

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.)	

**MOTION OF DEFENDANT ANDREW SMITH TO DISMISS COUNT FOUR
AND TO SEVER THE ACPA CLAIMS AGAINST HIM FROM THE ECPA CLAIMS,
AND SUPPORTING MEMORANDUM OF LAW**

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CONSTITUTION, STATUTES AND RULES

United States Constitution

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[http://www.wtsp.com/rss/article/266873/8/Bradenton-residents-demand-justice
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MOTION

Pursuant to Rules 12(b)(6), 20 and 21 of the Federal Rules of Civil Procedure, defendant Andrew Smith moves the Court to dismiss Count IV of the First Amended Complaint, and to sever the claims against him from the claims brought against the remaining defendants under the Electronic Communications Privacy Act.

Undersigned counsel spoke with counsel for plaintiff to ask him to concur in the motion to sever; in response, plaintiff amended its complaint to add defendants to Count Four. Undersigned spoke again with counsel for plaintiff to ask him to concur in the dismissal of Count Four and to sever; however, plaintiff's counsel would not agree to the motion.

Introduction

Defendant Andrew Smith is a dissatisfied homeowner in the Willowbrook subdivision of Lakewood Ranch, Florida, built entirely by plaintiff KB Home. Like many of his fellow owners, Smith believes that KB Home's shoddy construction made his home worth much less than what he paid for it. To express his opinions about KB Home, and to create a forum where other Willowbrook owners could exchange information about their experiences and ideas about effective solutions, Smith created a non-commercial web site—an Internet gripe site—devoted to explaining the many faults of KB Home. In January 2012, Smith registered the domain name “thekbhome.com,” which accurately identified his planned web site as being about KB Home. By August of that year, Smith and many other owners had concluded that the best solution to the problem would be for KB Home to take responsibility for its mistakes by buying back their homes. <http://www.wtsp.com/rss/article/266873/8/Bradenton-residents-demand-justice-from-KB-Home>. Smith joined the campaign for such a buyback program, and expressed that opinion

on his web site.

Decisions of several Courts of Appeals have held that non-commercial commentary sites about a trademark holder may use the trademark holder's name as their domain name without violating either the Lanham Act or the Anticybersquatting Consumer Protection Act ("ACPA"), the 1999 cybersquatting amendment to that Act.¹ The Eleventh Circuit has not yet addressed the issue, although it has cited some of the cases from other circuits with apparent approval.² On the other hand, the law is clear that it is not permissible to register or use a domain name that is "confusingly similar" to a protected trademark, or dilutive of a "famous" mark, for the purpose of shaking down a trademark holder for the privilege of using its own mark as the domain name for its own web site.³

Plaintiff apparently contends that, because one purpose of Smith's web site has been to campaign for the buyback of the homes in the Willowbrook development, <http://thekbhome.com/about-us-willowbrooks-kb-homes-story/>, his use of the domain name counts as prohibited cybersquatting rather than protected non-commercial speech. As reflected in Smith's answer to

¹ *Utah Lighthouse Ministry v. Foundation for Apologetic Information and Research*, 527 F.3d 1045 (10th Cir. 2008); *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005); *TMI v. Maxwell*, 368 F.3d 433, 436-438 (5th Cir. 2004); *Lucas Nursery and Landscaping v. Grosse*, 359 F.3d 806 (6th Cir. 2004).

² *Southern Grouts & Mortars v. 3M Co.*, 575 F.3d 1235, 1246, 1247 (11th Cir. 2009) (citing *Lucas Nursery* and *Utah Lighthouse*). See also *Sound Surgical Technologies v. Leonard A. Rubinstein, M.D.*, 734 F. Supp.2d 1262, 1275 (M.D. Fla. 2010) (citing *Utah Lighthouse* and *Bosley Med. Inst. v. Kremer*, 403 F.3d 672, 680 (9th Cir.2005)).

³ *Virtual Works v. Volkswagen of Am.*, 238 F.3d 264, 269 (4th Cir. 2001).

the first amended complaint (“FAC”), filed simultaneously with this motion, Smith will defend this case on the grounds that (1) his use of the domain name is truthful noncommercial speech protected by the First Amendment and by the ACPA; (2) the fact that one objective of the expression on his web site and in his domain name is to achieve a change that would benefit him personally, along with others in his community, does not constitute “bad faith intent to profit from the mark” and is no reason to deny him constitutional or statutory protection; and (3) the domain name is neither “confusingly similar” to a trademark nor “dilutive” of a “famous mark.”

In addition to suing Smith over his registration or use of the domain name, KB Home has sued a separate group of Willowbrook home owners who allegedly used a very different mechanism to induce KB to buy back their homes. Allegedly, one of their number violated the Electronic Communications Privacy Act (“ECPA”) by hacking into the wifi hotspot owned by Dueall Construction, the company that is doing the Willowbrook repairs, and downloaded emails exchanged between KB Home and Dueall; several Willowbrook owners then asked Dueall’s president about the emails as part of their efforts to obtain home buybacks.

KB Home’s original complaint alleged no connection between Smith and the hacking defendants; accordingly, after being retained to represent Smith, Smith’s undersigned counsel called plaintiff’s counsel to meet and confer about a proposed motion to sever. In response to this request, plaintiff amended its complaint to allege that the defendants to the alleged hacking scheme conspired with Smith to violate the ACPA, and that Koehler, a second defendant on the ACPA claim, conspired with the hackers. As Smith explains in this memorandum, however, these amendments do not afford a proper basis for joining the ECPA claims with the ACPA

claims against Smith, for several reasons. First, the Supreme Court and Eleventh Circuit have repeatedly held that bare allegations of conspiracy are insufficiently specific to plead a claim consistent even with the notice pleading standards of Rule 8 of the Federal Rules of Civil Procedure. Second, an ACPA claim can be brought only against a defendant who wrongfully registers or uses a domain name—it is not a generalized tort that makes actionable the use of KB Home’s name in the text of the web site or possible harm to KB Home’s reputation. Only Smith owns and had rights in the domain name, and the bare allegation that the ECPA defendants were somehow involved in “trafficking in” or using the domain lacks sufficient plausibility to meet the standards of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and lacks the needed allegations of specific intent to support a claim given the First Amendment expression involved under *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-908 (1982). Consequently, the allegation that the ECPA defendants were involved in a conspiracy with Smith relating to the ACPA claims should be dismissed. Third, because the ACPA conspiracy claim should be dismissed, it does not provide a proper basis for joinder under Rules 20 and 21 of the Federal Rules of Civil Procedure. Fourth, even if the ACPA conspiracy claim is not dismissed, the ECPA claims are so different from the ACPA claims that litigating them together will not produce judicial economies, but will threaten to prejudice Smith in the defense of his First Amendment right to use KB Home’s trademark to identify his web site truthfully as being about KB Home.

ARGUMENT

I. COUNT FOUR SHOULD BE DISMISSED BECAUSE ITS CONSPIRACY ALLEGATIONS DO NOT MEET THE STANDARDS OF RULE 8.

A. Facts Alleged About the ECPA Defendants' Involvement in the Supposed ACPA Conspiracy.

Under Florida law, the elements of a conspiracy claim are

(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.

Charles v. Florida Foreclosure Placement Ctr., 988 So. 2d 1157, 1159-60 (Fla. Dist. Ct. App. 2008).

However, the Eleventh Circuit has cautioned against allowing “conclusory, vague and general . . . allegations of conspiracy.” *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir. 1984). “[A] defendant must be informed of the nature of the conspiracy which is alleged. . . . [S]ufficient detail must be given so that the defendant, and the Court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery.” *Id.* at 556, 557. Although Count Four certainly alleges the fourth element, the allegations fail to meet the remaining elements.

The first amended complaint (“FAC”) lists the following facts related to the supposed involvement of the ECPA defendants in an alleged conspiracy to violate the ACPA:

- (1) SMITH, KOEHLER, MCGETTIGAN, CRISMON, and some other current or former Willowbrook residents have repeatedly demanded that KB Home to buy-back [sic] he units they owned. (FAC 30.)
- (2) SMITH and KOEHLER, in concert with MCGETTIGAN, CRISMON,

DELGADO and others, 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, drive down its stock value, and otherwise cause harm to KB Home as part of a scheme to profit. (FAC 31.)

(3) SMITH and KOEHLER in concert with MCGETTIGAN, CRISMON, DELGADO and others 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. (FAC 34.)

(4) 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. (FAC 35.)

(5) A conspiracy exists or existed between SMITH, KOEHLER, MCGETTIGAN, CRISMON and DELGADO. (FAC 75.)

(6) SMITH, KOEHLER, MCGETTIGAN, CRISMON and DELGADO, agreed to act in concert, and acted in concert, in furtherance of their bad faith intent to profit from and traffic in and “theKBHome.com” domain name to attempt to coerce KB Home to buy back their Willowbrook units or to otherwise pay them valuable consideration in exchange for transfer, termination or sale of the infringing domain name and website affiliated with it. (FAC 76.)

Only facts (1) and (4) state that anyone other than Smith and Koehler took a specific action. Facts (2) and (3) are not direct allegations that anyone other than Smith and Koehler acted; “in concert with” is a legal conclusion about a conspiracy. *American Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1293-94 (11th Cir. 2010) (“Plaintiffs offer conclusory statements such as ‘[d]efendants have not undertaken the above practices and activities in isolation, but instead have done so as part of a common scheme and conspiracy,’ and ‘[e]ach Defendant and

member of the conspiracy, with knowledge and intent, agreed to the overall objective of the conspiracy, agreed to commit acts of fraud to relieve Class Plaintiffs of their rightful compensation, and actually committed such acts.’). Facts (5) and (6) explicitly state the same legal conclusion. Facts (1) and (4)—demanding buyback and organizing a letter-writing campaign—do not state a claim or even relate to ACPA violations. And, as discussed below, they are expression protected by the First Amendment.

B. The Allegations of “Agreement” to Violate the ACPA Do Not Withstand Scrutiny under *Iqbal* and *Twombly*, and Do Not Meet First Amendment Standards.

First, and most important, plaintiff has failed to allege adequately the first element, “an agreement between two or more parties.” KB Home alleges an agreement, but alleges no facts to illustrate the agreement. “[S]tating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). *Twombly* involved an antitrust claim that depended on proper allegations of a conspiracy—in that case, a conspiracy to restrain trade instead of merely parallel conduct. In *Twombly*, the Supreme Court held that a statement that there was “agreement” alone is merely “formulaic recitation of the elements of” the cause of action, and insufficient to claim a conspiracy. *Id.* at 555; *see also Am. Dental Ass’n*, 605 F.3d at 1293 (11th Cir. 2010) (“In analyzing the conspiracy claim under the plausibility standard, *Iqbal* instructs us that our first task is to eliminate any allegations in Plaintiffs’ complaint that are merely legal conclusions.”); *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. Dist. Ct. App. 1997) (“Appellee Furlong’s sole proof of the inception of the conspiracy was Ida’s telephonic request to her son, Manny, that he

contact the decedent to render assistance to her after her late husband's death. Without more, we find this evidence to be wholly insufficient for the establishment of a conspiracy.") Moreover, although *Twombly* itself involved a conspiracy under the antitrust laws, in *American Dental Association*, the Eleventh Circuit applied the same conspiracy language to a RICO conspiracy, implying that the requirement applies to conspiracies generally, not just antitrust cases. *Am. Dental Ass'n*, 605 F.3d at 1293. KB Home makes no factual allegation to support the agreement at all, and *Raimi*, even predating *Twombly*, held that a phone call was not enough to state a claim.

Moreover, especial caution is required where, as here, the claimed conspiracy involves expression on an issue of public concern. As the Supreme Court has held, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . [B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-908 (1982). See also *Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981). In such cases, the First Amendment bars imposition of liability "merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908. Instead, liability for membership in the group can be imposed only if the defendant group "itself possessed unlawful goals and . . . the individual held a specific intent to further those illegal aims." 458 U.S. at 920. The amended complaint does not allege this constitutionally required element of a conspiracy claim, and hence Count IV cannot stand.

C. The Complaint Does Not Adequately Allege Unlawful Acts by the Conspirators.

The second element—to do an unlawful act, or a lawful act by unlawful means—is also not satisfied. To be sure, KB Home alleges acts by Smith and Koehler that could, liberally construed, be unlawful under the ACPA (the effort to sell “the web site”), and Florida law provides that a conspiracy claim can stand even if not all of the co-conspirators acted to further conspiracy, even if those others’ acts were not illegal. *Charles v. Florida Foreclosure Placement Ctr.*, 988 So. 2d 1157, 1160 (Fla. Dist. Ct. App. 2008).

But none of the various conspiracy defendants, other than Smith himself, could be sued for violating the ACPA itself: only Smith could have “used” or “trafficked in” the “thekbhome.com” domain name in violation of ACPA. As the Eleventh Circuit has repeatedly held, the ACPA is directed at “the ‘proliferation of cybersquatting—the Internet version of a land grab.’ *Virtual Works [v. Volkswagen of America]*, 238 F.3d [264,] 267 [(4th Cir. 2001)].” *Southern Grouts & Mortars v. 3M Co.*, 575 F.3d 1235, 1246 (11th Cir. 2009). As *Southern Grouts* explained, “The purpose of the Anti-cybersquatting Act is to ‘curtail one form of cybersquatting—the act of registering someone else’s name as a domain name for the purpose of demanding remuneration from the person in exchange for the domain name.” *Id.* Or, as the Eleventh Circuit earlier defined it, cybersquatting is “the conduct of one who reserves with a network information center a domain name consisting of the mark or name of a company for the purpose of relinquishing the right to the domain name back to the legitimate owner for a price.” *Eagle Hosp. Physicians v. SRG Consulting*, 561 F.3d 1298, 1307 (11th Cir. 2009). *See also Pensacola Motor Sales v. Eastern Shore Toyota*, 684 F.3d 1211, 1220 (11th Cir. 2012) (defining

the propriety of injunctive relief under the ACPA as resting on whether the defendant “was likely to register or use the infringing **domain names** again”) (emphasis added); *Sound Surgical Technologies v. Leonard A. Rubinstein, M.D., P.A.*, 734 F. Supp.2d 1262, 1275 (M.D. Fla. 2010) (ACPA violated when defendant registers domain name and uses it for competing business or ransoms it back to trademark owner). Other forms of alleged wrongdoing, even demands for payment to obtain the removal of criticism on a web site, do not make out a violation of the ACPA. *E.g., Cleary Building Corp. v. David A. Dame*, 674 F. Supp.2d 1257 (D. Colo. 2009); *Carl v. bernardjcarl.com*, 662 F. Supp.2d 487, 497-498 (E.D. Va. 2009), *aff’d in relevant part*, 409 Fed. App’x 628, 630 (4th Cir. 2010); *Cintas Corp. v. Unite Here*, 601 F. Supp.2d 571 (S.D.N.Y. 2009), *aff’d*, 355 Fed. App’x 508 (2d Cir. 2009).

As thus defined, the only proper defendant on a cybersquatting claim is the person who has registered, used or trafficked in the domain name. *Petroliam Nasional Berhad v. GoDaddy.com*, 897 F.Supp.2d 856, 866 (N.D. Cal. 2012); *Lockheed Martin Corp. v. Network Solutions*, 141 F. Supp.2d 648, 654-655 (N.D.Tex. 2001). Courts in this district have repeatedly limited ACPA liability to “the domain name registrant or that registrant’s authorized licensee.” *Synergy Real Estate of SW Florida v. Premier Property Management of SW Florida*, 2013 WL 5596795, at *2 (M.D. Fla. Oct. 11, 2013); *King Ranch v. King Ranch Contractors*, 2013 WL 2371246, at *3 (M.D. Fla. May 30, 2013) (dismissing ACPA claim for this reason even though default judgment was granted on other claims). The complaint acknowledges that only Smith registered and owned the domain name “thekbhome.com. ¶¶ 24, 47, and that fact is reflected by

the official “whois” record that is attached to defendant Smith’s affidavit.⁴ Consequently, only Smith could have “used” or “trafficked in” the domain name. The conspiracy allegations in Count IV of the complaint represent an effort to evade the limitations of the ACPA.⁵ Indeed, to the extent that the ACPA claim is pleaded against defendant Dan Koehler, it is legally insufficient, as Koehler’s own motion to dismiss demonstrates.

D. The Complaint Does Not Properly Allege Overt Acts in Furtherance of the Conspiracy.

The third element—overt acts in furtherance of the conspiracy—has also not been properly alleged. The only overt acts attributed to the members of the alleged ECPA conspiracy are the constitutionally protected acts of conducting an organized letter-writing campaign and demanding economic justice as a remedy for plaintiff’s extensive construction defects. Like the economic boycott and advocacy at issue in such cases as *Claiborne Hardware* and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), such activity is protected by the First Amendment and cannot be the proper basis of an actionable conspiracy. Such expression is protected by the First Amendment even when it is both motivated by the hope of economic gain

⁴ “[A] document central to the complaint that the defense appends to its motion to dismiss is also properly considered, provided that its contents are not in dispute.” *See, e.g., Brooks v. Blue Cross & Blue Shield of Fla.*, 116 F.3d 1364, 1369 (11th Cir.1997).” *Harris v. Ivax*, 182 F.3d 799, 802 & n.2 (11th Cir.1999).

⁵A change in the ECPA allegations also suggests that there may not even be federal jurisdiction for plaintiff’s claims against the ECPA defendants. Although the original complaint alleged only that these defendants had obtained plaintiff’s emails by hacking into Dueall Construction’s computers, the amended complaint alleges, in the alternative, that plaintiff’s emails were obtained by burglary of Dueall’s construction trailer. FAC ¶ 60. Reprehensible though burglary may be, an alleged burglary would not present a federal question.

and “designed to pressure others to act.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 796 F.2d 1328, 1332 (11th Cir. 1986), *aff’d*, 485 U.S. 568, 575-576 (1988). And in light of First Amendment concerns, the fact that the expression on the web site might hurt KB Home’s reputation is similarly not actionable on a trademark theory. *Universal Communications Sys. v. Lycos*, 478 F.3d 413, 424 (1st Cir. 2007) (applying Florida law).

Count IV also includes allegations that the ECPA defendants acted with intent to profit from the domain name and to obtain consideration from transfer of the domain name, but this allegation is utterly lacking in plausibility because Smith is the only defendant who had any right to the domain name. “[W]ell-pled allegations must nudge the claim ‘across the line from conceivable to plausible.’” *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (quoting *Twombly*, 550 U.S. at 570), *abrogated on other grounds*, *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012). As the Eleventh Circuit said in *American Dental Ass’n*,

to survive a motion to dismiss, a complaint must now contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” [*Bell Atlantic*, 550 U.S.] at 570. Cautioning that its new plausibility standard is not akin to a “probability requirement” at the pleading stage, the [Supreme] Court nonetheless held that the standard “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence” of the claim. *Id.* at 556. The Court was careful to note that “we do not require heightened fact pleading of specifics, but concluded that when plaintiffs “have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” *Id.* at 570.

605 F.3d at 1290-1291.

In *American Dental Ass’n*, for example, plaintiff offered far more detail about alleged

common activities, and added that the defendants were members of the same trade associations and had done certain acts in common, but even those were deemed insufficient to make out a plausible conspiracy claim in light of the facts that membership in a trade association and parallel conduct are not, as a matter of law, sufficient to make out an antitrust case. *Id.* at 1295-1296. Similarly, here, given the fact that only a domain name owner or his licensed agent can violate the ACPA, the bare allegations of this complaint, that the hacking defendants somehow participated in an alleged effort to extort a payment for the domain name, are simply too implausible to make out a claim of conspiracy to violate that federal law. Count IV should be dismissed.

II. THE ACPA CLAIMS AND DEFENDANTS SHOULD BE SEVERED FROM THE ECPA CLAIMS AND DEFENDANTS.

A. The Claims Were Improperly Joined Under Rule 20.

The ACPA and ECPA defendants have been improperly joined, and this Court should sever the claims against the two sets of defendants. Parties may be joined under Federal Rule of Civil Procedure 20 if between them there is “1) a right to relief arising out of the same transaction or occurrence, or series of transactions or occurrences, and 2) some question of law or fact common to all persons seeking to be joined.” *Alexander v. Fulton Cnty., Ga.*, 207 F.3d 1303, 1323 (11th Cir. 2000), *overruled on other grounds by Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

“In determining what constitutes a transaction or occurrence for the purposes of Rule 20(a), courts have looked for meaning to Fed.R.Civ.P. 13(a) governing compulsory

counterclaims.” *Id.* Therefore, for joinder just as for compulsory counterclaims, the Eleventh Circuit follows the “logical relationship” test. *Id.*; *Smith v. Trans-Siberian Orchestra*, 728 F. Supp. 2d 1315, 1319 (M.D. Fla. 2010) (citing *Republic Health Corp. v. Lifemark Hosp. of Fla.*, 755 F.2d 1453, 1455 (11th Cir.1985)). “[T]here is a logical relationship when ‘the same operative facts serve as the basis of both claims.’” *Republic Health*, 755 F.2d at 1455 (quoting *Plant v. Blazer Fin. Servs.*, 598 F.2d 1357, 1361 (5th Cir.1979)).

“The test for joinder is . . . whether the claims share *operative facts*.” *Edwards-Bennett v. H. Lee Moffitt Cancer & Research Inst.*, 8:13-CV-00853-T-27, 2013 WL 3197041 (M.D. Fla. June 21, 2013) (emphasis in original). As this Court recently observed in *Edwards-Bennett*, even if “there are similar core issues of liability and common questions of law,” more is still required to permit joinder of claims. 2013 WL 3197041, at *2. Here, there are neither similar core issues, common questions of law, nor common operative facts.

In *Edwards-Bennett*, three different plaintiffs sued their employer for different types of discrimination. In its order severing the claims, this Court observed that “[t]he only similarities [we]re the Defendant, an occasional overlap in the personnel involved, and similar legal theories.” *Edwards-Bennett*, 2013 WL 3197041, at *2. Here, because—as discussed earlier—there is no basis for the ACPA conspiracy claim, the link is weaker still. The only similarities between the ACPA claim and the ECPA claim and conspiracy are the plaintiff KB Home, each defendant’s desire for KB Home to buy back his shoddily constructed home, and participation in a letter-writing campaign to express that desire. None of these facts are operative to either an ACPA or ECPA claim, or an ECPA conspiracy. The operative facts required to prove

an ACPA claim relate to the ownership of the domain name, a bad faith intent to profit **from the trademark**, and the “confusing similarity” of the domain name or fame of the plaintiff’s mark. *Southern Grouts & Mortars*, 575 F.3d at 1243. The operative facts required to prove the ECPA claims relate to the interception of emails and the use of those allegedly intercepted emails. 18 U.S.C. §§ 2511(1)(c)-(d). Neither statute has anything whatsoever to do with the few facts defendants have in common. Certainly, none of those facts are operative to *both* claims, as is necessary to find a logical relationship between them.

Moreover, after this Court dismisses the ACPA conspiracy claim, the lone remaining thread between the ACPA and ECPA claims is that defendant Koehler is alleged to have taken part in both. As discussed earlier, however, plaintiff has not properly alleged a violation of ACPA with respect to Koehler, who at no time controlled the relevant domain names. Additionally, the ECPA claim and ECPA conspiracy suffer the same defects with respect to Koehler; his only alleged “action” in relation to those claims is passive receipt of a stack of papers that allegedly included the intercepted email, and later meeting to discuss the papers with McGettigan. (FAC 42). Koehler is not alleged to have acted intentionally, or even knowingly, in using the intercepted emails. As far as the ECPA conspiracy, much like the ACPA conspiracy, the FAC only states that Koehler “agreed to act” (FAC 85), “acted in concert” (FAC 85), “committed overt acts” (FAC 86), and “conspired” (FAC 67), or that “a conspiracy existed” with respect to Koehler. (FAC 84). These are no more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 556 U.S. at 678. Because none of the claims against Koehler has any basis in law or fact, even that lone, tiny thread

connecting the parties in this action does not exist.

The claims also fail the second prong of the joinder requirement. “The second prong of Rule 20 does not require that all questions of law and fact raised by the dispute be common, but only that some question of law or fact be common to *all parties*.” *Alexander*, 207 F.3d at 1324 (emphasis added); see also *Union v. Montenegro*, 2:10-CV-734-FTM-99, 2012 WL 2401784, at *5 (M.D. Fla. June 25, 2012) “It follows that under Rule 20(a)(2), a plaintiff may not bring multiple claims against multiple parties in a single action unless the ‘statutory nexus’ is demonstrated with respect to all defendants named in the action.”). This commonality requirement is often easily satisfied, *see Alexander*, 207 F.3d at 1324 (“Several courts have found that the question of the discriminatory character of Defendants’ conduct can satisfy the commonality requirement of Rule 20.”), but the common facts must be at least *related* to the claims in the litigation; they must be part of the “statutory nexus.” *Montenegro*, 2012 WL 2401784, at *5. Rule 20 cannot be satisfied by alleging that all the defendants live in Florida, or even that they all live in the same subdivision, when that fact has nothing whatsoever to do with the legal claims. There is simply no basis for joinder under Rule 20.

B. In the Alternative, This Court Should Exercise Its Discretion to Sever the Claims Under Rule 21.

If this Court does not find the claims improperly joined under Rule 20, it should still exercise its discretion to sever the claims under Rule 21 of the Federal Rules of Civil Procedure. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296 (9th Cir. 2000) (“[E]ven once the [Rule 20(a)] requirements are met, a district court must examine whether permissive joinder would

comport with the principles of fundamental fairness or would result in prejudice to either side.”); *Malibu Media v. Does* 1-28, — F.R.D. —, 2012 WL 9512018, at *5 (M.D. Fla. Dec. 6, 2012). “A district court has broad discretion when deciding whether to sever claims under Rule 21 and may consider factors such as judicial economy, case management, prejudice to parties, and fundamental fairness.” *Id.*; see also *In re Amergi ex rel. Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1367 (11th Cir. 2010) (affirming district court’s decision to sever based on case management concerns); *Acevedo v. Allsup’s Convenience Stores*, 600 F.3d 516, 521-22 (5th Cir. 2010) (considering fundamental fairness of joinder to the parties); *Foster v. Auburn Univ. Montgomery*, No. 2:11-cv-503-WHA-CSC, 2011 WL 3875623, at *4 (M.D. Ala. Sept. 1, 2011) (“[A] court’s decision to sever parties under Rule 21 should be tempered by the possibility of prejudice to the severed party.”); *Acciard v. Whitney*, No. 2:07-cv-476-UA-DNF, 2008 WL 5120820, at *1 (M.D. Fla. Dec. 4, 2008) (“Courts are given discretion to decide the scope of the civil action and to make such orders as will prevent delay or prejudice.”).

The “central purpose” of joinder is judicial economy, *Alexander*, 207 F.3d at 1323. In this case, the claims are so completely unrelated, and the facts so separate that “[t]he only economy that litigating these cases as a single action would achieve is an economy to plaintiff—the economy of not having to pay a separate filing fee for each action brought.” *Malibu Media*, Slip Op. at 10. (quoting *Digital Sins, Inc. v. John Does* 1-245, 11 CIV. 8170 CM, 2012 WL 1744838, at *3 (S.D.N.Y. May 15, 2012)). “Where . . . judicial economy is not served by joining claims, as in this case, severance is appropriate and the fair thing to do.” *Id.* The fact that the two sets of claims “travel[] under different legal theories” is a strong reason supporting severance. *In re*

Amergi ex rel. Amergi, 611 F.3d at 1367.

Moreover, Smith would be heavily prejudiced by a continued joint suit. His costs in time and expenses would increase by participating in extra depositions, having to review extra documents and interrogatory answers, and having to prepare for trial on an entirely different set of issues, unrelated to the claims against him. A jury is also sure to look more unfavorably on claims of “computer hacking” or burglary, torts wholly unrelated to free speech concerns, that are certainly more ominous than “cybersquatting,” leading to a possibility of unfair prejudice. A jury that is unfamiliar with technology might be confused by two claims relating to computers in some way (perhaps the jury would misunderstand that the domain name in the ACPA claim hosts a website used to “hack” into plaintiff’s emails). There is a significant possibility of confusion. Therefore, in the interests of justice and fairness, the Court should sever these claims, even if it does not find misjoinder under Rule 20.

CONCLUSION

The conspiracy claims in Count IV of the First Amended Complaint should be dismissed, and the claims against Smith should be severed from the claims against the remaining defendants.

Respectfully submitted,

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