

JULIETTE P. WHITE (9616)
MICHAEL W. YOUNG (12282)
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 532-1234 (telephone)
(801) 536-6111 (facsimile)
jwhite@parsonsbehle.com
myoung@parsonsbehle.com

Attorneys for Plaintiff Koch Industries, Inc.

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

<p>KOCH INDUSTRIES, INC.</p> <p>Plaintiff,</p> <p>v.</p> <p>JOHN DOES 1-25,</p> <p>Defendants.</p>	<p>Case No. 2:10-cv-01275-DAK</p> <p>Judge Dale A. Kimball</p> <p>Magistrate Judge Samuel Alba</p> <p>(Hearing Requested)</p>
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**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION TO QUASH SUBPOENAS AND IN OPPOSITION TO DEFENDANTS'
MOTION TO ISSUE PROTECTIVE ORDER**

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INTRODUCTION

Speech—including anonymous speech—is protected by the First Amendment. Trademark infringement and misleading impersonations are not. Koch brought this lawsuit to stop Defendants from *stealing* and *misleading*, not to stop them from *speaking*.

Defendants are free to express their views in innumerable ways, and they have numerous ways to do so anonymously. They may, for example, write anonymous letters to the editor, post pseudonymous websites that are not confusingly similar to Koch’s website, or give anonymous interviews with newspapers (which they have done since the filing of this action) to voice their criticism of Koch. *The Federalist Papers* of the late 18th Century are perhaps our Nation’s most cherished example of anonymous political expression; they were published under the pseudonym “Publius”; only later was it revealed that Alexander Hamilton, James Madison, and John Jay were the authors.

What Hamilton, Madison, and Jay did not do, however, was publish *The Federalist Papers* under the name “George Clinton” (then-Governor of New York, an outspoken critic of the Constitution), attach Clinton’s photo to the publications, and lead the world to believe that the views were attributable to Clinton. That is what Defendants did in this case. That is not protected by the First Amendment. In fact, it is prohibited by federal law.

In the memorandum in support of their motions to quash the subpoenas, issue a protective order, and dismiss the complaint, Defendants admit all of the conduct that forms the basis of Koch’s Complaint, namely: (1) registering the domain name koch-inc.com without Koch’s authorization and despite having no legitimate interest in a KOCH formative name; (2) improperly accessing and copying content from Koch’s website in order to establish a virtual

copy of Koch's homepage on Defendants' koch-inc.com domain; and (3) impersonating Koch by issuing a false press release attributed to Koch with the intention of deceiving and confusing the public. (ECF No. 13, at vi-viii.) Indeed, in the very first paragraph of their brief to this Court, Defendants concede that they conjured up a fictitious press release "purporting to announce a decision by Koch" and then "posted the release on a website . . . designed to look like Koch's." (*Id.* at iii.) They refer to their actions variously as a "joke," "prank," and (repeatedly) a "hoax." (*Id.* at iii, vi-viii.)

Despite these admissions—and this Court's order permitting Koch to engage in limited, accelerated discovery directed to the domain registrar and webhost to uncover the anonymous Defendants' identities—Defendants now seek to quash Koch's already-executed third-party subpoenas and to prevent Koch's disclosure and use of Defendants' identities through a protective order. Defendants contend their conduct and identities are shielded by the First Amendment. Defendants are wrong, and the Court should deny their motion to quash and motion for protective order.¹

Contrary to Defendants' claims, Defendants' conduct and identities are not protected by the First Amendment when they steal someone else's identity, pass themselves off as that person, and perpetrate what they themselves describe as a "hoax." (*Id.*) Perpetrating a "hoax" with respect to Koch's business to further Defendants' own competing agenda is not protected—it is simply false commercial speech.

Moreover, assuming *arguendo* that Defendants' actions were protected by the First Amendment, the identity of an anonymous Internet speaker is properly disclosed where, as here,

¹ Koch separately is responding to Defendants' Motion to Dismiss in an Opposition to Defendants' Motion to Dismiss that is being filed contemporaneously with this Opposition.

the victim has established a *prima facie* case of actionable harm against the anonymous Internet speaker. As previously outlined in Koch's Complaint and in its Memorandum in Support of Motion for Accelerated, Pre-Conference Discovery, Koch has sufficiently pleaded, and can prove, each of its six causes of action against Defendants—although for purposes of Defendants' instant motions, Koch need only establish a *prima facie* case for one of those claims. Koch also meets the other evidentiary requirements for obtaining the identity of an anonymous Internet speaker, namely: Koch's subpoenas sought information about Defendants' identities for the proper purpose of serving the Complaint; the subpoenas are specific and directly related to Koch's claims; no other adequate means exist for obtaining the information sought in the subpoenas; and Defendants' identities are necessary to proceed with this litigation. Finally, Defendants had no expectation of privacy as to their identities: they agreed to the webhost's terms of service that permitted disclosure of information about them. Accordingly, this Court should deny Defendants' motions.

FACTUAL BACKGROUND

Founded almost seventy years ago, Koch owns multiple companies involved in a wide variety of industry areas, including energy supply, fibers for carpeting and garments, chemicals used in manufacturing, process and pollution control equipment, forest and consumer products, and commodity trading. (*See* Declaration of Mark V. Holden in Support of Motion for Accelerated, Pre-Conference Discovery, filed on Dec. 29, 2010 (ECF No. 5-3) ("Holden Decl."), ¶ 2.) The Koch name is associated with innovation, operations excellence, and world class performance and it is well known and recognized in business, financial, and industry sectors.

(Id.) As part of the promotion of Koch's business and trademarks, Koch has maintained a website under the domain name kochind.com since 1996. *(Id.* ¶ 3.)

Defendants registered the domain name koch-inc.com (the "Infringing Domain Name") through Fast Domain, a domain registration company located in Utah, on or before December 10, 2010. *(Id.* ¶ 4.) Through BlueHost.com, a web-hosting company also located in Utah, Defendants then set up a website at www.koch-inc.com (the "Infringing Website") with an imposter homepage that Defendants themselves admit (ECF No. 13 at iii) was virtually an exact replica of the homepage for Koch's official website. *(Id.* ¶ 5.) To further their self-described "hoax," Defendants placed active links to the official Koch website on the Infringing Website, thus further confusing anyone who visited the Infringing Website. *(Id.)* Defendants then took their impersonation of Koch one step further by issuing an admittedly false press release purporting to come from Koch, with admittedly false quotes attributed to Koch's Chief Executive Officer. *(Id.* ¶ 6.) The fake press release also contained a fictitious name and e-mail, a telephone number, and an embedded link to Defendants' Infringing Website. *(Id.)*

Shortly after Defendants released the fake press release, Koch was forced to spend time and money responding to inquiries, investigating the press release's claims, and acting to have the Infringing Website taken down. *(Id.* ¶ 7.) There was no contact information on the Infringing Website and no accurate information in the fake press release that would enable it to identify the Defendants. *(Id.* ¶ 8.) The purported contact name in the false press release was Kate Anderson, but no one by that name is or has been employed as a Koch spokesperson. *(Id.)* Koch further learned that attempts by national news organizations to reach the perpetrators

through the e-mail address or telephone number provided on the false press release had proven fruitless. (*Id.* ¶ 9.)

Efforts to identify the Defendants through other publicly-available means proved equally unavailing. The only registrant listed for the Infringing Domain Name at the time was the hosting service, BlueHost.com, and the registration did not name any actual individual(s). (*Id.* ¶ 10.) Nor was there any public information available regarding the telephone number provided on the false press release that was sufficient to enable Koch to identify the individual(s) involved. (*Id.*) Accordingly, Koch had no alternative but to file this action against the Defendants and seek the Court's authorization to serve third-party subpoenas on the parties that were most likely to have information identifying the Defendants.

On January 3, 2011, this Court granted Koch's request to serve third-party subpoenas on Fast Domain and BlueHost.com so that Koch could discover the Defendants' identities to serve legal process on them in accordance with federal law. (Order Granting Motion for Accelerated Discovery, ECF No. 7.) In accordance with the Court's order, Koch served a subpoena *duces tecum* on January 4, 2011 to BlueHost.com for information related to the identity of the operator(s) of the Infringing Website. (*See* ECF No. 9.), and on January 5, 2011, Koch served a subpoena *duces tecum* to Fast Domain for information related to the identity of the registrant(s) of the Infringing Domain Name. (*See* ECF No. 8.) Fast Domain and BlueHost.com provided documents in response to Koch's subpoenas on January 6, 2011. (Declaration of Judith Powell, attached as Ex. A ("Powell Decl.") ¶ 5.)

On January 20, 2011, Koch's counsel received a letter from Defendants' counsel (Powell Decl. ¶ 6; ECF No. 13-16), claiming that any information leading to the disclosure of the

Defendants' identities was subject to a "First Amendment privilege," and that they intended to seek an order quashing the subpoenas and a protective order. (ECF No. 13-16.) Counsel for the parties had a follow-up telephone call on January 24. (Powell Decl. ¶ 6.) During this conversation, Defendants' counsel asked whether Koch would agree not to disclose Defendants' identities or utilize Defendants' identities for purposes of the litigation. (*Id.* ¶ 7.) Counsel for Koch agreed to maintain confidentiality temporarily, but stated that she did not believe that such information was protected from disclosure under the circumstances of this case. She asked that Defendants' counsel provide her with any authority involving a case of impersonation that supported his claim of privilege. (*Id.* ¶ 8.) Defendants' counsel declined to provide any such authority. (*Id.* ¶ 9.)

ARGUMENT

I. The First Amendment Does Not Protect Trademark Infringement or False and Misleading Impersonations.

Defendants' argument that their identities are protected by the First Amendment and that Koch must meet a heightened standard of review to discover and use those identities fails. Even assuming that Defendants' conduct constitutes "speech" under the First Amendment, it is false commercial speech that is not protected by the First Amendment.²

It is highly questionable that Defendants' conduct in misappropriating Koch's trademarks constitutes "speech" at all. In *Spence v. Washington*, the U.S. Supreme Court concluded that conduct is analyzed as speech under the First Amendment if there is (1) an intent to convey a specific message, and (2) a substantial likelihood that the message will be understood by those receiving it. 418 U.S. 405, 410-11 (1974); *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) ("[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative."); *ACORN v. City of Tulsa, Oklahoma*, 835 F.2d 735, 742 (10th Cir. 1987) (conduct is "speech" if it "is intended and reasonably perceived to convey a message").

Here, neither prong of the *Spence* analysis is satisfied by the record evidence: (1) the

² In addition to substantive deficiencies, Defendants' motions are procedurally deficient. The motion to quash is moot because Fast Domain and BlueHost.com already had complied with the subpoenas by the time Defendants filed their motion to quash. The motion for protective order fails because Defendants did not comply with Fed. R. Civ. P. 26(c)(1) and DUCivR 37-1, which require the moving party to file a certification that it conferred or attempted to confer in good faith with opposing counsel. Specifically, DUCivR 37-1 requires that such certification be filed when the motion is filed. Although consultation occurred, Defendants failed to provide the authority Koch requested, and they failed to file the required certification. *See, e.g., Stitching Mayflower Mountain Fonds v. City of Park City Utah*, No. 2:04-CV-925, 2008 WL 2149381 (D. Utah May 21, 2008) (unpublished) (denying Stitching's motion for protective order for failure to comply with Fed. R. Civ. P. 26(c)(1) and DUCivR 37-1(a)).

alleged intended message is not clear from the face of the press release or website; and (2) Defendants' collection of unauthenticated articles are insufficient to establish a substantial likelihood that others receiving the alleged message would understand it. Thus, Defendants did not engage in protected "speech"; rather, they stole Koch's identity and sought to pass themselves off as Koch by (1) obtaining a confusingly similar domain name registration; (2) accessing and copying Koch's website to create an imposter website "designed to look like Koch's," with no indication that it was not (ECF No. 13, at iii); (3) linking the fake site to the authentic Koch website; and (4) issuing a fake press release purporting to come from Koch, with false quotes from Koch's CEO, a fictitious contact name, e-mail, and telephone number, and an embedded link to Defendants' imposter website. (Holden Decl. ¶¶ 4-6.) Those activities constitute conduct, not "speech."

In support of their position that their conduct is protected under the First Amendment, Defendants cite a series of cases from outside the Tenth Circuit involving either "gripe sites" or Internet posts that Defendants contend are analogous to the identity theft at issue here. (See ECF No. 13, at 2-5.) These cases are all inapposite: none of them involve misleading impersonation and none of them involve unauthorized copying of another's website. The "gripe sites" were exactly what they purported to be; none was pretending to be someone else, as is the case here.

Assuming *arguendo* that Defendants' act of identity theft constitutes "speech," it is "false commercial speech [that] receives no First Amendment Protection . . ." *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 553-54 (5th Cir. 2001); *see also Cincinnati v. Discovery Network*, 507 U.S. 410, 432 (1993) (Blackmun, J., concurring) ("A listener has little interest in receiving false, misleading, or deceptive commercial information."); *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 949 (3d Cir. 1993) ("[C]ommercial speech that is false when uttered does not

enjoy the protection of the First Amendment.”). For speech even to come within First Amendment analysis, “it at least must concern lawful activity and not be misleading.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

The First Amendment does not protect the unauthorized use of trademarks “where it is likely to create confusion as to the source or sponsorship of the speech . . . in question.” *Coca-Cola Co. v. Purdy*, 382 F.3d 774, 787 (8th Cir. 2004). For example, in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987), the U.S. Supreme Court held that the Gay Olympic Games had no First Amendment right to appropriate the Olympics mark in spite of their having an expressive purpose. *Id.* at 540; *see also Anheuser-Busch, Inc. v. Balducci Publ’ns*, 28 F.3d 769, 776 (8th Cir. 1994) (“A parody creating a likelihood of confusion may be subject to a trademark infringement action.”); *Mut. of Omaha Ins. Co. v. Novak*, 648 F. Supp. 905, 911 (D. Neb. 1986) (“There are numerous ways in which [defendant] may express his aversion to nuclear war without infringing upon a trademark in the process.”), *aff’d*, 836 F.2d 397 (8th Cir. 1987); *United We Stand Am., Inc. v. United We Stand, Am., N.Y., Inc.*, 128 F.3d 86, 93 (2d Cir. 1997) (a political organization’s use of plaintiff’s mark not protected where it “would cause significant consumer confusion”).

Indeed, many courts have rejected an infringer’s claim of First Amendment protection for use of a plaintiff’s mark in a domain name allegedly to convey a social message or critical commentary. *See, e.g., Coca-Cola*, 382 F.3d at 787 (holding that the First Amendment did not protect defendant’s use of plaintiff’s mark in the domain name of a website critical of plaintiff); *People for the Ethical Treatment of Animals v. Doughney*, 113 F. Supp. 2d 915, 921 (E.D. Va. 2000) (same), *aff’d*, 263 F.3d 359 (4th Cir. 2001); *OBH, Inc. v. Spotlight Magazine, Inc.*, 86 F. Supp. 2d 176 (W.D.N.Y. 2000) (same); *Jews for Jesus v. Brodsky*, 993 F. Supp. 282, 310 (D.N.J.

1998) (same), *aff'd*, 159 F.3d 1351 (3d Cir. 1998); *Planned Parenthood Fed. of Am., Inc. v. Bucci*, 42 U.S.P.Q.2d 1430, 1440 (S.D.N.Y. 1997) (same), *aff'd*, 152 F.3d 920 (2d Cir. 1998).³ Such use constitutes “commercial” speech because it is “commercial in nature.” *Jews for Jesus*, 993 F. Supp. at 310; *cf. OBH, Inc.*, 86 F. Supp. 2d at 198 (“[D]efendants’ use of plaintiffs’ mark as the domain name for their web site is, on its face, more analogous to source identification than to a communicative message; in essence, the name identifies the web site as being the product, or forum, of the plaintiffs.”); *Planned Parenthood*, 42 U.S.P.Q.2d at 1440 (same).

Unlike Defendants’ Infringing Website and press release—which impersonated Koch for purposes of furthering confusion and deceit—the websites at issue in *Coca-Cola*, *Doughney*, *OBH*, *Jews for Jesus*, and *Planned Parenthood* all contained explicit criticisms of their target. Defendants’ Infringing Website contained no such explicit criticisms and, as such, the case against First Amendment protection is even stronger.

II. Koch Meets Any Increase in the Pleading Standard to Overcome Defendants’ Limited First Amendment Rights.

Defendants next argue that Koch must meet a heightened pleading requirement before disclosing the anonymous Defendants’ identities. To support their argument, Defendants rely on standards articulated by various state courts and district courts from other circuits.⁴ Their argument and citations are misguided.

³ See also J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 25:76 (4th ed. 2010) (“In the author’s opinion, gripe sites that use the target’s trademark in the domain name either identically or in a confusingly similar format violate mainstream trademark policies. Such sites . . . rely on confusion caused by the domain name to convey their message, thereby negating any free speech defense.”).

⁴ See ECF No. No. 13, at 3-5 (citing *Dendrite Int’l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. App. 2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *SaleHoo Group, Ltd. v. ABC Co.*, 722 F. Supp. 2d 1210 (W.D. Wash. 2010); *Best W. Int’l, Inc. v. Doe*, No. CV-06-1537, 2006 WL 2091695 (D. Ariz. July 25, 2006) (unpublished); and *McMann v. Doe*, 460 F. Supp. 2d 259 (D. Mass. 2006)).

The cases relied on by Defendants all involved actual statements clearly made by one party about another and posted on message boards, blogs, e-mails, or on gripe sites. In all of those contexts, the First Amendment was implicated. Here, as discussed above, Defendants did not engage in protected speech and Koch is entitled to pursue its claims. *See, e.g., Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 7, n.6 (D.D.C. 2008) (declining to apply heightened pleading requirement set forth in cases involving actual speech to a copyright infringement case); *see also Too Much Media, LLC v. Hale*, 993 A.2d 845, 862 (N.J. App. 2010) (noting that its holding in *Dendrite* was limited to “standards to be applied by courts in evaluating applications for discovery of the identity of anonymous users of Internet Service Provider (ISP) message boards”) (quotation omitted).

Further, Koch’s allegations are sufficient to overcome whatever limited privacy interest Defendants may have, regardless of the standard applied. The First Amendment protection that Defendants assert is at most minimal because their actions constitute infringement of Koch’s intellectual property. *See, e.g., Arista Records*, 551 F. Supp. 2d at 8 (“[C]ourts have routinely held that a defendant’s First Amendment privacy interests are exceedingly small where the ‘speech’ is the alleged infringement of copyrights.”); *Sony BMG Music Entm’t v. Doe*, No. 5:09-cv-109, 2009 WL 5252606, at *7 n.14 (E.D.N.C. Oct. 21, 2009) (declining “defendant’s invitation to apply the arguably more rigorous test in the state case of [*Dendrite*]” because

Defendants also rely on *Doe v. Shurtleff*, No. 1:08-CV-64, 2008 WL 4427594 (D. Utah Sep. 25, 2008) (unpublished), *order vacated*, 2009 WL 2601458 (D. Utah Aug. 20, 2009), for the proposition that “courts have ‘outlined strict rules for allowing a subpoena that had the effect of unmasking the identity of anonymous online speakers.’” (ECF No. 13, at 3 (quoting *Shurtleff*, 2008 WL 4427594, at *6.)) *Shurtleff* is inapplicable as it involved a constitutional challenge to a statute that required sex offenders to disclose all their Internet identifiers. 2008 WL 4427594, at *1. The cited quote is from the court’s discussion of *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), which is also inapplicable since it involved an attempt to identify a third-party witness, rather than a party.

Dendrite involved defamation, “a unique area of particular federal concern”); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999) (allowing discovery of a defendant’s identity in a trademark infringement case where plaintiff showed that its suit could withstand a motion to dismiss); see also Ashley I. Kissinger & Katherine Larsen, *Untangling the Legal Labyrinth: Protections for Anonymous Online Speech*, 13 J. Internet L. 1, 18 (2010) (“[W]hen expressive speech is at issue, as in defamation cases, courts tend to apply a high burden test, and when the speech is alleged to constitute copyright or trademark infringement, courts tend to apply a low burden test.”).

While this Court has not yet addressed the issue, the standard urged by Defendants is incorrect. The appropriate standard to apply is the standard already adopted by another district court in this Circuit. See *Interscope Records v. Does 1-14*, 558 F. Supp. 2d 1176, 1179 (D. Kan. 2008) (applying the five-factor analysis articulated in *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), to find plaintiffs had overcome the Doe defendants’ limited privacy interests). As the court in *Interscope* explained, there are five factors to consider in determining that disclosure of anonymous defendants’ identities is warranted, namely:

- (1) a concrete showing of a prima facie claim of actionable harm;
- (2) the specificity of the discovery request;
- (3) the absence of alternative means to obtain the subpoenaed information;
- (4) a central need for the subpoenaed information to advance the claim; and
- (5) the Doe defendants’ expectation of privacy.

Interscope, 558 F. Supp. 2d at 1179 (citing *Sony Music*, 326 F. Supp. 2d at 565-66).

As discussed below, Koch has sufficient evidence to sustain a *prima facie* case against Defendants for all of its causes of action. In addition, Koch meets the other evidentiary requirements articulated by *Sony Music* and *Interscope*.

A. Koch has established a *prima facie* case against Defendants for all of its causes of action.

Koch has asserted trademark infringement and unfair competition under federal and common law, violations of the Anticybersquatting Consumer Protection Act (“ACPA”), violations of the Computer Fraud and Abuse Act (“CFAA”), and breaches of the terms and conditions of Koch’s website. To satisfy the analysis outlined above, Koch need only establish a *prima facie* case for one of its claims. In their Memorandum, Defendants concede most of the elements that make up Koch’s claims. Accordingly, Koch will only address those elements for which Defendants argue Koch’s evidentiary showing is lacking. (See ECF No. 13, at 23-25.)

On Koch’s trademark infringement and unfair competition claims, Defendants concede that Koch has the exclusive right to use its federally-registered and common-law marks, that Defendants have made use of those marks without Koch’s permission, and that their unauthorized use has led to confusion, mistake, and deceit. See 15 U.S.C. §§ 1114 and 1125(a); see also *Donchez v. Coors Brewing Co.*, 392 F.3d 1211, 1219 (10th Cir. 2004). Defendants contend only that Koch has failed to introduce evidence that Defendants’ unauthorized use of Koch’s trademarks and service marks was “in commerce” as required under the Lanham Act (ECF No. 13, at 24), claiming that their use was intended to be purely political.

Defendants’ “use in commerce” argument is addressed in detail in Koch’s Memorandum in Opposition to Defendants’ Motion to Dismiss;⁵ for purposes of the instant motions, however, Koch notes that even the cases on which Defendants rely make clear that a plaintiff, in establishing a *prima facie* claim of actionable harm, “must only plead and prove facts with regard to elements of the claim that are within his control.” *Cahill*, 884 A.2d at 464; see also *SaleHoo*, 722 F. Supp. 2d at 1215; *Best Western*, 2006 WL 2091695, at *5 (“[A] plaintiff at an

⁵ See Plaintiff’s Memorandum in Opposition to Defendants’ Motion to Dismiss at 5-10, incorporated herein (showing Defendants’ use of Koch’s marks indeed qualifies as commercial).

early stage of the litigation may not possess information about the role played by particular defendants or other evidence that normally would be obtained through discovery.”). Defendants remain cloaked in anonymity, and Koch does not know the full extent of their unauthorized commercial use of Koch’s marks. At this stage, such facts are simply not within Koch’s control.

On Koch’s ACPA claim, Defendants argue only that Koch failed to introduce evidence that Defendants used or registered the domain names “with a bad faith intent to profit.” (ECF No. 3, at 12 (quotation omitted).) As above, it is premature, unreasonable, and untenable that Koch be required to introduce evidence of Defendants’ “intent” before their identities are even known and before Koch has had the opportunity to conduct discovery. *See Cahill*, 884 A.2d at 464; *Best Western*, 2006 WL 2091695, at *5.

Regarding Koch’s claims that Defendants violated the CFAA and breached the terms and conditions of Koch’s website, Defendants argue that Koch has presented no evidence that the Defendants “manifested assent to a binding contract.” (ECF No. 13, at 24.) Defendants also claim that, as to Koch’s CFAA claim, Koch has not introduced sufficient evidence of its damages. (*Id.*) Again, Defendants’ argument is premature as such evidence is not currently within Koch’s control. Koch cannot be expected to introduce evidence of Defendants’ subjective assent without first knowing their identities. *See Cahill*, 884 A.2d at 464. And as for damages, Koch already has, at a minimum, expended time, money, and effort responding to inquiries, investigating the fake press release’s claims, acting to have the Infringing Website taken down, attempting to identify the Defendants, and pursuing the instant action. (Holden Decl. ¶¶ 7, 10.) Quantifying such loss “normally would be obtained through discovery,” and as such, Koch should not be required to make a more detailed evidentiary showing at this time. *Best Western*, 2006 WL 2091695, at *5.

B. Koch satisfies the remaining applicable evidentiary requirements for disclosing Defendants' identities.

In addition to making a *prima facie* showing of actionable harm for each of Koch's claims against Defendants, Koch satisfies the remaining evidentiary requirements articulated in *Sony Music*, *Interscope*, and other cases for permitting disclosure of Defendants' identities.

First, as evidenced by this Court's granting of Koch's Motion for Accelerated, Pre-Conference Discovery, Koch issued the subpoenas in good faith and for a proper purpose: to unmask the anonymous infringers, serve them with process, conduct a Rule 26 meet and confer, and proceed with litigating Koch's valid claims. *See, e.g., La Societe Metro Cash & Carry France v. Time Warner Cable*, No. CV030197400S, 2003 WL 22962857, *7 (Conn. Super. Ct. Dec. 2, 2003) (permitting disclosure where plaintiffs established probable cause that they were seeking the information in "good faith and not for any improper purpose").

Second, Koch's subpoenas were specific, limited in scope, and directly related to Koch's causes of action. *See Sony Music*, 326 F. Supp. 2d at 566; *Interscope*, 558 F. Supp. 2d at 1179. Koch sought only the Defendants' names, addresses, and the records related to their accounts. (ECF Nos. 5-1, at 6; 5-2, at 6.) Indeed, in complying with the subpoenas, Fast Domain and BlueHost.com disclosed no more than what was identified in the subpoenas. (Powell Decl. ¶ 5.)

Third, as outlined in Koch's Memorandum in Support of Motion for Accelerated, Pre-Conference Discovery, Koch had no other adequate means for obtaining the information sought in the subpoenas. *See Sony Music*, 326 F. Supp. 2d at 566; *Interscope*, 558 F. Supp. 2d at 1179. Before seeking leave from the Court to serve the third-party subpoenas, Koch exhausted all publicly-available means to discover the infringers' identities, but these efforts proved fruitless. (Holden Decl. ¶ 10.) Accordingly, the account information possessed by Fast Domain and

BlueHost.com was the only lead available regarding Defendants' identities.

Fourth, Defendants' identities are essential for Koch to advance its claims against Defendants. Absent their identities, Koch will be unable to serve Defendants with process and proceed with this litigation. *See Sony Music*, 326 F. Supp. 2d at 566 (finding plaintiff had satisfied this factor by showing that it could not serve process absent the defendants' identities); *Interscope*, 558 F. Supp. 2d at 1179 (same).

Finally, Koch is entitled to the information it sought in the subpoenas in light of Defendants' minimal expectation of privacy. When Defendants chose to contract with BlueHost.com, they agreed to its terms of service, including the following provision:

Bluehost.com may disclose any information in its possession, including without limitation, information about Subscribers, . . . in order to comply with a court order, subpoena, summons, discovery request, . . . or other legal process to protect Bluehost.com or others from harm *Bluehost.com has no obligation to notify any person, including the Subscriber about whom information is sought, that Bluehost.com has provided the information.*

See <https://www.bluehost.com/cgi/info/terms.html>, at ¶ 11(03) (emphasis added); *see also id.* at ¶ 6(03)(B). Thus, Defendants had virtually no expectation of privacy in using BlueHost.com's services to engage in infringing conduct that would subject BlueHost.com to a potential claim for contributory infringement and discovery under the federal rules. *See Sony Music*, 326 F. Supp. 2d at 566 (relying on third-party's terms of service to find defendants had little expectation of privacy in engaging in infringement); *Interscope*, 558 F. Supp. 2d at 1179 (same).⁶

⁶ Defendants also contend that Koch was required to provide them notice (ECF No. 13, at 6), but other than *Dendrite* and *Cahill*—state court decisions inapplicable on their facts—Defendants cite no authority in support of this argument. This is not a requirement in this District, and this Court placed no such obligation on Koch when it granted its motion for accelerated discovery. Indeed, Defendants waived any such notice by agreeing to the terms of service cited above.

CONCLUSION

For the reasons stated above, Koch asks that the Court deny Defendants' Motions to Quash Subpoenas and Issue Protective Order.

Respectfully submitted,

/s/ Juliette P. White

Juliette P. White

Michael W. Young

PARSONS BEHLE & LATIMER

Attorneys for Plaintiff Koch Industries, Inc.

Of Counsel:

Judith A. Powell
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309
(404) 815-6500 (telephone)
(404) 815-6555 (facsimile)
jpowell@kilpatricktownsend.com

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2011, I electronically filed the foregoing Plaintiff's Memorandum in Opposition to Defendants' Motion to Quash Subpoenas and in Opposition to Defendants' Motion to Issue Protective Order with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

Deepak Gupta
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
gbeck@citizen.org

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

and I hereby certify that I have mailed the foregoing, by United States Postal Service, to the following non-CM/ECF participants:

Judith A. Powell
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, Georgia 30309
(404) 815-6500 (telephone)
(404) 815-6555 (facsimile)
jpowell@kilpatricktownsend.com

/s/ Juliette P. White
Attorney for Plaintiff Koch Industries, Inc.