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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Xcentric Ventures, LLC, an Arizona  
limited liability corporation, and Jaburg &  
Wilk, P.C., a professional corporation,

Plaintiff,

vs.

Shawn Richeson,

Defendant.

No. CV-10-01931-PHX-NVW

**ORDER**

Before the Court is Plaintiffs’ “Emergency Application for Temporary Restraining Order Without Notice and Application for Order to Show Cause Why a Preliminary Injunction Should Not Issue.” (Doc. 7.) Following an ex parte telephonic hearing with Plaintiffs’ counsel, Judge Teilborg granted the temporary restraining order on September 9, 2010. (Doc. 11.) This Court then held a preliminary injunction hearing on September 21, 2010, attended by Plaintiffs’ counsel as well as Defendant representing himself. During that hearing, Defendant stipulated to entry of a temporary injunction. This Court then asked Plaintiffs’ counsel for (i) additional briefing regarding Plaintiffs’ ability to satisfy the amount-in-controversy threshold for diversity jurisdiction in federal court, and (ii) a proposed preliminary injunction. Plaintiffs have now submitted both documents. (See Docs. 25, 31.)

For the reasons stated below, the Court accepts Plaintiffs’ contention that they can satisfy the amount-in-controversy requirement, at least on the pleadings. However, despite

1 the parties' stipulation to a permanent injunction, this Court will deny the injunction without  
2 prejudice to a renewed application.

### 3 **I. Legal Standard**

4 "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed  
5 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,  
6 that the balance of equities tips in his favor, and that an injunction is in the public interest."  
7 *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008). In cases such as this, moreover, where the  
8 conduct to be enjoined involves defamation, the moving party "carries a heavy burden of  
9 showing justification for the imposition of such a restraint" because "[a]ny prior restraint on  
10 expression comes . . . with a heavy presumption against its constitutional validity." *Org. for a*  
11 *Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (internal quotation marks omitted). The  
12 First Amendment "[f]reedom from government censorship . . . is so jealously guarded that  
13 courts have, since the foundation of this country, been loathe to restrain speech, even if its  
14 content is alleged to be remarkably harmful." *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d  
15 1071, 1083 (C.D. Cal. 2003).

### 16 **II. Facts**

17 The facts recounted here rely in part on the e-mails exchanged between Plaintiffs and  
18 Defendant in the run-up to this lawsuit. Because the parties stipulated to an injunction,  
19 Plaintiffs did not have the opportunity to authenticate these e-mails. The Court has developed  
20 the facts recounted here by assuming (for purposes of this order) that the e-mails are  
21 authentic. The Court further accepted as true (for purposes of this order) Plaintiffs' non-  
22 conclusory factual allegations in their complaint. The Court sees no prejudice to Defendant  
23 in so doing, because, as explained below, Plaintiffs still do not merit a preliminary injunction.

24 Plaintiff Xcentric Ventures, LLC, is an Arizona company that owns and operates the  
25 consumer complaint website [www.ripoffreport.com](http://www.ripoffreport.com). At some point in 2008, someone posted  
26 on Ripoff Report a number of complaints against a Texas computer services business known  
27 as "Click a Nerd." Click a Nerd is run by Defendant Shawn Richeson. Richeson began  
28 contacting Xcentric, requesting that Xcentric remove those postings. Xcentric refused.

1 In September 2009, Richeson started communicating with Maria Speth, a partner at  
2 Plaintiff Jaburg & Wilk, P.C. Jaburg & Wilk is a law firm that frequently represents Xcentric.  
3 The nature of Richeson’s early communications with Speth is not clear, but by Summer 2010,  
4 Richeson had begun posting comments on his own website stating or suggesting that Jaburg  
5 & Wilk owns Ripoff Report.

6 Early last month, Richeson informed Xcentric and Jaburg & Wilk that he had created  
7 a website publishing the criminal history of David Gingras, a former Jaburg & Wilk attorney  
8 and now general counsel for Xcentric.<sup>1</sup> Richeson’s website reported that, in 1999, Maricopa  
9 County had charged Gingras with twelve counts of sexual conduct with a minor.<sup>2</sup> Richeson’s  
10 website also contained several headings such as “Jaburg and Wilk - CHILD MOLESTERS”  
11 and “David Gingras | CHILD MOLESTER | Jaburg and Wilk.” Richeson’s website  
12 additionally featured a small banner with a picture of Jaburg & Wilk named partner Gary  
13 Jaburg alongside the text: “An Excentric [*sic*] Ventures Company [¶] Speth & Jaburg [¶]  
14 Attorneys at Law [¶] We Employ Child Molesters!” Finally, Richeson’s website claimed that  
15 Gingras was a partner at Jaburg & Wilk, and that the firm “buried in the report about  
16 [Gingras] to keep their law firm from looking bad. Maria Speth said that they alter reports  
17 about child molesters.”

18 Richeson later posted substantially the same content (absent the banner) on a blog, and  
19 then invited Speth to tell Gingras to post “his side of the story” in that blog’s comment  
20 forum. Richeson also launched a dedicated website, [www.jaburgandwilsucks.com](http://www.jaburgandwilsucks.com),  
21 supposedly containing similar or duplicative accusations against Jaburg & Wilk and  
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24  
25 <sup>1</sup> Gingras is also one of the attorneys of record representing Plaintiffs in this lawsuit.

26 <sup>2</sup> According to an explanatory e-mail from Speth to Richeson, “When David [Gingras]  
27 was in his early twenties, he had a girlfriend who was seventeen. Her parents made  
28 accusations and pressed charges, against her will. Those charges were **dismissed**.” (Emphasis  
in original.)

1 Gingras.<sup>3</sup> Richeson also posted reviews of Jaburg & Wilk through Google's and Yahoo's  
2 forums for reviewing businesses located through their search engines. One of these reviews  
3 said that "[t]he quality of legal service was terrible and I found out that [Speth's] partner  
4 David S. Gingras has been in trouble for various sexual offenses and DWI." The other review  
5 accused Speth of "running her web site ripoffreport.com" and that "she hired a fella named  
6 David Gingras" who was "charged with 12 counts of indecency with a child. How can we  
7 trust an Attorney to help us if they hire child molesters?"

8 Richeson sent frequent e-mails to Speth containing links to his various websites and  
9 other postings. In these e-mails, he offered to erase everything in exchange for Ripoff Report  
10 removing all references to him and his business. If Speth could not convince Ripoff Report  
11 to do so, Richeson threatened to use his SEO knowledge<sup>4</sup> to ensure that web searches for  
12 Jaburg & Wilk would hit numerous sites detailing the criminal records of Jaburg & Wilk  
13 partners, employees, and clients. Richeson hoped to ensure that Jaburg & Wilk "couldn't get  
14 a client if they stood on the corner with sign saying 'we sue for food.'"

15 Speth eventually convinced Xcentric to satisfy Richeson's demands, and Xcentric  
16 reportedly removed the references to Richeson that Richeson had specifically pointed out to  
17 Speth. Apparently, however, other references remained, and Richeson then began demanding  
18 removal of those as well. His demands included at least three attempts to call Speth on her  
19 home phone number. When he did not receive a satisfactory response, he announced to  
20 Jaburg & Wilk (via e-mail) that he would go through with his "SEO war." Xcentric then  
21 removed the additional references to Richeson and his company.

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24 <sup>3</sup> The parties have submitted no printouts or screenshots from this website. It currently  
25 contains information about various lawsuits pending against Xcentric, apparently derived  
26 from justia.com.

27 <sup>4</sup> Richeson apparently refers to "search engine optimization," a generic term for the  
28 various techniques one can use to increase the chances that a particular website will rank  
high in search results on sites such as Google and Yahoo.

1           **III. Procedural History**

2           On September 9, 2010, Plaintiffs filed a sealed complaint against Richeson, and a  
3 sealed motion for a temporary restraining order. That same day, Judge Teilborg held a  
4 telephonic hearing on the temporary restraining order with Jaburg & Wilk (acting as counsel  
5 for itself and Xcentric). Judge Teilborg subsequently signed Plaintiffs’ proposed temporary  
6 restraining order, but added that the Court would unseal Plaintiffs’ pleadings once Plaintiffs  
7 had served the temporary restraining order on Richeson. Jaburg & Wilk then e-mailed the  
8 temporary restraining order to Richeson.

9           On September 15, 2010, Richeson filed a combined answer and “motion to convert  
10 Plaintiff’s [*sic*] TRO into a temporary injunction.” In that document, under the heading  
11 “II. Defendant’s Motion to Convert Plaintiff’s [*sic*] TRO in to a Joint Temporary Injunction,”  
12 Richeson stated, “Defendant does hereby stipulate to the Plaintiff’s [*sic*] pending application  
13 and motion for a temporary injunction during the advancement of this cause of action.” (Doc.  
14 15 at 10.) Richeson went on to request “that this Court enter a temporary injunction  
15 prohibiting all parties” from posting or maintaining information about each other on the  
16 Internet. (*Id.*) On September 20, 2010, the Court denied Richeson’s “motion to convert” as  
17 a procedurally improper method of stating a counterclaim.

18           On September 21, 2010, the Court held a hearing on whether the temporary restraining  
19 order should be converted to a preliminary injunction. Jaburg & Wilk represented itself and  
20 Xcentric at that hearing, and Richeson appeared *pro se*. When the Court asked Jaburg &  
21 Wilk how it wanted to proceed, Jaburg & Wilk attorney Adam Kunz referred to Richeson’s  
22 above-quoted stipulation to the injunction. The Court then questioned Richeson about this  
23 stipulation. Richeson replied, “When I first applied for an expansion of that temporary  
24 injunction, I was — I applied the law wrong. So you had ruled on it yesterday, and at this  
25 time I’d like to go ahead and hold a hearing.” (Doc. 33 at 4: 4–7.) The Court then asked  
26 Richeson if he was retracting “what you wrote here in your answer,” to which Richeson  
27 responded, “Yes, Your Honor.” (*Id.* at 4: 16–18.) The Court questioned Richeson for the  
28 basis of his retraction. Richeson essentially repeated his original explanation: “So when I

1 drafted my answer, I tried to mix together my application for a temporary injunction to  
2 expand the scope of Mrs. Speth’s temporary injunction. And after receiving Your Honor’s  
3 ruling yesterday, it became clear that I did this improperly.” (*Id.* at 5:11–15.)

4 The Court expressed some confusion and reiterated: “It says here, as Mr. Kunz  
5 pointed out, that in your answer you consented to the temporary injunction during the  
6 advancement of this cause. . . . [W]hat is your basis for seeking to be relieved of this  
7 stipulation for the entry of a temporary injunction during the pendency of this case?” (*Id.* at  
8 5:24–6:8.) To this, Richeson replied, “Now that the question’s been posed like that, Your  
9 Honor, there really is no basis for my retraction of that.” (*Id.* at 6:9–11.) The Court then  
10 accepted Richeson’s stipulation.

11 Much of the remainder of the preliminary injunction hearing involved questions to  
12 Jaburg & Wilk regarding whether they could meet the amount-in-controversy jurisdictional  
13 requirements. The Court concluded by ordering Jaburg & Wilk to submit a legal  
14 memorandum analyzing the amount-in-controversy requirement, as well as a draft  
15 preliminary injunction. Jaburg & Wilk has now submitted both.

#### 16 **IV. Analysis**

##### 17 **A. The Preliminary Injunction**

18 The Court made an error in judgment in accepting Richeson’s stipulation to the  
19 preliminary injunction. Upon reviewing the hearing transcript, it is clear that Richeson was  
20 attempting to explain to this Court that his stipulation to the injunction was part of his  
21 improperly filed motion to convert the Temporary restraining order into a cross-injunction.  
22 Given that this Court had already denied that motion, Richeson naturally sought to withdraw  
23 that stipulation. Accordingly, the Court will not hold Richeson to his stipulation.

24 Even if the stipulation had been effective, the Court has serious doubts about the  
25 injunction Plaintiffs seek. To begin, Plaintiffs’ proposed injunction is, in many respects, too  
26 broad to be effectively enforceable. *FEC v. Furgatch*, 869 F.2d 1256, 1263–64 (9th Cir.  
27 1989); *see also Patriot Homes, Inc. v. Forest River Housing, Inc.*, 512 F.3d 412, 414–15 (7th  
28 Cir. 2008); *Louis W. Epstein Family P’ship v. Kmart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994).

1 “The district court may not simply order [a party] to ‘obey the law.’” *Am. Red Cross v. Palm*  
2 *Beach Blood Bank, Inc.*, 143 F.3d 1407, 1409–10, 1412 (11th Cir. 1998).

3 Further, much of the injunction would effectively act as a prior restraint on speech,  
4 which requires extraordinary circumstances that the Court does not perceive here. The Court  
5 will therefore analyze each request in the injunction for its constitutional permissibility and  
6 general enforceability.

### 7 **1. Threats to Plaintiffs**

8 Plaintiffs first ask this Court to enjoin Richeson from “[k]nowingly sending or causing  
9 to be sent to either Plaintiff any communication that contains threats of violence, threats to  
10 perform criminal acts, threats to harm either Plaintiff’s business by tortious or unlawful  
11 means, or threats to harm either Plaintiff’s reputation by tortious or unlawful means.” The  
12 first complicating factor for this language is the fact that Jaburg & Wilk is both a plaintiff and  
13 counsel in this case, and Richeson is both a defendant and his own counsel. Therefore,  
14 Richeson (representing himself) must be able to communicate with Jaburg & Wilk without  
15 fearing a contempt motion.

16 Richeson should have no reason to send “threats of violence” or “threats to perform  
17 criminal acts” to Jaburg & Wilk or Xcentric, and nothing in the record suggests that Richeson  
18 has previously made such threats. Therefore, the Court sees no basis to enjoin him in this  
19 regard.

20 With respect to “threats to harm either Plaintiff’s business by tortious or unlawful  
21 means,” the Court notes that litigators and business persons frequently exchange barbs, some  
22 of which could be perceived as threats to engage in tortious or unlawful conduct. But aside  
23 from fantastic statements such as “I intend to defraud you,” much gray area exists. And gray  
24 area, of course, makes for unenforceable injunctions. Accordingly, the Court will not enjoin  
25 Richeson from such statements.

26 Finally, regarding “threats to harm either Plaintiff’s reputation by tortious or unlawful  
27 means,” the Court finds this language implicates First Amendment concerns, discussed more  
28 fully below in the Court’s analysis of Plaintiffs’ third injunction request. For the reasons

1 stated there, the Court will not put such language into an injunction.

2 **2. Threats to Third Parties**

3 Plaintiffs next ask the Court to enjoin Richeson from

4 [k]nowingly sending or causing to be sent to any individual or  
5 entity that Richeson knows is an existing client of a Plaintiff any  
6 communication that contains threats of violence, threats to  
7 perform criminal acts, threats to harm its business by tortious or  
8 unlawful means, or threats to harm its reputation by tortious or  
9 unlawful means[.]

10 As with Plaintiffs’ previous request, the Court sees no basis to enjoin Richeson from threats  
11 of violence or criminal acts. With respect to the remainder of this language, the Court repeats  
12 that “threats to harm its business by tortious or unlawful means” is not specific enough to be  
13 enforceable, and neither is “threats to harm its reputation by tortious or unlawful means.”  
14 It also may run afoul of the First Amendment. The Court therefore will not enjoin Richeson  
15 in this language.

16 **3. Defamation**

17 Plaintiffs thirdly ask for an injunction against “[k]nowingly publishing or  
18 disseminating or causing to be published or disseminated any false and defamatory  
19 communication about either Plaintiff or anyone who Richeson knows to be a client of either  
20 Plaintiff.” However, “[i]n addition to the First Amendment’s heavy presumption against prior  
21 restraints, courts have long held that equity will not enjoin a libel. . . . [A]bsent extraordinary  
22 circumstances, injunctions should not ordinarily issue in defamation cases.” *Metro. Opera  
23 Ass’n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 239 F.3d 172, 177 (2d Cir.  
24 2001) (citations omitted).

25 Many courts have held — although apparently none in Arizona — that a court may  
26 enjoin defamation after a judge or jury has determined that the subject communication was,  
27 in fact, defamatory. *See, e.g., Kramer v. Thompson*, 947 F.2d 666, 676–77 (3d Cir. 1991)  
28 (analyzing cases); *Aguilar v. Avis Rent A Car Sys., Inc.*, 21 Cal.4th 121, 138–41 (1999)  
(same). Here, no jury (as Richeson demanded, *see* Doc. 15) has found that Richeson’s  
alleged statements were defamatory. The Court therefore will not enjoin Richeson in the

1 manner requested by Plaintiffs.

2 Richeson, however, should be careful not to misunderstand. Although the First  
3 Amendment may currently protect him from an injunction, the First Amendment protects no  
4 one from liability for statements that are ultimately found to be defamatory. If the Court or  
5 a jury finds that (a) Richeson’s statements were false and (b) Richeson published those  
6 statements knowing that they were false, recklessly disregarding the possibility that they  
7 were false, or after negligently failing to determine whether they were true or false, then  
8 Richeson may be liable to Plaintiffs for a substantial amount of money. *See Dube v. Likins*,  
9 216 Ariz. 406, 417, 167 P.3d 93, 104 (Ct. App. 2007). This could potentially include liability  
10 for statements made between now and trial, if Plaintiffs chose to amend their pleadings and  
11 this Court granted leave to do so.

#### 12 **4. Damage to Plaintiffs’ Relationship With Clients**

13 Plaintiffs also seek an injunction against “[t]aking wrongful or unlawful actions that  
14 are intended to cause damage to the relationship between Plaintiffs and their existing clients.”  
15 This, again, lacks the specificity needed to be enforceable. Further, on this record, nearly all  
16 of Richeson’s alleged “wrongful or unlawful actions” that the injunction seeks to prevent are  
17 in the nature of defamation, which this Court will not enjoin at this stage.

#### 18 **5. Harassment**

19 Finally, Plaintiffs seek an injunction against

20 [e]ngaging in conduct that constitutes harassment of either  
21 Plaintiff, as that term is defined in A.R.S. § 12-1809(E), which  
22 is a series of acts over any period of time that is directed to  
23 either Plaintiff and that would cause a reasonable person to be  
seriously alarmed, annoyed or harassed and the conduct in fact  
seriously alarms, annoys or harasses the person and serves no  
legitimate purpose.<sup>5</sup>

24 To the extent that Plaintiffs characterize Richeson’s alleged defamatory conduct as  
25 harassing, this Court will not enjoin it for the reasons previously stated. To the extent that  
26 Plaintiffs characterize Richeson’s frequent e-mails and phone calls as harassing, the Court

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28 <sup>5</sup>Plaintiffs’ definition of harassment is actually found in A.R.S. § 12-1809(R).

1 does not perceive a reasonably enforceable rule to lay down in an injunction. Richeson's  
2 previous e-mails and phone calls could be characterized as an attempt (albeit profane and  
3 antagonizing) to resolve a dispute between the parties. Going forward, Richeson will  
4 continue to need to communicate at least with Jaburg & Wilk. At this stage, therefore, the  
5 Court will not issue any sort of anti-harassment injunction. However, if Richeson's  
6 communications with Jaburg & Wilk continue with such frequency, insistency, and profanity  
7 (or if Richeson, absent extraordinary circumstances, attempts to call other parties or attorneys  
8 of record on their home telephone numbers), this Court may revisit the issue.

9 **B. The Amount-in-Controversy Requirement**

10 The Court has reviewed Plaintiffs' memorandum regarding whether they can recover  
11 damages of more than \$75,000, or eventually obtain an injunction worth more than \$75,000.  
12 The Court finds, at this stage, that it cannot say with legal certainty that Plaintiffs will not  
13 satisfy the amount-in-controversy requirement. For the time being, then, the Court will accept  
14 Plaintiffs' damages allegations, which (when combined with diversity of citizenship) satisfy  
15 the jurisdictional requirements of 28 U.S.C. § 1332(a).

16 **C. The Temporary Restraining Order**

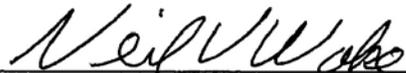
17 The temporary restraining order's continuing viability depends on entry of a  
18 preliminary injunction. Because this Court will deny the preliminary injunction, the  
19 temporary restraining order will be dissolved. The Court recognizes that this represents a  
20 change of course from what the parties expected following the preliminary injunction  
21 hearing. Nonetheless, as written, the temporary restraining order appears unenforceable. It  
22 is even less specific than Plaintiffs' proposed preliminary injunction, running afoul of Rule  
23 65(d), and raises the same First Amendment concerns. This analysis does not dispose of  
24 Plaintiffs' pending contempt motion. (Doc. 26.)

25 IT IS ORDERED that Plaintiffs' request for a preliminary injunction (*see* Doc. 7) is  
26 DENIED without prejudice to a renewed application for a preliminary injunction. Should any  
27 party seek such an injunction, it must submit a memorandum of law narrowly specifying  
28 what it seeks to enjoin, and for each such specification, an analysis of (a) the specific

1 previous conduct that offended the standard stated in the proposed language, (b) why this  
2 Court may constitutionally enjoin that conduct, and (c) how the proposed injunction language  
3 meets the specificity standards of Fed. R. Civ. P. 65(d)(1)(B)–(C).

4 IT IS FURTHER ORDERED that the “Sealed Temporary Restraining Order” (Doc.  
5 11) is dissolved.

6 DATED this 12<sup>th</sup> day of October, 2010.

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10 Neil V. Wake  
11 United States District Judge  
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