (S.D.N.Y. 2010); *Lewis-Burke Assocs., LLC v. Widder*, --- F. Supp. 2d ---, 2010 WL 2926161, at *5-6 (D.D.C. 2010).

This common-sense analysis is supported by the text and structure of the CFAA, as well as recent judicial and academic interpretations concluding that the statute does not criminalize the use of information on publicly available websites. Although Congress did not define the phrase “without authorization,” “exceed[ing] authorized access” is explicitly defined as “to access a computer with authorization and to use such access to obtain or alter *information in the computer that the accessor is not entitled to obtain or alter.*” 18 U.S.C. § 1030(e)(6) (emphasis added). The defendants here, however—like everyone else in the world—were given unimpeded access to the information on Koch’s public

website. Koch's complaint is not that the defendants *obtained* the information without authorization, but rather that that they ultimately *used* the information in a manner inconsistent with Koch's desires, as expressed in its Terms of Use. *See* Complaint ¶ 44 (quoting Terms of Use language purporting to forbid "any reproduction, publication, broadcast or posting" of any information obtained from the Koch website). The CFAA addresses only the act of trespassing or breaking into a protected computer system; it does not even purport to regulate the various uses to which information may be put.

Moreover, because the CFAA "has both criminal and noncriminal applications, courts should interpret the statute consistently in both contexts." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Thus, "[a]lthough this case arises in a civil context," the court's conclusion as to the extent of conduct prohibited by the CFAA "is equally applicable in the criminal context" and must be interpreted consistent with the "rule of lenity," avoiding "surprising or novel" interpretations that "impose unexpected burdens on defendants." *LVRC Holdings LLC*, 581 F.3d at 1134. Needless to say, imposing criminal liability for violation of a website's terms of use would be "surprising or novel." *See Creative Computer v. Getloaded.com LLC*, 386 F.3d 930, 937 (9th Cir. 2004) ("It is out of the ordinary, except in child pornography cases, to prohibit a person or company from accessing what is otherwise a publicly-available website. Ordinarily, when a company chooses to make certain information public via its website, it does so knowing that its competitors may view and take advantage of any information it choose to publicize."). For this reason, among others, the scholarly commentary has been uniformly critical of attempts to engraft website terms of use onto the CFAA—attempts that would end up subjecting most users of

the Internet to sweeping civil and criminal liability and greatly constrict First Amendment freedoms.¹⁶

Third, even assuming that liability under the CFAA could be premised on a contract theory, Koch's CFAA and breach-of-contract claims both fail under traditional contract principles. There can be no contract absent "a manifestation of assent to an offer, such that an objective, reasonable person is justified in understanding that a fully enforceable contract has been made." *Cal Wadsworth Const. v. City of St. George*, 898 P.2d 1372, 1376 (Utah 1995); see *Restatement (Second) of Contracts* § 19(2) (1981). That requirement is no less applicable on the Internet. "Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 35 (2nd Cir. 2002) (Sotomayor, J.) (extensively discussing parameters of online contracting). Accordingly, the majority of courts

¹⁶ See Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 Minn. L. Rev. 1561 (2010) (arguing that making terms-of-service violations constitute "unauthorized" access would render the CFAA unconstitutionally vague); Christine D. Galbraith, *Access Denied: Improper Use of the Computer Fraud and Abuse Act to Control Information on Publicly Accessible Internet Websites*, 63 Md. L. Rev. 320, 368 (2004) (CFAA was designed to prevent computer hacking and "was never intended to afford website owners a method for obtaining absolute control over access to and use of information they have chosen to post on their publicly available Internet sites"); Kerr, *Cyber-crime's Scope: Interpreting 'Access' and 'Authorization' in Computer Misuse Statutes*, 78 N.Y.U. L. Rev. 1596, 1600 (2003) ("[C]ourts should reject contract-based notions of authorization, and instead limit the scope of unauthorized access statutes to cases involving the circumvention of code-based restrictions."); Mark A. Lemley, *Place and Cyberspace*, 91 Cal. L. Rev. 521, 528 (2003) (criticizing attempts to extend the CFAA "to make it illegal—indeed, criminal—to seek information from a publicly available website if doing so would violate the terms of a 'browsewrap' license").

have held that “to state a plausible claim for relief based upon a browsewrap agreement, the website user must have had actual or constructive knowledge of the site’s terms and conditions, and have manifested assent to them.” *Cvent*, 2010 WL 3732183, at *8 (citing cases).¹⁷

Neither condition can be satisfied here. As already discussed, the Terms of Use on Koch’s website were available only via a hyperlink at the bottom of the page, and there was no prominent notice that a user would be bound by those terms. And more importantly, Koch’s complaint neither alleges nor produces evidence of any manifestation of assent to those terms. Indeed, the website does not provide any method for manifesting such assent. Accordingly, Koch’s allegations are insufficient to “nudge [its breach-of-contract theory] across the line from conceivable to plausible.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under Utah law, “the burden of proof for showing the parties’ mutual assent as to all material terms and conditions is on the party claiming that there is a contract,” *Cal Wadsworth*, 898 P.2d at 1376, and Koch cannot meet that burden.

¹⁷ The term “browsewrap” is generally used to refer to situations in which a notice found on a website purports to condition use of the site upon compliance with certain terms or conditions, which may be included on the same page as the notice or accessible via a hyperlink. Under circumstances similar to this, where both conspicuous notice and an objective manifestation of assent are lacking, courts have held that such notices do not create binding contracts. *See Specht*, 306 F.3d at 35; *Cvent*, 2010 WL 3732183, at *8; *Snap-On Business Solutions Inc. v. O’Neil & Assocs., Inc.*, 2010 WL 2650875, at *1 (N.D. Ohio 2010); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362 (E.D.N.Y. 2009); *Defontes v. Dell Computers Corp.*, 2004 WL 253560, at *7 (R.I. Super. 2004); *Motise v. America Online, Inc.*, 346 F. Supp. 2d 563, 564-65 (S.D.N.Y. 2004).

Finally, extending the CFAA to criminalize routine terms-of-service violations would render the Act unconstitutionally void for vagueness. See *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009); Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 Minn. L. Rev. 1561 (2010). Defendants would not have fair warning of such sweeping liability because “the language of section 1030(a)(2)(C) does not explicitly state (or implicitly suggest) that the CFAA has criminalized breaches of contract in the context of website terms of service.” *Drew*, 259 F.R.D. at 464. Moreover, “if a website’s terms of service controls what is ‘authorized’ and what is ‘exceeding authorization’—which in turn governs whether an individual’s accessing information or services on the website is criminal or not, section 1030(a)(2)(C) would be unacceptably vague because it is unclear whether any or all violations of terms of service will render the access unauthorized, or whether only certain ones will.” *Id.* For example, Koch’s Terms of Use contain the following vague and malleable prohibitions:

As a condition of your use of this Web site, you will not use this Web site for any purpose that is unlawful or prohibited by these Terms of Use or in any way which infringes the rights of anyone else or restricts or inhibits anyone else’s use or enjoyment of this Web site. . . .

The Koch Companies reserve the right to grant or deny access to its Web sites as they deem appropriate. . . .

You are not entitled to modify, print, publish, broadcast or redistribute the content of this Web site or reproduce, link, frame or deep-link this Web site on any other Web site without the express written permission of a Koch Company.

<http://www.kochind.com/terms.aspx> (Exh. 17). It is difficult, if not impossible, to predict the scope of these prohibitions with any confidence. If Koch’s CFAA theory is taken seriously, the authors of this memorandum are subject to criminal and civil liability merely for

citing, quoting, and linking to the content of Koch’s website, as are the many newspapers and other media outlets that have reported on this case. Liability would turn entirely on what Koch “deems appropriate.” As the *Drew* court concluded, making the terms of service the basis for liability under the CFAA would make “the website owner—in essence—the party who ultimately defines the criminal conduct,” and “convert a multitude of otherwise innocent Internet owners into misdemeanor criminals.” *Id.* at 466. That cannot be what Congress intended.

D. Koch Has Failed to Provide an Evidentiary Basis for Its Claims.

Identification of an otherwise anonymous speaker is itself a major form of relief because the defendant may then be subjected to harassment, economic retaliation, or other forms of retribution. For this reason, no person should be subjected to compulsory identification through a court’s subpoena power unless the plaintiff produces sufficient evidence to show a realistic chance of winning a lawsuit against that Doe defendant. *Dendrite*, 775 A.2d at 760. Accordingly, to justify discovery a plaintiff must not merely withstand dismissal, but must put forth enough evidence to meet a summary-judgment standard by creating genuine issues of material fact on all issues in the case that are within its control. *Cahill*, 884 A.2d at 457; *see SaleHoo Group*, 722 F. Supp. 2d at 1217 (requiring evidence on element of commercial use before allowing discovery into anonymous speakers in a trademark case). This requirement prevents a plaintiff from being able to identify critics simply by filing a facially adequate complaint. *See Best Western*, 2006 WL 2091695, at *5; *Cahill*, 884 A.2d at 458.

Here, as explained above, because Koch has not filed even a facially adequate complaint, the case should be dismissed for failure to state a claim. But if the Court were to conclude that Koch could withstand dismissal on any one of its claims, it should still require Koch to put forward evidence. Although Koch acknowledged the *Dendrite* standard in its motion for accelerated discovery, it did not inform the court of the need for an evidentiary showing or attempt to make such a showing.

That need is crucial here because, for example, Koch has introduced no evidence to attempt to satisfy the commercial-use requirement of the Lanham Act and no evidence that the parties manifested assent to a binding contract. That failure is not surprising, for it is not even plausible that such evidence exists. Moreover, Koch alleges that it has suffered damages from the defendants' website, but has offered no evidence to back up this allegation. Koch's assertions of damages are made "only in the most general and conclusory sense." *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 982 n.2 (N.D. Ohio 2003). In *Dendrite*, it was the plaintiff's failure to present any evidence of injury, which was an element of the libel claim, that barred discovery. *Dendrite*, 775 A.2d at 769. Although plaintiffs also request injunctive relief, they do not explain the need for such relief given the fact that the defendants' website is no longer active and defendants are no longer in possession of the koch-inc.com domain. In any event, Koch's requests for relief would be a prior restraint on speech that would violate the First Amendment. *See New York Times v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224-25 (6th Cir. 1996) (noting the "heavy presumption"

against prior restraints on speech). In sum, Koch has not presented evidence that it is entitled to *any* relief.

E. The Balance of the Equities Favors Quashing the Subpoenas and Dismissing This Action.

Finally, the *Dendrite* standard requires a balancing of the defendants' First Amendment right of anonymous free speech against the strength of plaintiff's prima facie case and the necessity for the disclosure of the anonymous defendant's identity. *Dendrite*, 775 A.2d at 760-61. Because of the weaknesses of Koch's claims and the importance of the core political speech rights involved, the balancing in this case strongly favors the defendants. See *In re Anonymous Online Speakers*, 2011 WL 61635, at *3, *6 (emphasizing the importance of protecting the Nation's "respected tradition of anonymity in the advocacy of political causes"). Any violation of an individual speaker's First Amendment rights constitutes irreparable injury, *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976), and a refusal to issue a protective order to prevent disclosure of the defendants' identity would cause them irreparable injury because, once they have lost their anonymity, they can never get it back.

CONCLUSION

The Court should quash the subpoenas, issue a protective order forbidding use or disclosure of the Does' identity, and dismiss the complaint.

Respectfully submitted,

/s/ Deepak Gupta

Deepak Gupta, *pro hac vice*

Gregory A. Beck

PUBLIC CITIZEN LITIGATION GROUP

1600 20th Street NW

Washington, DC 20009
Tel. (202) 588-1000
Fax (202) 588-7795
dgupta@citizen.org

Lester A. Perry (2571)
HOOLE & KING L.C.
4276 South Highland Drive
Salt Lake City, UT 84124
Tel. (801) 272-7556
Fax (801) 272-7557
lap@ hooleking.com

Attorneys for Defendants

January 26, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2011, I served the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENAS, ISSUE PROTECTIVE ORDER, AND DISMISS COMPLAINT on the following counsel via the Electronic Case Filing system:

Juliette P. White (9616)
Michael W. Young (12282)
Parsons Behle & Latimer
201 South Main Street, Suite 1800
Salt Lake City, UT 84111
(801) 532-1234

Attorneys for Plaintiff

/s/ Deepak Gupta
Deepak Gupta