

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

KB HOME, a Delaware corporation,)	
)	
Plaintiff,)	
)	
v.)	No. 8:13-cv-02644-JDW-EAJ
)	
ANDREW SMITH, <i>et al.</i> ,)	
)	
Defendants.)	

ANSWER AND DEMAND FOR JURY TRIAL OF ANDREW SMITH

1. This paragraph accurately characterizes two causes of action that are alleged against two different sets of defendants. However, defendant Andrew Smith (“Smith”) denies that he has violated the Anti-Cybersquatting Consumer Protection Act (“ACPA”), and notes that the complaint does not appear to charge him with a violation of the Electronic Communications Privacy Act (“ECPA”). In any event, Smith denies that he has violated ECPA, and lacks sufficient information to admit or deny whether the other defendants have violated the federal statutes as alleged in the complaint and accordingly denies such violations.

2. This paragraph accurately characterizes two causes of action that are alleged against two different sets of defendants. However, Smith denies the allegation that he is involved in any such civil conspiracy. He lacks sufficient information to admit or deny whether the other defendants have conspired as alleged in the complaint and accordingly denies such violations.

3. Admitted.

4. Admitted.

5. Denied.

6. Admitted.

7. Admitted.

8. Admitted.

9. This allegation is a conclusory allegation of a legal proposition, and Smith lacks sufficient information to admit or deny whether the underlying facts are true; accordingly, Smith denies this allegation.

10. Smith admits that plaintiff's counsel has been retained and assumes that plaintiff is paying its lawyers, but lacks sufficient information to admit or deny whether the fees are reasonable, and accordingly, denies that part of this allegation.

11. Smith admits that the Court has subject matter jurisdiction but denies that plaintiff has valid claims against him for violations of the ACPA or ECPA or for state-law conspiracy. Smith lacks sufficient information to admit or deny whether there are valid claims against other defendants, and accordingly denies that part of this allegation.

12. Admitted that venue is proper for the claim against Smith and that at least some of the defendants are domiciled in this district.

13. Admitted that KB Home has built many residential homes and that its stock is traded on the NYSE. Smith lacks sufficient information to admit or deny the numbers alleged, and hence denies those allegations. Smith also denies plaintiff's puffery about its relative size and degree of public recognition.

14. Smith lacks sufficient information to admit or deny the allegation in the first sentence of this paragraph that KB Home is known "throughout the United States . . . by the general

public,” and hence denies that allegation. Moreover, the initials KB are widely used by other commercial interests, and indeed generically in science and in the information technology industry, so to the extent that this paragraph asserts that plaintiff has trademark rights in the initials “KB” beyond the real estate industry, that allegation is denied. The remainder of this paragraph is admitted.

15. Smith lacks sufficient information to admit or deny the allegation in the first sentence of this paragraph that “the general public” came to associate KB with KB Home, and hence denies that allegation. Moreover, the initials KB are widely used by other commercial interests, and indeed generically in science and in the information technology industry, so to the extent that this paragraph asserts that plaintiff has trademark rights in the initials “KB” beyond the real estate industry, that allegation is denied. The remainder of this paragraph is admitted.

16. Smith lacks sufficient information to admit or deny the extent of the advertising of the adoption of plaintiff’s new name, and hence denies those allegations . The remainder of this paragraph is admitted.

17. Admitted.

18. Admitted.

19. Smith strongly denies that KB Home is a symbol of quality and value. Smith lacks sufficient knowledge to admit or deny that the KB Home mark has acquired any degree of “fame” as that term is used by the Lanham Act, and hence denies that allegation. The remainder of this paragraph is admitted.

20. Admitted.

21. Smith denies that KB Home's products, services, or sales have high quality. The remainder of this paragraph is admitted.

22. Admitted.

23. Admitted.

24. Smith admits that the domain name "thekbhome.com" contains the trademark "KBHome" but not that the domain name is "confusingly similar" to any of the KB Home Marks or to the domain name kbhome.com, because the placement of the word "the" makes it highly unlikely that any Internet user looking for plaintiff's trademark would mistakenly enter "thekbhome.com" into his Internet browser. Smith denies that he "knew" that KB Home has a famous trademark, and lacks sufficient knowledge to admit or deny that KB Home is a famous trademark. Smith also notes that KB Home has squatted on the domain names "kbhomesucks.com," "akbhomesucks.com," and more than one hundred other domain names that are expressly critical of KB Home (many listed at <http://thekbhome.com/kb-home-domain-bother/>), without using those names for any web site, thus preventing its critics from registering and using those names even though KB Home presumably does not believe that KB Home "sucks." The remainder of this paragraph is admitted.

25. It is admitted that the domain name "kbhomewillowbrook" contains the trademark KBHome but not that the domain name is "confusingly similar" to any of the KB Home Marks or to the domain name, because it is highly unlikely that any Internet user looking for plaintiff's trademark would mistakenly enter "kbhomewillowbrook.com" into his Internet browser. Smith denies that he "knew" that KB Home has a famous trademark and lacks sufficient knowledge to

admit or deny that KB Home is a famous trademark, and hence denies that allegation. It is also denied that Smith owns the domain name “kbwillowbrookhome.com”; Smith relinquished the name after deciding that he did not have any use for the name. The remainder of this paragraph is admitted.

26. Smith admits that he registered each of the domain names listed in this paragraph, but denies that the names are confusingly similar to any of the KBHome trademarks, because the domain names contain additional words that an Internet user is unlikely to type in his Internet browser in the hope or expectation of guessing the proper domain name for a KB Home web site. Smith also denies that he registered these or any other domain names with a bad faith intent to profit. Smith also denies that he owns the domain name “thekbhomes.com”; Smith relinquished the name after deciding that he did not have any use for the name.

27. Admitted.

28. Smith lacks sufficient information to admit or deny whether Dueall is independent and hence denies that allegation. The remainder of this paragraph is admitted.

29. Smith lacks sufficient information to admit or deny whether Armando Oyola-Delgado owned a unit at Willowbrook and hence denies that allegation. The remainder of this paragraph is admitted.

30. Smith admits that he and several other Willowbrook residents have demanded that KB Home buy back the units of all Willowbrook residents, his own included, and pay other damages and costs. Smith also admits that Gerald Wade, representing KB Home, offered to refund Smith’s original purchase price in trade for his silence, but Smith refused this offer unless

the rest of the residents remaining who still wanted a buyback could also seek buybacks.

31. Smith denies that he has trafficked in the KB Home Marks or in the domain name “thekbhome.com,” that he has used that domain name to divert traffic from KB Home, that he attempted to drive down the value of KB Home stock, or that he is part of any “scheme to profit.” Smith lacks sufficient information to admit or deny the allegations in this paragraph about defendant Koehler and hence denies those allegations. Smith notes that none of the defendants other than himself have any rights to the domain name “thekbhome.com” and hence denies that any of them could have “used” or “trafficked in” the domain name.

32. It is admitted that Smith is and always has been the administrator of the web site at thekbhome.com and that, for a period of time, defendant Koehler was allowed administrative access to the web site to write posts and tag and label photographs. The remaining allegations in the first sentence of this paragraph are denied. The second sentence of this paragraph is admitted.

33. It is denied that Smith employed his “theKBHome.com” domain name with bad faith intent to profit and that he attempted to coerce KB Home into buying back his own Willowbrook condominium or into paying him valuable consideration. Smith lacks sufficient information to admit or deny whether defendant Koehler attempted to coerce KB Home into buying back his own Willowbrook condominium or into paying him valuable consideration and hence denies that allegation. Smith denies that Koehler ever had any rights to the domain name “thekbhome.com,” or indeed to any of Smith’s other domain names, and hence denies that Koehler employed “thekbhome.com” domain name in any respect. Smith denies that he attempted to drive down

the value of KB Home stock. Smith also denies that he discouraged anybody from buying a KB Home, only that he encouraged potential homeowners to conduct thorough research before making their decisions. The remainder of this paragraph is admitted.

34. Denied.

35. Admitted.

36. Smith lacks sufficient information to admit or deny this allegation and hence denies it.

37. Denied.

38. The first two sentences of this paragraph are admitted. Smith admits that Deuall has Internet access in the trailer but lacks sufficient information to admit or deny the allegations in the third sentence of this paragraph about how Dueall gets that access, and hence denies this sentence.

39. Admitted.

40. It is admitted that defendant Crismon owned a home at Willowbrook, that he had a web site criticizing KB Home, and that he is employed as an information technology professional. Smith lacks sufficient information to admit or deny the remaining allegations in this paragraph and that he doubts that defendant McGettigan could have learned how to hack into a WiFi hotspot, and hence denies those allegations.

41. It is admitted that McGettigan resided in a home in close proximity to the Dueall construction trailer. Smith lacks sufficient information to admit or deny the phrase “and others working with Defendants,” except that he denies that he himself had any involvement with the

hacking scheme alleged in the complaint, and hence denies that allegation. Smith lacks sufficient information to admit or deny the last line of this paragraph, and indeed he doubts that defendant McGettigan could have learned how to hack into a WiFi hotspot; Smith therefore denies the last line of this paragraph.

42. Smith lacks sufficient information to admit or deny this paragraph and hence denies it.

43. Smith lacks sufficient information to admit or deny this paragraph, except that he knows that he had no involvement in the interception that is alleged, and that he doubts that defendant McGettigan could have learned how to hack into a WiFi hotspot, and hence denies it.

44. Smith denies that he has infringed plaintiff's marks and notes both that this paragraph is the only part of the amended complaint that alleges infringement, and that the allegation of infringement is far too conclusory to pass muster under Rule 8 of the Federal Rules of Civil Procedure. Smith lacks sufficient information to admit or deny the remaining allegations of this paragraph, and hence denies them.

45. It is admitted that KB Home reasserts the allegations; the allegations that are reasserted are admitted or denied as indicated in response to the allegations incorporated into this paragraph.

46. Admitted.

47. Smith admits that he registered the identified domain names, but denies that the registration was with bad faith intent to profit. It is noted that Smith relinquished the domain names "thekbhomes.com" and "kbhomewillowbrook.com" after he decided that he had no use

for them.

48. Denied.

49. Smith denies that either the domain name “thekbhome.com,” or any other domain names registered by Smith, are identical or confusingly similar to the KB Home Marks. Smith lacks sufficient knowledge to admit or deny that any of the KB Home Marks are famous, and hence denies that allegation. The remainder of this paragraph is admitted.

50. Smith admits that Kbhome.com is a legitimate web site used by KB Home to conduct business over the Internet. The remainder of this paragraph is denied.

51. Denied.

52. Denied.

53. Admitted.

54. Denied. Indeed, it is preposterous to assert that any Internet user could be confused about whether the web site posted at the domain name is sponsored by or affiliated with KB Home.

55. Smith admits that the domain name was not used, nor intended to be used, in connection with the offering of goods and services. Otherwise, this allegation is denied.

56. Denied.

57. Smith admits that plaintiff seeks the relief described in this paragraph but denies that plaintiff is entitled to any relief.

58. It is admitted that KB Home reasserts the allegations; the allegations that are reasserted are admitted or denied as indicated in response to the allegations incorporated into this

paragraph.

59. Smith denies that he conspired with anybody to intercept communications. Smith lacks sufficient information to admit or deny the remaining allegations of this paragraph, and hence denies the entire paragraph.

60. Smith lacks sufficient information to admit or deny the allegations of this paragraph, and hence denies them.

61. Smith lacks sufficient information to admit or deny the allegations of this paragraph, and hence denies them.

62. Smith lacks sufficient information to admit or deny the allegations of this paragraph, and hence denies them.

63. Smith lacks sufficient information to admit or deny the allegations of this paragraph, and hence denies them.

64. Smith lacks sufficient information to admit or deny the allegations of this paragraph, and hence denies them.

65. Smith lacks sufficient information to admit or deny the allegations of this paragraph, and hence denies them.

66. It is admitted that KB Home reasserts the allegations; the allegations that are reasserted are admitted or denied as indicated in response to the allegations incorporated into this paragraph.

67. Smith denies that he conspired with anybody to intercept communications. Smith lacks sufficient information to admit or deny the remaining allegations of this paragraph, and

hence denies the entire paragraph.

68. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them. Smith notes that to the extent that plaintiff is alleging that certain defendants committed a burglary, that may not be a basis for federal jurisdiction under the ECPA.

69. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

70. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

71. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

72. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

73. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

74. Smith admits that KB Home reasserts the allegations; the allegations that are reasserted are admitted or denied as indicated in response to the allegations incorporated into this paragraph.

75. Denied.

76. Denied.

77. Denied.

78. Smith denies that he communicated with KB Homes as alleged in this paragraph. Smith lacks sufficient information to admit or deny the allegations of this paragraph about defendant Koehler. However, Smith notes as well that Koehler never had any right to control any of Smith's domain names or any web site that Smith created, and hence could not have parted with either for consideration or otherwise. Accordingly, Smith denies this paragraph in its entirety.

79. Denied.

80. Denied.

81. The existence of a conspiracy, and hence of any causal effect on KB Home, is denied. Smith lacks sufficient knowledge about whether KB Home has been damaged to admit or deny that allegation, and hence denies it.

82. Smith lacks sufficient knowledge of the alleged ECPA violations to admit or deny whether plaintiff is entitled to pursue any action against defendants Koehler, McGettigan, Crimson and Delgado, or obtain any relief against them, and accordingly denies that part of this paragraph. Smith denies that he has violated either ECPA or ACPA and that the plaintiff is entitled to any relief from him.

83. It is admitted that KB Home reasserts the allegations; the allegations that are reasserted are admitted or denied as indicated in response to the allegations incorporated into this paragraph.

84. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

85. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

86. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

87. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

88. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

89. Smith lacks sufficient information to admit or deny the allegations of this paragraph and hence denies them.

PRAYER FOR RELIEF

Smith admits that KB Home seeks the relief set forth in ensuing paragraphs, but Smith denies that KB Home is entitled to any relief against himself. Smith lacks sufficient information to admit or deny that KB Home is entitled to any relief against any of the other defendants.

AFFIRMATIVE DEFENSES

1. The complaint fails to state a claim on which relief can be granted.
2. Smith's use of the KB Home name and trademarks in the domain name for his web sites and in the text of those web sites accurately identifies the company that he is criticizing on those web sites.
3. Smith makes only non-commercial use of the KB Home name and trademarks in the domain name for his web sites and in the text of those web sites, which is therefore beyond the

purview of the trademark laws.

4. Smith makes fair use of the KB Home name and trademarks in the domain name for his web sites and in the text of those web sites.

5. Smith's domain names are neither identical nor confusingly similar to the KB Home name or trademarks.

6. Smith did not register or use any domain names that include the KB Home name and trademarks with bad faith intent to profit.

7. Smith believed, and had reasonable grounds to believe, that his use of the domain names that include the KB Home name and trademarks was a fair use or otherwise lawful.

8. The claims are barred by the First Amendment, which protects Smith's right to use the domain names that include the KB Home name and trademarks to identify truthfully the target of Smith's criticism.

9. None of the KB Home trademarks is famous.

JURY DEMAND

Defendant Smith demands trial by jury.

Respectfully submitted,

/s/ Paul Alan Levy
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Attorneys for Andrew Smith

December 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this date, I am causing this Answer to be filed through the Court's ECF system, which will effect service on counsel for plaintiff and for defendants Crismon and Koehler. I will cause copies of the Answer to be sent by first-class mail, postage prepaid, to the unrepresented defendants using the addresses given for them in the First Amended Complaint, as well as by email.

December 2, 2013

/s/ Paul Alan Levy