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12  
 13 **UNITED STATES DISTRICT COURT**  
 14 **DISTRICT OF ARIZONA**

15 ECOMMERCE INNOVATIONS L.L.C., a  
 16 Nevada limited liability company,

17 Plaintiff,

18 vs.

19 DOES 1-10,

20 Defendants.

Case No. 2:08-MC-00093

[Pending in the Central District of  
 California, Case No. CV08-04596]

**PLAINTIFF'S RESPONSE TO  
 XCENTRIC VENTURES, LLC,  
 DBA RIPOFFREPORT.COM'S  
 SUR-REPLY AND OPPOSITION TO  
 ITS MOTION FOR SANCTIONS;  
 AND MEMORANDUM OF POINTS  
 AND AUTHORITIES IN SUPPORT  
 THEREOF**

**(Oral Argument Requested)**

21 Plaintiff Ecommerce Innovations L.L.C., dba Inspired Silver ("Plaintiff" or  
 22 "Inspired Silver"), respectfully submits the following Memorandum of Points and Authorities in  
 23 Response to the Sur-Reply by third party XCentric Ventures, LLC, dba RipOffReport.com  
 24 ("RipOffReport.com") regarding Plaintiff's Motion to Compel compliance with its Subpoena In  
 25 A Civil Case issued on August 5, 2008, and provide relevant documents and information.

26 **I. Introduction**

27 The issue for the Court to decide is whether Plaintiff has presented a *prima facie* case of  
 28 trade libel and defamation that would create a genuine issue of material fact sufficient to deny a  
 hypothetical defensive motion for summary judgment. Although RipOffReport.com wishes to

1 have the Court adjudicate the anonymous poster’s non-liability even at this early stage of  
2 litigation, Plaintiff’s moving papers have presented a sufficient *prima facie* case to permit  
3 discovery to proceed. Given the blatant falsity of the anonymous poster’s defamatory statements,  
4 Plaintiff’s claims may not be defeated as a matter of law.

5 **II. Argument**

6 Plaintiff’s evidence raises triable issues of fact as to each of the five false accusations  
7 contained in the anonymous post.

8 (a) **False accusation No. 1:** “Inspired Silver is an unethical online retail and Jewelry  
9 catalog company who would rather knock off jewelry designs being produced by their current  
10 manufacturer or wholesaler instead of paying their bills. . . . Their M.O. is [to] order goods [and  
11 not pay for them]. . . .”

12 In response Mr. Strager explains, “Inspired Silver does not engage in, and has never been  
13 sued for, trademark, copyright or patent infringement and does not “knock-off” proprietary  
14 designs of other manufacturers or wholesalers. In addition, Inspired Silver is current on all of its  
15 bills to its vendors, save any that may be subject to legitimate dispute for lack of proper tender.”

16 Since Inspired Silver’s principal place of business is located in Los Angeles, California,  
17 the anonymous poster identifies himself as “Alan” from “Los Angeles, California,” and the main  
18 action is pending in the Central District of California, it is likely that California law of defamation  
19 will govern.

20 The Sur-Reply wrongly attempts to argue that the poster’s accusation of non-payment for  
21 goods is “substantially true and therefore non-actionable as a matter of law” – despite  
22 Mr. Strager’s statement directly to the contrary: that Inspired Silver is current to its vendors  
23 except legitimate disputes. The fact that Inspired Silver may have legitimate disputes with  
24 vendors, which statement RipOffReport.com does not and cannot controvert, does not permit  
25 someone to make a blanket claim that Inspired Silver is not “paying their bills.” Allegations of  
26 “business misconduct” in even a single transaction or “imputing credit unworthiness” may be  
27 libel *per se*. 5 Witkin, *Summary of California Law* (2008) Torts § 543.

28 As to the anonymous poster’s allegations of being “unethical” and knocking-off jewelry

1 designs, “[t]he charge of commission of some kind of crime is obviously libel *per se*.” 5 Witkin,  
2 *Summary of California Law*, supra, Torts § 542.

3 Here, the Sur-Reply engages in its own baseless speculation as to whether certain ring  
4 designs being offered by Inspired Silver were illegally copied from Tiffany & Co. – despite the  
5 uncontroverted statement by Mr. Strager that Inspired Silver has never been sued for trademark,  
6 copyright or patent infringement and does not knock-off proprietary designs of others. The  
7 exhibits attached to Mr. Gingras’ Declaration in support of the Sur-Reply contain unauthenticated  
8 exhibits that purport to be from Tiffany & Co.’s website (Exhibits “A”-“D” and “F”-“G”) along  
9 with his guesswork as to what works are original and what works are copies or “fakes.”

10 Mr. Gingras identifies himself as a litigation associate with Jaburg & Wilk, P.C., counsel for  
11 RipOffReport.com. Mr. Gingras does not identify himself as an expert in copyright infringement  
12 – let alone a person possessed of any personal knowledge as to the business practices of  
13 Tiffany & Co. or the location of its actual web domain name. Such an attorney declaration  
14 that lacks personal knowledge is inadmissible and should be stricken. Fed. R. Evid. 104(a), 601,  
15 701, 801 and 901; *United States of America v. Bosurgi*, 530 F.2d 1105, 1111-1112 (2<sup>nd</sup> Cir.  
16 1976); *Schiess-Froriep Corp. v. S.S. Finnsailor*, 574 F.2d 123, 126 (2<sup>nd</sup> Cir. 1978); *Carnrite v.*  
17 *Granada Hospital Group, Inc.*, 175 F.R.D. 439, 441 (W.D.N.Y. 1997). At most, the Sur-Reply  
18 and Mr. Gingras’ declaration would raise triable issues of fact that may not be disposed on  
19 summary judgment.

20 **(b) False accusation No. 2:** “Currently they owe my friend close to \$25,000.00 (and  
21 it is over 190 days) wholesale cost to Accessories Rock but instead of honoring their fiduciary  
22 and moral obligations, would rather have another company make up the goods where the quality  
23 of those same goods also comes into question.”

24 In response, Mr. Stranger explains that there is no such debt for \$25,000.00 and that a  
25 much smaller debt of less than \$8,000.00 is disputed – none of which is controverted. This  
26 certainly presents a genuine issue of fact as to the materiality of alleged non-payment in light of  
27 the actual disputed amount – as well as allegation that all of the money is “owe[d]” when there is  
28 still a good faith dispute over even the \$8,000.00. Moreover, as to the charges of failing to honor

1 fiduciary and moral duties, “[f]alsely charging a person with ‘a violation of confidence reposed in  
2 him or with treachery to his associates’ is actionable *per se*.” *Dethlefsen v. Stull*, 86 Cal.App.2d  
3 499, 502 (1948). Plaintiff has presented a *prima facie* case of defamation that RipOffReport.com  
4 cannot dismiss as a matter of law.

5       **(c) False accusation No. 3:** “They find these companies by attending various  
6 jewelry trade shows, then use their company image of being a large company loving their  
7 products and wanting to order from them. What the supplier doesn't know is they are about to be  
8 ripped off themselves.”

9       In response, Mr. Strager explains that Inspired Silver does not “rip-off” its vendors.

10       RipOffReport.com wrongly attempts to dismiss this allegation as mere opinion that is not  
11 actionable. However, a “statement of opinion is actionable where it implies allegation of  
12 undisclosed defamatory facts.” 5 Witkin, *Summary of California Law, supra*, Torts § 544. Here,  
13 the anonymous poster is imputing all sorts of dishonest business practices, making this allegation  
14 defamatory and actionable.

15       **(d) False accusation No. 4:** The anonymous poster is accusing Inspired Silver of  
16 supplying Athra with sub-standard quality “cubic zirconia stones was not nearly as clear as they  
17 should be” and “lacking the morals and ethics that one should seek when doing business.”

18       In response Mr. Strager explains that he had never heard of nor done any business with  
19 Athra – thus could not have been the one to supply Athra with the stones, bad quality or  
20 otherwise. Accordingly, the post is brazenly false. Even more, in *Rosenberg v. J.C. Penney Co.*,  
21 30 Cal.App.2d 609, 620 (1939), the court there found the display of a rival merchant’s goods,  
22 with placards containing comments imputing dishonest business methods, to be both libel *per se*  
23 and trade libel. Again, Plaintiff’s claims of defamation as to these clearly false allegations clearly  
24 would survive summary judgment.

25       **(e) False accusation No. 5:** “[A]nd just so you know, they are charging  
26 you 3 or 4 times more than what he sold it to them for. If you come to my friend's site  
27 www.accessoriesrockjewelry.com, assuming he has it as it is still in style, he will sell it for  
28 much less than what you will pay buying it through them, and most likely much better quality,

1 after all, they stuck him with excess inventory.”

2 As explained by Mr. Strager, in actuality, while there is a price difference, the quality of  
3 the jewelry is the same. This is a defamatory swipe at the quality of Plaintiff’s goods. Moreover,  
4 the allegation that Inspired Silver “stuck him with excess inventory” imputes that the inventory  
5 was wrongly returned – which is controverted and creates a triable issue of fact that cannot be  
6 dismissed on summary judgment as a matter of law.

7 The evidence that supports Plaintiff’s claims of trade libel and defamation for any one  
8 of these five false defamatory allegations meets the standards enunciated by this Court in  
9 *Best Western International, Inc. v. John Doe*, 2006 W.L. 2091695 (D. Ariz. 2006). Such  
10 evidence does so by demonstrating a concrete showing of a *prima facie* claim that would survive  
11 a hypothetical summary judgment motion. Plaintiff has identified numerous triable issues of fact  
12 that may not be disposed as a matter of law, including false and defamatory allegations of  
13 unethical, illegal and tortuous business practices, non-payment of money owed in a sum certain,  
14 ripping-off suppliers, and selling sub-standard goods, among others.

### 15 **III. Conclusion**

16 As this Court noted in *Best Western*, the right to speak anonymously is not absolute  
17 and defamatory and libelous speech are entitled to no constitutional protection. *Best Western*,  
18 *supra*, at \*3.

19 “ ‘Those who suffer damages as a result of tortuous or other actionable  
20 communications on the Internet should be able to seek appropriate redress by  
21 preventing the wrongdoers from hiding behind an illusory shield of purported  
22 First Amendment rights.’ ”

23 *Best Western, supra*, at \*3, citing *In re Subpoena Duces Tecum to America On-Line, Inc.*,  
24 2000 W.L. 1210372, at \*5 (Va. Cir. Ct. 2000).

25 Here, Plaintiff has met its burden to establish a *prima facie* case of its claims under  
26 *Best Western*. Plaintiff requests that this Court issue an order compelling RipOffReport.com to  
27 produce all documents requested in the subpoena within five days and to pay the reasonable costs  
28

1 and attorneys' fees incurred by Plaintiff in preparing, filing and arguing this Motion and response  
2 papers.

3  
4 DATED this 22nd day of October, 2008

5 BUCHALTER NEMER  
6 A Professional Corporation

7 /s/ Donnelly A. Dybus  
8 Donnelly A. Dybus  
9 Attorneys for Plaintiff

10 ECF filed this 22nd day of  
11 October, 2008 and

12 COPY mailed this 22nd day  
13 of October, 2008, to:  
14 Honorable Robert Budoff

15 -and-

16 David S. Gingras, Esq.  
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21 /s/ JoAnn Gillotte  
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