

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION**

**WHITNEY INFORMATION NETWORK,
INC., a Colorado corporation, and RUSS
WHITNEY, an individual,**

CASE NO. 2:04-cv-47-FtM-29-SPC

Plaintiffs,

vs.

**XCENTRIC VENTURES, LLC, an Arizona
limited liability company;
BADBUSINESSBUREAU.ORG, an
Arizona limited liability company; and
ED MAGEDSON, an individual,**

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO STRIKE
DEFENDANTS' SECOND MOTION TO DISMISS FOR FAILURE TO STATE A
CLAIM**

Defendants respectfully request that the court deny Plaintiffs' Motion to Strike Defendants' Second Motion to Dismiss for Failure to State a Claim. Defendants previously filed a Motion to Dismiss for Lack of Jurisdiction. Because Defendants believed that the court lacked jurisdiction against them, the most efficient course was to move solely on those grounds and raise no other issues. That motion was denied. Defendants then filed a Motion to Dismiss for Failure to State a Claim.

Plaintiffs' assertion in Paragraph 6 of their motion that Defendants were required to raise their defense for failure to state a claim when they made their motion to dismiss for lack of personal jurisdiction is patently wrong. A defense of failure to state a claim may be raised in a motion for judgment on the pleadings. Fed.R.Civ.P. 12(h)(2). Defendants raised the defense in a motion to dismiss, which is a motion for judgment on the pleadings.

Plaintiffs may argue that the Motion to Dismiss is different from a motion for judgment on the pleadings, because no answer has been filed. Rule 12 (c) provides that "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." While the rule contemplates that a motion for judgment on the pleadings **may** be filed after the pleadings are closed, it does not prohibit filing a motion for judgment on the pleadings before the answer is filed. The motion to dismiss requests judgment based solely on the pleadings.

To the extent that this Court determines that the pending motion is not a motion for judgment on the pleadings, or can not be considered a motion for judgment on the pleadings without an answer filed, the proper course would be to order that Defendants interpose an answer to the complaint before the motion is decided. It serves no purpose to strike the motion only to have it re-filed after the answer is filed.

Accordingly, Defendants request that the court deny the Motion to Strike Defendants' Second Motion to Dismiss.

DATED this 27th day of October, 2004.

DUANE MORRIS, LLP
200 South Biscayne Boulevard, Suite 3400
Miami, Florida 33131
Telephone: 305.960.2261
Facsimile: 305.960.2201

By: s/ Tina M. Talarchyk
Tina M. Talarchyk
tmtalarchyk@duanemorris.com
Florida Bar No.: 794872

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Of Counsel:

JABURG & WILK PC

Maria Crimi Speth, Esq.
Arizona Bar No. 012574
3200 North Central Avenue
Suite 2000
Phoenix, Arizona 85012
Telephone: 602.248.1000
Facsimile: 602.248.0522
E-mail mcs@jaburgwilk.com

Jonathan P. Ibsen
7047 East Greenway Parkway
Suite 140
Scottsdale, AZ 85254
Telephone: 480.624.2777
Facsimile: 480.607.9483
E-mail: jpi@jaburgwilk.com

Attorneys for Defendants
Xcentric Ventures, LLC, ,
badbusinessbureau.org, and
Ed Magedson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 27, 2004, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following CM/ECF participants:

Christina M. Kitterman, Esq. ROTHSTEIN, ROSENFELDT, DOLIN & PANCIER, P.A. 300 Las Olas Place 300 S.E. 2 nd Street Suite 860 Ft. Lauderdale, Florida 33301 Telephone: 954.522.3456 Facsimile: 954.527.8663	
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I FURTHER CERTIFY that on October 26, 2004, I mailed the foregoing document and notice of electronic filing to the foregoing attorneys.

Scott W. Rothstein, Esq.
Alana D. Cappello, Esq.
Christina M. Kitterman, Esq.
ROTHSTEIN, ROSENFELDT, DOLIN & PANCIER, P.A.
300 Las Olas Place
300 S.E. 2nd Street
Suite 860
Ft. Lauderdale, Florida 33301
Telephone: 954.522.3456
Facsimile: 954.527.8663

By: s/Tina M. Talarchyk
Tina M. Talarchyk