COMMON PLEAS COURT
CUYAHOGA COUNTY, OHIO

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

DEFENDANT JOHN DOE'S RESPONSE TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER, TO SHOW CAUSE, AND FOR CONTEMPT

The First Amendment protects the right to engage in truthful speech and prohibits prior restraints in all but the narrowest of circumstances. Without disputing these fundamental propositions of First Amendment law, and without identifying anything on defendant John Doe's website that they allege to be false, plaintiffs ask this Court to restrain publication of Doe's entire website until the scheduled August 23 hearing on their motion for a preliminary injunction. Doe has already explained how plaintiffs' requested relief is totally unsupported by the facts or the law and is categorically prohibited by the United States and Ohio Constitutions. *See* Defs.' Mem. in Supp. of Mot. to Quash; Def.'s Resp. to Mot. for Prelim. Inj. Plaintiffs have made no effort to respond to this controlling precedent. Their motion should therefore be denied.

I. A Temporary Restraining Order Would Be an Unconstitutional Prior Restraint on Speech.

A. Plaintiffs Have Again Failed to Specify the Content on Doe's Website They Allege to Be False.

Despite having had multiple opportunities to do so, plaintiffs have still not alleged, much less presented evidence to show, that any specific statements on Doe's website are false and defamatory. Moreover, 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 the 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, at most, protected opinion. See Defs.' Mem. in Supp. of Mot. to Quash at 12-15. Truthful statements of fact and statements of opinion are protected by the First Amendment and the Ohio Constitution, and an injunction against Doe's site would for this reason be unconstitutional. *See Wampler v. Higgins*, 93 Ohio St. 3d 111, 112, 127-128, 752 N.E.2d 962, 965, 978 (Ohio 2001); *see also McMann v. Doe*, 460 F. Supp. 2d 259, 266 (D. Mass. 2006) (rejecting almost identical claims by a homebuilder against a gripe site operator on First Amendment grounds).

B. Injunctions Against Speech Prior to Final Judgment Are Categorically Prohibited by the United States and Ohio Constitutions.

Even if plaintiffs *had* presented evidence that Doe's site contains specific false statements, a temporary restraining order would still be prohibited. *See* Def.'s Resp. to Mot. for Prelim. Inj. Indeed, an injunction against speech prior to entry of a

final judgment is *categorically* prohibited by the First Amendment and the Ohio Constitution. *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). When there has been no final judgment, "[e]ven a temporary restraint on pure speech is improper absent the most compelling circumstances." *See Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) (holding 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"). Plaintiffs have not even attempted to explain how they can meet the overwhelmingly high standard required to justify a prior restraint on speech. *See id.* at 226-27 ("[P]rivate litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint."); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) ("No prior 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."). Thus, even if plaintiffs might ultimately be able to prove their entitlement to damages and a permanent injunction, an injunction at this stage of the proceedings is prohibited as a matter of law.

C. Plaintiffs' Requested Relief 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 Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968). Thus, even after final 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. *See O'Brien*, 42 Ohio St. 2d at 245, 327 N.E.2d at 755; *see also Lothschuetz*, 898 F.2d at 1208-09. Plaintiffs, however, seek to prohibit publication of Doe's *entire* website until the August 23 hearing. 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.

II. Plaintiffs' Delay in Seeking a Temporary Restraining Order Forecloses Their Requested Relief.

On July 23, 2007, Doe sent a letter by fax and overnight delivery to plaintiffs stating that Doe would republish the website on July 30 absent an order by this Court restraining publication. *See* Exh. 1. Rather than filing an immediate motion for a temporary restraining order, plaintiffs waited more than two weeks to file their motion and accompanying one-page brief. Plaintiffs would suffer no serious harm by waiting the additional two weeks until the scheduled hearing on their motion for a preliminary injunction for a ruling on their requested injunction.

III. Plaintiffs Have Given No Reason to Hold an Immediate Hearing or to Force Doe to Sacrifice His Anonymity by Personally Appearing in Court.

Because a preliminary injunction against speech is *always* prohibited, plaintiffs have no possibility of prevailing on their motion, and there is no need for an immediate hearing to decide whether to restrain publication of Doe's website. If the Court does hold such a hearing, however, Doe should not be required to attend. As plaintiffs are no doubt aware, Doe could not appear personally at a hearing without defeating the First Amendment right to anonymity he is seeking to protect. Without any legitimate basis for requesting an order compelling Doe's attendance, plaintiffs' motion appears to be nothing more than an attempt to create procedural obstacles to the protection of Doe's First Amendment rights.

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). The statements on the website speak for themselves, and only plaintiffs have access to evidence about whether these statements are true or false. 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. Nor

have they attempted to identify any testimony from Doe that would be necessary to substantiate their claims. Requiring Doe's attendance at a hearing 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.

IV. Plaintiffs' Motion for Sanctions and Contempt Are Meritless.

"Contempt of court is defined as disobedience of an order of a court." *Windham Bank v. Tomaszczyk*, 27 Ohio St. 2d 55, 55, 271 N.E.2d 815, 815 (Ohio 1971). Doe's July 23, 2007, letter was intended to give the Court an adequate opportunity to enter an order before Doe put the website back online, and, as the letter stated, Doe fully intended to "respect any order that prohibit[ed] him from republishing his website." Exh. 1. However, plaintiffs never requested such an order, which would have been, in any case, unconstitutional. Because Doe never violated any Court order, he cannot be in contempt of court. *See Cortland United Methodist Church v. Knowles*, No. 2006-T-0110, 2007 WL 1883273, at *4 (11th Dist. 2007) (holding that conduct could not support a contempt charge where the court had never entered an order and the alleged contemnors therefore "were not disobeying any order of the court"); *Summers v. Highland Hills Vill.*, No. 79175, 2002 WL 31769278, at *2 (8th Dist. 2002) (holding that a motion to show cause was not an appropriate remedy against a party who did not violate any order of the court); *see also Glover v. Johnson*, 138 F.3d 229, 245 (6th Cir. 1998) ("[A] party may be found in contempt for disobedience of a court's lawful order, but not for disregarding its 'urging.'").

Defendants nevertheless contend that Doe "agreed" at the July 11, 2007, hearing that he would not put the website back online until after the scheduled August 23, 2007, hearing. No such agreement was ever made. As the Court may remember, the issue of keeping the website down until August 23 was one of significant contention at the hearing. Although the Court stated its expectation that the site would remain down pending the hearing, Doe's counsel stated that Doe may nevertheless decide to republish the site and argued that such republication would be protected by the First Amendment. In response, the Court stated that it may enter an order prohibiting republication and that if Doe were to violate that order, he may be subject to contempt. Because Doe was not present at the hearing, his counsel could not state with certainty whether Doe would decide to republish the site, but counsel did assert Doe's First Amendment right to do so if he so chose.

Following the hearing, Doe's counsel contacted the Court's staff attorney to verify that no order had been entered prohibiting republication and stated that he would inform the Court in advance if Doe decided to republish his website. When Doe did decide to republish the site, Doe's counsel notified the Court one week in advance to give it time to enter an order. Throughout, Doe and his counsel have been straightforward about Doe's intentions and willing to obey any order of the Court. However, counsel never "agreed" to voluntarily keep Doe's site offline until the August 23 hearing.

Plaintiffs also repeat their mischaracterization of the June 18 hearing, again stating that Doe did not "notify the Court that he would not appear." Doe fully addressed this contention in his response to plaintiffs' motion to strike and for Rule 11

sanctions. Plaintiffs, however, ignore the facts presented by Doe in his response—that plaintiffs never notified him of the hearing or served him with any papers, that Doe learned about the hearing by other means less than a week before and had no time to obtain counsel, and that Doe notified the Court's staff attorney by telephone that he would not be able to attend. Courts that have set standards for balancing a plaintiff's right to assert legitimate claims against a speaker's right to anonymity have stressed the importance of providing the speaker reasonable notice and a reasonable opportunity to obtain counsel to defend the First Amendment right to remain anonymous. *See Cahill,* 884 A.2d at 460, 461. Rather than giving him an opportunity to obtain counsel and respond so that this Court would have the benefit of argument on the First Amendment issues, plaintiffs withheld notice from Doe and now seek to punish him for failing to obtain counsel and defend himself in a few days' time. Again, plaintiffs' argument appears to be nothing more than an effort to create procedural obstacles to Doe's maintenance of his constitutional right to anonymity.

Moreover, plaintiffs fail to acknowledge that Doe's counsel notified them by telephone and email that Doe could not appear at the June 18 hearing without sacrificing the anonymity he was seeking to protect and, given that the hearing was ex parte and that plaintiffs were seeking the extraordinary relief of a temporary restraining order, that they had a duty to inform the Court that Doe was looking for counsel and intended to assert his First Amendment rights. Exh. 2 (email from Gregory A. Beck to Bruce W. McClain); *see* Ohio Code Prof'l Resp. 3.3(d) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to

the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."). Plaintiffs' professed bafflement over Doe's failure to appear is therefore disingenuous.

Respectfully submitted,

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Attorneys for Defendant John Doe

August 9, 2007

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2007, I served the foregoing RESPONSE TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER, TO SHOW CAUSE, AND FOR CONTEMPT on all parties required to be served by causing a true and correct copy to be sent by U.S. mail and by fax to counsel at each of the following addresses:

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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

Exhibit 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

From: Greg Beck
To: bmcclain@brucewmcclain.com
Date: 6/15/2007 5:20:49 PM
Subject: Powermark Homes

Bruce,

I'm an attorney with Public Citizen Litigation Group in Washington, DC. We're a public interest group that has frequently represented John Doe operators of websites against defamation and trademark claims. I spoke with your colleague Thomas Maczuzak today and he told me that you'd be out of the country but returning on Monday. I've been contacted by the John Doe operator of the website powermarkhomes.net. I understand there's a hearing on Monday and I'd like to talk to you at some point before then. I am concerned about this lawsuit because, after reviewing the papers and the website, I'm unable to identify anything that is false. In fact, the entire website seems to consist of links to public records. So I don't understand how you can have a defamation claim, and I think the case raises serious First Amendment problems.

At this point, I'm attempting to locate local counsel in Ohio to associate with and to move for my pro hac admission so I can enter the case. Even if I could get local counsel by Monday, I have another hearing in New York that would make it impossible for me to attend the TRO hearing. I have two requests:

1) If there is something about the website that is false that I don't know about, it would be helpful if you could explain it to me because it would lessen my motivation to become involved in this case. If there is nothing false, I would encourage you to reconsider the wisdom of this lawsuit given the importance of the First Amendment issues involved. See, e.g., McMann v. Doe, 460 F. Supp. 2d 259 (D. Mass. 2006); Doe v. Cahill, 884 A.2d 451 (Del. 2005); Dendrite v. Doe, 342 N.J. Super. 134, 775 A.2d 756 (App. Div. 2001).

2) If John Doe appeared at the hearing it would risk revealing his identity. If you are intent on pushing forward with this case, I would ask you to inform the judge that Doe is actively seeking counsel, that I am interested in representing him but have not had time to locate local counsel and am unavailable on Monday, and that Doe intends to assert as a defense to your claims that his communications are truthful and protected by the First Amendment. Given that it will likely be an ex parte hearing, it will fall on you to make sure the judge is fully informed.

Thank you. I look forward to speaking on Monday.

Greg

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Exhibit 2