

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

PROJECT VOTE/VOTING FOR )  
 AMERICA, INC., )  
 )  
 Plaintiff/Counterclaim Defendant, )  
 )  
 vs. )  
 )  
 ASHAWNITA MONCRIEF, )  
 )  
 Defendant/Counterclaim Plaintiff, )  
 )  
 JOHN DOE, )  
 )  
 Defendant, )  
 )  
 vs. )  
 )  
 ASSOCIATION OF COMMUNITY )  
 ORGANIZATIONS FOR REFORM NOW, INC., )  
 )  
 Counterclaim Defendant. )

Case No. 09-cv-01109-RWR

**DEFENDANT ASHAWNITA MONCRIEF’S MEMORANDUM IN SUPPORT OF HER  
MOTION TO DISMISS COUNTS I-III, VI-VII, & IX-XI OF PROJECT VOTE’S  
COMPLAINT**

**GRAVES BARTLE MARCUS  
& GARRETT, LLC**

Todd P. Graves\*  
 Edward D. Greim\*  
 Clayton Callen\*  
 Ryan Kriegshauser\*  
 1100 Main Street, Suite 2700  
 Kansas City, Missouri 64105  
 Telephone: (816) 256-4144  
 Facsimile: (816) 817-0863  
[tgraves@gbmglaw.com](mailto:tgraves@gbmglaw.com)  
[edgreim@gbmglaw.com](mailto:edgreim@gbmglaw.com)  
[ccallen@gbmglaw.com](mailto:ccallen@gbmglaw.com)  
[rkriegshauser@gbmglaw.com](mailto:rkriegshauser@gbmglaw.com)

\* *Pro Hac Vice*

Michael E. Rosman  
 1233 20<sup>th</sup> Street, N.W., Suite 300  
 Washington, DC 20036  
 Telephone: (202) 833-8400  
 Facsimile: (202) 833-8410  
[rosman@cir-usa.org](mailto:rosman@cir-usa.org)

*Counsel for Defendant Anita MonCrief*

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### **Introduction**

This litigation has three purposes. First, it is an attempt by Project Vote and the Association of Community Organizations for Reform Now (“ACORN”) to silence one of their loudest critics, Defendant Anita MonCrief. Second, it is an attempt to force Ms. MonCrief to divulge her sources. Third, it is an attempt to set an example that will intimidate other whistleblowers within Project Vote, ACORN, and their family of for-profit and nonprofit organizations and unions. For these reasons, Defendant has filed a counterclaim for abuse of process against Project Vote and its alter ego, ACORN. The instant motion is targeted not to Plaintiff’s and ACORN’s abuse of process and the fundamental impropriety of their lawsuit, but to the almost inevitable result of this strategy: the appearance of specific gaps and holes in Plaintiff’s Complaint where the facts could not quite stretch to fit Plaintiff’s chosen causes of action.

The problems begin with Project Vote’s claim for \$5 million in damages. Allegedly, Defendant’s blog posting and email has “proximately caused” Project Vote to sustain this massive loss. Yet Project Vote does not plead one single fact regarding any actual, discrete harm—whether in the form of a lost contribution, business deal, or government grant. Instead, Project Vote pleads bare legal conclusions, merely uttering the words “proximate cause” and “damage.” The pattern is repeated in other areas of its pleading, where Project Vote does its best to bring Defendant’s political speech within the realm of federal statutes or common law causes of action. Some of these efforts may eventually require factual development before they are rejected, but some fall so short that they can and should be dismissed on the pleadings.

For example, Project Vote invokes the Lanham Act’s protection of trademarks. The Lanham Act, however, can provide no cover here: it only regulates commercial uses of a trademark. MonCrief’s alleged use of Project Vote’s trademark was for the purposes of

conveying an editorial message – communicating ideas – and was not in connection with the sale or advertising of any goods or services. Thus, the Lanham Act has no application to this case and Counts I-III of the Complaint fail to state a claim upon which relief may be granted.

Likewise, although Project Vote raises the common law doctrine of trespass to chattels, it fails to allege facts that might give rise to relief. First, Project Vote has failed to describe any chattel(s) upon which MonCrief trespassed. Second, Project Vote has failed to allege that any such chattel has diminished in value as a result of any trespass. Project Vote satisfies itself with speculative conclusions that are pled primarily to set up a fishing expedition into MonCrief's sources of information regarding troublesome behavior on the part of ACORN. Pleadings that amount to mere speculation fail to meet the requirements of Rule 8, which exists precisely to guard against plaintiffs' use of uncertain and hopeful allegations as bait to fish for otherwise-unavailable discovery.

Finally, Project Vote has alleged various causes of action based upon misrepresentation. However, Project Vote alleges no facts supporting its allegations that MonCrief made any false representation of any material fact. Thus, Counts IX-XI of the Complaint also fail as a matter of law and should be dismissed.

### **Facts Alleged by Plaintiff<sup>1</sup>**

Defendant MonCrief was employed by Plaintiff Project Vote as a Development Associate from October of 2005 until January of 2008 in its Washington, D.C. office. Project Vote tasked MonCrief with maintaining donor databases, preparing proposals for donors, receiving and recording donations, and a host of other responsibilities. In 2007, a Pitney Bowes postage meter machine was installed in Project Vote's office. Project Vote alleges that MonCrief subsequently

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<sup>1</sup> These facts are summarized from Project Vote's complaint and are assumed true only for purposes of this motion. MonCrief has simultaneously filed her Answer to Project Vote's complaint, which disputes or is inconsistent with many of Project Vote's allegations.

applied for a Pitney Bowes Purchase Power Visa card on behalf of Project Vote and charged personal expenses to that card. Additionally, Project Vote alleges that MonCrief forwarded billing statements from that card to Project Vote's accounts payable office, which then allegedly paid \$1,741.43. After an "internal investigation into [] MonCrief's obtaining and using the Pitney Bowes Purchase Power Visa" card Project Vote terminated MonCrief's employment in January of 2008. Complaint ¶¶ 25-35.

In what Project Vote alleges is the "role of a supposed 'whistleblower' against Project Vote and organizations with which Project Vote collaborates," in November of 2008 MonCrief began to blog at the website [anitamoncrief@blogspot.com](mailto:anitamoncrief@blogspot.com). Occasionally, MonCrief would also publish her blog posts on other online forums such as The Next Right (<http://thenextright.com>) and Blog Town Hall (<http://anitamoncrief.blogtownhall.com>). Many of MonCrief's blog posts were highly critical of Project Vote, ACORN, and Citizens Services, Inc. ("CSI"). Complaint ¶¶ 36-39. Project Vote has an "established track record of collaboration" with both ACORN and CSI. Complaint ¶ 72. Additionally, MonCrief testified against Project Vote and ACORN in a lawsuit in Pennsylvania relating to voter registration fraud. Complaint ¶ 37.

One particular blog post written by MonCrief forms the foundation of the most significant portion of Project Vote's lawsuit. On April 24, 2009, MonCrief published a blog post identified by Project Vote as the "Late April Blog Posting." Project Vote describes that post as "sharply criticiz[ing]" the National Committee for Responsive Philanthropy ("NCRP") for "among other things, its Executive Director's ties to ACORN...." The Late April Blog Posting included "extensive quotations from and photographic reproductions of private email exchanges between Project Vote and other organizations...." Senders and/or recipients of the emails contained in the Late April Blog Posting include Nathan Henderson-James, a former CSI

employee who was allegedly working for ACORN at the time of the blog's publication, Zach Polett, who is both the Executive Director of CSI and the Director of Political Operations of ACORN, Kevin Whelan, who is the Managing Director of CSI and the Deputy Political Director of ACORN, Michael Slater, who is the Executive Director of Project Vote, and Aaron Dorfman, the Executive Director of NCRP who formally worked at ACORN. Complaint ¶¶ 40-64.

In addition to publishing the Late April Blog Posting on her personal blog, MonCrief also distributed it via email to, among others, former donors of Project Vote. MonCrief's email of the Late April Blog posting was sent from the email address projectvoteneeds@mail.org, which was registered to the name "PROJECT VOTE." Complaint ¶¶ 40-48.

## **Argument**

### **I. Standard of Review**

In order to survive a Rule 12(b)(6) motion to dismiss, each claim of a complaint must include a sufficient *showing* that the plaintiff is "entitled to relief" so that the defendant has "fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). A complaint must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* While factual allegations contained in a complaint are assumed true for purposes of a motion to dismiss, *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 865 (D.C. Cir. 2008), the "factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. And the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

As set out below, Project Vote's complaint is heavy on conclusions and speculation but light on factual allegations—at least where the rubber meets the road on the substantive legal

elements of each cause of action. Disregarding Project Vote's legal conclusions and speculation, and taking all its factual allegations as true, reveals that Counts I, II, III, VI, VII, IX, X, and XI of its Complaint do not state a claim for which relief can be granted and fail as a matter of law. This Court should dismiss these counts with prejudice.

## **II. Counts I-III Fail as a Matter of Law**

Counts I-III of Project Vote's complaint allege that MonCrief's use of the words "Project Vote"<sup>2</sup> in the email version of her blog post violates the Lanham Act's protection of trademarks. As described above, MonCrief emailed one of her blog posts – which was critical of Project Vote's affiliated entities – from the email address projectvoteneeds@mail.org with the subject "Project Vote News: Whistleblower exposes NCRP." Complaint ¶¶ 40-43.

In trying to use the trademark protections of the Lanham Act to silence MonCrief's whistle-blowing activities, Project Vote tries to plug a square peg into a round hole. It simply does not fit. Project Vote perverts the commercial protections of trademark law into both a sword and a shield to silence any criticism of itself or its affiliated organizations. The Lanham Act does not – and cannot – protect Project Vote from criticism or the disclosure of embarrassing information. For this reason, the Lanham Act only prohibits unauthorized use of a trademark in the context of commercial competition. Thus, Counts I-III of Project Vote's complaint fail as a matter of law because the Lanham Act has no application to MonCrief's purely communicative and non-commercial use of Project Vote's mark.

Before looking to the precise language of the Lanham Act – which precludes its application in this case – some background regarding the nature of trademarks is in order. Laws protecting trademarks have a long history in this nation at both the state and federal level. A

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<sup>2</sup> Project Vote alleges that "it is the owner of U.S. Trademark Registration No. 2926255 for the mark PROJECT VOTE, registered February 15, 2005 on the Principal Register at the U.S. Patent and Trademark Office." *Complaint* ¶ 77.

trademark is a form of intellectual property owned by “a manufacturer or merchant to identify goods [or services] and distinguish them from those” produced or sold by others. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir. 1987). A “trademark is not property in the ordinary sense, but only a word or symbol indicating the origin of a commercial product.” *Lucasfilm LTD v. High Frontier, et al.*, 622 F. Supp. 931, 933 (D.C. Cir. 1985) (citation omitted). Unlike the owner of ordinary property, who can typically forbid impermissible use of their property irrespective of the manner of that use, the owner of a trademark only possesses “the right to prevent the goods to which the mark is applied from being confused with those of others and to prevent his own trade from being diverted to competitors through their use of misleading marks.” *Id.* A trademark “is not a copyright. A trademark only gives the right to prohibit the use of it so far as to protect the owner’s good will against the sale of another’s product as his.” *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924).

#### **A. The Lanham Act**

The Lanham Act is the current federal law governing registration and use of trademarks. Originally enacted in 1946, it was amended in 1996 by the Federal Trademark Dilution Act, which added 15 U.S.C. § 1125(c). Project Vote asserts that by using its Project Vote mark in the email version of her blog post MonCrief violated three separate provisions of the Lanham Act.

First, in Count I Project Vote alleges that MonCrief’s email infringed on its trademark. 15 U.S.C. § 1114. Section 1114 prohibits “use in commerce”<sup>3</sup> of the “registered mark” of

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<sup>3</sup> “Use in commerce” is defined as

the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce--

(1) on goods when--

another “in connection with the sale, offering for sale, distribution, or advertising of any goods or services” if such use “is likely to cause confusion, or to cause mistake, or to deceive.” *Id.* at § 1114(1).

In Count II, Project Vote alleges that MonCrief’s email violated the Lanham Act’s provision relating to false designation of goods. 15 U.S.C. § 1125(a). Section 1125(a) prohibits the use “in connection with any goods or services” of a “word, term, symbol, or devise, or any combination thereof, or any false designation of origin, [or] false or misleading description of fact” that is “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person...” *Id.*

Finally, in Count III Project Vote contends that MonCrief’s email impermissibly diluted its trademark. 15 U.S.C. § 1125(c). Section 1125(c) provides that “the owner of a famous mark, inherently or through acquired distinctiveness” can enjoin another’s use of that mark “in commerce” if it is “likely to cause dilution by blurring or dilution by tarnishment of the famous mark...” 15 U.S.C. § 1125(c). Lest there be any doubt as to the meaning of “in commerce,” § 1125(c) explicitly exempts from its application “[a]ny noncommercial use of a mark.” *Id.* at § 1125(c)(3)(C).

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(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce, and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

15 U.S.C. § 1127.

## B. Commercial Use Requirement<sup>4</sup>

As evident from the plain language of the statute, each of the forgoing provisions of the Lanham Act contains a “commercial use” requirement. This means that only the unauthorized use of another’s trademark for commercial purposes is prohibited. While some courts derive this requirement from the phrase “in commerce,” *see Sensient Technology Corp., v. Sensoryeffects Flavor Co.*, 2009 WL 1650085 (E.D. Mo. 2009), some from the phrase “in connection with” the sale or advertising of goods and services, *see Bosley Medical Institute, Inc. v. Kremer*, 403 F.3d 672 (9th Cir. 2005), and some from both, *see Lucasfilm*, 622 F. Supp. 931, one thing is clear: *commercial use* is a threshold requirement for the Lanham Act to be applicable. Limiting the Lanham Act to commercial uses of a trademark “serves the Act’s purpose: ‘to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.’” *Kremer*, 403 F.3d at 676 (*quoting Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992)). Indeed, the very concept of a *trademark* would not exist but for the commercial context, i.e. *trade*.

Thus, as set out below, courts have consistently held that the unauthorized use of a trademark for purely communicative purposes is not prohibited by the Lanham Act. Persons are free to use another’s mark for purposes of editorial, criticism, or even parody. So long as a mark is not used in connection with selling or advertising the sale of goods or services, the Lanham

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<sup>4</sup> For purposes of this motion, MonCrief asserts only the “commercial use” issue under the Lanham Act because this issue alone is dispositive on Counts I-III and is ripe for adjudication at this early stage of the litigation. Nonetheless, should her motion be denied and Counts I-III be permitted to go forward, MonCrief will also show that Project Vote cannot meet other required elements to succeed on a claim brought under the Lanham Act. Most notably, in regard to both § 1114 and § 1125(a), MonCrief’s use of the mark was not likely to cause confusion, mistake, or deceive as to its origin. Additionally, Project Vote’s mark is not sufficiently famous or distinctive to bring a cause of action under § 1125(c)’s trademark dilution provision. However, these additional issues need not be reached because Project Vote has failed to allege any facts showing commercial use of its mark, and Counts I-III thereby fail as a matter of law.

Act has no application. Trademark “laws do not reach into the realm of public discourse to regulate the use of terms used outside the context of trade,” *Lucasfilm*, 622 F. Supp. at 935, and therefore “[t]rademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view.” *L.L. Bean*, 811 F.2d at 29.

*Lucasfilm* provides a particularly in-depth and cogent analysis of the Lanham Act’s commercial use requirement and is applicable here. In *Lucasfilm* the owners of the “Star Wars” trademark brought suit against various public policy organizations that were running television advertisements that used the term “Star Wars” to describe President Reagan’s proposed missile defense system. *Id.* The owner of the “Star Wars” mark alleged that this unauthorized use of its mark violated sections 1114 and 1125(a) of the Lanham Act.<sup>5</sup> The court disagreed and held that the Lanham Act was inapplicable because the defendants’ use of the mark was not commercial in nature. *Id.* at 934.

Noteworthy here, the court noted that the defendants had “not affixed [the] trademark to any goods or services for sale.” *Id.* at 934. Rather, their only “activity [was] trying to communicate their ideas,” *id.*, and “purveying points of view is not a service” as that term is used in the Lanham Act. *Id.* Thus, the court held that the Lanham Act did “not reach such uses,” because the “purpose of trademark regulation is to prevent unfair competition and protect consumers from fraud and deception.” *Id.* Moreover, *Lucasfilm* stated that “courts obviously cannot regulate” such a “descriptive, non-trade use” of a trademark “without becoming the monitors of the spoken or written English language.” *Id.* at 935. Likewise, a court cannot

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<sup>5</sup> Section 1125(c) trademark dilution provision was not yet enacted at the time *Lucasfilm* was decided. However, Courts have routinely held that the commercial use requirement contained therein requires the same showing as the commercial use requirement of sections 1114 and 1125(a). *See e.g. Kremer*, 403 F.3d at 676.

“venture beyond the property protections provided by [] trademark laws and attempt to regulate [] terms of [a] public debate.” *Id.* at 935.

Similarly, in *Bosley Medical Institute, Inc. v. Kremer* the Ninth Circuit held that using a trademark in the domain name of a website designed to criticize the mark’s holder was also outside the scope of the Lanham Act’s commercial use requirement. 403 F.3d 672. The defendant in *Kremer*, a disgruntled former customer unhappy with a hair transplant performed by the plaintiff Bosley Medical Institute, created the website [www.bosleymedical.com](http://www.bosleymedical.com), which “to put it mildly, was uncomplimentary of the Bosley Medical Institute....” *Id.* Just like Project Vote here, the Bosley Medical Institute alleged that the website infringed its “Bosley Medical” trademark in violation of sections 1114, 1125(a), and 1125(c) of the Lanham Act. The Ninth Circuit disagreed.

*Kremer* first stated the “Lanham Act, expressly enacted to be applied in commercial contexts, does not prohibit all unauthorized uses of a trademark.” *Id.* Thus, the relevant inquiry was whether or not [bosleymedical.com](http://bosleymedical.com) was commercial in nature. To that end, the court noted that the website did not “offer for sale any product or service or contain paid advertisements from any other commercial entity.” *Id.* at 678. Nor was the defendant attempting to sell the domain name. *Id.*<sup>6</sup> Thus, the court found that Kremer’s use of Bosley’s mark was not commercial and the Lanham Act was not applicable. Particularly relevant to the present case, the court noted that any “harm to Bosley [arose] not from a competitor’s sale of a similar product under Bosley’s mark, but from Kremer’s criticism of their services.” *Id.* at 680. And “Bosley [could not] use the Lanham Act either as a shield from Kremer’s criticism, or as a sword to shut Kremer up.” *Id.* at 680.

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<sup>6</sup> *Kremer* also noted that the relevant inquiry is whether the mark was used in connection with the defendant’s goods or services. Thus, it was irrelevant that the defendant’s use of the Bosley Medical mark was in connection with the plaintiffs goods or services. *Kremer*, 403 F.3d at 678.

As illustrated in both *Lucasfilm* and *Kremer*, the Lanham Act's commercial use requirement does not extend to purely communicative speech. *See also Taubaman Co. v. Webfeats*, 319 F.3d 770 (6th Cir. 2003) (holding that website domain name containing trademark of another did not meet the Lanham Act's commercial use requirement in that it did not contain commercial links or advertisements); *L.L. Bean, Inc.*, 811 F.2d 26 (finding that use of L.L. Bean mark in a catalog parodying L.L. Bean was not used in commerce for purposes of the Lanham Act). "Speech is 'non-commercial' or 'communicative' when its purpose is 'editorial' or artistic,' 'communicating ideas or expressing points of view,' or 'to convey a message.'" *International Association of Machinists and Aerospace Workers v. Winship Green Nursing Center*, 914 F. Supp. 651, 654 (D. Maine 1996) (citation omitted).

Not only would the extension of the Lanham Act to non-commercial speech stray beyond the text and purpose of the law, but it may well violate the First Amendment. *Taubman Co.*, 319 F.3d at 774 ("The Lanham Act is constitutional because it only regulates commercial speech, which is entitled to reduced protections under the First Amendment"); *Kremer*, 403 F.3d at 677 ("As a matter of First Amendment law, commercial speech may be regulated in ways that would be impermissible if the same regulation were applied to noncommercial expressions"); *L.L. Bean*, 811 F.2d at 30 ("[T]here are serious [F]irst [A]mendment implications involved in applying anti-dilution statutes to cover noncommercial uses of a trademark").

### **C. MonCrief's Use of Trademark Was Not Commercial**

Project Vote's complaint alleges no facts that show MonCrief's use of the Project Vote mark was for commercial purposes. Failing this threshold inquiry, Counts I-III should be dismissed because the Lanham Act has no applicability. What *is* evident from the complaint is that MonCrief's email was for purposes of communicating a message and purveying a point of

view. While this message might have been critical of or embarrassing to Project Vote, the Lanham Act provides no shield against such messages.

Turning to the specific allegations contained in the Complaint, Project Vote alleges that MonCrief used the Project Vote mark in the email address from which she sent her Late April Blog Posting. Additionally, the Complaint alleges that MonCrief used the mark in the email subject line. The Complaint also notes that the email was critical of Project Vote's affiliated entity ACORN's ties to NCRP. Complaint ¶ 40. From these bare allegations, Project Vote asserts the purely conclusory statement that "MonCrief's use of the PROJECT VOTE mark occurred in commerce." Complaint ¶ 85. But legal *conclusions* are to be disregarded when considering a Rule 12(b)(6) motion and a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Thus, Project Vote's "commercial use" *conclusion* is irrelevant and should be disregarded by this court. This Court should look only to the *factual allegations* contained in the Complaint, or the absence thereof, to determine if MonCrief's use of Project Vote's mark was commercial in nature.

Noticeably absent from the Complaint is any allegation that MonCrief's email offered for sale any goods or services, advertised for sale any goods or services, solicited any donations, contained links to commercial websites,<sup>7</sup> or directly or indirectly provided any economic benefit to MonCrief. Indeed, there are no facts alleged in the Complaint that could support a cause of action even under the most expansive view of commercial activity imaginable.<sup>8</sup>

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<sup>7</sup> See *TMI, Inc. v. Maxwell*, 368 F.3d 433, 435 (5th Cir. 2004) (holding that the commercial use requirement not met when defendant's website contained no advertising or links, defendant did not charge any fee to view the website, and never received payments as a result of his website); see also *Taubman*, 319 F.3d at 775 (commercial use requirement not met when defendant's website did not contain advertising or links to commercial sites.)

<sup>8</sup> While it disagreed with certain aspects of *Lucasfilm's* application of the "commercial use" requirement, the Second Circuit's decision in *United We Stand America, Inc. v. United We Stand, America New York, Inc.*, 128 F.3d 86 (2d Cir. 1997), is not contrary to MonCrief's position here. *United We Stand* held that

MonCrief's use of the Project Vote mark was solely for purposes of editorial or commentary. MonCrief's blog posting and email are examples of MonCrief exercising her First Amendment right to speak out on issues of public concern by criticizing large, well-known, and highly controversial organizations for what she deemed to be improper and unethical behavior. Her use of the Project Vote mark was akin to a newspaper using the mark in the title of an article, or displaying a bumper sticker on her car critical of Project Vote and ACORN, or holding a sign outside an ACORN office stating "Project Vote News: ACORN is a Fraud." Just like MonCrief's email, none of those scenarios involves the sale or advertisement of any goods and services. MonCrief "is not [Project Vote's] competitor; [s]he is their critic." *Kremer*, 403 F.3d at 680. The Lanham Act does not – and cannot – prohibit such uses of a trademark. If Project Vote could employ the Lanham Act to purely communicative uses of its mark the result would be to remove a phrase from the English language. Trademark law was never intended to have such an effect. *Lucasfilm*, 622 F. Supp. at 935. MonCrief's use of the Project Vote mark was not commercial in nature and "[t]rademark law does not reach such uses." *Id.* at 934.

Counts I-III of the Complaint should be dismissed because they do not state a claim upon which relief can be granted and fail as a matter of law.

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the Lanham Act "is as available to public service organizations as to merchants and manufacturers." *Id.* at 89. Therefore, the unauthorized use of a "mark by [a] competing organization[]" was actionable under the Lanham Act. The defendant in *United We Stand* employed the plaintiffs trademark in performing a variety of activities similar to those performed by the plaintiff. For example, the defendant employed the trademark in "political organizing ... solicit[ing] politicians to run on the UWS ANY slate; issue[ing] press releases intended to support particular candidates; and distribut[ing] partisan political literature." *Id.* at 90. Central to the court's holding was the fact that the defendant organization offered *competing services* to those offered by the plaintiff. Here, there is no allegation that MonCrief somehow operates as an organization undertaking similar activities as Project Vote. In other words, MonCrief is not a "competing organization[]" *Id.* at 90. Rather, she is an individual exercising her First Amendment right to speak out against various controversial organizations that she believes to be acting inappropriately. Moreover, *United We Stand* specifically distinguished the scenario where a critic uses a mark to criticize the mark's holder. *Id.* at 92.

### III. Trespass to Chattels

Project Vote's Complaint also fails to state a claim for trespass to chattels. Project Vote does not describe or identify any discrete "chattel" that has been damaged or diminished in value as a result of alleged interference or intermeddling by MonCrief. Thus, Project Vote's trespass to chattels claim fails as a matter of law and should be dismissed.

The District of Columbia follows the Restatement rule for trespass to chattels, which provides: "A trespass to a chattel may be committed by intentionally (a) dispossessing another of the chattel, or (b) using or intermeddling with a chattel in the possession of another." *Pearson v. Dodd*, 410 F.2d 701, 707 (D.C. Cir. 1969) (quoting Restatement (Second) of Torts § 217 (1965)). The measure of damages for trespass to chattels is limited to "the actual diminution in [the chattel's] value caused by the interference." *Id.* Absent any damage or injury to a chattel, a plaintiff cannot succeed on a trespass to chattels claim.

#### A. Project Vote's Allegations

Project Vote alleges that "without authorization from Project Vote, Defendant MonCrief and Defendant John Doe obtained the emails included in Defendant MonCrief's Late April Blog Posting by using and/or intermeddling with computer facilities and/or other chattels representing, containing, or storing Project Vote's emails." Complaint ¶ 128. In regard to its damages, Project Vote asserts only that it "had costs associated with investigating and repairing the security breach, which [were] occasioned by the unauthorized use of and/or intermeddling with computer facilities and/or other chattels." Complaint ¶ 128.

Project Vote claims it has investigated and repaired "a security breach," but despite its alleged "investigation," it is otherwise noncommittal on precisely what property was the target of

the trespass. Whether Project Vote is describing its physical property or intangible<sup>9</sup> electronic property is unclear. Either way, Project Vote has not alleged that any chattel was damaged by a trespass on the part of MonCrief. Absent a showing that its chattel was damaged, no cause of action based upon trespass to chattels can be maintained.

**B. Project Vote Has Not Alleged Any Damage to its Chattel.**

“[L]iability for trespass to chattels exists only on a showing of actual damage to the property interfered with.” *Pearson*, 410 F.2d at 707. While unauthorized interference or intermeddling with a chattel is a trespass in the technical sense of the word, for a trespass to become “actionable” any unauthorized interference or intermeddling must cause damage or diminution in value to the chattel in question. *Intel Corp. v. Hamidi*, 30 Cal.4th 1342, 1351 (Ca. 2003). No “action [can] be maintained for a mere harmless intermeddling...” *Pearson*, 410 F.2d at 707 n. 32 (citation and quotations omitted). This is in stark contrast to a claim for trespass to real property, which is actionable even if the trespass caused no damage to the property. *Id.*; *See also Hamidi*, 30 Cal.4th at 1352 (Ca. 2003) (dignitary interest in the inviolability of land is sufficient to warrant a claim for trespass to land claim in the absence of any actual damage, but such interest in chattel is *not* sufficient to warrant trespass claim absent damage to the chattel).

Here, Project Vote has failed to allege that its’ “computer facilities and/or other chattels” have been damaged or diminished in value. Rather, Project Vote asserts only that it “had costs associated with investigating and repairing the security breach, which [were] occasioned by the

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<sup>9</sup> To the extent Project Vote alleges that intangible property was trespassed upon, it’s not clear that trespass to chattels would apply at all. *See Hornbeck Offshore Transp., LLC v. U.S.*, 563 F. Supp.2d 205, 213 (D.D.C. 2008) (noting that trespass to chattels requires “physical contact with the chattel”); *see also Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348, 359 (4th Cir. 2006) (noting “Oklahoma courts appear never to have recognized [trespass to chattels] based upon intangible invasions of computer resources” because physical contact has generally been required to establish the tort). Regardless, Project Vote’s claims fail because it fails to allege any tangible or intangible chattel has been damaged.

unauthorized use of and/or intermeddling with computer facilities and/or other chattels.”

Complaint ¶ 128. The key phrase in Project Vote’s pleading is “occasioned by,” which neatly skips over the requirement that the chattels must have lost value as a result of damage caused by the alleged trespass. Under Project Vote’s theory, it learned that MonCrief had emails, assumed she could not have gotten them without unauthorized access, spent money investigating its system, and “repaired” a means of unauthorized access that it found. But even accepting all of this as true, saying that one spent money investigating or repairing a “security breach” is not the same as saying that the value of some specific chattel was diminished because of damage *caused by* a trespass. Assuming for purposes of this motion that Project Vote did in fact have a “security breach,” the “intermeddling” would be the *result*, not the *cause*, of the breach. In this case, even one who passes through the breach and “intermeddles” is not liable. That is because mere unauthorized interference or intermeddling is not sufficient to state a claim for trespass to chattels; Project Vote must allege that the trespass damaged its chattel. *Pearson*, 410 F.2d at 707. It has not done so.

Absent from the Complaint is any allegation that MonCrief’s alleged trespass caused any physical damages to its “computer facilities and/or other chattel,” or any “functional disruption” to Project Vote’s computer systems. *See Intel*, 30 Cal.4th at 1346. Project Vote has only alleged that it has incurred expense to determine how the alleged breach occurred and to prevent future breaches from occurring. Complaint ¶ 128. Security related expenses incurred by Project Vote to prevent intermeddling are entirely distinct from damage to a chattel occurring as a result of intermeddling. Assuming *arguendo* that Project Vote has sufficiently alleged that MonCrief intermeddled with its chattel, it has not alleged the “additional harm” that its chattel was damaged or diminished in value. *Id.* at 1351. As a result, Project Vote has failed to allege

sufficient facts to state a cause of action for trespass to chattels. Count VI of the Complaint should be dismissed.

#### **IV. Civil Conspiracy**

In addition to dismissing Counts I-III and VI, this Court should also dismiss Count VII of the Complaint as it relates to each of those claims. Count VII alleges that MonCrief and a John Doe participated in a civil conspiracy to commit Counts I-VII. Civil conspiracy requires: ““(1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme.”” *Second Amendment Foundation v. U.S. Conference of Mayors*, 274 F.3d 521, 524 (D.C. Cir. 2001) (citation omitted).

For the same reasons Counts I-III and VI fail as a matter of law, so too does Project Vote’s civil conspiracy claim on each of these counts. Counts I-III fail as a matter of law because the Lanham Act only applies to the unauthorized commercial use of a trademark and Count VI fails because Project Vote has failed to plead sufficient facts to state a claim for trespass to chattels. Therefore, in regard to each of these counts, Project Vote has also failed to state a claim for civil conspiracy because no “unlawful act” was committed. Because its civil conspiracy claims lack the predicate unlawful act as to Counts I-III and Count VI, Count VII of the complaint should be dismissed as to these claims.

#### **V. Misrepresentation**

Counts IX-XI of the Complaint should also be dismissed because they fail to state a claim upon which relief can be granted. Project Vote’s asserts causes of action based on negligent misrepresentation, fraudulent misrepresentation by knowing concealment of a material fact, and

fraudulent misrepresentation of a material fact, which arise from MonCrief's alleged unauthorized use of a Project Vote company credit card for personal expenses. Rule 9(b) requires that all of these claims be pled with particularity. Fed. R. Civ. P. 9(b); *see also In re U.S. Office Products Co. Securities Litigation*, 251 F.Supp.2d 58, 74 n. 9 (D.D.C. 2003). Project Vote fails to meet this heightened requirement.

To state a claim for negligent misrepresentation Project Vote must show that MonCrief "negligently communicated false information," that MonCrief "intended or should have recognized that the [Project Vote] would likely be imperiled by action taken in reliance upon [her] misrepresentation," and that Project Vote "reasonably relied upon the false information to [its] detriment." *Hall v. Ford Enterprises, LTD*, 445 A.2d 610, 612 (D.C. App. 1982). Likewise, to state a claim for fraudulent misrepresentation Project Vote must show (1) that MonCrief made a false representation (2) of a material fact, (3) with knowledge of its falsity, (4) with intent to deceive Project Vote, and (5) that Project Vote relied upon the misrepresentation. *Esteves v. Esteves*, 680 A.2d 398, 401 n. 1 (D.C. App. 1996).

The facts alleged in Project Vote's complaint fail to state a cause of action for misrepresentation. Project Vote alleges that MonCrief applied for and obtained a credit card through Pitney Bowes without authorization from Project Vote, and subsequently used the card for a variety of personal expenses. Project Vote alleges that MonCrief sent billing statements for the credit card to Project Vote's accounts payable office for payment, and that Project Vote ultimately paid \$1,741.43 to cover personal charges made by MonCrief. Complaint ¶¶ 144-183. Moreover, it is alleged that MonCrief sent only the first page of these billing statements, which did not contain an itemization of the charges, to the accounts payable office.

Project Vote also makes multiple factual allegations entirely irrelevant to its claims. Project Vote alleges that MonCrief made false representations to Pitney Bowes, that MonCrief either had intent to deceive Pitney Bowes or knew that Pitney Bowes would detrimentally rely on these misrepresentations, that Pitney Bowes relied on these misrepresentations, and that Pitney Bowes was damaged accordingly. Complaint ¶¶ 145-148, 155-158, 170-173. While these allegations might be relevant if Pitney Bowes had been damaged and attempted to bring a lawsuit, they have no relevance to this matter. In order to succeed on claims for misrepresentation – whether negligent or fraudulent – the *plaintiff* must show that it relied on misrepresentations. *See e.g. Hall*, 445 A.2d at 612 (must show that “plaintiff reasonably relied”); *Alicke v. MCI Comm. Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997) (“A claim for common law fraud or negligent misrepresentation requires, among other things, an allegation that the *plaintiff* acted in reliance upon the alleged misrepresentation.”) (emphasis added)). The only relevant allegations to this lawsuit involve representations made to Project Vote and any reliance on those representations by Project Vote.

Turning to the allegations that are relevant here, Counts IX , X, and XI fail as a matter of law because Project Vote fails to allege that any false representation was made by MonCrief. Project Vote alleges that by sending the Pitney Bowes credit card bill to its accounts payable office, MonCrief was “representing that the charges constituted business expenses of Project Vote....” Complaint ¶¶ 149, 174. But Project Vote fails to offer any facts that might support this conclusion. Project Vote does not allege that MonCrief had any duty to only forward credit card charges constituting business expenses. Nor does Project Vote allege that MonCrief affirmatively stated that any personal charges on the card were business expenses. Likewise, as to Count X,

Project Vote has failed to allege that MonCrief was under any duty to disclose the itemized charges on the credit card.

In sum, Project Vote has failed to plead – particularly under the heightened standards of Rule 9(b) – any facts supporting the threshold inquiry in a misrepresentation claim: that MonCrief made a false representation, or that she omitted any material facts that she was under a duty to disclose. As a result, Counts IX, X, and XI of the Complaint should be dismissed because they fail to state a claim upon which relief can be granted. Rule 12(b)(6).

**Conclusion**

For the reasons stated, Defendant MonCrief respectfully requests that this Court dismiss Claims I-III, VI-VII, and IX-XI with prejudice. Oral argument on this motion is requested.

Respectfully submitted,

**GRAVES BARTLE MARCUS & GARRETT LLC**

/s/ Edward D. Greim  
\_\_\_\_\_  
Todd P. Graves\*  
Edward D. Greim\*  
Clayton Callen\*  
Ryan Kriegshauser\*  
1100 Main Street, Suite 2700  
Kansas City, Missouri 64105  
Telephone: (816) 256-4144  
Facsimile: (816) 817-0863  
[edgreim@gbmglaw.com](mailto:edgreim@gbmglaw.com)  
*\*Pro Hac Vice*

Michael E. Rosman  
1233 20th Street, N.W., Suite 300  
Washington, DC 20036  
Telephone: (202) 833-8400  
Facsimile: (202) 833-8410  
[rosman@cir-usa.org](mailto:rosman@cir-usa.org)

*Counsel for Defendant Anita MonCrief*