

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**FORD MOTOR COMPANY,**

**Plaintiff,**

v.

Case No. 01-CV-71685-DT

~~Case No. 01-CV-60084-DT~~

**2600 ENTERPRISES, and  
ERIC CORLEY p/k/a  
EMMANUEL GOLDSTEIN,**

Hon. Robert H. Cleland  
United States District Judge

**Defendants.**

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**DEFENDANTS' RULE 12(b)(2) AND 12(b)(6) MOTION AND SUPPORTING  
MEMORANDUM TO DISMISS FOR LACK OF PERSONAL  
JURISDICTION AND FAILURE TO STATE A CLAIM**

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2600 MAGAZINE AND ERIC  
CORLEY (pseudonymously known as  
EMMANUEL GOLDSTEIN).

## ISSUES PRESENTED

1. Does a cause of action for noncommercial “*false attribution*” exist under the Lanham Trademark Act, or must the “*false attribution*” claim be pleaded under a more appropriate body of substantive law, such as the common and state statutory law of defamation?
2. Is Plaintiff’s “*false attribution*” claim subject to dismissal because Plaintiff has failed to allege that any Defendant intentionally “*attributed*” to FORD any speech that originated from source other than FORD?
3. Is Plaintiff’s “*false attribution*” claim subject to dismissal because Plaintiff has affirmatively pleaded that the “Whois” for the Internet Domain Name F\_\_GENERALMOTORS.COM truthfully identifies the actual speaker who has the sole power to point the Domain Name, and therefore “*false attribution*” is impossible on the face of the Complaint because the Complaint alleges that the only “*attribution*” at issue is completely truthful?
4. Is Plaintiff’s “*false attribution*” theory subject to dismissal because Plaintiff has failed to plead any of the elements<sup>1</sup> of a defamation or injurious falsehood cause of action:
  - a. A statement of fact by the Defendant;
  - b. The Defendant’s statement is false and not privileged;
  - c. The unprivileged falsehood was communicated to some third party;
  - d. The statement was made with **actual malice** (i.e., either

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<sup>1</sup>E.g., Neshewat v. Salem, 173 F.3d 357, 362-64 (6<sup>th</sup> Cir. 1999) (failure to state a claim): Under the Restatement, “[o]ne who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.” Id. at 363 (citing Kollenberg v. Ramirez, 127 Mich. App. 345, 339 N.W.2d 176, 179 (1983); Restatement (Second) of Torts, §§ 623A (1977)); see also Andrews v. Prudential Securities, Inc., 160 F.3d 304, 308 (6<sup>th</sup> Cir. 1998); Collins v. Detroit Free Press, 245 Mich. App. 27, 627 N.W.2d 5, 8 (2001) (per curiam) (citing Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991); New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964)); Kevorkian v. American Med. Ass'n, 237 Mich. App. 1, 602 N.W.2d 233, 236 (1999).

knowledge that the statement was false and intent to harm the plaintiff, or with reckless disregard of its truth or falsity, and intent to injure the plaintiff); and

- e. Actionable harm proximately caused by the publication?
5. If a Defendant, who uses an Internet Domain Name for the noncommercial purpose of expressing the opinion “F\_\_\_ General Motors,” (1) truthfully attributes ownership of the Domain Name (via the “Whois” record) to the Defendant itself, and (2) does not use the Domain Name in any way whatsoever as a **brand** or designation of origin of any goods or services, does the Lanham Trademark Act support any cause of action against the **non-trademark** use of the Domain Name as a medium for expressing opinion?
6. Since FORD does not own the brand GENERAL MOTORS®, does FORD have standing to sue to block the use of the Domain Name at issue?
7. Has FORD, by participating voluntarily in the World Wide Web – a system for representing ideas and exchanging information by “linking” ideas one to another (by anyone to any Website for any reason) – thereby elected to participate in a system where, customarily and for important reasons of policy, “freedom to link” is always the default rule unless an affirmative technological “opt-out” is erected, and for which there exists no legal right “not to be referred to?”
8. Are Defendants’ actions privileged by a “Fair Use” Defense, for commentary, criticism, or the **nominative** (non-trademark) use of references to trademarks?
9. Is either Defendant subject to personal jurisdiction?

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<u>Avery Dennison Corp. v. Sumpton</u> , 189 F.3d 868 (9th Cir. 1999). . . . .	<u>-19-</u>
<u>Bad Frog Brewery, Inc. v. New York State Liquor Auth.</u> , 134 F.3d 87 (2 <sup>nd</sup> Cir.1998). . . . .	<u>-4-</u> , <u>-15-</u> , <u>-18-</u>
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<u>Caribbean Broadcasting Sys., Ltd. v. Cable &amp; Wireless PLC</u> , 148 F.3d 1080 (D.C. Cir. 1998). . . . .	<u>-23-</u>
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<u>Central States, S.E. &amp; S.W. Areas Pension Fund v. Reimer Express World Corp.</u> , 230 F.3d 934 (7 <sup>th</sup> Cir. 2000). . . . .	<u>-23-</u>

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199 F.3d 350 (6<sup>th</sup> Cir. 2000). . . . . [-5-](#), [-18-](#)

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403 U.S. 15 (1971) . . . . . [-4-](#)

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245 Mich. App. 27, 627 N.W.2d 5 (2001). . . . . [-3-](#), [-6-](#), [-7-](#), [-8-](#)

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89 F.3d 1257 (6<sup>th</sup> Cir. 1996). . . . . [-23-](#), [-24-](#)

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214 F.3d 456 (4<sup>th</sup> Cir. 2000). . . . . [-9-](#), [-14-](#), [-15-](#)

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233 F.3d 456 (7<sup>th</sup> Cir. 2000). . . . . [-17-](#), [-20-](#)

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220 F.3d 433 (6<sup>th</sup> Cir. 2000). . . . . ~~-5-~~, ~~-18-~~

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931 F.2d 1100 (6th Cir.1991). . . . . -11-

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71 F. Supp. 2d 500 (D. Md. 1999). . . . . -15-, -17-, -19-

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163 F.3d 27 (1<sup>st</sup> Cir. 1998). . . . . -17-, -19-, -21-

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106 F.3d 147 (6<sup>th</sup> Cir. 1997). . . . . -25-

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622 F. Supp. 931 (D.D.C.1985). . . . . -16-

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95 F. Supp. 2d 528 (E.D. Va. 2000). . . . . -9-

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504 U.S. 555 (1992). . . . . -13-

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501 U.S. 496 (1991). . . . . -3-, -6-, -7-, -8-

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28 F. Supp. 2d 1120 (C.D. Cal. 1998). . . . . -10-, -12-, -13-

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722 F.2d 779 (D.C. Cir. 1983). . . . . -23-



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191 F.3d 208 (2<sup>nd</sup> Cir.1999). . . . . ~~-14-~~, ~~-17-~~, ~~-20-~~

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134 F.3d 749 (6<sup>th</sup> Cir.1998). . . . . [-10-](#), [-11-](#), [-12-](#), [-13-](#), [-14-](#), [-16-](#)

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244 F.3d 88 (2<sup>nd</sup> Cir. 2001). . . . . [-16-17-](#), [-19-](#), [-20-](#)

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935 F.2d 1454 (6<sup>th</sup> Cir. 1991). . . . . [-23-](#), [-25-](#)

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212 F.3d 157 (3<sup>rd</sup> Cir. 2000). . . . . [-14-](#), [-16-](#)

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248 U.S. 90 (1918). . . . . [-11-](#)

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128 F.3d 86 (2<sup>nd</sup> Cir. 1997). . . . . [-16-](#)

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22 A.D.2d 452, 256 N.Y.S.2d 301,  
*aff'd*, 15 N.Y.2d 940, 259 N.Y.S.2d 832, 207 N.E.2d 508 (1965). . . . . [-4-](#)

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454 U.S. 464 (1982). . . . . -13-

Varljen v. Cleveland Gear Co., Inc.,  
250 F.3d 426 (6<sup>th</sup> Cir. 2001). . . . . -5-

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425 U.S. 748 (1976). . . . . -14-, -15-

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495 U.S. 149 (1990). . . . . -13-

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105 F. Supp. 2d 746 (E.D. Mi. 2000). . . . . -23-, -24-25-

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430 U.S. 705 (1977) . . . . . -4-

**STATUTES AND RULES**

15 U.S.C. § 1114(1). . . . . -12-, -15-

15 U.S.C. § 1125(a).. . . . . -12-, -15-

15 U.S.C. § 1125(c). . . . . -13-14-, -15-

15 U.S.C. § 1125(c)(4)(B). . . . . -16-

15 U.S.C. § 1127. . . . . -10-

FED.R.CIV.P. 12(b)(6). . . . . -5-

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EMMANUEL GOLDSTEIN,**

Hon. Robert H. Cleland  
United States District Judge

**Defendants.**

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**MOTION**<sup>1</sup>

Defendants Eric Corley p/k/a Emmanuel Goldstein (“Goldstein”) and 2600 Enterprises (“2600”) respectfully move for dismissal of the Complaint pursuant to FED R. CIV. P. 12(b)(2) and 12(b)(6) because personal jurisdiction is lacking and the Complaint fails to state any claim against Defendants upon which relief can be granted.

In accordance with Local Rule 7.1(a), counsel for the Defendants conferred with counsel for Plaintiffs. Plaintiffs declined to assent to the specific relief requested in this Motion.

This Motion is accompanied by a supporting brief.

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<sup>1</sup>As previously noted in Defendants’ Pre-hearing Memorandum, Defendants have preserved their rights under Rule 12(b) to move for dismissal. One issue anticipated in the Prehearing Memorandum is apparently off the table. FORD’s counsel assure Defendants that FORD does not seek to proceed on any theory of *in rem* jurisdiction, under 15 U.S.C. § 1125(d)(2) or otherwise. Defendants reassert all defenses to any claim based on *in rem* jurisdiction. However, based on FORD’s assurances, it should not be necessary to brief this issue. Defendants also hereby assert and do not waive the defense of dismissal for improper venue and the right to move to transfer venue.

Wherefore, Defendants respectfully pray that all claims against them by Plaintiffs be dismissed WITH PREJUDICE.

2600 ENTERPRISES and  
ERIC CORLEY p/k/a  
EMMANUEL GOLDSTEIN,

By counsel,

Dated: July 2, 2001

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EMMANUEL GOLDSTEIN,**

Hon. Robert H. Cleland  
United States District Judge

**Defendants.**

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**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Defendants 2600 Enterprises and Eric Corley respectfully move for dismissal of the Complaint for two reasons: (1) Defendants are not subject to Michigan jurisdiction and Plaintiff has not made a preliminary evidentiary showing sufficient to support the taking of jurisdictional discovery, and (2) the Complaint does not state a claim upon which relief can be granted.

**STATEMENT OF THE CASE**

It's a joke! And the funniest part about it is this: Everyone seems to be in on it *except* the Ford Motor Company.

This case revolves around an emphatic statement of opinion – the Internet Domain Name F\_\_GENERALMOTORS.COM. FORD contends that the Defendants have expressed themselves using this Domain Name in a way that causes FORD some kind of injury to FORD's reputation. The core of FORD's legal theory boils down to the issue of "false attribution." FORD contends that the opinion expressed through the use of this Domain Name has somehow been "attributed" to

FORD and that the opinion happens to be one that FORD does not share.<sup>1</sup> FORD's reputational injury claim therefore depends on the combined notions that (1) some third party will actually believe that FORD holds this opinion, (2) such a third party will actually care what FORD's opinion is, and (3) that liability may be premised not on the opinion itself, or even the expression of it, but rather on a separate statement attributing the opinion to FORD.

Of course, even more fundamentally, the whole notion of "attribution" in this case is clearly problematic and no statement of "attribution" has even been alleged in the Complaint. Rather, the Complaint clearly alleges that Defendants are the actual persons or entities who both registered and pointed this Domain Name. Noplace in the Complaint is either Defendant ever alleged to have made any statement that "it wasn't us who pointed the Domain Name; it was FORD." Quite the contrary, on the face of the Complaint, it is clear that 2600 took the affirmative step of self-attributing 2600's speech to itself. 2600 alone is truthfully identified as the *Registrant* of this Domain Name. From the face of the Complaint, therefore, it is clear that the only "attribution" of this speech that any Defendant has made is to Defendant 2600 alone. Thus, the factual allegations in the Complaint conclusively foreclose FORD's claims as a matter of law because the facts alleged by FORD render impossible any "attribution" by any Defendant to any entity other than 2600.

Ultimately, however, this case revolves around the question of **what law** may FORD rely upon to remedy an alleged injury to FORD's reputation in the event that somebody (another defendant in another lawsuit, presumably) actually falsely attributes an opinion to the FORD Motor Company that FORD does not share. FORD's claim is nothing more nor less than a "false

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<sup>1</sup>Presumably, FORD should not have any cause of action if this opinion is or ever has been one that FORD actually holds, even of FORD presently denies it.



attribution” claim under the common law and state statutory law of defamation. See Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510 (1991); Collins v. Detroit Free Press, 245 Mich. App. 27, 627 N.W.2d 5, 8 (2001) (per curiam). Therefore, even if FORD had an actual statement of “false attribution” to allege (and FORD does not), in order to survive dismissal, FORD would have to allege defamation or injurious falsehood – **not** trademark infringement.

**But FORD never alleged or attempted to allege any cause of action for “defamation.”**

Because FORD has alleged the wrong cause of action, the Complaint must be dismissed.

FORD’s attempted reliance on the Lanham Trademark Act and the Federal Trademark Dilution Act (“FTDA”) is not in any way germane to this case because the Defendants are not (and have never been alleged to be) using the Domain Name F\_\_GENERALMOTORS.COM as a **BRAND** of anything. Nor are Defendants alleged to be using the Domain Name commercially. FORD’s attempt to repackage a defamation claim as a trademark lawsuit should be rejected because these essential prerequisites (use **as** a trademark and **commercial** use) are not alleged.

It is undisputed (in fact, Plaintiff affirmatively alleges as much in the Complaint, see Compl. ¶ 3 & Exh. A) that the official Registrant of the Domain Name is 2600 Enterprises. It is also undisputed that the “Whois” record for the Domain Name truthfully and accurately identifies 2600 Enterprises as the Registrant of this Domain Name. Further, on information and belief Defendants state that it is undisputed (and FORD does not contest) that no person or entity other than the named Registrant has any power, capacity or authority whatsoever to engage in any speech using this Domain Name, because the Registrant alone has the power to “point” it. Defendants certainly could have registered under some assumed name had they sought to do so. Obviously, they did not.

It is undisputed that 2600 Enterprises has no affiliation whatsoever with the FORD Motor Company, and that speech originating from and attributable to 2600 Enterprises is not under any circumstances “attributable” to FORD Motor Company. Under the circumstances, no viable claim for “false attribution” can exist under either defamation law or trademark law.

### **ARGUMENT**

[T]hat plaintiff (and even the [C]ourt) may find defendants’ [expression] “profane and vulgar” and not regard it as artistically serious is of no consequence: “It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases. It is enough that the work is a form of expression ‘deserving of substantial freedom both as entertainment and as a form of social and [political] criticism.’”

Parks v. LaFace Records, Inc., 76 F. Supp. 2d 775, 780-81 (E.D. Mi. 1999) (*quoting* University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 458, 256 N.Y.S.2d 301, 307, *aff’d*, 15 N.Y.2d 940, 259 N.Y.S.2d 832, 207 N.E.2d 508 (1965)). The Defendants’ expression of opinion is clearly protected speech,<sup>2</sup> and therefore is protected even if Plaintiff has some tort theory upon which Plaintiff seeks to suppress it. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (tort remedies limited to balance First Amendment interests).

Moreover, apart from First Amendment considerations, Plaintiff has failed to allege any viable tort. Even assuming all the facts alleged on the face of the Complaint to be true, the Plaintiff has identified no viable cause of action whatsoever – no claim for defamation, no claim for trademark infringement, no claim for trademark dilution, and no claim for unfair competition.

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<sup>2</sup>Defendants’ speech is entitled to the full panoply of First Amendment protection. See Hess v. Indiana, 414 U.S. 105 (1973); Cohen v. California, 403 U.S. 15 (1971); Wooley v. Maynard, 430 U.S. 705 (1977); Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 96-97 (2<sup>nd</sup> Cir.1998).

Because Plaintiff has no viable cause of action, the Complaint must be dismissed for failure to state a claim.

**I. The Complaint Must Be Dismissed for Failure to State a Claim.**

“To survive a motion to dismiss under FED.R.CIV.P. 12(b)(6), a ‘complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.’” Glassner v. R.J. Reynolds Tobacco Co., 223 F.3d 343, 346 (6<sup>th</sup> Cir. 2000) (quoting Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6<sup>th</sup> Cir.1988)); Varljen v. Cleveland Gear Co., Inc., 250 F.3d 426, 429 (6<sup>th</sup> Cir. 2001). In evaluating a Rule 12(b)(6) Motion, the Court accepts well-pleaded allegations as true, Albright v. Oliver, 510 U.S. 266, 268 (1994), and views them in the light most favorable to the Plaintiff. Glassner, 223 F.3d at 346. Here, even assuming the truth of all allegations Plaintiff makes, and viewing them in the most favorable light, the Complaint must be dismissed.

Of course, only “well-pleaded” allegations must be viewed favorably. See Albright, 510 U.S. at 268. It is black-letter law that pleadings consisting of bare legal conclusions uniformly fail to state a claim upon which relief can be granted and cannot survive dismissal under Rule 12(b)(6). Gregory v. Shelby County, Tenn., 220 F.3d 433, 446 (6<sup>th</sup> Cir. 2000) (“We need not accept as true legal conclusions or unwarranted factual inferences.”) (citing Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6<sup>th</sup> Cir. 1987)); Mixon v. State of Ohio, 193 F.3d 389, 400 (6<sup>th</sup> Cir. 1999) (same); Begala v. PNC Bank, Ohio, N.A., 214 F.3d 776, 779 (6<sup>th</sup> Cir. 2000) (“more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements”) (citing Scheid, 859 F.2d at 436, and 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357, at 596 (1969)), cert. denied, \_\_\_ U.S. \_\_\_ 121 S. Ct. 1082 (2001); Claybrook v. Birchwell, 199 F.3d

350, 353 n.1 (6th Cir. 2000) (“A court is not bound to accept alleged legal conclusions or unwarranted factual inferences.”).

Moreover, when a Plaintiff’s Complaint contains affirmative allegations of fact that rule out the possibility of recovery, dismissal under Rule 12(b)(6) is proper. E.g., Glassner, at 351-52 (Complaint alleged chronological date that decedent commenced smoking, and court concluded date was “well after the Labeling Act became effective on January 1, 1966” and “the case law is well settled that the health hazards of smoking were within the ordinary citizen’s “common knowledge”” by that time); Neshewat v. Salem, 173 F.3d 357, 364-65 (6<sup>th</sup> Cir. 1999) (allegations established circumstances surrounding allegedly defamatory statements that rendered them privileged). Here, the face of the Complaint establishes conclusively that the only “attribution” intended or communicated by any Defendant was solely to the Domain Name *Registrant*, 2600 Enterprises. Thus, Plaintiff’s claims fail as a matter of law because there is no allegation of any “attribution” to support any “*false attribution*” claim.

**A. Plaintiff Fails to State a Defamation Claim.**

Ordinarily, “false attribution” of statements or expression is actionable, if at all, under the common law or state statutory law of defamation or injurious falsehood. E.g., Masson, 501 U.S. at 510; Collins, 245 Mich. App. 27, 627 N.W.2d at 8. In order to state a defamation or injurious falsehood claim, Plaintiff must set forth factual allegations sufficient to support all the essential elements of such a claim. The elements of defamation are:

1. A statement of fact by the Defendant;
2. The Defendant’s statement is false and not privileged;
3. The unprivileged falsehood was communicated to the third party;

4. The statement was made with **actual malice** (i.e., either knowledge that the statement was false and intent to harm the plaintiff, or with reckless disregard of its truth or falsity, and intent to injure the plaintiff); and
5. Actionable harm proximately caused by the publication.

Neshewat, 173 F.3d at 362-64 (dismissing for failure to state a claim); Andrews v. Prudential Securities, Inc., 160 F.3d 304, 308 (6<sup>th</sup> Cir. 1998); Collins, 245 Mich. App. 27, 627 N.W.2d at 8; (citing Masson, 501 U.S. at 510; New York Times Co., 376 U.S. at 279-280); Kevorkian v. American Med. Ass'n, 237 Mich. App. 1, 602 N.W.2d 233, 236 (1999). FORD is clearly a public figure, which means the heightened *mens rea* requirement of proof of actual malice is appropriate under Masson, 501 U.S. 496; New York Times Co., 376 U.S. 254; Collins, 627 N.W.2d 5; and Kevorkian, 237 Mich. App. 1, 602 N.W.2d at 236.

FORD has failed to state a viable claim for defamation or injurious falsehood. First of all, the statement embodied in the Domain Name F\_\_\_GENERALMOTORS.COM is not a statement of fact, but of opinion. While FORD apparently objects to a perceived “offensive” quality of the expression of this opinion, there is no recognized tort in Michigan or any other U.S. jurisdiction authorizing private persons to censor “curse words” through civil actions for damages or injunctive relief. See Parks, 76 F. Supp. 2d 775. Nor does there exist any recognized cause of action to compensate those whose delicate sensibilities happen to be upset by the pungent prose of others. Id.

Thus, instead of claiming the statement itself is tortious, FORD’s argument instead involves a theory of “attribution.” But FORD falsely attributes to the Defendants a statement (a separate statement of attribution) that Defendants never made and never intended to make. Defendants have never “attributed” (and in the Complaint are not even alleged to have made any statement

“attributing”) either the registration of the Domain Name or the use of it to FORD. Thus, even though FORD is the only party making any “false attribution,” FORD apparently contends that hypothetical third parties might mistakenly believe that the speech of 2600 using the Domain Name in question somehow comes not from the truthfully-identified *Registrant*, but from FORD.

Nevertheless, because FORD does not even allege that Defendants 2600 or Goldstein ever made any statement of fact – i.e., that “This expression of opinion is the expression of FORD Motor Company” – speculation about hypothetical mistaken reactions of imaginary third parties is completely irrelevant. In order for FORD to meet the “false statement” element of a defamation claim, FORD would be required to identify and allege such a false statement of fact (i.e., “attribution”) by some Defendant. See Collins, 627 N.W.2d at 8; Masson, 501 U.S. at 510. Ford has failed to do so. Moreover, in order to state a defamation or “false attribution” claim, FORD would not only be required to allege such a falsehood, but the publication of such a falsehood to a third party. The Complaint contains no such allegation. Thus, since no affirmative statement of “attribution” (except for a truthful attribution to 2600)<sup>3</sup> has ever been alleged to have been made by any Defendant, FORD has no possible predicate for any defamation cause of action.

Most importantly, FORD cannot recover on a defamation or injurious falsehood cause of action because the First Amendment of the U.S. Constitution requires a public figure such as FORD to prove that the injurious statement was made with actual malice. Masson, 501 U.S. 496; New York Times Co., 376 U.S. 254. Inasmuch as 2600 Enterprises, in the “Whois” record of the

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<sup>3</sup>The expression in question – according to FORD’s own allegations – is solely “attributed” and attributable to 2600 Enterprises. See Compl. ¶ 3 & Exh. A. Since no entity other than the *Registrant* of the Domain Name is capable of using the Domain Name for any expressive purpose, all expression using the Domain Name is and must be solely attributable to the *Registrant*.

Domain Name, truthfully self-identified itself as the registrant, the *actual malice* element cannot possibly be satisfied. If 2600 had, with *actual malice*, intended to “attribute” to FORD Motor Company the expression of the uncharitable opinion “F\_\_\_ GENERAL MOTORS,” then it would have been trivially easy for 2600 to falsify the “Whois” record to make it appear as though FORD were in fact the *Registrant*. The allegations on the face of the Complaint clearly show that 2600 did not do so. There clearly exists no basis for an *actual malice* allegation, even if one had been included in the Complaint. Thus, Plaintiff fails to allege a viable tort.

**B. Plaintiff Fails to State a Trademark Claim.**

“It is important that trademarks not be ‘transformed from rights against unfair competition to rights to control language.’” CPC Int’l, Inc. v. Skippy, Inc., 214 F.3d 456, 462 (4<sup>th</sup> Cir. 2000) (quoting Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1710-11 (1999)); see also Northland Ins. Cos. v. Blaylock, 115 F. Supp. 2d 1108, 1119-20 (D. Minn. 2000); Bihari v. Gross, 119 F. Supp. 2d 309, 322-23 (S.D.N.Y. 2000); Lucent Tech., Inc. v. LucentSucks.Com, 95 F. Supp. 2d 528, 535 (E.D. Va. 2000); Bally Total Fitness Holding Corp. v. Faber, 29 F. Supp. 2d 1161, 1168 (C.D.Cal.1998).

None of Plaintiff’s trademark theories is viable because Plaintiff fails to allege a simultaneous branding (as opposed to expressive) use of any trademark by both the Plaintiff and the Defendant. It is undisputed that FORD® is a brand name used by the Plaintiff.<sup>4</sup> However, it is

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<sup>4</sup>The recent Anticybersquatting Consumer Protection Act may represent an exception to the general rule that both the Plaintiff the Defendant must use a trademark *as a trademark* in order for the Lanham Act to be applicable. Apparently, under the ACPA, a trademark owner may possibly be permitted to seek to prohibit some limited non-branding registrations or uses of Domain Names. See Jessica Litman, *The DNS Wars: Trademarks and the Internet Domain Name System*, 4 J. SMALL & EMERGING BUS. L. 149 (2000), <

(continued...)

equally undisputed that Defendants have never offered any goods or services for sale under any FORD brand name, under any similar brand name, or under the F\_\_\_GENERALMOTORS.COM brand name. In short, **the situation in this case is simply not the kind of situation that the trademark laws can be stretched and distorted to address.** Neither trademark infringement nor trademark dilution has any application here.

As the Sixth Circuit succinctly has explained: “A trademark is a *designation*, ‘any word, name, symbol, or device, or any combination thereof,’ which serves ‘to identify and distinguish [the] goods [of the mark's owner] ... from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Prods., 134 F.3d 749, 753 (6th Cir.1998) (emphasis in original) (quoting 15 U.S.C. § 1127). “[T]he purpose of trademark has ‘remained constant and limited: Identification of the manufacturer or sponsor of a good or the provider of a service.’” Mattel, Inc. v. MCA Records, Inc., 28 F. Supp. 2d 1120, 1141 (C.D. Cal. 1998) (quoting New Kids on the Block v. News Am. Publ'g, 971 F.2d 302,

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<sup>4</sup>(...continued)

<http://www.law.wayne.edu/litman/papers/DNSwars.pdf> > (“Before we get too excited, let's take a look at how all this pans out if you apply the trademark law already on the books. The trademark law doesn't give anyone the exclusive right to use a word, or even to use a word commercially. If it did, we couldn't have all those Acme marks. We couldn't have Apple Records and Apple Computers and Granny Smith Apples. We couldn't have both Dell Paperback Books and Dell Computers, and children couldn't sing "The farmer in the dell." . . . What trademark law gets you is the exclusive right to make trademark use of a word on the products you sell in those markets in which you have actually done business. Dell Computers has an exclusive right to use the mark Dell as a trademark for computer hardware in connection with the sale of Dell-brand computer hardware. It can't stop Dell publishing from using the mark Dell on books, even books about computing. It can't stop Compaq computers from advertising that their machines are a better value than Dell. It can't stop New Line Cinema from making a movie in which the bad guy is a pornographer who uses a Dell Computer as the server for his x-rated web site. . . .”). Notably, FORD does not make any ACPA claims in this case. FORD does not have standing because FORD has no rights to the trademark GENERAL MOTORS®.



305 (9<sup>th</sup> Cir. 1992)). “[I]n order to be protected as a valid trademark, a designation must create ‘a separate and distinct commercial impression, which ... performs the trademark function of identifying the source of the merchandise to the customers.’” Rock and Roll Hall of Fame, at 753 (quoting In re Chemical Dynamics, Inc., 839 F.2d 1569, 1571 (Fed.Cir.1988); 1 J. McCarthy § 3:3).

It is well established that “[t]here is no such thing as property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed.” Id. (citing United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918)). Thus:

[W]hether alleging infringement of a registered trademark, pursuant to 15 U.S.C. § 1114(1), or infringement of an unregistered trademark, pursuant to 15 U.S.C. § 1125(a)(1), it is clear that a plaintiff must show that it has actually used the designation at issue *as a trademark*, and that the defendant has also used the same or a similar designation *as a trademark*. See, e.g., Holiday Inns, Inc. v. 800 Reservation, Inc., 86 F.3d 619, 622-23 (6th Cir.1996), *cert. denied*, 519 U.S. 1093 (1997); Homeowners Group, Inc. v. Home Marketing Specialists, Inc., 931 F.2d 1100, 1105 (6th Cir.1991). In other words, the plaintiff must establish a likelihood that the defendant's designation will be confused with the plaintiff's trademark, such that consumers are mistakenly led to believe that the defendant's goods are produced or sponsored by the plaintiff. See, e.g., Holiday Inns, 86 F.3d at 623.

Id. at 753-54 (italics in original; other emphasis added); accord Parks, 76 F. Supp. 2d at 784 n.9.

Likewise, with respect to the Federal Trademark Dilution Act:

If the anti-dilution statute were construed as permitting a trademark owner to enjoin the use of his mark in a noncommercial context found to be negative or offensive, then a corporation could shield itself from criticism by forbidding the use of its name in commentaries critical of its conduct. The legitimate aim of the anti-dilution statute is to prohibit the unauthorized use of another's trademark in order to market incompatible products or services. The Constitution does not, however, permit the range of the anti-dilution statute to encompass the unauthorized use of a trademark in a noncommercial setting such as an editorial or artistic context.

Bally Total Fitness, 29 F. Supp. 2d at 1168. Plaintiff's distaste for Defendants' communicative message cannot justify the silencing of critical speech. Mattel, Inc., 28 F. Supp. 2d at 1137. Thus, the problem with FORD's trademark theory (essentially, an attempt to circumvent the strictures of the First Amendment and of traditional defamation law by seeking to recast defamation claims as trademark causes of action) is that trademark law only applies when **both** Plaintiff and Defendant are using trademarks *as trademarks*.<sup>5</sup>

In this case, Defendants cannot possibly infringe or dilute any trademark because Defendants are not using any trademark as a brand. Rock and Roll Hall of Fame, at 753 ; see also Data Concepts, Inc. v. Digital Consulting, Inc., 150 F.3d 620, 627-27 (6th Cir. 1998) (Merritt, J., concurring) (citing Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 956 (C.D.Cal.1997)); UNITED STATES PATENT AND TRADEMARK OFFICE, EXAMINATION GUIDE NO. 2-99: TRADEMARKS COMPOSED, IN WHOLE OR IN PART, OF DOMAIN NAMES (Sept. 29, 1999); New Kids, 971 F.2d 302 (9<sup>th</sup> Cir. 1992) (expressive reference to trademark does not constitute branding use); Mattel, Inc., 28 F. Supp. 2d at 1137; Parks, 76 F. Supp. 2d 775. Defendants' use of the Domain Name in this case clearly is not a **branding** use.

The most Defendants are doing is making an expressive reference to General Motors

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<sup>5</sup>This issue of lack of "trademark use" is fatal to **all** of Plaintiffs' claims. See note 6, *infra* (same issue also fatal to dilution allegations). Even assuming that all the facts alleged in the Complaint are true, the Complaint fails to allege any use of (a) any brand, "word, term, name, symbol, or device, or any combination thereof" by the Defendants either "on or in connection with any **goods or services**, or any container for goods (see 15 U.S.C. § 1125(a)), or (b) any registered mark or imitation thereof on or in connection with any "sale, offering for sale, distribution, or advertising of any **goods or services**." See 15 U.S.C. § 1114(1). Nor are Defendants alleged to have used any word or anything else as a "designation of origin" to signify that any particular goods or services originated with either of the Defendants. Neither the Federal Trademark Dilution Act, nor sections 1114 or 1125(a) of Title 15 authorizes any cause of action to prohibit speech that involves no **trademark use** of any terms or symbols.

Corporation, in the process of expressing an opinion. Such expressive, non-branding conduct is completely non-actionable on any theory of trademark infringement or dilution. Id. In the absence of any allegation in the Complaint (and there is none) of the use by Defendants of any trademark for branding as opposed to expressive or referential purposes, then there is no viable cause of action.

**1. FORD Has No Standing To Complain About “F GeneralMotors.com”**

General Motors has threatened to sue the Defendants over this Domain Name, but has not. In Fact, the Domain Name does not infringe any right of General Motors. However, clearly enough, FORD does not own or have any right to the trademarks of its direct competitor General Motors. FORD has no standing to sue on General Motors’s behalf.

The defense of lack of standing to sue may properly be raised by way of a Rule 12(b)(6) motion. Lujan v. Defenders of Wildlife, 504 U.S. 555, 661 (1992) (citing Lujan v. National Wildlife Federation, 497 U.S. 871, 883-889 (1990)); Sierra Club v. Morton, 405 U.S. 727, 731, 739-41 & n.16 (1972); see also Whitmore v. Arkansas, 495 U.S. 149 (1990); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-476 (1982). Here, FORD lacks standing.

**2. Plaintiff Fails To State a Viable FTDA Claim.**

The Federal Trademark Dilution Act provides that:

(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's **commercial use in commerce of a mark or trade name**, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection.

15 U.S.C. § 1125(c)(1) (emphasis added). For a plaintiff to state a federal claim of dilution, the Complaint must contain sufficient factual allegations to support all of the following elements: “(1)

the senior mark must be famous; (2) it must be distinctive; (3) the junior use must be a commercial use in commerce; (4) it must begin after the senior mark has become famous; and (5) it must cause dilution of the distinctive quality of the senior mark.” Kellogg Co. v. Exxon Corp., 209 F.3d 562, 577 (6<sup>th</sup> Cir. 2000) (quoting Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 215 (2<sup>nd</sup> Cir.1999)); Times Mirror Magazines, Inc. v. Las Vegas Sports News, L.L.C., 212 F.3d 157, 163 (3<sup>rd</sup> Cir. 2000) (listing elements “the plaintiff must plead and prove” to “establish a *prima facie* case” of trademark dilution) (citing 4 McCarthy, § 24:89; Hershey Foods Corp. v. Mars, Inc., 998 F. Supp. 500, 504 (M.D. Pa.1998)). Here, at least three fundamental pleading requirements are not satisfied: (1) “famous;” (2) “commercial use in commerce;” and (3) “a mark or trade name.”<sup>6</sup>

First, and most importantly, the FTDA requires a “commercial use in commerce” – which seems at first blush to be redundant, until one recognizes that “in commerce” refers to the Commerce Clause of Article I of the U.S. Constitution, while “commercial use” refers to a separate doctrine – the First Amendment “Commercial Speech” doctrine of Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y., 447 U.S. 557 (1980).

Speech falls in the “commercial” category only if it does “no more than propose a commercial transaction.” Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976); CPC Int’l, 214 F.3d at 462. Here the situation is the **exact opposite** – the Defendants’ expression using “F\_\_\_GENERALMOTORS.com” consists exclusively of core speech (humorous commentary and criticism) and does nothing whatsoever to propose any commercial transaction with anyone. Id.; see also Rubin v. Coors Brewing Co., 514 U.S. 476, 481-

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<sup>6</sup>The requirement of use as a trademark is already discussed above, and in Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Prods., 134 F.3d 749, 753 (6<sup>th</sup> Cir.1998); see also note 5, *supra*.

83 (1995); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 495-98 (1996) (describing history and limited scope of “commercial speech” doctrine).

For FTDA purposes, both “in commerce” **and** “commercial use” must be satisfied, and the two are not coterminous. Here, the “commercial use” prong clearly is not satisfied. Of course, FORD has argued that “commercial use in commerce” **is** redundant, and that both halves of the same phrase refer to the Commerce Clause. Ford’s statutory interpretation is wrong as a matter of law.<sup>7</sup>

The interplay between trademark law and First Amendment doctrine sensibly recognizes that trademarks are entitled to lesser (Central Hudson) First Amendment protection only to the extent that trademarks are solely commercial and non-expressive. See Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 96-97 (2<sup>nd</sup> Cir.1998); Bihari v. Gross, 119 F. Supp. 2d at 318 (citing Bad Frog). Here, however, the speech in question clearly falls outside the “commercial speech” doctrine, and as noncommercial speech is both (1) entitled to the full panoply of First Amendment protection, and (2) **not** subject to any regulation whatsoever under the FTDA. Northland Ins. Cos., 115 F. Supp. 2d at 1122-23; HQM, Ltd. v. Hatfield, 71 F. Supp. 2d 500, 505-07 (D. Md. 1999). If Congressional intent to exempt noncommercial speech from FTDA regulation were not clear enough, Congress specifically emphasized this exemption by incorporating the

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<sup>7</sup>Moreover, the Lanham Act and the FTDA (especially the requirements of “trademark use” to signify the source of goods and services, and “commercial use”) should not be interpreted or construed as Plaintiff proposes, because statutes should be interpreted in a manner calculated to **avoid** unnecessary constitutional problems. Fleet Boston Fin. Corp. v. FleetBostonFinancial.com, No. Civ. A. 00-10176-DPW, 2001 WL 360592, at \*12 (D. Mass. Mar. 27, 2001); accord Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 341, 346 (1936) (Brandeis, J., concurring). Simply put, if 15 U.S.C. §§ 1114, 1125(a), and 1125(c) are construed as plaintiff proposes, to reach and enjoin the Defendants’ expression, then these statutes are (1) unconstitutional as applied and (2) overbroad. Accordingly, the statutory interpretation proposed by the Plaintiff should be rejected.

“noncommercial speech” exception not only as an essential element of the Plaintiff’s case in chief, but also as an absolute defense to the Dilution Act under 15 U.S.C. § 1125(c)(4)(B). Specifically, “The following shall not be actionable under this section: (B) Noncommercial use of a mark.” Id.

None of the various Court of Appeals opinions interpreting the FTDA is in any way inconsistent with the Defendants’ statutory interpretation<sup>8</sup> – namely, that “in commerce” refers to the Commerce Clause, but that “commercial use” is **not** synonymous with “in commerce,” and instead exempts all speech from FTDA regulation **unless** the speech is “commercial speech.” See Kellogg Co., 209 F.3d at 577; Times Mirror Magazines, Inc., 212 F.3d at 163 (using term “interstate” to modify “commerce” but **not** “commercial use”); see also TCPIP Holding Co., Inc. v. Haar Communications, Inc., 244 F.3d 88, 93 (2<sup>nd</sup> Cir. 2001); Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 466 (7<sup>th</sup> Cir. 2000); Federal Exp. Corp. v. Federal Espresso, Inc., 201 F.3d 168

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<sup>8</sup>At argument, FORD sought to rely upon United We Stand Am., Inc. v. United We Stand, Am. New York, Inc., 128 F.3d 86 (2<sup>nd</sup> Cir. 1997), an appeal from a default judgment in favor of a political organization concerning use of the trademark registered by the H. Ross Perot campaign in 1992. Not only does the United We Stand case have nothing to do with the question of “commercial use” under the FTDA (United We Stand New York merely argued that their activities were conducted “wholly within the State of New York” see id. at 93), but the United We Stand case also involved clearly commercial activity, including political fund-raising: UWSANY was incorporated “to solicit, collect and otherwise raise money” in support of the presidential candidacy of Ross Perot. Since its incorporation, it has engaged in political organizing; established and equipped an office; solicited politicians to run on the UWSANY slate; issued press releases intended to support particular candidates and causes; endorsed candidates; and distributed partisan political literature. Id. at 90-91 (distinguishing Lucasfilm Ltd. v. High Frontier, 622 F. Supp. 931 (D.D.C.1985): “UWSANY, unlike the defendants in Lucasfilm and L.L. Bean, is using the Mark not as a commentary . . . but instead as a source identifier.”). No part of the United We Stand decision in any way attempts to interpret the “commercial use in commerce” language of the FTDA. Finally, to the extent that FORD contends that certain broad language in United We Stand enables FORD to reach non-branding references to FORD in speech, Defendants respectfully note that Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Prods., 134 F.3d 749, 753-54 (6<sup>th</sup> Cir.1998), and not United We Stand is the controlling law in the Sixth Circuit.

(2<sup>nd</sup> Cir. 2000); Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208 (2nd Cir. 1999); I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27 (1<sup>st</sup> Cir. 1998). The one Court of Appeals that has squarely addressed this issue has recognized the merit of Defendants' interpretation:

Toeppen argues that his use of Panavision's trademarks simply as his domain names cannot constitute a commercial use under the Act. **Case law supports this argument.** See Panavision International, L.P. v. Toeppen, 945 F. Supp. 1296, 1303 (C.D.Cal.1996) ("Registration of a trade[mark] as a domain name, without more, is not a commercial use of the trademark and therefore is not within the prohibitions of the Act.");<sup>9</sup> Academy of Motion Picture Arts & Sciences v. Network Solutions, Inc., 989 F. Supp. 1276 (C.D. Cal. 1997) (the mere registration of a domain name does not constitute a commercial use); Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949 (C.D.Cal.1997) (NSI's acceptance of a domain name for registration is not a commercial use within the meaning of the Trademark Dilution Act).

Panavision Intern., L.P. v. Toeppen, 141 F.3d 1316, 1319 (9<sup>th</sup> Cir. 1998). Moreover, several District Courts addressing this exact issue have repeatedly held that noncommercial references in speech do not qualify as a "commercial use in commerce." Northland Ins. Cos., 115 F. Supp. 2d at 1122-23 ("On the basis of the present record, defendant's [Internet] use is for noncommercial commentary purposes. Defendant correctly contends that his use is exempt because it constitutes noncommercial speech. Therefore, the court finds that plaintiff is unlikely to prevail on the merits of the FTDA claim."); HQM, Ltd., 71 F. Supp. 2d at 505-07 ("The Court believes, however, that the Complaint fails to allege facts sufficient to plead the statutory elements of "commercial use" and "dilution.");

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<sup>9</sup>We recognize that the March 30, 2001 Opinion in Ford Motor Co. v. Great Domains, Inc., 141 F.Supp.2d 763 (E.D. Mich. Mar 30, 2001), contained some language expressing disagreement with the reasoning of the Ninth Circuit in Panavision. However, a motion for reconsideration is pending in the Great Domains litigation, and Defendants respectfully suggest that the Sixth Circuit is rather more likely to agree with the Ninth Circuit's view of the law than it is to agree with this Court's March 30, 2001 "lexical context" jurisdiction analysis.

Bally Total Fitness Holding Corp., 29 F. Supp. 2d 1161 (holding mere use of another's mark on Internet is insufficient to constitute commercial use).

Likewise, in a closely related and parallel context, the Southern District of New York has squarely recognized that:

The commercial use requirement in § 43(a) tracks the commercial speech doctrine as developed by the United States Supreme Court. See Central Hudson, 447 U.S. 557, 561. Following the Supreme Court's precedent, the Second Circuit has explained that “[t]he ‘core notion’ of commercial speech includes ‘speech which does no more than propose a commercial transaction.’” Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 97 (2d Cir.1998) (quoting Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 66 (1983)). “The mere use of another's name on the Internet ... is not *per se* commercial use.” Bally Total Fitness Holding Corp., 29 F. Supp. 2d at (C.D.Cal. 1998). Nor do the Gross websites offer any “commercial transaction.”

Bihari v. Gross, 119 F. Supp. 2d 309, 318, (S.D.N.Y.2000). The same reasoning applies here. FORD's FTDA allegations fail to state a claim because FORD does not allege any “commercial use in commerce” by the Defendants of any trademark.

### **3. FORD Is Not a “Famous” Trademark.**

The Sixth Circuit repeatedly has recognized the difference between bare legal “conclusions”(which are not sufficient to save a Complaint from dismissal) and the necessity of alleging sufficient facts to state a claim. See Gregory, 220 F.3d at 446; Begala, 214 F.3d at 779 (“More than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements”); Claybrook, 199 F.3d at 353 n.1 (“A court is not bound to accept alleged legal conclusions or unwarranted factual inferences.”); Mixon, 193 F.3d at 400; Morgan, 829 F.2d at 12. Here, FORD has alleged the conclusion that the word-mark FORD® (a different trademark from FORD in a blue oval) is a so-called “famous” trademark, without supporting factual allegations



sufficient to support an FTDA claim. At least in the face of the minimal supporting factual allegations made by FORD in this case, the FTDA simply does not reach “surname” trademarks such as “FORD.” Avery Dennison Corp. v. Sumpton, 189 F.3d 868, 875-77 (9th Cir. 1999) (“Avery” and “Dennison” marks meet test of “acquired distinctiveness” but “g[o] no further” and do not meet statutory requirement for FTDA remedy).

Both the term “famous” and the term “dilution” – as those terms of art are used in the FTDA – have caused the courts considerable interpretive difficulty. See Federal Exp. Corp., 201 F.3d at 177-78; Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 170 F.3d 449, 459 (4th Cir.) (Recognizing that the FTDA term “dilution” presents unremitting[ly] difficul[t] . . . interpretive problem[s] for all who touch it . . .”), cert. denied, 528 U.S. 923 (1999); I.P. Lund, 163 F.3d 27 at 46-47 (“Both the text and legislative history of the original bill in 1988 and the FTDA itself indicate a congressional intent that courts should be discriminating and selective in categorizing a mark as famous.”); HQM, Ltd., 71 F. Supp. 2d at 506-09.

The Federal Trademark Dilution Act is strong medicine because it restricts non-competing uses of trademarks – e.g., Kodak pianos or Xerox mouthwash. Accordingly, dilution remedies are available only for a small class of marks called “famous” marks. The FTDA requires, as a mandatory precondition for a dilution cause of action, that a trademark must be “famous **and distinctive**.” See TCPIP Holding Co., Inc., 244 F.3d at 93-94. Not all trademarks are “famous and distinctive” – even if extraordinarily well-known. Avery Dennison, 189 F.3d at 875-77; Hasbro, Inc. v. Clue Computing, Inc., 66 F.Supp.2d 117, 131-32 (D. Mass. 1999), aff’d, 232 F.3d 1 (1<sup>st</sup> Cir. 2000) (“CLUE®” is not a “famous” trademark).

The mark “FORD” is not an arbitrary or fanciful coined term like “Kodak,” “Xerox,” “Prozac,” “Kleenex,” or (probably not famous yet) “Verizon.” Indeed, many companies other than the Ford Motor Company offer goods or services in commerce that use marks referencing the name “Ford.” See, e.g., U.S.P.T.O. Reg. No. 1939442 (Dec. 5, 1995) (“Betty Ford Center”); U.S.P.T.O. Reg. No. 2400805 (Oct. 31, 2000) (“One Ford Road” for real estate development); U.S.P.T.O. Reg. No. 2075160 (July 1, 1997) (“Henry Ford Health System” for health care services); U.S.P.T.O. Reg. No. 2077011 (July 8, 1997) (“Henry Ford” for health care services); U.S.P.T.O. Reg. No. 2064445 (May 27, 1997) (“Henry Ford Museum”); U.S.P.T.O. App. No. 76001043 (*published for opposition* Oct. 24, 2000) (“Ford’s Colony” for country club entertainment services); U.S.P.T.O. App. No. 75514241 (*published for opposition* Dec. 28, 1999) (“The Ford Plantation” for real estate development, hotel services, and golf course entertainment services).

The naked word “FORD” simply lacks the degree of inherent distinctiveness to associate it uniquely with a single company or a single source of goods and services. The strongest protection is reserved for fanciful marks that are purely the product of imagination and have no logical association with the product. Eli Lilly & Co., 233 F.3d at 466 (“Prozac” case); Nabisco, Inc., 191 F.3d at 216. Especially when the factual allegations made by FORD in support of its conclusory allegation that the naked word FORD is “famous” are so scant, it would be inappropriate simply to assume that “FORD” can claim to possess a so-called “famous” mark. TCPIP Holding Co., 244 F.3d at 95 (“against a background of **policies that strongly disfavor marks lacking inherent distinctiveness**, according them only narrow protection, we think it highly unlikely that Congress intended to extend to such marks the expanded rights conferred by the Dilution Act”) (emphasis added). A mark that evokes an association with a specific source only when used in connection with

the particular goods or services that it identifies is ordinarily not sufficiently distinctive to be protected against dilution. I.P. Lund, at 46-47.

## **II. There Is No General “Right Not to Be Referred To” on the Web.**

FORD simply does not have the right to pick and choose among speakers, allowing some speaker to link or refer to FORD’s Website, and forbidding other, disfavored speakers from doing so. Yet this expansive power to pick and choose, by vetoing (censoring) the speech of others is exactly what FORD demands in this case. See May 28, 2001 Transcript, at 54:

THE COURT: Yeah. The General Motors component of the, of the link on the far end does not seem to be of any really substantial significance as, I think, through this in listening to your arguments. It would seem that Ford would have an equivalent complaint, and equivalent arguments with almost any, let's say, disagreeable message out at the far end which then links into the Ford trademark said products at the, at the genuine Ford website.

MR. LEE: It might well.

THE COURT: Do you agree with that?

MR. LEE: It might have, Your Honor, I think I do, ....

The arbitrary power that FORD seeks to command in this case (and which, if granted, will certainly be demanded by many institutions here and abroad which are far less benign than FORD claims to be) represents a direct and extraordinary threat to free speech on the Internet.

The World Wide Web is based on a kind of commonly understood “social contract,” defined at the time of its creation, which recognizes “freedom to link” as its core and most fundamental value, and which FORD is not at liberty to rewrite or disregard unilaterally at FORD’s pleasure. See Tim Berners-Lee, *Axioms of Web Architecture 4 -- Links and Law: Myths*, *published at* < <http://www.w3.org/DesignIssues/LinkMyths.html> >; Tim Berners-Lee, *Axioms of Web Architecture*

2 -- Links and Law, *published at* < [http://www.w3.org/DesignIssues/ LinkLaw](http://www.w3.org/DesignIssues/LinkLaw) >. As clearly explained by the man who created the ‘Web: “We cannot regard anyone as having the ‘right not to be referred to’ without completely pulling the rug out from under free speech.” *Id.* This is because “[t]he ability to refer to a document (or a person or any thing else) is in general a fundamental right of free speech to the same extent that speech is free. Making the reference with a hypertext link is more efficient but changes nothing else. . . . **There is no reason to have to ask before making a link to another site.**” *Id.*

There are two easy and commonly understood mechanisms by which FORD may “opt out” of the social contract authorizing any ‘Web publisher to make links or referrals to any other ‘Web page for any reason or no reason at all: (1) do not publish a ‘Web page, or (2) erect a “software code” barrier to regulate the links or referrals. For example, Internet protocols authorize the use of password protection to restrict access to all or part of a Website. Likewise, it is common (in fact, 2600's Website uses software “code” to encourage visitors to enter the site through the Homepage, instead of through “deep links”) to use a computer database to generate pages on the fly – making it possible to have a Website that is open to the public, but that the public may visit in only a predetermined way. In the absence of a technological “opt-out,” however, it is important to make the default rule of “freedom to link” uniform and simple. Entities like FORD should not be given the opportunity unilaterally to legislate their own set of rules because the resulting patchwork would be detrimental and damaging to the fabric of the World Wide Web.

### III. Defendants are Not Subject to Personal Jurisdiction.

The existence of personal jurisdiction is a necessary prerequisite for injunctive relief. R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 957-58 (4<sup>th</sup> Cir. 1999). And the burden is on the plaintiff to present an evidentiary foundation for personal jurisdiction. Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1262 (6<sup>th</sup> Cir. 1996); Winfield Collection, Ltd. v. McCauley, 105 F. Supp. 2d 746, 748-49 (E.D. Mi. 2000); Neighbors v. Penske Leasing, Inc., 45 F. Supp. 2d 593, 597 (E.D. Mi. 1999). The affidavit of Eric Corley, submitted in advance of the preliminary injunction hearing, demonstrates with affirmative evidence that neither Defendant has jurisdictional contacts with Michigan sufficient to satisfy the requirements of the Michigan Long-Arm statute or Due Process.

Plaintiff has not made any countervailing evidentiary showing to establish any jurisdictional contacts whatsoever. Moreover, Plaintiff has not even made out a “*prima facie*” evidentiary case for personal jurisdiction sufficient to justify the taking of jurisdictional discovery. See Central States, S.E. & S.W. Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 946-47 (7<sup>th</sup> Cir. 2000); Ellis v. Fortune Seas, Ltd., 175 F.R.D. 308, 312 (S.D. Ind. 1997) (“[A] plaintiff is **not always** entitled to discovery to respond to a motion to dismiss for lack of personal jurisdiction.”) (emphasis added); Poe v. Babcock Int’l, plc, 662 F. Supp. 4, 7 (M.D. Pa. 1985) (“It would be inappropriate for this court to allow plaintiff to conduct a fishing expedition in order to construct a basis for jurisdiction.”); Leema Enters., Inc. v. Willi, 575 F. Supp. 1533, 1536 (S.D.N.Y. 1983); Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1089-90 (D.C. Cir. 1998); Jazini v. Nissan Motor Co., 148 F.3d 181, 185-86 (2<sup>nd</sup> Cir. 1998); Noonan v. Winston Co., 135 F.3d 85, 94-95 (1<sup>st</sup> Cir. 1998); Theunissen v. Matthews, 935 F.2d 1454, 1465 (6<sup>th</sup> Cir. 1991); Naartex Consulting Corp. v. Watt, 722 F.2d 779, 788 (D.C. Cir. 1983); McLaughlin v. McPhail, 707 F.2d

800, 806-07 (4<sup>th</sup> Cir. 1983); Chrysler Corp v. Fedders Corp., 643 F.2d 1229, 1239-40 (6<sup>th</sup> Cir. 1981); Greenspun v. Del E. Webb Corp., 634 F.2d 1204, 1208 n.5 (9<sup>th</sup> Cir. 1980); Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 93-94 (2<sup>nd</sup> Cir. 1975); H.L. Moore Drug Exch., Inc. v. Smith, Kline & French Labs., 384 F.2d 97, 97-98 (2<sup>nd</sup> Cir. 1967); Hansen v. Neumuller GmbH, 163 F.R.D. 471, 474-76 (D. Del. 1995); International Terminal Operating Co., Inc. v. Skibs A/S Hidleford, 63 F.R.D. 85, 87-88 (S.D.N.Y. 1973).

Plaintiff bears the sole burden of establishing the factual foundation for personal jurisdiction over either of the Defendants. Compuserve, Inc., 89 F.3d at 1262. In order to establish personal jurisdiction, Plaintiffs must satisfy two separate and distinct requirements. Green v. Wilson, 455 Mich. 342, 348-51 & nn.4-6, 565 N.W.2d 813, 815-17 & nn.4-6 (1997) (holding Michigan “Long-Arm Statute” and Federal Due Process analyses cannot be collapsed into a single inquiry); Neogen Corp. v. Neo Gen Screening, Inc., 109 F. Supp. 2d 724, 727 (W.D. Mi. 2000); Neighbors, 45 F. Supp. 2d at 597. Plaintiffs have the burden of establishing both (1) that one or more of the factual predicates necessary to trigger the Michigan Long-Arm statute<sup>10</sup> have been satisfied with sufficient admissible evidence, and (2) that the exercise of personal jurisdiction by a Michigan court over each Defendant must be consistent with the dual Due Process requirements of “purposeful availment,” and “fair play and substantial justice.” Id.; Hanson v. Denckla, 357 U.S. 235, 253 (1958); International Shoe Co v. Washington, 326 U.S. 310, 316 (1945); Winfield Collection, Ltd., 105 F.

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<sup>10</sup> MICH. COMP. L. ANN. § 600.705 (specific personal jurisdiction over individuals); MICH. COMP. L. ANN. § 600.715 (corporations). The issue of “general jurisdiction,” as opposed to “specific jurisdiction,” need not be addressed because Defendants do not have sufficient jurisdictional contacts with Michigan to satisfy the Due Process requirements for general personal jurisdiction and Plaintiffs do not attempt to assert any general jurisdiction theory. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 & nn. 8-9 (1984) (discussing standards for specific and general jurisdiction, respectively).

Supp. 2d at 748-49. If either Due Process or the Long-Arm Statute is not satisfied, dismissal is mandatory. Id.

When faced with a properly supported Rule 12(b)(2) motion, the Plaintiffs must set forth sufficient facts establishing personal jurisdiction. Neighbors, at 595; see also Kerry Steel, Inc. v. Paragon Indus., 106 F.3d 147, 152-53 (6<sup>th</sup> Cir. 1997). Plaintiffs are not permitted to rest on pleadings alone, but must come forward with specific evidence in admissible form that, if believed, would be sufficient to support the exercise of personal jurisdiction. Theunissen, 935 F.2d at 1458); Hi-Tex, Inc. v. TSG, Inc., 87 F. Supp. 2d 738, 741-42 (E.D. Mi. 2000).

Here, Plaintiff's sole basis for asserting jurisdiction appears to involve reliance upon the "lexical context" theory of "effects test" jurisdiction posited in Ford Motor Co. v. Great Domains, Inc., 141 F.Supp.2d 763 (E.D. Mich. Mar 30, 2001). However, as should be obvious, the lexical context of "F\_\_\_GENERALMOTORS.COM" is so far removed from the trademark FORD, that the Ford v. Great Domains decision cannot possibly apply here. Moreover, in light of Plaintiff's failure to allege a defamation claim, the so-called "effects test" of Calder v. Jones (a defamation case) is not and should not be applicable here. Simply put, Plaintiff has not set forth the necessary factual predicate that an assertion of "effects test" jurisdiction clearly would require. See Reynolds v. International Amateur Athl. Ass'n, 23 F.3d 1110 (6<sup>th</sup> Cir. 1994); IMO Indus. v. Kiekert, AG, 154 F.3d 254 (3<sup>rd</sup> Cir. 1998); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 625-26 (4<sup>th</sup> Cir. 1997).

### **CONCLUSION**

Wherefore, premises considered, Defendants respectfully pray that Plaintiff's Motion for a Preliminary Injunction be rejected and that the action be dismissed WITH PREJUDICE for lack of jurisdiction or failure to state a claim.

Respectfully submitted,

2600 ENTERPRISES and  
ERIC CORLEY p/k/a  
EMMANUEL GOLDSTEIN,

By counsel,

Dated: July 2, 2001

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**CERTIFICATE OF SERVICE**

I certify that **DEFENDANTS' RULE 12(b)(2) AND 12(b)(6) MOTION AND SUPPORTING MEMORANDUM TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND FAILURE TO STATE A CLAIM** was served on all counsel fo record, by First Class Mail, postage prepaid, on July 2, 2001.