

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  
 5 David S. Gingras (021097)  
**Gingras Law Office, PLLC**  
 4072 E Mountain Vista Dr.  
 6 Phoenix, AZ 85048  
 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**

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

15 Plaintiffs,

16 v.

17 SHAWN RICHESON,

18 Defendant.

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

**RESPONSE TO MOTION FOR  
 SUMMARY JUDGMENT**

19 Plaintiff Xcentric Ventures, LLC requests that the Court deny the Motion for  
 20 Summary Judgment because it seeks judgment on a counterclaim that is subject to  
 21 dismissal under Rule 12(b)(6) and because there are no facts deemed admitted.

22  
 23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 **I. THERE ARE NO FACTS THAT ARE DEEMED ADMITTED**

25 Richeson bases his motion entirely upon twenty-six requests for admissions to  
 26 which Xcentric did not respond. Rule 36(a)(3), which provides that a failure to respond to  
 27 a request for admission is deemed an admission, is inapplicable because the requests for  
 28 admissions were not properly served.

1 Fed.R.Civ.P. 26(d)(1) provides that a party may not seek discovery from any  
2 source before the parties have conferred as required by Rule 26(f). Shawn Richeson has  
3 repeatedly flouted that rule and served discovery requests, deposition notices and third-  
4 party subpoenas. (Declaration of Maria Crimi Speth, Exhibit "A"). On October 22, 2010,  
5 Mr. Richeson emailed the Requests for Admissions to undersigned counsel along with his  
6 acknowledgment of this rule. (Exhibit "B"). His email stated, "I understand some of my  
7 discovery requests may be premature and obviously we have not concluded our 26F  
8 hearing." Based upon the Court's Order of that same day striking an earlier set of  
9 requests for admissions (Document 44), Mr. Richeson fully expected that the Court would  
10 sua sponte strike his requests for admissions. (Exhibit "B"). Mr. Richeson requested that  
11 undersigned stipulate to allowing him to file discovery (Exhibit "B"). In response,  
12 undersigned reminded him that the rules do not permit the filing of discovery and  
13 reminded him, "we still have to wait until discovery opens." (Exhibit "B").

14 On October 27, 2010, the clerk filed the Request for Admissions that Mr. Richeson  
15 had mailed to the Court on October 22, 2010. (Document 50). The Court has not stricken  
16 them as was anticipated.

17 The October 22, 2010 Request for Admissions, filed on October 27, 2010 contains  
18 a certificate of service that states that a true and correct copy of the document "was served  
19 upon Maria Crimi Speth via US Mail and by electronic mail [mcs@jaburgwilk.com](mailto:mcs@jaburgwilk.com) on  
20 Friday the 22<sup>nd</sup> day of October 2010." The mailing address is listed as 3105 E. Claire Dr.,  
21 Phoenix Arizona 85032. It is true that Mr. Richeson emailed a copy of the document to  
22 the above stated email address. However, undersigned never received a mailed copy.  
23 (Exhibit "A")

24 It is important to point out that the only mailing address that undersigned counsel  
25 has ever used in connection with this case is 3200 North Central Ave., Suite 2000,  
26 Phoenix, AZ 85012. (Exhibit "A"). Nevertheless, Mr. Richeson insists on referring to  
27 Ms. Speth's home address in his pleadings. On one occasion, Mr. Richeson actually  
28 mailed a pleading to that home address. (Exhibit "A"). On October 12, 2010 undersigned

1 received a “Cross Claim – Against Ed Magedson and Maria Crimi Speth” at her home  
2 address via United States Priority mail. (Exhibit “A”). The Request for Admissions  
3 were not received by regular mail, only by email. (Exhibit “A”).

4 Mr. Richeson claims in his Affidavit in support of his Motion for Summary  
5 Judgment that he sent an identical copy via US mail to an address in Fountain Hills,  
6 Arizona. First, the certificate of service contained on the Request for Admissions, does  
7 not include a reference to that Fountain Hills address. Nor is the Fountain Hills address a  
8 proper address for service of discovery in this case. The only proper mailing address for  
9 service of discovery in this case is 3200 North Central Ave., Suite 2000, Phoenix, AZ  
10 85012.

11 Fed.R.Civ.P. 5(a)(1)(C) provides that all discovery must be served. Fed.R.Civ.P. 5  
12 provides that if a party is represented by an attorney, service under this rule must be made  
13 on the attorney. Fed.R.Civ.P.5(b)(2) provides that service must be made by handing it to  
14 the person, leaving it at the person’s office, or mailing it to the person’s last known  
15 address. Read together, the only proper service of a discovery request in this matter is to  
16 mail it to the law offices of Jaburg & Wilk or the law offices of David Gingras. That was  
17 never done. (Exhibit “A”).

18 The Request for Admissions was, therefore, never served. Moreover, the Request  
19 for Admissions was premature and sent in violation of Fed.R.Civ.P. 26(d)(1). It was these  
20 defects that caused undersigned counsel to decide that no response was necessary.

21 In the unlikely event that the Court determines that the Request for Admissions  
22 were proper and the facts are deemed admitted, Xcentric requests that the Court permit  
23 Xcentric to withdraw any such admission pursuant to Fed.R.Civ.P.36(b) since it would  
24 promote the presentation of the merits of the action and would not prejudice Defendant  
25 Richeson.

26 . . . .  
27 . . . .  
28 . . . .



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

3 Shawn Richeson  
4 1906 Twilight Drive  
5 Killeen, Texas 76543  
6 Shawn@ClickaNerd.com  
7 Defendant Pro Per

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

**EXHIBIT A**

1 Maria Crimi Speth (012574)  
2 **JABURG & WILK, P.C.**  
3 3200 N. Central Avenue, Suite 2000  
4 Phoenix, Arizona 85012  
5 mcs@jaburgwilk.com  
6 (602) 248-1000

7 David S. Gingras (021097)  
8 **Gingras Law Office, PLLC**  
9 4072 E Mountain Vista Dr.  
10 Phoenix, AZ 85048  
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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

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

Plaintiffs,

v.

SHAWN RICHESON,

Defendant.

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

**DECLARATION OF MARIA CRIMI  
SPETH**

I, Maria Crimi Speth, declare as follows:

1. My name is Maria Crimi Speth. I am 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.

2. I am an attorney at Jaburg & Wilk, P.C.

3. Even though there has been no Rule 26f conference, Shawn Richeson has repeatedly served discovery requests, deposition notices and third-party subpoenas in this matter.





**EXHIBIT B**

## Maria Crimi Speth

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**From:** Maria Crimi Speth  
**Sent:** Friday, October 22, 2010 4:00 PM  
**To:** 'Shawn - Field Manager'  
**Subject:** RE: Emailing: 1-RFA-XCENTRIC

Shawn:

I doubt that the court will let us file discovery requests. It is against the rules. Look at Rule 5(d)(1), which says you "must not" file discovery. However, there is Local Rule 5.2 that provides for you to file a notice of service of discovery requests. That will help track it. But we still have to wait until discovery opens.

Maria Crimi Speth, Esq.  
Jaburg & Wilk, P.C.  
3200 N. Central Ave., Suite 2000  
Phoenix, AZ 85012

602-248-1089  
602-248-0522 (fax)

[www.jaburgwilk.com](http://www.jaburgwilk.com)

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-----Original Message-----

**From:** Shawn - Field Manager [mailto:Shawn@ClickaNerd.com]  
**Sent:** Friday, October 22, 2010 3:17 PM  
**To:** Maria Crimi Speth  
**Subject:** Emailing: 1-RFA-XCENTRIC

Dear Maria,

I understand some of my discovery requests may be premature and obviously we have not concluded our 26F hearing. I am a bit proactive and wish to get some of the work out of the way now. If you would please forgive what appears to be an over zealous approach and understand it just my attempt at efficiency. Attached is the Counter Plaintiff's request for admissions from Xcentric ventures LLC. It appears that the Court will most like sua sponte strike my filing of this discovery request. The date time stamp of the Court provides for an easy to track system of discovery deadlines and with your stipulation and upon order of the Court, I would like to motiton the Court to file all discovery requests with this Court this issues between any party.

Please let me know your thoughts?  
Take Care  
Shawn