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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

XCENTRIC VENTURES, LLC, an Arizona limited liability company,

Plaintiff,

v.

LISA JEAN BORODKIN and JOHN DOE BORODKIN, husband and wife; RAYMOND MOBREZ and ILIANA LLANERAS, husband and wife; DANIEL BLACKERT and JANE DOE BLACKERT, husband and wife; ASIA ECONOMIC INSTITUTE, LLC, a California limited liability company; DOES 1-10, inclusive,

Defendants.

No. 2:11-CV-01426-PHX-GMS

DEFENDANT LISA JEAN BORODKIN'S MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11

(Assigned to the Honorable G. Murray Snow)

(Oral Argument Requested)

Pursuant to Federal Rule of Civil Procedure 11 and the Court's inherent power, Defendant Lisa Jean Borodkin moves this Court to sanction Plaintiff Xcentric Ventures, L.L.C., its manager, Edward Magedson, and its counsel, David Scott Gingras, for signing, verifying and filing the Verified Complaint and Verified First Amended Complaint (collectively, the "Complaint") in this action asserting frivolous claims against her for an

improper purpose. This Motion is supported by the attached Memorandum of Points and Authorities, the accompanying Request for Judicial Notice, the Declaration of Lisa Jean Borodkin and the entire record in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Lisa Jean Borodkin ("Borodkin") was one of the attorneys who represented several plaintiffs in a case against Xcentric Ventures, L.L.C. ("Xcentric") and Ed Magedson ("Magedson") in the Central District of California. Borodkin joined the California case already substantially in progress, and was involved in litigating the RICO/attempted extortion claim complained of in the Complaint for approximately three (3) months out of the case's eighteen (18) month history. The rest of Borodkin's involvement with the case focused on other claims not complained of in the Complaint. The California case was eventually resolved via two separate summary judgment orders in favor of the defendants.

Xcentric now has sued Ms. Borodkin in Arizona, on vague, frivolous claims, for a patently improper purpose – to extract from Ms. Borodkin information she does not have about things an unrelated third party "did wrong." Plaintiff, through its manager, Magedson, has telegraphed to Ms. Borodkin, in no uncertain terms, it will not dismiss the Complaint unless she provides information on things this unrelated third party "did wrong." Moreover, the Complaint's factual allegations are contradicted by prior sworn statements of Xcentric's counsel and Magedson in the California case.

Yet even with this information, Xcentric and its counsel refuse to dismiss the Complaint.

Pursuant to Federal Rule of Civil Procedure 11, Xcentric, its counsel, and Magedson should be sanctioned for their outrageous conduct. Moreover, the Complaint against Ms. Borodkin should be dismissed, with prejudice, and Plaintiff should be ordered to pay Ms. Borodkin's attorneys' fees and costs incurred herein.

II. FACTUAL BACKGROUND.

A. The Plaintiff And Its Principals.

Xcentric operates a for-profit website known as "Ripoff Report." Magedson is Ripoff Report's manager. Xcentric's counsel in this matter, David Gingras ("Gingras"), is both General Counsel for Xcentric and was also one of the attorneys of record for Xcentric in the California case.

Ripoff Report solicits and publishes negative reviews of businesses and people. Ripoff Report earns revenues from services including the "Corporate Advocacy Program" ("CAP").[1] Members of CAP receive preferential treatment.[2] For example, negative reports about CAP members are less prominent in internet searches.[3] In order to join CAP, a company must pay a fee to Xcentric.[4] CAP costs an initial flat fee of $7,500, as well as a monthly fee.[5]

The Florida Court of Appeals described the CAP as follows:

> Xcentric describes a "service" it provides to people and entities who wish to challenge false postings on Xcentric's website. This "service" is called the "Corporate Advocacy Program" by Xcentric. Individuals or businesses who believe they have been defamed by a posting on Xcentric's website must, according to the amicus brief filed in this case, "pay a tidy sum to be investigated by Xcentric's management." Moreover, "[i]n addition to a steep upfront charge, the business is required to make periodic payments to keep its status in the program."

See Giordano v. Romeo, 76 So. 3d 1100, 1102 and fn.1 (Fla. Dist. Ct. App. 3d Dist. 2011)

B. The California Action.

Xcentric, Magedson and "Doe Defendants" were defendants in an action litigated in the Central District of California, styled as Asia Economic Institute, L.L.C. et al. v.

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[1] *See Asia Econ. Inst. v. Xcentric Ventures, LLC*, 2010 U.S. Dist. LEXIS 133370 (C.D. Cal. July 19, 2010) (the "July 19, 2010 Order") at *11.

[2] *See Asia Econ. Inst. v. Xcentric Ventures LLC*, 2011 U.S. Dist. LEXIS 145380 (C.D. Cal. May 4, 2011) (the "May 4, 2011 Order") at *8.

[3] *See id.*

[4] *See id.*

[5] *See* July 19, 2010 Order, at *13.

Xcentric Ventures, L.L.C. et al., C.D.Cal. No. 10-cv-1360 ("the California Action"). The California Action had been commenced by defendant Daniel F. Blackert ("Blackert") on January 27, 2010 on behalf of Asia Economic Institute, L.L.C. ("AEI"), Raymond Mobrez and Iliana Llaneras (collectively with AEI, the "AEI Parties"). It is undisputed that Borodkin had no role in preparing or signing the original complaint. *See* Compl. ¶ 31.[6]

The initial complaint filed by Blackert contained numerous claims under both state and federal law. *See* Compl. ¶29 and Ex. A thereto. Xcentric's first response was to file an Anti-SLAPP motion under California Civil Code § 425.16. It claimed, unsuccessfully, that the California Action was filed to chill Ripoff Report's First Amendment rights. On April 19, 2010, the Court denied Xcentric's first anti-SLAPP motion in a 33-page opinion.[7] It found that Ripoff Report complaints were not a matter of public concern.[8]

At the April 19, 2010 hearing, the Court bifurcated the action and set an early trial on one of the claims in the initial complaint - the RICO claim predicated on attempted extortion. *See* Compl. ¶32 and Ex. B thereto. After bifurcating the RICO/attempted extortion claim, the Court ordered the parties to submit declarations describing all meetings with each other.[9] *See id.* Thereafter, on May 3, 2010, Blackert filed declarations for Mobrez and Llaneras per the Court's Order. *See Compl.* ¶ 33 and Exs. C-D thereto. On May 11, 2010, Gingras also filed a declaration for Magedson per the Court's Order.[10]

On May 7, 2010, Gingras took the deposition of Mobrez. After eliciting testimony, Gingras produced and played unauthenticated recordings of conversations that he alleged were all the telephone conversations between Mobrez and Magedson.[11] It is undisputed

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[6] Citations to "Compl. _¶" are to the Complaint in this action.

[7] *See* AEI v. Xcentric, C.D. Cal No. 10-cv-1360 DN-23, available at: https://ecf.cacd.uscourts.gov/doc1/031110016999 (the "Apr. 20, 2010 Order").

[8] *See id*. Xcentric and Magedson later filed a second unsuccessful anti-SLAPP motion towards the end of the case. *See* May 4, 2011 Order, at *33.

[9] It is undisputed that Ms. Borodkin only became involved in the California Action after April 19, 2010, long after the proceeding had been initiated. *See* Compl. ¶ 31.

[10] *See* AEI v. Xcentric, C.D. Cal No. 10-cv-1360 DN-31 (May 11, 2010), available at https://ecf.cacd.uscourts.gov/doc1/031110147370.

[11] Borodkin was not present for this portion of the deposition.

that the recordings were made without Mobrez' knowledge. *See* Compl. ¶41. The unauthenticated recordings were inconsistent with Mobrez **and** Magedson's prior declarations.

On May 10, 2010, Blackert and Ms. Borodkin consulted the California State Bar Ethics Hotline and read the authorities recommended by the Ethics Hotline, particularly California State Bar Formal Ethics Opinion No. 1983-74. *See* Declaration of Lisa J. Borodkin ("Borodkin Decl.") at ¶¶2-3; Request for Judicial Notice ("RJN"), filed concurrently herewith, at Exhibit "1". After counseling Mobrez and Llaneras, and consistent with California Ethics Opinion No 1983-74, defendants Blackert and Borodkin honored the clients' informed decision to continue with the case after taking corrective measures. As such, Blackert filed corrected declarations for both Mobrez and Llaneras on May 20, 2010. Compl. ¶49 and Exs F-G thereto. Mobrez and Llaneras did not refer to the corrected testimony and did not rely on evidence of oral threats in the case thereafter. *See Asia Econ. Inst. v. Xcentric Ventures, LLC*, 2010 U.S. Dist. LEXIS 133370 (C.D. Cal. July 19, 2010) at *46.

Importantly, for purposes of this Motion, Gingras, too, had to correct the testimony of his client. On May 11, 2010 Gingras filed a new declaration for Magedson, recanting Magedson's false statements in declarations filed on both March 22, 2010 and April 5, 2010, alleging that Mobrez had "threatened" him in a telephone conversation. *See* RJN, at Ex. 2.

Notwithstanding the foregoing, Gingras insisted repeatedly that Blackert and Ms. Borodkin faced serious ethical consequences with the California State Bar by continuing to represent the AEI Parties after taking corrective action. *See* Compl. ¶44 and Ex. E. However, in a letter dated May 11, 2010, Gingras states that Xcentric would not agree to settle the case unless the AEI Parties agreed to the following terms:

> The first point is that [the AEI Parties] would need to retract their prior testimony and admit that they were never asked for money, etc., and immediately agree to the dismissal of their lawsuit with prejudice.

> The second point is that your clients would agree to pay all of the attorney's fees and costs incurred by Xcentric to date which we believe are probably less than $25,000 (though this number is increasing with each passing day).
>
> The third point is that your clients would provide a full, complete, and truthful explanation of each and every third party who aided, solicited, and/or encouraged them to make their false extortion claims in this case.

See Compl. ¶44 and Ex. E thereto at 4. Blackert and Ms. Borodkin were not authorized to agree to a settlement that required the AEI Parties to pay all Xcentric's fees. Borodkin Decl. ¶4.

On May 24, 2010, Xcentric moved for summary judgment on the RICO claim based on attempted extortion.[12] Gingras attempted to offer the recordings that were purportedly all the conversations between Mobrez and Magedson, in support of the defendants' first motion for summary judgment.[13] In the July 19, 2010 Order, the Court excluded the recordings from evidence. RJN, Ex. 3, at 21. The Court found that the recordings had been obtained in violation of California's wiretapping law, Penal Code Section 632(a):

> [I]t is undisputed that Mobrez was unaware that his calls with Magedson were being recorded and that Mobrez did not give consent . . . some of the recordings that Defendants seek to admit were obtained in violation of California Penal Code § 632(a).

RJN, Ex. 3, at 21:25-22:4. The Court also found that the recordings "may not be accurate," finding:

> *Defendants have refused to reveal the name of the third party vendor to the Plaintiffs despite the Plaintiffs' reasonable request* . . . and have not offered any declarations from the third party vendor or any information about the method of recording, the equipment used, or how the recordings are kept in the ordinary course of the vendor's business.. . .*Further, the foundational shortcomings are especially problematic here because Plaintiffs have*

[12] Xcentric also moved for summary judgment on the other claims. The Court found the motion "inappropriate given the Court's prior Order bifurcating the RICO/extortion claims." *See* July 19, 2010 Order at *26.

[13] *See id.* at *29.

> *presented facts indicating that the recordings may not be accurate or trustworthy*. Specifically, Mobrez's phone records indicate the duration of each of the calls made from Mobrez to Magedson in March and April 2009. . . . In most instances, the duration of the calls is considerably longer than the length of the recorded conversation submitted to the Court.

RJN, Ex. 3, at 26:9-22 (emphasis added). Moreover, the Court found that California law would apply in a choice-of-law analysis:

> [I]f the Court were to engage in a choice-of-law analysis between Arizona and California law, the Court undoubtedly would apply California law, given California's strong public interest in protecting the confidentiality of certain communications.

RJN, Ex. 3, at 22:4-9.

In addition, Gingras and Magedson maintained during the California Action that they believed Blackert and Ms. Borodkin were not aware that Mobrez' and Llaneras' May 3, 2010 declarations were purportedly inaccurate. On June 24, 2010, Gingras filed a declaration in support of Xcentric's motion for summary judgment explaining that he was trying to "warn" Blackert of potential ethics pitfalls. To show this, Gingras quoted from his own statement at the May 7, 2010 deposition of Mobrez:

> GINGRAS: I want – your [Mobrez's] lawyer has certain obligations under his duties to the State Bar and to our court, and I do not want to put him in a position, *assuming, as I hope, that he is an innocent victim of your conduct and your crimes*, I do not want to put him in a position where he will lose his license if he continues to represent you knowing, as he knows now, that you have committed perjury in this case.

RJN, Ex. 4, at 4:19-27 (emphasis added). Gingras reiterated this position in his May 11, 2010 letter to Blackert and Ms. Borodkin, when he stated: "*Of course, as I have already explained to Dan, my assumption thus far has been that both of you have been unaware of the truth*." Compl. ¶44 and Ex. E thereto at 5 (emphasis added).

Likewise, Magedson testified at his June 8, 2010 deposition that he "assumed" Blackert and Ms. Borodkin "weren't aware" of lies against him:

> Q: Why do you think that?
>
> MAGEDSON: Because people who I'm sure you've already reached out to and that have been mentioned are people who are directly connected, and all have helped other people to perform DDoS attacks, gotten people to try to -- *like Mr. Mobrez, to lie, which I'll assume, as nice as you are -- that I think the two of you's [Borodkin and Blackert] are nice people, that you're probably -- I would assume you weren't aware of* -- I don't know. I don't want to really just say anymore.

See Borodkin Decl. ¶5, Ex.1 at 72:19-73:3 (emphasis added).

From May 20, 2010 to its conclusion in July 2011, Blackert and Ms. Borodkin litigated the California Action without referring to the corrected testimony. The RICO claim predicated on attempted extortion was dismissed on July 19, 2010.[14] The RICO Claim based on wire fraud was voluntarily dismissed on September 20, 2010.[15] The rest of the case concerned claims for unfair competition, tortious interference with economic advantage, fraud, deceit, defamation,[16] false light and injunction.

However, Xcentric kept trying to revive the issue of the recordings. Xcentric made two unsuccessful Rule 11 motions, one of which claimed, falsely, that:

> *[I]t was proven that the individual Plaintiffs (Mr. Mobrez and Ms. Llaneras) committed perjury* in this case by manufacturing and presenting sworn false testimony accusing Mr. Magedson of demanding $5,000 in order to make negative information disappear from the Rip-Off Report website.[17]

Of course, no "perjury" was ever "proven." As explained above, the Court had commented that the recordings violated California's Penal Code and that "*may not be accurate or trustworthy*." *See* RJN, Ex. 3, at 21, 26 (emphasis added). The Court denied all of Xcentric's Rule 11 Motions, as well as Xcentric's second unsuccessful anti-SLAPP motion. *See* RJN, Ex. 5, at 12-14.

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[14] *See* July 19, 2010 Order at *79.

[15] AEI v. Xcentric, AEI v. Xcentric, C.D. Cal No. 10-cv-1360 DN-144, available at https://ecf.cacd.uscourts.gov/doc1/031110926415 (the "Sept. 20, 2010 Order").

[16] The defamation claims were asserted primarily against "Doe" defendants."

[17] AEI v. Xcentric, AEI v. Xcentric, C.D. Cal No. 10-cv-1360 DN-135 at 2:12-15, available at https://ecf.cacd.uscourts.gov/doc1/031110823447 (the "Sept. 3, 2010" Order).

C. The Complaint.

On July 18, 2011, Gingras signed and filed the Complaint in the District of Arizona. The Complaint alleged, in a conclusory fashion:

- "[Before filing the California Action] BLACKERT knew that they could not legitimately present [a RICO/extortion] theory because at no time was AEI actually extorted by XCENTRIC or Magedson." Compl. ¶ 24.

- "At the time the [California Action] was commenced, Defendants AEI, MOBREZ, LLANERAS and BLACKERT each knew the action was factually groundless in particular as to the allegations of RICO/extortion[.]" Compl. ¶ 70.

- That Defendants [including Borodkin] "engaged in . . . multiple/repeated violations of the California Rules of Professional Conduct including, but not limited to, Rule 3-200 (prohibiting a lawyer from bringing an action or asserting any position in litigation without probable cause and for the purpose of harassing or maliciously injuring any person); Rule 3-210 (prohibiting a lawyer from advising a client to violate the law); and Rule 5-200 (B) (prohibiting a lawyer from misleading a court by making a false statement of fact)." Compl. ¶ 2.

- That Defendants (including Ms. Borodkin), and each of them, wrongfully continued the [California Action] without probable cause and knowing that the action was brought primarily for a purpose other than that of securing the proper adjudication of the claims in which the proceedings were based. Compl. ¶ 82.

Moreover, and despite the fact that the California Action did not actually contain a claim for extortion (only RICO predicated on a pattern of attempted extortion) the Complaint further alleged:

- "As of no later than May 7, 2010, Defendants BORODKIN and BLACKERT knew, with absolute certainty, that Defendants MOBREZ and LLANERAS had committed perjury and that their claims of extortion were totally fabricated and false." Compl. ¶ 77.

And, although the AEI Parties did not refer to any phone calls between Mobrez and Magedson after May 7, 2010, the Complaint further alleged in a conclusory fashion:

- "MOBREZ further perjured himself [in his May 20, 2010 declaration] by testifying for the first time, 'In addition, there were a number of incoming calls to me from Ripoff Report.'" Compl. ¶ 50

- "Upon information and belief, Defendants BORODKIN and BLACKERT assisted Defendant MOBREZ with the creation of his "Corrected declaration" and in doing so, BORODKIN and BLACKERT intentionally suborned perjury from MOBREZ." Compl. ¶ 51.

D. The Demand.

After filing the Complaint, on August 10, 2011, Magedson sent Ms. Borodkin an email making outrageous and improper demands, using the Complaint as leverage. That email stated, in pertinent part, that:

> To be clear,. *NO MONEY WOULD BE DEDUCTED for any information on Brewington*. Not a dime. The only benefit to you would be, if you do provide information to us that you know would help us with Brewingtons other alleged activities to hurt Ripoff Report and myself.. the only thing that would get you is the following.
>
> I would consider settling with you out of court, but, I would require you to stipulate to a judgment for $100,000 as well..
>
> *Benefit to you, you would not have to go thru a long court battle*. This amount will be much less than what I will be suing for. This is one court battle I will be looking forward to. I will be on a mission to get courts to punish lawyers like you and Blackert. What you did is disgusting, despicable and unforgivable. Courts need to start coming down on lawyers like you as well as prosecutors for misconduct. . . .
>
> What I am offering you will get you to avoid a long drawn out legal battle and will only make you look worse than you already do. You can also start focusing on looking for a job instead of a legal battle. *In order to get me to settle out of court with you, you would also need to provide info on things you know John F Brewington did wrong*. I know you can help in this area.
>
> You would also need to start, immediately paying on that judgment, $10,000 down and $5,000 a month. If not, I will see you in court.

Borodkin Dec. ¶6, Ex. 2 (emphasis added).

Moreover, Gingras sent Ms. Borodkin an email on August 8, 2011 stating that evidence about Brewington might "provide a basis for resolving Ed's claims against you." Borodkin Dec., at Ex. 2. John Brewington is an unrelated third party who was neither a party nor a witness in the California Action.

On March 1, 2012, this Court granted in part Ms. Borodkin's motion to strike and motion for a more definite statement, striking paragraph 2 of the Complaint and ordering Xcentric to "provide a more definite statement regarding Borodkin's alleged improper motives and purposes." *See* Doc. 52 at 19:12-14; 20:16.

On March 16, 2012, Xcentric filed a Verified Amended Complaint. The Verified First Amended Complaint did not retract any of the allegations in the Complaint except for Paragraph 2, which had been stricken by the Court. The Verified First Amended Complaint pleaded Ms. Borodkin's purported malice in wholly conclusory terms, collectively with Blackert's and without any new accompanying factual allegations to support them.

Based on the foregoing, this Motion follows.

III. ARGUMENT.

A. The Standards Imposed By Rule 11.

By signing the Complaint, Gingras certified for himself and on behalf of Xcentric that to the best of their "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that:

> (1) [The Complaint is] not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law...; [and]
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery ... .

Fed. R. Civ. Proc. 11(b). And, by signing the verification, Magedson subjects himself to sanctions also. *See Business Guides v. Chromatic Communications Enters.*, 892 F.2d 802, 809 (9th Cir. 1989). Sanctions are especially appropriate when the party is sophisticated, representing itself as having extensive litigation experience. *See id.* at 812.

Sanctions under Rule 11 are appropriate in either of the following instances: (a) "when a pleading is frivolous, i.e., both baseless and made without a reasonable and competent inquiry"; or (b) when a pleading is filed for an improper purpose. *See Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1991) (*en banc*); *In re Pozsga*, 158 F.R.D. 435, 437 (D. Ariz 1994). Determining if a pleading is frivolous

does not depend on a lawyer's subjective belief, but rather is judged by an objective standard of whether a "competent attorney would believe it was well-grounded in fact and warranted by law." *Adriana Intel Corp. v. Thoeren***,** 913 F.2d 1406, 1415 (9th Cir. 1990); *see also Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir. 1993); *Pozsga*, 158 F.R.D. at 437.

Here, the Complaint is **both** frivolous **and** has been filed for an improper purpose. Accordingly, the Court should impose sanctions against Xcentric, its counsel, and Magedson, pursuant to Rule 11.

B. Plaintiff's Complaint Is Frivolous.

Plaintiff's Complaint asserts two claims against Ms. Borodkin: (1) "Wrongful Continuation of Civil Proceedings"; and (2) Aiding and Abetting Tortious Conduct.

Here, Plaintiff has not pled, nor does Plaintiff (or Plaintiff's counsel) have any objectively reasonable reason to believe, that Ms. Borodkin's representation in the California Action was "motivated by malice" or not "primarily to help the client obtain a proper adjudication of the client's claim."

The California Action alleged, among other things, that Ripoff Report's activities constituted unfair and deceptive trade practices, fraud and racketeering. Until July 19, 2010, the California Action included causes of action under the RICO statutes, 18 U.S.C. 1962(c)-(d) predicated on attempted extortion.[18]

Indeed, a similar claim of RICO against Ripoff Report predicated on threatened extortion had survived a motion to dismiss in *Hy Cite Corp. v. Badbusinessbureau*, 418 F. Supp. 2d 1142, 1150 (D. Ariz. 2005). There, the Court had written:

> Defendants operate a website. Plaintiff alleges that Defendants create and solicit false and defamatory complaints against businesses, but will cease this conduct for a $50,000 fee and $ 1,500 monthly retainer. Remedying the publication of false and defamatory complaints, which Defendants allegedly created and solicited, does

[18] Contrary to the allegations, the California Action had no claim for "extortion" and did not claim that Magedson "extorted" the AEI Parties. *See* Compl. ¶29 Ex. A, at ¶63.

> not give Defendants the right to collect fees. . . . Plaintiff has properly alleged threatened extortion.

418 F. Supp. 2d 1142. *Hy Cite* was eventually dismissed by stipulation.[19] Additionally, in California, the recent case, *Monex Deposit Co. v. Gilliam*, 666 F. Supp. 2d 1135 (C.D. Cal. 2009), recognized a private cause of action for attempted extortion under Penal Code § 523 even if no money changed hands. *See id.* at 1136. Thus, Ms. Borodkin had no improper motives, and was merely litigating claims for her clients that were supported by California law.

In addition, Xcentric cannot show that Ms. Borodkin did anything other than observe her ethical duties to follow her clients' instructions in declining to dismiss the California Action upon Gingras' demand that the AEI Parties pay all of Xcentric's fees. Compl. ¶44 and Ex. E at 4 thereto. Where a lawyer's client is willing to dismiss the action but instructs the attorney not to agree to a settlement that requires the client to pay the adversary's attorney's fees, the attorney is ethically required to follow the client's instructions. *See Smith v. Lucia*, 173 Ariz. 290, 296 (App. 1992). In *Smith*, the Court found that the adversary was more concerned with preserving a claim for malicious prosecution against the lawyer than in resolving the case. The record here would support the same finding.

C. Plaintiff's Complaint Lacks Evidentiary Support.

This is not a case in which a party filed a pleading with the reasonable belief that the allegations would find evidentiary support once discovery was conducted. Gingras and Magedson's statements show that they already *know* that they will not find evidentiary support for the allegations. On June 24, 2010, Gingras filed a declaration in the California Action stating that he believed Blackert was "innocent" of the alleged

[19] *Hy Cite* had contained allegations that Ripoff Report "created and solicited reports"; however, no case had tested RICO predicated on attempted extortion alleging solely that Ripoff Report "solicited" reports.

perjury. RJN Ex. 4 at 4:19-27. Likewise, Magedson testified on June 8, 2010 that he did not believe Blackert and Borodkin were "aware" of the alleged perjury.

No evidence has come to light indicating that Borodkin was aware of any purported perjury. Nor does the Complaint refer to any newly-discovered evidence since Gingras and Magedson made these sworn statements that they believed Blackert and Borodkin were "innocent" of the alleged perjury. Yet Gingras and Magedson continue to use the alleged inconsistencies shown by the illegally-made recordings to harass Blackert and Borodkin, even after the conclusion of the California Action.

Plaintiff, its counsel and Magedson therefore cannot claim absentmindedness or mistake as an excuse for filing the frivolous Complaint. *See Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995). At a minimum, the facts demonstrate that Plaintiff and its counsel filed the challenged allegations without reasonable inquiry. That, alone, is enough for sanctions under Rule 11. *See Terran v. Kaplan*, 989 F. Supp. 1025, 1026 (D. Ariz. 1997).

D. Plaintiff's Complaint Is Brought for an Improper Purpose.

Plaintiff, Magedson and Gingras filed the Complaint for an improper purpose. Magedson's August 10, 2011 communication evidences, without a doubt, that he intends to use the Complaint as leverage to intimidate Ms. Borodkin into providing negative information about John F. Brewington. Indeed, Magedson wrote to Ms. Borodkin that he "would not settle out of court ***unless*** you also provide information of what John F. Brewington did wrong." *See* Borodkin Dec. Ex. 2 (emphasis added). This is an unequivocal threat and an improper reason to refuse to settle a case. Magedson's August 10, 2011 email also threatened that the lawsuit will make Ms. Borodkin look "worse than you already do" and subject her to a costly "long drawn out court battle." *See id.*

Where litigants act willfully and in bad faith in filing a complaint, "including to circumvent a court order in another case and to harass and intimidate witnesses," the sanction of attorneys' fees and dismissal is appropriate. *See Hussein v. Frederick*, 2011

U.S. App. LEXIS 11722 (9th Cir. June 8, 2011) at *4; *see also Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997) ("Buster's efforts to relitigate the prior case similarly support a finding of harassment"); *In re Grantham Bros.*, 922 F.2d 1438, 1443 (9th Cir. 1991) (filer sought to harass or intimidate adversary through frivolous collateral attack of prior proceeding).

A lawyer may not file a baseless complaint to be vindictive against counsel in a prior action. *See Townsend*, 929 F.2d at 1363 ("the court inferred from the fact that the allegations were frivolous and from the fact that Wilson & Reitman had been the law firm which opposed Wright in the state court action that the naming of Wilson was essentially vindictive.") That is what Gingras has done here, and should therefore be sanctioned.

III. XCENTRIC, ITS COUNSEL, AND MAGEDSON HAVE ACTED EGREGIOUSLY, AND THEREFORE SHOULD BE SANCTIONED FOR THE ATTORNEYS' FEES THAT MS. BORODKIN HAS INCURRED AND THE ACTION SHOULD BE DISMISSED.

A competent attorney would not file a complaint which is contradicted by both his own and his client's prior statements under oath, use the complaint to harass and coerce testimony about an unrelated third party. One federal court has already found the recordings troublingly unreliable and made in violation of California's Penal Code. *See* RJN, Ex. 3, at 21:25-22:4.

In sum, the Complaint focuses almost entirely on certain unauthenticated recordings – which, the court noted were missing substantial chunks of time -- as a pretext to harass Ms. Borodkin into paying Xcentric's attorney fees and intimidate her into providing testimony in an unrelated matter.

IV. CONCLUSION.

For the foregoing reasons, Ms. Borodkin requests, pursuant to Rule 11, that the Court sanction Gingras and Magedson as follows: (1) require Magedson and Gingras to pay all of Ms. Borodkin's attorneys' fees, costs, and expenses associated with her defense; and (2) dismiss the action with prejudice as against Ms. Borodkin.

RESPECTFULLY SUBMITTED this 16th day of October 2012.

By */s/ Lisa J. Borodkin*
Lisa J. Borodkin
Admitted Pro Hac Vice

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Phoenix, AZ 85004-2391
John S. Craiger
David E. Funkhouser III

Attorneys for Lisa Jean Borodkin

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

David S. Gingras, Esq. (David@GingrasLaw.com)
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Raymond Mobrez (Raymond@asiaecon.org)
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Attorneys for Defendant
Lisa Jean Borodkin

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

XCENTRIC VENTURES, LLC, an Arizona limited liability company,

Plaintiff,

v.

LISA JEAN BORODKIN and JOHN DOE BORODKIN, husband and wife; RAMOND MOBREZ and ILIANA LLANERAS, husband and wife; DANIEL BLACKERTS and JANE DOE BLACKERTS, husband and wife; ASIA ECONOMIC INSTITUTE, LLC, a California limited liability company, DOES 1-10, inclusive,

Defendants.

No. 2:11-CV-01426-PHX-GMS

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11

(Assigned to the Honorable G. Murray Snow)

Pursuant to Federal Rule of Evidence 201, and the inherent authority of this Court, Defendant Lisa Jean Borodkin respectfully requests that the Court take judicial notice of the public records attached hereto as Exhibits 1 through 5.

MEMORANDUM OF POINTS AND AUTHORITIES

The Federal Rules of Evidence mandate that judicial notice be taken where it is "requested by a party and supplied with the necessary information," Fed. R. Evid. 201(d), and authorizes judicial notice "at any stage of the proceeding." Fed. R. Evid. 201(f). Moreover, "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2)

capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Here, the requested fact is "not subject to reasonable dispute" in that it is "capable of accurate and ready determination by" referring to public records dockets, sources "whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Thus, the documents are readily verifiable and the proper subject to judicial notice.

Courts may take judicial notice of court filings and other matters of public record. See Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n. 6 (9th Cir. 2006); see also Allen v. City of Los Angeles, 92 F.3d 842, 850 (9th Cir. 1992) (federal courts may take judicial notice of proceedings in other courts, both within and without federal judicial system, if those proceedings have a direct relation to matters at issue) (overruled on other grounds); Bryant v. Carleson, 444 F.2d 353, 357 (9th Cir. 1971) (court took judicial notice of proceedings and filings in other courts).

Borodkin respectfully requests that this Court take judicial notice of the following:

Exhibit 1: The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1983-74 ("Ethics Opinion No. 1983-74").

Exhibit 2: Pages 1 to 3 of the May 11, 2010 declaration of Ed Magedson in Asia Economic Institute LLC et al. v. Xcentric Ventures LLC et al., C.D.Cal. No. 10-cv-1360 ("the California Action"). The full declaration can be provided on the Court's request.

Exhibit 3: Pages 19 to 28 of the Order of July 19, 2010 in the California Action, granting the Plaintiffs' evidentiary objection to the admissibility of certain recorded conversations. The full Order can be provided on the Court's request.

Exhibit 4: The declaration of David Gingras filed June 24, 2010 in the California Action, excluding the exhibits. The full declaration can be provided on the Court's request.

Exhibit 5: Pages 12 to 14 of the Order of May 4, 2011, in the California Action. The full Order can be provided on the Court's request.

Pursuant to these Rules, Ms. Borodkin respectfully requests that this Court take judicial notice of the documents attached as Exhibits **1, 2, 3, 4** and **5** and the contents thereof in connection with Ms. Borodkin's Motion for Sanctions under Rule 11.

RESPECTFULLY SUBMITTED this 16th day of October 2012.

By */s/ Lisa J. Borodkin*
Lisa J. Borodkin
Admitted Pro Hac Vice

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Attorneys for Lisa Jean Borodkin

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

David S. Gingras, Esq. (David@GingrasLaw.com)
Attorneys for Plaintiff

Raymond Mobrez (Raymond@asiaecon.org)
Pro se

Iliana Llaneras (iliana@asiaecon.org)
Pro se

/s/ Lisa J. Borodkin

EXHIBIT "1"

Editor's Note:

State Bar Ethics Opinions cite the applicable California Rules of Professional Conduct in effect at the time of the writing of the opinion. Please refer to the California Rules of Professional Conduct Cross Reference Chart for a table indicating the corresponding current operative rule. There, you can also link to the text of the current rule.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

FORMAL OPINION NO. 1983-74

ISSUE:

Does a member of the State Bar employed as an attorney in a civil, non-jury trial have a duty to apprise the court if he/she knows that his/her client has committed testimonial perjury?

DIGEST:

An attorney employed in a civil, non-jury trial does not have a duty to advise the court that his/her client has committed testimonial perjury; the attorney is precluded from divulging the perjury absent the client's consent. However, the attorney is required promptly to pursue remedial action. If the remedial action fails, the attorney is required to move to withdraw -- but without disclosing any confidence or secret of his/her client. If the attorney is unable to withdraw, the attorney may not use the perjured testimony to support the client's claim.

AUTHORITIES INTERPRETED:

Business and Professions Code sections 6068, 6128.

Rules 2-111 and 7-107 of the Rules of Professional Conduct of the State Bar of California.

DISCUSSION

The Committee has been asked whether a member of the State Bar who is engaged in a non-jury civil trial has an affirmative duty to advise the court that the attorney has knowledge that his/her client has committed testimonial perjury.

The Committee's opinion is that, absent the client's consent, the attorney does not have a duty to advise the court, but does have the duty to commence remedial action.

THE INQUIRY

The specific inquiry directed to the Committee postulated that the perjurious testimony was given by the attorney's human client in civil non-jury trial. The attorney was surprised by the testimony which he/she neither solicited nor suborned; he/she did not engage in the prohibited conduct of "knowingly allowing a witness to testify falsely." (*People v. Pike* (1962) 58 Cal.2d 70, 97, [22 Cal. Rptr. 664, 372 P.2d 656].) The inquirer asks us to assume that disclosure of the perjured testimony to the court would so adversely reflect on the client's credibility that the court could "reasonably be expected to render an adverse decision." The inquirer asks us further to assume that withdrawal from representation would also result in an adverse decision.

Our consideration and opinion are limited by the foregoing facts. We do not address criminal trials, jury trials, depositions, declarations, affidavits, certifications, subornation (procuring) of perjury, or post-trial-discovery of perjury. We do not address the question of an attorney's obligations in such a situation when the perjuring witness was an officer or agent of a non-human client (i.e., a corporation, trust, etc.). And, in accordance with Committee policy, we do not address any issue regarding the attorney's civil or criminal liability. Of course, conviction of a crime involving "moral turpitude" is grounds for attorney discipline. (Bus. & Prof. Code, §6101.) And while there may be criminal implications involving moral turpitude for an attorney in this situation, it is not within our

charter to consider them. We treat only the attorney's ethical duties arising from his/her membership in the State Bar.

Perjury is defined in California Penal Code section 118:

> "Every person who, having taken an oath that he will testify... truly before any competent [court]... wilfully and contrary to such oath, states as true any material matter which he knows to be false... is guilty of perjury."

Perjury is a felony. (Pen. Code, §126.) The perjurer's lack of knowledge of materiality is no defense to the crime. (Pen. Code, §123.)

Because the inquiry assumes that the attorney "has knowledge" that his/her client has committed perjury, the Committee's analysis assumes the same. This is a portentous assumption.

How does an attorney acquire knowledge that a client has committed perjury?

Technically, one cannot be pronounced guilty of the crime of perjury unless one has been found guilty following a criminal proceeding. Even then, the pronouncement is merely hearsay opinion, except upon a guilty plea. One can admit his/her guilt to perjury, after giving knowing and intelligent waivers of the multitude of rights he/she has. On this ground alone, an attorney may have a justifiable reluctance to conclude he/she has "knowledge" his/her unconvicted client has committed perjury.

Assuming that the attorney is receptive to judging whether his/her client has committed perjury absent a criminal verdict to that effect, how does the attorney decide, on the spot, whether the testimony was a "wilful" statement about a "material" matter and was "false?" The attorney must exercise his/her own subjective judgment about the materiality of testimony given in the midst of trial. Materiality may not become apparent until the close of all testimony. And every attorney has had the disconcerting experience of discovering, after verdict, that the trier of fact wholly disagreed with the attorney about what was and was not material.

But assuming the attorney is satisfied that he/she knows the testimony was material, how does he/she know it was "false?" It may appear false because it does not coincide with the attorney's recollection of what the client previously told him/her. However, the attorney's recollection may be faulty. Or the previous version may have been false and the in-court version may actually be true. It is not a simple matter for an attorney to conclude, during trial, that he/she knows his/her client has committed perjury. And, if the attorney has any doubt about his/her knowledge, he/she should resolve the doubt in favor of his/her client.

The foregoing discussion is not meant to imply that "actual knowledge" of testimonial perjury is the only state of mind which may trigger an attorney's duty to act when he/she hears deceptive testimony by his/her client. We express no opinion about whether a lesser state of certainty in a civil matter (e.g., "a reasonable belief" or "suspicion" that perjury has occurred) might trigger a duty to act. However, "actual knowledge" of a client's testimonial perjury does raise serious questions.

The situation requires the attorney to reconcile his/her duty (1) to his/her client not to imperil the client or his/her case by divulging the client's secrets to the court and (2) not to deceive or consent to deceiving the court.

The first duty arises under Business and Professions Code section 6068, subdivision (e) which provides that it is the duty of a lawyer:

> "To maintain inviolate the confidence and at every peril to himself to preserve the secrets, of his client."

The second duty arises under Business and Professions Code section 6128 which provides that an attorney is guilty of a crime who:

> "(a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

This second duty is also reflected in other provisions of the Business and Professions Code and Rules of Professional Conduct.

> "It is the duty of an attorney to... maintain the respect due to the courts of justice and judicial officers." (Bus. & Prof. Code, §6068, subd. (b).)

> "It is the duty of an attorney to... employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact." (Bus. & Prof. Code, §6068, subd. (d).)

(See also Rule of Professional Conduct 7-105 [which restates in pertinent part Bus. & Prof. Code, §6068, subd. (d)].)

ATTORNEY'S DUTY TO CLIENT

The first question is whether Business and Professions Code section 6068, subdivision (e) is applicable. The attorney's knowledge of his/her client's testimonial perjury a "secret" of the client which the attorney may not disclose?

In the Committee's opinion 1976-37, we indicated our approval of ABA Disciplinary Rule 4-101(A)'s definition:

> "'[S]ecret' refers to information gained in the professional relationship that the client has held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

Presumably, the attorney's knowledge of the testimonial perjury is a product of information gained in the professional relationship. Whether the client has held it inviolate is not significant, because disclosure of the testimonial perjury would doubtless embarrass the client and would, in view of the facts presented to us, be detrimental to him/her: his/her case would be lost. We note also that disclosure would subject the client to potential criminal prosecution for perjury regardless of its effect on his/her civil case. Under these circumstances, it is our opinion that Business and Professions Code section 6068, subdivision (e) is applicable and does prevent the attorney from divulging the testimonial perjury to the court absent his/her client's consent. But that does not end the matter.

ATTORNEY'S DUTY TO THE COURT

For the attorney to proceed with trial without taking further action raises the question whether the attorney has implicitly but intentionally consented to a deception upon the court. (Bus. & Prof. Code, §6128.) It also raises the question whether the attorney s silence and inaction is "consistent with truth" or an attempt to "mislead the judge... by an artifice of false statement of [material] fact." (Bus. & Prof. Code, §6068, subd. (d).)

Active misrepresentations by an attorney to opposing counsel by deliberately failing to state a material fact "falls short of the honesty and integrity required of an attorney at law in the performance of his professional duties." (*Coviello v. State Bar* (1955) 45 Cal.2d 57, 65-66 [286 P.2d 357].) An attorney's active representations to a judge, accompanied by deliberate failure to disclose a material fact, is similarly reprehensible. But, in this case, the attorney is faced with decisions about how to proceed immediately after his/her discovery of the perjured testimony. The attorney has not yet taken the step of making any further representations while deliberately concealing the perjury.

It is our opinion, under the circumstances of this case, that the attorney may not remain silent and is required to take action to ensure that he/she does not give his/her implicit consent to the deception. Silence and inaction would not be consistent with truth and would constitute, albeit indirectly, an attempt to mislead the judge by an artifice, to wit, the client's false testimony of a material fact. "An attorney who attempts to benefit his/her client through the use of perjured testimony may be subject to criminal prosecution (Pen. Code, §127) as well as severe disciplinary action." (*In re Jones* (1930) 208 Cal. 240, 242 [280 P.2d 964].) (*In re Branch* (1969) 70 Cal.2d 200, 210-211, [74 Cal. Rptr. 238, 449 P.2d 174].) But the attorney must speak and act consistently with his/her duties to his/her client.

Opinions of the American Bar Association are not precedential guides for professional conduct of members of the California bar. (CAL 1983-71.) But they are helpful in suggesting alternative courses of conduct. ABA Formal Opinion 287 (June 27, 1953) considered the case of an attorney who secured a divorce for a client who later informed the attorney that he/she had committed perjury in a deposition in securing the divorce. The opinion held that the attorney was precluded from revealing the perjury to the court, but that the attorney should "urge his client to make the disclosure [to the court]" and if he/she refuses to do so "should have nothing further to do with him" but the attorney "should not disclose the facts to the court." As we note below, this conclusion neglects to consider the implications of persuading the client to make disclosure to the court. It is also inapposite because it does not involve perjury committed and known to the attorney in the midst of trial. But it does suggest that withdrawal of representation by the attorney may be an appropriate course of conduct.

The Bar Association of San Francisco Legal Ethics Committee has considered the duties of an attorney whose client refused to disclose the existence of community assets during the course of a domestic relations matter. (SF Opinion 1977-2.) The Committee opined:

> "In most cases the client's refusal to disclose the existence of community assets constitutes fraud. However, since the client usually discloses this information in confidence, the attorney is under conflicting duties to maintain the

> confidentiality of his client's communication and, on the other hand not to suppress the fraud or maintain his deliberate silence. Therefore, the attorney should withdraw from his representation of the client, and his failure to withdraw is a proper subject for disciplinary proceedings."

But this opinion did not address the question of an attorney's obligation to withdraw in the midst of trial. The domestic relations matter had not yet reached the trial stage so that, as a practical matter, withdrawal of representation would not severely prejudice the client. In the instant case, the inquirer has stated, and we accept as true, that withdrawal would result in the client's losing his/her case.

But the attorney may have a duty to withdraw from the case. Rule 2-111(B)(2), Rules of Professional Conduct mandates that he/she withdraw when:

> "He knows or should know that his continued employment will result in a violation of these Rules of Professional Conduct [which includes Rule 7-105] or of the other State Bar Act [which includes Bus. & Prof. Code, §§6068, 6128]."

The attorney in the instant case should immediately have a private conference with his/her client. The attorney should explain to the client the attorney's opinion that the client has committed testimonial perjury and the basis for that opinion. The client may be able to offer an acceptable explanation of the testimony that would change the attorney's opinion, curing the problem.

If the attorney's opinion is unchanged, the attorney must explain to the client that if the perjured testimony is not corrected or at least removed from the record, the attorney will be duty-bound to make a motion to the court, not disclosing the testimonial perjury unless the client consents, to be allowed to withdraw from the case.

The attorney must explain to the client the full ramifications of attempting to "correct" the perjured testimony. If the client desires to and is allowed to retake the stand, he will presumably testify contrary to his/her earlier testimony. He is then potentially subject to criminal prosecution for perjury. He is also most likely to be subjected to uncomfortable cross-examination about his/her memory and credibility. The "correction" may result in the client's losing his/her case.

The attorney must explain to the client the full ramifications of attempting to remove the testimony from the record. The attorney may seek, without explanation, a stipulation from opposing counsel that the testimony be stricken. If that stipulation is agreed to, the court may strike the testimony, curing the problem. If this effort is unsuccessful, the attorney will have to move that the testimony be stricken, stating whatever grounds exist but not disclosing its perjurious nature absent the client's consent.

If these efforts fail, the attorney is required to move the court to withdraw as counsel without disclosing the perjurious testimony. (Accord, ABA Informal Opinion 1314 (1975).)[1]

If the court denies the motion to withdraw and orders that the case proceed, the attorney must continue his/her representation (perhaps seeking appellate relief from denial of the motion). But the attorney may not thereafter rely upon or refer to any of the perjured testimony. To do so would constitute a willful misrepresentation by the attorney of matters that he/she knows to be untrue, which could subject the attorney to discipline. (See Bus. and Prof. Code, § 6086.7.) The attorney must conduct the balance of the trial as if such testimony had been stricken from the record.

In closing, the Committee notes that a member of the Bar may take precautions prior to trial which would minimize the likelihood of this situation occurring. An attorney would be well-advised to alert his/her client in advance of the above-described ramifications of testimonial perjury to ensure that it does not occur.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of The State Bar of California. It is advisory only. It is not binding upon the courts, The State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.

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[1] See *Uhl v. Municipal Court* (1974) 37 Cal. App.3d 526 and *People v. Donahoe* (1962) 200 Cal. App.2d 17 as examples of cases in which it is suggested that defense counsel may be permitted to withdraw from representation after making conclusionary statements as to the existence of a conflict of interest.

EXHIBIT "2"

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Edward Magedson

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASIA ECONOMIC INSTITUTE, LLC, *et al.*, **Plaintiffs,** **vs.** **XCENTRIC VENTURES, LLC, *et al.*,** **Defendants.**	Case No: 2:10-cv-01360-SVW-PJW **AFFIDAVIT OF ED MAGEDSON**

GINGRAS LAW OFFICE, PLLC
4072 EAST MOUNTAIN VISTA DRIVE
PHOENIX, ARIZONA 85048

I, Edward Magedson, declare as follows:

1. My name is Ed Magedson. I am a United States citizen, a resident of the State of Arizona, am over the age of 18 years, and if called to testify in court or other proceeding I could and would give the following testimony which is based upon my own personal knowledge unless otherwise stated.

CORRECTION OF STATEMENTS

ABOUT THREATS FROM MR. MOBREZ

2. On March 22, 2010, I filed an Affidavit in this matter entitled "Affidavit of Ed Magedson In Support of Defendants' Special Motion to Strike" (the "March 22 Affidavit") which covered numerous topics. Among other things, one of the topics that I covered in the March 22 Affidavit was a series of telephone conversations I had with Raymond Mobrez which took place in April and May 2009. At the time, I did not know Mr. Mobrez, but I am now aware that he is one of the plaintiffs in this case.

3. In paragraph 31 of the March 22 Affidavit, I testified among other things: "During my phone conversations with Mr. Mobrez, he became very threatening towards me, stating that he 'had people in Arizona' who could 'find me' which I interpreted as a threat." I repeated this same statement in another short affidavit filed in this matter on April 5, 2010. At the time I made the allegations regarding Mr. Mobrez threatening me, I believed those statements to be true.

4. As I explained in ¶ 4 of my April 5, 2010 Affidavit, I have received many threats in the past. Many of these past threats have included statements similar to those which I attributed to Mr. Mobrez – people sometimes state that they are going to try to find me or my home which is a very serious safety concern to me.

5. I believed that Mr. Mobrez was one of the people who threatened me because my email to Mr. Mobrez on July 24, 2009 said that I lived in California (which was not true). I concluded that I probably made that statement to Mr. Mobrez in response to a statement from him which threatened to find me in Arizona, or to have someone else do so. This is why I thought that Mr. Mobrez made such threats.

6. After these affidavits were filed, I recalled that I had recordings of all of my telephone conversations with Mr. Mobrez which had taken place approximately a year earlier. I had not yet retrieved or listened to any of these recordings before my affidavits were filed with the court.

7. At the request of my attorneys following the Court's denial of our anti-SLAPP motion on April 19, 2010, on April 20, 2010 I spent several hours conducting a search of my records. I was able to eventually locate six recordings of calls and/or voicemails from Raymond Mobrez to the main number for the Ripoff Report site; (602) 359-4357. The first time I listened to any of these recordings was on April 20, 2010. I also provided copies of these calls to my counsel for the first time on that same day.

8. After listening to each of these recordings, I was surprised to find that they do not contain any threats from Mr. Mobrez as outlined in my March 22 or April 5 Affidavits.

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9. Having reviewed the recordings, I believe that I was mistaken when I testified in my affidavits that Mr. Mobrez made such threats towards me. I must have confused Mr. Mobrez with someone else.

10. Upon reviewing the six recordings of the calls/voicemails from Mr. Mobrez which took place approximately a year ago, I realize now that I may not have accurately recalled the substance of those calls. These recordings do not contain any threats by Mr. Mobrez to locate me in Arizona and to the extent that my previous affidavits stated that such a threat occurred during those calls, I must have been mistaken.

RESPONSE TO ALLEGATIONS OF EXTORTION

11. I have reviewed the Declarations of Raymond Mobrez and Iliana Llaneras filed in this case on May 3, 2010. I am aware from reviewing these declarations that Mr. Mobrez claims that in a telephone conversation that took place on May 5, 200, I asked him for a payment of $5,000 plus a monthly monitoring fee in order to help remedy negative postings about AEI on the Ripoff Report site. I am aware that Mr. Mobrez claims that during other calls, I told him that if he paid this fee, all of the negative would be changed into a positive. I am also aware that Mr. Mobrez claims that I bragged about Ripoff Report being at the top of all of the search engines, that any lawsuit against us would be fruitless, and that it was therefore best for him to just "go with the [CAP] program." I understand that Ms. Llaneras claims to have been listening in to several of these calls without my knowledge, and I am aware that she testified in her declaration that Mr. Mobrez had accurately recounted each of these conversations in his declaration.

12. I am aware that at the time their declarations were filed on May 3, 2010, Mr. Mobrez and Ms. Llaneras did not know that these calls had been recorded. I am also aware that the existence of these recordings was revealed to Mr. Mobrez and Ms. Llaneras for the first time during the deposition of Mr. Mobrez on May 7, 2010.

13. The six audio recordings that were played during the deposition of Mr. Mobrez were true, complete, and unaltered copies of recordings which Xcentric

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EXHIBIT "3"

material fact. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). Only genuine disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 248; see also Aprin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must identify specific evidence from which a reasonable jury could return a verdict in its favor).

When deciding whether a genuine issue of fact exists, the Court may not engage in credibility determinations or the weighing of evidence; such functions are the province of the jury, not the judge. Anderson, 477 U.S. at 255.

C. Evidentiary Objections

In support of their Motion for Summary Judgment, Defendants seek to introduce evidence of six audio recordings which purport to be recordings of the telephone calls that Mobrez made to Magedson on April 27, 2009 (two calls), May 5, 2009 (two calls), May 9, 2009 (one call), and May 12, 2009 (one call). (Mobrez Depo., Exh. 25 [compact disc containing audio files of the recordings].) Defendants seek to introduce these recordings to rebut the May 3, 2010 declarations that Plaintiffs Mobrez and Llaneras[8] filed with the Court in which they recounted the substance of their telephone conversations with Magedson in April and May 2009.[9] Defendants contend that the recordings prove

[8] Llaneras never spoke with Magedson directly; however, she claimed in her May 3, 2010 declaration that she had listened to three calls between Mobrez and Magedson by picking up an additional phone receiver.

[9] At the April 19, 2010 status conference, the Court ordered Plaintiffs Mobrez and Llaneras, as well as Defendant Magedson, to file detailed declarations indicating every conversation between Plaintiffs and Defendants that Plaintiffs believed supported their claim that Defendants engaged in attempted extortion (as a predicate act to the RICO claims.) Plaintiffs filed their declarations with the Court on May 3, 2010. Magedson filed his declaration with the Court on May 11, 2010.

that the phone conversations were nothing like what was described in Plaintiffs' declarations, and that several of the statements Plaintiffs attributed to Magedson - for example, demands for money - simply never occurred.

Mobrez's phone records indicate that in April and May 2009, Mobrez called Magedson a total of seven times. (DSUF 46; Mobrez Depo., Exh. 21.) One of these calls, on April 27, 2009, was not recorded. (DSUF 50.) The remaining six calls were automatically recorded by a third-party vendor hired by Xcentric to record all telephone calls to Ripoff Report's main phone number. (Magedson Decl., dated May 24, 2010, ¶ 29.) In April and May 2009, persons calling the Ripoff Report main telephone number were not given notice that their calls would be recorded. (Mobrez Corrected Decl. ¶ 12; Borodkin Decl. ¶ 6, Exh. 3 [Magedson Depo.].)

Magedson testified that once a call is recorded, the third party vendor automatically emails Magedson an audio file which contains a copy of the recorded call. (Id. ¶ 29.) On April 20, 2010, Magedson reviewed the audio files of every recorded call made to the Ripoff Report's main telephone number over a period of several months - a total of 4,537 calls. (Id. ¶ 27.) Magedson declares that the six audio recordings submitted to the Court are true, complete, and unaltered copies of recordings automatically created by Xcentric's third party vendor. (Id. ¶¶ 25, 29.)

Plaintiffs contend that the recordings are inadmissible and cannot be considered on summary judgment. Plaintiffs assert three primary objections to the recordings: First, Plaintiffs argue that California

Penal Code § 632(a)[10] prohibits a person from recording a confidential communication without the consent of all parties to the communication, and Section 632(d) makes such recordings inadmissible in both civil and criminal proceedings. Second, Plaintiffs contend that the recordings should be excluded under Federal Rule of Civil Procedure 37(c) because Defendants failed to disclose the recordings in their initial disclosures. Third, Plaintiffs contend that the recordings are inadmissible because they were not properly authenticated under Federal Rule of Evidence 902 and Defendants refused to disclose the name of the third party vendor to Plaintiffs.

1. California Penal Code § 632

California Penal Code § 632(a) makes it a criminal offense to "intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrop[] upon or record[] the confidential communication . . . ." Additionally, subsection (d) provides that no evidence obtained as a result of eavesdropping upon or recording a confidential communication shall be admissible in "any judicial, administrative, legislative, or other proceeding." Cal. Penal Code § 632(d). A confidential communication is defined as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto," but excludes communications that reasonably may be expected to be overheard or recorded. Id.

Here, it is undisputed that Mobrez was unaware that his calls with Magedson were being recorded and that Mobrez did not give consent for

[10] Both parties repeatedly referred to California Penal Code § 623, which is wholly irrelevant to this case. The relevant eavesdropping statute is California Penal Code § 632.

the recordings. (Mobrez Corrected Decl. ¶ 12; Borodkin Decl. ¶ 6, Exh. 3 [Magedson Depo.].) Thus, at the very least, some of the recordings that Defendants seek to admit were obtained in violation of California Penal Code § 632(a).[11] Furthermore, even though the recordings complied with the laws in the forum state in which the recordings were made (Arizona), if the Court were to engage in a choice-of-law analysis between Arizona and California law, the Court undoubtedly would apply California law, given California's strong public interest in protecting the confidentiality of certain communications. See Downing v. Abercrombie & Fitch, 265 F.3d 994, 1006 (9th Cir. 2001). Nonetheless, neither California Penal Code § 632 nor Arizona law is relevant to the present action.

The present action is based on federal law (as well as state law) and is proceeding in federal court. In such cases, "the Ninth Circuit has consistently held that [recordings of conversations] [are] admissible in federal court proceedings when obtained in conformance with federal law and without regard to state law." Roberts v. Americable International, Inc., 883 F. Supp. 499, 503-04 (E.D. Cal. 1995) (citing United States v. Adams, 694 F.2d 200, 201-02 (9th Cir. 1982)); see Feldman v. Allstate Ins. Co., 322 F.3d 660 (9th Cir. 2003); United States v. Cormier, 220 F.3d 1103, 1111 (9th Cir. 2000); United States v. Little, 753 F.2d 1420, 1434 (9th Cir. 1984). As the court explained in Roberts:

> [Plaintiff's] argument has consistently been that his state law 'privacy privilege' [under California Penal Code § 632] has been invaded by [defendant's] actions. However, as previously noted, this present action is based on federal law

[11] Voice mails would not fall within the prohibitions of California Penal Code § 632 because voice mails are necessarily recorded (and expected to be so) and therefore do not constitute "confidential communications." Two of the recordings at issue are of voice mails that Mobrez left for Magedson.

> as well as state law. It is well settled the federal law applies to privilege claims brought in actions based in whole or in part on federal law.

Id. at 504 (citing Pagano v. Oroville Hospital, 145 F.R.D. 683, 687 (E.D. Cal. 1993); Heathman v. U.S.D.C., 503 F.2d 1032, 1034 (9th Cir. 1974)). Thus, Plaintiffs' motion to exclude the tape recordings must be examined under federal law.[12]

The Omnibus Crime Control and Safe Streets Act ("the Act") is the federal law that regulates the interception of oral communications. 18 U.S.C. §§ 2510 *et. seq.* Section 2511(2)(d) provides that the interception of wire, oral, or electronic communications shall not be unlawful where the interception is done by a party to the conversation or where one of the parties to the conversation has given prior consent to such interception, unless the communication is intercepted for the purpose of committing any criminal or tortuous act. 18 U.S.C. § 2511(2)(d). In the present case, Defendants Xcentric and Magedson clearly gave prior consent to the third party vendor to record all telephone calls coming into the main Ripoff Report telephone number. Further, there is no evidence, nor any suggestion, that the purpose of the recordings was to perpetrate a criminal or tortuous act. Although

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[12] The result would be different if this case were proceeding on the ground of diversity jurisdiction. In diversity cases, "a federal court must conform to state law to the extent mandated by the principles set forth in the seminal case of Erie R.R. v. Thompkins, 304 U.S. 64 (1938)." Feldman v. Allstate Ins. Co., 322 F.3d 660, 666 (9th Cir. 2003). "State evidence rules that are 'intimately bound up' with the state's substantive decision making must be given full effect by federal courts sitting in diversity." Id. The Ninth Circuit has concluded that California Penal Code § 632 embodies "a state substantive interest in the privacy of California citizens from exposure of their confidential communications by third parties," and therefore is "properly characterized as substantive law within the meaning of Erie" and must be applied in diversity cases. Id. at 667.

Here, however, the Court has federal question jurisdiction. Furthermore, Defendants are asking the Court to use the tapes as evidence to rebut the federal claims asserted by Plaintiff - i.e., the RICO causes of action. Thus, as stated above, federal law relating to the interception of wire communications applies.

Plaintiffs allege that Defendants used the phone to communicate extortionate threats to Plaintiffs, even if that were true, there is no suggestion that *the recordings* were used for the purpose of extortion. To the contrary, Defendants have presented evidence that all calls to the Ripoff Report's main telephone number were recorded in the ordinary course of business. Therefore, the recordings at issue do not violate federal law.

In sum, because the recordings at issue comply with federal law, they may be admitted as evidence without regard to California Penal Code § 632.

2. Failure to Disclose Recordings in Initial Disclosures

Next, Plaintiffs argue that the Court should exclude the tape recordings under Federal Rule of Civil Procedure 37(c). Rule 37(c) provides that "if a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Plaintiffs assert that Defendants failed to disclose the recordings in their initial disclosures on April 21, 2010, as required under Rule 26(a), even though Defendants knew of such tape recordings before April 21, 2010. Instead, Defendants waited until May 7, 2010 to disclose the tape recordings at the deposition of Plaintiff Mobrez.

This argument also fails. As Plaintiffs recognize in their briefs, Rule 26(a) does not require parties to disclose impeachment evidence in their initial disclosures. Gribben v. United Parcel Service, Inc., 528 F.3d 1166, 1172 (9th Cir. 2008). In the context of

the present motion, Defendants seek to introduce the tape recordings only to impeach Plaintiffs' accounts of the conversations between Mobrez and Magedson. At a minimum, the recordings are admissible for that limited purpose.

3. Inadmissible Under the Federal Rules of Evidence

Plaintiffs' final objection is that the recordings were not properly authenticated and are inadmissible under the Federal Rules of Evidence 902 and 1002. The Court agrees. "When offered into evidence, a tape recording must normally be accompanied by proof that the recording is what it is purported to be." ROBERT E. JONES, GERALD E. ROSEN, WILLIAM E. WEGNER, AND JEFFREY S. JONES, RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE § 8:472 (2009); Fed. R. Evid. 901(a). The proponent of the evidence must show that the tape is a "true, accurate, and authentic recording of the conversation, at a given time, between the parties involved." United States v. Andreas, 23 F. Supp. 2d 835, 840 (N.D. Ill. 1998). Courts generally consider the following foundational factors when determining whether a tape recording is admissible: (1) whether the recording device was capable of taking the conversation; (2) whether the operator of the device was competent to operate it; (3) whether the recording is authentic and correct; (4) whether no change, additions or deletions have been made to the recording; (5) whether the recording has been preserved in a manner that is shown to the court; (6) whether the speakers are identified; and (7) whether the conversation elicited was made voluntarily and in good faith. JONES & ROSEN ET AL., RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL TRIALS AND EVIDENCE § 8:472.2 (citing United States v. Oslund, 453 F.3d 1048, 1057 (8th Cir. 2006), Penguin Books U.S.A., Inc. v. New Christian

Church of Full Endeavor, Ltd., 262 F. Supp. 2d 251, 264 (S.D.N.Y. 2003)).

Here, Defendants offer the Declaration of Edward Magedson to authenticate the recordings. However, Magedson admittedly did not record the conversations. At best, Magedson can only state that the recordings submitted to the Court are accurate copies of the audio files that he was emailed by the third party vendor that actually made the recordings. (Magedson Decl., dated May 24, 2010, ¶¶ 25-29.) Defendants have refused to reveal the name of the third party vendor to the Plaintiffs despite the Plaintiffs' reasonable request (see Magedson Depo. at pg. 74) and have not offered any declarations from the third party vendor or any information about the method of recording, the equipment used, or how the recordings are kept in the ordinary course of the vendor's business. Defendants have not produced the original recordings to the Court or to the Plaintiffs.

Further, the foundational shortcomings are especially problematic here because Plaintiffs have presented facts indicating that the recordings may not be accurate or trustworthy. Specifically, Mobrez's phone records indicate the duration of each of the calls made from Mobrez to Magedson in March and April 2009. (Mobrez Depo., Exh. 21.) In most instances, the duration of the calls is considerably longer than the length of the recorded conversation submitted to the Court. Thus, Plaintiffs suspect that the recordings may have been altered or edited. While Defendants have a ready explanation for the time discrepancy - that is, that the third party vendor does not begin recording the calls until after the caller has navigated through an automated series of prompts, which takes some time - neither the Court

nor the Plaintiffs can verify this without testimony from the third party vendor who actually recorded the conversations. Finally, Magedson's assertion that he did not personally alter or edit the recordings does not resolve the issue,[13] as the recordings could have been altered by the third party vendor.

For these reasons, the Court finds that the tape recordings have not been properly authenticated and are not admissible as evidence in support of Defendants' motion for summary judgment.

Nonetheless, this ruling does not change the landscape of the summary judgment motion to any significant degree. After the recordings were revealed to Plaintiffs during the Mobrez deposition on May 7, 2010, but before the summary judgment motion was filed, Mobrez and Llaneras each filed declarations with the Court seeking to correct their May 3, 2010 declarations. In Mobrez's corrected declaration filed on May 20, 2010, Mobrez admits that when he filed the May 3, 2010 declaration, he was "mistaken as to the substance of the six phone conversations between [himself] and Magedson" and that he had "confused some of what was said in [his] telephone conversations with what was written in e-mail correspondence." (Mobrez Corrected Decl. ¶¶ 2, 4.) Similarly, in Llaneras's corrected declaration filed on May 20, 2010, Llaneras states that "the descriptions of the telephone conversations in my May 3, 2010 declaration were not accurate" and that she too "had . . . confused some of what [she] overheard with some of what [she] had read in emails." (Llaneras ¶ 3.) Thus, Mobrez and Llaneras now have each admitted that their May 3, 2010 testimony regarding the phone

[13] This statement is not entirely accurate either, as Defendants admitted in later briefing that the actual electronic files provided to Plaintiffs had been redacted so as to exclude the name of the third party vendor in the file titles. (Defs. Response to Objections at 9.)

EXHIBIT "4"

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Xcentric Ventures, LLC and
Edward Magedson

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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ASIA ECONOMIC INSTITUTE, LLC, *et al.*, **Plaintiffs,** **vs.** **XCENTRIC VENTURES, LLC, *et al.*** **Defendants.**	Case No: 2:10-cv-01360-RSWL-PJW **DECLARATION OF DAVID S. GINGRAS IN SUPPORT OF DEFENDANTS' REPLY RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Hearing Date: June 28, 2010 Time: 1:30 PM Courtroom: 6 (Hon. Stephen Wilson)

I, David S. Gingras declare as follows:

1. My name is David Gingras. I am a United States citizen, a resident of the State of Arizona, am over the age of 18 years, and if called to testify in court or other proceeding I could and would give the following testimony which is based upon my own personal knowledge unless otherwise stated.

2. I am an attorney licensed to practice law in the States of Arizona and California, I am an active member in good standing with the State Bars of Arizona and California and I am admitted to practice and in good standing with the United States District Court for the District of Arizona and the United States District Court for the Northern, Central, and Eastern Districts of California.

3. Since July 2009, I have been employed as General Counsel for Plaintiff Xcentric Ventures, LLC. In my capacity as counsel for Xcentric Ventures I have been involved in the litigation of this action since its inception. I have possession of Xcentric's files relating to this case, and I am personally familiar with the contents thereof.

4. I have personally reviewed the Declaration of Daniel F. Blackert in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. Mr. Blackert's declaration contains numerous false, incomplete and misleading statements about myself, my actions in this case, and Defendants' positions with respect to various issues.

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DEPOSITION OF RAYMOND MOBREZ

5. I am aware that in ¶¶ 49–56 on pages 21–24 of his declaration, Mr. Blackert accuses me of making illegal and unethical threats against him and his clients during and after the deposition of Mr. Mobrez which took place on May 7, 2010. These allegations are patently false, extremely offensive and disappointing.

6. The deposition of Mr. Mobrez was recorded both on video and stenographically, and the complete transcript of the deposition was attached as **Exhibit A** to the declaration I filed in this matter on May 24, 2010 (Doc. #47). To the extent that Mr. Blackert states that I "threatened" Mr. Mobrez with several audio recordings, this statement is not an accurate summary of the deposition transcript which speaks for itself and which Mr. Blackert's declaration does not quote with respect to such "threats". The actual colloquy between myself and Mr. Mobrez wherein the audio recordings were revealed for the first time is contained in the deposition transcript of Mr. Mobrez at 267:3–270:25.

7. During the deposition of Mr. Mobrez and before I revealed the content of the audio recordings, I explained to him various aspects of the federal perjury statute including the right of a witness to recant his previous testimony. I explained this to Mr. Mobrez because I believed that he testified falsely in his deposition and in his previous declarations filed with the court, and I wanted to encourage him to tell the truth and to recant his false testimony before we proceeded any further. For that reason, I explained to Mr. Mobrez that the federal perjury statute, specifically 18 U.S.C. § 1623(d), provides a single "get out of jail free" card to a witness who has perjured himself by giving the witness the right to recant his previous testimony and to do so *without* fear of prosecution as long as the witness admits lying before the lie has been exposed. My discussion with Mr. Mobrez on this issue was on the record and is reflected in the deposition transcript.

8. Based on research I performed prior to the deposition, I determined that when a witness has testified falsely, the right to recant will be lost if it has "become manifest that such falsity has been or will be exposed." 18 U.S.C. § 1623(d). I also determined that "[t]he purpose of this section is to induce a witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk of prosecution for doing so." *United States v. Anfield*, 539 F.2d 674, 679 (9th Cir. 1976). I had both of these principles in mind when I discussed the audio recordings with Mr. Mobrez and when I asked him if he wanted to recant any of his previous testimony.

9. Because I knew that the protection afforded to Mr. Mobrez by 18 U.S.C. § 1623(d) would no longer apply once I revealed the nature of the audio recordings, I did not reveal these recordings until after I deposed Mr. Mobrez, concluded that he was lying, and then asked him if he wanted to recant. Rather than "threatening" Mr. Mobrez in any unlawful manner, I simply explained the penalties for perjury under federal law and I provided Mr. Blackert with a copy of the federal perjury statute containing the section describing the right to recant. I then called a short five-minute break to allow Mr. Mobrez to consult with Mr. Blackert about his options before I asked Mr. Mobrez to make a decision as to whether or not he wished to recant.

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10. The reason I said I would begin playing the recordings whether Mr. Mobrez was present or not was because during his deposition Mr. Mobrez and his counsel repeatedly took breaks which were supposed to be short (five minutes) but which ended up being far longer (20 minutes or more) as a result of Mr. Mobrez and his attorneys failing to return to the deposition promptly. I found these unnecessarily extended breaks to be highly disruptive and I felt they interfered with my ability to depose the witness. Because the audio recordings were not revealed until relatively late in the day (around 4:30 PM) and because I knew that I would need as much time as possible in order to complete my examination of Mr. Mobrez, I informed him that I would begin playing the recordings in five minutes to ensure that he would return promptly which he subsequently did. If Mr. Mobrez or Mr. Blackert had requested additional time to meet and confer regarding the recordings, I would have agreed to this but no such request was made.

11. In ¶ 53 of his declaration, Mr. Blackert quotes a portion of a statement I made to Mr. Mobrez and then indicates that he (Mr. Blackert) interpreted this as a "direct threat" on his license to practice law in California. This statement was taken entirely out of context and does not accurately reflect the purpose of the comment—to explain to Mr. Mobrez that his wife's deposition was being suspended in order to permit Mr. Blackert to determine his legal and ethical duties. Below is the entire statement made in context:

> All right. I think I'm going to call this a day. I know we scheduled the deposition of your wife today. I'd like to go on the record as saying that I am suspending that deposition in light of what has happened here today. I want -- your lawyer has certain obligations under his duties to the State Bar and to our court, and I do not want to put him in a position, assuming, as I hope, that he is an innocent victim of your conduct and your crimes, I do not want to put him in a position where he will lose his license if he continues to represent you knowing, as he knows now, that you have committed perjury in this case. For that reason and only that reason, I am suspending your wife's deposition. I will retake it at a later time if this case continues past today, which I certainly expect it will not. Okay? And I'll give your lawyer notice of that when and if we decide to. Okay?

Mobrez Depo. at 299:1–20 (**Exhibit A** to Doc. #47)

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12. When I made this statement to Mr. Mobrez, I noticed Mr. Blackert looking at me and nodding in agreement. It appeared very clear to me that he understood the statement in the manner I intended it—i.e., that because Mr. Mobrez perjured himself during his deposition and Ms. Llaneras perjured herself in her declaration, it was likely unethical and impermissible for Mr. Blackert to continue representing them in this matter. For that reason, I informed Mr. Mobrez and Ms. Llaneras (who was present during the entire deposition of Mr. Mobrez) that I was suspending the deposition of Ms. Llaneras in order to allow Mr. Blackert to determine what his duties and obligations were and to take whatever remedial action he may have felt was necessary. Rather than intending this as a threat against Mr. Blackert, I took this action in order to *avoid* putting Mr. Blackert into a position where he may have been forced to violate his ethical obligations by continuing to represent Ms. Llaneras during her deposition knowing that both she and her husband had committed perjury. Put simply, I merely wanted to ensure that Mr. Blackert had a full and fair opportunity to do the right thing.

13. I never told Mr. Blackert that "I called the state bar regarding you and co-counsel" nor did I look at Mr. Blackert "smugly" nor did I say that Mr. Borodkin is a "bad lawyer". Rather, immediately following the deposition of Mr. Mobrez, both Mr. Mobrez and Ms. Llaneras swiftly left the room where the deposition took place. After they departed, left behind were myself, Mr. Blackert, my co-counsel Ms. Speth, and the court reporter and videographer. Ms. Borodkin departed several hours earlier.

14. After his clients left the room, Mr. Blackert began to apologize to me, stating, "I'm so sorry...you have to understand that I had no idea [they were lying]. I never would have brought this case if I had known..." or words to that effect. I told Mr. Blackert that I appreciated his position but I did not otherwise respond to him or attempt to continue the conversation.

15. Mr. Blackert then asked me, "What should I do?" I told him that I could not give him any legal advice, nor did I do so. Instead, I recommended that he contact the State Bar of California ethics hotline for guidance.

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16. In that context, I explained to Mr. Blackert that once I received the declarations of Mr. Mobrez and Ms. Llaneras on May 3rd, I knew that they were lying. Because I was not familiar with my ethical duties in California in this situation, I informed Mr. Blackert that I had called the California Bar's ethics hotline for guidance. However, I specifically told Mr. Blackert that I did not call the bar to file a complaint about either him or Mr. Borodkin, and I specially told him that I did not give the bar his name or Ms. Borodkin's name, nor did I explain anything at all about the facts of the case. Instead, without revealing any information about Mr. Blackert or Ms. Borodkin, I merely asked the state bar what my duties were upon learning that an opposing party had committed perjury.

17. I took that step because under Arizona's ethical rules (specifically ER 8.3(a) of the Arizona Rules of Professional Conduct, Rule 42 of the Supreme Court of Arizona), it is mandatory for an attorney to report any conduct which raises a substantial question about the honesty of another lawyer; the failure to do so it itself an ethical violation. Because the majority of my practice is based in Arizona and because I have never been in a situation where I was in possession of such clear evidence showing that an opposing party had lied, I was not intimately familiar with California's rules on this subject and for that reason I contacted the California bar for guidance.

18. On the evening of May 7, 2010 around 10:30 PM, after the deposition of Mr. Mobrez, I received an email from Mr. Blackert in which he announced his intention to withdraw from this case. A copy of this email was attached as **Exhibit A** to my declaration filed with the court on June 4, 2010 (Doc. #54).

19. Immediately upon receiving Mr. Blackert's email, I was concerned that he may not have fully understood his ongoing ethical duties to his clients. That concern was based on the fact that Mr. Blackert's email contained what appeared to be a summary of confidential discussions between Mr. Blackert and his clients.

20. Shortly after receiving Mr. Blackert's email, I sent him a response. A copy of my response sent at 12:11 AM on May 8, 2010 is attached hereto as **Exhibit A**. In my

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response, I reminded Mr. Blackert of his ethical duties, suggested that he contact the state bar for guidance, and cautioned him, as I did following his client's deposition, that I could not give him any legal advice:

> As I indicated before, I am obviously unable to give you any legal advice. However, I would NOT recommend that you do anything in terms of disclosing information about your clients or what they have told you, even if this seems like it might be appropriate. I understand that you may feel the need to correct the record, and there is probably a method to do this later, but even under these unusual circumstances, please do not forget that you continue to have duties to your clients including the duty to protect them to the extent you can do so without simultaneously doing anything that conflicts with your ethical obligations. This is exactly why there probably is an unresolveable conflict of interest here.
>
> Again, unless you have already decided what you are going to do, the best advice is to call the state bar ethics hotline and seek their guidance. No matter what, calling them in advance of any issue is always a good idea (I have done this many time myself and while they won't give you legal advice, they will get you all the information you need to make an informed decision).
>
> My letter to you on Monday will explain my views of what I believe you need to do. Until then, please do not make any rush decisions about anything. I realize this situation is bad, but it's not the end of the world.

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21. A few minutes later, I received a reply from Mr. Blackert a copy of which is attached hereto as **Exhibit B** in which Mr. Blackert thanked me for my response.

22. In ¶ 55 of his declaration, Mr. Blackert states, "To date, Mr. Gingras continues to threaten my and co-counsel on a weekly basis in the form of letters, emails, and phone calls." These allegations are absolutely false. The only "threats" I have made against Mr. Blackert relate to my clients' insistence that Plaintiffs and counsel conduct themselves lawfully and ethically in this case. In order to protect my clients' rights, I have repeatedly urged both Mr. Blackert and Ms. Borodkin to act lawfully and ethically, and I have reminded them that the failure to do so may result in civil liability to both them and to their clients. Given the extraordinary circumstances of this case, I believe these warnings are entirely justified, well-grounded in fact and law, and are a necessary part of my duty to protect my clients from further harm.

23. In ¶ 56 of his declaration, Mr. Blackert states "Mr. Gingras threatened both me and my clients with criminal and administrative legal proceedings in order to gain the upper hand in a civil action." This statement is absolutely false. At no time have I ever made any threats to take criminal or administrative action against Mr. Blackert, Ms. Borodkin, or their clients. On the contrary, I have repeatedly explained to Mr. Blackert in writing that despite my insistence that he act lawfully, I was not threatening to report him to the bar nor was I threatening to accuse him of civil/criminal wrongdoing in an effort to gain any advantage in this litigation.

24. In fact, each of these points was covered in detail in a letter I sent to Mr. Blackert and Ms. Borodkin more than a month ago on May 11, 2010. A copy of my letter is attached hereto as **Exhibit C**. In my letter I repeatedly informed Mr. Blackert that despite my demand that he act lawfully, I was *not* making any threats of criminal or administrative action against him; "To be clear – while I am not threatening to report you to the bar or to make any reports of criminal conduct to law enforcement in order to gain any advantage in this case, at the same time I believe it is appropriate for me to stop and make note of your ethical and other obligations and to insist that you act lawfully in this case." **Exhibit C** at 2. I repeated this same statement several times throughout my letter.

25. As explained in my letter to Mr. Blackert and Ms. Borodkin, my reference to various ethical rules and duties was not intended to state or imply a threat to report either of them to the State Bar of California, nor was I making any threat in an effort to obtain an advantage in this case. Rather, I have a good faith belief that the actions of Mr. Mobrez and Ms. Llaneras constitute serious criminal offenses, and I honestly believed that at least during the period immediately following the May 7th deposition of Mr. Mobrez, Mr. Blackert and Ms. Borodkin may not have fully understood the implications of continuing to represent a client who has offered false testimony to the court. For that reason, I have made several efforts to remind Mr. Blackert and Ms. Borodkin of their ethical and legal responsibilities in the hope that they would act lawfully. Unfortunately, these warnings have been completely ignored.

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26. To date, I have never received any substantive response from Mr. Blackert or Ms. Borodkin to my May 11, 2010 correspondence.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED ON: June 23, 2010.

/S/David S. Gingras
David S. Gingras

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Ms. Lisa Borodkin, Esq.
Mr. Daniel F. Blackert, Esq.
Asia Economic Institute
11766 Wilshire Blvd., Suite 260
Los Angeles, CA 90025
Attorneys for Plaintiffs

And a courtesy copy of the foregoing delivered to:
Honorable Stephen V. Wilson
U.S. District Judge

~~/s/David S. Gingras~~

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Exhibit A

From: "David Gingras" <david@ripoffreport.com>
Date: Sat, 8 May 2010 00:11:30 -0700
To: <blackertesq@yahoo.com>
Subject: RE: AEI et al. v. Xcentric (C.D. Cal. 10-cv-1360) Draft Rule 26f Report

Dan,

Thanks for the response. As I indicated before, I am obviously unable to give you any legal advice. However, I would NOT recommend that you do anything in terms of disclosing information about your clients or what they have told you, even if this seems like it might be appropriate. I understand that you may feel the need to correct the record, and there is probably a method to do this later, but even under these unusual circumstances, please do not forget that you continue to have duties to your clients including the duty to protect them to the extent you can do so without simultaneously doing anything that conflicts with your ethical obligations. This is exactly why there probably is an unresolveable conflict of interest here.

Again, unless you have already decided what you are going to do, the best advice is to call the state bar ethics hotline and seek their guidance. No matter what, calling them in advance of any issue is always a good idea (I have done this many time myself and while they won't give you legal advice, they will get you all the information you need to make an informed decision).

My letter to you on Monday will explain my views of what I believe you need to do. Until then, please do not make any rush decisions about anything. I realize this situation is bad, but it's not the end of the world.

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Exhibit B

From: daniel F. Blackert, esq. [mailto:blackertesq@yahoo.com]
Sent: Saturday, May 08, 2010 12:30 PM
To: david@ripoffreport.com
Subject: Re: AEI et al. v. Xcentric (C.D. Cal. 10-cv-1360) Draft Rule 26f Report

Thanks David

I agree duty to the court and still to clients. I called a mentor attorney of mine and we discussed. Its just a serious conflict so u shall proceed as instructed by the rules.

Daniel

Sent from my Verizon Wireless BlackBerry

Exhibit C

GINGRAS LAW OFFICE, PLLC

4072 E Mountain Vista, Phoenix, AZ 85048 • Tel: (480) 668-3623 • Fax: (480) 248-3196

May 11, 2010

VIA FACSIMILE: (310) 826-4448
& Email: lborodkin@gmail.com; blackertesq@yahoo.com

Ms. Lisa J. Borodkin, Esq.
Mr. Daniel F. Blackert, Esq.
Asia Economic Institute
11766 Wilshire Blvd., Suite 260
Los Angeles, CA 90025

Re: Asia Economic Institute, LLC, *et al.*, v. Xcentric Ventures, LLC, et al.,
U.S. District Court, Central District of California Case No. 10-cv-01360

Lisa and Dan:

This letter is a follow-up to several discussions we have had relating to the events which transpired during the deposition of your client, Raymond Mobrez, on Friday, May 7, 2010. As Dan knows (because he was there), and as Lisa knows (by virtue of my email to her on May 8, 2010), both of your clients have committed perjury in this case by manufacturing and presenting sworn false testimony accusing Mr. Magedson of demanding $5,000 in order to make negative information disappear from the Ripoff Report website, among other things. The testimony given by both of your clients could not have been more material to the claims in this case. Their false testimony literally constitutes the heart of their extortion/RICO claims. The false testimony also bears on all of the other claims in the case insofar as your clients apparently were attempting to argue that the Communications Decency Act immunity should be denied to my clients because of these acts of extortion.

Based on these events, I am writing to explain my position on several issues and to demand that you provide me with your position on several issues.

I. SUMMARY OF XCENTRIC'S POSITION

Our position is very simple – your clients have lied under oath and have commenced and continued an action which they knew was factually groundless. They clearly did this to maliciously harm Xcentric, harass Mr. Magedson, and to lend unjustified credibility to the lies of others who dislike the Ripoff Report's efforts to foster and promote free speech.

By their actions, your clients have violated Fed. R. Civ. P. 11 and they have exposed themselves to significant civil liability under Section 674 of the Restatement (Second) of

Torts which Arizona applies as our common law. Assuming the present federal case in Los Angeles is resolved in favor of Xcentric, a new lawsuit will immediately be filed against your clients in Arizona seeking to recover all damages caused by their illegal conduct.

II. OPTIONS FOR PROCEEDING

a. Mandatory Withdrawal

As we have already discussed, these events give rise to serious ethical and legal concerns. Among these are your duties to the State Bar of California and to the Court. To be clear – while I am not threatening to report you to the bar or to make any reports of criminal conduct to law enforcement in order to gain any advantage in this case, at the same time I believe it is appropriate for me to stop and make note of your ethical and other obligations and to insist that you act lawfully in this case.

In that regard, I note that Rule 3–700 of the California Rules of Professional Conduct appears to make it mandatory for you to withdraw from this case immediately. Specifically, the Rule states in pertinent part:

> Rule 3-700. Termination of Employment
>
> * * *
>
> (B) Mandatory Withdrawal.
>
> A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:
>
> (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;

Clearly, at least with respect to the RICO/extortion allegations, you both know that your client has taken a position that is manifestly without probable cause and which serves no purpose other than to injure and harass Xcentric. As I already stated, I understand that I cannot force to you comply with your ethical obligations, but I believe it is appropriate for me to remind you of what those obligations are and to demand that you comply with them.

Of course, the events of this case give rise to other serious ethical concerns, among these are California Rules of Professional Conduct: 3-200 (prohibiting a lawyer from bringing an action or asserting any position in litigation without probable cause and for the purpose of harassing or maliciously injuring any person); 3-210 (prohibiting a lawyer

from advising a client to violate the law); and 5-200(B) (prohibiting a lawyer from misleading a court by making a false statement of fact). Furthermore significant case law exists for the principle that "an attorney should make a motion to withdraw from representation when the representation will result in a violation of law or rules of professional conduct." *People v. Johnson*, 62 Cal.App.4th 608, 622, 72 Cal.Rptr.2d 805, 812 (4 DCA 1998) (citing Cal. Rules of Prof. Conduct, rule 3-700(B)(2), (C)(1)(b) & (c)); *People v. Brown*, 203 Cal.App.3d 1335, 1339–1340, footnote 1, 250 Cal.Rptr. 762 (1988) (same).

For these reasons, I would like you to inform me as soon as possible whether you intend to withdraw in this case. Normally, this decision would not be exceptionally urgent. However, because this case is set for trial on an expedited basis, and because Xcentric will need to take additional steps to protect itself from further harm in the event you refuse to withdraw, I would like to request that you provide me with your position on this issue no later than Wednesday, May 12, 2010. If you do not bring a Motion to Withdraw by that date, I will assume that you have decided not to do so.

b. Continuation Of Case On Modified Factual Theory

Assuming that you do not withdraw, I believe that you may be exposing yourself to significant liability if you continue to rely on and pursue your clients' existing factual allegations regarding extortion/RICO knowing, as you now do, that those allegations are entirely false. However, based on our conversation yesterday, I understand that you have indicated that your clients will be filing new declarations/affidavits which seek to "correct" their previous testimony.

It is unclear to me how these corrections would allow you to proceed with the extortion/RICO claims. Your clients brought those claims based entirely on specific factual allegations that you now know are untrue.

However, it may be possible that you believe the case, or some part thereof, may still be salvageable based on the disclosure of new or different factual theories of some kind. While I disagree this is even a possibility, if you intend to continue with this case on a *modified* and previously undisclosed theory, please let me know immediately, bearing in mind that the Court ordered your clients to disclose their factual theory as to the extortion claims no later than last Monday, May 3rd. To the extent you attempt to assert any new or different factual theories, this plainly violates the Court's order and I will object to any modified theory on that basis.

Furthermore, the deposition confirmed and in some cases revealed serious deficiencies in your evidence related to essential elements of the claims brought. It is exceedingly clear that your client can not satisfy the elements of extortion or RICO including a lack of damages and a lack of causation. The remaining claims are barred by the CDA, so the entire case has no possible hope of succeeding.

c. General Settlement Points

As Maria and I explained to you on the phone, Xcentric has successfully sued parties and their lawyers for knowingly commencing and continuing litigation that they knew was factually groundless. Xcentric intends to bring such claims against your clients for their wrongful actions and we will not hesitate to include claims against either or both of you individually if you continue to prosecute any claims in this case which you know are factually untrue or if the evidence demonstrates that you brought this case knowing that the allegations contained in it were factually untrue.

That fact notwithstanding, although the settlement window will be closing very soon, this case is actually in a good posture to be resolved without years of additional litigation. That is so because at present, Xcentric's attorney's fees and costs are relatively low (probably less than $25,000), and based on my discussions with Mr. Mobrez during his deposition, we believe it is likely that he has information that may be of substantial value to Xcentric. In a nutshell, I think our clients may be in a position where they can each receive something of value from an immediate resolution of this case.

Thus, as Maria explained to you on the phone, we may be willing to agree to a settlement of this case based on several simple points.

The first point is that your clients would need to retract their prior testimony and admit that they were never asked for money, etc., and immediately agree to the dismissal of their lawsuit with prejudice.

The second point is that your clients would agree to pay all of the attorney's fees and costs incurred by Xcentric to date which we believe are probably less than $25,000 (though this number is increasing with each passing day).

The third point is that your clients would provide a full, complete, and truthful explanation of each and every third party who aided, solicited, and/or encouraged them to make their false extortion claims in this case. Ultimately, even though Xcentric has suffered damage as a result of your clients' actions, we have a larger goal of ferreting out and stopping third parties who have helped or directed this type of fraudulent litigation. As such, Xcentric may be willing to reduce or even completely waive the amount of damages and fees your clients would have to pay depending upon how useful the information they are willing to provide is. Of course, further false testimony is of no interest to us, so we would only be willing to discuss this option in the event your clients can provide solid, verifiable evidence (preferably in the form of documents) which show what role was played by any third parties in the initiation of this case. Again, the opportunity to discuss settlement on these terms presumes that your clients will immediately end this case and immediately stop causing Xcentric to incur additional fees, so each day that passes makes this proposal less likely to be acceptable to Xcentric.

III. RESPONSE TO SPECIFIC POINTS

Having stated Xcentric's general position, I also wanted to respond to some of the specific comments/remarks made in Lisa's email to me from this past Sunday.

a. CRPC 5–100

Lisa noted that some of my prior comments referred to your clients' criminal actions and to my decision to contact the State Bar of California. Lisa cited California Rule of Professional Conduct 5-100 which provides, in part, "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute."

To be clear—at no time in the past have I threatened anyone with criminal or administrative charges of any kind, nor should this letter be construed as such a threat. Obviously, because this case contained allegations of extortion, I am well-aware that it would be patently illegal and unethical for me to state or imply that I would report your clients' criminal actions to any law enforcement agency, or your actions to the State Bar of California in order to gain any advantage in this case.

So that there is no misunderstanding, I want to offer some explanation of the actions I have taken along with my reasons for taking such action. Under Arizona's ethical rules (specifically, ER 8.3(a) of the Arizona Rules of Professional Conduct), it is mandatory for a member of the bar to report any conduct by another lawyer which "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects ... ." The failure to report another attorney is, itself, an ethical violation under Arizona's rules.

Because I did not know that your clients had perjured themselves until I received their declarations on Monday, May 3, because I did not know (and still do not know) what involvement, if any, you may have had, and because I did not know whether California imposed a similar duty to report ethical violations by another attorney, I contacted the State Bar of California ethics hotline on Tuesday, May 4th, to ask for their guidance in this situation. I did not tell them your names nor did I tell them anything else about this case. I simply inquired about the nature and extent of my duties and obligations upon learning that the opposing party in a civil case had committed perjury.

The person I spoke to at the bar informed me that unlike Arizona, California does not require lawyers to report such events, but she also indicated that reporting any misconduct that may occur is strongly encouraged. Of course, as I have already explained to Dan, my assumption thus far has been that both of you have been unaware of the truth. If true, then you would not have engaged in any unlawful or unethical conduct – at least up until the point where you became aware that your clients had lied under oath. From that point forward, the situation changes because now that you know the truth, you could face serious consequences if you continue representing your clients in this matter.

However, please note that I have never threatened to accuse anyone of a crime or to report any actions of anyone to the State Bar, whether to gain a tactical advantage or otherwise. Instead, because my clients are plainly victims of your clients' criminal actions, I am merely demanding that both you and your clients follow all applicable laws and ethical obligations.

b. Timing & Admissibility of Recordings

As to the issue of timing, obviously the recordings are rebuttal evidence used solely to impeach your clients' testimony. Under Rule 26(a), it is not necessary for any party to automatically disclose this type of evidence, so that's why I did not disclose them to you as part of our original disclosures. I did not intend to suppress evidence, trick you, or withhold anything from you – I simply did not know that the recordings were going to be necessary until your clients claimed that the extortionate acts took place during these calls (Mr. Mobrez could just as easily have claimed they took place in writing, in person, or in some other manner other than by phone).

Furthermore, as you certainly know, the first time that I learned about your clients' specific factual allegations was in their declarations that you filed with the court on Monday, May 3, 2010. Before those declarations, your clients only made generalized allegations as to when/where/how they had been extorted, so until they both accused Mr. Magedson of demanding money over the phone on specific dates, I had no idea whether or not the recordings were going to be necessary at all. As soon as it became clear to me that the recordings were needed, I disclosed them to you, albeit only after asking Mr. Mobrez to confirm the story as contained in these declarations (which I felt I was required to do in order to protect my clients and to prevent Mr. Mobrez from changing his story again).

In addition, and to respond to another of Lisa's questions, until I actually saw your clients' declarations, I did not know whether the recordings were admissible. This is so because although the recordings were made in Arizona, and although Arizona does not require the consent of both parties in order to record a telephone call, the law in California is different. Under Cal. Pen. Code § 623(a), calls recorded without the consent of both parties *may* be inadmissible in a party's case-in-chief if the communication was "confidential". Under § 623(c), the term "confidential" does not include any calls where the speaker knows or reasonably expects he is being recorded, nor does it apply to "any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

Until I saw your clients' declarations, I did not know that Ms. Llaneras was listening in to any of the calls. Of course, because Mr. Mobrez knew that she was eavesdropping (which, by itself, may have violated the law), Ms. Llaneras was kind enough to render these recordings admissible because Mr. Mobrez could not have expected that his conversations with Mr. Magedson were confidential when he knew they were being overhead by Ms. Llaneras.

Although I believe there are three calls that Ms. Llaneras did not eavesdrop upon (Call #1, #3, and #6 according to my list) I am confident the court would find the recording of every call to be admissible. This is so because two of these calls were voicemails left by Mr. Mobrez (Call #3 on April 27 and Call #6 on May 6). Obviously, a person who leaves a voicemail knows that the call is being recorded, so the eavesdropping statute would not apply at all.

This leaves only Call #1 on April 27. Even assuming *arguendo* that Mr. Mobrez could have reasonably expected that this call was not being recorded, that point is irrelevant because the exclusionary evidentiary sanction of Penal Code § 632 is not a "shield for perjury" and therefore recordings made in violation of that section can still be used for impeachment of any witness who takes the stand and lies. *See Frio v. Superior Court*, 203 Cal.App.3d 1480, 1497, 250 Cal.Rptr. 819, 829 (2 DCA 1988) (explaining, "the evidentiary sanction of section 632, subdivision (d), cannot be construed so as to confer upon a testifying witness the right to commit perjury.")

What this means is simple – if Mr. Mobrez testifies falsely about the contents of Call #1 (as he has already done) the recording of that call can be used for impeachment. Of course, if Mr. Mobrez chooses to testify truthfully about this call and every other call, then the recording of Call #1 is would be unnecessary.

c. Authenticity of Recordings

As for the authenticity of the recordings, Mr. Mobrez admitted the voice on the tape was his, so I do not think this is an issue. In terms of whether the recordings are genuine and complete, I have a couple of comments.

First, the recordings were NOT made by Mr. Magedson. Rather, they were created by a third-party vendor to Xcentric who recorded the calls and then emailed the audio recordings to Mr. Magedson in the usual course of business. These calls are business records of Xcentric and the original emails from the vendor are kept in the regular course of our business. I also have the original emails with the original audio files attached to them (these vary from the ones I gave you only with respect to the file names which were changed for ease of reference and some of the meta data in the file header which was redacted in order to protect the name of the vendor until such time as a protective order can be entered).

Second, if you wish, I am certainly happy to expend additional fees allowing you to investigate and confirm the authenticity of the recordings. As I already stated, absent a prompt settlement, your clients will be bearing all costs and fees incurred by Xcentric, so any costs we incur will ultimately be their responsibility. Even assuming the vendor does not maintain copies of these recordings beyond a certain date (which I have not yet been able to confirm), I am confident that an expert could review the files and the process by which they were emailed to Mr. Magedson and confirm that tampering with them would have been impossible.

Third, you should note that in many ways, your client's own speech on the recordings confirm that they are an accurate version of the discussions between Mr. Magedson and Mr. Mobrez. For instance, on the final recording (#7 made on May 12), Mr. Mobrez tells Mr. Magedson that he still does not know what the cost of the CAP program is. Of course, this is entirely consistent with the rest of the recordings because Mr. Magedson never told him what the cost was and never asked for any money of any kind. Similarly, in the recording of Call #6 (a voicemail call made from Mr. Mobrez's cell phone), Mr. Mobrez's message states that he has been talking to someone at Xcentric who "keeps hanging up and doesn't seem to want to stay on the phone...." This is completely consistent with what the previous calls show.

As such, while you might think it is prudent to take the position that there could be a small chance that the recordings have been altered, I want you understand that the consequences of taking that position could be substantial—because the facts clearly show that your clients have lied in virtually every material respect, continuing to represent them will make you jointly and severally liable for their actions. Thus, assuming the recordings have not been altered (which is obvious under the facts here), then travelling down that road in the vain hope of finding support for claims which you know to be false will not result in any reduction of your liability. In order for counsel to become personally liable for the tort of wrongful use of civil proceedings, all that is required is to show that they commenced or continued a case or claim after learning that the claim lacked "probable cause"; "one who continues a civil proceeding that has properly been begun or one who takes an active part in its continuation for an improper purpose after he has learned that there is no probable cause for the proceeding becomes liable as if he had then initiated the proceeding." Restatement (Second) of Torts § 674, comment 'c'. Hoping against hope that you might find probable cause in the face of such overwhelming evidence does not mean that you will do so, and if you do not do so, then you will be exposed to complete liability for continuing this case without probable cause.

IV. SUMMARY

In closing, I want to emphasize one obvious fact—your clients have lied about the material facts of this case. As such, just as your clients were, you now stand at a crossroads wherein you have a choice: you can do the right thing and follow the requirements set forth by the law and by your ethical duties, or your can ignore those duties and face the consequences. Although your clients have clearly made the wrong choice, I hope that you display more wisdom and that you decide to make the right choice while it still remains available to you.

VERY TRULY YOURS,

David Gingras

EXHIBIT "5"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-01360 SVW (PJWx) Date May 4, 2011

Title Asia Economic Institute v. Xcentric Ventures LLC, et al.

JS-6

B. Analysis

Plaintiffs argue that additional discovery will aid their defense to summary judgment in the following areas: (1) yielding evidence to oppose Defendants' claim that all HTML code and meta tags are generated "automatically"; (2) yielding evidence to refute Defendants' claim that all meta tags are generated by content contributed by third-party users; and (3) yielding evidence to refute Defendants' claim that Mr. Magedson has no control over how Google or any other search engine decides to rank content. (56(f) Mot. at 3, 4). Plaintiffs' Motion Under Rule 56(f) is denied because the discovery sought could not defeat the Motion for Summary Judgment.

1) Defendants' claim that (1) all HTML code and meta tags are generated "automatically" and (2) that all meta tags are generated by content contributed by third-party users

Whether all HTML code and meta tags are generated "automatically" is irrelevant to the summary judgment motion. As discussed above, Plaintiffs have failed to cite any authority for the proposition that increasing the prominence of a page in internet searches amounts to "creation or development of information" that would make Defendants "information content providers" under the CDA. As discussed above, increasing the visibility of a statement is not tantamount to altering its message, particularly since the Ripoff Report is purportedly a consumer report website intended to be seen on a grand scale. See Roommates.com, 521 F.3d at 1174–75; Black, 2010 WL 3222147 at *3; Goddard, 640 F.Supp.2d at 1196. Absent alterations of the actual content of postings, which did not occur here, liability cannot be found. Moreover, Plaintiffs conceded that the HTML code and meta tags of the reports devoted *to them* were created automatically. They have only alleged non-substantive changes to the meta tags of CAP members – Plaintiffs were not CAP members.

2) Defendants' claim that Mr. Magedson has no control over how Google or any other search engine decides to rank content

Plaintiffs generally assert that Defendants had greater credibility with the public at large because of their representation that they lack control over Google's searches. Even if the statements were false, Plaintiffs have produced no evidence of reliance on these statements or of injury-in-fact. See *supra* section IV(C).

VI. DEFENDANTS' SPECIAL MOTION TO STRIKE PURSUANT TO CAL. CODE CIV. P. § 425.16

Initials of Preparer PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-01360 SVW (PJWx) Date May 4, 2011

Title Asia Economic Institute v. Xcentric Ventures LLC, et al.

JS-6

Defendants have moved to strike under California's anti-SLAPP statute, Cal. Code Civ. P. §§ 425.16(e)(3) and (e)(4). Defendants argue that Plaintiff's claims for deceit, fraud, and unfair competition arise from statements made in connection with litigation, and therefore, are *per se* within the scope of § 425.16(e)(3). In the alternative, Defendants argue the claims involve matters of public concern. In addressing these arguments, the Court applies the legal standard and burdens set out in Hilton v. Hallmark Cards, 580 F.3d 874, 882-87 (9th Cir. 2009). Here, Defendants have failed to meet their burden in showing that the anti-SLAPP statute applies.

First, although Defendants argue that Plaintiffs have alleged that Defendants made threats in a settlement conference between the parties, no such allegation appears in the FAC. Thus, the anti-SLAPP statute is not triggered.

Second, Defendants contend that one of Plaintiffs' fraud claims[9] arises from settlement activity in a prior case between Defendant and a third party, and are therefore *per se* within the scope of the anti-SLAPP statute. Although a cause of action may be triggered by a protected act, this does not necessarily mean the cause of action *arises from* that act. Kolar v. Donahue, McIntosh & Hammerton, 145 Cal.App.4th 1532, 1537, 52 Cal.Rptr.3d 712 (2006). Here, though Plaintiffs' fraud claim may be triggered by Defendants' previous settlement, Plaintiffs do not allege that Defendants' statements in their prior settlement are false. Instead, Plaintiffs' fraud claim arises from Defendants' subsequent allegedly false statements claiming that Defendants never remove reports. These statements, made on Defendants' site and in e-mails, were not made in connection with any seriously considered litigation (as addressed below).

Defendants argue that statements on their website and in certain e-mails, allegedly stating that Defendants have never lost a case and are immune from suit, form the basis of Plaintiffs' claims. Even accepting this as true, these statements were not made in serious consideration of an anticipated lawsuit. A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc., 137 Cal.App.4th 1118, 1128 (2006) *as modified, rehearing denied, review denied* (holding that a defendant's mere threats of possible legal action did not demonstrate serious consideration of litigation despite having a viable legal claim); c.f. Neville v. Chudacoff, 160 Cal.App.4th 1255, 1269 (2008) (holding that letter sent by attorney accusing employee of breach of contract and misappropriation of trade secrets and signaling intention to sue employee was sent in serious consideration of anticipated litigation). Here, Defendants made blanket statements on their site and sent generic e-mails merely threatening their readers in a general fashion that litigation would be futile. There are no indicia of seriously considered anticipated litigation; rather, Defendants generally warn their readers not to litigate.

Finally, in the alternative, Defendants argue that statements on their site stating that it would be futile to sue them were made on a public forum and related to matters of substantial public interest under

[9] As previously discussed, Plaintiffs claim that Defendants' statements in e-mails and on their site stating that Defendants never remove reports for money are false. Plaintiffs allege that on at least one occasion Defendants removed a report from their site for money.

Initials of Preparer PMC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-01360 SVW (PJWx) Date May 4, 2011

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JS-6

§ 425.16(e)(3). As discussed in Hilton, California Appellate Courts have formulated multiple tests to determine whether a defendant's activity is in connection with a public issue. Hilton, 580 F.3d at 886-87. However, Defendants fail to meet any of these tests. Rather than concerning matters of importance to the public, Defendants' statements were made in their private-interest (to avoid litigation).

VII. CONCLUSION

Defendants' Motion for Summary Judgment is GRANTED. Plaintiffs' Motion under Rule 56(f) is DENIED. Defendants' Motions for Sanctions pursuant to Fed. R. Civ. P. 11 are DENIED. Defendants' Special Motion to Strike is DENIED.

Initials of Preparer PMC

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Attorneys for Defendant
Lisa Jean Borodkin

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

XCENTRIC VENTURES, LLC, et al., Plaintiff, v. LISA JEAN BORODKIN, et al. Defendants.	**No. 2:11-CV-01426-PHX-GMS** **DECLARATION OF LISA JEAN BORODKIN IN SUPPORT OF MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11** (Assigned to the Honorable G. Murray Snow) (Oral Argument Requested)

I, Lisa J. Borodkin, declare,

I have first-hand, personal knowledge of the facts set forth below and, if called as a witness, I could and would testify competently thereto.

1. I am an attorney at law, duly admitted to practice before all the courts of the State of California and was co-counsel of record for the plaintiffs in Asia Economic Institute LLC et al. v. Xcentric Ventures LLC et al., C.D.Cal. No. 10-cv-1360 ("the California Action").

2. On May 10, 2010, Daniel Blackert advised me that he had received a return telephone call from the California State Bar Ethics Hotline in response to a message he had left regarding the May 7, 2010 deposition of Raymond Mobrez, and that the Ethics Hotline had referred to some relevant materials.

3. On May 11, 2010, Blackert emailed me three California State Bar Ethics Opinions and one case, *People v. Johnson*, 62 Cal. App. 4th 608 (Cal. App. 4th Dist. 1998), relevant to the situation at hand. Based on these authorities, Blackert and I concluded that we could continue to represent the clients after taking appropriate remedial action.

4. On May 11, 2010, Blackert and I received a settlement demand from Xcentric, attached as Exhibit E to the Verified Amended Complaint in this action, that demanded payment of $25,000 in attorneys' fees as a condition of settlement. Blackert and I were not authorized to accept a settlement that required payment of the defendants' attorneys' fees.

5. On June 8, 2010, Plaintiffs took the Deposition of Defendant Edward Magedson in the California Action. Attached hereto as **Exhibit "1"** are true and correct copies of the caption page, pages 72-73 and the verification page of the official deposition transcript of the June 8, 2010 deposition of Mr. Magedson. The full deposition transcript can be provided at the Court's request.

6. Attached as **Exhibit "2"** is a true and correct copy of an August 10, 2011

email message I received from Ed Magedson, as well as earlier email messages I received from David Gingras, counsel for Plaintiff in this action.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 26th day of April 2012, in Los Angeles, California.

/s/ Lisa J. Borodkin
Lisa J. Borodkin

EXHIBIT "1"

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASIA ECONOMIC INSTITUTE, LLC, a California LLC; RAYMOND MOBREZ, an individual; and ILIANA LLANERAS, an individual, Plaintiffs, vs. XCENTRIC VENTURES, LLC, an Arizona LLC, d/b/a as BADBUSINESS BUREAU and/or BADBUSINESSBUREAU.COM and/or RIP OFF REPORT and/or RIPOFFREPORT.COM; BAD BUSINESS BUREAU, LLC, organized and existing under the laws of St. Kitts/Nevis, West Indies; EDWARD MAGEDSON, an individual, and DOES 1 through 100, Inclusive, Defendants.	Case No: 2:10-cv-01360-SVW-PJW

Videotaped Deposition of EDWARD MAGEDSON, taken on June 8, 2010 at the offices of Jaburg & Wilk, P.C., 3200 North Central Avenue, Suite 2000, Phoenix, Arizona, commencing at 10:07 a.m. before Marcella Daughtry, RPR and Arizona Certified Reporter.

PAGES 1 - 227

confidential volunteer work in the community?

A Yes.

Q Is it in the Phoenix community?

A Yes. And I would say even nationwide.

Q Why do you do it? 11:45:43

A Because I love animals, so that tells you -- that tells you the story right there.

Q Does it concern animals?

A Yes.

Q And it doesn't concern people? 11:46:02

A Correct.

Q But you think that because of your work with the animals, people could be subject to harassment?

A Yeah, so I'd be harassing -- I'd be subjecting any organization that I do anything for or anything 11:46:16 else like that, I would. So, yeah.

Q I'm sorry, I don't understand.

A That would be yes, it would be.

Q Why do you think that?

A Because people who I'm sure you've already 11:46:28 reached out to and that have been mentioned are people who are directly connected, and all have helped other people to perform DDoS attacks, gotten people to try to -- like Mr. Mobrez, to lie, which I'll assume, as nice as you are -- that I think the two of you's are 11:46:49

nice people, that you're probably -- I would assume you weren't aware of -- I don't know. I don't want to really just say anymore.

But -- but that's not the only thing. There is something else that I do that does, you know, go with human rights, something else. Because I've been a human rights activist, I would say since my teen years, because I don't -- I don't like discrimination and those kinds of things. So there is other things that I do make time for and I'm involved with. 11:47:02 11:47:22

Q Is there any -- is there any of that that you can tell us about today?

A No, it's better off I don't, because it's just -- I don't want to say too much because it would just cause a problem. 11:47:35

Q Okay. Do you donate any money?

A That's a question I don't even want -- I don't want to answer. President Obama. But I'm asking for a refund.

Q Are you? 11:48:03

A I'm kidding. No, I'm joking.

Q Is Ripoff Report a better known name than Xcentric Ventures?

A Yes, of course. Yes. That's the trade name, Ripoff Report. 11:48:53

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

I HEREBY CERTIFY that the foregoing deposition was taken before me; that I was then and there a Registered Professional Reporter, and an Arizona Certified Reporter, Certificate No. 50623, in and for the State of Arizona; that the witness before testifying was duly sworn by me to testify to the whole truth; that the questions propounded by counsel and the answers of the witness thereto were taken down by me in shorthand and thereafter transcribed under my direction; and that the foregoing 227 pages contain a full, true, and accurate transcript of all deposition testimony and proceedings had, all done to the best of my skill and ability.

I FURTHER CERTIFY that I am in no way related to nor employed by any of the parties hereto, nor am I in any way interested in the outcome.

DATED at Phoenix, Arizona, this 21st day of June, 2010.

MARCELLA L. DAUGHTRY, RPR
Certified Reporter
Certificate No. 50623

EXHIBIT "2"

Gmail by Google

Lisa Borodkin <lborodkin@gmail.com>

Settlement offer, so we are all on the same page.. / RE: ROR Lawsuit

ED - Rip-off Report <EDitor@ripoffreport.com> **Wed, Aug 10, 2011 at 2:05 PM**
To: lborodkin@gmail.com, lisa_borodkin@post.harvard.edu
Cc: david@gingraslaw.com

Dear Lisa,

Sorry for all the confusion, sometimes attorneys and clients are not on the same page..

You don't need to respond to me on this, do respond to David.

To be clear,. NO MONEY WOULD BE DEDUCTED for any information on Brewington. Not a dime. The only benefit to you would be, if you do provide information to us that you know would help us with Brewingtons other alledged activities to hurt Ripoff Report and myself.. the only thing that would get you is the following.

I would consider settling with you out of court, but, I would require you to stipulate to a judgment for $100,000 as well..

Benefit to you, you would not have to go thru a long court battle. This amount will be much less than what I will be suing for. This is one court battle I will be looking forward to. I will be on a mission to get courts to punish lawyers like you and Blackert. What you did is disgusting, despicable and unforgivable. Courts need to start coming down on lawyers like you as well as prosecutors for misconduct.

The only way that judgment would get lowered is if I am successful in getting damages from your accomplices. But, my damages are way more than the $100,000 .. You would be responsible for at least $40,000 no matter what.. I intend on getting what I deserve as you almost devastated me and the business I built for the last 13 years and you stressed me out more than I had ever been before... I really want to have my chance to expose you. You are the reason lawyers get a bad name. You should be ashamed of yourself. Even though you kept telling everyone, .."I really like ED"

What I am offering you will get you to avoid a long and drawn out legal battle and will only make you look worse than you already do.
You can also start focusing on looking for a job instead of a legal battle.

In order to get me to settle out of court with you, you would also need to provide info on things you know John F Brewington did wrong. I know you can help in this area.

You would also need to start, immediately paying on that judgment, $10,000 down and $5,000 a month. If not, I will see you in court.

But Lisa, "*I really like you*." .. Lisa, you are a phony and in my opinion, you should not be practicing law and you should be prosecuted. You're a real piece of work and an embarrassment to the entire law community and the Harvard School you went to.

If we have to file or answer another document for this case, this offer is off the table.

If you want to talk more specifics, contact David Gingras. I think we all now understand what page I am on.

ED Magedson - Founder
EDitor@RipoffReport.com
www.ripoffreport.com

..by consumers, for consumers
Ripoff Report.

PO BOX 310, Tempe, AZ 85280
602-359-4357 when selection starts, press 5 ...then, three seconds later press 1... Say who you are!

Our mission:

- ***empower*** consumers
- ***defend*** the First Amendment
- ***expose wrongdoing***
- help companies ***regain control***

Do for others as you would want them to do for you
ED Magedson: Founder, Ripoff Report

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Follow me, **Ed Magedson**, on Twitter

Find us on Facebook

From: David Gingras [mailto:david@gingraslaw.com]
Sent: Wednesday, August 10, 2011 11:33 AM
To: 'ED - Rip-off Report'
Subject: FW: ROR Lawsuit

Ed,

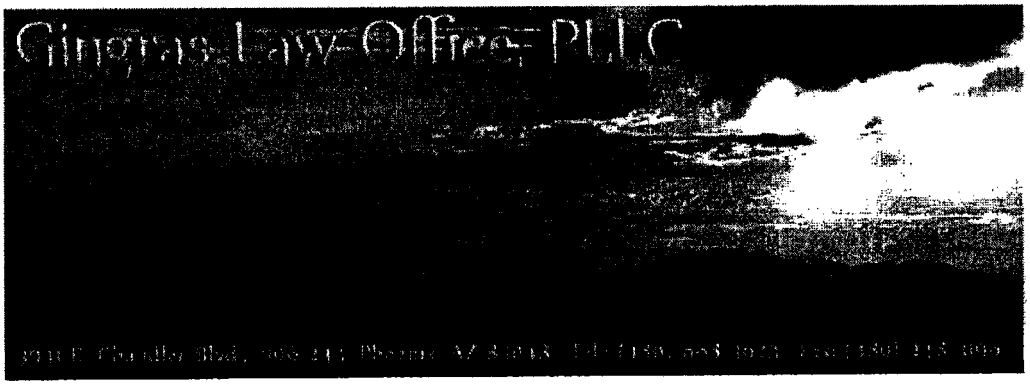
FYI – the reason I said $100k is the amount of the judgment is because I called J&W and that's what your fees and costs were on the Asia case (the actual amount was technically $99k and a little more, so I rounded it up to $100k).

David S. Gingras, Esq.

David@GingrasLaw.com

Tel.: (480) 668-3623

Fax: (480) 248-3196



From: David Gingras [mailto:david@gingraslaw.com]
Sent: Wednesday, August 10, 2011 11:32 AM
To: 'david@gingraslaw.com'; 'lborodkin@gmail.com'
Cc: 'lisa_borodkin@post.harvard.edu'
Subject: RE: ROR Lawsuit

Lisa,

Although you haven't responded to my email below, I need to let you know that apparently I misunderstood Ed – he's NOT willing to settle his claims against you based solely on information about Brewington. Instead, Ed said that his offer would require you to stipulate to a judgment for $100,000, and if you provided information that resulted in Ed collecting any damages from Brewington, that amount would be deducted from the judgment against you.

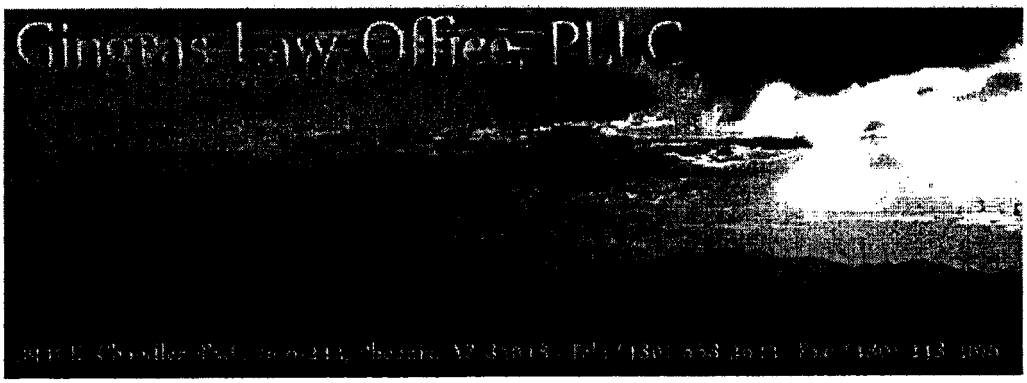
Sorry about the miscommunication.

David S. Gingras, Esq.

David@GingrasLaw.com

Tel.: (480) 668-3623

Fax: (480) 248-3196



From: David Gingras [mailto:david@gingraslaw.com]
Sent: Monday, August 08, 2011 9:58 AM
To: 'lborodkin@gmail.com'
Cc: 'lisa_borodkin@post.harvard.edu'
Subject: RE: ROR Lawsuit

Lisa,

To follow up on our phone conversation last week, I have talked to Ed and he's not willing to resolve his claims against you in exchange for information about Dan's location. He also understands that obtaining money from you or Mr. Mobrez might be impossible, but that's not the sole point of the lawsuit. Ed feels he has to send a strong message to all the "haters" out there telling them that if they break the law when pursing ROR, that conduct will have serious consequences. Standing alone, if we can prevent even one other person from bringing a case based on fabricated claims against ROR, this will have significant value to Ed.

Having said that, as much as Ed feels that it is important to send a message by making an example here, after talking about it, he said that it is possible we could reach an alternative resolution. How? Simple – Ed wants to know if you have any evidence that would implicate John Brewington in any sort of unlawful conduct. I understand you previously answered that question by saying no, but that was a long time ago, and maybe new information has come to light.

I know you're aware of the long history with Brewington, so there's no need to discuss all the details. It suffices to say that if you had solid, reliable information (really, it would have to be documents/emails/etc.) showing that Brewington did something unlawful either in connection with the Asia litigation or otherwise, that information could be extremely valuable to Ed and it might provide a basis for resolving Ed's claims against you. Of course, if the honest answer is that you have no such information, then that's fine...we have no interest in anything but discovering the truth. For my part, I am not now nor have I ever been very closely involved in any of Ed's disputes with Brewington (this is mainly Maria's thing), so I really don't know what information might be out there, but anything that shows Brewington participating in or encouraging any sort of unlawful conduct would probably be of the highest value to Ed.

Because I know we talked about this before, I assume that you might have the same practical concerns – i.e., if you did have information to share, how could you know whether Xcentric would simply review the information and then say: "Yeah, that's not good enough. No Deal."? My answer to that is pretty simple – you would simply have to make a generalized proffer which described the type of information at issue, and we'd have to see if it sounded interesting enough to proceed. I think this could be done in such a way that Xcentric would not be able to "burn" you by taking the information, using it to our advantage, but then refusing to resolve the case against you. In other words, I would envision an arrangement wherein Xcentric agrees that it cannot use any of the information you provide for any purpose unless we reach a resolution on Xcentric's claims against you. This is sort of what FRE 408 says anyway.

Of course, because you have always said that there wasn't any helpful information to give, I don't want to belabor this topic, but if you think you might want to discuss it as a possible way of resolving the case, I would be happy to hear whatever you have to say.

David S. Gingras, Esq.

David@GingrasLaw.com

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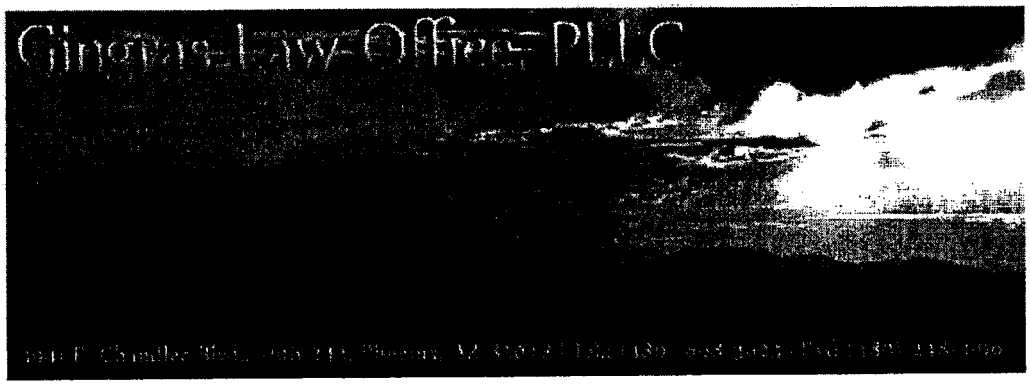
Fax: (480) 248-3196



From: David Gingras [mailto:david@gingraslaw.com]
Sent: Wednesday, August 03, 2011 4:32 PM
To: 'lborodkin@gmail.com'
Cc: 'lisa_borodkin@post.harvard.edu'
Subject: ROR Lawsuit

Lisa,

I'm sorry to be reaching out to you this way, but I have a question for you. By now, I assume you're aware of the lawsuit that Xcentric has commenced here in Arizona. Because I have no physical address for Dan, I mailed a copy of the Complaint, Summons, and a request for waiver of service to the PO box address that Dan has listed on the State Bar of California's website. As reflected in the attached PDF, I just received notice from the post office that Dan's address is invalid.

Because I have no other way of contacting him (I understand that the email address listed on the bar's website is also invalid, and I called the phone number they have for him but I got a strange voicemail recording that didn't sound anything like Dan), I wanted to see if you would be willing to provide me with whatever other address you may have for him. Obviously I can't require you to provide this, but I wanted to ask anyway.

If you don't have any other contact information for Dan or you're not willing to provide it to me, please let me know if you have any objection to Xcentric seeking leave from the court to perform early discovery on this issue. My thinking is that the California bar probably has a non-public address for Dan that I could obtain with a subpoena, so that's what I would seek leave to do.

Thank you.

David S. Gingras, Esq.

David@GingrasLaw.com

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Fax: (480) 248-3196