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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-29

**MOTION TO ADMIT NEWLY
 DISCOVERED EVIDENCE IN
 SUPPORT OF DEFENDANTS'
 MOTION FOR SUMMARY
 JUDGMENT**

Xcentric Ventures, LLC, (“Xcentric”), and Ed Magedson (“Magedson”) (collectively, the “Defendants”) respectfully move to submit new evidence that Plaintiff Whitney Information Network, Inc. (“Whitney”) has admitted in deposition testimony that Whitney has no evidence that Defendants authored or provided the content for any defamatory statements at issue in this case. Pursuant to 47 U.S.C. § 230(c)(1), Defendants cannot be liable as publishers for defamation posted on the interactive computer service by third parties, and if Plaintiff has no evidence that Defendants authored the defamatory content at issue in this case, the Court must grant the Motion for Summary Judgment.

On January 21, 2008, deposition transcripts became available for the depositions of Ronald Steven Simon, Whitney’s COO and Co-President, and Russell E. Whitney, Whitney’s founder and Chairman of the Board.

Whitney designated Mr. Simon as the corporate representative to speak on the topic of who authored the statements at issue in this lawsuit that Whitney claims to be false and defamatory. (Exhibit A, Simon Transcript, p. 92 l. 11 through p. 93 l. 8) Defendant's Rule 30(b)(6) Deposition Notice specifically requested:

The person with the most knowledge regarding:

1. The exact statements that Whitney Information Network, Inc. ("WIN") claims (in this lawsuit) to be false and defamatory;
2. Who authored statements at issue in this lawsuit that Whitney Information Network, Inc. ("WIN") claims to be false and defamatory;
3. The alleged changes made to consumer complaints/reports about WIN posted on the www.ripoffreports.com webpage.
4. What evidence is in WIN's possession to support WIN's claims about the authorship of alleged false and defamatory statements at issue in this lawsuit, or to support the allegations about changes made to consumer complaints/reports about WIN posted on the www.ripoffreports.com webpage.
5. What testimony will WIN use to support its claims about the authorship of alleged false and defamatory statements at issue in this lawsuit, or to support the allegations about changes made to consumer complaints/reports about WIN posted on the www.ripoffreports.com webpage.

The evidence this motion seeks to introduce has not previously been available to Defendants because depositions of Whitney's 30(b)(6) witness or Mr. Whitney could not be scheduled until December 3, 2007, and the transcripts of those depositions were not provided until January 21, 2008. Defendant's Motion for Summary Judgment was filed 6/21/07. Plaintiff's response was filed 9/10/07. Defendant petitioned the Court for permission to reply on 9/14/07. The Court has not ruled on either the Motion for Summary Judgment or the request to file a Reply. Defendant provided supplemental authority on 1/18/08, and now files this Motion to supplement the evidence.

Mr. Simon testified that Whitney had no evidence that any defendant authored or provided content to any alleged defamatory statement at issue in this case. For example:

2 Q Okay. Would it be fair to say that the
3 report that was filed on June 14th, 2003 that purports
4 to be authored by Leilani, that as to that report you
5 have no reason to believe that anyone from XCentric
6 Ventures authored that particular report?

7 MS. STERN: Object to form.

8 **THE WITNESS: I have no idea.**

...

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16 Q So let me put it this way, do you have any
17 evidence or any reason to believe that my client
18 authored this particular report that we've been
19 talking about?

20 A **I have no reason to believe that they**
21 **authored it, and I have no reason to believe that they**
22 **didn't assist in it.**

23 Q Fair. I understand your position. You just
24 don't know either way on this particular report,
25 correct?

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1 A **Correct.**

(Simon Transcript, p.54 ll. 2 through 8, p. 54 l. 16 through p. 55 l.1)

Mr. Simon further testified that he had no evidence that the person making that particular complaint about Whitney on Defendant's website was coached by Defendant, or that she didn't independently choose to file her complaint under the category "corrupt companies," stating "No, it's just a feeling." (Simon Transcript, p. 58 ll. 2 through 9) Mr. Simon admitted several times that he did not know whether or not Defendants choose categories or provided any content to the alleged defamatory statements. (See, e.g. Simon Transcript, p. 72. l. 24 through p. 73 l. 4; p. 76 ll. 2 through 4; p. 77. ll. 7 through 14).

Mr. Simon testified that he had no evidence to indicate that Defendants authored any of the allegedly defamatory statements. During the deposition, to indicate what statements were alleged to be defamatory, Mr. Simon highlighted printouts of statements about Whitney from the Defendant's web page. This was labeled Exhibit 3 to the deposition. He testified that he had no evidence to indicate that Defendants authored any of the highlighted statements.

15 Q Now, the statements that you highlighted in
16 Exhibit 3 as false, is it your position that my client
17 authored some or all of those statements?

18 MS. STERN: Objection to form.

19 **THE WITNESS: At this point I have no**
20 **knowledge one way or another.**

21 BY MS. SPETH:

22 Q Do you have any reason to believe that my
23 client authored any of the statements that are
24 contained in Exhibit 3 that you have identified as
25 false?

1 **A Just a personal opinion.**

(Simon Transcript, p. 89 l. 15 through p. 90 l. 1) Mr. Simon believed someone told him that Defendants had authored the reports, but could not remember any source for the information, except that he remembered that he did not get that information from Defendants.

2 Q What evidence do you have that my client
3 authored any of these statements?

4 **A At this point I don't have any evidence other**
5 **than what I surmise or what I've been -- what people**
6 **have told me.**

7 Q When you say what people have told you -- I
8 don't want to ask you about your conversations with
9 your attorneys, but other than your attorneys who has
10 told you my client has authored these statements, if
11 anyone?

12 **A I don't recall at this point.**

13 Q Do you think that someone has told you that
14 my client authored these statements other than your
15 attorneys?

16 **A It's possible.**

17 Q And do you think that person was someone who
18 had any personal knowledge? Let me do it this way,
19 has either Ed Magedson or anyone who works for
20 XCentric Ventures ever told you that an employee or an
21 agent of XCentric Ventures authored these statements?

22 **A I have not spoken to him.**

23 Q So if it's possible that somebody has told
24 you this, is it possible that the somebody who told
25 you this is somebody who had personal knowledge of who

1 authored the statements?

2 **A Anything is possible at this point.**

3 Q I know, but what is it you are remembering
4 when you say what people told you?

5 **A I don't know. At this point I don't have a**
6 **clear recollection.**

7 Q Okay. But are you reasonably certain that no
8 one who works for XCentric Ventures or Mr. Magedson
9 ever told you that they authored the statements?

10 **A At this point, yes.**

(Simon Transcript, p. 91 l. 2 through p. 921 l. 10.)

Likewise, Mr. Simon had no evidence that any Defendants made any changes to any allegedly defamatory statements posted by Whitney's customers on Defendant's webpage.

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9 Q Do you have any knowledge regarding any
10 changes or modifications made to reports that are
11 posted on RipoffReport by a consumer? In other words,
12 if a consumer posts a report, and I think you guys
13 have made some allegations that my client makes
14 modifications or changes to the report, what evidence
15 or information do you have about any changes that may
16 have been made to a report?

17 **A Well, at this point we have very little**
18 **except when we compare the information to -- if we're**
19 **able to compare the information to our records and**
20 **what's on the report we get different things. We can**
21 **make comparisons and find differences. If we can find**
22 **the original postings and compare them to what's on**
23 **the web site I think we'd find market differences.**

24 Q What do you base that on?

25 **A Intuition.**

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1 Q Anything else?

2 **A No. I think we're going to continue to look**
3 **for people and continue to find differences.**

4 Q Have you had any situation where you've
5 spoken to -- you or somebody who works for you had
6 spoken to an author of a report on RipoffReport?

7 **A No, because we're unsure who the authors are.**

8 Q I'm saying has there been any instance where
9 you have identified an author and spoken to them?

10 **A As I said we just recently found these six,**
11 **we're continuing to look.**

12 Q So thus far you haven't had any conversations
13 with any authors of any reports?

14 **A Not to my knowledge.**

15 Q And I did mean --

16 A When you say you --

17 Q I meant the company, anyone within the
18 company.

19 **A The company has had continuous conversations**
20 **with people who have had complaints. Pages and pages**
21 **of conversations with people who have had complaints.**
22 **We will continue to talk to them and continue to work**
23 **with them.**

24 **Q** But have you had any conversations with any
25 of the authors of the reports about the reports, about

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1 the fact that they posted or whether they posted or
2 what they posted?

3 **A Not to my knowledge.**

(Simon Transcript, p. 93. l. 9 through p. 95. 13.) As shown in the quote above, Mr. Simon admitted that Whitney had been looking for evidence that Defendants authored the alleged defamation, but found none. The relevant pages of Mr. Simon’s deposition have been attached as Exhibit A to this Notice.

Likewise, Mr. Russell E. Whitney testified that he had no knowledge regarding who authored or provided content to any alleged defamatory statement at issue in this case. See Deposition of Russell E. Whitney, p. 70 ll. 11 through 17, “Do I have any knowledge [or information] regarding who authored the reports that are on RipoffReport? . . . No, not at all.” The relevant pages of Mr. Whitney’s deposition have been attached as Exhibit B to this Notice.

Plaintiff’s counsel informed Defense counsel that Plaintiff opposes this motion because Defendants opposed Plaintiff’s motion to extend the time to respond to the Motion for Summary Judgment. In that circumstance, Plaintiff wanted to depose witnesses that had already given declarations under oath stating that they had not created any of the alleged defamatory content posted by Plaintiff’s customers. Defendants argued that delay was pointless because Plaintiff already had the witnesses’ sworn statements, and there was no likelihood that depositions would find any evidence against those sworn declarations. Plaintiff also stated opposition because Defendants had given the Court notice that the Ninth Circuit’s decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.*, 489 F.3d 921 (9th Cir. 2007) (“*Roommates*”), the main authority cited by Plaintiff in opposition to the Motion for Summary Judgment, had been

depublished. Plaintiff's desire to retaliate is not a substantive reason to deny the motion, so Plaintiff has no substantive reason to oppose the requested supplementation of evidence.

As set out in the Motion for Summary Judgment, Defendants operate an interactive computer service and did not author the content of any alleged defamatory statements, so, pursuant to 47 U.S.C. § 230(c)(1), Defendants cannot be liable as publishers. Plaintiff Whitney admits it has not evidence that Defendants provided the defamatory content. The Court should allow supplementation of the Motion for Summary Judgment, and the Motion for Summary Judgment should be granted.

DATED January 28, 2008.

JABURG & WILK, P.C.

s/Maria Crimi Speth
Maria Crimi Speth, Esq.
Attorneys for Defendants

CERTIFICATE OF CONFERENCE PURSUANT TO LOCAL RULE 3.01(g)

I hereby certify that on the 28th day of January 2008, I caused my associate to communicate with opposing counsel requesting that opposing counsel stipulate to resolve the issues raised by this motion, but opposing counsel opposes allowing Defendants to supplement the Motion for Summary Judgment.

DATED January 28, 2008.

JABURG & WILK, P.C.

s/Maria Crimi Speth
Maria Crimi Speth, Esq.
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January 2008, 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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