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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 **DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' SUMMARY JUDGMENT**

Defendants submit this Reply pursuant to the Court's February 6, 2008 Order granting leave to file a reply to the Response of Whitney Information Network ("WIN").

"No 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). Both Magedson and Xcentric are users and providers of an interactive computer service and all of the evidence in this case proves that the allegedly defamatory content was provided by different information content providers, not the Defendants.

After completion of discovery, WIN's only arguments and evidence to attempt to overcome summary judgment are: (1) Magedson is not a user or provider of an interactive computer service; (2) the website provides categories from which the author of a posting can choose for the posting; (3) the website encourages users to file postings; (4) the website provides "guidance," encouraging users to make reports "interesting;" (5) the website has top Rip-off links on the home page; and (6) Dixon Woodard's deposition in an unrelated case.

WIN argues that Magedson is not individually covered by the CDA, relying solely on *MCW, Inc. v. Badbusinessbureau.com, L.L.C.,* 2004 WL 833595 ((N.D.Tex 2004). However, in *MCW,* the Court only stated that "the defendants have failed to offer any proof that Magedson is a provider or user of an interactive computer service." *MCW* at *9. In the case at bar, Magedson's undisputed declaration and deposition testimony was that that Magedson manages the website, which makes him both a user and a provider of an interactive computer service.[1] Conversely, if Magedson is neither a provider nor a user of an interactive computer service, then he must be dismissed from this case because he could **not** have defamed WIN without either providing or using the website.

In arguing that the list of categories provided by Defendants make Defendants information content providers, WIN relies heavily on *MCW,* an unpublished decision granting Rip-off Report's motion to dismiss the federal claims, and declining to exercise jurisdiction over the defamation claim.[2] Because it was a Rule 12(b)(6) motion to dismiss, the Court "accept[ed] all [plaintiff's] well-pleaded facts as true and view[ed] them in the light most favorable to the plaintiff." *MCW* at *6. Among those allegations that the Court accepted as true were: (1) "the defendants create report titles such as "Con Artists," "Scam," and "Ripoff," and organize the reports under headings such as "Con Artists" and "Corrupt Companies" (*MCW* at *9) ; (2) "the defendants post consumer complaints on the Rip-Off Report website, organizing the complaints…under various other headings …" (*MCW* at *1); and (3) "defendants create disparaging and defamatory titles to postings." (*MCW* at *2).

Here, on summary judgment, the Court must not accept WIN's baseless, unfounded allegations as true on their face. *See* Fed. R. Civ. P. 56(e) (in response to a motion for summary judgment, a party may not rest on mere allegations). Rather, WIN was required to come forward with competent, admissible evidence. *See Id.* It has not done so. In the case at bar, the

[1] It should also be noted that while the 11th Circuit in this case would not address Plaintiff's identical argument because it was raised for the first time in the reply, "we note that 230(c)(1) requires only that Magedson have been a provider or user of an interactive computer service, not the service itself."

[2] Plaintiff also relies on *Fair Housing Council v. Roommates.com, L.L.C.*, 489 F.3d 921 (9th Cir. 2007). This argument will not be addressed because the Ninth Circuit granted rehearing en banc and stated that its prior decision shall not be cited as precedent. 506 F.3d 716 (9th Cir. 2007).

undisputed evidence is that Defendants do not create report titles and do not organize the reports under the categories (Magedson Transcript, Docket No.153 at pp 139-42). Rather, consumers write their own titles to reports. (*Id.* at Exhibit 7). Also, consumers suggested most of the category names (*Id*. at pp. 134-36, 258), and the consumer who posts the report chooses the category from a list of 500 to 800 categories (*Id.* at 141-42). Other federal courts have specifically rejected the argument that providing a list of categories defeats CDA immunity, with respect to these same Defendants. *See Global Royalties, Ltd. v. Xcentric Ventures, L.L.C.*, 2007 WL 2949002, *3 (D.Ariz. 2007) (observing, "The most plaintiff alleges is that defendant supplied a list of titles from which Sullivan picked the phrase 'Con Artists' to label the first statement. Complaint ¶ 14. This minor and passive participation in the development of content will not defeat CDA immunity, which can even withstand more active participation.") (emphasis added) (*citing Batzel v. Smith*, 333 F.3d 1018, 1035 (9th Cir.2003)).

WIN also points to the unpublished, non-precedential *MCW* ruling as the sole legal authority for its argument that encouraging people to post reports makes Defendants responsible for the content of the reports. The type of "encouragement" the *MCW* Court was referring to was not simply general statements on the website that invite and solicit truthful postings, but, rather, "[s]pecifically, MCW contends, the defendants, in an e-mail signed by Magedson, encouraged a consumer to take photos of (1) the owner, (2) the owner's car with license plate, (3) the owner handing out Rip-off Reports in front of Haldane's offices, and (4) the Bernard Haldane sign in the background with the Rip-off Reports in hand, all so that the defendants could include these photos on the websites." *MCW* at *10. The Court described that as "actively encouraging and instructing a consumer to gather specific detailed information." *Id*. There is no evidence in this case of any conduct approaching that level of specific, detailed instruction for a consumer to gather specific detailed information related to WIN. Rather, the evidence in this case is that consumers are merely encouraged to submit true and valid postings. (Declaration of Ed Magedson, Exhibit 1 to Statement of Facts in Support of Motion for Summary Judgment).

WIN's argument that Defendants "shape" the content of the report is equally unpersuasive. The evidence shows that the website has a section entitled "what makes a good

Rip-off Report" which states: "the report should be relating an honest, factual, and impartial story. Make your statement as objective as possible." (Magedson Transcript, Docket No. 153 Exhibit 6). Under a separate section of the website, the section the author uses to actually file the report, there are steps for filing a report. (*Id*., Exhibit 7). One step is for the author to create the title. The title is divided into boxes, the name of the company, the descriptive words explaining what the company did to the consumer, and the location of the company. (*Id.*) Under the box for the description of what the company did, the instructions state "be creative when using the example words, it will make your report more interesting." (*Id*.) WIN cites no legal authority for the far-fetched argument that providing such basic instructions/guidance makes Defendants into information content providers. The Ninth Circuit has also found that a website was not an information content provider even though it created more than fifty detailed questions and menus providing between four and nineteen options which aided users in creating personal profiles for the site. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124–25 (9th Cir. 2003); s*ee also, Donato v. Moldow*, 374 N.J. Super 475, 865 A.2d 711 (2005) (website operator was not an "information content provider" under the CDA even though operator shaped and selectively edited website content, and website's anonymous format encouraged defamatory and otherwise objectionable messages).

Plaintiff points to the "Top Rip-off Links" on the home page of the website as support for its position that Defendants are information content providers. Defendants' testimony was that a consumer requests that a link be put on the front page and then someone at Rip-off Report decides if the link will be added to that section. (Magedson Transcript at pp. 93-4). Whether a posting or link appears on the website's home page, or elsewhere, is entirely irrelevant to the single relevant issue—whether Defendants authored the report. Plaintiff cites no law (and there is no law) for the premise that placing a link to the content on the home page would transform an interactive computer service into an information content provider of that specific content. Rather, this is simply a typical editorial function which the CDA expressly immunizes. *See Barrett v. Rosenthal*, 40 Cal.4th 33, 60, 146 P.3d 510, 527 note 19 (Cal. 2007) (recognizing

"many courts have reasoned that participation going no further than the traditional editorial functions of a publisher cannot deprive a defendant of section 230 immunity.")

Plaintiff also improperly relies on the deposition testimony of Dickson Woodard. Woodard's deposition was taken in an unrelated case in which Defendants were not a party. Defendants were not present at Woodard's deposition and did not have notice of the deposition. Thus, pursuant to Rule 32, Fed. R. Civ. P., Woodard's deposition can not be used "at trial or upon the hearing of a motion" against Xcentric or Magedson. Moreover, Woodard admittedly has no personal knowledge of Defendants' practices related to the website, nor about postings regarding WIN. Also, the reference from Woodard's inadmissible deposition testimony cited by WIN does not refer to negative reports about companies, rather, it refers to certain positive investigative reports authored and filed by Mr. Magedson on behalf of companies who pay Xcentric to investigate negative consumer postings. (Declaration of Dickson Woodard, attached as Exhibit "A")

Woodard has admitted that he wrote the reports that he first attributed to Mr. Magedson. Woodard denied writing reports about a company called GW Equity, and then accused Mr. Magedson of writing them. (See Woodard Deposition p. 236–38, attached to WIN's Response) Later, in a letter to the court, Woodard admitted that he was the author of the reports, and the court entered a final judgment and injunction documenting that fact. (See Exhibit B, Final Judgment of Permanent Injunction After Bench Trial, with letter from Dickson Woodard).

CONCLUSION

Defendants respectfully request that the Court grant Defendants' Motion for Summary Judgment.

DATED this 12th day of February, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th 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:

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