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6
 7 **UNITED STATES DISTRICT COURT**
 8 **DISTRICT OF ARIZONA**

9 ECOMMERCE INNOVATIONS, L.L.C.,
 a Nevada limited liability company,
 10
 11 Plaintiff,
 12 v.
 13 DOES 1 through 10,
 14 Defendants.

Case No.: 2:08-MC-00093

**NON-PARTY XCENTRIC VENTURES,
 L.L.C.’s MOTION FOR LEAVE TO
 FILE SUR-REPLY RE:
 MOTION TO COMPEL**

15 Non-party XCENTRIC VENTURES, L.L.C. (“Xcentric”) respectfully requests
 16 leave to file a Sur-Reply to Plaintiff ECOMMERCE INNOVATIONS, L.L.C.’s
 17 (“Ecommerce”) Reply re: Motion to Compel Compliance With Subpoena.

18 Ecommerce’s Reply brief contains entirely new evidence—specifically a
 19 declaration of its manager, David Strager—which was not included in Ecommerce’s
 20 initial Motion to Compel. The Reply also (for the first time) identifies the actual
 21 statements which Ecommerce alleges are defamatory. Because Ecommerce has raised
 22 these new arguments and evidence in its Reply, Xcentric has not had any opportunity to
 23 respond. A Sur-Reply is therefore necessary. Ecommerce’s concedes this in its Reply (p.
 24 10:13–15). The proposed Sur-Reply is attached as **Exhibit A**.

25 DATED this 15th day of October 2008.

26 **JABURG & WILK, P.C.**
 s/David S. Gingras
 27 _____
 Maria Crimi Speth
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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2008 I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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With a COPY of the foregoing delivered to:

Honorable David G. Campbell
United States District Court
District of Arizona

s/Debra Gower

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EXHIBIT A
PROPOSED SUR-REPLY

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7 **UNITED STATES DISTRICT COURT**
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13 DOES 1 through 10,

14 Defendants.

Case No.: 2:08-MC-00093

**NON-PARTY XCENTRIC VENTURES,
L.L.C.'s [PROPOSED]
SUR-REPLY TO PLAINTIFF'S
MOTION TO COMPEL
AND
MOTION FOR SANCTIONS**

15 Non-party XCENTRIC VENTURES, L.L.C. ("Xcentric") respectfully submits the
16 following Sur-Reply to Plaintiff ECOMMERCE INNOVATIONS, L.L.C.'s
17 ("Ecommerce") Motion to Compel Compliance With Subpoena. Xcentric also requests an
18 award of sanctions pursuant to Fed. R. Civ. P. 56(g).

19 **I. INTRODUCTION**

20 Ecommerce harshly criticizes Xcentric for taking steps to protect the rights of
21 authors who wish to speak anonymously. This attack is inappropriate considering the
22 important Constitutional questions involved here.

23 Among the myriad laws, rules and regulations at work in this nation, the First
24 Amendment ranks among the most sacred; "[T]he freedom to speak one's mind is not
25 only an aspect of individual liberty—and thus a good unto itself—but also is essential to the
26 common quest for truth and the vitality of society as a whole." *Hustler Magazine v.*
27 *Falwell*, 485 U.S. 46, 50, 108 S.Ct. 876 (1988) (quoting *Bose Corp. v. Consumers Union*
28 *of United States, Inc.*, 466 U.S. 485, 503–04, 104 S.Ct. 1949, 1961 (1984)).

1 Though sometimes viewed with suspicion, anonymous speech falls squarely within
2 the First Amendment’s shield and is widely considered a healthy part of a free society:

3 Under our Constitution, anonymous pamphleteering is not a pernicious,
4 fraudulent practice, but an honorable tradition of advocacy and of dissent.
5 Anonymity is a shield from the tyranny of the majority. It thus exemplifies
6 the purpose behind the Bill of Rights, and of the First Amendment in
7 particular: to protect unpopular individuals from retaliation-and their ideas
8 from suppression-at the hand of an intolerant society. The right to remain
9 anonymous may be abused when it shields fraudulent conduct. But political
speech by its nature will sometimes have unpalatable consequences, and, in
general, our society accords greater weight to the value of free speech than to
the dangers of its misuse.

10 *McIntyre v. Ohio Elections Com'n*, 514 U.S. 334, 357, 115 S.Ct. 1511, 1524 (1995)
11 (emphasis added). The First Amendment’s shield is, of course, not absolute—it does not
12 extend to defamatory speech. By the same token, “The First Amendment was designed to
13 protect offensive speech, because nobody ever tries to ban the other kind.” Mike Godwin,
14 Staff Counsel for the Electronic Frontier Foundation (quoted in *EFF Quotes Collection*
15 *6.0*, May 18, 1995; <http://w2.eff.org/Misc/EFF/?f=quotes.eff.txt>).

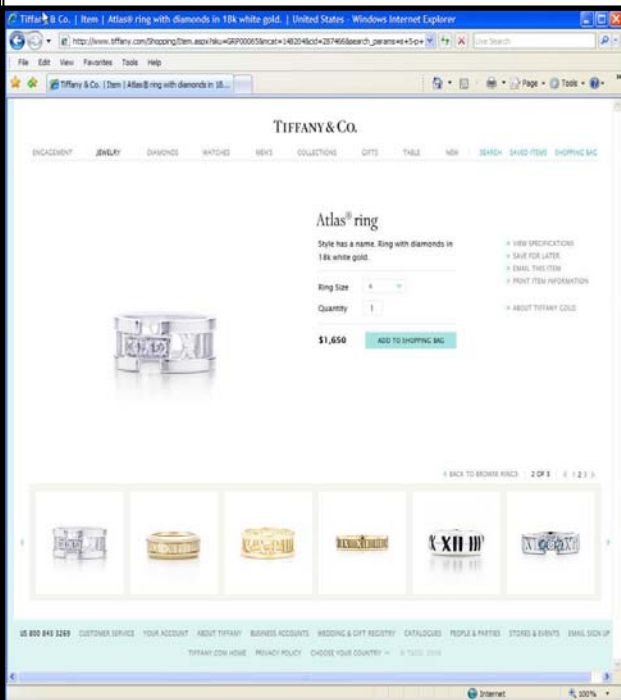
16 With these competing standards in mind, although it never endorses defamatory or
17 illegal speech, Xcentric takes great pride in its efforts to protect the First Amendment
18 rights of its users consistent with the law. Ecommerce understandably expresses
19 frustration at this, arguing that it has been defamed and that it is therefore entitled to learn
20 the identity of the author involved.

21 However, merely labeling a statement as false or defamatory is not the end the
22 analysis, it is the beginning. Consistent with this Court’s opinion in *Best Western Int’l*
23 *Inc. v. Doe* and the Arizona Court of Appeals’ decision in *Mobilisa v. Doe*, courts must
24 serve a gatekeeper function to safeguard the First Amendment in matters relating to
25 anonymous online speech. Valid claims will easily pass muster and will not be hindered,
26 while marginal or meritless claims will be promptly discarded. The dispositive question,
27 then, is whether this case presents facts and evidence sufficient to move forward. Because
28 this case does not, the Motion to Compel should be denied.

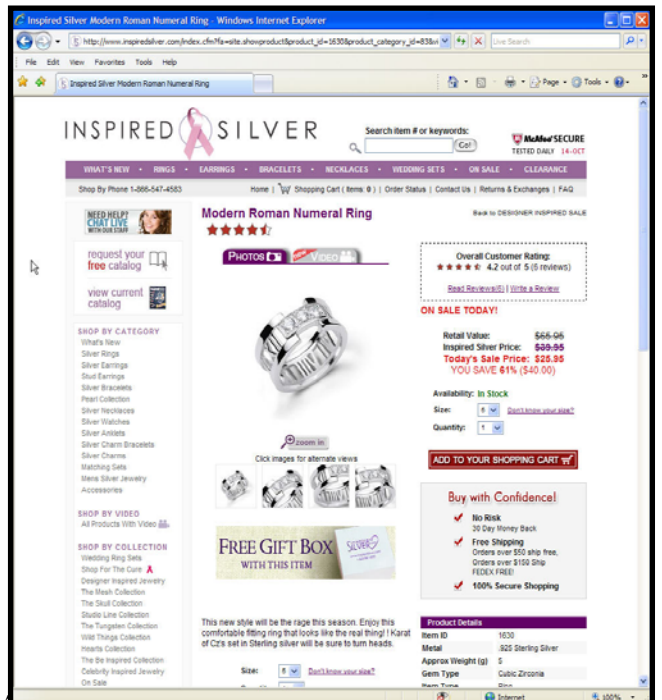
1 As to the second part of Statement #1 which accuses Inspired Silver of “knocking
2 off” jewelry designs by other manufacturers, Mr. Strager carefully states that Inspired
3 Silver does not “knock off *proprietary designs* of other manufacturers.” Of course,
4 Statement #1 does not claim that only “proprietary” designed have been copied; it simply
5 accuses Inspired Silver of “knocking off” jewelry designs. In addition, Statement #1 does
6 not say that Inspired Silver has ever been sued for copyright or trademark infringement so
7 Mr. Strager’s denial of those points is irrelevant.

8 However, even if Mr. Strager had unequivocally denied selling counterfeit products
9 on his website, this denial would not be sufficient to support Ecommerce’s burden in light
10 of the overwhelming evidence to the contrary. Specifically, as explained in the
11 Declaration of David S. Gingras submitted herewith, a cursory review of Ecommerce’s
12 website www.InspiredSilver.com shows that the company is engaged in blatant and
13 widespread copying of jewelry designs by such famous manufacturers as Tiffany & Co.
14 In fact, Ecommerce’s theft of Tiffany’s products is so brazen that the site actually brags
15 that its products “look like the *real thing!*” Gingras Decl. ¶ 13, **Exhibit A-1.**

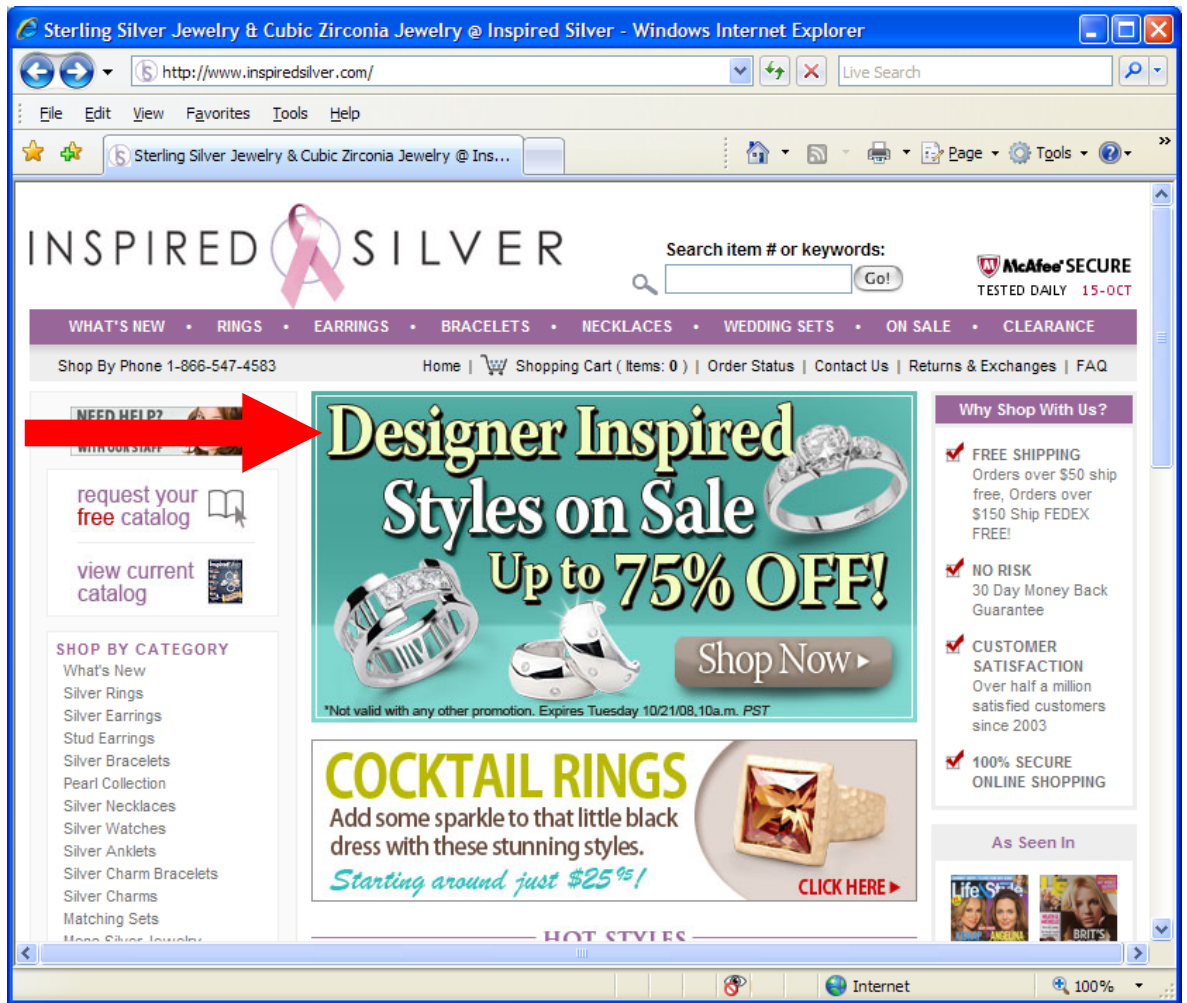
16
17 **Genuine Tiffany Ring (Exhibit A)**



Counterfeit Ring (Exhibit A-1)



1 As explained in the declaration of counsel submitted herewith, the examples shown
2 above is only one of numerous instances of Ecommerce creating and selling identical
3 copies of Tiffany’s exclusive jewelry designs. Far from being an isolated or innocent act
4 of copying, Ecommerce’s website proudly explains the source of its “inspired” products—
5 they are actually “inspired,” meaning *copied from*, famous designers:



22 In light of the clear and undisputed evidence that Ecommerce does, in fact, “knock
23 off” the jewelry designs of third parties such as Tiffany & Co., no reasonable juror could
24 believe Mr. Strager’s false denial of this accusation. As such, Ecommerce has failed to
25 demonstrate the existence of a *genuine* factual dispute sufficient to survive a hypothetical
26 Motion for Summary Judgment on this issue; “Where the record taken as a whole could
27 not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue
28 for trial.’” *Scott v. Harris*, 550 U.S. ___, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007)

1 (emphasis added) (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475
2 U.S. 574, 586-587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

3 In other words, although legitimate factual disputes normally preclude summary
4 judgment, this principle does not apply when no reasonable juror could possibly believe
5 one side's story:

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

10 *Scott*, 550 U.S. at ___, 127 S.Ct. at 1776 (finding that where police chase was captured on
11 videotape, summary judgment was proper even though fleeing suspect offered version of
12 facts which were clearly inconsistent with events recorded on video); *see also Anderson v.*
13 *Liberty Lobby, Inc.*, 477 U.S. 242, 249–50, 106 S.Ct. 2505, 2510–11 (1986) (recognizing
14 that summary judgment is properly granted where no reasonable juror could find in favor
15 of the non-moving party).

16 Statement #2

17 “Currently they [Inspired Silver] owe my friend close to \$25,000.00 (and it
18 is over 190 days) wholesale cost to Accessories Rock but instead of
19 honoring their fiduciary and moral obligations, would rather have another
20 company make up the goods where the quality of those same goods also
21 comes into question.”

22 Evidence From Strager Declaration

23 “The real story as to Accessories Rock is that I ordered and returned
24 product with this company in a customary fashion. Accessories Rock then
25 attempted to make a further shipment to me C.O.D., which I rejected and
26 returned. It then claimed that my company owed it between \$6,000 and
27 \$8,000 based on these orders, which I disputed. I have been in discussion
28 with Accessories Rock's attorney regarding our dispute of less than \$8,000.
Under no circumstance does my company owe \$25,000 to Accessories
Rock.”

Statement #2 simply claims that Inspired Silver owes money to a third party
company called “Accessories Rock”. Mr. Strager's declaration does not deny that a

1 dispute exists between the two companies; he simply contends the amount at issue is “less
2 than \$8,000” rather than “close to \$25,000”.

3 Whatever it may be, the true amount of this dispute is irrelevant. The test in this
4 situation is whether the statement as-written would have a materially different effect in the
5 mind of a reader than the literal truth would have. *See Read*, 169 Ariz. at 355 (“the issue
6 is whether the “gist” or “sting” of the statements published in The Republic would have
7 made a material difference to a reader had the newspaper published the literal truth of
8 [Plaintiff’s] conviction and sentence.”) An inter-business dispute over \$8,000 is not
9 materially different than a dispute over “close to \$25,000”. As such, Ecommerce has
10 failed to prove that Statement #2 is actionable.

11
12 **Statement #3**

13 “They find these companies by attending various jewelry trade shows, then
14 use their company image of being a large company loving their products
15 and wanting to order from them. What the supplier doesn’t know if that
16 they are about to be ripped off themselves.”

17 **Evidence From Strager Declaration**

18 “Inspired Silver does not ‘rip-off’ its vendors.”

19 The determination of whether a statement is capable of a defamatory meaning is a
20 threshold question of law for the Court. *See Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th
21 Cir. 2005 (citing *Dworkin v. Hustler Magazine, Inc.*, 668 F.Supp. 1408, 1415 (C.D.Cal.
22 1987) (“It is for the court to decide [whether a statement is actionable defamation] in the
23 first instance as a matter of law.”) (brackets in original)). When performing this task, the
24 Court “must interpret [the] statement ‘from the standpoint of the average reader, judging
25 the statement not in isolation, but within the context in which it is made.’” *Knievel*, 393
26 F.3d at 1074 (quoting *Norse v. Henry Holt & Co.*, 991 F.2d 563, 567 (9th Cir. 1993)).

27 Based on Mr. Strager’s declaration, the only question is whether Inspired Silver
28 “rips off” its suppliers. Viewed in-context, this allegation appears to be the author’s

1 general opinion, not an assertion of fact. As such, it is non-actionable. *See Jaillett v.*
2 *Georgia Television Co.*, 238 Ga.App. 885, 890–91 520 S.E.2d 721, 725–26 (Ga.App.
3 1999) (holding that use of term “rip-off” to describe an unnecessary air conditioning
4 repair was protected statement of opinion, not fact).

5 As the Georgia Court of Appeals explained in *Jaillett*, when a reader offers an
6 explanation of the factual basis for an opinion, and then simply concludes with a
7 statement containing the opinion itself, such matters are non-actionable:

8 The requirement that, to be actionable, a statement of opinion must imply
9 an assertion of objective facts about the plaintiff ... unquestionably
10 excludes from defamation liability not only statements of rhetorical
11 hyperbole ... but also statements clearly recognizable as pure opinion
12 because their factual premises are revealed Both types of assertions
13 have an identical impact on readers-neither reasonably appearing factual-
and hence are protected equally under the principles espoused in *Milkovich*.

14 *Jaillett* (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d
15 1 (1990)); *see also Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807, 813 (N.Y.
16 2005) (holding statements posted on website were non-actionable opinions accusing
17 plaintiff of being a “blatantly dishonest company”; a “crooked company”; that has “been
18 ripping off its contract holders for a while”; also observing, “in the context of statements
19 pertaining to issues of consumer advocacy, courts have been loathe to stifle someone’s
20 criticism of goods or services.”) (emphasis added) (citing extensive authority for
21 premise); *see also Global Telemedia International, Inc. v. Doe*, 132 F.Supp.2d 1261, 1267
22 (C.D.Cal. 2001) (finding that statements posted on Internet message board accusing
23 company management of lying and “screw[ing investors] out of [their] hard earned money
24 ...” were non-actionable as a matter of law because the statements were filled with
25 “hyperbole, invective, short-hand phrases and language” which suggested the statements
26 were the author’s opinions).

27 Here, to say that Ecommerce might “rip off” a supplier in the future is simply the
28 author’s opinion about what the company might do based on the author’s description of

1 Ecommerce’s refusal to pay a debt to his friend’s company and based on Ecommerce’s
2 clear record of copying and “knocking-off” of products from others such as Tiffany’s.
3 The author’s opinion is protected speech and is not defamatory as a matter of law.

4 Statement #4

5 “It has been noticed that a company called Athra was making up their
6 goods. If you go the following links, www.inspiredsilver.com, and
7 www.athra.com, you will see all the same styles which are Accessories
8 Rock styles. When my friend initially got into the business, he bought a
9 few things from Athra. The main problem he indicated is the quality of the
10 cubic zirconia stones was not nearly as clear as they should be. According
11 to my friend, Inspired Silver claimed these goods were not items that sold,
12 and returned them after many months of holding them, but instead
13 obviously gave a copy of them to Athra. Inspired Silver is a company
14 lacking the morals and ethics that one should seek when doing business.”

12 Evidence From Strager Declaration

13 “In actuality, prior to reading the defamatory posting, I had never heard of
14 nor done any business with Athra. Upon reviewing the posting, I reviewed
15 the Athra website referenced in the post and saw that it had misappropriated
16 some images from my company’s website. I then personally contacted
17 Athra to demand the immediate removal of those images. Inspired Silver
18 has never done any business with Athra.”

19 Based on a review of Statement #4 and Mr. Strager’s declaration, it is unclear
20 exactly what Ecommerce believes is false or defamatory. Other than denying a business
21 relationship with a third party company called “Athra”, Mr. Strager does not appear to
22 dispute the bulk of Statement #4 which generally claims that certain goods sold by Athra
23 were of poor quality.

24 To the extent Statement #4 again accuses Ecommerce of “lacking morals and
25 ethics” these are clearly protected statements of opinion, not fact. *See Held v. Pokorny*,
26 583 F.Supp. 1038 (D.C.N.Y. 1984) (statement accusing attorney of engaging in
27 “immoral” conduct was statement of opinion and not defamatory as a matter of law);
28 *Henry v. Halliburton*, 690 S.W.2d 775, 789–90 (Mo. 1985) (accusations stating that an
insurance agent was a “fraud” motivated by “greed” for the purpose of “fleecing a
customer” were all non-actionable opinions; “The law is well-settled that individuals may

1 use pejorative or vituperative language when referring to another as long as they do not
2 suggest specific criminal conduct, which would be a statement of fact.”)

3 **Statement #5**

4 “[A]nd just so you know, they are charging you 3 or 4 times more than
5 what he sold it to them for. If you come to my friend's site
6 www.accessoriesrockjewelry.com, assuming he has it as it is still in style,
7 he will sell it for much less than what you will pay buying it through them,
8 and most likely much better quality, after all, they stuck him with excess
9 inventory.”

10 **Evidence From Strager Declaration**

11 “In actuality, while there is a price difference, the quality of the jewelry is
12 the same.”

13 Little need be said regarding Statement #5. Mr. Strager does not dispute that his
14 company charges more for its products than some competitors (which is, of course, not
15 defamatory in any case). The only alleged defamation is the suggestion that Accessories
16 Rock will sell the same items albeit “most likely much better quality.” Mr. Strager
17 contends the quality is the same.

18 No citation is needed to explain that the author’s subjective views about which
19 company sells better quality fake jewelry are opinions, not facts.

20 **III. SANCTIONS SHOULD BE ORDERED PER RULE 56(g)**

21 In addition to requesting that Ecommerce’s Motion to Compel be denied, Xcentric
22 further requests an award of attorney’s fees pursuant to Rule 56(g) which states:

23 **Affidavit Submitted in Bad Faith.** If satisfied that an affidavit under this
24 rule is submitted in bad faith or solely for delay, the court must order the
25 submitting party to pay the other party the reasonable expenses, including
26 attorney’s fees, it incurred as a result. An offending party or attorney may
27 also be held in contempt.

28 Fed. R. Civ. P. 56(g) (emphasis added). As explained above, it is clear that Mr. Strager’s
declaration submitted to the Court contains false statements to the effect that Inspired
Silver does not steal the designs of famous third party manufacturers. Mr. Strager’s own
website proves that this is exactly what Inspired Silver does.

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Under the circumstances, it is obvious that Mr. Strager submitted a false declaration to the Court in an effort to support a frivolous claim so that he could invade the First Amendment rights of the anonymous author who posted truthful statements about Mr. Strager's illegal business practices. This conduct is an abuse of the Court's process and warrants the imposition of serious sanctions.

As such, in addition to any other remedy the Court may find appropriate, Xcentric requests that the Court find Mr. Strager's declaration was submitted in bad faith and that the Court order Mr. Strager to pay the reasonable expenses, including attorney's fees, incurred by Xcentric pursuant to Fed. R. Civ. P. 56(g).

IV. CONCLUSION

For all of these reasons, the Court should deny Ecommerce's Motion to Compel, quash the subpoena pursuant to Fed. R. Civ. P. 45(c)(3)(A)(iii), and award sanctions including costs and attorney's fees to Xcentric pursuant to Fed. R. Civ. P. 56(g).

DATED this ____ day of October 2008.

JABURG & WILK, P.C.

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David S. Gingras
Attorneys for Xcentric Ventures, L.L.C.