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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 MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO ALTER OR AMEND THE JUDGMENT

AOL has moved to alter or amend the Court's Memorandum Opinion and Order and Final Judgment as a housekeeping measure intended to avert the possibility of a needless remand of the case by the Court of Appeals. As set forth in this memorandum, it would promote judicial economy for the Court to make explicit what it already has implicitly ruled: that Plaintiff's Objection and Appeal concerning the Magistrate Judge's February 3, 1999 Order Denying Plaintiff's Motion To Serve First Request for Production on Defendant ("February 3 Order") was not meritorious and has been overruled. While AOL is wary of adding to the flurry of filings that have burdened the Court in this action, the intent of this motion is to save this Court, the Court of Appeals, and the parties from the possibility of still greater burden.

BACKGROUND

On March 1, 1999, the Court granted AOL's motion for summary judgment and dismissed the case with prejudice as to AOL. The Court's Memorandum Opinion and Order granting summary judgment explicitly denied Plaintiff's Cross-Motion for Partial Summary Judgment and also explicitly denied as moot Plaintiff's

Motion To Stay Proceedings Against Defendant America Online, Inc. and Plaintiff's Motion To Amend Complaint To Join Additional Defendants. (Memorandum Opinion and Order at 7.) The Court's Final Judgment, moreover, "adjudicate[d] all existing claims and liabilities of the parties." (Final Judgment at 1.)

Neither the Memorandum Opinion and Order nor the Final Judgment *explicitly* addressed Plaintiff's Objection and Appeal of Order Denying Plaintiff's Motion To Serve First Request for Production of Documents. Plaintiff filed this Objection and Appeal on February 11, 1999, and AOL filed a response to it on February 22, 1999. The Court *implicitly* ruled that this Objection and Appeal was not meritorious -- and that the Magistrate Judge's February 3 Order was not clearly erroneous or contrary to law -- in holding that "Plaintiff has had a full and fair opportunity for discovery . . . and that a further opportunity for discovery is unwarranted." (Memorandum Opinion and Order at 7 n.2.)

On March 5, 1999, Plaintiff filed a notice of appeal from this Court's Final Judgment. To avoid any technical issues that might unnecessarily complicate the appeal proceedings in the Court of Appeals, AOL now asks that this Court amend its Memorandum Opinion and Order and Final Judgment to make explicit its overruling of Plaintiff's Objection and Appeal concerning the February 3 Order.

ARGUMENT

The Court's implicit consideration and denial of Plaintiff's appeal from the Magistrate Judge's February 3 Order was more than adequate to comply with the text

of the jurisdictional statute governing such appeals. *See* 28 U.S.C. § 636(b)(1)(A).[1] The Tenth Circuit, however, arguably has adopted the additional requirement that a district court make a formal ruling with respect to a party's objection to a magistrate judge's order. *See Hutchinson v. Pfeil*, 105 F.3d 562, 565-66 (10th Cir. 1997). In *Hutchinson*, the district court expressly ruled on some of the plaintiff's objections to a magistrate judge's order, but not others, before granting summary judgment in the defendants' favor. *Id.* While the court of appeals affirmed the entry of summary judgment, it nonetheless remanded the action "[b]ecause the district court ha[d] not yet ruled upon [all of the plaintiff's] objections." *Id.* at 566.

Hutchinson suggests that this case could be remanded for further proceedings, despite the fact that a remand would be pointless and inefficient. By amending or altering the Memorandum Opinion and Order and Final Judgment, the Court would eliminate any possible need for a remand. Such a housekeeping amendment is a proper subject for a motion under Rule 59(e), the scope of which "pertains to 'reconsideration of matters properly encompassed in a decision on the merits.'" *Utah Women's Clinic, Inc. v. Leavitt*, 75 F.3d 564, 567 (10th Cir. 1995) (citing *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989)).[2]

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[1] Section 636(b)(1)(A) provides, in pertinent part, that "[a] judge of the court *may reconsider* any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A) (emphasis added).

[2] Because AOL's Rule 59(e) Motion is timely filed, *see* Fed. R. Civ. P. 59(e), 6(a), this Court plainly has jurisdiction to rule on that motion notwithstanding Plaintiff's earlier filing of a notice of appeal. *See, e.g., Tripati v. Heman*, 845 F.2d 205, 205-06 (9th Cir.1988) (district court retains subject matter jurisdiction to consider a timely Rule 59(e) motion that is filed after a notice of appeal); *Saladin v. Turner*, 936 F. Supp. 1571, 1584 n.1 (N.D. Okla. 1996) (same).

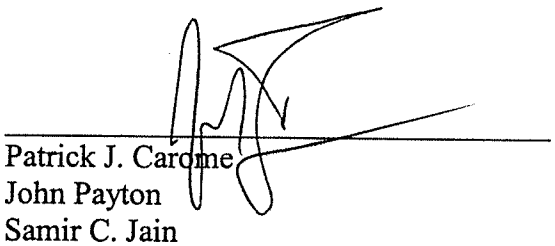
A remand by the court of appeals would be a pointless procedure because, as noted above, this Court *already* has held that Plaintiff had a "full and fair opportunity" to conduct discovery, and thus that the Magistrate Judge did not commit clear error in denying leave to serve document requests. (*See* Memorandum Opinion and Order at 6-7 & n.2.) In contrast to situations in which a district court simply failed to consider an objection to a magistrate judge's ruling, such as in *Hutchinson*, here the Court not only considered the objection but implicitly overruled it. That decision was clearly correct, as AOL demonstrated in its Response to BEW's Objection and Appeal.

Amending the Court's Memorandum Opinion and Order and Final Judgment now to make explicit its overruling of BEW's objection to the Magistrate Judge's discovery order will obviate the possibility of a remand for purely technical reasons, thereby conserving judicial resources and expediting the final disposition of this litigation. It will eliminate any need for briefing and argument of this technical issue in the Court of Appeals and avoid the costs, inefficiency, and delay that would be attendant to any remand. It would also further the ends of justice by helping to ensure that "this futile cause" will not "keep AOL ensnared for even one more moment" than is necessary. (Memorandum Opinion and Order at 7.)

CONCLUSION

For the foregoing reasons, and for the reasons set forth in AOL's Response to Plaintiff's Objection and Appeal, the Court should amend its Memorandum Opinion and Order and Final Judgment to state explicitly that it has overruled Plaintiff's Objection and Appeal concerning the Magistrate Judge's February 3 Order.

Respectfully submitted,



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Dated: March 12, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion To Alter or Amend Judgment and memorandum in support thereof were served on March 12, 1999 by first-class mail, postage prepaid, on the following counsel:

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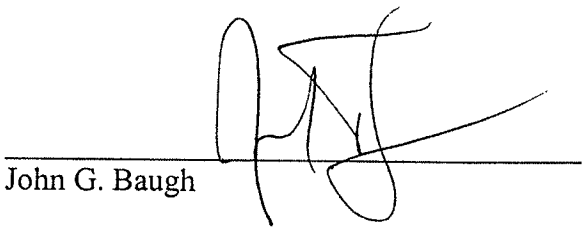

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