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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

WHITNEY INFORMATION NETWORK, INC.; a Colorado corporation, Plaintiffs, v. XCENTRIC VENTURES, LLC, an Arizona limited liability company; BADBUSINESSBUREAU.ORG, an Arizona limited liability company; and ED MAGEDSON, an individual, Defendants.	Case No: 2:04-CV-47-ftm-34-SPC **DEFENDANTS' REPSONSE TO PLAINTIFF'S MOTION TO STRIKE**

Defendants Xcentric Ventures, LLC, ("Xcentric"), and Ed Magedson ("Magedson") (collectively, the "Defendants") respond in opposition to Plaintiff's Motion to Strike (Document 151). In short, Plaintiff has flouted the discovery rules and *ignored* ***all*** the discovery propounded by Defendant, including timely discovery. Defendant should not be forced to the expense and difficulty of compelling Plaintiff's delinquent responses related to traditional defamation defenses before the Court decides the controlling issue about Defendants' immunity under the Communications Decency Act.

**The Communications Decency Act Controls this Case,
But Plaintiff Ran Out the Discovery Clock**

In January 2004 Plaintiff's filed their meritless Complaint (Document 1) alleging counts of trademark infringement (federal and common law), false origin, and defamation.

In July of 2005 the Court dismissed the Complaint for failure to state a claim upon which relief could be granted (Document 49). Plaintiff did not have trademark claims. The Court dismissed the defamation claim because the Communications Decency Act at 47 U.S.C. § 230(c)(1) mandated that "no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider." The Court held that

> Defendants are a service provider as they publish information by consumers on their website. They do not write the information. Thus, Defendants are immune by virtue of § 230(c)(1) and Count IV should be dismissed.

(Document 49, Order, p. 7)

In September 2005, Plaintiff filed a First Amended Complaint (Document 56) ("FAC"), which falsely alleged "upon information and belief", with no basis in truth or fact, that Defendants "create[d] fictional complaints themselves [about Plaintiff] which were then attributed to people with false names . . .". (FAC ¶ 41) Plaintiff stated a false and groundless single claim, for defamation. Although the FAC was dismissed on jurisdictional grounds, it was reinstated because Plaintiff, with this groundless false allegation, had *alleged* a tort with impact in Florida.

Now, a Motion for Summary Judgment is pending that proves the lie in Plaintiff's allegations. Defendants did not author any complaints against Plaintiff, and Defendant is immune from defamation claims "by virtue of U.S.C. § 230(c)(1)." Plaintiff's Response doesn't prove any authorship by Defendant. This case should be decided by summary judgment in favor of Defendants, because the Communications Decency Act controls.

But the summary judgment motion has been pending for a long time because Plaintiff has been stalling and propounding discovery against Plaintiff.

The Plaintiff ran out the discovery clock. Plaintiff received answers to multiple discovery responses. Plaintiff took depositions in Arizona. This case should have been efficiently disposed of on summary judgment before the end of the discovery period, but Plaintiff stalled, requesting extensions under Rule 56(f) and taking extensions that the Court never granted before filing a Response.

Plaintiff delayed and ignored Defendant's discovery requests. Defendants asked to depose two witnesses. Plaintiff stalled on providing dates, forced reschedules, and has finally stipulated to allow those depositions *at the end of November*.

Defendants propounded Non-Uniform Interrogatories, Requests for Admission, and Requests for Production of Documents in May, 2007. That was a *first* set, not the "Second" set that is the subject of Plaintiff's Motion to Strike. That *first* set asked Plaintiff to identify specific false, defamatory statements out of the many narrative postings from complaining consumers who felt ripped off by Plaintiff's "infomercial" courses. The requests also asked Plaintiff to identify any evidence they had that Defendants authored allegedly defamatory statements. The requests also asked for any proof that Plaintiff suffered any damage due to postings on Defendant's website. Plaintiff ignored that timely discovery, altogether ignored it and never answered. Plaintiff has not disclosed any proof of false statements, Defendant's authorship, or damages.

The Court should not have to allocate resources and time to ancillary discovery disputes before deciding the main issue. The controlling summary judgment issue should be decided before Defendant is forced to expend additional resources to compel discovery about traditional defamation defenses. There are dozens of pages in which angry customers complain about Plaintiff's business practices, and Plaintiff has refused to say what, if anything, about the consumer complaints are false. If the case moves beyond summary judgment, Defendant should have the opportunity to require the Plaintiff to identify false statements. Defendants should also have the opportunity to focus narrow, efficient discovery on the statements alleged to be false, and show that the allegations are

true, or at least not defamatory. Plaintiff has shown no proof of damage and ignored requests for it. Defendants should be able to test Plaintiff's theories and evidence about damage.

Defendants "Second" set of discovery requests (also Requests to Admit, Interrogatories, and Requests for Production) asks for evidence about settlement of disputes with customers and disgruntled employees. That is a sound request that may lead to discovery of admissible evidence to support a defamation defense. If the case proceeds beyond summary judgment, Defendant should be entitled that evidence.

But, Plaintiff has stalled during the summary judgment phase of the litigation, and the Court has not decided the controlling issue before the discovery period expired.

Defendant Sought Compromise, but Plaintiff was Inflexible.

It would be wasteful and inefficient to require battles about that discovery before the Court rules on the controlling issue, Communications Decency Act immunity. Defendant has tried to avoid this unnecessary dispute, and did contact Plaintiff to confer, on October 18, after receiving Plaintiff's October 18 request to confer. Plaintiff had already filed the Motion to Strike. Defendant requested a conference to seek a compromise, and Plaintiff did participate. But, Plaintiff, having nothing to loose, would not compromise.

Conclusion

This Court acknowledged once already that the Communications Decency Act makes Defendant immune from defamation claims unless Defendants *creates defamatory content*. Plaintiff alleged a lie based on what Plaintiff hoped to find, but didn't find any evidence of Defendant's authorship. Now, Plaintiff hopes to survive summary judgment and force Defendant into a trial, after withholding evidence about traditional defamation defenses.

The Court has the discretion to modify the discovery schedule for good reasons. The Court should not rush to strike discovery requests that have been strategically

ignored by Plaintiff before the Court decides the controlling issue. It is far more just and efficient to address first-things-first.

DATED this 2nd day of November, 2007.

JABURG & WILK, P.C.

s/Maria Crimi Speth by ASK
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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2007, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

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