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 11
 12 **UNITED STATES DISTRICT COURT**
 13 **DISTRICT OF ARIZONA**

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

16 Plaintiff,

17 v.

18 DOES 1 through 10,

19 Defendants.

Case No.: 2:08-MC-00093

**EMERGENCY MOTION FOR STAY;
 MOTION FOR RECONSIDERATION;
 NEW TRIAL AND TO REOPEN
 RECORD AND, ALTERNATIVELY,
 MOTION FOR STAY PENDING
 APPEAL**

20 Non-party XCENTRIC VENTURES, L.L.C. (“Xcentric”) respectfully moves the
 21 Court for an order pursuant to Civil Local Rule 7.2(g)(1) and/or Fed. R. Civ. P. 59(a)
 22 which reconsiders the Court’s prior order and reopens the judgment (order) and record in
 23 this matter based on newly discovered evidence which clearly demonstrates
 24 fraud/misconduct by the plaintiff ECOMMERCE INNOVATIONS, L.L.C.
 25 (“Ecommerce”). Based on these matters, this Court should reconsider and reverse its
 26 prior ruling (Doc. #16) which granted Ecommerce’s Motion to Compel.

27 In addition, Xcentric respectfully moves the Court for an emergency order staying
 28 the effect of its November 26, 2008 ruling (Doc. #16) pending the disposition of this
 motion. As explained herein, newly discovered evidence unequivocally shows that the
 Court’s prior ruling is based on false testimony by Ecommerce. This false testimony was

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1 the only evidence upon which the Court’s previous order was based. As such, that order
2 must be reversed, and the Court should therefore stay the order while the instant motion is
3 resolved.

4 In the event the Court denies the request to revisit its prior order, Xcentric further
5 requests a stay of the Court’s November 26, 2008 ruling pending appeal of this matter to
6 the Ninth Circuit Court of Appeals. The bases for each request are explained fully below.

7 Local Rule 7.2(g)(1) permits a party to seek reconsideration of a order for a variety
8 of reasons including, but not limited to, newly discovered evidence. Similarly, “Under
9 Fed. R. Civ. P.59(a), the district court has the discretion to reopen a judgment if one has
10 been entered, take additional testimony, amend findings of fact and conclusions of law or
11 make new findings and conclusions.” *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928–
12 29 (9th Cir. 2000). The standards for either motion are essentially the same:

13 Defenders must establish that (1) the evidence was discovered after trial, (2)
14 the exercise of due diligence would not have resulted in the evidence being
15 discovered at an earlier stage and (3) the newly discovered evidence is of
16 such magnitude that production of it earlier would likely have changed the
outcome of the case.

17 *Bernal*, 204 F.3d at 929 (citing *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833
18 F.2d 208, 211 (9th Cir.1987)). Here, this Court should reconsider and reverse its prior
19 ruling on Plaintiff’s Motion to Compel based on fraud by the plaintiff. Evidence has
20 come to light which clearly and unequivocally establishes that the principal of
21 Ecommerce, David Strager, made materially false statements of fact to the Court in his
22 declaration. The Court’s decision to grant the Motion to Compel was based solely on Mr.
23 Strager’s false statements. Standing alone, this warrants reversal of the Court’s order.

24 Specifically, this Court found that Ecommerce had met its burden of establishing a
25 *prima facie* defamation claim based on statements in Mr. Strager’s declaration; “Mr.
26 Strager has testified that ‘[u]nder no circumstances does Inspired Silver owe \$25,000 to
27 Accessories Rock.” The complete testimony by Mr. Strager as to this debt was as follows
28 (*next page*):

1 The real story as to Accessories Rock is that I ordered and returned product
2 with this company in a customary fashion. Accessories Rock then
3 attempted to make a further shipment to me C.O.D. which I rejected and
4 returned. It then claimed that my company owed it between \$6,000 and
5 \$8,000 based on these orders, which I disputed. I have been in discussion
6 with Accessories Rock’s attorney regarding our dispute of less than \$8,000.
7 Under no circumstances does my company owe \$25,000 to Accessories
8 Rock.

9 Declaration of David Strager (Doc. #5) at ¶ 3(b) (emphasis added). Based on Mr.
10 Strager’s sworn representation that he had been in discussions with the attorney for
11 Accessories Rock “regarding our dispute of less than \$8,000”, and based on his avowal
12 that no greater debt was owed, the Court found a *prima facie* showing of defamation.

13 Unfortunately, Mr. Strager blatantly lied to the Court. Submitted herewith are
14 affidavits from the attorney for Accessories Rock, Ian Berkowitz, and the principal of
15 Accessories Rock, Alan Frank.

16 As explained by Mr. Frank, Inspired Silver does in fact owe a debt to Accessories
17 Rock for unpaid invoices totaling \$21,290.18. In addition, the attorney for Accessories
18 Rock, Mr. Berkowitz, sent a letter to Mr. Strager in April 2008 which demanded the
19 amount of the unpaid invoices plus attorney’s fees for a total demand of \$23,719.18.

20 Whether Mr. Strager believes this debt is valid or not, there is no question that he
21 made a materially false statement of fact to the Court when he represented that
22 Accessories Rock “claimed that my company owed it between \$6,000 and \$8,000 based
23 on these orders” The letter from Mr. Berkowitz to Mr. Strager clearly shows that the
24 amount of the claim was \$23,719.18, not “between \$6,000 and \$8,000”. Mr. Strager
25 simply lied to the Court about the amount of the claimed debt in an effort to make his
26 story appear more credible.

27 In addition, regardless of whether Mr. Strager believes this debt is valid, there is no
28 question that he made a materially false statement to the Court when he testified that “I
have been in discussion with Accessories Rock’s attorney regarding our dispute of less
than \$8,000.” The affidavit from Mr. Berkowitz and his letter to Mr. Strager clearly show

1 that this statement is false. The amount discussed between Mr. Berkowitz and Mr. Strager
2 was \$23,719.18, not “less than \$8,000”.

3 There can be no serious doubt about what has occurred here—Mr. Strager lied to
4 the Court about these two material issues so that he could convince the Court to force
5 Xcentric to reveal the identity of the anonymous author. This extremely serious
6 misconduct is sufficient, standing along, to justify the Court’s reversal of its prior
7 determination that Ecommerce had met its burden of showing that it would survive a
8 hypothetical Motion for Summary Judgment filed by the anonymous author.

9 None of this evidence could have been discovered sooner for two reasons. First, as
10 the Court is aware, Ecommerce failed to identify any false statements in its original
11 Motion to Compel, nor did it initially offer any evidence to support that motion. Rather,
12 Ecommerce only addressed these issues for the first time in its Reply brief.

13 Because of this, Xcentric was only allowed a matter of days to submit a Sur-Reply
14 addressing the new evidence and arguments set forth for the first time in Ecommerce’s
15 Reply. In addition, it is important to note that due to the posture of this matter, Xcentric
16 has had no right to pursue discovery, nor was it evident that such discovery was needed
17 until Xcentric received this information from Mr. Berkowitz and Mr. Frank which only
18 occurred yesterday, December 4, 2008. In any event, Mr. Strager cannot legitimately
19 argue that Xcentric should be faulted for not uncovering his lies sooner.

20 In addition, it is also important to note that this motion is markedly different from
21 the usual request for reconsideration. This is so because the First Amendment issues here
22 are unique in that if the Court erroneously allows an anonymous author’s identity to be
23 revealed based on a fabricated case, the resulting harm cannot be undone:

24 An order compelling disclosure of an anonymous party's identity is
25 essentially a mandatory injunction; both such orders change the status quo.
26 Unlike most parties subject to a preliminary mandatory injunction,
27 however, an unmasked anonymous speaker cannot later obtain relief from
28 the order should the party seeking the speaker's identity not prevail on the
merits of the lawsuit. Given this consequence, it is even more appropriate

1 to require the court to balance the parties' competing interests before
2 permitting discovery on the identity issue.

3 *Mobilisa v. Doe*, 217 Ariz. 103, 112, 170 P.3d 712, 721 (App. 2007) (emphasis added).

4 As the Court explained in *Mobilisa*, the anonymity of the author at issue cannot be
5 restored once it is lost if Mr. Strager does not prevail on the merits. Because of this, and
6 because revealing this author's identity may have a very real chilling effect on others who
7 wish to speak anonymously, this Court must exercise extreme caution here.

8 Xcentric firmly agrees that the First Amendment does not protect defamatory
9 speech. However simply taking an unsupported declarant such as Mr. Strager at his word,
10 "set[s] the bar too low, chilling potential speakers from speaking anonymously on the
11 internet." *Mobilisa*, 217 Ariz. at 111.

12 Before he may overcome the weighty protection afforded by the First Amendment,
13 Mr. Strager must carry the burden of proving that a *legitimate* case exists here. Rather
14 than doing so, the evidence here clearly shows that Mr. Strager has lied to the Court not
15 once, but twice (first with respect to his false denial of "knocking off" jewelry designs and
16 second with respect to his false and misleading statements about the debt owed to
17 Accessories Rock). No party with a *legitimate* claim would ever resort to such conduct.

18 For these reasons, Xcentric requests that the Court reopen the record in this matter
19 and revisit its prior ruling in light of the statements of Mr. Berkowitz and Mr. Frank, and
20 in light of the documents attached to their affidavits. This evidence, which was not
21 available until only yesterday (and which Mr. Strager clearly had but which he did not
22 disclose), shows that the statements regarding the \$25,000 debt are true. Because this is
23 so, the Court should not have found that Ecommerce met its burden under *Mobilisa*.

24 Keeping in mind the standard is whether Ecommerce could defeat a hypothetical
25 Motion for Summary Judgment, it is clear that this burden has not been met. As explained
26 in Xcentric's Reply to the Motion to Compel, although legitimate factual disputes
27 normally preclude summary judgment, this principle does not apply when no reasonable
28 juror could possibly believe one side's story:

1 When opposing parties tell two different stories, one of which is blatantly
2 contradicted by the record, so that no reasonable jury could believe it, a
3 court should not adopt that version of the facts for purposes of ruling on a
motion for summary judgment.

4 *Scott v. Harris*, 550 U.S. at ___, 127 S.Ct. 1769, 1776 (2007) (finding that where police
5 chase was captured on videotape, summary judgment was proper even though fleeing
6 suspect offered version of facts which were clearly inconsistent with events recorded on
7 video).

8 Here, Accessories Rock has supplied invoices showing that goods were shipped to
9 Inspired Silver. The principal of Accessories Rock, Mr. Frank, has testified that Inspired
10 Silver failed to pay these invoices which total more than \$21,000. Other than his clearly
11 false testimony about demands made by Accessories Rock’s attorney, Mr. Strager has
12 offered nothing to support his denial of the validity of this debt. Of course, the plain
13 language of Rule 56 provides this is insufficient to defeat summary judgment; “an
14 opposing party may not rely merely on ... denials in its own pleading”

15 Based on this record, the Court should reconsider its prior ruling and it should enter
16 an order denying Ecommerce’s Motion to Compel.

17 Alternatively, in the event the Court does not do so, Xcentric respectfully moves
18 the Court for an order pursuant to Fed. R. Civ. P. 62(c) staying its Nov. 16th order pending
19 appeal to the Ninth Circuit Court of Appeals. In its current form, the Court’s order
20 changes the *status quo* and requires the disclosure of confidential information which, once
21 disclosed, cannot be “undisclosed”. Therefore, if this request for a stay is denied, the
22 effect will be to moot the appeal before the Court of Appeals is able to determine the
23 propriety of the Court’s ruling. This would improperly make the Court’s existing order
24 non-appealable. Standing alone, this a proper basis for a stay. *See Stop H-3 Ass’n v.*
25 *Volpe*, 353 F.Supp. 14, (D.C. Hawaii 1972) (holding, ““A stay pending appeal, usually in
26 the form of an injunction, is necessary only if what may be done under the judgment is
27 beyond the power of the Court of Appeals to undo by its judgment.’ Traditionally, the
28 irreparable injury contemplated by Rule 62(c) is that which will make the appeal moot.”)

1 (emphasis added) (quoting Moore's Federal Practice, Section 208.03) (citing *United States*
2 *v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (9th Cir. 1951)).

3 Based on the above, Xcentric respectfully requests that the Court:

- 4 1.) Stay the enforcement of its November 16, 2008 order pending the
5 disposition of this motion;
- 6 2.) Reopen the record to admit the affidavits of Mr. Berkowitz and Mr.
7 Frank and the documents attached thereto;
- 8 3.) Reconsider and reverse the Court's prior order granting the Motion to
9 Compel in light of the new evidence; and
- 10 4.) In the event the Court does not reverse its ruling, issue an order pursuant
11 to Fed. R. Civ. P. 62(c) staying the November 16, 2008 order pending
12 appeal of this matter to the Ninth Circuit Court of Appeals.

13 DATED this 5th day of December 2008.

14
15 **JABURG & WILK, P.C.**

16 /s/ David S. Gingras _____
17 Maria Crimi Speth
18 David S. Gingras
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 5, 2008 I electronically transmitted the attached
3 document to the Clerk’s Office using the CM/ECF System for filing, and for transmittal of
4 a Notice of Electronic Filing to the following CM/ECF registrants:

5 Donnelly A. Dybus, Esq.
6 **BUCHALTER NEMER**
7 16435 North Scottsdale Road, Suite 440
8 Scottsdale, AZ 85254-1754

9 Attorneys for Plaintiffs

10 With a COPY of the foregoing delivered to:

11
12 Honorable David G. Campbell
13 United States District Court
14 District of Arizona

15 s/David S. Gingras
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