

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

BEN EZRA, WEINSTEIN, AND
COMPANY, INC.

Plaintiff,

vs.

NO. CIV 97-0485 LH/LFG

AMERICA ONLINE, INC.

Defendant.

**PLAINTIFF'S MOTION FOR LEAVE TO CONDUCT LIMITED
DISCOVERY RELATING TO PLAINTIFF'S SECOND MOTION
TO DISQUALIFY COUNSEL FOR AMERICA ONLINE, INC. OR, IN
THE ALTERNATIVE, EXCLUDE CERTAIN EVIDENCE,
SERVED JUNE 2, 1997**

Plaintiff Ben Ezra, Weinstein, and Company, Inc., by and through its attorneys of record, Esteban A. Aguilar, Moses, Dunn, Farmer & Tuthill, P.C. by Mark Glenn, and Pepper, Hamilton & Scheetz by Paul Kennedy, files this Motion for Leave to Conduct Limited Discovery in connection with its Second Motion to Disqualify, and as grounds states as follows:

Plaintiff has filed a Second Motion to Disqualify Counsel for America Online, Inc. or, in the Alternative, Exclude Certain Evidence, served June 2, 1997.

Notwithstanding the provision of Fed. R. Civ. P. 26, and Local Rule 26.4 (a) and pursuant to Local Rule 26.5(a) in anticipation of an evidentiary hearing on Plaintiff's Motion to Disqualify, it is appropriate to allow Plaintiff to conduct limited discovery prior to the meet and confer conference required by Rule 26.

Plaintiff seeks leave of the Court to serve a Rule 45 Subpoena on Paul G. Bardacke, Eaves Bardacke & Baugh, P.A., James O. Browning, and Browning & Peifer, P.A., copies of which are attached hereto as Exhibits "1" and "2." The production of the documents sought in the subpoenas are necessary for a just adjudication of the allegations contained in Plaintiff's Motion to Disqualify.

Plaintiff also seeks leave of the Court to take the depositions of Paul G. Bardacke and James O. Browning on the issues presented by its Motion to Disqualify. Plaintiff also seeks leave of the Court to take the deposition(s) of other counsel for Defendant, if necessary.

Concurrence of opposing counsel has been sought and denied.

WHEREFORE, Plaintiff prays for an Order allowing it to conduct the aforementioned discovery prior to the meet and confer conference required by Rule 26.

Respectfully submitted,

Esteban A. Aguilar, Esq.
1011 Lomas NW
Albuquerque, NM 87102
(505) 242-6677

Original signed by
ESTEBAN A. AGUILAR

By: _____
Esteban A. Aguilar

Co-counsel for Plaintiff

Paul J. Kennedy, Esq.
Donna E. Correll, Esq.
PEPPER, HAMILTON & SCHEETZ, LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103

Mark A. Glenn, Esq.
MOSES, DUNN, FARMER &
TUTHILL, P.C.
P. O. Box 27047
Albuquerque, NM 87102
(505) 843-9440

I hereby certify that a copy
of the foregoing pleading was
mailed via overnight delivery
to the following counsel of record
on this 2nd day of June 1997:

WILMER, CUTLER & PICKERING
Patrick J. Carome, Esq.
John Payton, Esq.
Samir Jain, Esq.
2445 M Street NW
Washington, D.C. 20037

Randall J. Boe, Esq.
Elizabeth deGrazia Blumenfeld, Esq.
America Online, Inc.
22000 AOL Way
Dulles, VA 20166-9323

and hand-delivered to:

John G. Baugh, Esq.
EAVES, BARDACKE & BAUGH, P.A.
P. O. Box 35670
Albuquerque, NM 87176-5670

Original signed by
ESTEBAN A. AGUILAR

Esteban A. Aguilar

Exhibit 1

United States District Court

DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY, INC.,
Plaintiff

v.

AMERICA ONLINE, INC.,
Defendant.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: CIV-97-0485 LH/LFG

TO: EAVES, BARDACKE & BAUGH, P.A.
6400 Uptown Blvd. NE, Suite 110-West
Albuquerque, New Mexico 87110

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
---------------------	---------------

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

SEE EXHIBIT "1" ATTACHED HERETO.

PLACE	DATE AND TIME
-------	---------------

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
----------	---------------

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
---	------

Esteban A. Aguilar, Attorney for Plaintiff

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
--

1011 Lomas Blvd. NW
Albuquerque, NM 87102 (505) 242-6677

PROOF OF SERVICE

DATE

PLACE

SERVED

SERVED ON (PRINT NAME)

MANNER OF SERVICE

SERVED BY (PRINT NAME)

TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in per-

son, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT "1"

1. Original notes taken by Paul Bardacke or any other employee of Browning & Peiffer, P.A. of any conversation with Jack Ben Ezra in January or February 1996.
2. Records and calendars, either paper or electronic, of any telephone calls or messages from or to Jack Ben Ezra in January or February 1996.
3. Billing records of Paul Bardacke that show any contact with Jack Ben Ezra in January or February 1996.

Exhibit 2

United States District Court

DISTRICT OF NEW MEXICO

BEN EZRA, WEINSTEIN AND COMPANY, INC.,
Plaintiff

v.

AMERICA ONLINE, INC.,
Defendant

SUBPOENA IN A CIVIL CASE

CASE NUMBER: CIV-97-0485 LH/LFG

TO: BROWNING & PEIFER, P.A.
20 First Plaza, Suite 725
Albuquerque New Mexico

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	DATE AND TIME

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ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
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Esteban A. Aguilar, Attorney for Plaintiff

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
--

1011 Lomas Blvd. NW
Albuquerque NM 87102 (505) 242-6677

PROOF OF SERVICE

DATE

PLACE

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SERVED ON (PRINT NAME)

MANNER OF SERVICE

SERVED BY (PRINT NAME)

TITLE

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(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in per-

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(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

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(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

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(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT "1"

1. Original notes taken by James O. Browning or any other employee of Browning & Peiffer, P.A. of any conversation with Jack Ben Ezra.
2. Original notes taken by James O. Browning or any other employee of Browning & Peiffer, P.A. of any conversation with Michael L. Weinstein.
3. Letters, memoranda, correspondence, facsimile transmissions, or other communications between any employee of Browning & Peiffer, P.A. and Jack Ben Ezra, Michael L. Weinstein, or Ben Ezra, Weinstein and Company, Inc.
4. Drafts of letters or other communications by any employee of Browning & Peiffer, P.A. that were sent to Casablanca, Inc., Casablanca Enterprises International, Ltd., Inc., Joel Cutler or Mary Ulberg, which James O. Browning knew would be forwarded to Jack Ben Ezra, Michael L. Weinstein, or Ben Ezra, Weinstein and Company, Inc. for review, revision or comment, including any proposed revisions to said documents.
5. Copies of any and all Browning & Peiffer, P.A. billing statements and billing records for legal services or costs regarding the matter involving Ari Ma'ayan, which James O. Browning knew would be forwarded to Jack Ben Ezra, Michael L. Weinstein, or Ben Ezra, Weinstein and Company, Inc.
6. Original notes taken by James O. Browning or any other employee of Browning & Peiffer, P.A. of any conversation with Spencer Reid or any other representative of Ari Ma'ayan regarding Jack Ben Ezra, Michael L. Weinstein, or Ben Ezra, Weinstein and Company, Inc.
7. Originals of any correspondence or communications in any form from any employee of Browning & Peiffer, P.A. to Joel Cutler, Janice Cutler, Mary Ulberg or Ari Ma'ayan, or any employee or agent of America Online, Inc. or of Wilmer, Cutler & Pickering regarding Ben Ezra, Weinstein and Company, Inc.'s, Jack Ben Ezra's or Michael L. Weinstein's dealings or involvement with Ari Ma'ayan, Casablanca, Inc., Casablanca Enterprises International, Ltd., Inc., Joel Cutler, Janice Cutler or Mary Ulberg.
8. Original telephone logs or messages, either paper or electronic, from Jack Ben Ezra, or Michael Weinstein.