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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 REPLY  
MEMORANDUM OF POINTS  
AND AUTHORITIES  
REGARDING ITS MOTION TO  
COMPEL COMPLIANCE WITH  
SUBPOENA ISSUED TO  
XCENTRIC VENTURES, LLC,  
DBA RIPOFFREPORT.COM; AND  
DECLARATION OF DAVID  
STRAGER 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 Reply to the Response by third party XCentric Ventures, LLC, dba RipOffReport.com  
24 ("RipOffReport.com") to Plaintiff's Motion to Compel Compliance with its Subpoena in a Civil  
25 Case, which subpoena was issued on August 5, 2008, and provide relevant documents and  
26 information.

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2 **I. INTRODUCTION**

3 In opposing Plaintiff's Motion to Compel, RipOffReport.com appears determined to  
4 shield whoever is anonymously posting the flagrantly defamatory post that was attached to and  
5 authenticated by the moving papers. Specifically, Exhibit "1" to the Jason Fisher Statement  
6 consists of the very post of which Plaintiff complains, which includes several false and  
7 misleading accusations, as follows:

- 8 (1) False Accusation No. 1: "Inspired Silver is an unethical online retail and  
9 Jewelry catalog company who would rather knock off jewelry designs. . .  
10 instead of paying their bills. . . ." "Their M.O. is [to] order goods [and not  
11 pay for them]."
- 12 (2) False Accusation No. 2: "Currently they owe my friend close to  
13 \$25,000.00 (and it is over 190 days) wholesale cost to Accessories Rock."
- 14 (3) False Accusation No. 3: "[S]upplier[s] [are] ripped off. . . ."
- 15 (4) False Accusation No. 4: Inspired Silver sells sub-standard goods; and
- 16 (5) False Accusation No 5: Inspired Silver marks-up its inventory "3 or 4  
17 times" over wholesale, and a friend's website,  
18 [www.accessoriesrockjewelry.com](http://www.accessoriesrockjewelry.com), and will sell "better quality" inventory  
19 for "much less."

20 Each one of these allegations is false and defamatory, and apparently put forward  
21 by a "friend" of a competing jewelry website engaging in unfair competition. The post  
22 was purportedly submitted "Alan" of "Los Angeles, California," but is signed by a  
23 "Richard."

24 Although the moving papers have put forward competent evidence to support the five-part  
25 standard enunciated by this Court in *Best Western International, Inc. v. John Doe*, 2006 W.L.  
26 2091695 (D. Ariz. 2006), out of an abundance of caution, Plaintiff is submitting herewith the  
27 Declaration of David Strager, the managing member of Inspired Silver, to ensure that the Court  
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1 has a full presentation of the defamatory nature and ill-will of the anonymous post being  
2 protected by RipOffReport.com

3 **II. LEGAL ARGUMENT**

4 **A. The Motion to Compel is Procedurally Sound**

5 Initially, as set forth in Paragraph 6 of Mr. Fisher's Statement, RipOffReport.com took the  
6 position that "the most important question is whether or not efforts have been taken by the  
7 requesting party to give notice to the author that their identity may be revealed." Exhibit 3 to  
8 Fisher Statement, p. 1. Yet, once Plaintiff's counsel complied with RipOffReport.com's request  
9 by posting such notice, RipOffReport.com continued to resist.

10 Similarly, although counsel for RipOffReport.com initially advised Plaintiff's counsel that  
11 "you are welcome to serve the subpoena on my office," it now objects to such service. Exhibit 3  
12 to Fisher Statement, p. 1.

13 Finally, in objecting to the Subpoena on September 12, 2008, RipOffReport.com insisted  
14 that Plaintiff "present a prima facie case of defamation to the court" before it would respond."  
15 Exhibit "6" to Fisher Statement. Even after such a presentation, RipOffReport.com continues to  
16 object.

17 **B. RipOffReport.com Failed to Timely Object to the Subpoena**

18 In his July 18, 2008 e-mail, counsel for RipOffReport.com agreed to accept service of the  
19 Subpoena, which was thereafter sent to him. RipOffReport.com now takes the inconsistent  
20 positions that it was never served with the Subpoena but timely objected to it. Under Rule 45,  
21 however, any such objections were due the earlier of 14 days after service (August 21, 2008) or  
22 the return date. RipOffReport.com waited until the date for compliance (September 12, 2008),  
23 which was more than 14 days after service (August 5, 2008), to object, which was not timely.

24 **C. Plaintiff Laid a Proper Foundation for its Motion to Compel**

25 The moving papers satisfied all of the five requirements to compel compliance with a  
26 subpoena in connection with anonymous internet postings as set forth by this Court in  
27 *Best Western*, as follows:  
28

- 1 “(1) a concrete showing of a *prima facie* claim of actionable harm;
- 2 (2) the specificity of the discovery request;
- 3 (3) the absence of alternative means to obtain the subpoenaed information;
- 4 (4) a central need for the subpoenaed information to advance the claim; and
- 5 (5) the Doe defendants' expectation of privacy.”

6 *Best Western, supra*, at \* 4. In addition, the Plaintiff complied with the final requirement in  
7 *Best Western* to “give notice to the John Doe Defendants over the Internet site and afford them an  
8 opportunity to oppose the discovery.” *Best Western, supra*, at \*5.

9 Here, Plaintiff has specifically identified the defamatory statements in the anonymous  
10 post, made a narrowly tailored request for discovery, and showed that there is no way to proceed  
11 with its lawsuit without the requested information and no alternative means to obtain it.

12 In its Response to the present Motion, RipOffReport.com only contests the first  
13 requirement, a *prima facie* claim of actionable harm.

14 Under *Best Western*, the standard is as follows:

15 “The court in *Cahill* described the test in these words: ‘Before a  
16 defamation plaintiff can obtain the identity of an anonymous defendant through  
17 the compulsory discovery process, he must support his defamation claim with  
18 facts sufficient to defeat a summary judgment motion.’ [Citation.] This standard  
19 does not require a plaintiff to prove its case as a matter of undisputed fact, but  
20 instead to produce evidence sufficient to establish the plaintiff's *prima facie* case:

21 “‘[T]o obtain discovery of an anonymous defendant's identity under the  
22 summary judgment standard, a defamation plaintiff must submit sufficient  
23 evidence to establish a *prima facie* case for each essential element of the claim in  
24 question. In other words, the defamation plaintiff, as the party bearing the burden  
25 of proof at trial, must introduce evidence creating a genuine issue of material fact  
26 for all elements of a defamation claim *within plaintiff's control*.’ [Citation.]

1           “The emphasized words ‘within plaintiff’s control’ recognize that a  
2           plaintiff at an early stage of the litigation may not possess information about the  
3           role played by particular defendants or other evidence that normally would be  
4           obtained through discovery. But a plaintiff must produce such evidence as it has  
5           to establish a *prima facie* case of the claims asserted in its complaint.”

6           *Best Western*, supra, at \*4.

7           Unlike in *Best Western* (where the plaintiff did not specify the statements about which it  
8           was complaining), the moving papers for the present Motion have attached the very anonymous  
9           post in dispute in full. Thus, RipOffReport.com’s contention that Plaintiff has not identified a  
10          single false statement written by the anonymous author is not well taken. Plaintiff had attached  
11          the entire post. In addition, Plaintiff has also taken RipOffReport.com up on its invitation to  
12          submit “an affidavit of an officer.” Response Memorandum p. 7:9-11.

13          Plaintiff will delay asking for a hearing on the present Motion for an extra 10 days in  
14          order to give RipOffReport.com an opportunity to further respond to Mr. Strager’s newly-  
15          submitted Declaration.

16          Plaintiff’s showing is sufficient to raise a triable issue of fact that would defeat a  
17          hypothetical summary judgment motion by the anonymous poster. Under federal and California  
18          law, the elements of trade libel and defamation, which are the First and Second Counts of  
19          Plaintiff’s Complaint, are as follows:

20               (1) Under 15 U.S.C. section 1125(a)(1)(B), trade libel includes a “false or misleading  
21               description [or representation] of fact. . .” “in connection with any goods or services. . .” “in  
22               commerce. . .” [which] “misrepresents the nature, characteristics [or] qualities. . .” “[of] another  
23               person’s goods, services, or commercial activities. . .”

24               (2) Under California Civil Code sections 44 and 45, defamation in writing is termed  
25               “libel” and defined as “a false and unprivileged publication by writing, printing, picture, effigy, or  
26               other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or  
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1 obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in  
2 his occupation.”

3 The post accuses Plaintiff in interstate commerce of being unethical, engaging in tortuous  
4 or criminal activities (copyright infringement in knocking-off jewelry designs of others) and not  
5 paying its vendors. The anonymous post further accuses Plaintiff of ripping-off vendors, selling  
6 sub-standard goods and unfairly marking-up inventory for sale to the public. As Mr. Strager’s  
7 Declaration confirms, these allegations by the anonymous poster are false and published with  
8 scienter with the intent to harm Plaintiff in its business. The anonymous poster also demonstrates  
9 his or her spite and ill-will toward Plaintiff and its owner by naming the owner’s family,  
10 individually, and revealing their respective cities of residence. Plaintiff’s showing would  
11 certainly survive a hypothetical motion for summary judgment and supports the issuance of an  
12 order by this Court compelling RipOffReport.com to comply with the Subpoena.

13 **III. CONCLUSION**

14 Given the awful, invasive and untrue misrepresentations the anonymous poster made  
15 about Plaintiff that would easily support a claim for trade libel and defamation and the fact that  
16 the poster’s identity is needed to pursue the lawsuit, the balance of the parties’ competing  
17 interests clearly favor disclosure and compliance with the subpoena. A poster may not immunize  
18 himself or herself from liability for trade libel and defamation simply by insisting that a web  
19 provider maintain their anonymity. Plaintiff requests that this Court issue an order compelling  
20 RipOffReport.com to produce all documents requested in the subpoena within five days and to  
21 pay the reasonable costs and attorneys' fees incurred by Plaintiff in preparing, filing and arguing  
22 this Motion.

23 DATED this 13th day of October, 2008

24 BUCHALTER NEMER  
25 A Professional Corporation

26 By: /s/ Donnelly A. Dybus  
27 Donnelly A. Dybus  
28 Attorneys for Plaintiff

1 ORIGINAL filed this 13th day of  
2 October, 2008 and

3 COPY mailed this 13th day of  
4 October, 2008, to:

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9 Attorneys for XCentric Ventures, LLC, dba RipOffReport.com

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9 /s/ JoAnn Gillotte