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

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
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BEN EZRA, WEINSTEIN AND COMPANY, INC.,

Plaintiff,

v. No. Civ. 97-0485 LH/LFG

AMERICA ONLINE, INC.,

Defendant.

DEFENDANT AMERICA ONLINE, INC.'S
OPPOSITION TO PLAINTIFF'S RULE 56(f) MOTION

As AOL has shown in its reply memorandum supporting its motion for summary judgment, BEW has utterly failed -- indeed, not even attempted -- to controvert any of the evidence AOL has adduced to show that the allegedly defamatory stock quote information at issue in this case was created and developed entirely by parties other than AOL. BEW argues in its Rule 56(f) motion that it should nonetheless escape summary judgment based on its hope and speculation that, if discovery were allowed, it might stumble into some presently unknown evidence that would create a genuine issue of material fact. This gambit must fail because BEW has offered no basis whatsoever to believe that the discovery it proposes would probably uncover material facts that would controvert AOL's detailed and comprehensive evidentiary showing. Moreover, BEW has failed to establish that many of the areas it wants to explore in discovery are even germane to AOL's immunity defense. Accordingly, BEW's Rule 56(f) motion should be denied.

BACKGROUND

On June 24, 1998, AOL served its motion for summary judgment asserting its immunity from suit under 47 U.S.C. § 230. Based on its statutory protection against the burdens of litigation concerning third-party information, id. § 230(d)(3), and the threshold nature of its summary judgment motion, AOL also sought a stay of discovery. The Court granted AOL's stay motion on July 16, 1998. The Court found that "Congress' grant of immunity to interactive service providers, such as AOL, [was] intended to afford a special protection to this unique electronic medium." Memorandum and Order Staying Discovery, July 16, 1998, at 4.

In granting a stay of discovery, the Court also noted that BEW would be free to attempt to make a showing that it is entitled to limited discovery pursuant to Fed. R. Civ. P. 56(f). The Court stated that, if BEW makes the required Rule 56(f) showing, the Court "can issue a supplementary order authorizing discovery and specifically outlining the scope and extent of discovery, if any, that will be permitted." Id. at 4-5. BEW served a Rule 56(f) motion, together with its cross-motion for partial summary judgment and its opposition to AOL's motion for summary judgment, on July 17, 1998. BEW's affidavit in support of its Rule 56(f) motion identifies 21 "factual areas" into which BEW would like to inquire before the Court decides the dispositive motions. Nowhere in its Rule 56(f) papers, however, does BEW offer any reason to believe that discovery into any of these broad "areas" is likely to yield any specific fact that would defeat AOL's claim of immunity.

ARGUMENT

I. BEW HAS FAILED TO ESTABLISH THAT DISCOVERY WOULD PROBABLY YIELD EVIDENCE THAT WOULD DEFEAT AOL'S STATUTORY IMMUNITY.

BEW has failed to justify Rule 56(f) discovery because it has offered nothing but speculation to support its claim that discovery would provide facts that are "essential" to defeat AOL's summary judgment motion. Fed. R. Civ. P. 56(f). The law is clear: "[A] mere assertion that the evidence supporting a [party's] allegation is in the hands of the [opposing party] is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984) (citation omitted); see also Weir v. Anaconda Co., 773 F.2d 1073, 1083 (10th Cir. 1985) (same). But that is precisely what BEW has done. BEW notes that it "has not been afforded an opportunity to conduct discovery," and "[c]onsequently . . . [that it] cannot present . . . facts essential to justify its opposition to AOL's summary judgment motion." (BEW Rule 56(f) Motion at 2 (emphasis added).) In fact, BEW's lack of evidentiary support for its opposition by itself does not warrant discovery under Rule 56(f); to the contrary, it only highlights the baselessness of BEW's claims.

Rule 56(f) plainly requires that the party opposing summary judgment demonstrate, at a minimum, that discovery will probably yield specific facts that will defeat the motion. A party invoking Rule 56(f) must provide an affidavit that "state[s] with specificity how the desired time [and discovery] would enable [the nonmoving party] to meet its burden in opposing summary judgment." Jensen v. Redevelopment Agency, 998 F.2d 1550, 1554 (10th Cir. 1993) (emphasis added) (citation omitted). In particular, the Rule 56(f) affidavit must "proffer sufficient facts to show that the evidence sought exists . . . and that it would prevent summary judgment." Nidds v. Schindler Elevator Corp., 113 F.3d 912, 921 (9th Cir. 1996)

(emphasis added), cert. denied, 118 S. Ct. 369 (1997). In other words, the affiant must, at a minimum, identify "probable facts not available," Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir. 1992) (emphasis added), not just facts it merely hopes to discover.[1]

BEW's Rule 56(f) application falls far short of this standard. It expresses nothing more than a mere "hope" that discovery would uncover evidence that would contradict AOL's arguments and supporting affidavits. (BEW Rule 56(f) Mem. at 3-4.) It offers no basis for concluding that discovery probably would yield any evidence that would create a genuine issue of material fact. Although BEW's summary judgment brief contends that AOL is not entitled to immunity under 47 U.S.C. § 230 because AOL allegedly played an "active role in developing the stock quote information" at issue (BEW Sum. Judg. Opp. at 1, 8, 10), BEW's Rule 56(f) affidavit more candidly concedes that BEW has "no . . . knowledge of . . . [the] processes that AOL uses to download stock information from its stock service, S & P ComStock, Inc." (Affidavit of

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[1] See also, e.g., California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998) (parties invoking Rule 56(f) must show "(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion") (emphasis added); Mattoon v. City of Pittsfield, 980 F.2d 1, 7-8 (1st Cir. 1992) (party invoking Rule 56(f) must articulate basis for believing that evidence sought through discovery probably exists); Price v. General Motors Corp., 931 F.2d 162, 164 (1st Cir. 1991) (same); Vivid Techs., Inc. v. American Science & Eng'g, Inc., 997 F. Supp. 104, 107 (D. Mass. 1998) ("If all one had to do to obtain a grant of a Rule 56(f) motion were to allege possession by movant of certain information or other evidence every summary judgment decision would have to be delayed while the non-movant goes fishing in the movant's files.").

Michael Weinstein ("Weinstein Aff.") ¶ 19 (emphasis added).)[2] And although BEW identifies a number of "factual areas" it would like to explore in order to learn more about those processes (id. ¶ 21), that is no substitute for establishing a basis to conclude that facts that are essential to preclude summary judgment probably exist. In short, BEW plainly has asked the Court to authorize a fishing expedition. But "Rule 56(f) was not intended to allow parties to fish for information." Wesley v. Don Stein Buick, Inc., 996 F. Supp. 1312, 1316 (D. Kan. 1998) (construing Tenth Circuit decisions).

The purely speculative nature of BEW's grounds for seeking Rule 56(f) discovery is illustrated by the fact that BEW posits only questions about whether particular facts might exist, not reasons to believe that any such facts probably do exist. For example, BEW repeatedly wonders aloud about whether AOL might own the software that Townsend Analytics, Ltd. ("Townsend") provides -- apparently assuming (erroneously) that such ownership would deprive AOL of its immunity defense. (See Weinstein Aff. ¶ 21(b); BEW Sum. Judg. Opp. at 2, 4, 5, 8, 10, 18, 20.) In fact, as supplemental declarations from AOL show, Townsend not only owns this software, but actually employs a security device that renders the software unusable by AOL without a secret password that Townsend changes every month. (See Supplemental Declaration of Robert C. Shenk, Jr. ¶ 11; Supplemental Declaration of Michael C. Hsu ¶ 5.) Thus, BEW is not just speculating, it is making the wrong guesses.

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[2] There is a glaring inconsistency between BEW's assertion that "AOL is taking an active role in developing the stock information [provided by S&P ComStock] before it is published" (BEW Sum. Judg. Opp. at 10), and BEW's admission in its Rule 56(f) affidavit that it has "no . . . knowledge" of how S&P ComStock ("ComStock") transmits information to AOL. (Weinstein Aff. ¶ 19.) The latter admission, made under oath, highlights the recklessness of the assertions in BEW's summary judgment opposition.

BEW's "improbable speculation" about what discovery might yield would "hardly suffice[] to justify delayed summary adjudication" even in a case where the motion for summary judgment was not based on an immunity defense. Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333, 1343 (D.N.M. 1995) (Hansen, J.). Its speculation falls especially short in this case because AOL has asserted a statutory immunity that, as this Court has already ruled, entails immunity from the burdens of litigation. The Tenth Circuit has expressly held that the burden on a party invoking Rule 56(f) is especially heavy in cases where such an immunity defense has been raised. Lewis v. City of Ft. Collins, 903 F.2d 752, 758 (10th Cir. 1990).[3/] "Liberal application of rule 56(f) should not be allowed to subvert the goals of" such immunity. Jones v. City and County of Denver, 854 F.2d 1206, 1211 (10th Cir. 1988); see also Sawyer v. County of Creek, 908 F.2d 663, 668 (10th Cir. 1990) ("A federal lawsuit is not a fishing expedition. Were we to permit [the plaintiff's] complaint to continue in its present form, we would defeat the rationale for the qualified immunity defense."). Even where parties have presented a close case for obtaining Rule 56(f) discovery -- in contrast to BEW's failure to establish any basis for believing that facts supporting its claims are likely to be discovered -- courts have denied discovery on the ground that the defendant's assertion of an immunity defense requires a heightened showing that the facts sought would in fact be discovered. See Redpath v. City of Overland Park, 857 F. Supp. 1448, 1459 (D. Kan. 1994) (denying Rule 56(f)

[3/] In Lewis, the defendants had sought summary judgment on the basis of the qualified immunity for public officials -- a defense to which this Court compared AOL's Section 230 immunity in its order staying discovery. See Memorandum and Order Staying Discovery, July 16, 1998, at 4 ("Congressional policy considerations, as enunciated in Zeran v. America Online, Inc.[,] are similar to the policy considerations cited by the Supreme Court in Harlow v. Fitzgerald, and, accordingly, this Court believes that the same type of immunity from the burdens of litigation [as in official immunity cases] should appropriately be afforded AOL.").

discovery and noting that, had an immunity defense not been raised, "the Court might be inclined to permit Rule 56(f) discovery freely and liberally").

Notably, BEW's speculation that facts essential to controvert AOL's declarations might exist would not suffice even under the threshold standard for asserting a claim under Rule 11 of the Federal Rules of Civil Procedure. Rule 11 prohibits a party from asserting a claim unless its attorney certifies that the allegations "have evidentiary support or . . . are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3) (emphasis added). Of course, this threshold standard must be satisfied before any discovery is permitted.[4] Given BEW's failure to assert any basis for concluding that evidence that would defeat AOL's immunity likely exists, it appears that BEW lacks even the minimum foundation for bringing a federal action. Accordingly, a fortiori, BEW has failed to make a showing that, in the face of AOL's comprehensive and detailed declarations, warrants postponement of summary judgment so that discovery may be taken.

AOL's submission of comprehensive declarations confirms beyond any doubt that BEW's mere speculation regarding AOL's supposedly active role in the development of stock quotation information provides no foundation for Rule 56(f) discovery. AOL employees Robert C. Shenk Jr. and Michael C. Hsu have provided a complete account of where the stock quote information at issue in this case originated and how it was made available through the AOL

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[4] See, e.g., White v. General Motors Corp., 126 F.R.D. 563, 567 (D. Kan. 1989) (holding that discovery was unwarranted because the plaintiff's claims were not well-founded in fact or in law), aff'd in pertinent part, vacated in part, 908 F.2d 675 (10th Cir. 1990); see also Albright v. Upjohn Co., 788 F.2d 1217, 1221 (6th Cir. 1986) (reversing district court's denial of sanctions at prediscovery phase of litigation where complaint was filed without adequate investigation of facts).

service. The facts to which they have sworn confirm AOL's immunity from suit under 47 U.S.C. § 230(c)(1). (See Appendix of Exhibits and Authorities in Support of Defendant's Motion for Summary Judgment at tabs 1-2.) In particular, the declarations show that AOL had no role in the creation or development of the allegedly erroneous information concerning BEW's stock. (Id.) BEW offers no reason to doubt the truth of those declarations, and there is none.[5]

BEW's mere yearning to "test the veracity" of AOL's declarants (Weinstein Aff. ¶ 22) is no substitute for a proper showing under Rule 56(f). BEW may not "avoid the entry of an adverse judgment by raising the unlikely possibility that, upon further discovery, an adverse witness may contradict an earlier statement or volunteer an admission." United States v. On Leong Chinese Merchants Ass'n Bldg., 918 F.2d 1289, 1294 (7th Cir. 1990). BEW can only speculate that the testimony of AOL's declarants "could be shaken so badly as to rebut . . . the basis for their conclusions." Id. at 1295. Such speculation does not warrant subjecting AOL to the burden and expense of discovery. As Judge Posner has stated, where a witness "swears in an affidavit" to the material facts in question, there is

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[5] The same is true of these declarants' supplemental declarations, which are included in AOL's Supplemental Appendix of Exhibits in Support of Defendant's Motion for Summary Judgment. The supplemental declarations refute BEW's newly invented -- and unpled -- theory that Townsend is AOL's agent. BEW has articulated no basis for believing either that AOL's declarations are untrue or that any facts that would support the proposition that Townsend was AOL's agent probably exist. Accordingly, even if Rule 56(f) discovery were ever proper with respect to claims that have not yet even been pled, it certainly is unavailable in this case with respect to BEW's new-found "agency" theory. See Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135, 142-43 (S.D.N.Y. 1991) (rejecting as unduly speculative plaintiff's theory that independent contractor responsible for managing portion of interactive service provider's system could be characterized as that provider's agent). See also Campbell, 962 F.2d at 1522; Nidds, 113 F.3d at 921; On Leong, 918 F.2d at 1294; DF Activities Corp. v. Brown, 851 F.2d 920, 922 (7th Cir. 1988).

> no point in keeping the lawsuit alive. Of course the [witness] may blurt out an admission in a deposition, but this is hardly likely, especially since by doing so he may be admitting to having perjured himself in his affidavit. . . . [R]emote possibilities do not warrant subjecting the parties and the judiciary to proceedings almost certain to be futile.

DF Activities Corp. v. Brown, 851 F.2d 920, 922 (7th Cir. 1988). Judge Posner's reasoning in Brown is particularly relevant here because that case involved a threshold statute of frauds defense that was meant to provide the same sort of "protection against the risks and costs of being hauled into court" as AOL's statutory immunity defense. Id. at 923.[6]

II. IN ANY EVENT, MANY OF THE "FACTUAL AREAS" FOR DISCOVERY IDENTIFIED BY BEW ARE IRRELEVANT.

Even if (contrary to the foregoing discussion) BEW had established a basis for believing that facts it wants to obtain through discovery probably exist, it still would not be entitled to take the far-reaching discovery that it now proposes because most of the "factual areas" it seeks to probe (Weinstein Aff. ¶ 21) are not "essential" to the resolution of the threshold immunity issue. By its plain terms, Rule 56(f) permits only discovery that is calculated to yield

[6] BEW's reliance on Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978) and Weir v. Anaconda Co., 773 F.2d 1073, 1081 (10th Cir. 1981) (BEW Rule 56(f) Mem. at 5) is unfounded. Madison, which had nothing to do with Rule 56(f), stands for the unremarkable proposition that, where an interested party's subjective state of mind is at issue and there are "conflicting inferences" from other record evidence, summary judgment should not be entered on the basis of the affidavit of that party. See id. at 1036-37. Here, where the facts at issue are entirely objective and do not involve anyone's state of mind, and there is no evidence that calls into question the credibility of AOL's declarants, summary judgment should be granted on the basis of their declarations. Similarly, Weir was not a case about Rule 56(f). The court in Weir, after noting in passing its earlier holding in Madison, actually affirmed the grant of summary judgment over the plaintiff's objection that essential facts were exclusively in the defendant's possession. 773 F.2d at 1081-83.

evidence of "facts essential to justify the party's opposition." Fed. R. Civ. P. 56(f). The discovery that BEW seeks would roam far beyond this strict boundary.

In the first instance, it must be noted that BEW's Rule 56(f) Affidavit fails even to undertake the most basic task of identifying specific "facts" sought to be substantiated through discovery. Instead, it merely sets out a laundry list of "factual areas" that BEW would like to explore, without ever specifying any particular "fact" that might be found within any area or explaining how any such "fact" would defeat AOL's claim of immunity. (See Weinstein Aff. ¶ 21.) Yet it is an identification of specific "facts," and an explanation of how they are "essential to justify the party's opposition," that Rule 56(f) most plainly requires. Wesley, 996 F. Supp. at 1316 (denying Rule 56(f) discovery where movant "list[ed] possible sources from which she would [have] like[d] to obtain information . . . [but] fail[ed] to identify the specific facts she need[ed] to discover") (emphasis added); Jensen, 998 F.2d at 1554-55 (Rule 56(f) affidavit must, at minimum, show how identified facts would be "useful in opposing the motion[] for summary judgment."). This lack of specificity is, by itself, reason enough to deny BEW's Rule 56(f) motion.

More fundamentally, BEW has made no attempt to confine its proposed discovery to "areas" that are even germane, much less "essential," to opposing AOL's threshold immunity defense. As AOL's briefs on the merits of the immunity issue have shown, the only evidence that could even conceivably defeat AOL's immunity in this case would be (1) evidence establishing (contrary to AOL's uncontroverted declarations) that AOL's own actions or software actually changed the content of the information provided by ComStock and Townsend, or (2) evidence establishing (contrary to AOL's uncontroverted declarations) that Townsend

acted as AOL's "agent" when it developed and provided the software that tabulated the ComStock data stream.[7] The bulk of the "factual areas" that BEW seeks to probe bear no relationship whatsoever to these discrete and limited factual points. [8]

For example, BEW does not -- and cannot -- show that it would be better equipped to oppose AOL's motion for summary judgment if it obtained discovery on the questions of "[w]hether AOL's interconnected personal computers that run the Townsend software are used by AOL for any other purposes;" "whether Townsend . . . provides [AOL with] computer support services;" "[h]ow AOL markets, promotes and sells the Quotes & Portfolios service area;" [h]ow often AOL has received complaints regarding the stock information it transmits, and exactly how has AOL responded to each of these complaints;" or "[w]hat steps AOL considered, and rejected, when deciding how or whether to advise its subscribers of the errors in stock information after AOL was made aware of the errors." (Weinstein Aff. ¶¶ 21(c), (d), (p), (r), (u).) Far from qualifying as <u>essential</u> to BEW's ability to

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[7] AOL believes that Section 230 would immunize it from liability in this case even if it were shown that AOL's own actions or AOL-created software had introduced the alleged errors or if Townsend had been AOL's agent. (<u>See</u> AOL Sum. Judg. Mem. at 26 n.11; AOL Sum. Judg. Reply at 5 n.3, 19 n.9.) But AOL is not now asking the Court to reach either of those issues because there so plainly is no genuine issue of material fact concerning either the role of AOL in developing the allegedly erroneous information or the status of Townsend. (<u>See</u> AOL Sum. Judg. Mem. at 22-27; AOL Sum. Judg. Reply at 4-27.)

[8] Even if BEW's "factual areas" were properly limited in scope, no discovery would be warranted in any event with respect to BEW's speculation that Townsend is AOL's agent: As BEW concedes, the existing amended complaint does not even hint at a claim that rests on an agency theory. (<u>See</u> BEW Sum. Judg. Opp. at 21 n.5.) <u>See, e.g.</u>, <u>Mercury Serv., Inc. v. Allied Bank of Texas</u>, 907 F.2d 154, 1990 WL 90216, at *4 (9th Cir. July 2, 1990) (denying Rule 56(f) discovery because bulk of information sought was related to unpled claims and was thus irrelevant to summary judgment opposition); <u>Travelers Ins. Co. v. Broadway West Street Assocs.</u>, 164 F.R.D. 154, 161-62 (S.D.N.Y. 1995) (affirming Magistrate Judge's ruling that party was not entitled to Rule 56(f) discovery regarding unpled allegations).

oppose summary judgment, these "factual areas" have no possible bearing on whether AOL played an "active role in developing the stock quote information" at issue. (BEW Sum. Judg. Opp. at 1.)

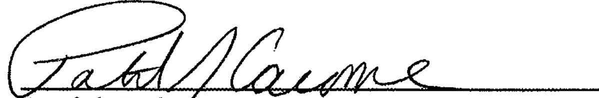
Similarly, whereas BEW might have been entitled to very limited discovery concerning the relationships among AOL, ComStock, and Townsend if it had established the probable existence of facts establishing (contrary to AOL's declarations) that Townsend was AOL's agent, it certainly would not be entitled to anything approaching the breadth of discovery it now proposes. (See, e.g., Weinstein Aff. ¶¶ 21(t) (seeking "[p]roduction of all e-mail and other correspondence between AOL and Townsend, between AOL and ComStock, and between ComStock and Townsend, related to errors in securities information") (emphasis added).) Most, if not all, of that information would have nothing whatever to do with AOL's statutory immunity.

Accordingly, even if some Rule 56(f) discovery were permitted, the Court would have to impose far greater limitations on it than BEW proposes. The Court need not delve into such line drawing, however, because BEW has fallen so far short of establishing a basis to take any discovery.

CONCLUSION

For the foregoing reasons, the Court should deny BEW's motion to take discovery pursuant to Rule 56(f).

Respectfully submitted,



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Dated: August 7, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant America Online, Inc.'s Opposition to Plaintiff's Rule 56(f) Motion was served on August 7, 1998 by first-class mail, postage pre-paid, on the following counsel:

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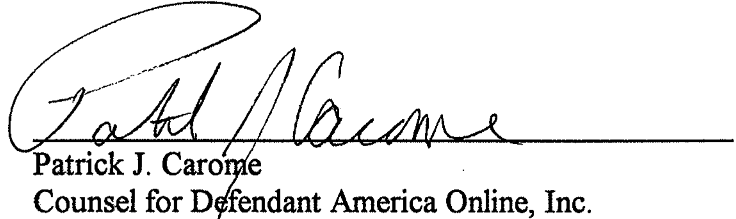

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