COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO

POWERMARK HOMES, *et al.*,	
Plaintiffs,	Case No. CV 07-625465
v.	
JOHN DOE, *et al.*,	
Defendants.	

DEFENDANT JOHN DOE'S RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Without specifying anything on defendant John Doe's website that they allege to be false, plaintiffs have moved for a preliminary injunction prohibiting publication of the website in its entirety. Plaintiffs' requested injunction would be a prior restraint on speech that is categorically prohibited by the First Amendment. On that basis alone, plaintiffs' motion should fail. Moreover, the injunction requested by plaintiffs would require Doe to shut down his entire website, without regard to whether particular statements on the site are true or false. Such an injunction would prohibit entirely truthful communications, including links to the public dockets of Ohio courts. Even if justified as to specific (and as yet unidentified) false statements on Doe's website, plaintiffs' requested injunction would be dramatically overbroad as applied to the website as a whole. For these reasons, plaintiffs' motion for a preliminary injunction should be denied.

I. A Preliminary Injunction Prohibiting Publication of Doe's Website Would Be a Prohibited Prior Restraint on Speech.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). A court order prohibiting publication constitutes such a prior restraint. *See Near v. Minnesota*, 283 U.S. 697 (1931) (striking down a statute permitting courts to enjoin the publication of a "malicious, scandalous and defamatory" publication). Indeed, judicial injunctions prohibiting speech pose an even greater threat to fundamental rights than do statutes that have an equivalent effect, because injunctions "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 764-65 (1994).

In *Procter & Gamble Co. v. Bankers Trust Co.*, the Sixth Circuit recognized the extraordinary nature of an injunction prohibiting speech. 78 F.3d 219 (6th Cir. 1996). In that case, the district court entered successive injunctions that prohibited publication of a magazine for a total of three weeks. *Id.* at 221. The court held the injunctions to be an unconstitutional prior restraint, concluding that "[e]ven a temporary restraint on pure speech is improper absent the most compelling circumstances." *Id.* (internal quotation omitted). As the court noted, only a "grave threat to a critical government interest or to a constitutional right" can justify restraint of publication, and even then only when the threat "cannot be militated by less intrusive measures." *Id.* at 225; *see also In re Providence Journal Co.*, 820 F.2d 1342, 1352 (1st Cir. 1986) (holding a temporary restraining order prohibiting publication

of a newspaper until a hearing could be held several days later to be a "transparently invalid prior restraint on pure speech"); *State ex rel. Blue Cross & Blue Shield of N. Ohio v. Carroll*, 21 Ohio App. 3d 263, 266, 487 N.E.2d 576, 579 (8th Dist. 1985) (holding that, although the plaintiff "may have an action for damages for defamation," a preliminary injunction "exceed[ed] the court's constitutional authority by exercising unjustified prior restraint on free speech").[1]

Because of the seriousness of a prior restraint, a preliminary injunction prohibiting speech is justified only when publication would "threaten an interest more fundamental than the First Amendment itself." *Procter & Gamble*, 78 F.3d at 226-27; *see Nebraska Press Ass'n*, 427 U.S. 539 (rejecting a prior restraint issued to guarantee a criminal defendant's Sixth Amendment right to a fair trial); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (declining to enjoin newspapers from publication despite the government's claim that doing so could threaten national security). That standard is not remotely met here; indeed, "private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint." *Procter & Gamble*, 78 F.3d 219, 226-27; *see Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) ("No prior

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[1] Although *Procter & Gamble* involved the prior restraint of a news magazine, there is no constitutional difference between restraint of the media and restraint of an individual website operator. *See Wampler v. Higgins*, 93 Ohio St. 3d 111, 112, 752 N.E.2d 962, 965 (Ohio 2001); *see, e.g., Bihari v. Gross*, 119 F. Supp. 2d 309, 324-327 (S.D.N.Y. 2000) (holding that the First Amendment prohibited a preliminary injunction against an allegedly defamatory website criticizing a home design company); *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 749-753 (E.D. Mich. 1999) (holding that a preliminary injunction prohibiting publication of a website alleged to divulge trade secrets would be an unconstitutional prior restraint on speech).

decisions support the claim that the interest of an individual in being free from public criticism of his business practices . . . warrants use of the injunctive power of a court."). In sum, plaintiffs' vague assertions of defamation and injury to their reputations cannot justify a violation of Doe's fundamental First Amendment rights.

To be sure, if plaintiffs are able to prove at trial that they were injured by false and defamatory statements on Doe's website, they may ultimately be entitled to recover damages. *See Carroll,* 21 Ohio App. 3d at 266, 487 N.E.2d at 579. In addition, the Ohio Supreme Court has held that, following a trial and a judicial determination of defamation, a court may enter a narrowly tailored injunction prohibiting the *specific* speech determined to be false. *O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 42 Ohio St. 2d 242, 245, 327 N.E.2d 753, 755 (Ohio 1975). Before entering any such injunction, however, the speech at issue must have been adjudicated to be false and defamatory. *Id.*; *see also Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990) (limiting a preliminary injunction to "statements which have been found in this and prior proceedings to be false and libelous"); *New.net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1071 (C.D. Cal. 2003) (holding that a preliminary injunction is improper when there has been no prior adjudication of falsity).[2]

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[2] The Supreme Court has never decided the question whether courts can enjoin speech even when it has been specifically adjudicated to be false. The traditional rule is that "equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages." *Lothschuetz*, 898 F.2d at 1206 (Guy, J., dissenting as to this issue) (internal quotation omitted). Although there is no need to reach that question here, Doe reserves the right to raise it should it become relevant.

In this case, plaintiffs have not identified any specific statements that they allege to be false, and even a casual review of the website reveals that there is nothing on it capable of being proved false. As explained in Doe's memorandum in support of his motion to quash, the bulk of his website is made up of links to public court dockets—including the dockets of this Court—in cases where the plaintiffs have been sued, and the remaining content on the page states no provable facts and is protected opinion. See Defs.' Mem. in Supp. of Mot. to Quash at 12-15. Regardless of plaintiffs' ultimate probability of success on the merits, however, any injunction entered prior to a final adjudication would be unconstitutional.

II. Plaintiffs' Requested Injunction Is Dramatically Overbroad.

The First Amendment requires that any restriction on speech be "tailored as precisely as possible to the exact needs of the case." *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968). Thus, even after an adjudication of falsity, any injunction entered by the Court must be limited to the particular statements on Doe's website specifically found to be false. Plaintiffs, however, request an order "requiring Defendants to remove the false and defamatory website" in its entirety, Pls.' Mot. for TRO, without identifying anything on the website that is allegedly false. Even assuming that plaintiffs will eventually be able to substantiate their claims, their requested injunction is far too broad, sweeping within it not only the as-yet-unidentified defamatory speech but entirely truthful speech as well. Indeed, an injunction prohibiting publication of Doe's entire website would prohibit Doe from publishing links to the public dockets of the Ohio courts, which make up

the majority of the site. A prior restraint against publication of public court dockets would be unprecedented in the history of the First Amendment.

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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July 23, 2007

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July 23, 2007

By Hand Delivery

Hon. Timothy McCormick
Cuyahoga County Court of Common Pleas
1200 Ontario St.
Cleveland, Ohio 44113

Re: *Powermark Homes, et al. v. Doe, et al.*, No. CV 07-625465

Dear Judge McCormick:

I represent defendant John Doe in this case, which is set for a hearing on plaintiffs' motion for a preliminary injunction on August 23, 2007. As a result of plaintiffs' actions, the website that is the subject of this lawsuit is currently offline and unavailable to the public. While we await the August 23 hearing, my client has indicated a strong desire to put the website back online at the new address http://www.powermarkhomessucks.com/. Doe will respect any order that prohibits him from republishing his website, but no such order is currently in place. Absent such an order, Doe plans to put his website back online at its new address on Monday, July 30, 2007.

For the reasons set out in Doe's response to plaintiffs' motion for a preliminary injunction, we believe that any order restraining publication of Doe's website before an adjudication on the merits of plaintiffs' claims would be an unconstitutional prior restraint on speech. A preliminary injunction prohibiting publication differs from other sorts of preliminary injunctions because it implicates fundamental First Amendment rights. *See Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226 (6th Cir. 1996). For this reason, the Ohio Supreme Court has held that such an injunction may not be entered prior to a final judicial determination that specific speech is false and defamatory. *See O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 42 Ohio St. 2d 242, 245, 327 N.E.2d 753, 755 (Ohio 1975); *see also Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208-09 (6th Cir. 1990).

Doe did not voluntarily take down his website—it was shut down by Doe's Internet service provider GoDaddy after plaintiffs submitted a claim to GoDaddy that the website infringed their copyright (a claim that plaintiffs have not asserted in this lawsuit and that Doe

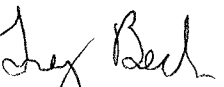
Attachment 1

disputes). Although Doe's website is noncommercial, and he has no financial interest in keeping it online, he suffers an irrevocable First Amendment injury every day the website is kept down. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Doe is willing to keep the site offline long enough for this Court to rule on the pending motions, but he believes a 45-day delay from the date of the status hearing to be excessive under the First Amendment. *See Proctor & Gamble*, 78 F.3d 219 (holding that a district court's three-week prohibition on publication while it held hearings on the requested injunction to be an unconstitutional prior restraint); *In re Providence Journal Co.*, 820 F.2d 1342, 1352 (1st Cir. 1986) (holding a temporary restraining order prohibiting publication of a newspaper until a hearing could be held several days later to be a "transparently invalid prior restraint on pure speech").

Because a preliminary injunction against speech is always prohibited, plaintiffs have no possibility of prevailing on their pending motion, and there should be no need for an immediate hearing to restrain republication of Doe's website. However, if the Court does believe that a hearing is necessary, we respectfully request that the Court not order Doe to attend. Doe could not appear personally in Court without defeating the First Amendment right to anonymity he is seeking to protect. Moreover, plaintiffs have no need for Doe's testimony, since they already have access to all the evidence they need to establish their claims. *See Doe v. Cahill*, 884 A.2d 451, 463-64 (Del. 2005) (noting that a plaintiff will ordinarily have access to all the evidence necessary to show that a published statement is false and defamatory). As explained in Doe's memorandum in support of his motion to quash, courts for this reason have consistently held that plaintiffs must make a preliminary showing of likely success based on the evidence in their possession before they should be allowed to discover the identity of an anonymous speaker. *See id.* Here, although plaintiffs have access to the entire text of the allegedly defamatory website, they have yet to identify a single false statement on the site. Requiring Doe's attendance under these circumstances would not only moot his pending motion to quash and violate his fundamental First Amendment rights by irrevocably revealing his identity, but it would provide no countervailing benefit to the plaintiffs.

To reiterate, Doe fully intends to comply with any order prohibiting republication of his website. Absent such an order, however, Doe intends to put the website back online on July 30.

Sincerely,



Gregory A. Beck

cc Bruce W. McClain
Thomas P. Maczuzak

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2007, I served the foregoing RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION and the accompanying letter to Judge Timothy McCormick on all parties required to be served by causing a true and correct copy to be sent by UPS, overnight delivery, and by fax, to counsel at each of the following addresses:

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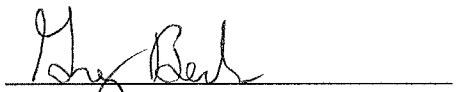

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