

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROBERT NOVAK d/b/a PetsWarehouse.com,

Plaintiff,

CV 01 3566

-against-

ANSWER TO
AMENDED
COMPLAINT

ACTIVE WINDOW PUBLICATIONS, INC.,
MARK ROSENSTEIN, ROBERT HUDSON d/b/a
AQUABOTANIC.COM,

Defendants

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Defendants ACTIVE WINDOW PRODUCTIONS, INC., improperly captioned above as ACTIVE WINDOW PUBLICATIONS, INC., despite numerous notification to plaintiff of the incorrect name, and MARK ROSENSTEIN, by their attorneys, Robert L. Folks & Associates, LLP, respectfully answer the Complaint of Robert Novak d/b/a Pets Warehouse.com, as follows:

1. Deny information sufficient to form a belief as to the truth of the averments in Paragraph 1.
2. Paragraph 2 is a conclusion of law to which no responsive pleading is required; however, defendants deny information sufficient to form a belief as to the truth of the averments in Paragraph 2.
3. Paragraph 3 is a conclusion of law to which no responsive pleading is required; however, defendants deny information sufficient to form a belief as to the truth of the averments in paragraph 3.

4. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments of Paragraph 4.

5. Defendants Active Window Productions, Inc, and Mark Rosenstein deny the averments of Paragraph 5.

6. Paragraph 6 is a conclusion of law to which no responsive pleading is required; however, defendants deny information sufficient to form a belief as to the truth of the averments in Paragraph 6.

7. Deny information sufficient to form a belief as to the truth of the averments in Paragraph 7 in general and deny as to defendants Active Window Productions, Inc. and Mark Rosenstein.

8. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 8.

THE PARTIES:

9. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 9, despite numerous attempts at discovering the facts related to those allegations, except to believe that defendants have a belief that at least individual named Robert Novak operates a business at 1550 Sunrise Highway, Copiague, New York, selling pet supplies and aquatic plants.

10. Defendants Active Window Productions, Inc. and Mark Rosenstein admit the allegations of Paragraph 10, except denies that the acronym AWP refers to Aquatic Plants Digest, which is sometimes referred to as "APD" but never "AWP". The

Aquatic Plants Digest is a mailing list operated pro-bono by Active Window Productions. All postings on the mailing list are archived on the Fish Information Service (or FINS) website, hosted by Active Window Productions.

11. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the existence of any "Active Window Publications" associated in any way with Active Window Productions, Inc. or Mark Rosenstein. Admit that Mark Rosenstein exerts editorial control over articles and some other materials published on the FINS website. Deny that Mark Rosenstein exerts editorial control over postings to the Aquatic Plants Digest mailing list or the archives of that list as they appear in FINS. Deny that Active Window Productions, Inc. or Mark Rosenstein operate any "chat rooms" as that phrase is commonly used on the Internet.

12. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 12.

THE INTERNET:

13. Defendants Active Window Productions, Inc. and Mark Rosenstein admit the averments of Paragraph 13.

14. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments of Paragraph 14. Aquatic Plants Digest does not operate a "chat room". It operates a list-serv which has different capabilities and characteristics than those of chat rooms.

15. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 15, and assert that plaintiff's description of terms does not reflect common usage.

16. Defendants Active Window Productions, Inc. and Mark Rosenstein admit the averments of Paragraph 16.

17. Defendants Active Window Productions, Inc. and Mark Rosenstein admit the averments of Paragraph 17.

18. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 18. Plaintiff has misleadingly used the acronym "AWP" to refer to allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

19. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 19.

20. Paragraph 20 is an illegible black box and therefore defendants are unable to respond to it.

21. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 21. The domain name was not "granted to plaintiff". He bought it, the same way any other person can buy a domain name not already in use.

22. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 22 and specifically assert that plaintiff's description of terms does not reflect common usage.

23. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averment in Paragraph 23.

24. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraphs 24 and 25.

25. With respect to Paragraph 26 of the Complaint, admit that defendant Mark Rosenstein purchased domain name Pets-Warehouse.net, as could any other member of the public. Deny any association with or knowledge of Active Window "Publications".

26. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 27, 28, 29, 30, 31, 32, 33.

27. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 34 except to admit that defendant Mark Rosenstein is acquainted with John Benn.

28. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averment in Paragraph 35. Deny that any such monies were used to pay Robert L. Folks & Associates, LLP, attorneys for Active Window Productions, Inc. and Mark Rosenstein, or that any such monies, should they exist, have been used for the benefit of Active Window Productions, Inc. or Mark Rosenstein.

29. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraphs 36. Plaintiff has misleadingly used the acronym "AWP" to refer to allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

30. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraphs 37 and 38.

31. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraphs 39 and 40.

32. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 41 as they may pertain to Active Window Productions, Inc. or Mark Rosenstein. Deny information sufficient to form a belief as to the truth of the averments in all other respects. Plaintiff has misleadingly used the acronym "AWP" to refer the allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

33. Defendants Active Window Productions, Inc. and Mark Rosenstein deny Paragraphs 42, 43 as they pertain to Active Window Productions or Mark Rosenstein. Deny information sufficient to form a belief as to the truth of the averments in Paragraph 42. Plaintiff has misleadingly used the acronym "AWP" to refer the allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

34. Paragraph 44 does not contain any allegations relating to Active Window Productions, Inc.

35. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments contained in Paragraph 45.

36. Defendant Active Window Productions, Inc. admits so much of the averments in Paragraph 46 that it, in cooperation with Petsforum.com, developed "PSW-Lawsuit-news" newsletter which is emailed to individuals who have asked to receive information on the progress of the instant and related litigation. Defendant Mark Rosenstein denies the averments in Paragraph 46.

37. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments of Paragraph 47. Plaintiff has misleadingly used the acronym "AWP" to refer the allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

38. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averment in Paragraph 48.

39. Defendants Active Window Productions, Inc. and Mark Rosenstein deny such portions of Paragraph 49 as are legible. Portions of Paragraph 49 are an illegible black box and, therefore, defendants Active Window Productions, Inc. and Mark Rosenstein cannot respond to any information contained in the illegible portion.

40. With respect to Paragraph 50 of the Complaint, admit that the statement of Alan Kaufman appeared on Aquatic Plants Digest. Deny that defendants authorized or condoned the acts of Mr. Kaufman. Publishing is automatic in the software. Both defendants and plaintiff saw Mr. Kaufman's statement after it was

published. Plaintiff has misleadingly used the acronym "AWP" to refer the allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

41. Defendants Active Window Productions, Inc. and Mark Rosenstein deny averments of Paragraphs 51 as they pertain to Active Window Productions, Inc. and Mark Rosenstein. Plaintiff has misleadingly used the acronym "AWP" to refer the allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

42. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments contained in Paragraph 52 of the Complaint except to admit that the following statement was posted by Mark Rosenstein:

To: aquatic-plants at actwin_com
Subject: Re: Novak and Tax Fraud
From: Mark Rosenstein<mar at actwin_com>
Date: Tue, 5 Mar 2002 16:35:33-0500

I don't actively read the APD. But it has brought to my attention that a recent posting on this list advocates reporting Robert Novak of Pets Warehouse to the IRS for tax fraud. While I am no friend of Bob's (he is suing me after all), I urge you to be careful in your response to this.

If you have reason to believe that tax fraud has been committed, then by all means call the IRS and report this. But to do so falsely just to hassle him may not be legal. Use your judgment, and do what is right. Alan thinks it likely that there is fraud. I really don't know.

-Mark Rosenstein
Editor, FINS

Plaintiff has misleadingly used the acronym "AWP" to refer to allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

43. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 53, 54, 55. Plaintiff has misleadingly used the

acronym "AWP" to refer the allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

44. Paragraph 56 contains a conclusion of law which does not require a response.

45. Defendants Active Window Productions, Inc. and Mark Rosenstein admit that portion of Paragraph 57 which contains a quote from defendant Mark Rosenstein. Admit that Mark Rosenstein exerts editorial control over articles and fish descriptions. Neither admits nor denies that portion of Paragraph 57 which described the record in this case which speaks for itself. Denies that Mark Rosenstein exerts any editorial control over statements posted by readers.

46. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the allegations of Paragraphs 58 and 59. Plaintiff has misleadingly used the acronym "AWP" to refer the allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

47. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 60, 61, 62, 63, 64, 65, and specifically deny that Active Window Production, Inc. or Mark Rosenstein are connected in any way with the events described in Paragraphs 60, 61, 62, 63, 64, 65.

48. In response to Paragraph 66, defendants Active Window Production, Inc. and Mark Rosenstein repeat and reallege each and every response above as if fully set forth herein.

49. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the allegations of Paragraphs 67, 68, 69, 70, 71, 72. Plaintiff has misleadingly used the acronym "AWP" to refer to allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

50. In response to Paragraph 73, defendants Active Window Production and Mark Rosenstein repeat and reallege each and every response above as if fully set forth herein.

51. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the allegations of Paragraph 74.

52. Paragraph 75 is a legal conclusion to which no response is required.

53. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the allegations of Paragraphs 76, 77, 78.

54. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 79.

55. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the allegations of Paragraphs 80, 81, 82, 83.

56. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraphs 84.

57. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the allegations of Paragraphs 85, 86, 87, 88.

58. Paragraph 89 does not contain any allegations relating to Active Window Production, Inc. or Mark Rosenstein. Therefore, no response is required herein.

59. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments of Paragraph 90.

60. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraph 91, 92 and assert that the statements contained therein are more in the order of legal argument than statement of facts.

61. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments of Paragraph 93.

62. Defendants Active Window Productions, Inc. and Mark Rosenstein deny all averments in Paragraph 94 as they pertain to Active Window Productions, Inc. or Mark Rosenstein.

63. Paragraphs 95, 96, 97 do not contain any allegations pertaining to Active Window Productions, Inc. or Mark Rosenstein. Therefore, no response is required herein.

64. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 98, 99, 100, 101, 102, 103, 104, 105.

65. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 106 except to admit advising Mr. Novak to "calm down".

66. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 107 as they pertain to Mark Rosenstein or Active

Window Productions, Inc. The comments referred to were made by Mark Rosenstein in a private email and were subsequently reported by one of the recipients of that email without prior notice to Mark Rosenstein.

67. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 108.

68. With respect to Paragraph 109, defendants Active Window Productions, Inc. and Mark Rosenstein admit that the FINS website employs automatically filter software that blocks messages containing profanities and file attachments. Such software is NOT configured to block posts from specific individuals.

69. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 110, 111, 112

70. Paragraph 113 of the Amended Complaint does not state any facts. However, defendants Active Window Productions, Inc. and Mark Rosenstein specifically deny being the recipients of any results of such fundraising efforts and, therefore have no fundraising proceeds to disgorge.

71. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 114.

CLAIM TWO – LANDHAM ACT CONTRIBUTORY INFRINGEMENT

72. With respect to Paragraph 115, defendants Active Window Productions, Inc. and Mark Rosenstein repeat and reallege each and every response above as if fully set forth herein.

73. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 116 except as to those portions which are illegible and, therefore, defendants are unable to respond.

74. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 117, 118, 119.

**CLAIM THREE - TORTIOUS INTERFERENCE WITH
PERSPECTIVE AND PAST ECONOMIC ADVANTAGE**

75. In response to Paragraph 120, defendants Active Window Productions, Inc. and Mark Rosenstein repeat and reallege each and every response above as if fully set forth herein.

76. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 121.

77. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraphs 122, 123, 124.

78. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 125, 126, 127.

79. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraphs 128, 129, despite attempts to ascertain via discovery.

80. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 130, 131.

81. Defendants Active Window Productions, Inc. and Mark Rosensetin deny the averments in Paragraph 132 in so far as they pertain to Active Window

Productions, Inc. or Mark Rosenstein. Specifically deny and object to the characterization "Active Windows Website".

82. Paragraphs 133, 134, 135, 136, 137, 138 do not contain any allegations relating to Active Window Productions, Inc. or Mark Rosenstein.

83. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 139, 140 as they pertain to Active Window Productions, Inc. or Mark Rosenstein.

85. Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraphs 141 despite attempts to ascertain via discovery. Further, defendant Active Window Productions, Inc. and Mark Rosenstein specifically deny operating a chat room.

86. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 142, 143.

**CLAIM FOUR – PRODUCT DISPARAGEMENT
AND TRADE LIBEL**

87. In response to Paragraph 144, defendants Active Window Productions, Inc. and Mark Rosenstein repeat and reallege each and every response above as if fully set forth herein.

88. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 145, 146, 147, 148, 149. Plaintiff has misleadingly used the acronym "AWP" to refer to allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

89. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 150 except to admit that the archived contract of Aquatic Plants Digest remains, unedited, on the internet.

90. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 151.

**CLAIM FIVE – THE LIBEL, CYBER LIBEL,
COMMERCIAL DEFNIMATION, FALSE LIGHT
AND LIBEL PER SE OF THE DEFENDANTS**

91. In response to Paragraph 152, defendants Active Window Productions, Inc. and Mark Rosenstein repeat and reallege each and every response above as if fully set forth herein.

92. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 153 and 154 as they pertain to Active Window Productions, Inc. or Mark Rosenstein, and assert that plaintiff has incorrectly used internet terminology to create a false and misleading impression.

93. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 155, 156, 157, 158, 159, 160. Plaintiff has misleadingly used the acronym “AWP” to refer to allegations pertaining to Aquatic Plants Digest, not Active Window Productions, Inc.

**CLAIM SIX – CYBRSQUATTING PURSUANT TO
15 U.S.C. §1125(d)(1)**

94. In response to Paragraph 161, defendants Active Window Productions, Inc. and Mark Rosenstein repeat and reallege each and every response above as if fully set forth herein.

95 Defendants Active Window Productions, Inc. and Mark Rosenstein deny information sufficient to form a belief as to the truth of the averments in Paragraphs 162 despite attempts to ascertain via discovery.

96. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraph 163 except to admit registering the domain name "Pets-Warehous.net" which was at the time a freely available domain name open to registration by anyone desiring to do so.

97. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments in Paragraphs 164, 165, 166, 167, 168, 169, 170 and 171.

**CLAIM SEVEN – INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS TO ROBERT NOVAK**

98. With respect to Paragraph 172, defendants Active Window Productions, Inc. and Mark Rosenstein repeat and reallege each and every response above as if fully set forth herein.

99. Defendants Active Window Productions, Inc. and Mark Rosenstein deny the averments contained in Paragraphs 173 and 174.

AS AND FOR A FIRST DEFENSE

100. The Complaint fails to state a claim upon which relief can be granted as against Active Window Productions, Inc. and Mark Rosenstein.

AS AND FOR A SECOND DEFENSE

101. Upon information and belief, the statements complained of are true.

AS AND FOR A THIRD DEFENSE

102. That the statements complained of were an expression of opinion protected by the First Amendment of the Constitution.

AS AND FOR A FOURTH DEFENSE

- 103. Upon information and belief, the plaintiff sustained no harm as a result of the complained of statements.

AS AND FOR A FIFTH DEFENSE

104. Upon information and belief, the statements complained of are absolutely or qualifiedly privileged.

AS AND FOR A SIXTH DEFENSE

105. Upon information and belief, the instant suit was brought to harass and intimidate the defendants so as to prevent them from hosting web pages or list-servs where commentators can relay anecdotal evidence and voicing legitimate complaints about plaintiffs' goods and services in violation of the New York Civil Rights Law.

AS AND FOR A SEVENTH DEFENSE

**COMMUNICATIONS DECENCY ACT
Tital 47 USC §230**

106. Defendants Active Window Productions, Inc. and Mark Rosenstein do not exert editorial control over the contents posted on the Websites or list services at issue in this suit.

107. Active Window Productions, Inc. provided pro bono website design and web hosting and mailing list operation to "Aquatic Plants Digest".

108. Neither Active Window Productions, Inc. nor Mark Rosenstein exert any editorial control over the contract of either the website or list service.

109. As such, neither Active Window Productions, Inc. nor Mark Rosenstein are “publishers or speakers” of any alleged defamatory or trademark infringement statements as asserted in the Complaint. 42 USC 230(c)(1).

110. Neither Active Window Productions, Inc. nor Mark Rosenstein have any control over or connection with the operation of other websites, search engines, etc. described in the Complaint.

AS AND FOR AN EIGHTH DEFENSE
Release and Waiver

111. Many of the acts complained of in the Complaint involve acts by defendants in this action and in a related action who have already entered into Stipulations of Settlement with plaintiff herein and have obtained waivers and releases from plaintiff for those acts.

AS AND FOR A NINTH DEFENSE

112. Many of the acts complained of herein involve purported acts by companies and individuals who are not parties to this suit, who are not agents or employees of defendants Active Window Productions and Mark Rosenstein and over whom Active Window Productions, Inc. and Mark Rosenstein exert no dominion or control. Many of the names of these non-parties are completely unknown to defendant Mark Rosenstein, who is also the sole employee of Active Window Productions, Inc.

AS AND FOR A FIRST COUNTERCLAIM

113. Upon information and belief, the instant suit was brought to harass and intimidate the defendants so as to prevent them from hosting web pages or list-servs where commentators can relay anecdotal evidence and voicing legitimate complaints about plaintiffs’ goods and services in violation of the New York Civil Rights Law.

114. That as a result of the violation by the plaintiffs, the defendants Active Window Productions, Inc. and Mark Rosenstein have been damaged by incurring counsel fees and in another amounts to be determined at trial.

WHEREFORE, your deponent demands that the Complaint be dismissed and judgment be rendered on behalf of the defendants Active Window Productions, Inc. and Mark Rosenstein.

Dated: Melville, New York
September 9, 2007

Cynthia A. Kouril
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