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9 UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 BOSLEY MEDICAL INSTITUTE,

12 Plaintiff,

13 v.

14 MICHAEL STEVEN KREMER,

15 Defendant.

) No. 01 CV 1752-WQH (JMA)
)
) District Judge Hayes
)
) **NOTICE OF DEFENDANT'S MOTION**
) **FOR SUMMARY JUDGMENT**
)
) DATE: February 5, 2007
) TIME: 11 AM
) PLACE: Courtroom 4
) **ORAL ARGUMENT REQUESTED**

17
18
19 Please take notice that on February 5, 2007, at 11 A.M. in Courtroom 4, pursuant to Rule 56
20 of the Federal Rules of Civil Procedure, and based on the accompanying memorandum of law and
21 exhibits, and other evidence previously submitted to the Court, defendant Kremer will move the Court
22 to grant summary judgment dismissing plaintiff's claim under the Anti-Cybersquatting Consumer
23 Protection Act.

24 Respectfully submitted,

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26 PAUL ALAN LEVY
ALLISON M. ZIEVE

27 Public Citizen Litigation Group
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Dated: December 15, 2006

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9 UNITED STATES DISTRICT COURT
 10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 BOSLEY MEDICAL INSTITUTE,)	No. 01 CV 1752-WQH (JMA)
)	
12 Plaintiff,)	District Judge Hayes
)	
13 v.)	MEMORANDUM SUPPORTING
)	DEFENDANT’S RENEWED MOTION FOR
)	SUMMARY JUDGMENT
)	
15 MICHAEL STEVEN KREMER,)	DATE: February 5, 2007
)	TIME: 11 AM
16 Defendant.)	PLACE: Courtroom 4
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17
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11 **CONSTITUTION, LEGISLATIVE MATERIALS AND RULES**

12 First Amendment 10, 15, 16

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15 Section 32, 15 U.S.C. §§ 1114 6

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19 Section 43(d)(1)(B)(i), 15 U.S.C. § 1125(d)(1)(B)(i) 10

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25 Section 43(d)(1)(B)(ii), 15 U.S.C. § 1125(d)(1)(B)(i) 10, 14

26 *Intellectual Property and Communications Omnibus Act of 1999*,
 27 House Conf. Rep. 106-424, 106th Cong., 1st Sess. (1999) 11

28 *Trademark Cyberpiracy Prevention Act*,
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MISCELLANEOUS

18 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* (2d ed. 2002) 11

19 *McCarthy Trademarks and Unfair Competition* § 31-148 (4th ed. 1999) 13

1 This case revolves around a web site, created by defendant Michael Steven Kremer and
2 posted at www.bosleymedical.com, criticizing plaintiff Bosley Medical Institute (“Bosley”). In the
3 fall of 2003, defendant Kremer filed a motion seeking summary judgment dismissing all of
4 Bosley’s claims, including claims under the Anticybersuattng Consumer Protection Act
5 (“ACPA”). Kremer did so because, even after Bosley had obtained discovery from defendant
6 Kremer on the issue of commercial use of his web site, including whether Kremer had sought to
7 extort a payment of money for his domain name, there remained no genuine issue on any fact
8 material to his claims. This Court granted summary judgment, but the Court of Appeals reversed
9 in part because Bosley claimed that it had not had sufficient opportunity to prove that Kremer had
10 sent it certain letters which, according to Bosley, would show Kremer’s extortionate intent and
11 thus would support Bosley’s claim that Kremer registered his domain name with a bad faith intent
12 to profit.

13 In fact, those letters do not establish any genuine issue barring summary judgment.
14 Accordingly, Kremer the letter one letter not already in the record and renews his Rule 56 motion
15 for summary judgment. Specifically, Bosley’s claim under the ACPA alleges generally that
16 Kremer embarked on a “plan” to “extort” money from Bosley by “smearing” its reputation, and
17 that certain letters sent by Kremer were part of that “plan.” However, to state a claim under the
18 ACPA, Bosley must do more than show a plan to extort money – it must show that Kremer
19 demanded a payment **for a domain name**. The letters never sought money for domain names.
20 Moreover, the undisputed facts show that Kremer is entitled to prevail on the statutory “bad faith
21 intent to profit factors.” Accordingly, summary judgment should be granted for Kremer^{1/}.

22 STATEMENT

23 A. Facts

24 Plaintiff Bosley is a large national company that performs surgery of the hair and scalp.
25 Complaint ¶ 6. Bosley attracts patients throughout the world as a result of an extensive and
26

27

28 ^{1/}In a separate motion, Kremer also seeks to dismiss Bosley’s state-law claims under Rule 12(b)6).

1 “aggressive” marketing campaign using television, print media, and Internet advertising.
2 Complaint ¶¶ 6, 19, 21, 23.

3 Despite its marketing efforts – or, perhaps, because of them – Bosley has also attracted
4 much unfavorable attention. Its practices have repeatedly been censured by state medical boards
5 and other law enforcement agencies. In the mid-1990's, Bosley was the subject of an extensive
6 investigation by the California Medical Board and the Los Angeles District Attorney (“DA”) who,
7 after interviewing many of Bosley’s patients and former employees, produced a stinging critique of
8 Bosley’s marketing and medical practices (“DA Report”). The condemned conduct included
9 doctoring photographs to show favorable results; concealing from prospective patients the
10 unpleasant aspects of hair transplantation (such as the painful nature of the treatments and the
11 tendency to require more expensive treatments after the first treatments are completed);
12 recommending initial levels of treatments based on each patient’s perceived ability to pay (and
13 then adding on further services when, predictably, the initial treatments proved unsatisfactory);
14 paying commissions based on employees’ success in luring patients using these abusive practices;
15 using non-medical personnel to perform medical procedures; and numerous other abuses. *See*
16 Docket Entry No. (“DEN”) 6, Kremer Affidavit, Exhibit F. Following this damning report, Bosley
17 agreed to pay a six-figure fine and the DA’s legal expenses. *Id.* ¶ 8.

18 More recently, many of the California Board’s findings were adopted verbatim by the
19 Maryland Board of Medical Discipline, and accepted by Bosley in a consent decree, which
20 suspended Bosley’s practice and placed it on probation for five years. *Id.*, Exhibit H. In fact, a
21 review of web sites maintained by the Federation of State Medical Boards reveals that Bosley has
22 been disciplined by nearly half of the fifty states. Kremer Affidavit ¶ 9 and Exhibit G. Bosley also
23 lost a class action lawsuit brought by several disgruntled patients. *Id.* ¶ 29. Several major media
24 outlets have reported unfavorably on Bosley’s activities. *Id.* ¶ 13 and Exhibits J, K, L. Bosley is
25 unquestionably a public figure, and discussions of its practices are indisputably a matter of public
26 interest.

27 Defendant Michael Steven Kremer is a dissatisfied former patient of Bosley’s. He was
28 attracted by its advertising, and by its assurances of a clean disciplinary history and an absence of

1 patient complaints. *Id.* ¶ 4. Kremer filed a suit in 1994 to recover damages from Bosley, but his
2 complaint was dismissed because he could not find a physician willing to testify against Bosley.
3 In 1999, Kremer learned of the disciplinary action taken against Bosley. He found that Bosley had
4 been sanctioned for using several of the same unlawful business practices that Kremer had alleged
5 in his suit against Bosley. Kremer felt that if he had had this information earlier, he would never
6 have become a Bosley patient or might well have prevailed in his lawsuit against Bosley. *Id.* ¶ 14.
7 He decided to create an Internet site to call the public's attention to Bosley's style of medical
8 practice, so that consumers could then weigh his warnings against Bosley's self-promotional
9 information and make an informed choice. *Id.*

10 To create this site, Kremer first registered a "domain name," the Internet address at which
11 he was going to publish his criticisms of Bosley. The first domain name that he chose, on January
12 7, 2000, was "bosleymedical.com," which aptly summarized the target of his criticisms. *Id.* Soon
13 thereafter, Kremer notified Bosley of his plans for an Internet site (as well as other possible means
14 of communication), thus giving Bosley the opportunity to raise any objections that it might have.
15 *Id.* ¶ 15. The communication, a copy of which is attached to the complaint as Exhibit H, did not
16 seek any funds from Bosley, and did not offer to refrain from publishing the web site or from using
17 the domain name for any reason. In fact, the communication did not even mention the domain
18 name. Kremer has never offered to sell a domain name (to Bosley or anybody else), never offered
19 to yield a name in exchange for anything, and never even hinted at a willingness to do so. DEN
20 70, Kremer Second Affidavit ¶ 13, 24. Kremer did not register the domain name in the hope, or
21 with the plan, of receiving anything in consideration for giving it up. *Id.* ¶ 13.

22 By November 2000, he had prepared material to be posted at bosleymedical.com, and
23 forwarded it to several Bosley physicians along with a cover letter telling them of his plans for the
24 web site. *Id.* ¶ 12; *see also* attached Exhibit BB. (The lettering is sequential to the last affidavit
25 previously submitted in 2004 in support of Kremer's motion for summary judgment).^{2/} After
26

27 ^{2/} The document was produced to Bosley in response to its 2002 Request for Production of Documents.
28 Kremer Deposition at 118. The complaint, ¶ 35, alleges the letter's date as November 2001.
However, by November 2001, Bosley had not only filed and lost its UDRP claim (which itself

1 Bosley's unsuccessful arbitration proceedings against this domain name (discussed *infra* 4-6),
2 Kremer registered a second name, "bosleymedicalviolations.com," on March 29, 2001. *Id.* ¶ 34.

3 Kremer's web sites are straightforward. The site posted at "bosleymedical.com" contains a
4 home page that summarizes the DA Report, along with five pages that republish, verbatim, factual
5 findings from that Report. *Id.* Exhibit T. A second site, "bosleymedicalviolations.com," contains
6 verbatim quotes and summaries of the conclusions of several major institutions that have
7 investigated Bosley. This site concludes with a series of links to other sites from which viewers
8 can obtain other information about hair transplantation issues, about medical discipline, and about
9 Bosley in particular. *Id.* Although Bosley originally sued over both web sites, Bosley did not
10 appeal this Court's ruling in favor of Kremer's "bosleymedicalviolations.com." Accordingly,
11 although Bosley has not amended its complaint, those claims are no longer in the case.

12 Kremer's gripe sites against Bosley are entirely non-commercial. Kremer does not earn
13 any revenue from any aspect of the sites, and they contain no advertising. DEN 70, Kremer
14 Second Affidavit ¶ 23. No goods or services are sold on the sites. Neither Kremer nor, so far as he
15 is aware, any member of his family has any investments or other interests in any competitor of
16 Bosley's. Kremer pays the costs of the sites from his own pocket and receives no financial support
17 for them from any other person. *Id.*

18 The sites are direct in their criticisms of Bosley. The criticisms begin at the very top of the
19 home page. No person viewing either site could suffer a moment's uncertainty about whether
20 Bosley as opposed to one of its critics is the sponsor of the page. Near the top of the home page of
21 each web site is a prominent disclaimer of affiliation with Bosley; each disclaimer identifies the
22 URL of Bosley's own site, and contains a hyperlink to the official Bosley site. Moreover, the title
23 and meta tags on both sites make clear their critical attitudes toward Bosley, so that any person
24 who finds Bosley's site through a search engine that supports meta tags, as many major search

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26 attached the letter), but it had sued Kremer in Illinois, had that suit transferred to this Court in
27 response to Kremer's first motion to dismiss for lack of personal jurisdiction, and Kremer had
28 renewed his motion to dismiss, to which the content of his web sites were attached. The notion that
Kremer would have been writing directly to Bosley, while he was represented by undersigned counsel,
is farfetched, and Bosley's counsel has acknowledged that the date in the complaint may have been
a typographical error.

1 engines do, will see from the listing of search results that this site contains consumer criticism and
2 is not a source of information created by Bosley. *Id.* ¶¶ 26-27. *See also* attached Exhibit CC, a
3 recent Google search. Not only does Bosley’s own site appear before either of Kremer’s sites, but
4 Bosley also buys advertising on Google that ensures that links to its own sites are pervasive.

5 **B. The Arbitration Proceeding**

6 On November 28, 2000, in apparent response to Kremer’s November 1 letter, Bosley
7 invoked the Uniform Dispute Resolution Policy (“UDRP”) by filing a complaint with the
8 Arbitration and Mediation Center of the World Intellectual Property Organization (“WIPO”), a
9 leading organization devoted to the enforcement of trademark owners’ rights. However, in his
10 February 28, 2001 decision, the arbitrator ruled against Bosley and in favor of Kremer.
11 http://arbiter.wipo.int/domains/decisions/html/2000/d2000_1647.html. The arbitrator found that
12 Kremer “has legitimate rights or interests in the Domain Name – namely, to make information
13 about Bosley more widely available.” *Id.* at 3. In this regard, the arbitrator cited several previous
14 arbitration decisions under the UDRP that had held that the registration of a domain name for the
15 purpose of consumer criticism constitutes protected fair use, and thus is a legitimate use of the
16 trademark. *Id.* at 4. Second, he ruled that Bosley had failed to establish bad faith. Bosley had not
17 shown that any of the indicia of bad faith applied, and Kremer’s intention to use the domain name
18 to post litigation documents about Bosley and otherwise to further his goal of non-commercial
19 consumer criticism directly rebutted the claim of bad faith. Again, the arbitrator cited several
20 previous arbitration decisions that had upheld uses of domain names, even ones that were
21 confusingly similar to an existing trademark, for purposes of consumer criticism, against claims of
22 bad faith. Finally, the arbitrator concluded as follows:

23 The Panel therefore reluctantly concludes that the purpose of this proceeding is less
24 to protect the Complainants’ trademark rights than to squelch Respondent’s
25 criticism of Complainants – a practice sometimes called “cyber-bullying.” . . . The
26 ICANN domain name proceedings were intended to provide a swift and
27 inexpensive remedy for cybersquatting, not to provide trademark holders with a
28 monopoly over every permutation of their marks in domain names or a weapon to
employ against domain name registrants exercising legitimate free speech and fair
use rights.

Id. at 4-5 (citation omitted).

1 **C. Proceedings to Date.**

2 Undeterred by this ruling in a forum of its own choosing, Bosley sued Kremer in the
3 United States District Court for the Northern District of Illinois. As amended, its complaint raised
4 the same trademark claim that was litigated and lost in the UDRP arbitration proceeding. The
5 complaint alleged that the domain name “bosleymedical.com” violates various provisions of the
6 federal trademark laws, including the cybersquatting, infringement, dilution, and false designation
7 of origin provisions. 15 U.S.C. §§ 1114, 1125(a), 1125(c), 1125(d). The complaint also alleged
8 that “bosleymedicalviolations.com” violates Bosley’s trademark rights. However, the complaint
9 never alleged that the domain names or other portrayals of plaintiff’s marks were “used in
10 commerce” or were “commercial,” as these provisions require. Moreover, although the
11 infringement claim incorporated by reference the cybersquatting claim that Kremer’s names were
12 “confusingly similar” to Bosley’s mark, it never alleged that Kremer’s names or web site were
13 likely to cause confusion with respect to the ownership or source of the web sites. The complaint
14 also alleged that Kremer’s web sites libeled the plaintiffs.

15 Kremer moved to dismiss on numerous grounds. First, he argued that the Illinois court
16 lacked jurisdiction over him. Second, he argued that the failure to allege use in commerce and the
17 obviously non-commercial character of the web sites themselves barred proceeding under the
18 trademark laws. Likewise, the failure to allege likelihood of confusion, coupled with the obvious
19 absence of confusion caused by the web sites, required dismissal of the infringement claim. Third,
20 Kremer argued that the state-law claims should be dismissed for failure to state a claim and should
21 be stricken under the California anti-SLAPP statute.

22 Bosley consented to a change of venue to this Court, and Kremer again filed his motions to
23 dismiss and to strike. Bosley sought and was granted leave to take limited discovery to respond to
24 the motions. Although the Magistrate Judge initially limited discovery to the libel issues, Kremer
25 voluntarily expanded the list of subjects to which he responded to include the issue of
26 “commercial use,” so that he could later seek summary judgment on that issue. In October 2003,
27 the parties reached a settlement concerning the libel claims, and Bosley amended its complaint yet
28

1 again, mooted the pending motions and more specifically alleging commercial use as well as the
2 existence of a “plan to extort” money from Bosley through the creation of critical web sites.

3 The newly amended complaint alleged infringement, unfair competition and dilution under
4 the Lanham Act, cybersquatting under the Anticyberquatting Consumer Protection Act (“ACPA”),
5 and trademark infringement and dilution as well as “unlawful business practices” under California
6 law. Kremer renewed his motion to dismiss all state and federal claims on their face. Kremer
7 argued that, because his web sites were alleged in the complaint, their contents could be
8 considered under Rule 12(b)(6) without converting that part of his motion into one for summary
9 judgment. At the same time, Kremer’s motion also sought summary judgment, as well as to strike
10 the state-law counts under California’s anti-SLAPP statute. In support of these aspects of his joint
11 motion, Kremer attached an affidavit and numerous other exhibits. Bosley responded to Kremer’s
12 motion and sought summary judgment on the federal trademark issues, also attaching affidavits
13 and numerous exhibits. Bosley did not, however, seek summary judgment on either the ACPA
14 claim or the state trademark claims.

15 On April 29, 2004, this Court decided that, because evidence had been attached to
16 Kremer’s joint motion to dismiss and for summary judgment, and because Bosley had not only
17 cross-moved for summary judgment but attached exhibits to that motion, it would treat Kremer’s
18 motion as one for summary judgment. The Court granted summary judgment and dismissed all
19 federal claims while striking the state claims. DN 115, at 4. The Court ruled that all federal
20 claims required that Kremer’s use of Bosley’s trademarks must have been commercial, and that the
21 presence of links to other sites which themselves contained advertisements, or to the web site of
22 Kremer’s pro bono counsel, did not render either of Kremer’s sites commercial. *Id.* at 10-14. As
23 an independent ground for summary judgment, the Court held that because Kremer’s web sites
24 themselves were plainly not confusing about source, and because each of Kremer’s sites had a
25 hyperlink to Bosley’s own site, the possibility that someone searching for Bosley’s own web site
26 might access Kremer’s web site by mistake was legally irrelevant, and hence the domain names
27 did not create a likelihood of confusion as a matter of law. *Id.* at 14-15.

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1 Finally, the Court held that, because Bosley had sued over Kremer's use of Bosley's name
2 both in his domain names and in the content of his web sites, and because Bosley's sought-after
3 relief would have a chilling effect on Kremer's right of free speech, California's anti-SLAPP
4 statute applied. The Court granted Kremer's motion to strike because the same elements that were
5 required for Bosley's federal trademark claims, which Bosley had failed to meet, also applied to
6 Bosley's state-law claims – its infringement and unfair business practices claims required both
7 commercial use and likelihood of confusion, and its state dilution claim required commercial use.
8 Accordingly, the Court granted Kremer's special motion to strike. *Id.* at 15-17.

9 Bosley appealed to the United States Court of Appeals for the Ninth Circuit, but did not
10 challenge the rulings that Kremer was entitled to keep his second domain name,
11 "bosleymedicalviolations.com," and that Kremer could use Bosley's name in the text of his web
12 site (as opposed to the domain name "bosleymedical.com").

13 The Court of Appeals affirmed in part and reversed in part. 403 F.3d 672 (9th Cir. 2005).
14 The court agreed with this Court's holding that commercial use is a fundamental requirement for
15 both federal dilution and infringement claims, although it rested its construction of the
16 infringement statute on different statutory language than this Court had invoked. *Id.* at 676-677.
17 The Court of Appeals also upheld this Court's ruling that the site was noncommercial because it
18 neither offered any products for sale nor contained paid advertising from any commercial entity.
19 *Id.* at 677. Neither the presence of links to other web sites which themselves had advertisements,
20 nor the fact that Kremer's web sites were critical of a commercial enterprise (Bosley), was
21 sufficient to treat Kremer's own web site as commercial. *Id.* at 677-678. Moreover, Bosley's
22 contention that Kremer's web site was created to extort money from Bosley failed because "there
23 is no evidence that Kremer was trying to sell the domain name itself," *id.* at 678, and Bosley had
24 not moved to take discovery for the purpose of showing such an effort on Kremer's part. *Id.* at
25 678-679. Because the Court of Appeals affirmed based on lack of commercial use, it did not have
26 occasion to consider this Court's holding on likelihood of confusion, although its discussion of the
27 fact that any harm to Bosley would come from Kremer's criticism rather than his sale of
28 competing products, *id.* at 679-680 and n.3, suggests sympathy with that holding.

1 registered, and certain letters sent to Bosley as part of that plan. However, the ACPA count of its
2 complaint, Count IV, does not make any reference to extortion. Instead, Bosley alleges that
3 Kremer's "bosleymedical.com" domain name is "identical, confusingly similar and dilutive" of
4 Bosley's trademarks, and that Kremer had a bad faith intent to profit as evidenced by five
5 enumerated facts, each of which is apparently intended to invoke one of the nine "bad faith intent
6 to profit" factors set forth at 15 U.S.C. § 1125(d)(1)(B)(I). This approach is consistent with
7 Bosley's strategy on appeal, when it argued that, even if it waived its right to seek further
8 discovery and submit further evidence on the issue of commercial use, ACPA liability turns on
9 nine factors, and Bosley was deprived of the opportunity to submit evidence with respect to those
10 nine factors.

11 The undisputed evidence shows that Kremer is entitled to prevail on each of the relevant
12 "bad faith intent to profit" factors, and, in any event, there is no probative evidence that Kremer
13 asked Bosley to pay him money in exchange for his "bosleymedical.com" domain name. As a
14 separate and independent ground for summary judgment, Kremer is excused from liability by the
15 ACPA's safe harbor provision, § 1125(d)(1)(B)(ii), which bars a finding of bad faith, regardless of
16 Kremer's reasons for registering the domain name, so long as he "believed and had reasonable
17 grounds to believe that the use of the domain name was a fair use or otherwise lawful." Finally, in
18 light of the Court of Appeals' holding that Kremer's use of the domain name for the web site
19 posted at bosleymedical.com was entirely consistent with the Lanham Act, the First Amendment
20 bars a court from issuing an injunction against otherwise lawful speech simply because the speaker
21 allegedly had a bad motive for exercising his free speech rights.

22 **A. On the Undisputed Facts, the Bad Faith Intent to Profit Factors**
23 **Support the Lawfulness of Kremer's Registration and Use of His**
24 **Domain Name.**

25 The ACPA was enacted to remedy a particular evil – people taking advantage of companies
26 that were slow to recognize how they could use the Internet for marketing purposes through "the
27 Internet version of a land grab to force the rightful owners to pay for the right to engage in
28 electronic commerce under their own name." *Interstellar Starship Svces. v. Epix*, 304 F.3d 936,
946 (9th Cir. 2002). That scenario does not apply here. Far from being blocked from advertising

1 itself on the Internet, Bosley selected bosley.com as its domain name years before Kremer
2 established his gripe site, DEN 70, Kremer Second Affidavit ¶ 20, and there is no doubt that it has
3 been an effective self-promotion tool. DEN 6, Kremer First Affidavit. ¶ 21; Complaint ¶ 19.
4 Indeed, it is Bosley that has been blocking expression, by registering many critical domain names,
5 such as “bosleysucks.com,” not to provide additional fora for its own speech but for the obvious
6 purpose of squelching the speech of others. Kremer First Affidavit ¶ 19.

7 To guide the courts’ determination whether a particular defendant registered or used the
8 domain name in question “with a bad faith intent to profit,” Congress adopted a list of nine factors
9 that were drawn from the typical behavior of the cybersquatters at which the statute was aimed.
10 The presence of one or more of the first four factors tends to negate bad faith, while the presence
11 of the next four factors tends to suggest bad faith. *Lamparello v. Falwell*, 420 F.3d 309, 319 (4th
12 Cir. 2005); *Intellectual Property and Communications Omnibus Act of 1999*, House Conf. Rep.
13 106-424, 106th Cong., 1st Sess. (1999), at 109 (ninth factor can point either way).

14 Kremer prevails under the factors because he fits squarely within “positive” factor IV, 15
15 U.S.C. §1125(d)(1)(B)(i)(IV), “the person’s bona fide noncommercial or fair use of the mark in a
16 site accessible under the domain name.” This Court has previously ruled that Kremer’s use of his
17 domain name for his gripe site about Bosley was non-commercial and fully permissible under the
18 Lanham Act, and Bosley has abandoned its claim that the use of the mark in the content of the web
19 site was impermissible; those findings are now final, and control the decision with respect to
20 Factor IV.^{3/} To be sure, a serial cybersquatter who erects a pseudo “free speech” site after being
21 sued under ACPA cannot escape judgment through such a fig leaf. *E.g., E&J Gallo Winery v.*
22 *Spider Webs*, 286 F.3d 270 (5th Cir. 2002). The present suit, however, was not filed until after
23 Kremer had created his gripe site.

24 _____
25 ^{3/}At the very least, that holding is law of the case, *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th
26 Cir. 1995); *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985), and should preclude the
27 relitigation of the same issue. 18 Wright, Miller & Cooper, *Federal Practice & Procedure:*
28 *Jurisdiction and Related Matters* § 4418 (2d ed. 2002); *Cowgill v. Raymark Industries*, 832 F.2d 798,
802 (3d Cir. 1987) (“When a court of appeals reverses a judgment and remands for further
consideration of a particular issue, leaving other determinations of the trial court intact, the unreversed
determinations of the trial court normally continue to work an estoppel.”).

1 Moreover, **none** of the negative factors favors Bosley. For example, Kremer has not
2 registered **any other** trademarks as domain names. DEN 70, Kremer Second Affidavit ¶ 24.
3 Although the Amended Complaint attempted to invoke Factor VIII, 15 U.S.C.
4 §1125(d)(1)(B)(i)(VIII), by charging Kremer with owning “multiple domain names” using
5 Bosley’s trademarks, ¶ 78(e), Kremer has only two such names – “bosleymedical.com” and
6 “bosleymedicalviolations.com” – and Bosley has dropped its claim that the latter name is
7 impermissible. (It has also lost its claim that bosleymedical.com is impermissible under federal
8 trademark law.) Moreover, the language of the statute shows that it is inapplicable to this case: It
9 makes relevant “registration or acquisition of multiple domain **names** which the person knows are
10 identical or confusingly similar to **marks** of **others**.” §1125(d)(1)(B)(i)(VIII). The uses of the
11 plural in the words “names,” “marks” and “others” demonstrate that this factor is aimed at persons
12 who have shown a pattern of cybersquatting. *See Nissan Motor Co. v. Nissan Computer Corp.*,
13 2002 WL 32006514 (C.D. Cal. Jan. 7, 2002) (fact that defendant had registered both nissan.com
14 and nissan.net did not tilt Factor VIII against him). Moreover, “bosleymedicalviolations.com is not
15 “confusingly similar” to Bosley’s marks, and in any event Kremer is now charged with registering
16 only one domain name improperly, and involving the trademarks of only one other entity, Bosley.
17 The undisputed facts relating to Factor VIII thus do not support Bosley.

18 Factor VII requires “provision of **material** and misleading false **contact** information.” §
19 1125(d)(1)(B)(i)(VII) (emphasis added). As the House Committee stated, this factor was aimed at
20 persons who give employ “falsif[y] contact information with the intent to evade identification and
21 service of process by trademark owners,” and thus to attempt to frustrate the legal enforcement of
22 mark holders’ rights. *Trademark Cyberpiracy Prevention Act*, House Report 106-412, 106th
23 Cong., 1st Sess. (1999), at 12-13. Bosley contended on appeal that it intended to introduce
24 evidence that Kremer was guilty under Factor VII by supplying some incorrect information when
25 he registered. Bosley’s own UDRP complaint, DEN 6, Kremer First Affidavit, Exhibit E, shows
26 that the registration data included Kremer’s name as the billing contact, and even his telephone
27 number (at page 4). Although for some reason the ISP that did the registration for Kremer
28 included some incorrect information in the original registration for bosleymedical.com, such as an

1 erroneous listing of the registrant as “Bosley Medical,” the listing of Kremer as the billing contact
2 enabled Bosley to contact Kremer when it desired to do so. Bosley’s UDRP Complaint expressed
3 no doubt that it was Kremer who was the registrant, and Bosley was able to serve Kremer both
4 with the UDRP complaint, and with process for its federal court complaint. This factor therefore
5 does not favor Bosley.

6 Invoking Factor V, 15 U.S.C. §1125(d)(1)(B)(i)(V), the Amended Complaint alleges that
7 Kremer registered his domain name “with an intent to divert consumers from Bosley’s web site.” ¶
8 78(d). Again the undisputed facts show that Bosley cannot establish a violation of the actual
9 language of the statute, which requires:

10 (V) intent to divert consumers from the mark owner’s online location to a site
11 accessible under the domain name that could harm the goodwill represented by the
12 mark, either for commercial gain or with the intent to tarnish or disparage the mark,
by creating a likelihood of confusion as to the source, sponsorship, affiliation, or
endorsement of the site

13 This provision has three elements: (1) intent to divert to a site that could harm the site’s goodwill,
14 (2) either seeking commercial gain or having an intent to tarnish or disparage the mark, and (3)
15 likelihood of confusion. Even if there were a genuine issue about the “commercial gain” aspect of
16 prong (2) of this factor – and there is not – neither prong (1) nor prong (3) can be established
17 here.^{4/} Prong (1) is defeated by Kremer’s affidavit, which disclaims any intent to divert, and by the
18 clear disclaimer of affiliation at the top of the web site, along with the listing of Bosley’s own
19 official domain name and a hyperlink to Bosley’s web site. Prong (3) is defeated by this Court’s
20 finding, which has become final for the purpose of this case, that Kremer’s domain name does not
21 create any likelihood of confusion under the Lanham Act.

22 The Amended Complaint does not invoke Factor VI, 15 U.S.C. §1125(d)(1)(B)(i)(VI) and
23 for good reason. This factor requires:

24 (VI) the person’s offer to transfer, sell, or otherwise assign the domain name to the mark
25 owner or any third party for financial gain without having used, or having an intent to use,
26 the domain name in the bona fide offering of any goods or services, or the person’s prior
conduct indicating a pattern of such conduct;

27 ^{4/}The other aspect of prong (2), intent to disparage or tarnish **the mark**, is not present here, because
28 as Professor McCarthy writes, the cause of action for tarnishment does not limit the right to criticize
the trademark holder. *McCarthy on Trademarks* § 31-148 (4th ed. 1999).

1 It is undisputed in the record that Kremer has never made such an offer. DEN 70, Second Kremer
2 Affidavit, ¶¶ 13, 24.

3 Indeed, although in many cases, statements by domain name registrants about their domain
4 names have been invoked to show that the registrant was seeking payment for a domain name,
5 counsel have been unable to locate a single case in which the mere fact that the registrant
6 communicated with the trademark holder about his plans for a web site, without suggesting an
7 expectation of payment or trading for the domain name, was sufficient to find a bad faith intent to
8 profit. Every other case involves much more direct language seeking money, or some other
9 consideration, or an “offer” for the domain names. *See Coca-Cola Co. v. Purdy*, 382 F.3d 774, 786
10 (8th Cir. 2004) (registrant offered to give up names in exchange for free space on editorial page);
11 *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 548-549 (6th Cir. 2003) (registrant told markholder
12 that he had received “offers” from the competition but name was “available for a limited time” to
13 markholder); *PETA v. Doughney*, 263 F.3d 359, 363 (4th Cir. 2001) (registrant stated that if
14 plaintiff wanted his domain name it should “make me an offer”); *Virtual Works v. Volkswagen*,
15 238 F.3d 264, 267 (4th Cir. 2001) (registrants told trademark owner it would start an auction for
16 the domain name unless he heard from the owner within 24 hours); *Harrison v. Microfinancial,*
17 *Inc.*, 2005 WL 435255 (D. Mass. Feb 24, 2005) (registrant posted offer on web site to surrender
18 name if markholder canceled his lease and refunded his money, then called and confirmed orally).

19 Kremer never did anything of the sort. The undisputed evidence in this case supports
20 Kremer’s motion for summary judgment based on the bad faith intent to profit factors.

21 **B. Kremer Is Entitled to Summary Judgment Under ACPA’s Safe Harbor**
22 **Provision Because He Actually and Reasonably Believes That His**
23 **“Use” of the Domain Name Is a Fair Use or Otherwise Lawful.**

24 ACPA’s safe harbor provision also gives Kremer the right to summary judgment because,
25 even if there were a genuine issue about Kremer’s motivation for registering the domain name in
26 the first place and such motivation were alone a sufficient basis for an ACPA cause of action, the
27 undisputed facts show that Kremer’s **use** of the domain name is protected by ACPA’s safe harbor
28 provision, § 1125(d)(1)(B)(ii):

1 Bad faith intent described under subparagraph (A) shall not be found in any case in
2 which the court determines that the person believed and had reasonable grounds to
believe that the use of the domain name was a fair use or otherwise lawful.

3 Kremer's affidavit in this case makes clear that he believes that his bosleymedical.com domain
4 name is entirely lawful because it identifies the subject matter of his web site. Kremer Second
5 Affidavit ¶ 11. Moreover, in its first ruling in this case, this Court confirmed that the use of the
6 domain name for the purpose of identifying the subject of the site is and was lawful under the
7 Lanham Act, and therefore dismissed Bosley's trademark claims under federal law. This ruling is
8 now a final determination for purposes of this case that, whatever Kremer's original reasons for
9 registering the site, the use he has made of the domain name **is and was** lawful under federal law.
10 It is a fortiori that Kremer's belief in the lawfulness of his use must be reasonable as a matter of
11 law. Accordingly, Kremer is entitled to summary judgment based on the ACPA's safe harbor
12 provision.

13
14 **C. Summary Judgment Should be Granted Because The First Amendment
Bars a Claim Based on an Allegedly Improper Motive for Engaging in
15 Otherwise Protected Speech.**

16 Even if Bosley were able to present evidence sufficient to show a genuine issue about
17 whether Kremer has a bad purpose for registration, the question is what relief is appropriate for a
18 defendant whose registration was unlawful but whose use was lawful. The language of the safe
19 harbor provision, cited above, shows that proper use can negate bad intent with respect to
20 registration. Even beyond, it supports denial of injunctive relief that would preclude continuing
21 lawful use.

22 As discussed above, Kremer's use of "bosleymedical.com" is for a non-commercial and
23 non-confusing web site which, accordingly, is accorded maximum protection under the First
24 Amendment. On the facts of this case, the First Amendment would bar the application of the
25 ACPA to take away Kremer's domain name. Put another way, an allegedly bad motive for
26 exercising free speech rights does not support issuance of an injunction against the speech. See
27 *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) ("the right of the people to petition
28 their representatives in government 'cannot properly be made to depend on their intent in doing

1 so,” quoting *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127
2 (1961)); *Penn Warranty Corp. v. DiGiovanni*, 2005 WL 2741947 (N.Y. Sup. Ct. Oct. 24, 2005)
3 (“Since defendant has the right to express his opinion to the public about plaintiff’s services, the
4 ‘threat’ to express such personal opinion cannot be actionable as coercion, extortion or any related
5 tort.”). Although liability can be imposed for the making of illegal threats, see *McCalden v.*
6 *California Library Ass’n*, 955 F.2d 1214 (9th Cir. 1990), such threats cannot be merely imaginary
7 or based on speculation about the reasons for a dissatisfied consumer’s issuing a warning that he
8 plans to begin a campaign of criticism. By the same token, the serious First Amendment questions
9 that would be presented by such an injunction counsel adoption of a construction of ACPA that
10 bars such relief.

11 It is all too easy for a company that has been criticized online to hypothesize that a
12 disgruntled consumer could not possibly be motivated solely by principle, but might hope to be
13 offered a buyout in return for discontinuing his criticisms and turning over whatever domain
14 names he has registered to use as a platform from which to communicate those criticisms. The
15 fact that the company can afford to hire lawyers and press its claims in court, however, should not
16 be sufficient basis to allow the company to tie the defendant down in a protracted litigation and
17 thus chill his freedom of speech. See *Shulman v. Group W Productions*, 18 Cal. 4th 200, 228, 955
18 P.2d 469 (Cal. 1998); *Schuster v. U.S. News & World Report*, 602 F.2d 850, 855 (8th Cir. 1979).

19 Here, the complaint is based on nothing more than speculation that the reason why Kremer
20 informed Bosley of his planned web site was that Kremer hoped to be paid to keep his mouth shut
21 **and** to give up his domain name. None of Kremer’s communications to Bosley expressed any
22 interest in being paid to surrender his domain names or, indeed, to refrain from criticizing Bosley.
23 Nor did Bosley make any effort to communicate with Kremer before it sued him to test its
24 hypothesis about his “real” agenda, such as by asking whether he would take money for the
25 domain name. This is frequently what companies do when confronted with situations that they
26 believe involve cybersquatting. E.g., *Nissan Motor Co. v. Nissan Computer Corp.*, 2002 WL
27 32006514 (C.D. Cal. Jan. 7, 2002); see also *Taubman v. WebFeats*, 309 F.3d 770, 776 (6th Cir.
28 2003) (registrant initially accepted trademark owner’s offer to buy domain name). To be sure,

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11/1/00

Thomas Buchholtz
Bosley Medical
1700 Montgomery St
Ste. 221
San Francisco, CA 94111

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