

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS  
CIVIL DIVISION**

<b>CHARLES G. KOCH AND DAVID H. KOCH,</b>	)	
	)	
<b>Plaintiffs,</b>	)	<b>Case No. 12CV01749</b>
	)	
<b>v.</b>	)	<b>Division No. 3</b>
	)	
<b>KATHRYN WASHBURN, EDWARD H. CRANE, III AND CATO INSTITUTE,</b>	)	<b>K.S.A. Chapter 60</b>
	)	
<b>Defendants.</b>	)	

**DEFENDANT CATO INSTITUTE’S ANSWER**

COMES NOW Defendant Cato Institute (“Cato”), by and through its counsel, and for its Answer to Plaintiffs’ Petition, states:

**PARTIES, VENUE AND JURISDICTION**

1. Cato admits the allegations in paragraph 1 of Plaintiffs’ Petition.
2. Cato admits the allegations in paragraph 2 of Plaintiffs’ Petition.
3. Cato admits the allegations in paragraph 3 of Plaintiffs’ Petition.
4. Cato admits the allegations in paragraph 4 of Plaintiffs’ Petition.
5. Cato admits the allegations in paragraph 5 of Plaintiffs’ Petition.
6. To the extent Plaintiffs make allegations against Cato in Paragraph 6 of their Petition, Cato admits these allegations.

**FACTS**

7. Cato admits the allegations in paragraph 7 of Plaintiffs’ Petition.
8. Cato lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 of Plaintiffs’ Petition and therefore denies them.

9. Cato lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of Plaintiffs' Petition and therefore denies them.

10. Cato lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of Plaintiffs' Petition and therefore denies them.

11. Cato lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of Plaintiffs' Petition and therefore denies them.

12. Answering paragraph 12 of Plaintiffs' Petition, Cato states that the Shareholders Agreement is a written document that speaks for itself and is the best evidence of its complete contents. Any characterization thereof by Plaintiff is specifically denied. Cato further states that Cato is not a party to the Shareholders Agreement and is not bound by the terms of the Shareholder Agreement as alleged by Plaintiffs.

13. Answering paragraph 13 of Plaintiffs' Petition, Cato states that the Shareholders Agreement is a written document that speaks for itself and is the best evidence of its complete contents. Any characterization thereof by Plaintiff is specifically denied. Cato further states that Cato is not a party to the Shareholders Agreement and is not bound by the terms of the Shareholder Agreement as alleged by Plaintiffs.

14. Answering paragraph 14 of Plaintiffs' Petition, Cato states that the Shareholders Agreement is a written document that speaks for itself and is the best evidence of its complete contents. Any characterization thereof by Plaintiff is specifically denied. Cato further states that Cato is not a party to the Shareholders Agreement and is not bound by the terms of the Shareholder Agreement as alleged by Plaintiffs.

15. Answering paragraph 15 of Plaintiffs' Petition, Cato states that The Restated Bylaws of Cato Institute and all amendments thereto are written documents that speak for

themselves and are the best evidence of their complete contents. The characterization thereof by Plaintiff is specifically denied.

16. Answering paragraph 16 of Plaintiffs' Petition, Cato states that K.S.A. 17-6426 is a statute that speaks for itself and is the best evidence of its complete contents. Any characterization thereof by Plaintiff is specifically denied.

17. Cato lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17 of Plaintiffs' Petition and therefore denies them.

18. Cato lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18 of Plaintiffs' Petition and therefore denies them.

19. Answering paragraph 19 of Plaintiffs' Petition, Cato admits that William Niskanen died in October 2011 and that Kathryn Washburn is his widow and personal representative of his estate. As to the remaining allegations of paragraph 19 of Plaintiffs' Petition, Cato states that the will of Mr. Niskanen is a written document that speaks for itself and is the best evidence of its complete contents. Any characterization thereof by Plaintiff is specifically denied.

20. Cato denies the allegations in paragraph 20 of Plaintiffs' Petition.

21. Cato denies the allegations in paragraph 21 of Plaintiffs' Petition.

22. Answering paragraph 22 of Plaintiffs' Petition, Cato admits that Kathryn Washburn has not offered to sell the Niskanen shares to Cato. Cato denies that the Shareholders Agreement requires Kathryn Washburn to offer to sell the Niskanen shares to Cato. The Shareholders Agreement is a written document that speaks for itself and is the best evidence of its complete contents. The characterization thereof by Plaintiff is specifically denied. Cato denies the remaining allegations in paragraph 22 of Plaintiffs' Petition.

23. Answering paragraph 23 of Plaintiffs' Petition, Cato admits that Kathryn Washburn has not delivered share certificates to Cato. Cato denies that the Shareholders Agreement requires Kathryn Washburn to deliver any share certificates to Cato. The Shareholders Agreement is a written document that speaks for itself and is the best evidence of its complete contents. Any characterization thereof by Plaintiff is specifically denied. K.S.A. 17-6426 is a statute that speaks for itself and is the best evidence of its complete contents. Any characterization thereof by Plaintiff is specifically denied. Cato denies the remaining allegations in paragraph 23 of Plaintiffs' Petition.

24. Answering paragraph 24 of Plaintiffs' Petition, Cato states that the Shareholders Agreement is a written document that speaks for itself and is the best evidence of its complete contents. Any characterization thereof by Plaintiff is specifically denied. Cato further states that Cato is not a party to the Shareholders Agreement and is not bound by the terms of the Shareholder Agreement. Cato denies the remaining allegations in paragraph 24 of Plaintiffs' Petition.

25. Answering paragraph 25 of Plaintiffs' Petition, Cato denies that the Shareholders Agreement requires Kathryn Washburn to offer to sell the Niskanen shares to Cato. Cato denies that Kathryn Washburn has offered the Niskanen shares to Cato. Cato is not a party to the Shareholders Agreement and is not bound by the terms of the Shareholder Agreement. Defendant has no obligation to accept or deny any offer or tender of shares which might be offered in the future. Cato has no obligation to acknowledge or act upon any tender or offer of shares. In the event Cato does acknowledge or act upon a tender or offer of shares which might possibly be made in the future, Cato has no obligation to give a reason for accepting or declining such tender or offer of shares. Moreover, there has been no offer or tender of the Niskanen

shares to Cato. There has been no determination by Cato as to whether an offer or tender of the Niskanen shares would be inconsistent with Cato's corporate purpose. There has been no determination by Cato whether Cato would accept, reject, or otherwise act in any fashion in the event the shares are actually tendered or offered to it. Upon information and belief, since the time of Niskanen's death in October 2011, there has been no assignment or transfer of ownership, or the right to ownership, of the Niskanen shares to Kathryn Washburn or anyone else. Upon information and belief, the Niskanen shares remain under the ownership of record of Niskanen. To the extent the remaining allegations in paragraph 25 of Plaintiffs' Petition suggest that Cato is bound or obligated by the Shareholders Agreement, the allegations are denied.

#### **REQUESTED RELIEF**

WHEREFORE, Defendant Cato Institute respectfully requests this Court enter judgment in its favor and against Plaintiffs, for its reasonable attorney fees if allowed by law, and for such other and further relief as the Court deems just and proper.

#### **AFFIRMATIVE DEFENSES**

COMES NOW Defendant Cato Institute, by and through its counsel, and for its further Answer and affirmative defenses states:

1. Cato denies each and every allegation set forth in Plaintiffs' Petition not expressly admitted herein.
2. Plaintiffs' Petition fails to state a claim upon which relief can be granted.
3. Plaintiffs' Petition should be dismissed because no contractual agreements exist between the Plaintiffs and Cato to support Plaintiffs' claims.
4. Plaintiffs' claims are barred by the doctrines of waiver and/or estoppel.

5. Plaintiffs' claims concerning the Shareholder Agreement are barred in whole or in part due to lack of mutual assent and/or lack of consideration and/or failure of consideration.

6. Plaintiffs' claims against Cato are barred in whole or in part due to the failure of conditions precedent. There has been no offer or tender of the Niskanen shares to Cato, and there may never be an offer or tender of the Niskanen shares. There has never been a determination by Cato as to whether any future offer or tender of the Niskanen shares, if ever made, would be inconsistent with Cato's corporate purpose. There has been no determination by Cato whether Cato would accept, reject, or otherwise act in any fashion in the event the shares were actually tendered or offered to it at some future date, if that event ever occurred. Therefore, this lawsuit brought by Charles and David Koch seeks an advisory decision by this Court when there is no right to bring such claims under the very language of the Shareholders Agreement relied upon by Plaintiffs.

7. Plaintiffs' claims against Cato are barred in whole or in part because they violate the rule against perpetuities.

8. Plaintiffs' claims against Cato are further barred in whole or in part because they are not ripe and are speculative. There is no real or justiciable case or controversy between the parties. Plaintiffs seek an advisory opinion and unwarranted Order against Cato which Plaintiffs hope will do one of two things. First, Plaintiffs ask this Court to force the Board of Directors of Cato to make a finding that a possible future tender of the Niskanen shares (which may never occur) would be inconsistent with Cato's corporate purpose. The practical effect of such a Board of Directors' vote (which is not required by contract or law) would be that Plaintiffs would then seek to acquire the Niskanen shares, giving Charles and David Koch effective control over the not-for-profit Cato Institute and destroying the independence of a highly respected libertarian

organization. In the alternative, Plaintiffs seek the unwarranted relief of forcing Cato to acquire the Niskanen Shares (which may never even occur) which Cato is not required to do by contract or law. The practical effect of Charles and David Kochs' alternative request for future relief is to cede control of Cato to the Kochs.

Cato is not a party to the Shareholders Agreement and is not bound by the terms of the Shareholder Agreement. Defendant has no obligation to acknowledge or act upon any non-existent or future tender or offer of shares. Even in the event Cato acknowledged or acted upon any speculative future tender or offer of shares, Cato would have no obligation to give any reason for accepting or declining such theoretical tender or offer of shares, and Plaintiffs would not be permitted to acquire the Niskanen shares under the very terms of the Shareholders Agreement relied upon by Plaintiffs. There has been no determination by Cato as to whether any future theoretical offer or tender of the Niskanen shares would be inconsistent with Cato's corporate purpose. There has been no determination by Cato whether Cato would accept, reject, or otherwise act in any fashion in the event the shares were actually tendered or offered to it in the future. Upon information and belief, since the time of Niskanen's death in October 2011, there has been no assignment or transfer of ownership, or right to ownership, of the Niskanen shares to Washburn or anyone else. Upon information and belief, the Niskanen shares remain under the ownership of record of Niskanen. To the extent Plaintiffs have alleged any "harm" that will result to them, which is denied, such harm is merely speculative. Any decision by the Court would be abstract and hypothetical. Accordingly, the exercise of the Court's remedial powers as requested by Plaintiffs is not justified.

9. Plaintiffs' claims are barred in whole or in part because Plaintiffs lack standing to sue for the reasons set forth above. Plaintiffs lack any personal or particularized stake in this

speculative litigation, and therefore, the exercise of the Court's remedial powers as requested by Plaintiffs is not justified.

10. Plaintiffs' claims are barred, in whole or in part, by Plaintiffs' own conduct and/or "unclean hands." Among other things, Plaintiffs' pursuit of this action is not consistent with their status as shareholders of a not-for-profit corporation. Rather, Plaintiffs seek to forcefully and improperly create a circumstance in which they attempt to gain control over Cato when the language of the Shareholders Agreement relied upon by Plaintiffs does not permit the expansive relief requested.

11. Defendant reserves the right to assert such other and further affirmative defenses as may be revealed during the course of discovery.

WHEREFORE, Defendant Cato Institute respectfully requests this Court enter judgment in its favor and against Plaintiffs, for its reasonable attorney fees if allowed by law, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

POLSINELLI SHUGHART PC

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served by (\_\_\_\_) United States Mail, postage prepaid; (\_\_\_\_) Facsimile; (\_\_\_\_) E-mail; (\_\_\_\_) Federal Express; and/or (\_\_\_\_) Hand Delivery this \_\_\_\_ day of \_\_\_\_\_, 2012, to:

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