

**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 RESPONSE TO DEFENDANTS’ MOTION TO ADMIT
NEWLY DISCOVERED EVIDENCE IN SUPPORT OF DEFENDANTS’ MOTION
FOR SUMMARY JUDGMENT AND PLAINTIFF’S MOTION TO STRIKE
SAID MOTION
AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, Whitney Information Network, Inc. (“WIN”), hereby files this Response to Defendants’ Motion to Admit Newly Discovered Evidence in Support of Defendants’ Motion for Summary Judgment and Plaintiff’s Motion to Strike Defendants’ Motion to Admit Newly Discovered Evidence in Support of Defendants’ Motion for Summary Judgment [Court Document No. 168] 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 deadline to file Motions for Summary Judgment was set for November 5, 2007. [Court Document No. 105]

On June 21, 2007, Defendants filed their Motion for Summary Judgment and Alternatively, Motion for Reconsideration RE: Motion to Dismiss Plaintiffs' [sic] First Amended Complaint for Lack of Personal Jurisdiction and Motion for Sanctions. [Court Document No. 115] Since Defendants' Motion for Summary Judgment was filed four (4) months prior to the discovery deadline and prior to WIN's opportunity to take the depositions of Ed Magedson and Xcentric's Rule 30(b)(6) corporate representative, on June 26, 2008, WIN was forced to file a Motion for Additional Discovery Time to Respond to Defendants' Motion for Summary Judgment. [Court Document No. 119]

WIN concluded its necessary discovery, and on September 10, 2007, WIN filed its Response to Defendants' Motion for Summary Judgment. [Court Document No. 141] United States District Court Judge Marcia Morales Howard deemed WIN's Response to Defendants' Motion for Summary Judgment as timely filed. [Court Document No. 149] (October 5, 2007 Order)

On January 28, 2008, almost five months after WIN responded to Defendants' Motion for Summary Judgment, Defendants' filed the instant Motion, seeking to use additional evidence to support their Motion for Summary Judgment. Defendants' Motion interjects and utilizes the new evidence and further incorporates the evidence into legal analysis. In essence, in lieu of appropriately waiting for this Court to determine whether Defendants can supplement the record, Defendants went ahead and added the new evidence without leave of court. Consequently, the Motion at issue is an impermissible reply.

In Bach v. Florida R/S, Inc., 838 F.Supp. 559 (M.D. Fla. 1993), this Court found: “Additionally, Plaintiff’s ‘notice’ includes two pages of legal argument. It appears that Plaintiff’s notice is, in effect, a reply, which is not permitted without leave of Court. The Court will consider only the cases cited by Plaintiff in her supplement and not the legal argument.” Bach v. Florida R/S, Inc., 838 F.Supp. 559 at 560. Similarly, this Court should not consider Defendants’ impermissible argument.

Having filed an impermissible reply, WIN is prejudiced because it is deprived of responding to the new discovery, facts and legal analysis. This would be fundamentally unfair to WIN.

It should be noted that on February 6, 2008, this Court granted in part and denied in part Defendants’ Motion for Leave to File Reply Brief. [Court Document no. 177] The instant motion cannot qualify as Defendants’ reply as it contains facts and argument that do not address WIN’s Response to Defendants’ Motion for Summary Judgment. United Broadcasting Corp. v. Miami Tele-Communications, 140 F.R.D. 12 (S.D. Fla. 1991) (“[A] ‘notice of supplemental authority’ that raises an argument that is not in defendant’s previous memorandum in opposition is in fact an attempt at a sur-response, which is not permitted in the absence of court order.”) Accordingly, Defendants’ instant Motion is clearly an attempt at an impermissible Reply, and any subsequent attempts by Defendants to include new argument or facts would clearly deprive WIN of the ability to address said argument or facts, and should therefore be discouraged.

WIN certifies that it has made a good faith effort to resolve the issue, by sending Defendants' counsel email correspondence, and in fact, the case law cited *supra*, but Defendants chose to file the Motion regardless of the authority.

WHEREFORE Whitney Information Network, Inc. respectfully requests this Court deny Defendants' Motion to Admit Newly Discovered Evidence in Support of Defendants' Motion for Summary Judgment and grant Plaintiff's Motion to Strike s Defendants' Motion to Admit Newly Discovered Evidence in Support of Defendants' Motion for Summary Judgment and for any other relief this Court deems necessary and proper.

Dated: February 11, 2008

Respectfully submitted,

By: /s/ Shawn L. Birken

Scott W. Rothstein
Florida Bar No.: 765880
Steven N. Lippman
Florida Bar No.: 709638
Shawn L. Birken
Florida bar No.: 418765
ROTHSTEIN ROSENFELDT ADLER
Counsel for Plaintiffs
401 East Las Olas Boulevard, Suite 1650
Fort Lauderdale, Florida 33301
Tele: 954/522-3456
Fax: 954/527-8663
E-Mail: sbirken@rra-law.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February, 2008, 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

H:\swrdocs\03-8471\Pleadings\motion to strike motion for leave to add evidence.doc

SERVICE LIST

United States District Court, Middle District of Florida
Fort Myers Division
Whitney Information Network, Inc. vs. Xcentric Ventures, LLC., et al.
Case No. 2:04-cv-47-FtM-34SPC

Scott W. Rothstein, Esq.

srothstein@rra-law.com

Steven N. Lippman, Esq.

slippman@rra-law.com

Shawn L. Birken, Esq.

sbirken@rra-law.com

ROTHSTEIN ROSENFELDT ADLER
401 East Las Olas Boulevard, Suite 1650
Fort Lauderdale, Florida 33301
Tele: 954/522-3456
Fax: 954/527-8663

Counsel for Plaintiff

Whitney Information Network, Inc.

Brian J. Stack, Esq.

Stack, Fernandez, Anderson, Harris & Wallace, P.A.

1200 Brickell Ave., Suite 950

Miami, Florida 33131

bstack@stackfernandez.com

Tele.: 305/371-0001

Fax: 305/371-0002

Counsel for Defendants

Xcentric Ventures, LLC, badbusinessbureau.org and EdMagedson

Maria Crimi Speth, Esq.

mcs@jaburgwilk.com

Jaburg & Wilk, PC

3200 North Central Avenue, Suite 2000

Phoenix, Arizona 85012

Tele.: 602/248-1089

Fax: 602/248-0522

Counsel for Defendants

Xcentric Ventures, LLC, badbusinessbureau.org and EdMagedson