

Maria Crimi Speth, #012574 (Admitted *Pro Hac Vice*)
JABURG & WILK, P.C.
3200 North Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 248-1000

Attorneys for Defendants

**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

**DEFENDANTS' MOTION IN LIMINE
REGARDING ALLEGED
DEFAMATORY STATEMENTS**

Defendants request that this Court enter an order *in limine* precluding evidence of any alleged defamatory statement that has not been properly disclosed. After more than three years of litigation, and repeated requests to do so, Plaintiff has never disclosed all of the specific alleged defamatory statements upon which its claim is based. Defendant can not be expected to defend itself against claims that have never been disclosed. Accordingly, Plaintiff should not be permitted to introduce evidence that any statement is defamatory if such statement has not been previously disclosed as defamatory. This Motion is supported by the following Memorandum of Law and by the Court's file in this case.

Memorandum of Points and Authorities

Rip-off Report is a website which is a public forum for consumers to post complaints about businesses. There are over 300,000 postings on Rip-off Report and forty-eight of those postings were filed about Whitney Information Network.

Fed.R.Civ.P. 26 provides that the parties are to identify in their initial disclosure statement each document the party expects to offer at trial. Plaintiff identified in its complaint certain "reports" appearing on Rip-off Report, in their entirety, as the defamatory statements. The exhibit, which was identified as Plaintiffs' Composite Exhibit "G" to Plaintiff's Complaint, consisted of 43 pages of content representing every posting in their entirety that appeared on Rip-off Report about Whitney as of the date of the Complaint.

On May 25, 2007, Defendants propounded interrogatories, including Interrogatory number one, which requested:

Identify each and every specific statement(s) contained on the ROR Sites which YOU contend is/are false and/or defamatory. For each statement, separately state:

- a. The exact wording of the statement; e.g. "Whitney Information Network, Inc. defrauds its customers on a regular basis."
- b. The location (preferably by Bates #) where the statement appears; e.g., "WHITNEY 0025"
- c. The name(s), if YOU know, of the person(s) who actually authored the statement; e.g., "John Smith". If not known, so state.

In response, on July 16, 2007, Plaintiff objected stating:

Objection, as this Interrogatory is overly broad and unduly burdensome as it requires individual reference to over two hundred pages of Defendants' website. Notwithstanding and without waiving said objection, WIN directs Defendants to Exhibit G of WIN's Complaint; Exhibit 2 to Defendants' Motion for Summary Judgment. WIN's position relates to the categories, created by Defendants, which include, but are not

limited to: False Television Advertisements and Corrupt Companies. WIN's position also includes the actual postings, of which have been edited by Defendants, including but not limited to, omission of certain information contained on the postings.

Once again, Plaintiff refused to identify what statements it alleges are defamatory other than identifying two category designations and referring to every posting on Rip-off Report that pertained to Whitney Information Network as of the date of the Interrogatory response.

On December 3, 2007, Defendants took the Rule 30(b)(6) deposition of Ronald Simon, who was designated by Whitney Information Network as the person within Whitney Information Network who is most knowledgeable regarding "the exact statements that Whitney Information Network, Inc. ("WIN") claims (in this lawsuit) to be false and defamatory."

When asked to identify the specific statements that Whitney Information Network claims are defamatory, he was unable or unwilling to do so.

Q: What do you contend is false?

A: The false statements on the web site have to do with the categories listed on the web site, which are completely false and defamatory, the headings that appear on the web site that are false and defamatory, and the content in some of the items on the web site.

Q: Okay. I'm asking you which items are false? I understand your position is that some categories are false and some headings are false and some content is false, but I'm asking you what are the false statements of fact that form the basis of your defamation claim in this case?

A: Well, as I said before, we're talking about the categories where you list us as con artists. We're not con artists, we're businessmen. Where you list corporate practices and so on. I've reviewed about eighty of these, I cannot recall all of your defamatory remarks, all of your false comments and so on. If you show me something specific I can comment on that.

Q: I'm going to ask you one more time, what statements do you contend are false?

A: Okay. The statements that we contend are false are the ones that we consider not to be true.

Defendants then provided Mr. Simon with a print out of the Rip-off Report postings that were attached to the Plaintiff's Complaint and requested that Mr. Simon highlight the specific statements that Whitney claims are defamation:

Q: Looking first at Exhibit G, which was attached to your complaint in this case, can you please tell me what statements in that document you contend are false statements of fact?

A: I'm going to continue on with what I said before. I'm going to say that the categories in some cases are false. Do you want to go to a specific one?

Q: I'm going to hand you a highlighter. Will you highlight everything that you claim is a false statement of fact in Exhibit G?

A: Okay.

MS. STERN: Take your time. Why don't we go off the record. That will probably take him some time and I can use the ladies room.

Mr. Simon highlighted the statements that Whitney claims are defamatory.¹ However, Mr. Simon was also shown an updated compilation of all postings on Rip-off Report as of the date of the deposition. He refused to highlight any additional statements, citing time constraints as the reason:

Q: Okay. The only thing that we have not done that I needed to do is, you know, the highlighting of Exhibit 4. Exhibit 4 is in many instances duplicative Exhibit 3, but there is some additional information in there. I think probably what makes sense is we take our lunch break and you go through it during the lunch break, and then take a couple of minutes after lunch to ask you about it, if necessary, because I don't need to go back over what we've gone over. But I do need to know if there are additional statements in there that you contend are false.

¹ Many of these statements are opinions and some are not even disparaging.

MS. STERN: Based on how long it took to go through the other exhibit, which was much smaller, that's probably going to take Ron a couple of hours. We have a deposition with Russ in fifteen minutes. I know Ron has other places to be this afternoon. He assumed as of 1:30 it was Russ's turn and he was done for the day.

MS. SPETH: It is duplicative. Everything in Exhibit 3 is in Exhibit 4. So he doesn't have to highlight again. But there is additional information in Exhibit 4.

MS. STERN: Additional information that he's going to have to read it to know it's duplicative.

MS. SPETH: I understand. And my position is I have a right to know what you claim to be false statements of fact in Exhibit 4. That's my position. I understand we have another deposition, I'm willing to put off the other deposition a little longer to finish this.

MS. STERN: This will take several hours though based on how long it took to do the other one. I know that Russ Whitney is also a very busy man, he planned on coming in at 1:30. I don't know that he'll be able to start a lot later. I don't know how long you anticipate taking with him.

MS. SPETH: The other thing we can do is take Russ's, and then when Russ is done we can finish up with Ron.

MS. STERN: Ron is not available this afternoon.

MS. SPETH: My position is that I've asked for this deposition, I've asked for this information. I clearly designated this as the number one most important topic, and I have a right to get the answer to the question.

MS. STERN: You set the deposition for three or four hours. You didn't have to schedule a second deposition at 1:30 if you thought you would need so much time. You're now saying you need longer than you anticipated, unfortunately we have scheduling issues.

MS. SPETH: I thought when I identified that as a topic I thought that the witness would come prepared to tell me what the false statements were, and instead what I got is show me what you have and I'll tell you. So I was not able to get any answers from the witness as to what you contend is a false statement without handing you a pile of documents which is everything that's ever been posted on my client's web site and saying, okay,

show me from that. So I had no way of knowing that he would be completely and utterly unprepared to answer – there is only six topics I was asking him about today. So the fact that he was not able to answer that question without going through the document that you identified in your interrogatory as the responsive document, you know, is not my issue. I'm happy to continue the deposition until this afternoon. I'm happy to continue it in any way that you want, but I'm not going to say, okay, you just don't have to answer that question.

MS. STERN: Well, I take issue with just about everything you just said, and I'm not going to go there because it really doesn't matter at this point in time. I suggest we go off the record right now because we are out of time and we can talk amongst ourselves to see if there is some way to accommodate you or not. I don't know that you're entitled to any accommodation at this point.

MS. SPETH: I don't think it's an --

MS. STERN: We'll talk about it and see what everybody's schedules are and whether we're willing to get Ron back here. Right now we have another deposition scheduled.

MS. SPETH: I think it's completely and utterly outrageous that you consider it an accommodation to let me know after discovery is over what statements you contend are false. I've asked it in interrogatory and I got a very broad response that wasn't completely responsive. I asked it today and haven't gotten a complete response. And you're accommodating me? I would make one other proposal, and that is if you guys don't want to do it today and you want to send me a highlighted version of that, I would be willing to do that with the understanding that if there is any new statements that are identified that weren't identified before, in other words, that weren't already identified in Exhibit 3, I would want to follow up with maybe a written interrogatory or something to follow up, it doesn't have to be another deposition. So you guys can talk amongst yourselves on how you want to handle that. One of those things needs to happen, otherwise what you're telling me is I simply don't get to know what you consider to be defamatory and false, and that's not acceptable and I don't think a judge would agree.

MS. STERN: What I am saying to you and what I was referring to you by accommodation, notwithstanding all of your self-serving statements, is that you scheduled this for an amount of time you thought you needed, you now appear to need more time. We have another deposition,

everybody else here is busy. You're talking about a CEO and president of a publicly traded company that have a lot of other things on their schedule. Ron anticipated he would be done by 1:30, and you're not done.

MS. SPETH: I'm done. I need an answer to that question, and you're telling me he needs three hours to answer a question. That's not my fault. And I made three proposals. Proposal number one is --

MS. STERN: I said we would talk about it and get back to you.

MS. SPETH: That's fine. I'm not ending the deposition, I'm continuing it until I have a response to this question.

(Thereupon, the luncheon recess was taken at 1:25 p.m. and the following proceedings were at 2:00 p.m.)

The parties agreed that Mr. Simon would take the exhibit with him and would return it to Defendants within two weeks with the alleged defamatory statements highlighted.

MS. STERN: We will agree that Ron will as one of the options we suggested review the documents on his own time and then send them in to you, and we'll reopen the deposition solely for the purpose of asking him about any of the highlights on Exhibit 4.

MS. SPETH: That's acceptable to me.

Following the deposition, Plaintiffs have never provided the additional highlights, despite follow-up requests that they do so.

Defendants are unable to adequately defend claims that they published defamatory statements without knowing which statements are contended to be defamatory. Plaintiffs have never disclosed the documents containing the alleged defamatory statements as is required by Rule 26 (except for producing every single posting appearing on Defendants' website). Further, Plaintiff has refused to respond to an interrogatory seeking identification of the alleged defamatory statements. Finally, Plaintiff refused to fully respond to the question during its deposition.

Pursuant to Rule 37(c)(1), Plaintiff should not be permitted at trial to offer evidence that any statement is defamatory that was not identified by Mr. Simon (via highlighting) as defamatory.

DATED: February 5, 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 5th day of February 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:

Steven Neil Lippman
Shawn L. Birken
Scott W. Rothstein
Rothstein Rosenfeld Adler
Suite 1650
401 E Las Olas Blvd
Ft Lauderdale, FL 33301
Attorneys for Plaintiff

Brian J. Stack
Stack, Fernandez, Anderson,
Harris & Wallace, P.A.
1200 Brickell Ave., Suite 950
Miami, FL 33131-3255
Attorneys for Defendant

s/Debra Gower