

#68

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND
COMPANY, INC.,

Plaintiff,

v.

Cause No. CIV-97-0485-LH/LFG

AMERICA ONLINE, INC.,

Defendant.

**UNCONTESTED MOTION TO EXTEND TIME TO RESPOND
TO COMPLAINT; AND, TO EXTEND TIME FOR
SUBMISSION OF INITIAL TRIAL REPORT**

COMES NOW Defendant AMERICA ONLINE, INC., by and through its counsel, WILMER, CUTLER & PICKERING, P.A. (Patrick J. Carome, Esq. and John Payton, Esq.), and EAVES, BARDACKE & BAUGH, P.A. (John G. Baugh, Esq.), and, pursuant to F.R.Civ.P. 6, requests the following extensions of time:

A. To plead or otherwise respond to the first amended complaint herein by serving Plaintiff's counsel with an answer or other response no later than end of business, Monday, June 15, 1998; and,

B. To submit to the Court the initial pretrial report by end of business on Tuesday, June 30, 1998.

As grounds for this motion, Defendant states:

1. Counsel for Plaintiff concurs in both of the requested extensions of time.
2. On April 17, 1998, a hearing was held in this matter on Plaintiff's motion to disqualify Defendant's counsel. The Court announced its decision to deny that motion, from the bench at the hearing. In subsequent discussion among counsel and the Court, at that hearing, Plaintiff's counsel

confirmed his intention to amend the complaint. The Court instructed Plaintiff's counsel to circulate the proposed amended complaint to defense counsel, and to seek their consent. On May 12, 1998, Plaintiff's counsel delivered a proposed first amended complaint in draft for discussion purposes, to Defendant's counsel. The following day, Defendant's counsel informed Plaintiff's counsel of his consent to the filing of the proposed first amended complaint. An uncontested motion and order permitting the filing of the first amended complaint has been submitted to the Court for its approval.

3. Pursuant to F.R.Civ.P. 15, Defendant's answer to the first amended complaint would be due ten days following service. The parties cannot anticipate when the first amended complaint will be approved for filing, and so cannot anticipate when Defendant's counsel will be served.

4. Defendants have determined that additional time is required to research and investigate the first amended complaint, and Plaintiff does not object. Additionally, Defendant's counsel has informed Plaintiff's counsel that it intends to file a dispositive motion, probably pursuant to F.R.Civ.P. 56, at or about the same time as an answer. The additional time requested to respond to the complaint will permit Defendant's counsel sufficient time to prepare that dispositive motion for service either simultaneously with the answer, or soon afterwards.

5. America Online, Inc. respectfully submits that the initial pretrial report should not be finalized until after America Online's answer and its anticipated dispositive motion are served upon Plaintiff, and Plaintiff's counsel has had time to consider them.

6. Also, Plaintiff has reserved the right to seek discovery before being required to respond to Defendant's dispositive motion. Defendant reserves the right to require Plaintiff to make the necessary showing before discovery is permitted. Therefore, the initial pre-trial report should not be finalized until after Defendant's dispositive motion is served and Plaintiff evaluates its need (if any) for related discovery.

7. At this time, extending the time for the parties to submit to the Court an initial pretrial

report does not affect any other case management deadlines currently in force.

WHEREFORE, Defendant respectfully requests an order extending the time in which it must plead or otherwise respond to the first amended complaint until end of business on Monday, June 15, 1998. Defendant further requests an extension of time for the parties to submit to the Court the initial pretrial report, until end of business on Tuesday, June 30, 1998. Defendant requests such further relief as the Court deems appropriate in the circumstances.

Respectfully submitted,

WILMER, CUTLER & PICKERING
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and

EAVES, BARDACKE & BAUGH, P.A.

By:

John G. Baugh
Attorney for America Online
P. O. Box 35670
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(505) 888-4300

THIS WILL CERTIFY that a true and correct copy of the foregoing Motion was mailed to counsel of record at the below address:

Esteban A. Aguilar, Esq.
Attorney for Plaintiff
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EAVES, BARDACKE & BAUGH, P.A.

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