

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

Case No. 2:04-cv-47-FtM-29 SPC

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.

---

**JOINT PRETRIAL STIPULATION**

Plaintiff, WHITNEY INFORMATION NETWORK, INC. (“WIN”), and Defendants, XCENTRIC VENTURES, LLC. (“XCENTRIC”) and ED MAGEDSON (“MAGEDSON”), by and through their undersigned counsel, pursuant to Local Rule 3.06, M.D.Fla., file this, their Joint Pretrial Stipulation and state as follows:

**I. BASIS OF JURISDICTION**

Jurisdiction is based on diversity of citizenship pursuant to 28 U.S.C. § 1332. The amount in controversy is greater than \$75,000.00 exclusive of interest, attorneys’ fees and costs. Plaintiff’s position is that this Court has personal jurisdiction over all Defendants as they intentionally published defamatory material concerning WIN in Florida on their Internet website. Plaintiff’s position is that Defendants’ use of such defamatory material is for interstate commercial activity and such use is a substantial aspect of Defendants’ conduct giving rise to WIN’s claims.

Defendants' position is that the Court does not have personal jurisdiction over Defendants, who are residents of Arizona and operate their business in Arizona. The 11<sup>th</sup> Circuit found personal jurisdiction only because of Plaintiff's unfounded allegation in its Amended Complaint that Defendants committed a defamation tort against Florida residents. Plaintiff now admits it had no basis in evidence to support the allegation.

## **II. CONCISE STATEMENT OF NATURE OF ACTION**

This is a claim for defamation brought by WIN against Defendants. Plaintiff claims that Defendants intentionally and/or recklessly published defamatory information about WIN, a Florida corporation and Florida citizen, and published same via the Internet resulting in significant injury and harm to WIN and its reputation.

## **III. GENERAL STATEMENT OF EACH PARTY'S CASE**

### **A. Plaintiff's Case**

WIN provides post-secondary educational and training products and services in the areas of real estate investing, business development, financial investment and asset protection to students world-wide. Xcentric operates a website called the "Rip-off Report." Ed Magedson does not own Xcentric, but does run the "Rip-off Report" website and directs and controls Xcentric's and BBB's activities.

In order to post a report on the "Rip-off Report" website one needs to follow a number of procedures including "Categorize your report by selecting from our list of categories." In order to do so, a number of choices are provided from which a selection must be made. Xcentric chooses which categories are included for selection. Among the categories for selection are "con artists", "corrupt companies" and "false TV advertisements", which categories were used on the postings at issue regarding WIN.

The “Rip-Off Report” solicits those who believe they are the “Victim of a consumer Rip-off” who “Want justice”. People are encouraged to file reports; they are told that “Filing a Rip-Off Report™ is important because you are helping us to help you, and others like you, achieve justice. We are able to accomplish this by working with the proper authorities for prosecution, and working with lawyers by using your Report to help organize lawsuits” and “The more Reports filed on a Company or individual, the more likely it is that the authorities and attorneys will want to take action.” To further entice people to post reports they are told that “Rip-Off Report™ works regularly with most TV News magazines & Networks and their affiliates, NBC, CBS, ABC, Fox News and local and National newspapers including The New York Times the Wall Street Journal to Auto Motive News” such that “Reporting your experiences on Rip-off Report is the next best thing to getting your story on TV or in a newspaper.” Facilitating a connection between the people positing reports on the “Rip-off Report” website and the media is an inducement to people to post reports on the “Rip-off Report” website. People are encouraged to “USE YOUR REPORT TO GET WHAT IS COMING TO YOU” by extorting things from the reported entity (“Faxing your Rip-off Report™ to the Company or Individual you have just reported can serve as a very valuable negotiating tool. Include in your negotiation that you have the ability to UPDATE your Report and reflect their good business practices by explaining that their eagerness to satisfy the complaint and make things right will be seen by the entire world. Also, explain that failure to respond/rectify the situation will also be seen.”). Xcentric encourages such reports even though it knows that people can post a report with derogatory comments that are totally false for spiteful purposes.

Not only do the defendants solicit reports, they take an active role in shaping the content of the postings on the “Rip-off Report” website. Under a heading “What makes a good Rip-off Report?” they provide “guidance on what [consumers] should think about in preparing their Rip-Off Reports”, including guidance on preparing a title such as “Be creative when using the example

words. It will make your report more interesting.” The home page of the “Rip-off Report” website contains a “front page” section which contains a picture and description of the “Top Rip-off Reports”, “Top Rip-off Links” and “Featured Rip-off Reports.” Not only does Xcentric decide which submissions are included in the “Top Rip-off Reports”, “Top Rip-off Links” and “Featured Rip-off Reports”, under a heading “How can my story be featured on the Home page?” they provide “guidance to a person who wants to place a Rip-Off Report as to how his might be deemed worthy of being in the top Rip-off Reports or featured Rip-Off Reports....”

Defendants sell a “Revenge Guide” on the “Rip-off Report” website. Mr. Magedson prepared this “Revenge Guide.” The “Revenge Guide” provides that “YOUR FIRST STEP TO REVENGE. First go to RIP-OFF Report to file your report and begin your Rip-off Revenge.”

Advertising is also sold on the “Rip-off Report” website. Xcentric acknowledges that the more hits it receives on its “Rip-off Report” website the greater the likelihood it can sell advertising and the greater amount it could sell that advertising for. In addition, donations are solicited on the “Rip-off Report” website and, likewise, the more hits the website receives the greater the likelihood it will obtain more and larger donations. The “Rip-off Report” website states that “TOGETHER, WE ARE A CONSUMER-REPORTING NEWS AGENCY, BY CONSUMERS, FOR CONSUMERS” and that “In response to reports placed on the website, we research abuses and help individuals defend their rights. Since our inception, we have helped consumers collect well over a million dollars to date ....”

One can avoid having reports posted about them on the “Rip-off Report” website by paying defendants a fee through participation in what is called the corporate advocacy program. For this fee, defendants tell those people who might submit a report that “these guys are pretty good. They’ll address your thing. Somebody will contact you in X number of days.” Defendants “try to calm them down.” The corporate advocacy program member then has an opportunity to deal with

the person submitting the report and if they can satisfy that person the report is never posted on the “Rip-off Report” website. Even if the person submitting the report is not satisfied, Xcentric might still decide not to post his report on the “Rip-off Report” website if it determines that the corporate advocacy program member’s response is acceptable. This ability to prevent the positing of submitted reports is only available to those who pay the fee to belong to the corporate advocacy program.

While people are encouraged to say whatever they want in reports posted on the “Rip-off Report” website, the people about whom a report is posted are constricted in what they are allowed to do in rebuttal. They are not allowed to make “trivial comments”, whatever that means; Xcentric decides if a rebuttal contains a “trivial comment” in which event it may not get posted on the “Rip-off Report” website. Mr. Magedson concedes that this standard is inconsistently enforced.

The “Rip-off Report” website contains numerous stories depicting WIN in a negative light and defaming its business practices. As consumers search for WIN’s products and services on the Internet they are unwittingly directed to the “Rip-off Report” website where they are exposed to the false and defamatory statements about WIN.

## **B. Defendants’ Case**

Plaintiff can not prove the elements of defamation. Plaintiff must prove that (1) the Defendants were responsible in whole or in part for creating and publishing a false and defamatory statement about Plaintiff; (2) the statement was made or published to a third person; (3) the Defendants knew that the statement or statements were false, or acted in reckless disregard as to whether the statement was true or false; and (4) the statement or statements caused the Plaintiff to suffer damage. Plaintiff has the burden of establishing element 3 (Defendants’ intent) by clear and convincing evidence.

The Plaintiff has no proof of any of the three elements of defamation. As to the first element, Plaintiff can not prove that Defendants authored the postings at issue, which it must do in order to satisfy that element. Under the law, the provider or user of an interactive website cannot be regarded as the publisher or speaker of any statement posted on the site by another person unless the evidence shows that the Defendant actually created the statement, in whole or in part.

Defendant did provide the authors of the reports a drop down list of categories to choose from. There are over 500 categories listed, and the categories were created based upon suggestions or requests from readers. The categories include benign categories such as home based business, financial services, and multi-level marketing. The categories also include more colorful descriptions such as corrupt companies and false television advertisements. Plaintiff's position is that even though the consumer chooses the category in which to place his or her report, the fact that there is a drop down list of categories makes Defendants an information content provider of those categories. This argument has been squarely rejected by the Courts. *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 2007 WL 2949002 (D.Ariz. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9<sup>th</sup> Cir. 2003) (holding dating website entitled to CDA immunity because, "Matchmaker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph. Matchmaker cannot be considered an 'information content provider' under the statute because no profile has any content until a user actively creates it.")

Plaintiff further proposes to offer evidence that Defendants solicit posting on the website, and, thus are responsible for the creation of the content at issue. There is zero support for this proposed exception, which, if adopted, would swallow the rule. All website operators that permit postings also encourage postings. The encouragement of a posting can never equate to the authoring of the posting.

Plaintiff similarly proposes to offer evidence that Defendants give advice on how to write the report. Plaintiff points to a statement that it alleges was on the website that told the poster to be creative in writing the title of the report in order to make the report more interesting. Here again, encouraging someone to make a report interesting can not rise to the level of authoring the posting.

Plaintiff also points to website policies about decisions to not post certain reports or rebuttals. Defendants do engage in editing decisions, such as deleting threats and profanity and not posting certain submitted content. However, editing of content or making decisions whether to publish, withdraw, postpone, or alter content, does not make Defendants a publisher or speaker of any statements about Plaintiff unless the evidence shows that the statements were actually written by Defendants and not by another person. *Green v. America Online*, 318 F.3d 465, 470 (3rd Cir. 2003).

Even apart from the Communications Decency Act, Plaintiff can not prove defamation. Plaintiff is a public figure, and the law requires the Plaintiff to show actual malice to prove defamation. When the Plaintiff in a defamation case is famous or otherwise well-known, the law will classify the Plaintiff as a “public figure” either generally or for the limited purpose of the case at issue. First, there must be a “public controversy” of some kind. A public controversy can be something newsworthy, but it does not have to be. Public controversies included any matter in which the public has some level of interest in knowing the outcome. Consumer reporting on complaints about businesses involves a “public controversy” as a matter of law. *Mile Marker, Inc. v. Petersen Publishing, L.L.C.*, 811 So.2d 841, 846 (Fl.App. 2002) (citing *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3rd Cir. 1980) (recognizing consumer reporting involves inherent matters of particular interest to the public in that it enables citizens to make better informed purchasing decisions)).

Another factor to consider is the Plaintiff's use of and access to the media. Plaintiff uses the media to attract attention to itself in ways other than merely defending itself or discussing this lawsuit. For instance, Plaintiff regularly issues press releases. Such conduct makes Plaintiff a public figure.

Plaintiff can not show by clear and convincing evidence that Defendants knew when the statements were made that they were false, or that they had serious doubts then as to their truth. There are over 300,000 postings on Rip-off Report and Defendants do not and can not investigate the truth of the postings that are made. It is not unusual for as many as 400 postings to be made in one day.

Indeed, there is overwhelming evidence that the statements at issue are, indeed true. A statement is substantially true if its substance or gist conveys essentially the same meaning that the truth would have conveyed. WIN is currently the subject of an SEC investigation and a class action lawsuit. Indeed, WIN's own attorneys, hired as a Special Committee, found that, "among other things, before the start of the government investigations, the Company's marketing function - including advertising for Company products, solicitation of customers, presentation of live seminars, telemarketing, coaching and mentoring - was characterized by inadequate controls, inadequate training and a failure to devote adequate resources to compliance. The Special Committee also criticized a variety of practices, including, among others, use of testimonials obtained for one brand in support of another, failure to disclose affiliations between endorsers and the Company, failure to adequately disclose investment risks, and misstatements by certain live speakers." Plaintiff has admitted to internal management and control problems during the relevant time period. Plaintiff has filed many other public documents with agencies such as the SEC that reveal negative information about the business. Plaintiff cannot recover for defamation when its "hands are not clean;" i.e., it would be inequitable for it to recover because the alleged false



statements describe conduct by the Plaintiff that is substantially similar to its actual unscrupulous conduct.

Plaintiff has not been damaged by any statements published on Defendants' interactive computer service. Damages resulting from the dissemination of truthful information that rationally includes the withdrawal of patronage from the person whom the information concerns must be partitioned from alleged defamation, and if reputation has already been damaged by truthful information then Plaintiff has no remedy against subsequent alleged defamation. Truthful negative information regarding Plaintiff abounds, and any withdrawal of patronage resulted from that. Negative reports and opinions about Plaintiffs abound on the internet, in the news media.

Plaintiff's business organization has been in turmoil due to key employees leaving the company as a result of scandalous allegations, government investigations, and poor management. Russ Whitney himself was forced to step down from his namesake company by Plaintiff's Board of Directors. Nothing posted on Rip-off Report caused damage to Plaintiff. It is more likely that Plaintiff's own business practices and tumultuous conditions, including self-inflicted and well-publicized scandals, certainly could have damaged Plaintiff.

#### **IV. EXHIBIT LISTS**

See schedules attached hereto as Schedules A (Plaintiff's exhibit list) and B (Defendants' exhibit list).

#### **V. WITNESS LISTS**

See schedules attached hereto as Schedules C (Plaintiff's witness list) and D (Defendants' witness list).

Defendant objects to the generic designation of witnesses provided by Plaintiff. At this point in time, Plaintiff should be able to specifically identify its witnesses, including those in the

provided categories of “WIN Representative with the most knowledge regarding its claim of Defamation” and “WIN Representative with the most knowledge regarding its claim of Damages”.

**VI. EXPERT WITNESSES**

No independent experts

**VII. DAMAGES**

In a defamation action, such as this, WIN shall be seeking general damages, which are those naturally, proximately and necessarily result from the publication of the defamation. These damages are allowable whenever the immediate result is to impair the plaintiff’s reputation, although no actual pecuniary loss is demonstrated. Bovenhausen v. Cassat Avenue Mobile Homes, Inc., 344 So.2d 279, 281 (Fla. 1st DCA 1977). The amount of the general damages are in the purview of the jury.

Defendants dispute that Plaintiff incurred any damages, and asserts that Plaintiff’s reputation was already low and lowered further due to its own mismanagement, wrongdoing, and negative reports from sources other than Defendants.

**VIII. DEPOSITIONS TO BE USED AT TRIAL**

A. Ed Magedson (Plaintiffs did not make specific designations)

Defendants object to wholesale admission of Ed Magedson’s deposition, which contains testimony that is not relevant to the claims at issue, cumulative, and prejudicial in certain parts.

B. Ed Magedson as designated by Defendants below

Offered in support of the Defense

PAGE/LINE

16/23-17/1
24/15-25/7

27/12 – 29/9
29/16-30/23
31/5-14
32/25 – 33/3
46/17–23
58/7–16
68/21-23
72/4 – 13
81/2–18
83/7 – 84/3
139/4 – 141/21
141/22 – 143/13
145/20 – 146/7
147/16 – 148/4
182/5–19
186/1 – 187/7
187/15 – 188/22
245/22 – 246/11
258/19 – 259-3
259/10 – 260/10
260/21 – 261/1
261/8–20
266/9-21

Offered only in rebuttal if objectionable irrelevant testimony from the Deposition is admitted during Plaintiff's case in chief

PAGE/LINE

68/4-16
155/4 – 156/6
158/21 – 162/21

C. Ben Smith, total deposition

**IX. CONCISE STATEMENT OF UNDISPUTED FACTS**

A. WIN provides post-secondary educational and training products and services in the areas of real estate investing, business development, financial investment and asset protection real estate to students world-wide.

B. Xcentric operates a website called the “Rip-off Report.” (also “ROR Site”).

C. Ed Magedson does not own the “Rip-off Report” website. He is the founder and managing member of Xcentric.

D. The “Rip-off Report” website contains postings by “consumers” about their experiences.

E. The home page of the “Rip-Off Report” website states that its purpose is “to file & document complaints about Companies or Individuals who ripoff consumers.”

F. The “Rip-off Report” website solicits those who believe they are the “Victim of a consumer Rip-off” who “Want justice”.

G. People are encouraged to file reports; they are told that “Filing a Rip-Off Report™ is important because you are helping us to help you, and others like you, achieve justice. We are able to accomplish this by working with the proper authorities for prosecution, and working with lawyers by using your Report to help organize lawsuits” and “The more Reports filed on a

Company or individual, the more likely it is that the authorities and attorneys will want to take action.”

H. Xcentric has on occasions assembled materials filed on its website and submitted them to a governmental agency who might be interested.

I. Xcentric has on occasions provided information from reports posted on the “Rip-off Report” website to reporters.

J. The “Rip-off Report” website states that “We are anxious and willing to join forces with victims and attorneys to stand up for the rights of consumers and help them get justice. E-mail us. Both victims and attorneys should send their e-mails to: [ClassAction@ripoffreport.com](mailto:ClassAction@ripoffreport.com)” and “We get requests every week for class action lawsuits; bringing victims together with lawyers willing to sue the company after reading your filed Rip-off Report™.”

K. The email address [ClassAction@ripoffreport.com](mailto:ClassAction@ripoffreport.com) goes to Xcentric’s office.

L. Xcentric does not investigate the veracity or truthfulness of the person posting a report on the “Rip-off Report” website or the actual posting itself.

M. Xcentric permits and encourages businesses to post rebuttals addressing the content of reports posted about them

N. When a user wants to post a new report, they must first sign up for an account with Rip-Off Report. This process is absolutely free, and Xcentric asks the user to provide truthful and accurate information, but it is possible for individuals to sign up for an account using forged or fraudulent names, phone numbers, etc. Given the enormous volume of traffic to the website, like any other popular site with such a high level of traffic, other than a valid email address which is required to obtain an account, Xcentric cannot and does not verify the authenticity of the personal information provided by each user.

O. Any time a user wishes to write a report or rebuttal, they must sign in with their username and password and submit their report using an online form. When they do so, Xcentric's server logs the personal account information provided by the user (which is only as accurate as the information originally provided by the user). The server also logs the internet protocol or "IP" address of the user which is a unique number comprised of four sets of one to three digits. When any person logs onto the Internet, their computer is automatically assigned a unique IP address by their Internet Service Provider ("ISP") which identifies that computer.

P. When the user is done writing their report, they click a button to post their story to the ROR Sites. There is no charge for submitting a report. As part of the process of submitting their report, the user creates a title or heading for the report.

**X. CONCISE STATEMENT OF UNDISPUTED LEGAL PRINCIPLES**

A. "Under Florida law, the elements of a defamation claim include 'a false and defamatory statement concerning another.'" Johnson v. Clark, 484 F.Supp. 2d 1242, 1247 (M.D.Fla. 2007); Thomas v. Jacksonville Tel., Inc., 699 So. 2d 800, 803 (Fla. 1st DCA 1997).

B. The Communications Decency Act ("CDA") states, in pertinent part, that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

C. The CDA "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." Zeran v. America Online, Inc., 129 F.3d 327, 330 (4<sup>th</sup> Cir. 1997), *cert. denied*, 524 U.S. 937 (1998). The immunity applies to a defendant who is the 'provider or user of an interactive computer service' and is being sued 'as the publisher or speaker of any information provided by' someone else. ; 47 U.S.C. § 230(c).

## **XI. CONCISE STATEMENT OF FACTUAL ISSUES THAT REMAIN**

- A. Whether Defendants edit the reports listed on “Rip-off Report”.
- B. Whether Ed Magedson runs the “Rip-off Report” website and directs and controls Xcentric’s activities.
- C. Whether in order to post a report on the “Rip-off Report” website one needs to follow a number of procedures including “Categorize your report by selecting from our list of categories.” A number of choices are provided from which a selection must be made. Xcentric chooses which categories are included for selection. Among the categories for selection are “con artists”, “corrupt companies” and “false TV advertisements”, which categories were used on the postings at issue regarding WIN.
- D. Whether the “Rip-off Report” website contains stories depicting WIN in a negative light and defaming its business practices.
- E. Whether as consumers search for WIN’s products and services on the Internet they are directed to the “Rip-off Report” website.
- F. Whether to further entice people to post reports they are told that “Rip-Off Report™ works regularly with most TV News magazines & Networks and their affiliates, NBC, CBS, ABC, Fox News and local and National newspapers including The New York Times the Wall Street Journal to Auto Motive News” such that “Reporting your experiences on Rip-off Report is the next best thing to getting your story on TV or in a newspaper.”
- G. Whether facilitating a connection between the people positing reports on the “Rip-off Report” website and the media is an inducement to people to post reports on the “Rip-off Report” website.
- H. Whether Xcentric solicited the disclosure of privileged information on the “Rip-off Report” website (“If you are an employee or ex-employee with privileged information about the

company or individual reported, and you can provide ‘insider information’, please click on the REBUTTAL Box at the end of the specific Rip-off Report™ you wish to give information on. This sort of information is often very helpful to an investigation and always needed.”); which solicitation it now realizes is inappropriate.

I. Whether people are encouraged to “USE YOUR REPORT TO GET WHAT IS COMING TO YOU” by demanding things from the reported entity (“Faxing your Rip-off Report™ to the Company or Individual you have just reported can serve as a very valuable negotiating tool. Include in your negotiation that you have the ability to UPDATE your Report and reflect their good business practices by explaining that their eagerness to satisfy the complaint and make things right will be seen by the entire world. Also, explain that failure to respond/rectify the situation will also be seen.”)

J. Whether Xcentric encourages such reports even though it knows that people can post a report with derogatory comments that are totally false for spiteful purposes. The solicitation closes with “Don’t let them get away with it! File your Report Now!”

K. Whether Xcentric provides “guidance on what [consumers] should think about in preparing their Rip-Off Reports” including guidance on preparing a title such as “Be creative when using the example words. It will make your report more interesting.”

L. Whether the home page of the “Rip-off Report” website contains a “front page” section which contains a picture and description of the “Top Rip-off Reports”, “Top Rip-off Links” and “Featured Rip-off Reports” that Xcentric decides which submissions are included in the “Top Rip-off Reports”, “Top Rip-off Links” and “Featured Rip-off Reports”, under a heading “How can my story be featured on the Home page?” it provides “guidance to a person who wants to place a Rip-Off Report as to how his might be deemed worthy of being in the top Rip-off Reports or featured Rip-Off Reports .....



M. Whether Defendants sell a “Revenge Guide” on the “Rip-off Report” website. Ed Magedson prepared this “Revenge Guide.” This “Revenge Guide” provides that “YOUR FIRST STEP TO REVENGE. First go to RIP-OFF Report to file your report and begin your Rip-off Revenge.”

N. Whether advertising is also sold on the “Rip-off Report” website. Xcentric acknowledges that the more hits it receives on its “Rip-off Report” website the greater the likelihood it can sell advertising and the greater amount it could sell that advertising for.

O. Whether donations are solicited on the “Rip-off Report” website and, likewise, the more hits the website receives the greater the likelihood it will obtain more and larger donations. Donations are solicited to fund investigation of consumer complaints and to assist consumers. The “Rip-off Report” website states that “TOGETHER, WE ARE A CONSUMER-REPORTING NEWS AGENCY, BY CONSUMERS, FOR CONSUMERS” and that “In response to reports placed on the website, we research abuses and help individuals defend their rights. Since our inception, we have helped consumers collect well over a million dollars to date ....”

P. Whether one can avoid having reports posted about them on the “Rip-off Report” website by paying defendants a fee through participation in what is called the corporate advocacy program. For this fee, defendants tell those people who might submit a report that “these guys are pretty good. They’ll address your thing. Somebody will contact you in X number of days.” The corporate advocacy program member then has an opportunity to deal with the person submitting the report and if they can satisfy that person the report is never posted on the “Rip-off Report” website. Even if the person submitting the report is not satisfied, Xcentric might still decide not to post his report on the “Rip-off Report” website if it determines that the corporate advocacy program member’s response is acceptable. This ability to prevent the posting of submitted reports is only available to those who pay the fee to belong to the corporate advocacy program.

Q. Whether a corporate advocacy program member may retain defendants to investigate and publish their findings regarding the truthfulness of complaints about that member.

R. Whether the people about whom a report is posted are constricted in what they are allowed to do in rebuttal. They are not allowed to make “trivial comments”; Xcentric decides if a rebuttal contains a “trivial comment” in which event it may not get posted on the “Rip-off Report” website. Ed Magedson concedes that this standard is inconsistently enforced.

S. Whether people considering a rebuttal are told there is a fee to submit multiple rebuttals.

T. Whether if Xcentric does not like a rebuttal it is not posted on the “Rip-off Report” website.

U. Xcentric operates a website called the “Rip-off Report.” (also “ROR Site”). This website has been in operation since 1998 and currently receives millions of hits every week. Since its inception, the site has accumulated almost 8.5 billion page views (meaning pages viewed by a user during a visit to the site). As of February 1, 2008, the ROR Site contains more than 300,000 individual reports. Including rebuttals, the site contains more than one million unique entries, and receives approximately 500–800 new reports/rebuttals every day.

V. Once a story is submitted, the story is held until it can be briefly reviewed by Xcentric’s staff of content monitors before it is posted online for other users to view. When a report is reviewed, it is only to confirm that the report does not contain blatantly illegal, inappropriate, or offensive material (i.e., images of pornography, social security numbers, credit card numbers, or other inappropriate material). Any report that contains such material may be deleted or redacted at the discretion of Xcentric staff. Otherwise, reports posted by users of the ROR Sites are not checked for accuracy. As a matter of policy, Xcentric staff does not add to, or rewrite, any of the reports posted by users.

W. Xcentric agents do not choose which stories to post. Xcentric agents are instructed to never add content to a report.

X. Xcentric agents did not create, author, or add any content to any of the reports at issue in this case, nor change or edit the statements made by third party consumers, nor author or modify any titles to the statements that are the subject of this lawsuit by adding words to the content of the titles.

Y. Magedson does not personally review all of the postings that are made on Rip-off Report before they are posted.

Z. Magedson did not personally review any postings that were made pertaining to Whitney before they were posted.

AA. Once a report or rebuttal is submitted to the ROR Site, only persons with administrative access have the ability to make any changes to that report or rebuttal.

BB. Since 1993, only the following people, and no one else, have had administrative access to the reports and rebuttals (meaning the ability to make edits to the reports): Ed Magedson, Amy Thompson, G. Young, Heather Norton, Kim Jordan, Jackie Wynne, Kim Smith, Lynda Craven, Mary Jo Baker, C. Bowen, Paulette Craven, and Ben Smith.

CC. None of the relevant reports and/or rebuttals were authored or posted by any of Xcentric's editorial staff including but not limited to Ed Magedson, Amy Thompson, G. Young, Heather Norton, Kim Jordan, Jackie Wynne, Kim Smith, Lynda Craven, Mary Jo Baker, C. Bowen, Paulette Craven, and Ben Smith. It would be a clear violation of Xcentric's rules for any agent of Xcentric to author or post a report or rebuttal, or to add any content or words to any report or any report title, without Magedson's express permission, which he did not give regarding any report or rebuttal regarding WIN. All persons who have had administrative access since the

beginning of 1993 have supplied an affidavit which confirms that they did not author or add any content to any of these statements.

DD. All of the reports and rebuttals at issue were written by independent third-party users of the ROR Sites.

EE. Although the ROR Site generally encourages people to write complaints when they have been victimized, Xcentric never encouraged anyone to submit false complaints. In fact, before a user is allowed to submit any report or rebuttal to the ROR Sites, they are required to first agree to a statement that includes the representation that “By posting this report/rebuttal, I attest this report is valid.”

FF. Because each user verifies and attests that their reports are valid, Defendants have a reasonable belief that the reports are truthful.

GG. Plaintiff WIN is a public figure for the purposes of the controversy at issue in this lawsuit.

HH. Plaintiff WIN is famous regarding the business that is the subject of this lawsuit.

II. Plaintiff WIN conducts extensive mass-media advertising of the business lines and products that are the subject matter of this lawsuit, including numerous television commercials and public seminars promoting those business lines.

JJ. WIN has recently been under government investigation including investigations by the S.E.C. and a Grand Jury investigation conducted by the United States Attorney for the Eastern District of Virginia (the “Government Investigations.”).

KK. Before the Government Investigations, WIN’s marketing function - including advertising for the Company’s products, solicitation of customers, presentation of live seminars, telemarketing, coaching and mentoring – was characterized by inadequate controls, inadequate training and a failure to devote adequate resources to compliance. WIN’s Board of Directors

appointed a Special Committee and hired outside counsel to investigate the same issues that were subjects of the Government Investigations. WIN's own Special Committee criticized WIN for a variety of practices, including, among others, use of testimonials obtained for one brand in support of another, failure to disclose affiliations between endorsers and the Company, failure to adequately disclose investment risks, and misstatements by certain live speakers. This information was disclosed to the public in a WIN press release that was published to the world through the internet, and covered in national business media.

LL. WIN's Special Committee found no evidence that WIN's executive management knew about the particular statements on which the government investigation was focused. The Special Committee did recommend management changes, including that Mr. Russ Whitney should step down as CEO, and Co-President Ron Simons should step down from his positions as a company officer and director. This information was disclosed to the public in a WIN press release that was published to the world through the internet, and covered in national business media.

MM. WIN has been widely and consistently criticized for practices that offended or put off consumers, in a number of public forums including internet websites other than the ROR Sites, for all periods of time relevant to this litigation. In fact, WIN, its affiliate companies, or its founder Russ Whitney, have sued several parties in several different lawsuits, each alleging that the defendant's public criticism damaged WIN.

There is negative information about WIN in many of its own public filings of required public disclosures, sufficient to reduce WIN's business reputation.

NN. The statements at issue in this case alleged to be defamatory are the highlighted statements in the exhibit designated Defendants' Exhibit 6.

OO. While it is possible for a user to provide forged or fake personal information such as a name, it is very difficult, though not impossible, to forge an IP address.

PP. This website has been in operation since 1998 and currently receives millions of hits every week. Since its inception, the site has accumulated almost 8.5 billion page views (meaning pages viewed by a user during a visit to the site). As of February 1, 2008, the ROR Site contains more than 300,000 individual reports. Including rebuttals, the site contains more than one million unique entries, and receives approximately 500–800 new reports/rebuttals every day.

## **XII. CONCISE STATEMENT OF LEGAL ISSUES THAT REMAIN**

- A. Whether Xcentric Ventures is afforded immunity under the CDA.
- B. Whether Magedson is afforded immunity under the CDA.
- C. Whether Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921 (9th Cir. 2007) is an un-citable, de-published case and is not precedent or authority.
- D. Whether “Magedson does not qualify for immunity under the CDA because he is neither a provider nor a user of an interactive computer service.” MCW, Inc. v. Badbusinessbureau.com, L.L.C., 2004 WL 833595 at \*9 (N.D. Tex. 2004); 47 U.S.C. § 230.
- E. Whether MCW, Inc. v. Badbusinessbureau.com, L.L.C., 2004 WL 833595 at \*9 (N.D. Tex. 2004) was a district court decision on a 12(b)(6) motion and has no precedential value because it assumed that the allegations of the complaint were true, so it is inappropriate to cite as precedent for any fact.
- F. Whether the following quotation is not factual precedent: CDA “immunity is not so broad as to extend to an interactive computer service that goes beyond the traditional publisher’s role and takes an active role in creating or developing the content at issue.” MCW, 2004 WL 833595 at \*8. “In determining whether the defendants qualify as information content providers, the critical issue is whether they are ‘responsible, in whole or in part, for the creation or development of [any disputed] information.’” Id. at \*9; 47 U.S.C. § 230(f)(3).

G. Whether the following quotation is not factual precedent: The creation of categories from which a user of the “Rip-off Report” website must choose, in and of themselves, constitutes, as a matter of law, the creation or development of the content at issue and takes defendants outside the protection of CDA immunity. MCW, 2004 WL 833595 at \* 10 & n 10. The MCW court found that defendants created “report titles and various headings” “such as ‘Con Artist,’ ‘Scam,’ and ‘Ripoff,’” and organize the reports under headings such as ‘Con Artists’ and ‘Corrupt Companies’”, Id., just like the foregoing reveals. Based upon this the MCW court held that “[t]he titles and headings are clearly part of the web page content. Accordingly, the defendants are information content providers with respect to the website postings and thus are not immune from MCW’s claims.” Id. at \*9.

H. Whether the following quotation is not factual precedent: “The defendants cannot disclaim responsibility for disparaging material that they actively solicit. Furthermore, actively encouraging and instructing a consumer to gather specific detailed information is an activity that goes substantially beyond the traditional publisher’s editorial role... They are participating in the process of developing information.” MCW, 2004 WL 833595 at \* 10.

I. Whether a statement is generally defamatory where it injures a person in his trade or in his profession. Scholz v. RDV Sports, Inc., 710 So. 2d 618, 625 (Fla. 5th DCA 1998).

J. Whether the following is the correct legal standard -- Determining whether a statement is defamatory requires the finder of fact to decide whether, “from the language of the comment, it does not seem unreasonable to infer that persons hearing the same and possessed of a common mind might have taken it to mean that the plaintiff was a person with whom commercial relations were undesirable.” Id. (quoting Wolfson v. Kirk, 273 So. 2d 774, 778 (Fla. 4th DCA 1973)).

K. Whether, in this case, decisions whether to publish, withdraw, postpone, alter content, or minor editing of content do not make Defendant liable as a publisher or speaker of any statement about the Plaintiff. See, e.g. Green v. America Online, 318 F.3d 465, 470 (3<sup>rd</sup> Cir. 2003).

L. Whether Defendant is immune from liability pursuant to the CDA because providing titles, editorial content, and categories for third parties to choose from does not make Defendants information content providers. See, e.g. Global Royalties, Ltd. v. Xcentric Ventures, LLC, 2007 WL 2949002 (D.Ariz. 2007) citing Hy Cite Corp. v. Badbusinessbureau.com, 418 F.Supp.2d 1142 (D.Ariz 2005); Batzel v. Smith, 333 F.3d 1018, (9<sup>th</sup> Cir. 2003).

M. Whether Defendant is immune from liability pursuant to the CDA because soliciting anonymous posting or favoring certain types of postings does not make Defendants information content providers. See, e.g. Donato v. Moldow, 374 N.J.Super. 475, 865 A2d 711 (N.J.Super.A.D. 2005) citing Batzel v. Smith, 333 F.3d 1018, (9<sup>th</sup> Cir. 2003); Zeran v. America Online, Inc. 129 F.3d 327, 334 (4<sup>th</sup> Cir. 1997), cert. Denied, 524 U.S. 937, 118 S.Ct. 2341, 141 L.Ed. 2d 712 (1998).

N. Whether Plaintiff is a public figure, in which case Defendants cannot be liable for defamation without clear and convincing proof that, at the time statements were made, Defendants knew the statements were false or had serious doubts as to their truth. (Florida Standard Jury Instruction MI 4.1(c))

O. Whether any false statements posted on Defendants' website (if any) were defamatory, whether it tended to so harm the reputation of Plaintiff as to lower him in the estimation of the community or to deter a third persons from associating or dealing with him. Restatement (Second) of Torts § 559; Byrd v. Hustler Magazine, 433 So.2d 593, 595 (Fla. 4<sup>th</sup> DCA 1983)); Florida Standard Jury Instruction MI 4.3(a)



P. Whether the statements claimed to be defamatory were statements of fact, or opinion not provably untrue, or such expressions as would not be reasonably interpreted as asserting actual facts rather than imaginative expression, exaggeration, jokes, rhetorical hyperbole, etc. such as the terms “rip-off, scandal, snake-oil job” etc. Colodny v. Inversion, Yoakum, Papiano & Hatch, 936 F.Supp. 917 (M.D.Fla. 1996) (reference to a book on Watergate as a “fraud” held non-actionable opinion); Phantom Touring, Inc. v. Affiliated Publ’ns, 953 F.2d 724 (1<sup>st</sup> Cir. 1992) (terms “rip-off, a fraud, a scandal, a snake-oil job” held non-actionable statements of opinion); McCabe v. Rattiner, 814 F.2d 839, 842 (1<sup>st</sup> Cir. 1987) (“The lack of precision [in the meaning of the word ‘scam’] makes the assertion ‘X is a scam’ incapable of being proven true or false.”) (emphasis added); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 108 S.Ct. 876, 879, 99 L.Ed.2d 41 (1988); Horsley v. Rivera, 292 F.3d 695 (11<sup>th</sup> Cir. 2002)

Q. Whether statements alleged to be defamatory can actually defame a corporation by relating to the corporations business operations, financial condition, or quality of goods and services rather than statements insult or even defame individual employees that are not actionable by the corporation. *Cont’l Nut Co. v. Robert L. Berner Co.*, 354 F.2d 395, 397 (7<sup>th</sup> Cir. 1965); *Byrd v. Hustler Magazine*, 433 So.2d 593, 595 (Fla. 4<sup>th</sup> DCA 1983)); David A. Elder, *Defamation: A Lawyer’s Guide* § 1:1[A][2] at 10–11 (emphasis added) (citing *Adirondack Record v. Lawrence*, 202 App.Div. 251, 195 N.Y.S. 627, 629–30 (1922); *Brayton v. Cleveland Special Police Co.*, 63 Ohio St. 83, 57 N.E. 1085, 1086 (1900); *Hapgoods v. Crawford*, 125 App.Div. 856, 110 N.Y.S. 122, 123 (1908); *Afftex, Ltd. v. General Electric Co.*, 161 App.Div.2d 855, 555 N.Y.S.2d 903, 905 (1990); Restatement (Second) of Torts § 561, comment b (1977))

R. Whether negative statements about Plaintiff have been published in other places by persons other than defendants, and Plaintiff suffered no additional harm as a result of the statements it claims Defendant to be responsible, so Plaintiff should recover nothing from Defendants. Rodney

A. Smolla, *Law of Defamation* § 9:61 (2d ed 2007); *Masson v. New Yorker Magazine, Inc.*, 881 F.2d 1452, 16 Media L. Rep. (BNA) 2089, 2093–94 (9th Cir. 1989); *Herbert v. Lando*, 781 F.2d 298, (2<sup>nd</sup> Cir. 1986); *Austin v. American Ass’n of Neurological Surgeons*, 253 F.3d 967 (7<sup>th</sup> Cir. 2001); *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1350 (7<sup>th</sup> Cir. 1995); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7<sup>th</sup> Cir. 1993)

S. Whether Plaintiff’s reputation was already so poor that none of the statements at issue in this case caused additional harm, and this did not defame Plaintiff. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 15; *Cardillo v. Doubleday & Co., Inc.*, 518 F.2d 638 (2d Cir. 1975); *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924 (C.D. Cal. 1982); *Ray v. Time, Inc.*, 452 F. Supp. 618 (W.D. Tenn. 1976), *aff’d*, 582 F.2d 1280 (6th Cir. 1978); *Logan v. District of Columbia*, 447 F. Supp. 1328 (D.D.C. 1978)

T. Whether Plaintiff’s failure to identify and disclose evidence in Plaintiff’s control supports an unfavorable inference against Plaintiff. Fed. R. Civ. P. 37(c); 2 J. Wigmore, *Evidence*, § 285 (1979); *International Union v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) (for discussion with citation to authority); *Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976)

### **XIII. ISSUES REGARDING APPLICATION OF LAW OR RULES OF PROCEDURE**

None at this time.

### **XIV. PENDING MATTERS**

A. Defendants’ Motion for Summary Judgment (Docket # 115).

B. Defendants’ Motion for Leave to File a Reply Brief in Support of Defendant’s Motion for Summary Judgment and Request for Oral Argument (Docket #144).

C. Motion to Admit Newly Discovered Evidence in Support of Defendants’ Motion for Summary Judgment (Docket #168)

D. Defendants Motion to Compel Plaintiff's Responses to Defendants' Request for Production of Documents and Defendants' Non-Uniform Interrogatories and Request for Sanctions (Docket # 174).

E. Motion in Limine (Docket # 170)

F. Motion in Limine (Docket # 171)

G. Motion in Limine (Docket # 172)

H. (Settle Jury Instructions)

I. (Motions for Leave to Present Witnesses by Telephone or Video Link)

**XV. ESTIMATED TRIAL TIME**

The parties estimate that this case will require 6 days to try before a jury following *voir dire*.

Dated: February 5<sup>th</sup>, 2008.

Respectfully submitted,

Scott W. Rothstein, Esq.  
Steven N. Lippman, Esq.  
Shawn L. Birken, Esq.  
**Counsel for Plaintiff**  
Rothstein Rosenfeldt Adler  
Las Olas City Centre, Suite 1650  
401 E. Las Olas Blvd.  
Fort Lauderdale, Florida 33301  
FBN 709638

By: /s/ Shawn Birken

Shawn L. Birken, Esq.  
Florida Bar Number: 418765  
Tele: 954/522-3456  
Fax: 954/527-8663  
Email: [sbirken@rra-law.com](mailto:sbirken@rra-law.com)

Maria Crimi Speth, Esq.  
Adam S. Kunz, Esq.  
**Counsel for Defendants**  
Jaburg & Wilk, P.C.  
3200 North Central Avenue, Ste. 2000  
Phoenix, Arizona 85012  
Tel: 602/248-1000  
Fax: 602/248-0522  
Email: [ask@jaburgwilk.com](mailto:ask@jaburgwilk.com)

Brian J. Stack, Esq.  
Stack, Fernandez & Anderson  
**Co-Counsel for Defendants**  
122 Brickell Avenue, Ste. 950  
Miami, Florida 33131-3255  
FBN 0476234

By: /s/ Adam Kunz

H:\swrdocs\03-8471\Pleadings\joint pretrial stipulation2.doc