

**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' PROPOSED
JURY INSTRUCTIONS**

Xcentric Ventures, LLC, (“Xcentric”), and Ed Magedson (“Magedson”) (collectively, the “Defendants”) respectfully request that the Court issue the following pattern jury instructions at trial in this matter:

Eleventh Circuit Pattern Jury Instructions (Civil Cases) 2005 – Basic Instructions
1, 2.2, 3, 4, 6, 7, 8, 9,

Eleventh Circuit Pattern Jury Instructions (Civil Cases) 2005 – Supplemental
Damage Instructions - 1.1 Duty to Mitigate in General

Eleventh Circuit Pattern Jury Instructions (Civil Cases) 2005 – Supplemental
Damage Instructions - 6.1 Attorneys Fees and Court Costs

In addition, Defendants request the following instructions:

. . . .
. . . .
. . . .

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 1

(Defamation)

Plaintiffs claim that Defendants defamed them. The issues for your determination on the claim of Whitney Information Network, Inc. against Edward Magedson and Xcentric Ventures, LLC are:

Whether Mr. Magedson and Xcentric made the statement concerning Whitney Information Network as Whitney Information Network contends, and if so;

Whether Mr. Magedson and Xcentric's statement concerning Whitney was in some significant respect a false statement of fact and tended to injure Whitney in its business, reputation or occupation.

A statement is in some significant respect false if its substance or gist conveys a materially different meaning than the truth would have conveyed. In making this determination, you should consider the context in which the statement is made and disregard any minor inaccuracies that do not affect substance of the statement.

If the greater weight of the evidence does not support the claim of Whitney Information Network on the issues on the issues I have just mentioned, your verdict should be for Edward Magedson and Xcentric. "Greater weight of evidence" means the more persuasive force and effect of the entire evidence in the case. However, if greater weight of the evidence does support the claim of Whitney Information Group on those issues, then:

You must next determine whether clear and convincing evidence shows that at the time the statement was made Mr. Magedson and Xcentric Ventures knew the statement was false or had serious doubts as to its truth.

"Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more compelling and persuasive. "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

If clear and convincing evidence does not show that Mr. Magedson and Xcentric Ventures knew when the statement was made that it was false, or that they had serious doubts then as to its truth, your verdict should be for Mr. Magedson and Xcentric Ventures.

However, if clear and convincing evidence does support Whitney Information Network's claim in this issue, and the greater weight of evidence supports Whitney Information Network's claim on the other issues on which I have instructed you then your verdict should be for Whitney Information Network.

Source: Florida Standard Jury Instruction MI 4.1

-] Given
-] Given as Modified
-] Refused
-] Withdrawn
-] Withdrawn

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 2
(Defamatory Meaning–Opinion)

In the previous instruction, I indicated that to be defamatory, the statement must be a false statement of fact. In other words, opinions can not be defamatory. When considering whether or not a statement is one of fact or opinion, you should consider the statement in its complete context and determine whether or not a reasonable reader would believe the statement was one of fact or opinion.

If you find than any statement was an opinion of the author, rather than a statement of fact, then that opinion can not be the basis for your verdict in favor of Whitney Information Network.

Source: *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974)

-] Given
-] Given as Modified
-] Refused
-] Withdrawn

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 3
(Defamation of a Corporate Plaintiff)

In this case, the Plaintiff is a corporation. Although corporations have reputations and can be defamed, the law does not allow corporations to recover for the same kinds of statements which might be defamatory as to a private individual.

In order for a corporate plaintiff to recover for defamation, the evidence must show that in addition to all the other elements of a defamation claim, false statements were made which related to the corporation's business operations, financial condition, or quality of goods or services.

Statements which insult or even defame individual employees of a company are not actionable by the corporation itself unless those statements also accuse the company of fraud, mismanagement, or financial instability.

Source: *Cont'l Nut Co. v. Robert L. Berner Co.*, 354 F.2d 395, 397 (7th Cir. 1965); *Byrd v. Hustler Magazine*, 433 So.2d 593, 595 (Fla. 4th 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); *Afftrex, 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)).

-] Given
-] Given as Modified
-] Refused
-] Withdrawn

DEFENDANTS’ REQUESTED JURY INSTRUCTION NO. 4
(Communications Decency Act Immunity/Publisher/Speaker)

You will recall that I instructed you that one of the determinations you will need to make is “whether Mr. Magedson and Xcentric made the statement concerning Whitney Information Network as Whitney Information Network contends.”

In making that determination, you must apply a legal test set forth by federal statute. The federal law states that the provider or user of an interactive website cannot be regarded as the publisher or speaker of any statement posted on the website by another person unless the evidence shows that the Defendant actually created the statement, in whole or in part.

If you find that Xcentric Ventures and Edward Magedson are users or providers of an interactive computer service and that the statement originated with a third party user of the website, then you should find that Mr. Magedson and Xcentric Ventures did not make the statement. On the other hand, if you find that Mr. Magedson and Xcentric Ventures authored the statement, then you should find that Mr. Magedson and Xcentric made the statement.

Source: *Whitney Information Network, Inc. v. Verio, Inc.*, 2006 WL 66724, *2, 79 U.S.P.Q.2d 1606 (M.D.Fla. 2006) (recognizing “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.”) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); 47 U.S.C. § 230(c)(1); *Blumenthal v. Drudge*, 992 F.Supp. 44, 51 (D.D.C. 1998); *Ben Ezra, Weinstein, and Co., Inc. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Morrison v. America Online, Inc.*, 153 F.Supp.2d 930, 933–934 (N.D.Ind. 2001); *PatentWizard, Inc. v. Kinko’s, Inc.* 163 F.Supp.2d 1069, 1071 (D.S.D. 2001); *Green v. America Online*, 318 F.3d 465, 470-471 (3rd Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-1124 (9th Cir. 2003); *Doe One v. Oliver*, 755 A.2d 1000, 1003-1004 (Conn.Super.Ct. 2000); *Doe v. America Online, Inc.*, 783 So.2d 1010, 1013-1017 (Fla. 2001); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40-42 (Wn.App. 2001); *Barrett v. Fonorow* 799 N.E.2d 916, 923-925 (Ill.App.Ct. 2003); *Donato v. Moldow* 865 A.2d 711, 720-727 (N.J. Super.Ct.App.Div. 2005); *Austin v. CrystalTech Web Hosting*, 125 P.3d 389, 392-394 (Ariz.App. 2005)).

-] Given
-] Given as Modified
-] Refused
-] Withdrawn

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 5
(Communications Decency Act/Publisher/Speaker)

Evidence shows that Mr. Magedson and Xcentric engaged in minor editing of content or making decisions whether to publish, withdraw, postpone, or alter content, is not sufficient to treat them as the publisher or speaker of any statements about Whitney Information Network unless the evidence shows that the statements were actually written by Defendants and not by another person.

Source: *Green v. America Online*, 318 F.3d 465, 470 (3rd Cir. 2003).

-] Given
-] Given as Modified
-] Refused
-] Withdrawn

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 6
(Defamation: Causation and Damages)

If you find for Mr. Magedson and Xcentric Ventures, you will not consider the matter of damages. But if you find for Whitney Information Network, you should award Whitney Information Network an amount of money that the greater weight of evidence shows will fairly and adequately compensate Whitney Information Network for such damage as the greater weight of evidence shows was caused by the statement complained of. A statement is a cause of damage if it directly and in natural continuance sequence produces or contributes substantially to producing such damage. If you find for Whitney Information Network you shall consider the following elements of damage:

Any injury to reputation experienced in the past or to be experienced in the future. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any award should be fair and just in light of the evidence.

If you find for Whitney Information Network but find that no damage has been proved, you may award nominal damages. Nominal damages are damages of an inconsequential amount which are awarded to vindicate a right where a wrong is established, but no damage is proved.

Source: Florida Standard Jury Instruction MI 4.4

-] Given
-] Given as Modified
-] Refused
-] Withdrawn

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 7
(Defense – Incremental Harm)

One of the defenses raised in this case is that some or all of the negative statements about Whitney Information Network have been published in other places beside Xcentric Ventures' website and by persons other than Edward Magedson and Xcentric Ventures.

If the evidence shows that negative statements about Whitney Information Network have been published in other places and by persons other than the Mr. Magedson and Xcentric Ventures, you may consider that fact when determining whether or not Whitney Information Network has suffered any damages as a result of the statements which it claims Mr. Magedson and Xcentric Ventures are responsible for.

If the weight of the evidence shows that Whitney Information Network's reputation has already been substantially harmed as a result of negative statements published in other places and by persons other than the Mr. Magedson and Xcentric Ventures, then you may find Whitney Information Network has not suffered any additional damages as a result of the statements which it claims Mr. Magedson and Xcentric Ventures are responsible for. In that case, you may find that Whitney Information Network is not entitled to recover any damages in this case because its reputation was already harmed by statements other than those at issue here.

Source: 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, (2nd Cir. 1986); *Austin v. American Ass'n of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001); *Desnick v. American Broadcasting Cos.*, 44 F.3d 1345, 1350 (7th Cir. 1995); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1228 (7th Cir. 1993).

-] Given
-] Given as Modified
-] Refused
-] Withdrawn

DEFENDANTS' REQUESTED JURY INSTRUCTION NO. 8
(Defense – Libel Proof Plaintiff)

One of the defenses raised in this case is that Whitney Information Network's reputation was already so poor that none of the statements at issue in this case caused any additional harm to Whitney Information Network even if those statements were not true. This is known as the "libel-proof Plaintiff" rule.

You may apply this rule if the weight of the evidence shows that the Whitney Information Network already had such a bad reputation that it cannot show further injury to its reputation as a result of the statements at issue in this case.

In the absence of evidence to the contrary, the law presumes that every Whitney Information Network has a reasonably good reputation which may be harmed by false and defamatory statements.

It is Xcentric Ventures' and Mr. Magedson's burden to prove that the weight of the evidence shows that Whitney Information Network's reputation was already damaged before the statements at issue in this case were made.

Source: 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).

-] Given
-] Given as Modified
-] Refused
-] Withdrawn

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 9
(Adverse Inference From Failure to Disclose or Present Evidence)

You are instructed that a party's failure to identify, disclose, or introduce into evidence a document or witness which is in that party's control, reasonably available to that party, and not reasonably available to the adverse party, may support an inference that the evidence is unfavorable to the party who could have produced it and did not. If you find that a party failed to identify, disclose, or introduce into evidence a document or witness in its control, reasonably available to that party, and not reasonably available to the adverse party, you may infer that that the evidence is unfavorable to the party who could have produced it but did not do so.

Sources: 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).

-] Given
-] Given as Modified
-] Refused
-] Withdrawn

DATED February 11, 2008

By: /s/ Maria Crimi Speth
Maria Crimi Speth
Arizona Bar No.: 012574
Jaburg & Wilk, P.C.
3200 N. Central Ave.
Suite 2000
Phoenix, AZ 85012
602-248-1000
Attorneys for Defendants

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.

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/ Maria Crimi Speth
Maria Crimi Speth