

4 CIVIL DIVISION

5 POWERMARK HOMES, et al., )  
 )  
6 Plaintiffs, )  
 )  
7 vs. ) Case No. CV 625465  
 )  
8 JOHN DOE, et al., )  
 )  
9 Defendants. )

10  
11  
12

TRANSCRIPT OF PROCEEDINGS

13 APPEARANCES:  
14  
15 Bruce W. McClain, Esq.,  
Thomas P. Maczuzak, Esq.,  
16 on behalf of the Plaintiffs;  
17 Gregory A. Beck, Esq.,  
Edward A. Icove, Esq.,  
18 Dean C. Williams, Esq.,  
19 on behalf of the Defendants.

20  
21  
22  
23  
24 Michael J. Jenovic, RMR  
25 Official Court Reporter  
Cuyahoga County, Ohio

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## TRANSCRIPT OF PROCEEDINGS

— — — —

BE IT REMEMBERED, that at the May  
A.D., 2007 term of said Court, to-wit,  
commencing on Thursday, August 23, 2007, this  
cause came on to be heard before the Honorable  
Timothy McCormick, in Courtroom No. 20-C,  
Courts Tower, Justice Center, Cleveland, Ohio,  
upon the pleadings filed heretofore.

— — — —

1 THURSDAY MORNING SESSION, AUGUST 23, 2007

2 THE COURT: We're here on a  
3 civil case, 625465, Powermark, Inc. and Mark  
4 Powers and Lisa Powers versus John Doe and  
5 Domains by Proxy. We're here for purposes of  
6 a hearing on a preliminary injunction.

7 Counsel, you are prepared to go  
8 forward; is that correct?

9 MR. MCCLAIN: Yes, sir, your  
10 Honor.

11 THE COURT: State your names  
12 for the court reporter, please.

13 MR. MCCLAIN: Yes. It's Bruce  
14 W. McClain, M-C-C-L-A-I-N.

15 MR. MACZUZAK: Thomas Maczuzak,  
16 M-A-C-Z-U-Z-A-K.

17 THE COURT: On behalf of the  
18 defense, state your names for the record.

19 MR. BECK: I'm Greg Beck,  
20 B-E-C-K.

21 MR. ICOVE: Ed Icové,  
22 I-C-O-V-E.

23 MR. WILLIAMS: Dean Williams,  
24 W-I-L-L-I-A-M-S.

25 THE COURT: Who do you

1 represent?

2 MR. WILLIAMS: I represent  
3 Domains by Proxy.

4 THE COURT: Mr. Icove, you  
5 have John Doe?

6 MR. ICOVE: Yes, your Honor.

7 THE COURT: Mr. Beck, you  
8 have John Doe?

9 MR. BECK: Correct, your  
10 Honor.

11 THE COURT: Have you been  
12 admitted pro hoc vice?

13 MR. BECK: Yes, your Honor.

14 THE COURT: Very good. Do  
15 you wish to make any opening statement or do  
16 you want to just present evidence?

17 MR. MCCLAIN: I don't think  
18 that we need to.

19 MR. BECK: I would like to  
20 say something briefly, your Honor.

21 THE COURT: Go right ahead.

22 MR. BECK: As the brief  
23 that we filed explains, your Honor, when it  
24 comes to a preliminary injunction on speech,  
25 the Ohio Supreme Court and other courts that

1           have considered the question have held that  
2           that sort of restriction is essentially  
3           unavailable in all cases as category of cases.

4                       Therefore, I think that there's no  
5           evidence that could be presented that would  
6           justify a restriction on --

7                       THE COURT:               Isn't there a  
8           distinction between commercial speech?

9                       MR. BECK:                There is, your  
10          Honor.

11                      THE COURT:               A different  
12          standard?

13                      MR. BECK:                Commercial  
14          speech is entitled to some protection.

15                      THE COURT:               So it's not --  
16          when you're talking speech, it's not  
17          unfettered.

18                      MR. BECK:                That's right.  
19          But we don't have a commercial speech case.

20                      THE COURT:               That's your --  
21          but don't say on the record there's no basis  
22          for an injunction at all.

23                      MR. BECK:                Okay, your  
24          Honor. That's correct, your Honor.

25                      THE COURT:               Thank you.

1                   Go ahead, counsel.

2                   MR. MCCLAIN:           Your Honor, we  
3 would call our witness -- we only have one --  
4 who is Lisa Powers.

5                   THE COURT:            Very good.

6                   Step forward, ma'am.

7                   - - - -

8                   The PLAINTIFF, to maintain the issues  
9 on its part to be maintained, called  
10 as a witness, LISA POWERS, who, being  
11 first duly sworn, was examined and  
12 testified as follows:

13                   - - - -

14                   MR. MCCLAIN:           I will keep this  
15 short on direct examination, your Honor. It's  
16 only about the issues of defamation and  
17 damages. Let me first say to the court -- and  
18 I apologize I only have one copy here. We've  
19 made some copies of the website, but there's  
20 an old website and a new website. After the  
21 court asked them to take it down, they put up  
22 a second one.

23                   THE COURT:            Right.

24                   MR. MCCLAIN:           And I believe  
25 that's attached to our motion to show cause.

1           So if the court has our motion to show cause,  
2           it can follow it with that.

3                       (Pause.)

4           THE COURT:               Go ahead.

5           MR. MCCLAIN:            I don't know if  
6           you have a copy of the motion to show cause  
7           that we filed.

8           THE COURT:               When was the  
9           motion to show cause filed?

10          MR. MCCLAIN:            I'm sorry?

11          THE COURT:               The motion to  
12          show cause, when was that filed?

13          MR. MCCLAIN:            Maybe several  
14          weeks ago.

15          THE COURT:               Okay.

16          MR. MCCLAIN:            Well, the only  
17          reason that I make a reference to it is  
18          because as a -- if I could approach the bench,  
19          I'll just hand it to you personally so you can  
20          see it.

21                       (Pause.)

22          THE COURT:               This is on the  
23          new one. I have this.

24          MR. MCCLAIN:            Okay. You have  
25          it. Okay.

— — — —

## DIRECT EXAMINATION OF LISA POWERS

BY MR. MCCLAIN:

Q. Ms. Powers, would you state your name and address for the record.

A. Lisa Powers. My home address is 25053  
Saddlehorn Circle. That's in Columbia Station, Ohio.

Q. And what is -- let me get right to the heart of things here. Have you seen both the old and -- I guess I'll call it the anti-Powermark Homes website. Have you seen both the old anti-Powermark website and the new anti-Powermark Homes websites?

A. Well, the initial anti-Powermark website that had the picture on it, I pretty look much looked at the whole site. The new, one to be honest with you, I was so disgusted I really didn't look at it.

Q. Why don't you look this over now a little bit.

This is a copy -- and we can mark this as an exhibit -- a copy of the new Powermark Homes -- anti-Powermark Homes website.

(Pause.)

A. Okay.

MR. MCCLAIN: Do you want to  
now and then I'll give it back to you



1 THE COURT REPORTER: Yes.

2 - - - -

3 (Thereupon, Plaintiff's Exhibit Nos.  
4 1 and 2 were marked for  
5 identification purposes.)

6 - - - -

7 THE COURT: I'm going to  
8 interrupt you for a second.

9 (Pause.)

10 Go ahead.

11 What did you mark?

12 MR. MCCLAIN: We have marked  
13 Plaintiff's Exhibits 1 and 2.

14 THE COURT: Okay.

15 MR. MCCLAIN: And I have been  
16 informed during the break by opposing counsel  
17 that what we're marking as Exhibit 1 is the  
18 first anti-Powermark website, the one they  
19 took down and that the copy that I printed out  
20 does not have all the words on it. But this  
21 is actually attached to the complaint that we  
22 filed.

23 THE COURT: Okay.

24 MR. MCCLAIN: So it's somewhat  
25 irrelevant in that it's already before the

1 court. And Exhibit -- Plaintiff's Exhibit 2  
2 is the new anti-Powermark website, the one  
3 that's still up.

4 Q. Lisa, looking to both Exhibits 1 and 2, do you  
5 recognize Exhibit 1, even though the printing, you  
6 know, kind of runs off the page on it?

7 A. Yes.

8 Q. What is that?

9 A. Well, Exhibit 1, which I've marked as the  
10 initial Powermark Homes dot net, is what was on the  
11 internet.

12 Q. That would be the initial anti-Powermark Homes  
13 website?

14 A. That's correct.

15 Q. Okay. What is -- is there anything -- is your  
16 name on both those websites in both the exhibits?

17 A. Yep.

18 Q. How are you identified there with Powermark  
19 Homes?

20 A. "This husband and wife team are obviously a  
21 very busy couple, as they own these corporations."

22 Q. Do you own any of Powermark Homes?

23 A. I never have owned any of Powermark Homes.

24 Q. So the statement there as an owner of  
25 Powermark Homes is false?

1 A. That's correct.

2 Q. As you being an owner is false?

3 A. Correct.

4 Q. Are there any other businesses listed there  
5 showing you as an owner where you're not an owner?

6 A. Yep.

7 Q. Okay. There's several corporations and LLCs  
8 listed there?

9 A. Uh-huh.

10 Q. There's others there, too, that you're not an  
11 owner of?

12 A. That's correct.

13 Q. Do you do any businesses personally yourself  
14 or with your husband outside of the corporation just  
15 in your only names?

16 A. Sure.

17 Q. Like what?

18 A. Well, one of the things that we do is we  
19 personally own townhouses in the city of Brooklyn.  
20 There's 14 units. And, you know, Mark and Lisa  
21 Powers personally own those. So we run those as a  
22 business. Also, personally, I've been in the horse  
23 business for 17 years, I think, and I sell and train  
24 and do a lot of that type of business under my own  
25 name.

1 Q. Have you gotten any feedback about these  
2 websites personally?

3 A. Well, as a matter of fact, yeah. As you and I  
4 have discussed, I've had numerous people coming up to  
5 me and wanting to know, you know, why, number one,  
6 when they do a search under my name why it's coming  
7 up, you know, under here. And it's a little awkward  
8 trying to explain to people.

9 You know, basically it puts me on the  
10 defensive when really I'm not really a part of  
11 Powermark Homes. So, you know, yeah, it does hurt.  
12 To be honest with you, I'm getting a little tired of  
13 defending myself all the time and, you know, trying  
14 to explain to people, you know, what this is.

15 Q. Okay. Have you gotten any feedback from  
16 people as a result of this regarding any questions  
17 about your integrity?

18 A. Well, how could you not? I mean, when you  
19 look at this, it basically says that, you know, Lisa  
20 Powers sucks. You know, that's what this second  
21 website, my understanding is, Powermark Homes sucks  
22 dot net. And, I mean, when you got your name  
23 plastered over that, sure, that hurts. Try  
24 explaining that.

25 Q. I'm sorry?

1 A. It just gets a little old explaining that.

2 Q. Have you received any feedback or feeling that  
3 it's hurting your personal business in your own name?

4 A. Well, it's been a little slow renting  
5 townhouses lately. Because, you know, you would  
6 think that that would be a busy thing at this time of  
7 the year. And, you know, the horse business has been  
8 a bit off. I've had two people that I sold horses to  
9 that actually asked me about this website and, you  
10 know, I had to explain to them I wasn't exactly sure  
11 who did this and why. You know? I mean, I have no  
12 idea why this person feels this way, first of all.  
13 They've never come to us and said, "We're angry with  
14 Powermark Homes or you personally." I mean, why?

15 Q. And you feel that by the time you got to trial  
16 that maybe with the help of your counsel you'll be  
17 able to offer additional evidence of damages caused  
18 by this?

19 A. Oh, sure. I can put together at least a good  
20 list of people.

21 Q. All right. And you and your husband are  
22 personally involved in the real estate business also  
23 in your own names?

24 A. Yes.

25 Q. Okay. Including you also?

1 A. Yes.

2 MR. MCCLAIN: Okay. That's  
3 all. I don't have any further questions of  
4 this witness.

5 THE COURT: You want to  
6 cross-examine the witness?

7 MR. BECK: Yes, your Honor.

8 MR. BECK: May I ask, does  
9 the witness have the exhibits still?

10 MR. MCCLAIN: She has them.

11 - - - -

12 CROSS-EXAMINATION OF LISA POWERS

13 BY MR. BECK:

14 Q. Ms. Powers, you are married to Mr. Mark Shay  
15 Powers?

16 A. I am.

17 Q. And did you say that you're not an owner of  
18 Powermark Homes?

19 A. No, I am not an owner and I have never been an  
20 owner or any part of it. I am an employee.

21 Q. You are an employee?

22 A. I am an employee.

23 Q. Does Powermark Homes have a board of  
24 directors?

25 A. I'm not an owner. I don't know that part.

1 Q. Are you an officer of Powermark Homes?

2 A. I've already stated I'm not anything with  
3 Powermark Homes except an employee.

4 Q. Do you know the business Pinnacle Homes?

5 A. I am not a part of that and have never been a  
6 part of Pinnacle Homes.

7 Q. Are you familiar with that?

8 A. I can't say that I am, no.

9 Q. You're not familiar with it?

10 A. I was not employed at that time by Powermark  
11 Homes.

12 Q. But my question is: Are you familiar with  
13 Pinnacle Homes?

14 A. Not really, no. I didn't have any part of it.

15 THE COURT: Have you ever  
16 heard the name?

17 THE WITNESS: Well, yeah.  
18 It's on the sheet here.

19 THE COURT: But other than  
20 seeing it on the sheet, do you have any  
21 familiarity with that name?

22 THE WITNESS: There was a  
23 gentleman that used that name that my husband  
24 may have been a partner with. But I can't  
25 tell you -- I can't testify about it, because

1 I don't know anything about it.

2 THE COURT: Okay.

3 Q. Do you know the business MLM Development?

4 A. Yeah. That's an LLC. It's not even a  
5 corporation.

6 Q. Who owns that business?

7 A. You know, I don't have the records. I didn't  
8 bring all that stuff. I didn't know I'd being  
9 testifying about it.

10 Q. Is your husband associated with that business?

11 A. You know what? There's a lot of them on here.  
12 I'm going to be honest. I don't know the breakdowns.  
13 Because there's other ones that we have that we own  
14 that aren't on here, also. So I don't remember which  
15 ones. Maybe that would be a better question for my  
16 counsel. He might know that.

17 Q. So you said that, "There's other businesses  
18 that we own that are not on there." Do you own  
19 businesses in cooperation with your husband?

20 A. There are numerous ones that we are partners  
21 in together. There are ones that we are not  
22 partners.

23 Q. And on this list in this exhibit -- this is  
24 Exhibit 1, the old website; is that right?

25 A. Okay.



1 Q. Are there any of these businesses in which you  
2 are an owner?

3 A. Again, I've already stated that I would want  
4 to bring out all of the corporate records for each  
5 individual entity based on the fact that I don't know  
6 that for a fact. I know that on the first two for  
7 sure I am not.

8 Q. So you cannot say that -- so you cannot say  
9 with any certainty whether you are or are not an  
10 owner of the last three businesses listed here?

11 A. That is correct.

12 Q. Okay. Thank you.

13 (Pause.)

14 Looking at Exhibit 1 again, look at this front  
15 page there. It shows a picture. Do you see that?

16 A. I do.

17 Q. Who is depicted in that picture?

18 A. Well, the picture was posted on the website.

19 Q. Yeah. But who's depicted in the picture?

20 A. It is myself and my husband.

21 Q. Okay. And what does the caption underneath  
22 that say?

23 A. Which one?

24 Q. Underneath the picture what does it say?

25 A. "Civil cases and property lien" --

1                   MR. BECK:                   Your Honor,  
2           since I don't have a copy of the exhibit, do  
3           you mind if I approach and look at what she's  
4           looking at?

5                   THE COURT:               Go right ahead.

6                   MR. BECK:               Thank you.

7   A.       It's directly right underneath it.

8   Q.       Okay. That's correct. Okay. Thank you. I  
9       will work off of that.

10           Are you familiar with the website for  
11   Powermark Homes, Incorporated, Powermark -- the  
12   website Powermark Homes dot com?

13   A.       That, I am.

14   Q.       And does this same picture appear on that  
15   website?

16   A.       Nope.

17   Q.       It does not?

18   A.       No.

19   Q.       Did it ever appear on that website?

20   A.       That is not the whole picture that's on our  
21   website.

22   Q.       A portion of that picture appears on the  
23   website?

24   A.       There is not this exact picture on the web --  
25   on our website, no. But a similar picture. Our

1 website posts three different persons, two of which  
2 are employees of Powermark Homes and one that is the  
3 owner. What you guys did is, you just cut off what  
4 was convenient and put in these two people. So --

5 Q. But --

6 THE COURT: Let her answer.

7 MR. BECK: Sorry.

8 A. When you go to Powermark Homes, this is the  
9 not the picture that I posed on that website.

10 Q. But there is a picture on your website that  
11 depicts you and your husband, Mark Powers?

12 A. And my brother-in-law, Scott Powers, who was  
13 also an employee of Powermark Homes, which, in turn,  
14 you guys cut off.

15 Q. And on that picture does it say the words  
16 "Powermark Homes, Incorporated"?

17 A. On which picture?

18 Q. On the picture on your web -- is this the  
19 Powermark Homes web page?

20 A. I don't know. I don't have a picture of it in  
21 front of me.

22 Q. Would it refresh your memory if you saw it?

23 A. I --

24 THE COURT: Do you have one?

25 MR. BECK: Yes.

1 THE COURT: Why don't you  
2 bring it out rather than --

3 MR. BECK: Okay.

4 A. I have it on my phone.

5 MR. BECK: I'm going to  
6 call this Exhibit 1 for defendant,

7 THE COURT REPORTER: Exhibit A.

8 THE COURT: Exhibit A

9 MR. BECK: Exhibit A is  
10 fine.

11 THE COURT: Let me see it.

12 (Pause.)

13 All right.

14 Q. Do you recognize that?

15 A. That would be the picture I was referring to.

16 Q. And is that a picture of the Powermark Homes  
17 dot com web page?

18 A. You know, we made some changes to it, so I  
19 don't know if that's the one that's there now.

20 Q. But does it look like the Powermark Homes  
21 website as it appeared at any point in time?

22 A. Yeah, it does.

23 Q. And on the picture -- is the picture you were  
24 referring to of Mark and Lisa Powers, you and your  
25 husband?

1 A. What do you mean?

2 Q. Never mind. I withdraw the question.

3 Do you see on that picture at the bottom some  
4 words "Powermark Homes, Incorporated"?

5 A. Uh-huh.

6 Q. Okay. And do you see there's two paragraphs  
7 that appear immediately above the picture?

8 A. Uh-huh.

9 MR. BECK: I'm sorry, your  
10 Honor. May I approach again?

11 THE COURT: Yes.

12 Q. Okay. Under the section that says "about us,"  
13 could you just read the first sentence up there.

14 A. We are a small custom builder that specializes  
15 in residential building from 2,000 square foot and up  
16 and a commercial builder up to 20,000 square feet.  
17 We have a small assortment of lots and we will build  
18 on your own lot in the Greater Cleveland area."

19 Q. Okay. And do you own, you said, some other  
20 businesses, a horse business, you said?

21 A. I own personally horses, yes.

22 Q. And you own some sort of building company  
23 where you -- I didn't understand what that was. Some  
24 other company you owned, you said?

25 A. Yeah.

1 Q. You lease buildings or something?

2 A. We have townhouses in the city of Brooklyn  
3 which we personally lease. We personally own them.

4 Q. And you own that business, as well?

5 A. I already testified to that, yes.

6 Q. And is that business affiliated with Powermark  
7 Homes in any way?

8 A. Well, considering that Mark and Lisa Powers  
9 own them personally and I don't own Powermark Homes,  
10 no.

11 Q. So the answer is no.

12 You mentioned that some people who you've sold  
13 horses to brought up the website to you.

14 A. Uh-huh.

15 Q. Do you remember who those people were?

16 A. Yeah. One of them is a girlfriend of mine  
17 that, you know, I ride with all the time. I've known  
18 her for quite a few years. A lot of people go to our  
19 website. They want to know what we have for sale as  
20 far as lots or, you know, things like that.

21 Q. And there was another person?

22 A. There's probably three or four.

23 Q. Okay. And do you remember who those people  
24 are?

25 A. Yeah, I have a lot of them. But we're in the

1 process of putting together all of that, a  
2 compilation of documents. We didn't come prepared to  
3 put all of this on here today. In fact, I didn't  
4 know even know I was going to be up here until about  
5 ten minutes ago.

6 Q. Do you remember any of the names of the  
7 people?

8 A. Sure. One of them is a girlfriend of mine,  
9 Mindy Schibley. Actually, Bruce's wife is another  
10 one. She was asking me about it. He's got other  
11 family members that know my family through my son.  
12 So there's numerous, you know, people.

13 Q. Did any of these people state that they would  
14 not buy a horse from you because of the website?

15 A. Well, she had already bought two horses from  
16 me.

17 Q. But did anybody state that they would not buy  
18 a horse from you because of the website?

19 A. Well, they don't come straight out and say  
20 that, but, you know, the implication is there, yes.

21 Q. So Mindy, your long time friend, for example,  
22 did she not purchase a horse from you because of the  
23 website?

24 A. She actually purchased them prior to this  
25 website going up.

1 Q. Okay. And what about Bruce's wife or other  
2 family members, did they not buy -- did they say they  
3 would not buy a horse from you because of the  
4 website?

5 A. No.

6 Q. And you said it's problematic for you when  
7 people say that you're affiliated with Powermark  
8 Homes. Is that why you're disturbed by being listed  
9 as an owner?

10 A. What do you exactly mean?

11 Q. Well, why does it bother you that you're  
12 listed as an owner of Powermark Homes?

13 A. Well, wouldn't it -- if you look at those  
14 websites and you got all of this stuff on here, none  
15 of which that pertains necessarily to me personally,  
16 I think anybody would be bothered by that. I mean,  
17 "Powermark Homes sucks." I mean, why do I have to go  
18 and defend myself all the time based on something  
19 that somebody is irritated about that had nothing to  
20 do with Lisa Powers personally?

21 Q. Well --

22 A. I mean, that just goes directly to your  
23 integrity. How could you not be irritated by that?  
24 How could you not feel like somebody is just slamming  
25 you for no reason? I mean, why is this guy not here



1 or woman not here? Why don't they say it directly to  
2 my face personally? That's what I don't understand.  
3 They can hide under a John Doe shield, but they can  
4 post my face over something that I had nothing to do  
5 with.

6 Q. Setting aside all the other things that are on  
7 the web page, would it bother you if you were  
8 introduced in public as being an owner of Powermark  
9 Homes?

10 A. Would it bother me if I was introduced? I was  
11 introduced in public as an owner. Look right here.  
12 This is --

13 Q. Setting aside the website --

14 A. Didn't you ask that already?

15 THE COURT: That's all.  
16 Move on.

17 MR. BECK: I have no  
18 further questions.

19 THE COURT: Any redirect?

20 MR. MCCLAIN: Just a few  
21 things, your Honor.

22 - - - -

23 REDIRECT EXAMINATION OF LISA POWERS

24 BY MR. MCCLAIN:

25 Q. Lisa, just to ask about two or three points

1     that came up on cross-examination, the picture, the  
2     actual original picture that is from the friendly  
3     Powermark Homes website, its own website, you were  
4     asked about the language above there where it says,  
5     "About us." Looking to that, is there anything in  
6     there anywhere in the Powermark Homes picture and  
7     website -- that's got your picture. It's got your  
8     picture, correct, included?

9     A.     This picture here was from a builder -- an  
10    architect magazine that was done. And, yeah, that we  
11    did post on our website.

12   Q.     And Scott is there and he's not an owner or  
13   anything but an employee?

14   A.     Right.

15   Q.     And is there anything in the caption or  
16   anything there on Powermark's page that says you're  
17   an owner of Powermark?

18   A.     No.

19   Q.     Or a director?

20   A.     No.

21   Q.     Or an officer?

22   A.     It doesn't say anything like that.

23   Q.     Finally, really just one other point about the  
24   damages. You and your husband are engaged in  
25   substantial -- personally. Not through a

1 corporation. On your own -- real estate --

2 A. Uh-huh.

3 Q. -- ventures of one sort or another?

4 A. Yes.

5 Q. Have you gotten feedback in the real estate  
6 area, people you deal with in real estate, regarding  
7 this website and --

8 A. You know we have, yes.

9 Q. Pardon?

10 A. You know we have, yes.

11 Q. Okay. And are you getting feedback that it's  
12 hurting you guys personally in your own real estate  
13 ventures?

14 A. Well, sure.

15 Q. And when I say "you guys," that includes you  
16 too, not just your husband Mark.

17 A. You're including both of us, yes.

18 Q. How has your real estate -- your personal real  
19 estate business been going in the last six months?

20 A. Slow.

21 MR. MCCLAIN: Okay. I don't  
22 have any further questions.

23 THE COURT: Anything? Any  
24 recross?

25 MR. BECK: If you don't

1 mind, your Honor.

2 - - - -

3 RECROSS-EXAMINATION OF LISA POWERS

4 BY MR. BECK:

5 Q. You said your real estate business has been  
6 slow recently?

7 A. What are you directing towards?

8 Q. The last thing you said. You were talking  
9 about how business has been slow.

10 A. I think Bruce is referring to personal real  
11 estate that we own and that we rent out.

12 Q. Okay.

13 A. Yes, that has been slow.

14 Q. And didn't you say that you got -- you had  
15 feedback about the website?

16 A. Uh-huh.

17 Q. What do you mean by that when you said there  
18 had been feedback about the website?

19 A. Well, when you have a customer who is building  
20 with Powermark Homes that brings to it your attention  
21 that it's up there and he wants to know what's going  
22 on, I think that would be feedback.

23 Q. Are you aware of any general downturn in the  
24 housing market in the recent months?

25 A. Well, I think that's --

1                   THE COURT:           Let's move on.  
2                   MR. BECK:            No further  
3                   questions.  
4                   THE COURT:           Any argument or  
5                   anything?  
6                   Strike that.  
7                   Anything on behalf of the defense?  
8                   MR. BECK:            I move to  
9                   introduce our exhibit.  
10                  THE COURT:           That's fine.  
11                  That will be admitted.  
12                  Anything else?  
13                  MR. BECK:            No, your Honor.  
14                  THE COURT:           You may step  
15                  down, ma'am.  
16                  THE WITNESS:        Thank you, sir.  
17                  MR. MCCLAIN:        I should -- I  
18                  don't think I moved to introduce ours.  
19                  THE COURT:           It's admitted.  
20                  Any argument?  
21                  MR. MCCLAIN:        I have an  
22                  argument, your Honor.  
23                  THE COURT:           Go ahead.  
24                  MR. MCCLAIN:        I'll keep it  
25                  very short.

1 THE COURT: Go ahead.

2 MR. MCCLAIN: I'll just do it  
3 from here. Two things are important here that  
4 we tried to establish today. There's two  
5 points. And our real point, more than  
6 anything, is, the website should come down.  
7 And we want to know who John Doe is. That's  
8 the most important thing.

9 THE COURT: Have you ever  
10 briefed that issue about whether I have the  
11 authority to make him disclose his name?

12 MR. MCCLAIN: No, I haven't,  
13 your Honor. But you asked me back in chambers  
14 prior to when we came in if I wanted to file a  
15 brief -- back in chambers the court asked me  
16 if I wanted to file a brief after today, and I  
17 said I did. And, frankly, I should clarify  
18 that that's exactly the issue the brief is  
19 going to be on.

20 It's not going to be responsive to  
21 most of the points brought up in the brief  
22 filed by defense counsel. It's really just  
23 one simple point; that defamation has been  
24 established. The real strong emphasis in this  
25 website is against Powermark Homes. Let's get

1 real. The name is Powermark Homes sucks dot  
2 com. She has clearly established she's not an  
3 owner or associated with Powermark Homes.  
4 That says she is. And that there's two points  
5 as far as damages.

6 The only other issue is going to be  
7 damages. She's got a very strong case against  
8 John Doe for two reasons. Number one, she is  
9 naming damages. I would remind the court of  
10 two points. Number one, this is a jury trial  
11 case and the issue of damages is going to be  
12 for the jury. And we intend to have very good  
13 evidence of damages to present to the jury by  
14 the time your Honor tries the new case.

15 Number two, that under Ohio law --  
16 and this would be the main point in my  
17 brief -- when it comes to your business  
18 integrity in most areas, defamation --  
19 business damages must be actual proven  
20 damages. But there's two or three areas.  
21 Some things about a disease and about a  
22 woman's chastity.

23 But the important one here is when it  
24 comes to your personal business integrity or  
25 your business reputation, Ohio law states

1           specifically -- and this will be in my  
2           brief -- that scenario where damages are  
3           presumed -- and we have presumed damages here.  
4           She's testified to the damages. We want to  
5           know who John Doe is. We want the website  
6           down. We want to know who John Doe is. She's  
7           established a case against him.

8                   THE COURT:           Thank you.  
9                   Counsel.

10                  MR. BECK:           Thank you, your  
11           Honor. Counsel for the plaintiff asserted  
12           that this is a jury trial case. But the basic  
13           question here is whether there's anything on  
14           the website that could be proved to be  
15           defamatory. That is a question of law.  
16           That's what the Ohio Supreme Court said in  
17           Wanpler. And the question that needs to be  
18           asked is: What evidence would be put on to  
19           prove the truth or falsity on the websites?

20                  Now, the only thing that's alleged to  
21           be false here is that Lisa Powers is not an  
22           owner of Powermark Homes.

23                  THE COURT:           Right.

24                  MR. BECK:           However, the  
25           website doesn't say she's an owner of



1           Powermark Homes. It says that, according to  
2           their Exhibit 1, "the husband and wife are a  
3           busy couple. Between them they own five --  
4           between them they own the five Ohio  
5           corporations as listed below."

6                       Now, Lisa Powers testified that as to  
7           three of those five she could not say whether  
8           or not she was an owner. There's no evidence  
9           that this statement is false. Even if it was  
10          false, it would be --

11                      THE COURT:                Sure, there is  
12          evidence she's testified she's not an owner of  
13          Powermark Homes, Inc. We know that that's  
14          false. You don't have any evidence contrary  
15          to that, do you?

16                      MR. BECK:                No.

17                      THE COURT:                Okay. That's  
18          false.

19                      MR. BECK:                Well --

20                      THE COURT:                The next one,  
21          Pinnacle Homes. She testified she's not an  
22          owner. That's false.

23                      MR. BECK:                If the website  
24          said that she was an owner of Powermark Homes,  
25          it would be false. But the website doesn't

1 say that. It says that between them they own  
2 five businesses. My second point is --

3 THE COURT: Okay. You're  
4 going to have a problem there.

5 MR. BECK: Okay.

6 THE COURT: I'm warning you  
7 right now.

8 MR. BECK: The second point  
9 is, your Honor, that their own web page,  
10 Powermark Homes dot com, on this exhibit shows  
11 Mark and Lisa Powers with the caption  
12 "Powermark Homes, Incorporated" and uses the  
13 pronoun "we" in describing ownership of the  
14 company.

15 THE COURT: Well, if you  
16 want to split hairs, then in the real  
17 photograph there's three. "We" could be two  
18 of those three, could it not?

19 MR. BECK: Well, it's  
20 possible.

21 THE COURT: One guy you cut  
22 out. And Mark Powers. They could be the  
23 "we," correct?

24 MR. BECK: Well, it  
25 certainly gives the impression that she's

1 associated.

2 THE COURT: Wait a second.

3 Isn't that correct?

4 MR. BECK: Yeah. That  
5 could be, yeah.

6 THE COURT: Okay.

7 MR. BECK: But it certainly  
8 gives the impression that she's associated  
9 with the website and in some way.

10 THE COURT: We know now  
11 that's not the case, don't we?

12 MR. BECK: Right. But if  
13 it was defamatory, then --

14 THE COURT: The case right  
15 now, as the evidence stands right now, you  
16 have no evidence to controvert the fact that  
17 she is not an owner, yes?

18 MR. BECK: That's correct,  
19 your Honor.

20 THE COURT: Okay.

21 MR. BECK: The problem is  
22 that, assuming that you believe the website  
23 says that she is an owner --

24 THE COURT: It does.

25 MR. BECK: Then it's not

1           defamatory to say someone is an owner of a  
2           business.

3                   THE COURT:                   What if it's not  
4           true?

5                   MR. BECK:                   The second  
6           element of the tort of defamation is  
7           defamation of the first --

8                   THE COURT:                   But you --

9                           - - - -

10                   (Thereupon, a discussion was had off  
11           the record.)

12                           - - - -

13                   THE COURT REPORTER:   One at a time,  
14           please, for the record.

15                   MR. BECK:                   But there's  
16           nothing on the website that says that is a bad  
17           company that rips off people. It never says  
18           that. It's only a rhetorical question.

19                   Now, I want to get away from this  
20           because I get the sense that you're not buying  
21           into this. But I just want to reiterate my  
22           fundamental legal point that a preliminary  
23           injunction in a case like this is  
24           categorically prohibited by the constitution,  
25           by first amendment.

1                   THE COURT:               Not if it's  
2               commercial speech.

3                   MR. BECK:               There's been no  
4               allegation that it's commercial speech.  
5               There's no advertising on the site. There's  
6               no money being made here. There's no evidence  
7               that it's commercial speech. It's speech by a  
8               consumer informing the public about a certain  
9               business. And that is not -- that's not  
10              commercial speech, because it discusses the  
11              business.

12                   THE COURT:               Submit your  
13              briefs a week from today and I'll make my  
14              ruling.

15                               - - - -

16                               (Hearing concluded.)

17                               - - - -

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## 1 C E R T I F I C A T E

2

3 I, Michael J. Jenovic, Official Court  
4 Reporter for the Court of Common Pleas,  
5 Cuyahoga County, Ohio, do hereby certify that  
6 as such reporter I took down in stenotype all  
7 of the proceedings had in said Court of Common  
8 Pleas in the above-entitled cause; that I have  
9 transcribed my said stenotype notes into  
10 typewritten form, as appears in the foregoing  
11 Transcript of Proceedings; that said  
12 transcript is a complete record of the  
13 proceedings had in the trial of said cause and  
14 constitutes a true and correct Transcript of  
15 Proceedings had therein.

16

17

18 Michael J. Jenovic, RMR  
19 Official Court Reporter  
20 Cuyahoga County, Ohio

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22

23

24

25

1 Michael J. Jenovic  
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6 (216) 443-3023

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8 (440) 342-3035

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9 Powermark Homes, et al v. John Doe, et al.  
10 In the Court of Common Pleas  
11 Case No. CV 625465

12 September 14, 2007

13 To the preparation of the Transcript of Proceedings  
14 commencing on Thursday, August 23, 2007, before the  
15 Honorable Timothy McCormick, in Courtroom No. 20-C,  
16 38 pages at \$2.45 a page, copy and ASCII,

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16 \$150.00 deposit  
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18 \$ 13.90 check attached

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