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

BEN EZRA, WEINSTEIN AND COMPANY,

Plaintiff,

vs.

No. CIV 97-485 LH/LFG

AMERICA ONLINE INCORPORATED,

Defendant.

**ORDER DENYING PLAINTIFF'S MOTION TO SERVE
FIRST REQUEST FOR PRODUCTION ON DEFENDANT**

THIS MATTER came before the Court on Plaintiff Ben Ezra, Weinstein and Company, Inc.'s ("BEW") Motion to Serve First Request for Production on Defendant, American Online, Incorporated ("AOL") [Doc. 79]. BEW's motion is opposed. The motion, response and reply were simultaneously filed on January 6, 1999. Oral argument is not necessary. This matter may be resolved based on the parties' submissions.

On October 30, 1998, the Court entered an order on discovery and extended BEW's time to respond to the motion for summary judgment. [Doc. 71]. After reviewing BEW's Fed. R. Civ. P. 56(f) affidavit, the Court authorized some limited discovery so as to allow BEW to respond to AOL's motion for summary judgment. The Court allowed discovery in five specific areas and, further, required that discovery be completed, and that the response to the motion for summary judgment be served within ninety days of receipt of the Court's order.

Discovery was limited to the following areas:

(a) whether problem(s) with the inter-connected personal computers owned and used by AOL altered or manipulated the securities information from Comstock;

(n) how the Comstock machines and AOL's personal computers interact;

(o) the alterations AOL makes to the stock data it takes from the Comstock/Townsend Database;

(q) how the errors in BEW's stock information actually occurred; and,

(s) whether computer software created by AOL "to perform the task of displaying articular information contained in the Comstock/Townsend Database" caused or allowed the erroneous reporting of BEW's stock information.

The Court authorized BEW to serve written interrogatories touching on those areas, but, in accord with the discovery maximums authorized by the federal rules, limited the number of interrogatories that could be served. Further, the Court authorized BEW to take four depositions, and in those depositions, the scope of inquiry was to be limited to the discrete areas authorized by the Court.

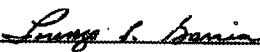
On November 17, 1998, BEW served AOL with written interrogatories. Those interrogatories exceeded the maximum number of interrogatories previously authorized by the Court. AOL responded by providing technical information and did not decline to answer interrogatories because BEW far exceeded the number of authorized questions.

BEW now wishes to serve expansive requests for written discovery which it asserts are essential to its ability to oppose AOL's motion for summary judgment. However, the Court's review of the request for production demonstrates that BEW is again exceeding the scope of the Court's discovery order. The requests go far beyond the five areas of inquiry authorized by the Court's

October 30, 1998 order. Moreover, BEW failed to demonstrate that the depositions authorized by the Court's order or the written discovery already undertaken are insufficient to allow it to respond to AOL's *prima facie* showing.

The Court reiterates that 47 U.S.C. § 230 affords interactive service providers, such as AOL, a congressionally mandated special immunity that, in the Court's estimation, allows interactive service providers to be free from the burdens of discovery. The Court analogized the congressional immunity under Section 230 to the qualified immunity protections afforded public officers performing discretionary functions. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Anderson v. Creighton, 483 U.S. 635 (1987); see also Gallegos v. City & County of Denver, 984 F.2d 358 (10th Cir.), *cert. denied*, 508 U.S. 972 (1993)("[A] successful claim of qualified immunity allows a public official to avoid the burdens of discovery and litigation, as well as liability.").

To allow further discovery beyond that already authorized by the Court would deny an interactive service provider the immunity authorized by the Communications Decency Act. BEW failed to demonstrate that the discovery previously authorized by the Court was inadequate or insufficient so as to allow BEW to respond to the motion for summary judgment. BEW's motion for production of documents is denied.



Lorenzo F. Garcia
United States Magistrate Judge