

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

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CHICAGO MOTOR CAR CORP.,	)	
PARIN SHAH, and FRANK SACCO,	)	Civil Action No. 12-cv-8905
Plaintiffs,	)	
	)	
v.	)	
	)	
DAVID BATES,	)	The Honorable John Z. Lee
Defendant.	)	

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**RESPONSE TO PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING  
ORDER/PRELIMINARY INJUNCTION**

Plaintiffs seek to have this Court do something forbidden by First Amendment jurisprudence: impose a prior restraint on speech to silence critique. “To begin with, an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint.” *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 797 (1994) (Scalia, J., concurring in part dissenting in part). Our right to speech is one of our most fundamental rights and any attempt to encroach upon that right comes with a heavy presumption of unconstitutionality. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Plaintiffs request an injunction to silence Defendant’s past and future speech because Defendant has been critical of Plaintiffs, a used car dealership and its owners, and expressed negative opinions of Plaintiffs. Defendant has used his free speech rights to inform potential consumers of his and other’s experiences with Plaintiffs. Now, Plaintiffs seek to enjoin his criticisms. Plaintiffs attempt to justify such a patently unconstitutional request by claiming that Defendant’s speech violates various federal and state unfair business practices statutes. Besides the obvious problem with asking this Court to enjoin critical speech, Plaintiffs have another problem with their motion. The statutes Plaintiffs’ rely so heavily upon do not apply to Defendant’s personal

and noncommercial speech. These statutes are meant to protect businesses from the unscrupulous conduct of competitors not silence the criticisms of a consumer.

This Court should deny Plaintiffs' request for a host of reasons. First and foremost, the First Amendment does not allow for a prior restraint on speech in this case. In fact, "the Supreme Court has never upheld a prior restraint as a permissible remedy in a defamation action." Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 *Syracuse L.Rev.* 157, 167. Second, Plaintiffs cannot show a likelihood of success on the merits of their claims. Third, Plaintiffs have an adequate remedy at law as evidenced by their request for a specific dollar amount in their requested relief. And fourth, the balance of hardships does not weigh in Plaintiffs' favor as injury to Defendant's free speech rights far outweighs any alleged lost profits by Plaintiffs.

### **FACTS**

Defendant, David Bates, is a former customer of Chicago Motor Car, Corp. ("CMC"). He saw an advertisement for a Mercedes AMG that CMC was selling. The CMC salesperson told him that the vehicle had never been in a wreck. When David went to CMC to see the vehicle he discovered damage to the front bumper. The CMC salesperson told David that the damage to the vehicle's bumper was the result of a CMC employee hitting a gasoline pump at a gas station. Plaintiff Parin Shah assured David that within a week he would have the damaged bumper repaired, have the vehicle detailed and thoroughly inspected, and have the vehicle delivered to David's home. **Exhibit A, Declaration of David Bates, at ¶4.**

The vehicle was delivered in a week but it quickly became apparent the vehicle was not as advertised. First, David realized that the vehicle was not a Mercedes AMG but rather a far less valuable Mercedes SL600. *Id.* Next, the damage to the front bumper was still evident. *Id.* David also noticed a bulge in the front tire. *Id.* When he brought the vehicle to a tire dealer for a new

tire, he was told the vehicle had a cracked rim which was a possibly fatal condition that could cause the driver to lose control of the vehicle. Id. at ¶5.

The vehicle was later inspected at a body shop where David discovered the vehicle had undergone major body work. The body shop employee informed David that the vehicle had been in a wreck and showed David where bondo had been used to repair damage to the driver's side of the vehicle. He also showed David the "overspray" which is where multiple layers of paint are visible. This indicates that the vehicle had been repainted, likely after receiving the body work. Id. at ¶6. If that was not bad enough, CMC could never deliver the title of the car to David despite the fact that he paid for the vehicle in full. Id. at ¶7.

In response to all this, David shared his experiences with Plaintiffs by posting on various social media sites and internet message boards. Id. at ¶10. David also registered two domain names [www.chicagomotorcars.us](http://www.chicagomotorcars.us) and [www.chicagomotorcarsuck.com](http://www.chicagomotorcarsuck.com). Id. at ¶8. Additionally he created a subpage on his personal website [www.dbec.us/chicago\\_motor\\_cars.htm](http://www.dbec.us/chicago_motor_cars.htm). Id. On these sites, he again shared his experiences with Plaintiffs. Id. at ¶10. He also shared the complaints others had posted on various websites detailing their negative experiences with Plaintiffs. Id. David's experiences with Plaintiffs are not unique. The Plaintiffs have been sued for allegedly misrepresenting the condition of their vehicles. According to the allegations in the Complaint of one lawsuit, attached as **Exhibit B**, CMC sold a vehicle described as having "no known accidents" and only "29,157 miles." According to the allegations of the Complaint, the car actually had 89,510 miles, a salvaged title and extensive damage due to a prior accident.

As a result of the publicity received from David's criticism, Plaintiffs have filed the instant action. Plaintiffs allege claims of (1) false advertising under the federal Lanham Act and Illinois Uniform Deceptive Trade Practices Act ("UDTPA"), (2) cybersquatting under the Anti-

cybersquatting Consumer Protection Act (“ACPA”), (3) defamation and false light, and (4) tortious interference with contraction contractual relations and prospective business advantage. All of Plaintiffs’ claims revolve around two specific types of conduct: (1) posting criticism of Plaintiffs on various websites; and (2) registering two domain names which include the mark of Plaintiff Chicago Motor Car, Corp. (“CMC”). Plaintiffs now seek entry of a preliminary injunction to (1) enjoin past speech which they contend is false and defamatory, (2) enjoin future speech that they would consider false or defamatory, (3) require Defendant to deactivate his domain names [www.chicagomotorcars.us](http://www.chicagomotorcars.us) and [www.chicagomotorcarsuck.com](http://www.chicagomotorcarsuck.com), and (4) prevent Defendant from registering any domain names in the future that use CMC’s mark. Plaintiffs’ brief lists several statements they believe are false or misleading. The parties have submitted competing affidavits regarding the truth or falsity of these statements. Plaintiffs have refused Defendant’s requests for preliminary discovery or the deposition of a corporate representative before the Court decides such a weighty matter involving such a fundamental Constitutional right as free speech.

### **ARGUMENT**

“[T]he grant of a preliminary injunction is the exercise of an extremely far-reaching power not to be indulged in except in a case clearly warranting it.” *Illinois Council on Long Term Care v. Miller*, 579 F. Supp. 1140, 1144 (N.D. Ill. 1983) (internal quotations omitted). A party seeking a preliminary injunction is required to demonstrate: (1) a likelihood of success on the merits, (2) that it has no adequate remedy at law, and (3) that it will suffer irreparable harm if the relief is not granted. *Ameritech v. Voices for Choices, Inc.*, 2003 WL 21078026, at \*1 (N.D. Ill. May 12, 2003). If the moving party satisfies these preliminary conditions, the court must then consider (1) any irreparable harm an injunction would cause the nonmoving party and (2) any consequences to the public from denying or granting the injunction. *Id.* The Court should not en-

ter an injunction if the harm to the nonmoving party or public of entering the injunction outweighs the harm to the moving party of not entering the injunction. *Id.* at \*3. An injunction seeking to restrain speech “comes to this Court with a ‘heavy presumption’ against its constitutional validity.” *Keefe*, 402 U.S. at 419; *Ameritech*, 2003 WL 21078026, at \*1-2.

### **I. A Preliminary Injunction Would Place an Unlawful Prior Restraint on Speech**

Plaintiffs’ allegations of defamation implicate all protections against prior restraints on speech afforded by the First Amendment. In Illinois, there is a general rule that First Amendment is not implicated where a party alleges only harm to contractual rights but not defamation. *See Herman v. Prudence Mut. Cas. Co.*, 38 Ill. 2d 98, 100 (1967); *see e.g. Ty, Inc. v. Publications Intern, Ltd.*, 81 F.Supp.2d 899 (N.D. Ill. 2000) (rejecting argument that First Amendment was implicated where no allegations of defamation existed). However, this general rule is inapplicable where the complaint contains both allegations of harm to contractual business rights *and* defamation. *See Herman*, 38 Ill. 2d at 100 (finding that the First Amendment was not implicated because the complaint “contains no hint of a charge of defamation”); *see e.g. Keefe*, 402 U.S. at 419 (holding that injunction prohibiting defendants from distributing allegedly defamatory pamphlets critical of plaintiff’s real estate practice violated First Amendment).

Here, Plaintiffs allege both injury to their contractual business rights (Lanham Act, ACPA, UDTPA, tortious interference) and defamation. Each and every one of Plaintiffs’ claims involves to some degree Defendant’s allegedly defamatory statements. This inexorably involves Defendant’s speech in this Court’s analysis of each of Plaintiffs’ claims. The Court cannot overlook the First Amendment implications when deciding this motion because Defendant’s allegedly defamatory speech is noncommercial speech, which is afforded all protections of the First Amendment. *Jordan v. Jewel Food Stores, Inc.*, 851 F. Supp. 2d 1102, 1111 (N.D. Ill. 2012)

(holding that “noncommercial speech [is] entitled to full First Amendment protection.”); *see Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998) (defining commercial speech as “speech which does no more than propose a commercial transaction.”). Simply because Defendant’s speech is a criticism of a business, it is not stripped of its First Amendment protection. *Lamparello v. Falwell*, 420 F.3d 309, 313-14 (4th Cir. 2005) (explaining how the First Amendment protects noncommercial criticism and comment from liability under both the Lanham Act and ACPA); *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003) (dissolving an injunction in Lanham Act case because “the First Amendment protects critical commentary when there is no confusion as to source, even when it involves the criticism of a business.”).

A preliminary injunction that restrains past and future speech constitutes a prior restraint on speech. *Madsen*, 512 U.S. at 797 (Scalia, J., concurring in part dissenting in part) (“To begin with, an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint.”). “Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.” *Keefe*, 402 U.S. at 419. A plaintiff “thus carries a heavy burden of showing justification for the imposition of such a restraint.” *Id.* A preliminary injunction against speech is presumptively unconstitutional because it “freezes” speech and removes “the whole panoply of protections afforded by [the judicial process.]” *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 589 (1976) (Brennan, J., concurring). In essence, it “shuts off communication before it takes place[.]” *Id.*

The preliminary injunction sought by Plaintiffs is incompatible with “a free society [that] prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.” *Id.* As Justice Scalia warned, “[t]he right to free speech should

not lightly be placed within the control of a single man or woman.” *Madsen* 512 U.S. at 793 (Scalia, J., concurring in part and dissenting in part). Justice Scalia’s warning is apt because an injunction in this case would permit the Court to silence Defendant’s criticism now before a jury has even determined if it is defamatory. *See Madsen*, 51 U.S. at 794 n. 1 (Scalia, J., concurring in part and dissenting in part) (observing that “I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct.”); *see also* Chemerinsky, 57 *Syracuse L.Rev.* at 169 (noting “[t]he absence of a single Supreme Court decision approving a prior restraint as a remedy in a defamation case”). “This is the essence of censorship.” *Near v. State of Minnesota ex rel. Olsen*, 283 U.S. 697, 713 (1931); *see Stuart*, 427 U.S. at 589 (Brennan, J., concurring) (describing prior restraint as “suppression by the stroke of a pen”).

Plaintiffs are asking this Court to disregard the First Amendment and a long consistent line of Supreme Court decisions and to preemptively enjoin Defendant’s (1) past speech (i.e. forcing Defendant to remove allegedly defamatory statements already posted on the internet) and (2) future speech (i.e. enjoining Defendant from expressing his opinion of Plaintiffs in the future). Plaintiffs’ justification for such a restraint is that Defendant’s speech, in Plaintiffs’ eyes, injures their business. Our Supreme Court has repeatedly held that this is not a justification for enjoining speech. *See CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (finding injunction on broadcast unconstitutional despite allegations that broadcast would be defamatory and cause economic harm); *Keefe*, 402 U.S. at 419 (finding injunction against distributing pamphlets unconstitutional despite allegations that pamphlets were defamatory and hurt plaintiff’s business); *see also Taubman Co. v. Webfeats*, 319 F.3d 770 (6th Cir. 2003) (“And although economic damage might be an intended effect of [defendant’s] expression, the First Amendment protects criti-

cal commentary when there is no confusion as to source, even when it involves the criticism of a business.”). “No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court.” *Keefe*, 402 U.S. at 419.

*Keefe* is particularly applicable to this case. An Illinois court enjoined defendants from distributing allegedly defamatory pamphlets which hurt the plaintiff’s real estate practice. *Id.* at 417. In finding the injunction unconstitutional, the Court noted that the truth or falsity of the allegedly defamatory statements was irrelevant; the focus was on whether the injunction imposed an unconstitutional prior restraint on speech. *Id.* at 418. By distributing the pamphlets, the defendants hoped to: (1) inform the public of plaintiff’s business practices which defendants found offensive; and (2) force the plaintiff to change his practices. *Id.* at 419. The Court found that the distribution of information, even information critical and harmful to plaintiff’s business was protected from prior restraint by the First Amendment. *Id.* at 419-20.

Here, Plaintiffs seek to place a similar prior restraint on speech to silence Defendant’s criticism of their business practices. Plaintiffs’ desire to be free from criticism cannot justify silencing those who criticize them. As *Keefe* and a host of other Supreme Court decisions teach, Defendant has a constitutionally protected right to criticize Plaintiffs and their business practices. *Id.* at 419; *see CBS, Inc.*, 510 U.S. at 1317-18; *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); *see also Taubman Co.*, 319 F.3d at 778.

One cannot be said to have “free speech” if, because of an injunction, he must obtain permission from the Court before speaking. Our Supreme Court has been clear: a Court may not enjoin speech because it is allegedly defamatory. *CBS*, 510 U.S. at 1317; *Keefe*, 402 U.S. at 419. There is too much risk to legitimate speech. *Stuart*, 427 U.S. at 589 (Brennan, J., concurring) (“It

is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.”). Plaintiffs only remedy if they truly have been defamed is to let a jury determine if the speech was defamatory and what if any damages they are entitled to. *Stuart*, 427 U.S. at 589 (Brennan, J., concurring); Chemerinsky, 57 Syracuse L.Rev. at 169 (“Courts have long recognized that damages, not injunctions, are the appropriate remedy in a defamation action.”). Even allegations of harm to Plaintiffs’ business do not provide a shortcut around the judicial process and allow Plaintiffs to restrain Defendant’s speech. Consequently, Plaintiffs’ request for a preliminary injunction should be denied.

## **II. Plaintiffs Cannot Show a Likelihood of Success on Their Defamation Claims**

Plaintiffs are not entitled to a preliminary injunction enjoining Defendant’s speech. The First Amendment and the applicable case law compel this result. An analysis of the requirements for a preliminary injunction only reinforces this conclusion. Plaintiffs’ failure to establish a likelihood of success is fatal to a request for preliminary injunction and cannot be overcome no matter what the potential harm is. *Curtis v. Thompson*, 840 F.2d 1291, 1296 (7th Cir. 1988). To establish likelihood of success in a defamation claim, Plaintiffs must prove: (1) a defamatory assertion of fact, (2) publication of the defamatory assertion; and (3) injury to the plaintiff’s reputation. *Ameritech*, 2003 WL 21078026, at \*2. “The first requirement, a defamatory assertion of fact, can be broken down into two components; the words must be defamatory and there must be a statement of fact rather than opinion.” *Id.* In cases where the plaintiff is a public figure, there can be no liability for defamation absent a showing of actual malice (i.e. actual knowledge of falsity or a reckless disregard of falsity). *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80

(1964) (enumerating this standard of liability for “public officials”); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967) (extending the *Sullivan* standard to all “public figures”).

Here Plaintiffs cannot establish a likelihood of success on the merits for two reasons: (1) Defendant’s statements were non-actionable opinion, rhetorical hyperbole, or “cybergripping”; and (2) Plaintiffs have not proven that Defendant published the statements with actual knowledge of their falsity or with reckless disregard for the truth.

A. Defendant’s statements were opinion, rhetorical hyperbole, or “cybergripping”

Plaintiffs cannot prevail on their defamation claims because Defendant’s allegedly defamatory statements are statements of opinion about public figures and thus are protected by the First Amendment. An expression of opinion is not actionable as defamation and is protected by the First Amendment. *Wilkow v. Forbes, Inc.*, 241 F.3d 552, 555 (7th Cir. 2001); *Ameritech*, 2003 WL 21078026, at \*2.

The gist of Plaintiffs’ claim is that Defendant defamed them when he published statements calling Plaintiffs “fraudulent scammers”; “liars, cheaters, and scumbags”<sup>1</sup>; “crooked”; etc. Dkt. 9 at 10. These statements are expressions of opinions regarding Plaintiffs and their business practices and thus are not actionable. “[A]n author’s opinion about business ethics isn’t defamatory under Illinois law[.]” *Wilkow*, 241 F.3d at 556.

In *Wilkow*, the defendant wrote an article in which she described the plaintiff’s conduct using terms such as “stiffing”, “rob”, and “pleaded poverty,” which the plaintiff alleged were false and defamatory. *Id.* at 556. The Court held that these statements were statements of opinion

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<sup>1</sup> It is important to note this allegedly defamatory statement “Like I tell everyone I believe 99% of the dealers out there are liars, cheaters & scumbags...” (Dkt. 9 at 10) is a statement made by Plaintiff, Parin Shah, and not by David Bates. Shah wrote the statement which is now being called defamatory on the [www.luxury4play.com](http://www.luxury4play.com) forum. A copy of Shah’s posting on that forum is attached as **Exhibit C**.

describing the defendant's objection to plaintiff's behavior and business ethics and as such were not defamatory. *Id.* The Court noted that "an author's opinion about business ethics isn't defamatory under Illinois law" and neither is "an allegation of greed[.]" *Id.* at 556-57. "Illinois," the court reasoned, "does not attach damages to name-calling." *Id.* at 557(citing *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988) (collecting cases where terms such as "sleezy" and "rip-off" were found to be non-actionable); see also *EventMedia Int'l, Inc. v. Time Inc. Magazine Co.*, 1992 WL 321629, at \*4 (S.D.N.Y. Oct. 26, 1992) (finding that referring to plaintiffs as "crooks" was non-actionable statement of opinion).

In *Horowitz v. Baker*, an Illinois court determined that defendant's use of the words "sleezy," "cheap," "pulled a fast one," and "rip-off" to describe a plaintiff's dealings with local government were non-actionable expressions of "rhetorical hyperbole" and not defamatory statements implying illegal conduct by plaintiff. 523 N.E.2d 179, 182-83 (Ill.App. 1988). In holding that the statements were not defamatory, the court relied heavily on *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 13 (1970). In *Bresler*, the plaintiff alleged that defendant's use of the term "blackmail" was defamatory because it imputed the commission of the crime of blackmail. *Id.* at 13. The Supreme Court rejected this argument and found the statement to be "nothing more than rhetorical hyperbole." *Id.* at 14.

In this case, Defendant's statements express his distaste with Plaintiffs and Plaintiffs' business practices. As *Wilkow*, *Horowitz*, and *Bresler* hold, calling Plaintiffs names like "crooks," "scammers," and "scumbags" is simply not defamatory. Name-calling by its very nature is meant to portray the person in a negative light. But applying the reasoning of *Wilkow*, the fact that Defendant's opinions are not positive does not make them defamatory. Defendant is not limited to expressing only positive opinions about Plaintiffs. On the contrary, Defendant may

express his negative opinions of Plaintiffs, their ethics and business practices using even over-the-top hyperbole without liability for defamation.

It is irrelevant to this Court's analysis whether or not Defendant's opinions negatively affect Plaintiffs' business. Consumers, like the Defendant, are permitted to criticize a business without liability. *See Bose Corp.*, 466 U.S. 485 (1984); *Keefe*, 402 U.S. 419; *Taubman*, 319 F.3d at 778 ("And although economic damage might be an intended effect of [defendant's] expression, the First Amendment protects critical commentary when there is no confusion as to source, even when it involves the criticism of a business.").

A defamation claim requires a statement of fact. The applicable case law holds that opinions, rhetorical hyperbole, and cybergripping are not statements of fact. *See Bresler*, 398 U.S. at 13; *Wilkow*, 241 F.3d at 556; *Taubman*, 319 F.3d at 772 (defining cybergripping); *Horowitz*, 523 N.E.2d 182-83. Defendant's allegedly defamatory statements are opinion, rhetorical hyperbole, and cybergripping meant to express Defendant's opinions about Plaintiffs and their business practices. Without a statement of fact, Plaintiffs cannot establish a likelihood of success on the merits which is fatal to their request for a preliminary injunction. *Curtis*, 840 F.2d at 1296.

B. Plaintiffs, as public figures, must prove actual malice

Plaintiffs cannot establish a likelihood of success on the merits because, they must establish that Defendant made any allegedly defamatory statements with actual knowledge of its falsity or reckless disregard for the truth. Public figures like Plaintiffs are afforded less protection against defamation. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (describing a public figure as one who as "general fame or notoriety in the community..."). The Supreme Court explained the reasoning for this in *Wolston v. Reader's Digest Association, Inc.*:

[First, public figures] enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to

counter criticism and expose the falsehood and fallacies of defamatory statements. . . [And second, the Supreme Court made] a normative consideration that public figures are less deserving of protection than private persons because public figures, like public officials, have “voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”

443 U.S. 157, 164 (1979).

Plaintiffs by their own admission enjoy notoriety both in the Chicago-land area and online. *See* Dkt. 9 at 4-5. Plaintiffs list the numerous ways in which they advertise and promote CMC. *See id.* at 4. With regards to their web presence, Plaintiffs contend that CMC “has become extremely successful with hundreds of potential buyers registered with their websites and millions of persons visiting their websites.” *Id.* at 5. Plaintiff Parin Shah as co-owner of CMC takes an extremely public role in promoting his dealership and acting as the face of CMC. *See* <http://triblocal.com/west-chicago/community/stories/2012/03/building-a-business-legend-chicago-motor-cars-fulfills-driving-dreams/>.

As public figures, Plaintiffs can only show a likelihood of success on their defamation claims by proving that Defendant published his statements with actual knowledge of its falsity or reckless disregard of the truth. *See Harris v. Quadracci*, 48 F.3d 247, 250 (7th Cir. 1995). Plaintiffs have not done this.

Plaintiffs argue that many of Defendant’s statements are “false and misleading” but are silent on Defendant’s subjective knowledge of the truth or falsity of the statements. Without proof of actual malice, plaintiffs cannot establish any likelihood of success on their defamation claim. *Harris*, 48 F.3d at 252-53 (“Our review of the record suggests that [plaintiff] has failed to [establish a defamation claim.] First, neither [plaintiff’s] complaint nor her brief on appeal claims that the named defendants published the alleged defamatory material with ‘actual malice.’ Second, [plaintiff] has presented absolutely no evidence that these defendants actually doubted

[the information they received from a third party about plaintiff.]”). Thus, Plaintiffs’ request for a preliminary injunction should be denied. *Curtis*, 840 F.2d at 1296.

### **III. Plaintiffs have an adequate remedy at law**

A preliminary injunction should not be entered because Plaintiffs have an adequate remedy at law for their common law defamation and tortious interference claims and their statutory claims. An injunction should not be entered where Plaintiffs have an adequate remedy at law. *Lancaster Found., Inc. v. Skolnick*, 1992 WL 211063, at \*5 (N.D. Ill. Aug. 21, 1992). Plaintiffs have an adequate remedy at law where their injuries can be compensated by money damages. *Id.* Plaintiffs’ allegations that continuing defamation will injure their business, reputation, and goodwill are insufficient to establish no adequate remedy at law because such injuries “are all amenable to pecuniary valuation and can be adequately compensated with money damages.” *Ameritech*, 2003 WL 21078026, at \*2 (collecting cases).

In this case, Plaintiffs allege that Defendant’s statements have “caused damage to Plaintiffs’ business and reputation in the loss of at least twenty (20) potential buyers.” Dkt. 9 at 21. Elsewhere, Plaintiffs allege that as a result of Defendant’s statements “Plaintiffs’ perspective business contracts with certain third-parties were not ripened, while others were terminated.” *Id.* at 22. These alleged injuries are compensable with money damages. *Ameritech*, 2003 WL 21078026, at \*2. In fact, Plaintiffs have already calculated the amount of their alleged damages. In Plaintiffs’ motion, they request that the Court “award[] Plaintiffs compensatory damages for harm they have suffered as a result of Defendant’s actions in violation of all counts above, including and without limitation, the cost of payments Plaintiffs would have received from the loss of twenty (20) buyers, which has resulted in at least over \$80,000.00” Dkt. 7 at ¶4g. While Defendant does not concede that Plaintiffs are entitled to any damages, Plaintiffs’ ability to put a

dollar figure on their alleged damages shows that there is an adequate remedy at law. *Lancaster*, 1992 WL 211063, at \*5. For this reason, Plaintiffs' motion should be denied.

#### **IV. Balance of Harms Does not Weigh in Plaintiffs' Favor because Even a Temporary Injury to Free Speech is Immeasurable and Irreparable**

Plaintiffs are not entitled to a preliminary injunction because the balance of harms does not weigh in Plaintiffs' favor. The harm that would be suffered by Defendant from the enjoining his constitutional rights far outweighs the speculative harm Plaintiffs allege they will suffer.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). On the contrary, injury to "business, reputation and good will... are all amenable to pecuniary valuation and can be adequately compensated with money damages." *Ameritech*, 2003 WL 21078026, at \*2.

Allegations of defamation are not the same as proof of defamation. By preliminarily enjoining allegedly defamatory speech, this Court runs the risk of enjoining speech that is later adjudged to be protected by the First Amendment. The Supreme Court has found this to be an unacceptable risk. *Curtis Pub. Co. v. Butts*, 388 U.S. at 149 ("It is because of the personal nature of [free speech] that we have rejected all manner of prior restraint on publication, despite strong arguments that if the material was unprotected the time of suppression was immaterial."). The high value placed on preserving First Amendment rights places a thumb on the scale in favor of preserving Defendant's free speech rights.

If Plaintiffs' preliminary injunction is granted, Defendant stands to suffer irreparable harm through loss of his First Amendment freedoms. The harm Plaintiffs allege will occur if the injunction is denied and Defendant is later found to be liable can be compensated with money damages. There is even a question of whether Plaintiffs have suffered or will suffer *any* harm at all. By Plaintiffs' own admission—a comment Plaintiffs left on one of Defendant's Youtube vid-

eos, Defendant's posts about Plaintiffs are giving Plaintiffs publicity and helping them sell more vehicles. Plaintiffs' comment is attached hereto as **Exhibit D**. Plaintiffs even refer to Defendant as "salesman of the month." **Ex. D**. In any event, irreparable harm far outweighs reparable harm meaning that Plaintiffs' motion should be denied.

**V. It is in Public Interest to Have Dissenting Viewpoints Represented in Marketplace of Ideas**

The Court should deny Plaintiffs' request for a preliminary injunction because it is in the public's interest to have dissenting viewpoints represented in the marketplace of ideas. In determining whether or not to grant a preliminary injunction, the Court must take into account possible harm to the public that would result from granting the injunction. *Ameritech*, 2003 WL 21078026, at \*1. It is in the public's interest to have "the widest possible dissemination of information from diverse and antagonistic sources." *Sullivan*, 376 U.S. at 266. "[P]rotecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006).

Here, Defendant is entitled to express his opinions about Plaintiffs and their business—even if those opinions are negative and may negatively affect Plaintiffs' business. *See Keefe*, 402 U.S. at 419 (finding that defendant had constitutionally protected right to criticize plaintiff and his business practices); *Wilow*, 241 F.3d at 556-57 (dismissing defamation claim because defendant had a right to criticize plaintiff's business ethics); *see also Taubman*, 319 F.3d at 778 (finding that injunction against [www.taubmansucks.com](http://www.taubmansucks.com) website negatively impacted the public's interest because it enjoined First Amendment rights). As Plaintiffs note in their brief, they "offer a type of product for which safety and features of the automobiles are key purchasing decisions." Dkt. 9 at 12. If safety and features are key issues in the purchasing decision, it is in the public's interest to be informed. This means having access to both positive and negative opinions

on these issues. This is the very purpose of review websites (e.g. [www.complaintsboard.com](http://www.complaintsboard.com), [www.reviewstalk.com](http://www.reviewstalk.com), [www.ripoffreport.com](http://www.ripoffreport.com), [www.dealerrater.com](http://www.dealerrater.com), etc.), consumer reports, eBay feedback, Amazon reviews, etc.

Plaintiffs are not seeking to enjoin overly positive reviews of their business and services only negative opinions like Defendant's. The public interest is not served if only dissenters are silenced. *See Ameritech*, 2003 WL 21078026, at \*3. Quite the opposite. The public's interest will be harmed unless negative opinions are allowed to remain in the marketplace of ideas.

If Plaintiffs believe that Defendant's opinions or websites are wrong, false, or misleading, the remedy is countering those opinions with competing opinions not silencing dissenting viewpoints. *Gertz*, 418 U.S. at 339-40. Indeed, because Plaintiffs are public figures they "enjoy significantly greater access than private individuals to channels of effective communication, which enable them through discussion to counter criticism and expose the falsehood and fallacies of defamatory statements." *Wolston*, 443 U.S. at 164. Plaintiffs' brief goes as far as to list all the channels of communication available to them to counter perceived false statements: internet, brochures, flyers, trade magazines, newspaper, radio, and television. Dkt. 9 at 4. The public's interest is served if Plaintiffs' use those channels available to them; the public's interest is harmed if Defendant's statements are removed and enjoined. Consideration of the public's interest dictates that Plaintiffs' motion be denied.

## **VI. Plaintiffs do not Have a Likelihood of Success on Lanham Act Claims**

This Court should not enter a preliminary injunction because Plaintiffs cannot establish that they have a likelihood of success on the merits of their false advertising claims under the Lanham Act. This is fatal to their request for a preliminary injunction. *Curtis*, 840 F.2d at 1296. No amount of harm can override Plaintiffs' failure to establish a likelihood of success and the

court need not even address the other factors. *Curtis*, 840 F.2d at 1296; *Ill. Council on Long Term Care v. Bradley*, 759 F. Supp. 1309, 1313 (N.D. Ill. 1991) (“Where the plaintiff is unable to show likelihood of success on the merits, the harm to the plaintiff will never override this failure. Denial of an injunction for failure to establish such likelihood of success is appropriate and proper.”) (internal cites omitted).

Plaintiffs have no likelihood of success on their false advertising claims under the Lanham Act for two equally fatal reasons. First, Plaintiffs do not have standing to bring such a claim. Second, Plaintiffs cannot establish that Defendant’s statements are “commercial advertising or promotion” which is essential for application of the Lanham Act.

A. Plaintiffs do not have standing to bring Lanham Act claims because Defendant is not a commercial competitor

Plaintiffs cannot prevail on their claim without standing. *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011). “[T]o establish standing to bring a false advertising claim under the Lanham Act, the plaintiff must allege that it is a commercial competitor of the defendant and that it has suffered or will likely suffer a ‘discernible competitive injury.’” *Marvelous Day Elec. (S.Z.) Co., Ltd. v. Ace Hardware Corp.*, 2012 WL 4579511, at \*2 (N.D. Ill. Oct. 2, 2012); *see L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993) (“Because [Plaintiff] is not in the computer business and thus is not a competitor of [Defendant], [Plaintiff] does not have standing to raise the false advertising claim.”); *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 942 F. Supp. 209, 215 (S.D.N.Y. 1996) aff’d, 314 F.3d 48 (2d Cir. 2002) (explaining that in a false advertising claim “the allegedly false representations must be made by someone who is in commercial competition with the plaintiff.”).

In *L.S. Heath & Son, Inc.*, Heath, a chocolate manufacturer, sued AT&T for false advertising under the Lanham Act. 9 F.3d at 575. The Seventh Circuit found that Heath did not have

standing to bring its false advertising claim “[b]ecause Heath is not in the computer business and thus is not a competitor of AT & T[.]” *Id.* Similarly, the court in *Marvellous Day* held that a manufacturer of LED holiday lights did not have standing to bring a false advertising claim against an importer of its lights and a retail store chain who sold the plaintiff’s lights because the manufacturer was not a commercial competitor of either defendant. 2012 WL 4579511, at \*1-3. Although all three parties sold the same LED holiday lights, they operated at different levels of the supply chain and thus were not commercial competitors. *Id.* at 3.

In both *Heath* and *Marvellous Day*, the courts found that a plaintiff that is not a commercial competitor of the defendant can never prevail on a false advertising claim. The result here should be no different. Plaintiffs do not allege that they are commercial competitors of Defendant. Plaintiffs cannot allege this because they are not commercial competitors of Defendant. Defendant does not sell automobiles or provide any services that compete with those provided by Plaintiffs. Ex. A, ¶¶2-3. Thus, Plaintiffs cannot meet even the threshold standing requirements to bring a false advertising claim against Defendant and thus cannot establish even a negligible likelihood of success on their false advertising claim. The cases cited in Plaintiffs’ brief do not compel a different result. Each case cited by Plaintiffs involves parties that are commercial competitors. That is not the situation in this case. Plaintiffs do not have standing to bring their Lanham Act claim, and thus their motion should be denied. *Curtis*, 840 F.2d at 1296.

B. Lanham Act does not apply because Defendant’s statements are not “commercial advertising or promotion”

The second fatal flaw in Plaintiffs’ Lanham Act claim is that Defendant’s statements are not “commercial advertising or promotion” and thus Section 43(a) of the Lanham Act does not apply. 15 U.S.C. §1125(a)(1)(B); see *Installation Services, Inc. v. Elec. Research, Inc.*, 2005 WL 645244 (N.D. Ill. Mar. 21, 2005) (dismissing false advertising claim because “the representations

alleged by [plaintiff] fail to qualify as ‘commercial advertising or promotion’ within the meaning of the Lanham Act.”).

Although the Lanham Act does not define the term “commercial advertising or promotion,” multiple Circuits and numerous Districts, including the Northern District of Illinois, have adopted a four prong test for defining these terms. *See e.g. Podiatrist Ass'n, Inc. v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 19 (1st Cir. 2003); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1181 (9th Cir. 2003); *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 56–58 (2d Cir. 2002) (adopting the first, third, and fourth prongs, but not reaching whether the second prong applies); *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1273–74 (10th Cir. 2000); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996); *Installation Services, Inc.*, 2005 WL 645244, at \*2 (applying the three prongs used in *Fendi USA, Inc.* and dismissing Lanham Act claim because allegedly false representations did not meet each prong of test); *Johnson Controls, Inc. v. Exide Corp.*, 152 F. Supp. 2d 1075, 1081 (N.D. Ill. 2001). Under the four-prong test, a statement is commercial advertising or promotion only if it is: (1) commercial speech; (2) made by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant’s goods or services; and (4) must be disseminated sufficiently to the relevant purchasing public to constitute “advertising” or “promotion” within that industry. *Johnson Controls, Inc.*, 152 F.Supp.2d at 1081.

Here, Plaintiffs cannot establish that Defendant’s statements were “commercial advertisement or promotion” and thus they cannot show a likelihood of success on their Lanham Act claim. Plaintiffs have not alleged nor can they establish either the second or third prong of the test for defining commercial advertising or promotion.

Defendant does not sell automobiles or provide any services whatsoever in connection with his posts on the internet. Ex. A at ¶¶2-3. He is simply expressing his opinions about Plaintiffs. Id. at ¶10. Because Defendant is not selling any goods or providing any services, he is not and cannot be considered in commercial competition with Plaintiffs. *Taubman*, 319 F.3d at 778.

For the same reasons, this Court cannot conclude that Defendant made any of his statements “for the purpose of influencing consumers to buy [Defendant’s] goods or services[.]” *Johnson Controls, Inc.*, 152 F.Supp.2d at 1081. Defendant is simply expressing his opinion about Plaintiffs and attempting to inform and warn potential consumers about Plaintiffs’ business practices. The Lanham Act simply does not apply to statements made by consumers commenting or criticizing a business. *See Lamparello*, 420 F.3d at 313. Plaintiffs cannot satisfy two of the four prongs of the test and thus are unable to establish that Defendant’s statements were commercial advertising or promotion. In the absence of a commercial advertisement or promotion, Plaintiffs cannot prevail on their Lanham Act claim. *Installation Services, Inc.*, 2005 WL 645244, at \*2 (dismissing false advertising claim because “the representations alleged by [plaintiff] fail to qualify as ‘commercial advertising or promotion’ within the meaning of the Lanham Act.”); *Johnson Controls, Inc.*, 152 F.Supp.2d at 1081 (same).

The Lanham Act’s limited applicability to “commercial advertising or promotion” is purposeful. It is intended to prohibit false misrepresentations of fact by a business or individual seeking to gain an edge over a competitor while protecting the First Amendment rights of individuals to comment and criticize a business. *See Lamparello*, 420 F.3d at 313 (“Congress left little doubt that it did not intend for trademark laws to impinge the First Amendment rights of critics and commentators.”). “Hence, only commercial speech that a competitor employs for the express purpose of influencing consumers to buy the competitor’s goods or services is actionable

under section 43(a).” *EventMedia Int’l, Inc. v. Time Inc. Magazine Co.*, 1992 WL 321629, at \*8 (S.D.N.Y. Oct. 26, 1992); *Wojnarowicz v. Am. Family Ass’n*, 745 F.Supp. 130, 142 (S.D.N.Y. 1990) (explaining that the Lanham Act only applies to statements made “in connection with the sale of goods or services by the defendant.”).

The Lanham Act “has never been applied to stifle criticism of the goods or services of another by one, such as a consumer advocate, who is not engaged in marketing or promoting a competitive product or service.” *Wojnarowicz*, 745 F.Supp. at 141; see *Lamparello*, 420 F.3d at 313-14. Congress was crystal clear on this point. As Rep. Kastenmeir explained, the Lanham act applies “only to false or misleading ‘advertising or promotion[.]’” 135 Cong.Rec. 1207, 1217 (April 13, 1989). It specifically does not apply to statements “*which raise free speech concerns, such as a Consumer Report which reviews and may disparage the quality of ... products, [and] misrepresentations made by interested groups which may arguably disparage a company and its products....*” *Id.* (emphasis added). These types of statements, he explained, “would be judged by first amendment law ... and not section 43(a) law....” *Id.*

Plaintiffs, in this case, attempt to misuse the Lanham Act to stifle Defendant’s criticism. The problem with this approach is that the legislative history and case law make it clear that the Lanham Act simply does not apply to Defendant’s statements. See e.g. *EventMedia Int’l, Inc.*, 1992 WL 321629, at \*4 (dismissing Lanham Act claim where defendant referred to plaintiffs as “crooks” because it was not a “false or misleading representation of fact made ‘on or in connection with any services.’ It is a statement of opinion not made in connection with any services, and thus is not actionable under section 43(a).”). Defendant’s statements are opinions and criticisms made on websites such as complaintsboard.com and reviewstalk.com, which, by their very design, are places for consumers to critique a company’s goods and services. That Defendant’s

statements “may arguably disparage a company and its products” does not make them actionable under the Lanham Act. 135 Cong.Rec. at 1217. His statements are to “be judged by first amendment law ... and not section 43(a) law....” *Id.* Because the Lanham Act does not apply to Defendant’s statements, this Court should conclude that Plaintiffs cannot establish a likelihood of success on the merits of their Lanham Act claim and deny their motion. *Curtis*, 840 F.2d at 1296.

**VII. Plaintiffs Have no Likelihood of Success on UDTPA Claim because Defendant’s Comments were not Made in the Course of “Business, Vocation, or Occupation”**

Because Plaintiffs cannot establish a Lanham Act claim their Illinois Uniform Deceptive Trade Practice Act (“UDTPA”) claims must necessarily fail too. A UDTPA claim “must rise or fall based on the Lanham Act claim... because the legal inquiry is the same under the Lanham Act as under the Consumer Fraud Act and the Deceptive Trade Practices Act.” *MJ & Partners Rest. Ltd. P’ship v. Zadikoff*, 10 F. Supp. 2d 922, 929 (N.D. Ill. 1998). The UDTPA applies only when a person engages in deceptive trade practices “in the course of his or her business, vocation, or occupation.” 815 ILCS 510/2.

Defendant’s statements are opinions and criticisms. They were not made in the course of Defendant’s business, vocation, or occupation. Ex. A at ¶10. The impetus for Defendant’s statements is a bad car-buying experience with Plaintiffs. *Id.* at ¶4. As a result of this negative experience, Defendant has decided to inform other potential consumers about his experience to warn them about what he considers to be Plaintiffs’ offensive and dishonest business practices. Similarly, he has collected and posted the negative experiences others have written about on the internet. *Id.* at ¶10. In no event were the statements posted by Defendant on Youtube, Facebook and other websites made in the course of his business, vocation, or occupation. *Id.* at ¶¶2-3, 8-9.

Plaintiffs cannot establish even a negligible likelihood of success on their Lanham Act claims. Likewise their UDTPA claims, which are subject to an identical legal analysis, suffer the

same deficiency. The failure to establish any likelihood of success on either their Lanham Act or UDTPA claims compels denial of Plaintiffs' motion. *Curtis*, 840 F.2d at 1296.

### **VIII. Plaintiffs are not Entitled to a Preliminary Injunction on Their Cybersquatting Claim**

Plaintiffs cannot establish that Defendant had a bad faith intent to profit from his ownership of two domain names at issue and thus they cannot prevail on their cybersquatting claim. A plaintiff cannot establish a likelihood of success on the merits of a cybersquatting claim under the Anti-Cybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. §1125, unless he can establish that Defendant had "a bad faith intent to profit" from the domain name. *Flentye v. Kathrein*, 485 F. Supp. 2d 903, 914 (N.D. Ill. 2007). Use of another's mark is not a violation of the ACPA if the use is a "bona fide noncommercial or fair use." *Lamparello*, 420 F.3d at 314. "The legislature believed this provision necessary to 'protect[ ] the rights of Internet users and the interests of all Americans in free speech and protected uses of trademarked names for such things as parody, comment, criticism, comparative advertising, news reporting, etc.'" *Id.*

In *Flentye*, the court found that the plaintiff had sufficiently plead a cybersquatting claim against defendants, plaintiff's direct competitors, who registered domain names using his company's mark. 485 F.Supp.2d at 909. In making its ruling, the court distinguished the Sixth Circuit case of *Lucas Nursery & Landscaping, Inc.*, 359 F.3d 806 (6th Cir. 2003), based on the fact that the defendant in *Lucas Nursery* registered the domain name only to complain about the plaintiff and not to profit from her ownership. *Id.* at 915. The court found the case inapplicable in light of the fact that the *Flentye* parties were direct competitors. *Id.*

Since the instant Plaintiffs and Defendant are not direct competitors, *Lucas Nursery* is highly applicable and factually similar to this case. The plaintiff, Lucas Nursery and Landscaping, sued a woman who registered the domain name www.lucasnursery.com. 359 F.3d at 807.

The defendant used the domain name to create a website “on which she detailed her complaints against Lucas for its allegedly bad service in landscaping her front yard.” *Id.* The court affirmed the grant of summary judgment in defendant’s favor on the ACPA claim. *Id.* at 811.

The court found that even though the defendant did not own any rights to the mark or names used in her domain name, she did not violate the ACPA because she did not have a “bad faith intent to profit.” *Id.* at 809-11. The Court noted that “most important to our conclusion are, Grosse’s actions, which seem to have been undertaken in the spirit of informing fellow consumers about the practices of a landscaping company that she believed had performed inferior work on her yard.” *Id.* at 811. “The practice of informing fellow consumers of one’s experience with a particular service provider[,]” the court reasoned, was not the “paradigmatic harm that the ACPA was enacted to eradicate- the practice of cybersquatters registering hundreds of names in an effort to sell them to the legitimate owners of the mark[.]” *Id.* at 810.

The instant Plaintiffs have the same problem with their ACPA claim that the *Lucas Nursery* plaintiffs did: they cannot establish that Defendant had a bad faith intent to profit from use of the domains. The ACPA permits Defendant’s registration of two domain names for the purpose of criticizing Plaintiffs and warning other potential consumers of his experience with Plaintiffs. *Id.* at 810; *Lamparello*, 420 F.3d at 314 (explaining that ACPA permits use of another’s mark for, *inter alia*, criticism). Defendant has never attempted to profit from the ownership of his domain names by offering to sell them to Plaintiffs. While Defendant did list the domain name [www.chicagomotorcars.us](http://www.chicagomotorcars.us) for sale to the general public for approximately three days, this does not constitute a bad faith intent to profit from the domain or warrant entry of a preliminary injunction. First, Defendant did not offer to sell the domain to Plaintiffs. Second, Defendant used the domain name for months before listing it for sale. *See* 15 U.S.C. §1125(d)(1)(B)(i)(VI) (stat-

ing that listing a domain for sale is evidence of bad faith only where a person does so “without having used or having and intent to use the domain name...”). Third, Defendant has since removed any reference to the domain name being for sale. *See Taubman*, 319 F.3d at 775 (“A preliminary injunction is proper only to prevent an on-going violation.”).

Plaintiffs further cannot establish that Defendant’s domains violate the ACPA because Defendant has made no commercial use of the domain names. Plaintiffs concede this in their brief. *See* Dkt. 9 at 16. The ACPA permits Defendant to use Plaintiffs’ mark in a domain name so long as it is for noncommercial purposes such as expressing opinions. *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1058 (10th Cir. 2008) (finding no ACPA violation because “Defendants’ use was entirely noncommercial[.]”); *Lamparello*, 420 F.3d at 320 (finding that “use of a domain name for purposes of ... comment, [and] criticism constitutes a bona fide noncommercial or fair use”) (internal quotations and citations omitted). Defendant has registered the domain names complained of for the noncommercial purpose of informing other consumers about his experiences with Plaintiffs. Ex. A. at ¶10. As the *Lucas Nursery* court held, the ACPA does not stop him from doing this.

Plaintiffs argue that Defendant’s use of the CMC mark in their domain names establishes bad faith because Defendant’s websites somehow “creat[e] a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site[.]” 15 U.S.C. §1125(d)(1)(B)(i)(V). Simple use of CMC’s mark in Defendant’s domain names does not mean consumers will be confused into believing that Plaintiffs are affiliated with Defendant’s sites. *See e.g. Lamparello*, 420 F.3d at 315 (finding no likelihood of confusion between two sites that “employ similar marks online” where defendant’s “website intend[ed] only to provide a forum to criticize ideas, not to

steal customers.”); *Bally Total Fitness Holding Corp. v. Faber*, 29 F.Supp.2d 1161, 1164 (C.D. Cal. 1998) (finding no likelihood of confusion from “compupix.com/ballyssucks” site).

A common thread that runs through all the content on Defendant’s websites: it is critical of Plaintiffs. Despite sharing a couple of words there is absolutely no chance that anyone would believe that Plaintiffs are affiliated with Defendant’s websites. *See New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 308-09 (9th Cir.1992) (stating that use of a mark to solicit criticism of the markholder implies the markholder is not the sponsor of the use). No one is going to believe that Plaintiffs maintain a site devoted entirely to criticizing themselves and compiling all the negative information about them on the internet. *See e.g. Lamparello*, 420 F.3d at 315(“No one would believe that Reverend Falwell sponsored a site criticizing himself, his positions, and his interpretations of the Bible.”). Plaintiffs’ inability to establish a likelihood of success on the merits on their cybersquatting claim is fatal to their request for a preliminary injunction and thus their motion should be denied. *Curtis*, 840 F.2d at 1296.

### **CONCLUSION**

For the reasons stated herein, Defendant respectfully requests that this Court deny Plaintiffs’ motion for a preliminary injunction in its entirety.

DAVID BATES

By: /s/ Andrew C. Murphy  
One of his attorneys

Peter S. Lubin  
Vincent L. DiTommaso  
Andrew C. Murphy  
DITOMMASO ♦ LUBIN, P.C.  
17W 220 22nd Street, Suite 410  
Oakbrook Terrace, IL 60181  
(630) 333-0000