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

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

16 Plaintiff,

17 vs.

18 DOES 1-10,

19 Defendants.

Case No. 2:08-MC-00093

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

**PLAINTIFF’S OPPOSITION
 TO MOTION BY
 XCENTRIC VENTURES, LLC,
 DBA RIPOFFREPORT.COM
 FOR RECONSIDERATION, ETC.
 OF ORDER GRANTING
 MOTION TO COMPEL
 COMPLIANCE WITH SUBPOENA;
 MEMORANDUM OF POINTS AND
 AUTHORITIES; DECLARATION
 OF DAVID STRAGER IN SUPPORT
 THEREOF**

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 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 Opposition to the Motion by third party Xcentric Ventures, LLC, dba RipOffReport.com
 24 (“Xcentric Ventures”) for Reconsideration, New Trial and to Reopen Record and Alternatively,
 25 Motion to Stay Pending Appeal.

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1 **I. INTRODUCTION**

2 After this Court granted Plaintiff's Motion to Compel, Xcentric Ventures brought the
3 present Motion for Reconsideration, etc. on only one of the five grounds on which the underlying
4 Motion was based. All that was required to grant the underlying Motion was a single disputed
5 issue of material fact regarding the false and misleading accusations contained in the anonymous
6 posting. The one ground, relied on in the Court's Order granting the underlying Motion, on
7 which the present Motion focuses is the dollar amount that the anonymous poster charged
8 Plaintiff as currently owing Accessories Rock: namely \$25,000.00.

9 Xcentric Ventures has now enlisted the aid of representatives of Accessories Rock in an
10 effort to contradict Plaintiff, but they fail to do so. They fail to present the complete picture of
11 their interactions, namely that the collection attorney for Accessories Rock had to recalculate the
12 total amount owing in light of credits that were owing to Plaintiff for merchandise that was
13 returned, refused or never delivered. As explained in the Declaration of David Strager filed
14 concurrently herewith, he discussed with Accessories Rock's attorney that a final accounting
15 would show an amount owing of somewhere between \$6,000 and \$8,000 based upon the unpaid
16 order. And, in fact, the net calculation for the relevant time period showed a balance of
17 \$6,491.60.

18 Accordingly, Mr. Strager stands by his earlier statement that under no circumstance did
19 Inspired Silver owe \$25,000.00 to Accessories Rock.

20 Given that there still remains a disputed issue of material fact as to the anonymous
21 poster's defamatory allegation of a substantial amount of money "currently" owed by Plaintiff,
22 and that there are still four other independent grounds for which a genuine issue of material fact
23 remains (and this Court, as it correctly stated in its original decision, only needs to rule that *one* of
24 them constitutes solely a *prima facie* showing in order for Plaintiff's original motion to compel to
25 be granted), the present Motion for Reconsideration should be denied.

26 Moreover, the matter should not be stayed pending any appeal that may follow because
27 the information sought by the Subpoena is time-sensitive. The Subpoena requests certain
28 electronic information about the anonymous poster that may be presented to an internet service

1 provider to identify that poster. (If Xcentric Ventures complies with the subpoena, as it should do
2 pursuant to this Court's Order, the information/documentation produced will, *inter alia*, identify
3 the internet service provider, which will then theoretically be able to identify the author of the
4 defamatory post). Some internet service providers, however, only maintain this electronic data
5 for approximately six to nine months. And since the anonymous posting was made back in
6 June 2008 and any appeal would take several more months, at a minimum, there is a risk that the
7 subpoenaed information will become worthless if this matter is stayed pending appeal.

8 **II. LEGAL ARGUMENT**

9 Plaintiff's evidence in support of the underlying Motion raised triable issues of fact as to
10 each of the five false accusations contained in the anonymous post, and in order to grant the
11 underlying Motion to Compel, this Court only needed to find that at least one can potentially be
12 defamatory.

13 (1) False Accusation No. 1: "Inspired Silver is an unethical online retail and
14 Jewelry catalog company who would rather knock off jewelry designs. . .
15 instead of paying their bills. . . ." "Their M.O. is [to] order goods [and not
16 pay for them]."

17 (2) False Accusation No. 2: "Currently they owe my friend close to
18 \$25,000.00 (and it is over 190 days) wholesale cost to Accessories Rock
19 but instead of honoring their fiduciary and moral obligations, would rather
20 have another company make up the goods where the quality of those same
21 goods also comes into question."

22 (3) False Accusation No. 3: "[S]upplier[s] [are] ripped off. . . ."

23 (4) False Accusation No. 4: Inspired Silver sells sub-standard goods; and

24 (5) False Accusation No 5: Inspired Silver marks-up its inventory
25 "3 or 4 times" over wholesale, and a friend's website,
26 www.accessoriesrockjewelry.com, and will sell "better quality"
27 inventory for "much less."

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1 The present Motion only addresses False Accusation No. 2. However, as explained by
2 Mr. Strager, the outstanding balance owing to Accessories Rock during the relevant time period
3 did not exceed \$6,491.60. Declaration of David Strager (“Strager Declr.”) ¶ 2. He discussed
4 with Accessories Rock’s attorney that a final accounting would show an amount owing of
5 somewhere between \$6,000 and \$8,000 based upon the unpaid orders. Strager Declr. ¶ 2. “This
6 was the range that he and I were negotiating in terms of settlement.” *Ibid.* When Plaintiff was
7 properly given credit for items that were returned, never received or refused delivery, the net
8 calculation for the relevant time period showed a balance of \$6,491.60. Strager Declr. ¶ 3 and
9 Exhibits “1” through “4” thereto. Thus, under no circumstance did Plaintiff owe \$25,000.00 to
10 Accessories Rock. Strager Declr. ¶ 4.

11 The evidence that supports Plaintiff’s claims of trade libel and defamation related to a
12 false debt of \$25,000.00 – or for any one of the other five false defamatory allegations – meets
13 the standards enunciated by this Court in *Best Western International, Inc. v. John Doe*, 2006
14 W.L. 2091695 (D. Ariz. 2006). Such evidence does so by demonstrating a concrete showing of a
15 *prima facie* claim that would survive a hypothetical summary judgment motion. Plaintiff has
16 identified numerous triable issues of fact that may not be disposed as a matter of law, including
17 false and defamatory allegations of unethical, illegal and tortuous business practices, non-
18 payment of money owed in a sum certain, ripping-off suppliers, and selling sub-standard goods,
19 among others.

20 In addition, Xcentric Ventures has not presented a satisfactory reason for the piecemeal
21 nature of its presentation of evidence or why it took so long to obtain.¹ On August 5, 2008,
22 Plaintiff served its Subpoena on counsel for Xcentric Ventures, who resisted compliance and
23 immediately began to meet and confer. On September 23, 2008, Plaintiff filed its Motion to
24 Compel and attached a copy of the anonymous posting that contained the defamatory material.
25 On October 3, 2008, and again on October 15, 2008, Xcentric Ventures filed a response and a sur-

26 ¹ In addition, the evidence presented by Ian M. Berkowitz, as counsel for Accessories Rock, is
27 suspect. Specifically, Exhibit “A” to Mr. Berkowitz’s Declaration purports to be a letter dated
28 April 16, 2008 and a computerized ledger “[a]ttached to the letter.” *See*, Ian M. Berkowitz
Declaration ¶ 7. The computerized ledger, however, is dated “12/04/08” on the top left corner so
it could not have been attached to a letter sent close to eight months prior.

1 response to the Motion, trying to undercut the evidence on which it was based. There is no
2 explanation as to why Xcentric Venture's collaboration with Accessories Rock took another
3 one and one-half months to materialize in the present Motion for Reconsideration, etc.
4 Xcentric Ventures should not be permitted to continue to delay the production of the subpoenaed
5 documentation which is time-sensitive.

6 **III. Conclusion**

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

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

14 *Best Western, supra*, at *3, citing *In re Subpoena Duces Tecum to America On-Line, Inc.*,
15 2000 W.L. 1210372, at *5 (Va. Cir. Ct. 2000).

16 The Court ruled correctly in its previous order and should stand by that ruling, since
17 herein, Plaintiff has met its burden to establish a *prima facie* case of at least one of its claims
18 under *Best Western*; and Xcentric Ventures has not, because it cannot, show that Plaintiff has not
19 made a *prima facie* case showing. Plaintiff requests that this Court deny Xcentric Venture's
20 Motion for Reconsideration, etc. and not stay its ruling pending appeal as the delay may serve to
21 make the discovery moot.

22 DATED this 19th day of December, 2008

23 BUCHALTER NEMER
24 A Professional Corporation

25 /s/ Donnelly A. Dybus
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1 ORIGINAL electronically filed this 19th day of
2 December, 2008

3 COPY mailed this 19th day of
4 December, 2008, to:

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9 /s/ JoAnn Gillotte