

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

COPY

BEN EZRA, WEINSTEIN AND COMPANY, INC.

Plaintiff,

v.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.,

Defendant.

**PLAINTIFF'S REPLY TO DEFENDANT'S
JOINT OPPOSITION TO PLAINTIFF'S MOTIONS TO
AMEND COMPLAINT AND TO STAY PROCEEDINGS**

Plaintiff Ben Ezra, Weinstein and Company, Inc., by and through its counsel of record, replies to Defendant America Online, Inc.'s Joint Opposition to Plaintiff's Motions to Amend the Complaint and to Stay Proceedings.

I. PROCEDURAL BACKGROUND

At the outset of this litigation, proceedings were stayed on May 19, 1997 for nearly a year while the Court considered and ruled upon BEW's motions to disqualify AOL's counsel. (See Order Abating Initial Scheduling Deadlines, Extending Time for Filing a Response, Striking a Motion, and Setting Briefing Schedule). While AOL calls these motions "meritless," AOL's counsel did withdraw from this case as a result of the first disqualification motion. Soon after this Court ruled on the disqualification issue, BEW filed its first amended complaint, which made a few, general references to S & P ComStock, Inc. ("ComStock"). On June 17, 1998, AOL filed its Answer to the First Amended Complaint. AOL's Answer denied most of the factual allegations made by BEW

with regard to ComStock. On the same day, AOL filed a motion to stay discovery.

On June 24, 1998, AOL served its summary judgment motion. On the following day, the Court entered its Initial Pre-Trial Report. In that Report, BEW advised the Court and AOL that "Plaintiff may seek leave to file a Second Amended Complaint depending on discovery." (Initial Pre-Trial Report at 2). Despite BEW's objections, the Court entered a Memorandum and Order Staying Discovery on July 16, 1998. However, the Court allowed BEW to make a showing that would permit BEW to conduct some discovery pursuant to Rule 56(f). After BEW successfully made such a showing, the Court allowed BEW limited discovery in the form of 25 interrogatories and up to four depositions. (*See* October 30, 1998 Order on Discovery and Granting Extension of Time to Respond to Motion).

BEW served its Rule 56(f) interrogatories on AOL on November 17, 1998. AOL served its responses a month later. On January 12, 1999, BEW served its motions to amend the complaint to join ComStock and Townsend Analytics, Ltd. ("Townsend") and to stay the proceedings as to AOL. In addition, BEW's counsel deposed three witnesses associated with AOL on January 19 and 20, 1999.

The Court has set no deadlines for amending pleadings and no trial date has been set.

II. MOTION TO AMEND COMPLAINT

The Court should allow BEW to amend its complaint to add ComStock and Townsend as additional defendants prior to ruling on AOL's pending motion for summary judgment. AOL argues this Court should defer its decision on the motion to amend until it decides the summary judgment motion while at the same time accusing BEW of undue delay in seeking leave to amend the complaint. AOL cannot have it both ways.

AOL's arguments of judicial economy and fairness are not well taken. If the Court grants AOL's motion for summary judgment, BEW then would be forced to file a new lawsuit that names ComStock and Townsend as defendants. This procedure would waste judicial resources rather than conserve them. Similarly, AOL's "fairness" argument simply makes no sense. The Court either will grant AOL's summary judgment motion and dismiss AOL from this case or deny the motion and allow meaningful discovery to proceed. Any ruling that results from the summary judgment motion will not clarify matters for any party or prospective party.

Granting the motion to amend the complaint, coupled with a stay to allow BEW to conduct discovery as to the new defendants, would allow BEW to learn whether AOL is responsible for the incorrect reporting of BEW's stock information. BEW suspects that ComStock and Townsend will be happy to point out actions or omissions by AOL that bar it from raising the immunity defense and make AOL liable for damages sustained by BEW. The discovery stays imposed by the Court, together with the extremely limited discovery allowed, effectively precluded BEW from learning what positions Townsend and ComStock will take as to their relationships with AOL and the role(s) AOL played in disseminating incorrect stock information.

AOL's repeated insistence that BEW could have pursued discovery against ComStock and Townsend borders on the absurd in light of the limited discovery allowed. While AOL identified dozens of people in its interrogatory answers, BEW was permitted to conduct only four depositions. AOL's claim that BEW could have used two of these four depositions to conduct adequate discovery of Townsend and ComStock is simply not plausible. By conducting such discovery against Townsend and ComStock, BEW was faced with the possibility of guessing wrong and responding to the summary judgment motion with insufficient information to defeat that motion.

It is established law that leave to amend a complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Tenth Circuit cases make it clear that trial courts should be liberal in allowing parties to amend their pleadings so that cases are not decided on mere technicalities and parties have a fair opportunity to present their claims and defenses. *See Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1027 (10th Cir. 1994). "Refusing leave to amend is generally only justified upon a showing of *undue* delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993) (emphasis added).

AOL's only complaint seems to be that BEW delayed in moving to amend the Complaint. Nowhere does AOL claim that it has been or will be prejudiced by the filing of a complaint that adds ComStock and Townsend as additional defendants. AOL apparently recognizes any argument of prejudice would be baseless since no trial date has been set and no scheduling order has been entered that set a deadline for the amendment of pleadings. *See Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622, 630 (D. Utah 1998) (timeliness of motion to amend the pleadings is "determined by reference to any court-ordered deadline for amending the pleadings"); *compare Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993) (upheld decision denying motion to amend complaint because it was filed four and a half months after court-imposed deadline to amend pleadings). Moreover, BEW advised the Court and AOL in the Initial Pretrial Report that it might be amending its complaint, depending on discovery. The limited discovery and BEW's resulting investigation is now complete.

AOL, citing an exhibit attached to BEW's original complaint, incorrectly asserts that BEW has known for more than two years about its claims against Townsend and ComStock. That exhibit

is a transcript of a telephone message left by an AOL employee regarding a “decimal truncation error” that caused the incorrect reporting of BEW’s stock information to AOL’s subscribers on AOL’s Quotes & Portfolio area. The AOL employee told BEW that AOL was “working really quickly right now with S & P ComStock” to attempt to correct the incorrect reporting of the BEW’s stock information. Townsend is not mentioned in that exhibit, while the role of ComStock is ambiguous, at best. A fair reading of the transcript shows that AOL and ComStock were making a joint effort to correct the admitted problems with AOL’s stock quotations.

Until recently, BEW had no idea of the precise roles of Townsend or ComStock in these events. *Compare Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1027 (10th Cir. 1994) (“proposed amendment was not based on new evidence unavailable at the time of the original filing”). BEW had to wait until the limited discovery was completed or face possible Rule 11 sanctions if it had brought ComStock and Townsend in as parties any earlier. BEW chose the more prudent road and should not be penalized for doing so.

AOL’s complaints about the delay fall away, however, when viewed in light of what has actually transpired in this case. Proceedings were stayed during much of this litigation and the limited discovery that was allowed was completed less than a month ago. Under similar facts, at least one other court ruled that amendment was allowed when knowledge about a claim was unearthed after discovery and a reasonable investigation. *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1222 (D. Kan. 1995). The lack of any court-imposed deadline further supports allowing the amendment in this case. BEW therefore requests that this Court grant its motion to amend its complaint to add ComStock and Townsend as defendants.

III. MOTION TO STAY PROCEEDINGS

AOL's mischaracterization of BEW's motion to stay as a second motion for continuance under Rule 56(f) must be rejected by this Court. By its motion, BEW does not concede that AOL is immune from suit. Indeed, despite flagrant attempts by AOL to coach witnesses and hinder free discovery allowed by the Court,¹ recent discovery has shown that AOL misrepresented to the Court and BEW its active involvement in the alteration and dissemination of stock quote information. As shown by BEW's supplemental response to the summary judgment motion, AOL is not entitled to immunity under the facts uncovered by BEW.

Furthermore, the issue raised by BEW's motion to stay is not a Rule 56(f) issue and is not subject to the analysis applied to Rule 56(f) motions. To the contrary, BEW is seeking a stay with respect to proceedings against AOL and intends to seek discovery from other parties, who AOL has consistently contended are separate and independent from AOL. And, as already discussed, AOL's insistence that BEW could have obtained this discovery against ComStock and Townsend as a part of the limited discovery allowed by the Court is simply absurd.

AOL's real objection to BEW's request for a stay is that AOL will be prejudiced. AOL claims it would be forced to monitor this discovery and attend any depositions conducted by BEW during the proposed stay period. This is a puzzling and troubling argument from AOL. If AOL, as it has claimed from the beginning, truly is entitled to immunity from litigation, why should it

¹Attached hereto as **Exhibit "1"** are highlighted excerpts from the **Deposition of Stephen H. Kovacs**, at 55, l. 13-25; 56, l. 1-25; at 57, l. 1-15; and at 58, l. 1. This excerpt is but one example of the blatant coaching of witnesses and obstruction of discovery by AOL's counsel during one of the depositions authorized by the Court. The speaking objections interposed by AOL's counsel ("vague and ambiguous as to what 'it' means") may be accurately described as "Clintonesque".

concern itself with the information Townsend and ComStock might reveal? If AOL has been truthful and forthcoming in its factual representations to the Court, why should it be worried about what other prospective defendants might disclose or say? Any discovery burdens that might fall on AOL during any stay period are burdens that AOL has imposed upon itself. If AOL chooses to submit to further expense so that it can monitor further discovery, that is AOL's decision and not something sought by BEW.

Accordingly, BEW requests that the Court stay the proceedings with respect to AOL. If, however, the Court decides to deny the stay and also grant AOL's summary judgment motion, the Court must dismiss AOL without prejudice to BEW's ability to rejoin AOL should discovery against ComStock and Townsend reveal AOL is not immune.

IV. CONCLUSION

Plaintiff Ben Ezra, Weinstein and Company, Inc. respectfully moves the Court to grant it leave to serve a second amended complaint adding ComStock and Townsend as defendants and to stay the proceedings in this matter as to AOL pending discovery against these new defendants.

Respectfully submitted,

COUNSEL FOR PLAINTIFF:

AGUILAR LAW OFFICES, P.C.

By 

Esteban A. Aguilar

1011 Lomas Blvd. NW

Albuquerque, NM 87102

Telephone (505) 242-6677

MOSES, DUNN, FARMER & TUTHILL, P.C.
Mark A. Glenn, Esq.
612 First Street NW
P. O. Box 27047
Albuquerque, NM 87125-7047
Telephone (505) 843-9440


PEPPER, HAMILTON & SCHEETZ, LLP
Paul J. Kennedy, Esq.
3000 Two Logan Square
Philadelphia, PA 19103-2799
(215) 981-4000

I hereby certify that a copy of the
foregoing pleading was mailed to:

John G. Baugh, Esq.
EAVES, BARDACKE & BAUGH, P.A.
6400 Uptown Blvd. NE, Suite 110-West
Albuquerque NM 87110

Patrick J. Carome, Esq.
WILMER, CUTLER & PICKERING
2445 M Street NE
Washington, DC 20037

this 11th day of February 1999:



Esteban A. Aguilar

Stephen H. Kovacs

January 19, 1999

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CONDENSED TRANSCRIPT AND CONCORDANCE

PREPARED BY:

ALDERSON REPORTING CO. INC.

1111 14th St, N.W.

4th Floor

Washington, DC 20005

Phone: 1-800-FOR-DEPO

FAX: 1-800-367-3310

EXHIBIT

"1"

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- (1) about the fix. Do you remember that?
- (2) A. As I recall, what I said of them was I
- (3) was aware that a fix was in the works and that we
- (4) hoped to have it in the next day or so.
- (5) Q. And what is your understanding of the
- (6) word "fix" in that context?
- (7) A. It would be a correction to the
- (8) computer programming by S&P or by whoever is
- (9) involved in their chain of providing information
- (10) to us.
- (11) Q. Were you aware at that time about the
- (12) involvement of Townsend Analytics?
- (13) A. Of Townsend, yes.
- (14) Q. Had you dealt with Townsend before?
- (15) A. No, I did not deal with Townsend.
- (16) Q. How did you become aware of their
- (17) involvement?
- (18) A. As part of the exchange of information
- (19) back and forth trying to track down what problem
- (20) we were having.
- (21) Q. And explain that to me. Did you
- (22) partake in this communication?
- (23) MR. CAROME: Objection, vague and
- (24) ambiguous.
- (25) THE WITNESS: Did I partake in --

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- (1) MR. AGUILAR: Can you read back the
- (2) last question and last answer?
- (3) THE REPORTER: "Question: How did you
- (4) become aware of their involvement?
- (5) "Answer: As part of the exchange of
- (6) information back and forth trying to track down
- (7) what problem we were having.
- (8) "Question: And explain that to me..
- (9) Did you partake in this communication?"
- (10) BY MR. AGUILAR:
- (11) Q. Did you partake in the exchange of this
- (12) information?
- (13) MR. CAROME: Same objection.
- (14) THE WITNESS: I think I said in my
- (15) previous answer that I found out as part of an
- (16) exchange of information back and forth as we were
- (17) trying to track down the problem.
- (18) BY MR. AGUILAR:
- (19) Q. That's correct. And my question to you
- (20) is, did you participate in that?
- (21) A. I participated in one aspect of trying
- (22) to track down the problem, yes.
- (23) Q. And what aspect was that?
- (24) A. I provide the member feedback,
- (25) information about the member feedback that we're

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- (1) getting back to personal finance -- to Jim, for
- (2) example -- to say the stock appears to have a bad
- (3) price or this member has a problem with this
- (4) issue, when they are noteworthy issues,
- (5) noteworthy situations.
- (6) Q. I guess what I'm trying to cut to here,
- (7) Mr. Kovacs, is here you are, you're a consultant
- (8) for AOL, correct?
- (9) A. That's correct.
- (10) Q. Your job is to handle complaints from
- (11) subscribers, correct?
- (12) A. That's correct.
- (13) Q. You've got subscribers that call you
- (14) and complain to you about this problem?
- (15) MR. CAROME: Objection, vague and
- (16) ambiguous as to what "this problem" means.
- (17) BY MR. AGUILAR:
- (18) Q. The misquoting of stock. Can we agree
- (19) that that's a problem, Mr. Kovacs?
- (20) A. I don't think that's a correct
- (21) description but --
- (22) Q. How do you characterize it?
- (23) A. This was an inaccurate quote on some
- (24) OTC issues.
- (25) Q. Fine. And the plaintiffs happened to

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- (1) be one of those, correct?
- (2) A. That's correct.
- (3) Q. Now, would you agree with me that an
- (4) inaccurate quote on some OTC issues is a problem?
- (5) MR. CAROME: Objection, vague and
- (6) ambiguous as to what a problem means.
- (7) BY MR. AGUILAR:
- (8) Q. Would you agree with me on that?
- (9) A. I suppose it depends on how you define
- (10) "problem."
- (11) Q. Well, let me -- let me -- let me -- let
- (12) me put it this way. Is it good to misquote the
- (13) stock prices?
- (14) MR. CAROME: Objection, vague and
- (15) ambiguous.
- (16) THE WITNESS: I think you're asking me
- (17) to draw conclusions here that I'm not sure I can
- (18) draw. I mean, if you can ask me more
- (19) specifically --
- (20) BY MR. AGUILAR:
- (21) Q. You know, Mr. Kovacs, you tell me.
- (22) It's a commonsense definition of the word
- (23) "problem," if you ask me. If you should be --
- (24) if AOL, S&P ComStock, Townsend analytics, whoever
- (25) is involved here, should be quoting accurate

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- (1) stock information and they're inaccurate, is that
 (2) a problem?
 (3) MR. CAROME: Objection, vague and
 (4) ambiguous, compound question, argumentative. You
 (5) can answer if you understand the question
 (6) THE WITNESS: I think that there are
 (7) several aspects to each -- no, I can't answer the
 (8) question. I'm sorry.
 (9) BY MR. AGUILAR:
 (10) Q. Why can't you answer the question?
 (11) A. Because -- because you said a problem
 (12) and I'm not sure how you define a problem and you
 (13) said should be providing or have to provide
 (14) accurate quotes and I'm not sure that's a correct
 (15) representation, given my understanding of the
 (16) industry and so that's why I have a problem. I
 (17) would be happy to answer it. I just need to be
 (18) more specific than those, or something.
 (19) Q. I would be happy to have you answer it
 (20) too. Let me start over.
 (21) A. Okay.
 (22) Q. You were getting complaints about it,
 (23) weren't you?
 (24) A. Yes.
 (25) MR. CAROME: Objection, vague and

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- (1) ambiguous as to what "it" means.
 (2) BY MR. AGUILAR:
 (3) Q. You answered yes to that, didn't you?
 (4) Didn't you?
 (5) MR. CAROME: The record will speak for
 (6) itself.
 (7) MR. AGUILAR: Okay. Read back the
 (8) question and the answer, the last question and
 (9) the answer, please.
 (10) THE REPORTER: "Question: You were
 (11) getting complaints about it, weren't you?
 (12) "Answer: Yes."
 (13) BY MR. AGUILAR:
 (14) Q. Now, you understood what I meant by
 (15) that, didn't you, Mr. Kovacs?
 (16) A. Well, I will give you my understanding
 (17) of what you meant if --
 (18) Q. Sure.
 (19) A. My understanding was you were talking
 (20) about the type of problem, the type of misquote
 (21) that had taken place with Mr. Ezra's company.
 (22) Q. All right. So in your capacity, you
 (23) were getting complaints about that, weren't you?
 (24) A. Yes.
 (25) Q. And you were getting complaints about

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- (1) that from other people, not just Mr. Ben Ezra or
 (2) Mr. Weinstein, isn't that true?
 (3) MR. CAROME: Objection. Are you asking
 (4) about complaints concerning -- this is vague and
 (5) ambiguous as to what you're asking about.
 (6) BY MR. AGUILAR:
 (7) Q. You can answer the question,
 (8) Mr. Kovacs. You understand what I'm asking,
 (9) don't you, sir? Read back the question, please.
 (10) THE REPORTER: "Question: And you were
 (11) getting complaints about that from other people,
 (12) not just Mr. Ben Ezra or Mr. Weinstein, isn't
 (13) that true?"
 (14) MR. CAROME: It's vague and ambiguous
 (15) whether that's referring to complaints concerning
 (16) the Ben Ezra stock in particular or other stock
 (17) issues.
 (18) THE WITNESS: What would you like?
 (19) Would you -- I'm not sure how you want me to do.
 (20) BY MR. AGUILAR:
 (21) Q. I want you to answer the question.
 (22) A. I don't think I can answer the
 (23) question.
 (24) Q. Why?
 (25) A. Because I'm not sure whether you mean

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- (1) Mr. Ben Ezra's company or you mean other OTC
 (2) issues.
 (3) Q. I'm talking about other OTC issues.
 (4) A. Yes.
 (5) Q. The answer is yes?
 (6) A. Yes.
 (7) Q. Now, when you're getting complaints
 (8) from not just Mr. Ben Ezra but other OTC issues
 (9) subscribers to AOL, isn't that a problem,
 (10) Mr. Kovacs?
 (11) MR. CAROME: Objection, vague and
 (12) ambiguous.
 (13) THE WITNESS: They're not OTC
 (14) subscribers to -- I'm not --
 (15) BY MR. AGUILAR:
 (16) Q. I'm sorry. When you were getting
 (17) complaints from AOL subscribers about stock
 (18) issues that are being inaccurately quoted, isn't
 (19) that a problem?
 (20) MR. CAROME: Same objection.
 (21) THE WITNESS: It's what I do is deal
 (22) with those things.
 (23) BY MR. AGUILAR:
 (24) Q. It's a problem, isn't it?
 (25) MR. CAROME: Same objection.