

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

Case No. 2:04-cv-47-FtM-34 SPC

WHITNEY INFORMATION
NETWORK, INC., a Colorado corporation,

Plaintiff,

v.

XCENTRIC VENTURES, LLC., an
Arizona limited liability company;
BADBUSINESSBUREAU.ORG, an
Arizona limited liability company; and
ED MAGEDSON, an individual,

Defendants.

**PLAINTIFF'S MOTION TO STRIKE OR IN THE ALTERNATIVE,
MOTION FOR PROTECTIVE ORDER REGARDING
UNTIMELY SERVED DISCOVERY REQUESTS
AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, Whitney Information Network, Inc. ("WIN"), hereby files this Motion to Strike or, in the Alternative, Motion for Protective Order Regarding Defendants' Untimely Served Discovery Requests and Incorporated Memorandum of Law and states:

On September 27, 2005, WIN filed its First Amended Complaint [Court Document No. 56] against defendants, Xcentric Ventures, LLC, Badbusinessbureau.org and Ed Magedson, alleging a cause of action for defamation *per se* based upon derogatory comments about WIN contained on the "Rip-off Report" website. On April 16, 2007, this Court entered its Amended Case Management and Scheduling Order, wherein the discovery deadline was set for October 1, 2007. [Court Document No. 105]

On September 26, 2007, Defendants served their Non-Uniform Interrogatories and Requests for Admission to Plaintiff (Second) and Defendants' Request for Production of Documents to Plaintiff (Second). Therefore, pursuant to Rules 6(e), 33 and 34, Fed. R. Civ. P., WIN's responses to Defendants' Second Interrogatories and Defendants' Second Request for Production are due to be served October 31, 2007, a month after the discovery deadline set by this Court. "There is no question that this [discovery] is untimely. 'When the court establishes a discovery deadline, a party must serve [discovery] in sufficient time to permit the responding party the 30-day response time allowed under Rule 33 (and whatever extension may be applicable under Rule 6) before the discovery cut-off date.'" DC Comics v. Kryptonite Corp., 2002 WL 31159121 at * 1 (S.D.N.Y. 2002).

In the Amended Case Management and Scheduling Order, this Court specifically directed: "D. Discovery Deadline – Each party shall timely serve discovery requests so that the rules allow for a response prior to the discovery deadline. The Court may deny as untimely all motions to compel filed after the discovery deadline." Amended Case Management and Scheduling Order at p. 3.

Defendants delay in serving the discovery at issue is inexcusable. WIN has been engaging in discovery for quite some time and nothing sought in Defendants' discovery is new. Since Defendants' discovery requests are clearly untimely, they should be stricken or, in the alternative, a protective order should be issued excusing WIN from responding to the discovery requests.

WIN certifies that it has made a good faith effort to resolve the issue, by sending Defendants' counsel email correspondence on October 17 and 18, 2007. Defendants have not responded to the emails.

WHEREFORE Whitney Information Network, Inc. respectfully requests this Court grant its Motion to Strike or, in the alternative, Motion for Protective Order, and strike Defendants' Second Set of Interrogatories and Second Request for Protection, or enter a protective order excusing Whitney Information Network, Inc. from having to respond to Defendants' Second Set of Interrogatories and Second Request for Protection and for any other relief this Court deems necessary and proper.

Dated: October 18, 2007

Respectfully submitted,

By: /s/ Shawn L. Birken

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October, 2007, I electronically filed the forgoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing is being served this day upon all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Shawn L. Birken
Shawn L. Birken

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SERVICE LIST

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Fort Myers Division
Whitney Information Network, Inc. vs. Xcentric Ventures, LLC., et al.
Case No. 2:04-cv-47-FtM-34SPC

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