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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 Xcentric Ventures, L.L.C., an Arizona
9 limited liability company,

10 Plaintiff,

11 vs.

12 Lisa Jean Borodkin, et al.,

13

Raymond Mobrez,

14 Counterclaimant,

15 vs.

16 Xcentric Ventures, L.L.C.; and Edward
17 Magedson,

18 Counterdefendants.

No. CV-11-01426-PHX-GMS

ORDER

19 Pending before the Court are two Motions. Defendants Raymond Mobrez and
20 Iliana Llaneras (the “AEI Plaintiffs”) have filed a Motion for Summary Judgment. (Doc.
21 184.) That Motion is granted. Plaintiff Xcentric Ventures, LLC had filed a Motion for
22 Reconsideration of several of the Court’s discovery and scheduling orders. (Doc. 217.) In
23 light of the grant of summary judgment for the AEI Plaintiffs, that Motion is now moot.

24 **FACTUAL BACKGROUND**

25 Plaintiff Xcentric Ventures, LLC is an Arizona company that operates the website
26 www.ripoffreport.com (“Ripoff Report”). As its name suggests, Ripoff Report is an
27 online forum where users can read and post messages about businesses that purportedly
28

1 have “ripped off” consumers in some manner. (Doc. 199-2 ¶ 2.) Xcentric claims never to
2 have removed a post, which allows its users to post anything about anyone. Edward
3 Magedson is the manager of Xcentric and the editor of Ripoff Report. (Doc. 199-2 ¶ 2.)
4 Defendants Raymond Mobrez and Iliana Llaneras were the principals of Defendant Asia
5 Economic Institute, LLC (“AEI”), a now-defunct California company that published
6 current news and events online from the year 2000 until June 2009. (Doc. 187 ¶ 3.) In
7 2009, several Ripoff Reports appeared that made various accusations against the AEI
8 Plaintiffs.

9 **I. THE 2010 LAWSUIT**

10 On January 27, 2010, the AEI Plaintiffs brought an action against Xcentric in
11 California (the “California Action”). (Doc. 55, Ex. A.) The California Complaint alleged
12 RICO racketeering claims against Xcentric predicated on attempted extortion.¹ (*Id.* ¶¶
13 62–64.) The AEI Plaintiffs allegedly contacted Xcentric after the Ripoff Reports
14 appeared on the website and learned that Xcentric “would not remove the defamatory
15 posts even if they were false.” (*Id.* ¶ 30.) Xcentric informed the AEI Plaintiffs that they
16 could file a free rebuttal or, if they remained unsatisfied, join the Corporate Advocacy
17 Program (“CAP”). (*Id.* ¶¶ 16, 20, 30.)

18 According to Xcentric, an individual or entity that enters the CAP has to pay a fee
19 and commit “to work with Ripoff Report and the unhappy customers who have filed
20 reports in order to resolve their complaints. This must include offering full refunds if
21 requested by the customer.” (Doc. 199-2, Ex. B (Magedson Decl. 3) ¶ 10; Doc. 199-2
22 (Magedson Decl. 1) ¶ 18.) In return, Ripoff Report “acts as a liaison between the CAP
23 member and its customers by contacting each author who has submitted a report to our
24 site about the company”, and appends various tags and notes to the already-published
25 Ripoff Reports to show that the subject of the Reports has begun to mend its ways. (*Id.*,

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27 ¹ Other claims were present in the California Action, but the Court has already
28 dismissed this malicious prosecution action as to the AEI Plaintiffs’ pursuit of those
claims. (Doc. 213.) The litigation of the extortion claim is the only basis for malicious
prosecution that remains.

1 Ex. B (Magedson Decl. 3) ¶¶ 10–12.)

2 According to the California Complaint, after Xcentric informed the AEI Plaintiffs
3 that CAP membership required an admission of guilt, Xcentric, through an exchange of
4 phone calls and emails with Magedson, “further informed Mobrez that it would not do
5 anything about the posts until it was paid a fee of approximately five thousand dollars
6 (\$5,000), plus additional monthly monitoring fees.” (Doc. 55, Ex. A ¶¶ 33, 62.) To the
7 AEI Plaintiffs, “[t]he implication was clear that for a fee, Defendants would correct the
8 content of the posts.” (*Id.* ¶ 34.) They arrived at this conclusion because Magedson told
9 them in an email that “[t]his program changes the negative listings on search engines into
10 a positive along with all the Reports on Rip-off Report.” (*Id.* ¶ 31.) The AEI Plaintiffs
11 asserted that Xcentric’s “program amounts to attempted extortion Additionally, the
12 electronic and telephonic communication between Mobrez and Magedson constitute[d]
13 several predicate acts sufficient to establish a ‘pattern of racketeering activity’ as that
14 term is defined in [the applicable statute].” (*Id.* ¶¶ 63–64.)

15 The California District Court bifurcated the case to consider the extortion claim²
16 first and ordered the AEI Plaintiffs to produce “a declaration describing meetings with
17 any representative of defendant regarding extortion[].” (*Id.*, Ex. B.) On May 3, 2010,
18 Mobrez filed an affidavit with the California District Court. (*Id.*, Ex. C.) He stated that he
19 communicated with Magedson several times by telephone and email during April and
20 May of 2009. (*Id.* ¶¶ 6–14.) During those conversations, Mobrez objected to the Reports
21 and asked Magedson to remove them, but Magedson refused, claiming Xcentric never
22 removes a post. (*Id.*) Instead, he directed Mobrez to join the CAP. (*Id.* ¶¶ 6–10.) He also
23 warned Mobrez that the lawsuits were futile. (*Id.* ¶ 10.) In a subsequent phone call,
24 Mobrez asked Magedson how much enrollment in the CAP would cost, and Magedson
25 informed him that “it would cost . . . at least ‘five grand’ plus a monthly maintenance fee
26 of a couple hundred dollars. He stated that these charges were based on the size [o]f the

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28 ² The references to “extortion claims” throughout this Order are references to the RICO claim predicated on attempted extortion.

1 company. Specifically, he stated that the more money a company made, the more they
2 would be charged.” (*Id.* ¶¶ 11–13.) Magedson refused to do anything until Mobrez agreed
3 to enroll in the CAP. “When asked what we would receive if we paid the fees he
4 demanded, Mr. Magedson claimed that ‘all the negative goes away and you see the
5 positive.’” (*Id.* ¶ 14.) Mobrez attached to his declaration “true and accurate copies of
6 hand written notes taken by me during my telephone conversations with Mr. Magedson.”
7 (*Id.* ¶ 19.)

8 Llaneras listened in on the conversations between Mobrez and Magedson and
9 affirmed in her declaration that the conversations occurred as Mobrez described. (*Id.*, Ex.
10 D.) She attached to her declaration “handwritten notes I took during the conversations as
11 they occurred.” (*Id.* ¶ 6; *id.* “Ex. A”.) She confirmed that during the conversation of May
12 5, 2009, “Mr. Magedson requested \$5,000 plus an additional monthly fee to enroll in
13 what Mr. Magedson referred to as the ‘CAP.’ On May 12, 2009, Mr. Magedson described
14 this ‘CAP’ as the ‘negative goes away—see positive!’” (*Id.* ¶ 8.)

15 At his deposition, Mobrez reaffirmed the statements about his conversations with
16 Magedson. (Doc. 55 ¶¶ 39–42; *Id.*, Ex. E at 1.) Xcentric’s counsel then disclosed to
17 Mobrez and Llaneras that all phone conversations between Magedson and Mobrez had
18 been recorded and that the recording flatly contradicted the statements made in their
19 affidavits that Magedson quoted a price for the CAP. (*Id.*) In fact, Magedson made
20 almost none of the comments attributed to him in the AEI Plaintiffs’ Declarations. (Doc.
21 199-2 (Magedson Decl. 1) ¶ 5.) The phone conversations were brief and Magedson made
22 only generic references to the website’s information on CAP. (*Id.* ¶¶ 6–19) Magedson
23 also sent a form email describing the basic contours of the program. (*Id.* ¶¶ 5–9.) The cost
24 of enrolling in the CAP did not appear on the website because, according to Magedson,
25 there is no set cost—it fluctuates based on the individual situation. (*Id.* ¶ 18.)

26 On May 20, 2010, Mobrez and Llaneras filed “corrected” affidavits. (Doc. 55,
27 Exs. F, G.) These new affidavits did not describe any telephone conversations where
28 Magedson threatened AEI or asked for money. (*Id.*, Ex. F.) Mobrez substantially recanted

1 all of the relevant details of the previous declaration, save two: he maintained that
2 someone at Xcentric told him it would cost “five grand” to join the CAP, and added that
3 he received several calls from Xcentric. (*Id.* ¶¶ 2–5.) Xcentric disputes these points.
4 Mobrez blamed a mix-up between telephone and email conversations for the “inaccurate”
5 statements in his prior declaration. (*Id.* ¶ 6.) Mobrez also admitted that the exhibit
6 attached to his prior declaration was not a copy of the notes he took contemporaneously,
7 but “notes of my confused efforts to reconstruct the exact details of the calls, based on a
8 combination of imperfect memory, documents I located at the time, and erroneous
9 assumptions drawn from Mr. Magedson’s prior declarations.” (*Id.* ¶ 6.) Llaneras followed
10 suit and admitted that the substance of the telephone conversations was not what had
11 been previously stated and likewise claimed she mixed up emails. (*Id.*, Ex. G.) She
12 likewise admitted her “handwritten notes [she] took during the conversations as they
13 occurred” were actually written much later. (*Id.*)

14 Xcentric subsequently moved for summary judgment on the RICO extortion
15 claims. That motion was granted on July 19, 2010. At that point, the AEI Plaintiffs were
16 “not relying on the substance of the phone calls to support their claims that Defendants
17 engaged in attempted extortion. Instead, Plaintiffs appear to rely solely on the emails
18 Magedson sent to Mobrez and the content on Defendants’ website.” *Asia Econ. Inst. v.*
19 *Xcentric Ventures, LLC*, CV 10-1360 SVW PJWX, 2010 WL 4977054 at *14 n.14 (C.D.
20 Cal. July 19, 2010). After extensively reviewing the evidence submitted by both parties,³

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22 [T]he only evidence that the Court can consider regarding the
23 communications between Plaintiffs and Defendants that are relevant to
24 Plaintiffs' extortion claim are: (1) the emails between the parties; (2) the
25 limited information contained in the Mobrez and Llaneras corrected
26 declarations filed on May 20, 2010-that is, information about the emails
27 and about the call regarding “five grand;” and (3) Magedson's testimony
28 regarding the substance of his calls with Mobrez, which is not refuted by
Plaintiffs' corrected declarations. For the reasons stated below, the Court
finds that this evidence, even construing all reasonable inferences in
support of Plaintiffs, fails to demonstrate a triable issue on Plaintiffs' RICO
claims.

28 *Asia Econ. Inst. v. Xcentric Ventures, LLC*, CV 10-1360 SVW PJWX, 2010 WL 4977054
at *14 (C.D. Cal. July 19, 2010).

1 Judge Wilson found that “no triable issue of fact exists as to whether Defendants engaged
2 in attempted extortion. The communications between Plaintiffs and Defendants do not, as
3 a matter of law, suggest or imply any threat within the meaning of California Penal Code
4 § 519 [California’s extortion statute].” *Id.* at *20. Summary judgment was granted for
5 Xcentric on the RICO extortion claim.

6 **II. THE CURRENT ACTION**

7 On July 18, 2011, Xcentric filed a Complaint in this Court, bringing claims for
8 malicious prosecution and aiding and abetting tortious conduct against AEI, Mobrez,
9 Llaneras, and their attorneys. (Doc. 1.)⁴ The AEI Plaintiffs moved for judgment on the
10 pleadings on November 30, 2012. (Doc. 156.) The Court granted that motion in part,
11 dismissing all of Xcentric’s claims save those premised on the extortion litigation. (Doc.
12 213.) The AEI Plaintiffs now move for summary judgment.

13 **DISCUSSION**

14 **I. LEGAL STANDARD**

15 Summary judgment is appropriate if the evidence, viewed in the light most
16 favorable to the nonmoving party, demonstrates “that there is no genuine dispute as to
17 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
18 P. 56(a). Substantive law determines which facts are material and “[o]nly disputes over
19 facts that might affect the outcome of the suit under the governing law will properly
20 preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
21 248 (1986). In addition, the dispute must be genuine, that is, the evidence must be “such
22 that a reasonable jury could return a verdict for the nonmoving party.” *Id.*; *Villiarimo v.*
23 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Thus, the nonmoving party
24 must show that the genuine factual issues ““can be resolved only by a finder of fact
25 because they may reasonably be resolved in favor of either party.”” *Cal. Architectural*

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27 ⁴ Default judgment has been entered against one attorney and AEI. (Doc. 126.)
28 The Court dismissed Xcentric’s case against the other attorney under Rule 12(b)(6).
(Doc. 146.)

1 *Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987)
2 (quoting *Anderson*, 477 U.S. at 250).

3 Because “[c]redibility determinations, the weighing of the evidence, and the
4 drawing of legitimate inferences from the facts are jury functions, not those of a judge, . .
5 . [t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be
6 drawn in his favor” at the summary judgment stage. *Id.* at 255 (citing *Adickes v. S.H.*
7 *Kress & Co.*, 398 U.S. 144, 158–59 (1970)); *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th
8 Cir. 1999) (“Issues of credibility, including questions of intent, should be left to the
9 jury.”) (citations omitted).

10 Furthermore, the party opposing summary judgment “may not rest upon the mere
11 allegations or denials of [the party’s] pleadings, but . . . must set forth specific facts
12 showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see *Matsushita Elec.*
13 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Brinson v. Linda Rose*
14 *Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995); *Taylor v. List*, 880 F.2d 1040, 1045
15 (9th Cir. 1989); see also L.R.Civ. 1.10(l)(1) (“Any party opposing a motion for summary
16 judgment must . . . set[] forth the specific facts, which the opposing party asserts,
17 including those facts which establish a genuine issue of material fact precluding summary
18 judgment in favor of the moving party.”). If the nonmoving party’s opposition fails to
19 specifically cite to materials either in the court’s record or not in the record, the court is
20 not required to either search the entire record for evidence establishing a genuine issue of
21 material fact or obtain the missing materials. See *Carmen v. S.F. Unified Sch. Dist.*, 237
22 F.3d 1026, 1028–29 (9th Cir. 2001); *Forsberg v. Pac. N.W. Bell Tel. Co.*, 840 F.2d 1409,
23 1417–18 (9th Cir. 1988).

24 **II. ANALYSIS**

25 **A. Malicious Prosecution**

26 Under California law, “[m]alicious prosecution is a disfavored action. . . . This is
27 due to the principles that favor open access to the courts for the redress of grievances.”
28 *Downey Venture v. LMI Ins. Co.*, 78 Cal. Rptr. 2d 142, 150 (Ct. App. 1998). California

1 law requires the narrow construction of a malicious prosecution claim to ensure that
2 “litigants with potentially valid claims will not be deterred from bringing their claims to
3 court by the prospect of a subsequent malicious prosecution claim.” *Sheldon Appel Co. v.*
4 *Albert & Oliker*, 765 P.2d 498, 502 (Cal. 1989).

5 Three elements must be established to show malicious prosecution: “a plaintiff
6 must demonstrate that the prior action (1) was commenced by or at the direction of the
7 defendant and was pursued to a legal termination in his, plaintiff’s, favor; (2) was brought
8 without probable cause; and (3) was initiated with malice.” *Id.* at 501 (internal quotations
9 omitted). The AEI Plaintiffs assert that Xcentric has failed to produce sufficient evidence
10 to justify trial on any of those elements.⁵ Because the Court finds that the extortion claim
11 did not lack probable cause on the basis of the undisputed facts, summary judgment is
12 appropriate and the remaining claim is dismissed.

13 “A litigant will lack probable cause for his action either [1] if he relies upon facts
14 which he has no reasonable cause to believe to be true, or [2] if he seeks recovery upon a
15 legal theory which is untenable under the facts known to him.” *Sangster v. Paetkau*, 80
16 Cal. Rptr. 2d 66, 75 (Cal. Ct. App. 1998). Xcentric’s chief claim throughout this lawsuit,
17 the claim that survived the AEI Plaintiffs’ Motion for Judgment on the Pleadings, is that
18 the AEI Plaintiffs lied about their conversations with Magedson to fabricate evidence for
19 a baseless extortion claim. The Court has previously ruled that the legal theory behind the
20 AEI Plaintiffs claim, assuming the truth of the facts they alleged, was not “so absurd that
21 no reasonable attorney would have advanced it.” (Doc. 146 at 11–13.) That foreclosed
22 any argument that the AEI Plaintiffs’ extortion *theory* lacked probable cause.
23 Nevertheless, the Court found that Xcentric sufficiently pled a lack of probable cause
24 because its allegations of falsification could show the AEI Plaintiffs “relie[d] upon facts
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26 ⁵ The AEI Plaintiffs devote most of their Motion and Statement of Facts to an
27 attempt to relitigate their claims in the California Action. This includes claims about
28 Xcentric’s supposed immunity under the Communications Decency Act or provision of a
separate arbitration program. None of those matters are relevant to the narrow issue
remaining in this suit.

1 which [they] ha[d] no reasonable cause to believe to be true.” (Doc. 213.) Xcentric thus
2 argues that the AEI Plaintiffs’ alleged lies formed the backbone of their extortion claim.
3 The AEI Plaintiffs now claim that there is insufficient evidence to show that the extortion
4 claimed lacked probable cause because their extortion claim did not rise or fall with their
5 supposedly false claims regarding Magedson’s communications. In making this
6 argument, they also relied on separate email communications and the structure of the
7 CAP itself.

8 The burden to show a lack of probable cause is high because California law gives
9 a malicious prosecution defendant the benefit of the doubt: “[i]n making its determination
10 whether the prior action was legally tenable, the trial court must construe the allegations
11 of the underlying complaint liberally in a light most favorable to the malicious
12 prosecution defendant.” *Sangster*, 80 Cal. Rptr. 2d at 75. All the defendant needs is some
13 rational basis for the claim pursued. Accordingly, the defendants’ lack of success in the
14 underlying action is hardly an automatic basis for a malicious prosecution suit. *Paiva*, 85
15 Cal. Rptr. 3d at 849. Indeed, “[p]robable cause may be present even where a suit [proves]
16 merit[less].” *Jarrow Formulas, Inc. v. LaMarche*, 74 P.3d 737, 743 n.13 (Cal. 2003)
17 (internal quotations omitted).

18 The probable cause standard is objective and considers the “facts upon which the
19 defendant acted in prosecuting the prior case.” *Paiva v. Nichols*, 85 Cal. Rptr. 3d 838,
20 848 (Cal. Ct. App. 2008) (citing *Sheldon Appel*, 765 P.2d at 511–12). Whether probable
21 cause existed on those facts is a question of law for the court to decide, often at the
22 summary judgment stage. *Id.*; *Sheldon Appel*, 765 P.2d at 503–07. Nevertheless, “if the
23 facts upon which the defendant acted in bringing the prior action are controverted, they
24 must be passed upon by the jury before the court can determine the issue of probable
25 cause.” *Sheldon Appel*, 765 P.2d at 506. That means “[w]hat facts and circumstances
26 amount to probable cause is a pure question of law. Whether they exist or not in any
27 particular case is a pure question of fact. The former is exclusively for the court, the latter
28 for the jury.” *Id.* As with all issues on summary judgment, though, “[o]nly disputes over

1 facts that might affect the outcome of the suit under the governing law will properly
2 preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. So long as the core
3 facts are undisputed, the Court may proceed to determine whether probable cause was
4 present on the basis of those facts. *Sangster*, 80 Cal. Rptr. 2d at 76.

5 According to the California Complaint, the CAP was extortionate. (Doc. 55, Ex. A
6 ¶ 62.) It promised, for a fee and with an admission of wrongdoing, “to ‘change[] the
7 negative listings on search engines into a positive along with all the Reports on Rip-off
8 Report.’” (*Id.*) The AEI Plaintiffs thought this claim implied that “Defendants would
9 correct the content of the defamatory posts”, (*id.* ¶ 34), although Xcentric maintains that
10 it does not remove posts. When asked by the California District Court to provide
11 declarations about conversations where this extortion occurred, Mobrez cited email and
12 telephone conversations with Magedson where they allegedly discussed the contours of
13 the CAP and Magedson stated that membership would cost “at least ‘five grand’ plus a
14 monthly maintenance fee of a couple hundred dollars.” (*Id.*, Ex. C ¶¶ 11-13.) Repeating
15 the claim made in the Complaint, Mobrez asserted that Magedson described the benefits
16 of the CAP as “‘all the negative goes away and you see the positive.’” (*Id.* ¶ 14.)

17 Xcentric’s argument that the extortion claim lacked probable cause centers on the
18 AEI Plaintiffs’ claim in the California Complaint and later declarations about their
19 conversations with Magedson. There is substantial evidence those statements were false.
20 Magedson vehemently denies the substance of those conversations as contained in the
21 declarations filed by Mobrez and Llaneras. (Doc. 199-2 (Magedson Decl. 1) ¶ 5.) He
22 claims that audio recordings directly contradict the AEI Plaintiffs’ claims that Magedson
23 told them that CAP membership would cost around \$5,000, plus a monthly rate. (*Id.* ¶¶
24 6–19.)⁶ Even without direct evidence of that contradiction, the wholesale changes in the
25 “corrected” declarations evidence that the AEI Plaintiffs were not speaking truthfully in

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27 ⁶ Neither party has sought to provide transcripts of those recordings or otherwise
28 use them for purposes of this Motion. The Court therefore abstains from ruling on their
admissibility.

1 their initial submissions. Both Mobrez and Llaneras admitted that their statements “were
2 not accurate.” (Doc. 55, Exs. F, G.) Llaneras had averred that she made contemporaneous
3 handwritten notes of the conversation that purport to show Magedson demanded \$5,000
4 to join the CAP, but she later admitted that those notes were not created
5 contemporaneously. (*Id.*, Ex. G; Doc. 181-1, Ex. C.) Finally, the AEI Plaintiffs have
6 never claimed in this litigation that their statements in the original declarations were true.
7 While they maintain that “someone” from Xcentric contacted them and told them that
8 CAP membership would cost “five grand”, they have submitted no evidence to that
9 effect.⁷ Still, the AEI Plaintiffs contest Xcentric’s claim that they lied about those
10 conversations; instead, they claim that they confused the telephone conversations with
11 email chains and conversations with others. There is thus a factual dispute surrounding
12 the declarations, their content, and the AEI Plaintiffs’ state of mind.

13 But even assuming that the AEI Plaintiffs fabricated or lied about those
14 conversations to support their extortion claim, California law is clear that Xcentric’s case
15 fails if there are “*any* undisputed facts objectively establishing, as a matter of law, that
16 any reasonable attorney would have thought the claims . . . were tenable.” *Sangster*, 80
17 Cal. Rptr. 2d at 76 (emphasis added). The AEI Plaintiffs assert that the Parties’ dispute
18 about the declarations does not affect the core of the extortion claim. Indeed, the
19 documents filed in the California Action show that the extortion claim never relied solely
20 on the telephone conversations between Mobrez and Magedson. The AEI Plaintiffs
21 included all “electronic and telephonic communication between Mobrez and Magedson”
22 as the “several predicate acts sufficient to establish a ‘pattern of racketeering activity’ . . .
23 .” (Doc. 55, Ex. A ¶ 64.) Throughout the California Action, the AEI Plaintiffs cited
24 telephone and email communications as evidence of that pattern. The California District
25 Court’s decision analyzed each of those communications. *See AEI*, 2010 WL 4977054 at

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27 ⁷ The AEI Plaintiffs did file an unsigned declaration purporting to be from a
28 “Steven Monk,” who claims he was contacted by Xcentric about paying money to get
content removed. (Doc. 187, Ex. 11.) Obviously, an unsigned declaration is inadmissible
evidence and the Court has not considered it.

1 *15–19 (“In sum, none of the communications Defendants sent to Plaintiffs contain any
2 suggestion that the CAP Program (or the payment of fees) would result in negative
3 reports being taken off the website or that such reports would no longer be featured in
4 search results.”).

5 While there may be a dispute of fact as to the extent of the AEI Plaintiffs’ reliance
6 on the supposedly nonexistent telephone conversations, there is no genuine dispute of
7 material fact that those conversations were not the sole basis of the case. The AEI
8 Plaintiffs advanced other conversations to show a pattern of racketeering activity. (Doc.
9 55, Ex. A ¶¶ 63–64.) Xcentric’s single-minded focus on the oral conversations ignores
10 the fact that the AEI Plaintiffs’ theory swept more broadly.

11 In fact, the focus of AEI Plaintiffs’ extortion claim was the CAP program itself,
12 not specific conversations. Their claim was that “Defendants’ *program* amounts to
13 attempted extortion.” (Doc. 55, Ex. A ¶ 63.) The oral and written conversations, with
14 their references to the website, provided the predicate acts. It is undisputed that the CAP
15 works in the following way: (1) RipoffReport user posts report that company does not
16 like; (2) company contacts RipoffReport to do something about it; (3) RipoffReport
17 directs the company to the CAP; (4) company pays a fee to enroll in the CAP and
18 acknowledges wrongdoing or makes efforts to restore consumer confidence; (5) and, in
19 return, Ripoff Report will note on the posts that the company is now enrolled in the CAP
20 and is addressing the problems, among other things. Xcentric does not dispute this.
21 Indeed, Magedson has submitted several declarations that describe how the CAP
22 functions. And it is precisely those facts that formed the basis of the extortion claim. That
23 the AEI Plaintiffs may have made false statements about the amount of the fee or where
24 or when they learned about the fee does not alter the fact that there is a fee.

25 In addition, Xcentric advertises that CAP participation results in better publicity
26 for the company—Magedson has admitted that “I frequently explain to people that one of
27 the benefits of joining the CAP program is that they can ‘turn a negative into a positive’”.
28 (Doc. 199-2, Ex. B ¶ 14.) Those are the same words quoted by the AEI Plaintiffs in their

1 Complaint and Declarations. While Magedson may not mean that RipoffReport.com will
2 go in and modify the content of the actual post, it is undisputed that Ripoff Report does
3 update the post with information about the company’s participation in the CAP and
4 remedial efforts.

5 The core facts of the AEI Plaintiffs’ extortion claim are therefore undisputed
6 because they are the basic aspects of the CAP, and the predicate acts are Magedson’s
7 description of the CAP in email and telephone conversations. Xcentric allows users to
8 post content, and then charges for participation in a program that “turns a negative into a
9 positive.” And this Court has already determined that an extortion theory that relied on
10 these facts, while tenuous and ultimately meritless, did not lack probable cause. For
11 purposes of clarity, the Court repeats that ruling here:

12 Xcentric’s FAC alleges that [the AEI Plaintiffs] proceeded on an RICO
13 extortion theory because such a theory would enable the AEI Plaintiffs to
14 avoid the limitations imposed by the Communications Decency Act
15 (“CDA”), 47 U.S.C. § 230(c)(1). (Doc. 55 ¶¶ 14–19.) The initial California
16 Complaint supports this claim: the AEI Plaintiffs alleged that conversations
17 between Xcentric and Mobrez demonstrated that Xcentric engaged in
18 extortion. (Doc. 1, Ex. A ¶¶ 57–68.) *See AEI I*, 2010 WL 4977054 at *14.

19 Extortion requires that Xcentric threatened “to do an unlawful injury [to the
20 AEI Plaintiffs]; to accuse [the AEI Plaintiffs] of any crime; to expose, or to
21 impute [to the AEI Plaintiffs] any deformity, disgrace or crime; or ... to
22 expose any secret [of the AEI Plaintiffs].” Cal. Penal Code § 519. The first
23 California Complaint alleged that the CAP, in exchange for a fee, promised
24 “to change[] the negative listings on search engines into a positive along
25 with all the Reports on Rip-off Report.” (Doc. 1, Ex. A ¶ 62.) The AEI
26 Plaintiffs . . . thus argued that the presentation of the CAP program, along
27 with its fees, amounted to a form of extortion. Moreover, although Mobrez
28 had corrected his declaration, he maintained that someone from Xcentric
had told him it would cost “five grand” to join the CAP. (Doc. 1, Ex. F ¶ 5.)

In *Hy Cite Corp. v. badbusinessbureau.com*, a decision of this Court denied
a motion to dismiss an extortion claim that had a similar foundation. 418 F.
Supp. 2d 1142, 1149–50 (D. Ariz. 2005) (“Here, Defendants operate a
website. Plaintiff alleges that Defendants create and solicit false and
defamatory complaints against businesses, but will cease this conduct for a

1 \$50,000 fee and \$1,500 monthly retainer. Remedying the publication of
2 false and defamatory complaints, which Defendants allegedly created and
3 solicited, does not give Defendants the right to collect fees.”). Nevertheless,
4 the California District Court eventually rejected all of [the AEI Plaintiffs’]
5 theories for lack of evidence. See *AEI I*, 2010 WL 4977054 at *16–19
6 (“[N]one of the communications Defendants sent to Plaintiffs contain any
7 suggestion that the CAP Program (or the payment of fees) would result in
8 negative reports being taken off the website or that such reports would no
9 longer be featured in search results. The offer to help Plaintiffs restore their
10 reputation and facilitate resolution with the complainants in exchange for a
11 fee does not constitute a threat under California Penal Code § 519.”).

9 Based on the allegations in Xcentric’s FAC and the documents of which the
10 Court has taken judicial notice, the Court cannot say that [the AEI
11 Plaintiffs’] legal theory was so absurd that no reasonable attorney would
12 have advanced it. The *Hy Cite* court found the theory at least tenable on a
13 motion to dismiss, although the California District Court ultimately found
14 the evidence lacking in th[is] case Moreover, even an absence of legal
15 authority—or presence of contrary decisions—does not amount to a lack of
16 probable cause. See *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP*,
17 184 Cal.App.4th 313, 109 Cal.Rptr.3d 143, 182 (2010) (“[A] claim is not
18 untenable merely because there is no existing authority that indisputably
19 establishes its legal viability. Indeed, a claim is not necessarily untenable
20 even if the existing authority is directly adverse, provided there is a tenable
21 basis to argue for an extension, modification, or reversal of existing law.”)
22 (emphasis in original). As the California Supreme Court has recognized, a
23 “court must properly take into account the evolutionary potential of legal
24 principles.” *Sheldon Appel*, 254 Cal.Rptr. 336, 765 P.2d at 511 (emphasis
25 in original).

20 (Doc. 146 at 11-13.) That ruling was appropriate because “[t]he question whether, on a
21 given set of facts, there was probable cause to institute an action requires a sensitive
22 evaluation of legal principles and precedents, a task generally beyond the ken of lay
23 jurors”, which means the Court decides whether a given set of facts (here, the CAP and
24 its functions) could support a legal claim (here, extortion). *Sheldon Appel*, 765 P.2d at
25 504.

26 In this regard, Xcentric’s case is very similar to *Sangster*. There, the malicious
27 prosecution plaintiff alleged that defendants fabricated evidence to support their claims in
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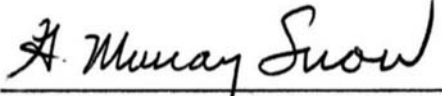
1 the underlying litigation. 80 Cal. Rptr. 2d at 76. Yet that was not enough to get the
2 malicious prosecution claim to a jury. “The principle difficulty with [plaintiff’s]
3 argument is that it does not address the question before us: that is, whether there are any
4 *undisputed* facts objectively establishing, as a matter of law, that any reasonable attorney
5 would have thought the claims of [defendants] in the cross-complaint were tenable.” *Id.*
6 (emphasis in original). Crucially, “the fact there may be *some* disputed facts relevant to
7 the merits of the underlying action does not by itself defeat a motion for summary
8 judgment in a malicious prosecution action. If undisputed facts in the record do establish
9 an objectively reasonable basis for bringing the underlying action, the existence of other,
10 allegedly disputed facts is immaterial.” *Id.* (emphasis in original). There, the Court found
11 that “undisputed evidence . . . upon which all . . . causes of action . . . were expressly
12 based . . . independently established the existence of probable cause to initiate the cross-
13 complaint.” *Id.*

14 So too here. There is evidence that the AEI Plaintiffs made false statements to
15 support their extortion claim. Normally, the murky facts surrounding the declarations
16 would go to the jury. Yet the extortion claim could survive on the undisputed facts of the
17 AEI Plaintiffs’ case—namely, how the CAP functions. The allegedly false statements
18 were not the skeleton of the extortion claim—they only provided some of the factual
19 detail. The AEI Plaintiffs relied on other statements—in phone calls or emails directing
20 the AEI Plaintiffs to the CAP website—as evidence of predicate acts of extortion. *See*
21 *AEI*, 2010 WL 4977054 at *14. Moreover, the actual amount of the CAP fee (the
22 principle dispute in the declarations) was not essential to the extortion claim—just the
23 existence of a fee, which is undisputed. As *Sangster* instructs, there is no claim for
24 malicious prosecution where this is “undisputed evidence . . . upon which all . . . causes
25 of action . . . were expressly based . . . [that] independently established the existence of
26 probable cause to initiate the [underlying claim].” 80 Cal. Rptr. 2d at 76. The AEI
27 Plaintiffs may have made false statements—even lied—about some of the facts. But their
28 case did not depend on those statements. Their lawsuit challenged the CAP and how it

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IT IS FURTHER ORDERED that Plaintiff's Motion for Reconsideration (Doc. 217) is **denied as moot**.

Dated this 17th day of June, 2013.



G. Murray Snow
United States District Judge