

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

KB HOME, a Delaware corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	Case No.:
ANDREW SMITH; DANIEL KOEHLER;)	
PATRICK MCGETTIGAN; WILLIAM)	
CRISMON; and ARMANDO OYOLA-)	
DELGADO,)	
)	
Defendants.)	

**COMPLAINT FOR DAMAGES, INJUNCTIVE RELIEF, AND TRANSFERRED
OWNERSHIP OR CANCELLATION OF INFRINGING DOMAIN NAME**

Plaintiff, KB Home (“KB Home” or “Plaintiff”), sues defendants, Andrew Smith (“SMITH”), Daniel Koehler (“KOEHLER”), Patrick McGettigan (“MCGETTIGAN”), William Crismon (“CRISMON”), and ARMANDO OYOLA-DELGADO (“DELGADO”) (collectively, the “Defendants”), and, in support, states as follows:

NATURE OF THE ACTION

1. This is an action based on violations of the Anti-Cybersquatting Consumer Protection Act (“ACPA”) and the Electronic Communications Privacy Act (“ECPA”), both of which arise under federal law.

2. This is also an action based on civil conspiracies among Defendants and others to carry out violations of the ACPA and ECPA under Florida common law.

PARTIES

3. Plaintiff KB Home is a Delaware corporation that maintains its principal place of business in Los Angeles, California.

4. Defendant SMITH is a Florida citizen who is domiciled at 8613 Majestic Elm Court, Lakewood Ranch, Florida 34202.

5. Defendant KOEHLER is a Florida citizen who is domiciled at 7330 Black Walnut Way, Lakewood Ranch, Florida 34202.

6. Defendant MCGETTIGAN is a Florida citizen who is domiciled at 8745 Spruce Hills Court, Lakewood Ranch, Florida 34202.

7. Defendant CRISMON is a Florida citizen who is domiciled in the State of Florida.

8. Defendant DELGADO is a Florida citizen who is domiciled in the State of Florida.

9. All conditions precedent to this action have been performed, waived, or excused.

10. KB Home retained the undersigned attorneys to represent it in this action and agreed to pay its attorneys a reasonable fee for their services.

JURISDICTION

11. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a) because KB HOME's claims for violations of the ACPA, 15 U.S.C. § 1125(d), arises under federal law and 28 U.S.C. § 1331 because KB Home's claims for violations of the ECPA, 18 U.S.C. § 2511 *et seq.*, arise under federal law. This Court also has supplemental

jurisdiction pursuant to 28 U.S.C. § 1367 because KB Home's state law conspiracy claims are so related to the federal claims that they form part of the same case or controversy.

VENUE

12. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(a) and (b), because the Defendants are domiciled in this District, and because a substantial part of the events giving rise to the claims herein occurred in this District.



FACTUAL BACKGROUND

13. Since its founding in 1957, KB Home has built over half a million residential homes throughout the United States. KB Home is one of the largest and most recognized homebuilders in the nation, and its stock is publically traded on the New York Stock Exchange.

14. Since 1974, KB Home has referred to itself as, and promoted itself with, the KB name and trademark, and has been known throughout the United States in the real estate development industry, the financial community, and the general public by the KB name and trademark. KB Home has often been referred to in professional business magazines, investor publications, real estate trade journals, and nationally distributed publications by the KB name and trademark.

15. Because of KB Home's size and the extent of publicity that it regularly receives, during the 1970s, 1980s, and since, the industry and general public came to associate KB, as that name and mark was used in connection with residential real estate development and home building services, with KB Home. Accordingly, KB is KB Home's proprietary trade name and service mark.

16. In January 2001, KB Home adopted the KB HOME trademark as its official corporate name. KB Home also adopted and began using the following design forms of KB

HOME:  and . The official adoption of the KB HOME name has been accompanied by a major investment in advertising and promotional activities throughout the United States, including television, radio, Internet and newspaper advertisements, featuring the KB HOME name and mark.

17. In addition to extensively advertising the KB Home Marks (as hereinafter defined) in television, radio, and print media, KB Home maintains an interactive website on the Internet. The website can be accessed under the “KBHome.com” domain name, which is extensively advertised.

18. The KB Home Marks are arbitrary, fanciful, and inherently distinctive.

19. As a result of KB Home’s longstanding and extensive use of the KB Home Marks in connection with its business, and as a result of widespread advertising and promotion of its services, the KB Home Marks have acquired a high degree of recognition, fame and distinctiveness throughout the United States, including Florida, as a symbol of quality and value in the field of residential real estate construction and development. The KB Home Marks are strong and deserving of a broad scope of protection against the use of confusingly similar marks, and are of great value to Plaintiff.

20. KB Home owns and has used the registered trademarks identified below:

a. Incontestable United States Trademark Registration No. 2,706,002 for the “KB” typed service mark used in construction services, namely, planning, laying out, and

construction of residential communities; construction of single family and multiple family dwelling units; real estate development, in International Class 37, issued on April 15, 2003 and based on a first use date of March 1974;

b. Incontestable United States Trademark Registration No. 2,768,634 for the “KB HOME” design service mark used in construction services, namely, planning, laying out and construction of residential communities; construction of single family and multiple family dwelling units; real estate development, in International Class 37, issued on September 30, 2003 and based on a first use date of January 17, 2001;

c. Incontestable United States Trademark Registration No. 2,832,387 for the “KB HOME” typed service mark used in construction services, namely, planning, laying out and construction of residential communities; construction of single family and multiple family dwelling units; real estate development, in International Class 37, issued on April 13, 2004 and based on a first use date of January 17, 2001;

d. Incontestable United States Trademark Registration No. 2,749,283 for the “KB HOME” design service mark used in construction services, namely, planning, laying out and construction of residential communities; construction of single family and multiple family dwelling units; real estate development, in International Class 37, issued on August 12, 2003 and based on a first use date of January 17, 2001; and

e. Incontestable United States Trademark Registration No. 2,825,554 for the “KB HOME” typed service mark used in mortgage lending and escrow services in connection with the construction and brokerage of single family and multiple family dwelling units, in International Class 36, issued on March 23, 2004 and based on a first use date of

March 6, 2002.

21. KB Home's aforementioned trademarks (the "KB Home Marks") constitute the lawful, valued, subsisting, and exclusive property of KB Home, and, as a result of the high quality of KB Home's products, services, sales, promotion, and advertising thereof, the KB Home Marks have become an intrinsic and essential part of the valuable goodwill and property of KB Home, and are well known and established to consumers and the trade as symbols identifying and distinguishing KB Home's products and services. True copies of the certificates of registration issued by the United States Patent and Trademark Office for the KB Home Marks are attached hereto as **Composite Exhibit "A."**

22. KB Home filed affidavits pursuant to sections 8 and 15 of the Lanham Act, 15 U.S.C. §§ 1058 and 1065, making the KB Home Marks incontestable. True copies of the declarations of incontestability are attached hereto as **Composite Exhibit "B."**

23. KB Home conducts business on the Internet through its website, "KBhome.com."

24. On or about June 23, 2012, SMITH registered the domain name "thekbhome.com," which is confusingly similar to the KB Home Marks. The domain name "thekbhome.com" is also confusingly similar to the domain name "KBHome.com" used on the website by KB Home in the regular course of its business. When SMITH registered the domain name "thekbhome.com," he knew that KB Home had a famous and distinct trademark in the name "KB Home," which was associated with its business.

25. On or about August 10, 2012, SMITH registered "kbhomewillowbrook.com" domain name, which is confusingly similar to the KB Home marks and incorporates the

name "Willowbrook" - the name of the KB Home development where SMITH lived at relevant times hereto. When SMITH registered the "kbhomewillowbrook.com" domain name he knew KB Home had a famous and distinctive trademark in the name "KB Home" and a development named "Willowbrook" associated with its business.

26. SMITH has also registered with a bad faith intent to profit the following domain names which are confusingly similar to KB Home trademarks and some of which also include KB Home's symbol used on the New York Stock Exchange "KBH": a) "thekbhomes.com"; b) "kb-homes-lawsuits.com"; c) "kbhinvestorsbeware.com"; d) "kbhomeforclosures.com; e) "kbhomestock.com"; f) "kbhstock.com"; g) "kbhsucks.com"; and j) "nysekbh.com."

27. KB Home was the original developer and general contractor of Willowbrook, a condominium complex in Manatee County, Florida.

28. KB Home is paying Dueall Construction, Inc. ("Dueall"), an independent contractor selected by the condominium association, to make extensive repairs to homes at Willowbrook. To date, KB Home has already paid Dueall millions of dollars for these repairs, and it is anticipated that KB Home will incur additional millions of dollars in repair costs to complete repairs at Willowbrook.

29. Defendants have all resided at Willowbrook at some time and have all owned units in Willowbrook.

ATTEMPTS TO COMPEL KB HOME TO BUY-BACK WILLOWBROOK UNITS

30. SMITH, KOEHLER, MCGETTIGAN, CRISMON, and some other Willowbrook residents have repeatedly demanded that KB Home buy-back their units at original purchase prices, plus pay them other alleged damages and costs.

31. SMITH and KOEHLER have improperly used and trafficked in KB Home Marks in the domain name at “thekbhome.com” to divert traffic from KB Home, to disparage it, damage its reputation, and otherwise cause harm to KB Home.

32. SMITH and KOEHLER have been co-administrators of the website at “thekbhome.com.” SMITH is employed in the information technology field.

33. At material times after registration, SMITH and KOEHLER employed “theKBHome.com” domain name to operate a website devoted to disparaging KB Home’s business reputation, criticizing the quality of KB Home construction, discouraging prospective buyers from purchasing homes developed by KB Home, and attempting to drive down the value of KB Home stock all with the bad faith intent to profit, by attempting to coerce KB Home into buying back their Willowbrook condominiums or otherwise paying them valuable consideration.

34. SMITH and KOEHLER have trafficked in “theKBHome.com” domain name with bad faith intent to profit by attempting to coerce KB Home into buying back their Willowbrook units or otherwise paying valuable consideration in exchange for sale or transfer of “theKBHome.com” domain name and website.

35. On or around August 6, 2012, SMITH, KOEHLER, MCGETTIGAN, and other Willowbrook homeowners engaged in an organized letter writing campaign to KB

Home executives and government officials demanding that KB Home: a) buy-back their homes at their purchase price; b) reimburse them for all closing costs, improvements, and moving expenses; and c) pay an additional percentage of their homes' values for alleged but unspecified health-related issues.

36. KOEHLER subsequently offered for sale to KB Home executives the website using the domain name "thekbhome.com."

37. SMITH and KOEHLER have used the infringing domain names and associated website with a bad faith intent to profit as expressed in various communications with KB Home that either state, suggest, or imply that the infringing domain name and associated website would be sold or exchanged for valuable consideration.

USE AND DISCLOSURE OF INTERCEPTED EMAILS TO AND FROM DUEALL'S COMPUTERS

38. Dueall has maintained a construction trailer at Willowbrook at all times material hereto, from which its employees supervise repair efforts at Willowbrook. Dueall maintains computers (the "Dueall Computers") in its construction trailer. The Dueall Computers use a mobile, password-protected hotspot to access the internet (the "WiFi Hotspot").

39. At all times material hereto, Shawn Seiler ("Mr. Seiler") was a project manager employed by Dueall who maintained an office in Dueall's construction trailer, and used a Dueall computer located in the trailer.

40. CRISMON, a former Willowbrook homeowner who registered and operated his own disparaging website of KB Home and is employed as an information technology professional, instructed Defendants, including MCGETTIGAN and others, on how to

intercept emails to and from the Dueall Computers by hacking into and gaining access to the WiFi Hotspot.

41. At all times material hereto, MCGETTIGAN and others working with the Defendants, resided in homes in close proximity to the Dueall construction trailer, giving them access to hack into the Dueall computer generated WiFi Hotspot.

42. On May 3, 2013, MCGETTIGAN, KOEHLER, and other residents of Willowbrook were conversing outside the Dueall trailer. MCGETTIGAN was in possession of a two-inch thick stack of papers at the time. MCGETTIGAN, while holding the stack of papers, then approached Dueall's President, Salvatore Ventimiglia ("Mr. Ventimiglia"). MCGETTIGAN displayed and read to Mr. Ventimiglia confidential email correspondence between Dueall and KB Home, and questioned Mr. Ventimiglia about the email correspondence. The confidential email correspondence was sent over the Internet and never provided to McGETTIGAN (or any other Willowbrook resident) by KB Home or Dueall.

43. Upon information and belief, MCGETTIGAN, with help from Defendants and other Willowbrook residents, illegally intercepted the confidential email correspondence to and from the Dueall Computers between KB Home and Dueall.

COUNT ONE
Violation of Anti-Cybersquatting Consumer Protection Act
15 U.S.C. §1125 (d)(1)(A)

44. KB Home reasserts the allegations set forth above as though fully set forth herein.

45. KB Home has continuously owned and used the KB Home Marks in connection with marketing, sales, and provision of residential home construction services and

mortgage lending since 2004 and has filed affidavits pursuant to sections 8 and 15 of the Lanham Act, making the KB Home Marks incontestable. *See* Composite Exhibits “A” and “B.”

46. SMITH registered the following domain names with the bad faith intent to profit from their registration and use: a) “thekbhome.com”; b) “thekbhomes.com”; c) “kb-homes-lawsuits.com”; d) “kbhinvestorsbeware.com”; e) “kbhomeforlosures.com”; f) “kbhomestock.com”; g) “kbhomewillowbrook.com”; h) “kbhstock.com”; i) “kbhsucks.com”; and j) “nysekbh.com.”

47. SMITH and KOEHLER have used KB Home Marks in the domain name “thekbhome.com” to divert and confuse customers looking for KB Home’s website to their website dedicated to disparaging KB Home’s business reputation, discouraging prospective homeowners from purchasing homes developed by KB Home, and driving down the value of KB Home stock all in order to obtain leverage and coerce KB Home into paying valuable consideration to them.

48. The domain name “thekbhome.com” and other domain names registered by SMITH identified herein, are identical or confusingly similar to the KB Home Marks, which were valid, distinctive, incontestable, famous, and exclusively associated with KB Home before the infringing domain names were registered.

49. The domain name “thekbhome.com” is confusingly similar to KB Home trademarks and calculated to steer prospective homebuyers away from, “KBhome.com,” the legitimate website used by KB Home to conduct business over the Internet.

50. SMITH and KOEHLER had a bad faith intent to profit from the registration use and trafficking in “thekbhome.com” domain name by using the domain name and website at the domain name as leverage to coerce KB Home into buying back their units at Willowbrook or otherwise to paying them valuable consideration in exchange for termination or sale of the websites using the infringing domain names.

51. SMITH and KOEHLER’s conduct was intentional, malicious, and willful.

52. Neither SMITH nor KOEHLER: a) possess any rights in the KB Home Marks, b) are identified by names containing the KB Home Marks, or c) have previously used “thekbhome.com” domain name in connection with bona fide offerings of goods or services.

53. SMITH and KOEHLER have used “thekbhome.com” domain name and associated website with the intent to divert customers away from KB Home’s legitimate website and to harm KB Home’s goodwill in the KB Home Marks by creating a likelihood of confusion as to the source of the website associated with “thekbhome.com” domain name.

54. SMITH and KOEHLER have expressly and impliedly offered to transfer, sell, or otherwise assign the websites using the infringing domain names to KB Home for financial gain without intending to use the infringing domain name in connection with commercial offerings of goods or services.

55. SMITH and KOEHLER’s actions constitute cyber-squatting infringement of the KB Home Marks in violation of 15 U.S.C. § 1125.

56. Accordingly, KB Home, as the owner of the KB Home Marks, seeks the following relief from SMITH and KOEHLER pursuant to 15 U.S.C §§ 1116, 1117 and 1125:

a) an injunction barring Defendants from registering, using, or trafficking in any domain name that is confusingly similar to the KB Home Marks; b) forfeiture or cancellation of domain names: “thekbhome.com”; kbhomewillowbrook.com”; “kb-homes-lawsuits.com”; “kbhinvestorsbeware.com”; “kbhomeforclosures.com”; “kbhomestock.com”; “kbhstock.com”; “kbhsucks.com”; nysekbh.com”; “thekbhomes.com,” and their transfer to KB Home; c) any profits made by virtue of the registration, use or trafficking in infringing domain names by defendants; d) compensatory or statutory damages; e) treble damages; f) the cost of this action; g) and reasonable attorneys’ fees.

COUNT TWO

Illegal Disclosure of Emails in Violation of the Electronic Communications Privacy Act
18 U.S.C. § 2511 (c)

57. KB Home reasserts the allegations set forth above as though fully set forth herein.

58. Defendants and others conspired to intercept electronic communications between the Dueall Computers and KB Home.

59. By information and belief, certain members of the conspiracy used computer-hacking devices or programs to intercept emails to and from the Dueall Computers between it and KB Home.

60. MCGETTIGAN, as a member of the conspiracy, knew or had reason to know that emails between KB Home and Dueall had been intercepted in violation of the ECPA.

61. On or around May 3, 2013, MCGETTIGAN “disclosed” some of the intercepted email correspondence by displaying and reading its contents to Mr. Ventimiglia, and by information and belief, to others.

62. MCGETTIGAN’s conduct was intentional, malicious, and willful.

63. MCGETTIGAN’s activities constitute intentional disclosure of intercepted electronic communications in violation of the ECPA, 18 U.S.C. § 2511(c).

64. Pursuant to 18 U.S.C. § 2520(a), KB Home is entitled to maintain this civil action against MCGETTIGAN and seek the following relief: a) compensatory or statutory damages; b) injunctive relief; and c) reasonable attorneys’ fees and litigation costs.

COUNT THREE
Illegal Use of Emails in Violation of the Electronic Communications Privacy Act
18 U.S.C. § 2511 (d)

65. KB Home reasserts the allegations set forth above as though fully set forth herein.

66. Defendants and others conspired to intercept electronic communications to and from the Dueall Computers and KB Home.

67. Certain members of the conspiracy used computer-hacking devices or programs to intercept emails to and from the Dueall Computers between Dueall and KB Home.

68. MCGETTIGAN, as a member of the conspiracy, knew or had reason to know that emails between KB Home and Dueall had been intercepted in violation of the ECPA.

69. On or around May 3, 2013, MCGETTIGAN “used” intercepted electronic communications between Dueall and KB Home in a number of ways, including reading and downloading their contents to Mr. Ventimiglia in an attempt to obtain information from him.

70. MCGETTIGAN’s conduct was intentional, malicious, and willful.

71. MCGETTIGAN’s activities constitute intentional use of intercepted electronic communications in violation of the ECPA, 18 U.S.C. § 2511(d).

72. Pursuant to 18 U.S.C. § 2520(a), KB Home’s electronic communications were intercepted and used in violation of the ECPA and as a result KB Home is entitled to maintain this civil action against MCGETTIGAN and seek the following relief: a) compensatory or statutory damages; b) injunctive relief; c) reasonable attorneys’ fees and litigation costs.

COUNT FOUR
Conspiracy to Violate Anti-Cybersquatting Consumer Protection Act
Florida Common Law

73. KB Home reasserts the allegations set forth above as though fully set forth herein.

74. A conspiracy exists between SMITH and KOEHLER.

75. SMITH and KOEHLER, and others by information and belief, acted and continue to act in concert in furtherance of their bad faith intent to profit from and traffic in and “theKBHome.com” domain name to attempt to obtain leverage against KB Home to convince it to buy back their Willowbrook units or to otherwise offer valuable consideration in exchange for termination or sale of the infringing domain name and website affiliated with it.

76. SMITH and KOEHLER have committed overt acts in furtherance of the conspiracy.

77. Specifically, SMITH and KOEHLER and others have communicated with KB Home stating expressly or implying that the infringing domain names and websites at “the KBHome.com” would be sold to KB Home or voluntarily terminated, if KB Home agreed to buy-back their units at Willowbrook or otherwise paid them valuable consideration.

78. Additionally, SMITH and KOEHLER have intentionally diverted Internet traffic to the websites located at “thekbhome.com” by using a domain name confusingly similar to KB Home’s famous and distinctive trademarks.

79. As a proximate result of this conspiracy, KB Home has been damaged.

80. Accordingly, KB Home is entitled to pursue this action against SMITH and KOEHLER and seek the following relief: a) damages; b) injunctive relief; and c) such further relief as this Court deems just and proper.

COUNT FIVE
Conspiracy to Violate Electronic Communications Privacy Act
Florida Common Law

81. KB Home reasserts the allegations set forth above as though fully set forth herein.

82. A conspiracy exists between MCGETTIGAN, CRISMON, DELGADO and, upon information and belief, others.

83. MCGETTIGAN, CRISMON, DELGADO and others acted and may be continuing to act in concert in furtherance of their scheme to intercept, use, and disclose electronic communications between KB Home and Dueall.

84. MCGETTIGAN, CRISMON, and others have committed overt acts in furtherance of the conspiracy.

85. CRISMON advised MCGETTIGAN and others how to intercept email between KB Home and Dueall and MCGETTIGAN used and disclosed some of the intercepted emails between KB Home and Dueall.

86. As a proximate result of this conspiracy, Plaintiff has been damaged.

87. Accordingly, Plaintiff is entitled to pursue this action against Defendants and seek the following relief: damages; injunctive relief; and such further relief as this Court deems just and proper.

WHEREFORE, KB Home respectfully requests this Court to grant the following relief with respect to SMITH and KOEHLER:

a) Forfeiture or cancellation of “thekbhome.com” and “kbhomewillowbrook.com”; “kb-homes-lawsuits.com”; “kbhinvestorsbeware.com”; kbhomeforlosures.com”; “kbhomestock.com”; “kbhstock.com”; “kbhsucks.com”; “nysekbh.com”; “thekbhomes.com” and other similar infringing domain names registered, used or trafficked in by Defendants or their co-conspirators and transfer to KB Home, as owner of the KB HOME marks, pursuant to 15 U.S.C. § 1125(d)(1)(C);

b) Recovery of compensatory or statutory damages, any profits made from the registration, use or trafficking in the infringing domain names, and the reasonable attorneys’ fees and litigation costs incurred in this action, pursuant to 15 U.S.C. § 1125(a)(5) and 15 U.S.C. §§ 1117; and

c) An injunction against registering, using, trafficking in, or otherwise operating these

and other domain names that infringe on the KB HOME Marks in violation of the ACPA, pursuant to 15 U.S.C. § 1116(a).

WHEREFORE, Plaintiff respectfully requests this Court to grant the following relief with respect to MCGETTIGAN, CRISMON and DELGADO:

a) Recovery of actual or statutory damages and reasonable attorneys' fees and litigation costs, pursuant to 18 U.S.C. §§ 2520; and

b) An injunction against illegally using and disclosing electronic communications between KB Home and Dueall and a return to KB Home and Dueall of all copies of intercepted communications between the two, pursuant to 18 U.S.C. § 2520.

Dated: October 11, 2013

Respectfully submitted,

CARLTON FIELDS, P.A.

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