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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' MOTION TO QUASH SUBPOENAS, ISSUE PROTECTIVE ORDER, AND DISMISS COMPLAINT

DEFENDANTS' MOTION TO QUASH SUBPOENAS, ISSUE PROTECTIVE ORDER, AND DISMISS COMPLAINT

Defendant John Does hereby move for (1) an order quashing two subpoenas issued by plaintiff Koch Industries in this case, (2) a protective order against any use or further disclosure of the subpoenaed information, and (3) an order dismissing the complaint for failure to state a claim on which relief can be granted. *See* Fed. R. Civ. P. 45(c)(3), 26(c), and 12(b)(6).

This case was brought by Koch Industries to unmask the identities of its critics—environmentalists who employed an elaborate hoax to bring public attention to Koch's controversial role in influencing public opinion on the science of global climate change. The defendants created a spoof press release purporting to announce a decision by Koch to stop funding organizations that deny the scientific consensus on climate change and anonymously posted the press release on a website (www.koch-inc.com) designed to look like Koch's. In response to the hoax, Koch filed this lawsuit and, without attempting to provide defendants with notice, moved for and obtained permission from this Court to subpoena identifying information about the defendants from the companies that hosted the spoof website.

Before authorizing subpoenas seeking to strip speakers of their First Amendment right to anonymity, the courts have universally held that plaintiffs must provide notice of the subpoena and make a preliminary showing that the lawsuit has some merit. *See, e.g.*, *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (App. Div. 2001); *Doe v. Cahill*, 884 A.2d 451, 460, 461 (Del. 2005); *In re Anonymous Online Speakers*, --- F.3d ----, 2011 WL 61635, at *2 (9th Cir. 2011); *SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210, 1214-15

(W.D. Wash. 2010). Because Koch has not made such a showing here, the Court should quash the subpoenas, issue a protective order barring further disclosure, and dismiss the complaint.

First, Koch's principal claims—trademark infringement, unfair competition, and cyberpiracy under state and federal law (Counts I, II, III, and IV)—each require a showing of commercial use. *See Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045 (10th Cir. 2008). "The Lanham Act is intended 'to protect the ability of consumers to distinguish among competing producers,' not to prevent all unauthorized uses." *Id.* at 1052. Moreover, Koch's cyberpiracy claim requires a showing of "bad faith intent to profit." *Id.* at 1057. The defendants' website, however, existed solely for the purpose of embarrassing Koch and commenting on the important issue of climate change. Application of the Lanham Act in these circumstances would punish not commercial but *political* speech, in violation of the First Amendment. *See Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003).

Second, Koch's claims under the Computer Fraud and Abuse Act and the common law of contract (Counts V and VI) are likewise meritless. Koch has neither alleged nor shown that defendants' short-lived spoof website could have caused the company to suffer the $5000 in damage required to state a claim under the CFAA. 18 U.S.C. §§ 1030(g), 1030(c)(4)(A)(i). Moreover, defendants' access to the company's *public* home page was not "unauthorized access" to a protected computer system under the CFAA. 18 U.S.C. § 1030; *see Cvent, Inc. v. Eventbrite, Inc.*, --- F. Supp. 2d ----, 2010 WL 3732183, at *3 (E.D. Va. 2010). Koch's theory also fails under basic contract principles: Because the company's

Terms of Use are hidden behind a small link at the bottom of its website, which visitors are not required to read before accessing the site's content, there is no way that defendants could have manifested assent to those terms. In any event, pegging the CFAA's scope to contract terms adopted by a private website owner would create vague and standardless liability and subject virtually every Internet user to arrest, *see United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009)—a result that Congress could not seriously have intended.

* * *

Because Koch has not shown—and cannot show—that its claims justify curtailing defendants' right to engage in anonymous political speech, the Court should (1) quash the subpoenas, (2) issue a protective order forbidding use or disclosure of the Does' identity, and (3) dismiss the complaint in its entirety.

Respectfully submitted,

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January 26, 2011

CERTIFICATE OF SERVICE

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

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