

1 Maria Crimi Speth (012574)
JABURG & WILK, P.C.
 2 3200 N. Central Avenue, Suite 2000
 Phoenix, Arizona 85012
 3 mcs@jaburgwilk.com
 (602) 248-1000

4 David S. Gingras (021097)
Gingras Law Office, PLLC
 5 4072 E Mountain Vista Dr.
 Phoenix, AZ 85048
 6 Tel.: (480) 668-3623
 7 David.Gingras@webmail.azbar.org

8 Attorneys for Plaintiffs

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 10 **UNITED STATES DISTRICT COURT**
 11 **DISTRICT OF ARIZONA**
 12

13 XCENTRIC VENTURES, LLC, an
 14 Arizona limited liability corporation, and
 JABURG & WILK, P.C., a professional
 15 corporation,

16 Plaintiffs,

17 v.

18 SHAWN RICHESON,

19 Defendant.

Case No.: 2:10-cv-1931-PHX-NVW

**MOTION TO DISMISS
 COUNTERCLAIM PURSUANT TO
 RULE 12(B)(6)**

20 Plaintiff Xcentric Ventures, LLC hereby moves this Court for dismissal of the
 21 Counterclaim Against Xcentric Ventures, LLC on the grounds that the Counterclaim fails
 22 to state a claim upon which relief can be granted. This Motion is supported by the
 23 following Memorandum of Points and Authorities and the Court's entire file in this
 24 matter.

Jaburg & Wilk, P.C.
 Attorneys At Law
 3200 N. Central Avenue, Suite 2000
 Phoenix, Arizona 85012
 (602) 248-1000

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2
3 **I. INTRODUCTION**

4 Defendants' Counterclaim (Doc. #4896; "FAC") does not assert any cause of
5 action upon which relief may be granted. Plaintiff recognizes that under Rule 12(b)(6), all
6 well-pleaded factual allegations are to be construed in the light most favorable to the
7 pleader, and accepted as true. *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052,
8 1056 (9th Cir. 2009). However, courts faced with a 12(b)(6) motion "are not bound to
9 accept as true a legal conclusion couched as a factual allegation," and as such,
10 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
11 statements, do not suffice." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)
12 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d
13 929 (2007)). As explained herein, Defendant has not properly pled a claim because his
14 RICO claim is so clearly lacking the mandatory elements of RICO that the claim is not
15 remotely plausible and is therefore appropriate for dismissal under Rule 12(b)(6).

16 **A. The Elements of a RICO Claim Predicated on Wire Fraud**

17 The elements that a claimant must prove (and therefore plead) to recover under 18
18 U.S.C. § 1962(c), are: (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of
19 racketeering activity (known as "predicate acts"); (5) causing injury to plaintiff's
20 "business or property" See *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431
21 F.3d 353, 361 (9th Cir. 2005) *cert. denied*, 126 S. Ct. 2861 (2006); *Sedima, S.P.R.L. v.*
22 *Imrex Co., Inc.*, 473 U.S. 479, 496, 105 S.Ct. 3275 (1985).

23 Richeson alleges that the one of the predicate acts is wire fraud. Plaintiffs must
24 plead, with particularity, each of the following elements: Xcentric (1) participated in a
25 scheme to defraud; and (2) used the wires to further the scheme. Ninth Circuit Model
26 Criminal Jury Instructions, 8.103 (wire fraud); *United States v. Ciccone*, 219 F.3d 1078,
27 1083 (9th Cir. 2000). In addition, there is an element of specific intent. *Id.* Materiality is
28 an essential element of the crime of wire fraud. *Neder v. United States*, 527 U.S. 1 (1999).

1 Richeson has not sufficiently pled wire fraud as a predicate act because he has not pled
2 facts that constitute a scheme to defraud, and he has not pled that he has suffered any
3 damage or that there is causation between an alleged injury and the alleged predicate act.
4 RICO was intended to combat organized crime, not to provide a federal cause of action
5 and treble damages to every tort plaintiff. *Oscar v. University Students Co-operative*
6 *Ass'n*, 965 F.2d 783, 786 (9th Cir.1992).

7 **B. The Elements of a RICO Claim Predicated on Extortion**

8 Racketeering activity includes the predicate act of extortion under 18 U.S.C.
9 §1951. “Extortion” is defined as “the obtaining of property from another, with his consent,
10 induced by wrongful use of actual or threatened force, violence, or fear.” 18 U.S.C.
11 §1951(b)(2).

12 **II. ARGUMENT**

13 **A. The Counterclaim Fails To Allege Any Injury**

14 The Counterclaim alleges that Xcentric engages in wire fraud and extortion in that
15 Xcentric is an alter ego of Ed Magedson and Magedson uses a website to post false or
16 inflated consumer complaints posing as a legitimate consumer hiding among real
17 consumers. It further alleges that Ed Magedson uses “surrogates” to enter responses to
18 the complaints. Nowhere does Counterclaim allege that Richeson was harmed in any
19 way as a result of this purported activity.

20 “It is well settled that, to maintain a civil RICO claim predicated on mail [or wire]
21 fraud, a plaintiff must show that the defendants’ alleged misconduct proximately caused
22 the injury.” *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 941 (9th Cir. 2006) (brackets in
23 original) (quoting *Poulos v. Caesar’s World, Inc.*, 379 F.3d 654, 664 (9th Cir. 2005)).
24 Furthermore, as the U.S. Supreme Court has explained:

25 [T]o state a claim under civil RICO, the plaintiff is required to show that a
26 RICO predicate offense “not only was a ‘but for’ cause of his injury, but
27 was the proximate cause as well.” Proximate cause for RICO purposes, we
28 made clear, should be evaluated in light of its common-law foundations;
proximate cause thus requires “some direct relation between the injury

1 asserted and the injurious conduct alleged.” A link that is “too remote,”
2 “purely contingent,” or “indirec[t]” is insufficient.

3 *Hemi Group, LLC v. City of New York, N.Y.*, 130 S. Ct. 983, 989 (2010) (emphasis
4 added) (quoting *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 112
5 S.Ct. 1311, 117 L.Ed.2d 532 (1992).

6 In *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed.
7 2d 532 (1992), the Supreme Court held that a plaintiff may sue under § 1964(c) only if the
8 alleged RICO violation was the proximate cause of the plaintiff’s injury. In *Anza v. Ideal*
9 *Steel Supply Corp.*, 547 U.S. 451, 457, 126 S. Ct. 1991, 1996, 164 L. Ed. 2d 720 (2006),
10 that theory was extended to claims, such as the one here, based on § 1962(c). As the
11 Court in *Anza* explained, the types of injuries asserted by Plaintiffs constitute a serious
12 discontinuity between the actions alleged giving rise to the RICO claim, and the actual
13 damages being asserted. *See Anza*, 547 U.S. at 459, 126 S.Ct. at 1997 (explaining that
14 because “Businesses lose and gain customers for many reasons,” plaintiff’s “alleged
15 injury was not the direct result of a RICO violation”). The theory behind this requirement
16 is simple:

17 The requirement of a direct causal connection is especially warranted where
18 the immediate victims of an alleged RICO violation can be expected to
19 vindicate the laws by pursuing their own claims. *See Holmes*, 503 U.S. at
20 269-270, 112 S.Ct. 1311 (“[D]irectly injured victims can generally be
21 counted on to vindicate the law as private attorneys general, without any of
22 the problems attendant upon suits by plaintiffs injured more remotely”)

23 *Id.* at 460, 126 S.Ct. at 1998. Proximate causation requires “some direct relation between
24 the injury asserted and the injurious conduct alleged.” *Holmes*, 503 U.S. at 268, 112 S.Ct.
25 1311. Under *Anza*, courts must scrutinize the causal link between the RICO violation and
26 the injury, identifying with precision both the nature of the violation and the cause of the
27 injury to the plaintiff. *Anza*, 126 S.Ct. at 1996-98. “Where the violation is not itself the
28 immediate cause of the plaintiff’s injury, proximate cause may be lacking.” *Canyon*
County v. Syngenta Seeds, Inc., 519 F.3d 969, 981 (9th Cir. 2008) *cert. denied*, 129 S. Ct.
458, 172 L. Ed. 2d 327 (U.S. 2008).

1 Further, even if Richeson amends his Counterclaim and alleges that he is injured,
2 the only possible injury he could claim is reputational harm resulting from posts on the
3 website. Not all injuries are compensable under RICO. *Oscar v. University Students Co-*
4 *operative Ass'n*, 965 F.2d 783, 785 (9th Cir.1992) (en banc), *cert. denied*, 506 U.S. 1020.
5 Case law in our circuit limits injuries compensable under RICO. *See Id.* A showing of
6 “injury” requires proof of concrete financial loss. *Id.* (citing with approval *Fleischhauer*
7 *v. Feltner*, 879 F.2d 1290, 1299-31 (6th Cir.1989) (plaintiffs under section 1964(c)
8 entitled to recover only for money they paid out as a result of racketeering activity), *cert.*
9 *denied*, 493 U.S. 1074, 110 S.Ct. 1122, 107 L.Ed.2d 1029 and 494 U.S. 1027, 110 S.Ct.
10 1473, 108 L.Ed.2d 611 (1990)). *See also Berg v. First State Ins. Co.*, 915 F.2d 460, 464
11 (9th Cir.1990) (Actual injury, that is financial loss or injury, is required to recover under
12 RICO).

13 Courts have repeatedly held that injury to reputation is not the type of injury that is
14 compensable under RICO. 18 U.S.C. §1964 provides that a person injured in his business
15 or property by reason of a violation of §1962 may sue. The injury must consist of a
16 concrete financial loss and not mere injury to valuable, but intangible, property interests.
17 *Pedrina v. Chun*, 906 F.Supp. 1377 (D. Hawaii 1995), *aff'd* 97 F.3d 1296, *cert. denied*
18 117 S.Ct. 2441. This Circuit has held that lost business from failure to obtain bids was
19 not a compensable injury. *Imagineering, Inc. v. Kiewit Pacific Company*, 976 F.2d 1303
20 (9th Cir. 1992). The District of Connecticut has held that economic consequences suffered
21 by an abortion clinic as a result of protests were not the type of financial loss required by
22 RICO. *Town of West Hartford v. Operation Rescue*, 792 F. Supp. 161, *vacated in part*
23 991 F.2d 1039, *cert. denied* 114 S.Ct. 185 (D. Conn. 1992). The District of Puerto Rico
24 has held that damages for injured reputations were not recoverable under RICO. *Padilla*
25 *Rodriguez v. Llorens Quinones*, 813 F. Supp. 924 (D. Puerto Rico 1993). Additionally,
26 the Arizona state court, interpreting identical statutory language regarding RICO injuries,
27 has held that injuries to reputation are not compensable. *Franzi v. Koedyker*, 157 Ariz.
28 401, 758 P.2d 1303 (App. 1985).

1 **B. The Counterclaim Fails To Allege the Remaining Elements of RICO**

2 The Counterclaim fails to allege that there is an enterprise that is conducted through
3 a pattern of racketeering activity. Indeed, it alleges that Magedson and Xcentric are alter
4 egos; precluding the possibility that there is an enterprise that is separate from the person
5 committing the acts. A claimant must allege a connection between at least two separate
6 entities - a “person” and a distinct and separate “enterprise.” *Cedric Kushner Promotions,*
7 *Ltd. v. King*, 533 U.S. 158, 163 (2001).

8 The Counterclaim fails to adequately allege the predicate act of wire fraud. Fraud
9 must be plead with particularity. Richeson does nothing more than generally allege that
10 Magedson posts false or inflated consumer complaints. The Counterclaim lacks any
11 specifics or details.

12 Moreover, the alleged conduct is squarely protected by the Communications
13 Decency Act, 47 U.S.C. § 230 (the “CDA”). The CDA prohibits all civil actions that treat
14 an interactive computer service as the “publisher or speaker” of messages transmitted over
15 its service by third parties. This federal statute, which was passed by Congress with the
16 intent to “promote unfettered speech,” provides in relevant part: “No provider or user of
17 an interactive computer service shall be treated as the publisher or speaker of any
18 information provided by another information content provider.” 47 U.S.C. § 230(c)(1)
19 (emphasis added). Section 230 further provides that “[n]o cause of action may be brought
20 and no liability may be imposed under any State or local law that is inconsistent with this
21 section.” *Green v. America Online*, 318 F.3d 465, 470 (3rd Cir. 2003) (noting that the
22 CDA, “‘precludes courts from entertaining claims that would place a computer service
23 provider in a publisher’s role,’ and therefore bars ‘lawsuits seeking to hold a service
24 provider liable for its exercise of a publisher’s traditional editorial functions - such as
25 deciding whether to publish, withdraw, postpone, or alter content.’”)

26 Richeson’s purported wire fraud claim is predicated on conduct which is protected
27 by the CDA. Even if Magedson posts false content on the website that he operates, he
28

1 would be immune unless it was alleged that he actually authored the content. There is no
2 such allegation in the Counterclaim.

3 The Counterclaim also fails to adequately allege the predicate act of extortion. The
4 Counterclaim never explains who was supposedly extorted or what the extortionate acts
5 were.

6 **III. CONCLUSION**

7 For all of the foregoing reasons, Xcentric requests that the Court dismiss the
8 Counterclaim with prejudice for failure to state a claim under Fed.R.Civ.P.12 (b)(6).

9 DATED this 15th day of November, 2010.

10 **JABURG & WILK, P.C.**

11
12
13 s/Maria Crimi Speth
14 Maria Crimi Speth
15 Attorneys for Plaintiff

16 *Certificate of Service*

17 I hereby certify that on the 15th day of November, 2010, I electronically transmitted the
18 attached document to the Clerk's Office using the CM/ECF System for filing.

19 I have also caused to be delivered to Defendant, who is not registered with the CM/ECF
20 System, a copy of the attached document by First Class Mail and E-Mail:

21 Shawn Richeson
22 1906 Twilight Drive
23 Killeen, Texas 76543
24 Shawn@ClickaNerd.com
25 Defendant Pro Per

26 s/Debra Gower
27
28