

#131

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

**BEN EZRA, WEINSTEIN AND COMPANY, INC.**

**Plaintiff,**

**v.**

**AMERICA ONLINE, INC.,**

**Defendant.**

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NO. CIV 97-0485 LH/LFG

**OBJECTION AND APPEAL OF ORDER DENYING PLAINTIFF'S  
MOTION TO SERVE FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

**I. INTRODUCTION**

Plaintiff, Ben Ezra Weinstein and Company, Inc. (BEW), by and through its attorneys of record, Aguilar Law Offices, P.C., by Esteban A. Aguilar, Moses, Dunn, Farmer & Tuthill, P.C., by Mark A. Glenn, and Pepper, Hamilton & Scheetz, by Paul Kennedy, files this Objection and Appeal pursuant to 28 U.S.C. §636(b)(1)(A) and Fed. R. Civ. P. 72(a). On February 3, 1999, the Honorable Lorenzo F. Garcia entered an Order Denying Plaintiff's Motion to Serve First Request for Production on Defendant. (The Order is attached hereto as Exhibit 1 and is referred to as the "February 3, 1999 Order"). As grounds for its objection to the February 3, 1999 Order, BEW states that the Magistrate's Order (1) is contrary to law because it is based on a legal conclusion that is beyond the scope of his authority under 28 U.S.C. §636(b)(1)(A); and (2) is contrary to law because it precludes BEW from pursuing discovery that is necessary to respond to AOL's summary judgment motion. Accordingly, BEW requests that the Court find that the Magistrate's Order is contrary to law, set aside the decision, and grant BEW's Motion to Serve First Request for Production.

## II. ARGUMENT

### A. Standard of Review.

Fed. R. Civ. P. 72(a) provides that a party may file objections to a magistrate judge's non-dispositive order and "[t]he district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." *See also* 28 U.S.C. §636(b)(1)(A). When a magistrate's decision involves legal rather than factual issues, the "more lenient" contrary to law portion of Rule 72(a) applies. *Jochims v. Isuzu Motors, Ltd.*, 151 F.R. D. 338, 340 (S.D. Iowa 1993); *Bryant v. Hilst*, 136 F.R.D. 487, 488 (D. Kan. 1991). A magistrate's legal conclusions "are freely reviewable" under Rule 72(a). *RTC v. Bright*, 157 F.R.D. 397, 400 (N.D. Tex. 1994).

### B. Procedural Posture Of This Case.

AOL's primary response to this lawsuit has been that it is immune from suit pursuant to 47 U.S.C. §230 and it filed a motion seeking summary judgment on that issue. BEW opposed the motion and sought the right to obtain discovery relative to the immunity issue pursuant to Fed. R. Civ. P. 56(f). The Magistrate granted BEW's Rule 56(f) motion in an Order entered on October 30, 1998. (This Order is attached hereto as Exhibit 2 and is referred to as the "October 30, 1998 Order"). The October 30, 1998 Order allowed limited and particularized discovery regarding AOL's involvement in the publication of information on its Quotes & Portfolios area. October 30, 1998 Order at 4. The October 30, 1998 Order did not specifically allow the production of documents. BEW subsequently filed an opposed motion to serve requests for production on AOL in order to obtain documents essential to its ability to oppose AOL's summary judgment motion. The February 3, 1999 Order denied BEW's request.

**C. The February 3, 1999 Order Exceeds The Magistrate's Authority And Is Contrary To Law.**

In the February 3, 1999 Order, the Magistrate concluded that:

\*\*\* 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. [Citations omitted.]

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.

February 3, 1999 Order at 3.

Thus, the February 3, 1999 Order is based on the Magistrate's conclusion that AOL is immune from suit and should be protected from the burdens of discovery. This is the central issue presented in AOL's summary judgment motion. Under 28 U.S.C. §636(b)(1)(A), a United States Magistrate is precluded from ruling on motions for summary judgment. *See Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1462 (10th Cir. 1988) (sanction that resulted in involuntary dismissal was beyond the power of a magistrate to order and was subject to *de novo* review). Accordingly, the February 3, 1999 Order is beyond the scope of the Magistrate's authority and erroneous as a matter of law. The February 3, 1999 Order must be set aside.

**D. The February 3, 1999 Order Denying BEW's Discovery Request is Contrary To Law.**

In the October 30, 1998 Order, the Magistrate specifically found that "discovery into the

issue of whether AOL alters or manipulates stock information as opposed to receipt and republication is a relevant issue." October 30, 1998 Order at 3. In its Supplemental Memorandum in Opposition to AOL's Motion for Summary Judgment filed on February 3, 1999,<sup>1</sup> BEW asserted that AOL is not simply an interactive service provider; AOL is acting in concert with Townsend Analytics, Ltd., and S&P ComStock, Inc., to create and develop information available to AOL subscribers on AOL's Quotes & Portfolios area; and AOL therefore is not entitled to the absolute immunity it claims under 47 U.S.C. §230.

BEW therefore is entitled to production of documents in the possession of AOL that relate to AOL's claim of immunity under 47 U.S.C. §230 and that relate to the merits of the underlying issue, that is, whether AOL was responsible for the erroneous information published on its Quotes & Portfolios area. *See In re Airline Ticket Commission Antitrust Litig.*, 918 F. Supp. 283, 287 (D. Minn. 1996) (court reviewed *de novo* magistrate's order denying discovery which trenched heavily on defendant's claimed defenses, reversed magistrate, and allowed partial discovery that touched on significant and far-reaching issues).

Moreover, limiting discovery in this case by analogizing the immunity granted in 47 U.S.C. §230 to the qualified immunity afforded public officers (February 3, 1999 Order at 3), sets a dangerous precedent. In considering the defense of qualified immunity, the question of whether the law was clearly established at the time of a public official's alleged violation is purely a legal question. *Gallegos v. City and County of Denver*, 984 F.2d 358, 361 (10th Cir. 1993). In contrast, the question whether AOL is immune from suit involves the factually-intensive question

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<sup>1</sup>The Supplemental Memorandum was filed in accordance with the Magistrate's Order of October 30, 1998, and was filed under seal in accordance with the December 17, 1998 Stipulation and Protective Order Concerning Confidentiality.

of whether AOL created or developed the information published on its Quotes & Portfolio area. This crucial difference precludes analogizing the two immunities.

Finally, AOL, unbelievably acting as sole arbitrator of what is relevant and what is not, voluntarily produced certain documents purporting to shift responsibility for the creation and development of the information available on the Quotes & Portfolios area to Townsend and ComStock. See BEW's Supplemental Memorandum at 6-8. AOL, however, did not produce the more pertinent documents that were directly relevant to the issue of AOL's involvement, maintaining it was not required to do so under the October 30 1998 Order. Thus, AOL is using the limitations of the October 30, 1998 Order to selectively disclose certain documents, while preventing the production of documents that are more relevant to the true activities of AOL in creating or developing information available on the Quotes & Portfolios area. In addition, by producing some of the relevant information, AOL waived the limitations of the October 30, 1998 Order. *Cf. Fujisawa Pharmaceutical Co. v. Kapoor*, 162 F.R.D. 539, 541 (N.D. Ill. 1995) ("voluntary disclosure of privileged information about a matter waives the privilege as to all information on the same subject matter"). AOL should therefore be required to produce all of that same class of documents, which, by its voluntary production of some of the documents, AOL has conceded are relevant to BEW's case.


### III. CONCLUSION

The February 3, 1999 is contrary to law because it is beyond the scope of the Magistrate's authority and because it precludes BEW from pursuing discovery that is necessary to respond to AOL's summary judgment motion. Accordingly, BEW requests that the Court set aside the February 3, 1999 Order, grant BEW's Motion to Serve First Request for Production, and extend the discovery period which expired pursuant to the October 30, 1998 Order.

Respectfully submitted,

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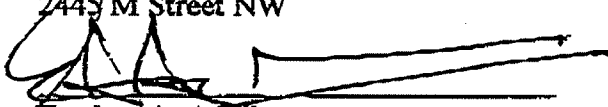
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## CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing document was mailed to the following counsel of record on this 17th day of February, 1999:

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