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

Koch Industries, Inc.,	*	Case No. 1:10-cv-01275 DAK
	*	
Plaintiff,	*	Judge Dale A. Kimball
	*	
v.	*	
	*	
John Does, 1-25,	*	
	*	
Defendants.	*	

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

Introduction

In nearly forty pages of dense briefing, Koch Industries tries to distinguish every relevant case and contest virtually every legal proposition advanced in our motion papers. But Koch fails to grapple with three simple facts.

First, the courts have uniformly held that plaintiffs must, at a minimum, establish the facial validity of their claims and make a preliminary evidentiary showing before piercing the First Amendment protection of anonymous online speakers. Koch has not attempted the requisite evidentiary showing and, on critical elements of each of its claims, cannot even withstand a motion to dismiss.

Second, this case involves wholly noncommercial speech—a fact that dooms Koch’s trademark-infringement, unfair-competition, and cybersquatting claims. Koch has not plausibly alleged that the parties are economic competitors or that the defendants sought to gain anything other than the advancement of their political agenda. The only marketplace relevant here is the marketplace of ideas.

Third, Koch’s computer-hacking and breach-of-contract theories ask this Court to go well beyond the boundaries of existing law, with staggering implications for online speech. Koch does not deny that its theories, if accepted, could expose any speaker to criminal or civil liability simply for quoting or citing the content of a website in a way that the website’s owner does not like. Because Koch does not allege a claim cognizable under the Computer Fraud and Abuse Act (CFAA) and cannot satisfy the traditional common-law elements of a binding contract, the Court should reject Koch’s sweeping proposal to criminalize political speech on the Internet.

I. Under Any Applicable Standard, Koch Fails to Justify Interference With The Defendants' Right to Anonymous Speech.

The bulk of Koch's response to our motion for a protective order hinges on its assertion that the spoof website and press release constitute trademark infringement and are thus not entitled to protection under the First Amendment. But Koch's *allegations* that the defendants' activities are actionable do not satisfy its burden of submitting *evidence* substantiating those allegations. "In addition to establishing that its action can withstand a motion to dismiss ..., the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant." *Dendrite v. Doe*, 775 A.2d 756, 760 (N.J. Super Ct. App. Div. 2001).¹

A. Plaintiffs in anonymous speech cases will always have alleged that the challenged speech is actionable and thus unprotected by the First Amendment. *See, e.g., Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) ("It . . . is clear that the First Amendment does not protect defamatory speech."). Yet those allegations do not always prove meritorious—especially where the plaintiff's primary motive is not to obtain relief but to obtain the identity of the anonymous speaker. The standards adopted by *Dendrite* and the many

¹ Our motion for a protective order is not "procedurally deficient," as Koch contends. Doc. 16 at 1 n.2. That Fast Domain and Bluehost.com have complied in whole or in part with the subpoenas does not preclude "an order from the Court directing that the Doe defendants' identities not be used for any purpose." *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 561 (S.D.N.Y. 2004) ("[E]ven though Cablevision has already produced the information, plaintiffs can be ordered to return the information and prohibited from using it. Accordingly, the issues are not moot."). Koch also complains that we did not file a "certification" of consultation with opposing counsel, but claims no prejudice and admits that the requisite consultation occurred. Lest there be any lingering confusion concerning our efforts on this score, we attach a certification to this brief.

courts that have followed it protect the First Amendment interests of anonymous defendants from meritless claims while protecting the rights of plaintiffs to seek relief in legitimate cases. *See Dendrite*, 775 A.2d at 760; *see also Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977) (“[C]ompulsory disclosure in the course of a ‘fishing expedition’ is ruled out in the First Amendment case.”).²

Although Koch devotes much effort to distinguishing the facts of state and federal cases that have adopted standards for discovery into the identity of online speakers, it does not dispute that the consensus of courts has required at least a preliminary evidentiary showing before allowing such discovery. *See* Doc. 5 at 6-7 (acknowledging that a preliminary showing is required). Despite variations, all of the standards require courts to “consider [] the important value of anonymous speech balanced against a party’s need for relevant discovery in a civil action.” *In re Anonymous Online Speakers*, --- F.3d ---, 2011 WL 61635, at *6 (9th Cir. 2011); *see* Doc. 13 at 1-5. *Cf. Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (“[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure.”).

² Koch deems it “highly questionable” that this case involves speech at all. Doc. 16 at 1. But the expressive-conduct cases on which Koch relies turned on whether *conduct*—such as building a structure in a public park, *ACORN v. City of Tula*, 835 F.2d 735, 742 (10th Cir. 1987)—implicitly conveyed a message protected by the First Amendment. In contrast, because defendants’ spoof website and press release were *themselves* speech, there is no need to hunt for an implicit message. *See Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (“It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of ‘speech’ that the First Amendment protects.”).

Even *Interscope Records v. Does 1-14*, the case Koch urges this Court to follow, required such a showing. *See* 558 F. Supp. 2d 1176, 1178 (D. Kan. 2008). *Interscope* allowed discovery into the anonymous identities of the accused infringers only after the plaintiffs had made a “concrete showing of a prima facie claim of actionable harm” and demonstrated that their “need for the subpoenaed information” outweighed the First Amendment interests in “the Doe defendants’ expectation of privacy.” *Id.* at 1179 (emphasis added). Like other music downloading cases, *Interscope* based its decision not on a relaxed test, but on the particular factual showing made by the plaintiff and a balancing of the plaintiffs’ interest in discovery against the minimal speech interests involved in music downloads. *Id.* at 1179 (concluding, based on affidavit evidence, that “plaintiffs have made a prima facie showing of copyright infringement”); accord *Sony Music Entm’t, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) (relying on evidentiary showing that defendants had illegally downloaded music). Koch is thus wrong to suggest that courts have applied a less demanding test for discovery into the identities of music downloaders.

In contrast to the limited speech interests in the music downloading cases, this case involves defendants’ interest in anonymous *political* speech, for which courts have “elevate[d] the bar to disclosure to the highest level.” *In re Anonymous Online Speakers*, 2011 WL 61635, at *6. In such cases, courts require plaintiffs to present evidence sufficient to survive summary judgment before allowing discovery that would unmask anonymous Internet speakers. *See id.*; *Doe v. Cahill*, 884 A.2d 451, 460, 461 (Del. 2005); *see also Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988) (holding that the strength of First Amendment protection is “at its zenith” for political speech).

B. On the key dispositive issues in this case—the absence of cognizable injury, commercial use, unauthorized access, or manifestation of assent—Koch makes no attempt to satisfy its evidentiary burden. The *only* evidence it points to, ostensibly to support its claim for damages, is two paragraphs of a declaration in which its general counsel mainly discusses Koch’s efforts to try to unmask the defendants; the declaration says nothing whatsoever about the damages Koch is seeking. *See* Doc. 16 at 8 (citing Doc. 5-3 ¶¶ 7, 10). And although the declaration asserts that “several” online news sources, including the websites of the Economist and The New York Times, reported on the press release, it fails to mention that those sources all correctly identified the press release as a spoof. Doc. 5-3 ¶ 7. Given the lack of evidence that even a single media organization was fooled, Koch had no need to invest *any* time or money responding to press inquiries on the subject. *See* Noam Cohen, *A Conglomerate’s Tack to Quash a Parody Site*, The New York Times, Feb. 13, 2011 (attached as Exh. 1). As noted in our opening memorandum, Koch itself puts out many press releases, editorials, and position papers on the politics of climate change. *See* Doc. 13 at v-vi, and Exh. 4-9. The company’s decision to allow its salaried media-relations staff to talk to reporters about the defendants’ spoof website is not attributable to any legally cognizable harm caused by the defendants, but to Koch’s decision to vigorously inject itself into the national political discourse. Koch has thus failed to substantiate any actionable harm—a fact that independently establishes defendants’ entitlement to a protective order. *See Dendrite*, 775 A.2d at 772 (quashing subpoena where plaintiff “failed to establish a sufficient nexus between [defendant’s] statements and [plaintiff’s] allegations of harm”).

Koch, moreover, has made no effort to substantiate its allegations that defendants' conduct is actionable. On its Lanham Act claims, Koch lacks not only evidence, but even a plausible theory as to how defendants could have commercially profited from an anonymous spoof website that sold no products and solicited no donations, that was disclosed only to reporters, and that was only online for a matter of hours. On its CFAA and contract claims, Koch has not shown that the defendants engaged in unauthorized access, manifested assent to its website's terms of use, or even that the website provides some method by which consent could be manifested. Indeed, as explained in the following sections, Koch's failure to articulate any plausible theory on these points demonstrates that its claims cannot even survive a motion to dismiss.

II. This Case Involves Wholly Noncommercial Speech.

The core claims in Koch's complaint allege trademark infringement, unfair competition, and cybersquatting under the Lanham Act. "The Lanham Act is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the First Amendment." *Taubman v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003). Thus, the threshold question in assessing Koch's claims is whether the defendants' speech was "commercial and therefore within the jurisdiction of the Lanham Act." *Id.*

The defendants' speech proposed no commercial transaction. Instead, it sought to draw public attention to Koch's controversial stance on one of the most pressing scientific and political issues of the day. Koch's trademark and unfair-competition claims therefore fall outside the constitutional scope of the Lanham Act and are foreclosed by the Act's commercial-use requirement. See *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1051-54 (10th Cir. 2008); *Cleary Bldg. Corp. v. David A.*

Dame, Inc., 674 F. Supp. 2d 1257, 1267-68 (D. Colo. 2009) (dismissing similar claims for lack of commercial use under *Utah Lighthouse*). Koch's cybersquatting claim fails for the same reason. Koch has not alleged facts sufficient for the Court to "find it plausible" that the defendants used Koch's domain name "with a bad faith intent to profit." *Id.* at 1263. Even if the complaint is viewed in the light most favorable to Koch, "it is clear that [defendants were] making a noncommercial use of [p]laintiff's marks." *Id.* at 1265 (dismissing similar cybersquatting claim under *Utah Lighthouse*).

Attempting to overcome these defects, Koch offers two theories. The first is an "interference" or "diversion" theory, under which merely "using a mark to harm, disrupt, or divert traffic away from a plaintiff's business satisfies the commercial use requirement." Doc. 17 at 6. To support this theory, Koch relies on three cases in which courts allowed trademark claims to go forward where the defendant's use of the plaintiff's mark might have diverted the public from the plaintiff's website. *See People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359 (4th Cir. 2001) ("*PETA*"); *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176 (W.D.N.Y. 2000); *Planned Parenthood Fed. Of Am., Inc. v. Bucci*, 1997 WL 133313 (S.D.N.Y. 1997).

But the Tenth Circuit has rebuffed the "interference" theory and the very three cases on which Koch relies. *See Utah Lighthouse*, 527 F.3d at 1053 & n.6 (criticizing *PETA*, *OBH*, and *Bucci*). "Such an interpretation," the Tenth Circuit reasoned, "eliminates the requirement of an economic competitor and is therefore inconsistent with the purpose of the Lanham Act 'to protect the ability of consumers to distinguish among competing producers.'" *Id.* at 1053 (quoting *Two Pesos, Inc. v. Taco Cabana*, 505 U.S. 763, 774 (1992)). The court also criticized "[t]he 'interference' theory ... on the ground that it

would ‘place most critical, otherwise protected consumer commentary under the restrictions of the Lanham Act.’” *Id.* (quoting *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 679 (9th Cir. 2005)). Accordingly, the Tenth Circuit confirmed that “the defendant in a trademark infringement and unfair competition case *must use the mark in connection with the goods or services of a competing producer*, not merely to make a comment on the trademark owner’s goods or services.” *Id.* at 1053 (emphasis added). Koch has not alleged, and cannot plausibly allege, such use.

Koch also proposes a fundraising theory, which speculates that the defendants (although anonymous) might have somehow used their spoof website to raise funds for political “causes that compete with” Koch’s political causes. Doc. 17 at 10. But even assuming that this implausible speculation were plausible, the Lanham Act regulates only economic, not ideological, competition. *Utah Lighthouse*, 527 F.3d at 1053. “Competition in the marketplace of ideas” is precisely what the First Amendment is designed to protect. *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983); see *Snyder v. Phelps*, 562 U.S. ---, slip. op. at 5-6 (March 2, 2011).

III. Koch’s Novel Computer-Hacking and Contract Theories Are Groundless.

Koch does not deny that its computer-hacking and contract theories would permit private parties—including corporations, political parties, and prominent individuals—to impose criminal and civil liability on their critics solely because of speech that quotes, cites, or comments on content that is publicly available on websites controlled by those parties. To reach that unpalatable result, Koch asks this Court to stretch the meaning of the Computer Fraud and Abuse Act (CFAA) well beyond its established scope and transform the CFAA into a vehicle for enforcing speech restrictions hidden in the fine

print of websites. The legal regime Koch proposes would come at great cost to public discourse. No court in the nation has endorsed Koch's theories, and this Court should not become the first.

For starters, the only injury Koch alleges consists of unspecified administrative and legal costs in responding to media inquiries and bringing this lawsuit. But loss under the CFAA "has consistently meant a cost of investigating or remedying damage to a computer or a cost incurred because the computer's service was interrupted." *Nexan Wires, S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 475 (S.D.N.Y. 2004), *aff'd*, 166 Fed. Appx. 559 (2d Cir. 2006); *accord Commc'ns Westwood Corp. v. Robincharux*, 2007 WL 756528 (E.D. La. 2007). It is insufficient to "claim[] to have lost money . . . because of the way the information was later used." *Nexan*, 319 F. Supp. 2d at 477. In short, "[t]he CFAA does not contemplate consequential damages . . . unrelated to harm to the computer itself." *Am. Ins. Family Mut. Ins. Co. v. Rickman*, 554 F. Supp. 2d 766, 772 (N.D. Ohio 2008).

Nor has Koch plausibly alleged that the defendants committed the sort of criminal hacking prohibited by the CFAA—that is, that the defendants gained "unauthorized access" or "exceeded authorized access" to a protected computer system. *See Cvent, Inc. v. Eventbrite, Inc.*, --- F. Supp. 2d ---, 2010 WL 3732183, at *3 (E.D. Va. 2010). Rather, the defendants used information that Koch made accessible to everyone in the world on its corporate home page. This elementary distinction derives from both common sense and from case law cited in our opening memorandum—to which Koch does not respond. *See* Doc. 13 at 17-18. Koch's response instead is to fall back on its website's sweeping Terms of Use, which purport to prohibit *any* use of the website's content without "prior written

approval from the Koch Companies.” Compl. ¶ 44. But as our opening memorandum explained, courts and commentators have persuasively criticized just such attempts to impose CFAA liability on the basis of hidden website terms of use. Doc. 13 at 17-20 & n.16, 22-23. Doing so would extend the statute far beyond what Congress intended and run headlong into the First Amendment.

Koch’s contract theory fails in any event because the common-law elements for a binding contract are absent. As then-Judge Sotomayor explained in the leading case on online contracts, both “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential” to a valid contract. *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002). Neither is present here. The Internet does not change the fundamentals of contract law: “Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King’s Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today.” *Specht v. Netscape Commc’ns Corp.*, 150 F. Supp. 2d 585, 587 (S.D.N.Y. 2001); see Lemley, *Terms of Use*, 91 Minn. L. Rev. 459 (2006).³

³ Koch relies on *Register.com v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004), which involved circumstances far removed from the website terms at issue here and in *Specht*. Verio, a sophisticated competitor of Register, was “daily submitting numerous queries” to Register and receiving emails in response. *Id.* at 401. Because “each day [it] saw the [contract] terms” included in the emails, Verio could not claim lack of assent. *Id.* The court compared Verio to a man who takes an apple from a roadside stand and, after taking a bite, notices a sign: “Apples—50 cents apiece.” He may be excused on the first day, but can’t take a new apple each day claiming to be unaware of the sign. *Id.* at 403. *Specht* was thus “crucially different.” *Id.* at 402. It “ruled against Netscape and in favor of the users of its software because the users would not have seen the terms Netscape exacted without scrolling down their computer screens, and there was no reason for them to do so.” *Id.*

Seeking to avoid *Specht*, Koch points to a smattering of unpublished district court cases that enforced online agreements in the context of commercial transactions—in which goods or services were exchanged over the Internet. *See* Doc. 17 at 23. But Koch tellingly does not identify a single case imposing “contractual” speech restrictions on noncommercial web users. No court has gone that far. *See* Hartzog, *The New Price to Play: Are Passive Online Media Users Bound By Terms of Use?*, 15 Comm. L. & Pol’y 405 (2010). This distinction—between ordinary commercial contracting and efforts to impose bare speech restrictions—has a strong constitutional basis: First Amendment rights may not be waived by contract absent clear and convincing evidence that the waiver was knowing, voluntary and intelligent. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *see also* Abruzzi, *Copyright, Free Expression, and the Enforceability of “Personal Use-Only” and Other Use-Restrictive Online Terms of Use*, 26 Santa Clara Computer & High Tech. L.J. 85 (2010). A waiver of First Amendment rights may also be held “unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.” *Davies v. Grossmont Union High Sch.*, 930 F.2d 1390, 1396 (9th Cir. 1991) (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)); *see generally* Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 Cornell L. Rev. 261, 363 (1998). Under either the knowing-voluntary-and-intelligent-waiver approach or the public-policy approach, “it is the burden of” the party seeking to enforce a waiver of constitutional rights “to plead and prove that the agreement” overcomes these heightened standards. *Lynch v. City of Alhambra*, 880 F.2d 1122, 1128 (9th Cir. 1989). Koch cannot meet that burden.

Koch's position is akin to that of a book publisher who embeds the following terms of use into the fine print of a book's endpapers: "By reading this book, you agree not to criticize or negatively comment upon this book in print without the advance consent of the publisher." The enforcement of that provision through contract law would be bad enough, but Koch wants this Court to go one step further—it seeks to use a federal criminal statute to enforce its private speech restrictions. Koch claims that it is irrelevant that the CFAA is a criminal statute because defendants "do not face any criminal liability in this action." Doc. 17 at 24. But when Congress allows the same standard of conduct to govern both criminal and civil cases, it is "of no significance . . . [w]hether a case is brought on the civil or criminal side of the docket." *United States v. Bigham*, 812 F.2d 943, 948 (5th Cir. 1987). Courts must "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 and novel" interpretations that "impose unexpected burdens on defendants." *LVRC Holdings LLC*, 581 F.3d 1127, 1134-35 (9th Cir. 2009) (applying the rule in a civil CFAA case).

If Koch's legal theory is correct, then any violation of its Terms of Use—that is, any use of its website's content that Koch does not like—could expose a political critic to criminal prosecution. In a society that places a high value on free expression, that cannot be the law.

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,

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March 3, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2011, I served the foregoing DEFENDANTS' REPLY IN SUPPORT OF MOTION TO QUASH SUBPOENAS, ISSUE PROTECTIVE ORDER, AND DISMISS COMPLAINT on the following counsel via the Electronic Case Filing system:

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