DANIEL F. BLACKERT CSB No. 255021
LISA J. BORODKIN CSB No. 196412
Asia Economic Institute
11766 Wilshire Blvd., Suite 260
Los Angeles, CA 90025
Telephone (310) 806-3000
Facsimile (310) 826-4448
Blackertesq@yahoo.com
lisa_borodkin@post.harvard.edu

Attorneys for Plaintiffs,
Asia Economic Institute LLC,
Raymond Mobrez, and
Iliana Llaneras

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASIA ECONOMIC INSTITUTE, 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

DISCOVERY MATTER
The Honorable Patrick J. Walsh

PLAINTIFFS' *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER REGARDING (1) THE PRESERVATION OF ELECTRONICALLY STORED INFORMATION ("ESI") AND (2) FOR PROTECTIVE ORDER PREVENTING INTERFERENCE WITH WITNESSES; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF LISA J. BORODKIN AND CERTIFICATION OF COMPLIANCE WITH LOCAL CIVIL RULES 7-3 AND 7-19]

[DECLARATION OF JOE REED, DECLARATION OF JAN SMITH]

[PROPOSED ORDER LODGED CONCURRENTLY HEREWITH]

Date: August 5, 2010 or tba
Courtroom: 827A

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 5, 2010 or at any other time as this Honorable Court may deem proper, Plaintiffs Asia Economic Institute, LLC, Raymond Mobrez, and Iliana Llaneras ("Plaintiffs") will and hereby do move *ex parte* for a temporary restraining order ("TRO") regarding preservation of electronically stored information ("ESI"), specifically requiring Defendants Xcentric Ventures, LLC, and Edward Magedson (hereinafter "Defendants") to:

(a) refrain from irrevocably overwriting the SQL server and databases for the website hosted at Ripoffreport.com (the "Website") and to create back-ups to preserve the HTML and electronic data relating to the 58 web pages identified in the pleadings (less than one-tenth of one percent out of the over 627,870 web pages in Defendants' database);

(b) provide a statement under oath as to the steps they have taken reasonable steps to preserve relevant ESI from the inception of this litigation on January 28, 2009; and

(c) insert the meta tag <meta name-"Robots" content="noindex,nofollow"> into the HTML for the 5 web pages concerning plaintiffs to prevent further harm from indexing from search engines.

In addition, Plaintiffs will and hereby do move *ex parte* for a protective order under Federal Rule of Civil Procedure 26(c) ordering Defendants and Defendants' counsel to refrain from improperly interfering with any witness for the purpose of gaining an advantage in this action, particularly until discovery is resumed.

This application is made on the grounds that (1) Defendants have expressly indicated, and the District Court found, in another case, G.W. Equity v. Xcentric Ventures, that Defendants will not and could not preserve all ESI in their database and permit overwriting of the SQL data in their database, including specific

electronically stored evidence ("ESI") relevant and discoverable to this action; and that on July 28, 2010 Defendants' counsel telephoned and wrote one of Plaintiffs' witnesses that submitted a declaration in support of Plaintiffs' First Amended Complaint seeking, inter alia, to influence the witness to submit a declaration supplementing the record with facts dictated by Defendants and demanding that he refrain from representing certain potential clients in matters related to Defendants.

The necessity for the *ex parte* relief on the TRO is that imminent destruction of requested documents and ESI by Defendants prior to a judicial determination of the scope of discovery would produce great and irreparable injury to Plaintiffs; Defendants have indicated that they have and will continue to permit overwriting of ESI by their SQL servers; the requested ESI preservation measures are to preserve the status quo, are reasonably limited in scope and not unduly expensive: and mitigating the continuing, future harm with the requested meta tag temporarily prevents further indexing of web pages concerning Plaintiffs on search engines such as Google but does preserves the status quo regarding Defendants' Website and does not interfere with Defendants' First Amendment rights or otherwise prejudice Defendants in expressing themselves on their Website.

The necessity of *ex parte* relief on the Protective Order under Rule 26(c) is that good cause exists to protect non-party witnesses from unwanted and improper interference from Defendants' counsel demanding procedurally improper filing of supplements to the record while the matter is still at the pleading stage; as discovery is currently on hold in this action, Defendants will not be prejudiced by a Protective Order preventing them from seeking to compel discovery from non-voluntary, third-party witnesses in this action at this time; Defendants will be entitled to resume proper discovery mechanisms should this matter proceed to discovery; and the circumstances and timing of Defendants' counsels' call and

demand letter to Plaintiffs' witness give rise to an inference that the effect was to chill the witnesses' participation in this particular action, and to unduly coerce an outcome in this particular action.

Ex Parte Notice. As set forth in the declaration of Lisa J. Borodkin, proper notice of this application was given to Defendants' counsel, as required by Local Civil Rule 7-19 and this Court's procedures.

This application is based upon all pleadings on file in this action, including the Complaint and Amended Complaint on file in this case, the Memorandum of Points and Authorities attached hereto, the Declarations of Lisa J. Borodkin and Joe Reed, the exhibits thereto, upon any argument, matters of which this Court may take judicial notice or otherwise as may be presented at the hearing on this matter.

The grounds for making this Motion *ex parte* are that Plaintiffs suffer, and will continue to suffer irreparable harm and prejudice to their claims by Defendants' continued destruction and loss of electronic evidence relevant to the claims in this action, and that Defendants have been asked and have to date refused to provide a statement regarding the reasonable steps they have taken to preserve ESI relevant to this action, and that Defendants' counsel has recently contacted one of Plaintiffs' witnesses extrajudicially with demands that such witness create and file evidence improperly with this Court and refrain from taking employment adverse to Defendants.

This Motion is based on Federal Rule of Civil Procedure 26(b) and 26(c), this Court's inherent authority, the attached Memorandum of Points and Authorities, Declaration of Joe Reed, Declaration of Jan Smith, Declaration of Lisa J. Borodkin and the exhibits thereto, the pleadings, papers and proceedings in this action, and such other matters as the Court deems proper.

This Motion is made following the conferences of counsel on April 27, 2010, June 24, 2010, July 20, 2010 and July 30, 2010, written communications between counsel dated April 22, 2010, April 27, 2010, May 27, 2010, May 29, 2010, May 30, 2010, and July 14, 2010 and July 30, 2010, and by contacting Defendants' counsel pursuant to L.R. 7-3 and notice of this *ex parte* application pursuant to L.R. 7-19 on July 30, 2010.

The undersigned counsel has advised counsel for Defendants that such an *ex parte* motion will be made to this Court. Defendants' counsel are David S. Gingras, Xcentric Ventures, LLC, P.O. Box 310, Tempe, AZ 85280, (480) 668-3623, david@ripoffreport.com, and Mari Crimi Speth, Jaburg & Wilk, P.C. 3200 N. Central Ave., Suite 2000, Phoenix, AZ 85012, (602) 248-1089, mcs@jaburgwilk.com; and Paul S. Berra, 1404 Third Street Promenade, Suite 205, Santa Monica, CA 90401 (310) 394-9700, paul@berra.org.

Defendants' counsel have indicated that they will oppose the motion and request to be present at any hearing on the motion.

DATED: August 5, 2010

Respectfully submitted,

By: /s/ Lisa J. Borodkin
Daniel F. Blackert
Lisa J. Borodkin
Attorneys for Plaintiffs
Asia Economic Institute LLC, Raymond Mobrez, and Iliana Llaneeras

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MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History

This action, alleging civil violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962(c) and (d), and related state law claims, was commenced on January 28, 2010 with the filing of a complaint ("Compl.") in California Superior Court for Los Angeles County. DN-1, Ex. 1.[1]

On February 24, 2010, Defendants removed the action to United States District Court for the Central District of California on the basis of federal question jurisdiction, DN-1, and filed an Answer, DN-4. On March 22, 2010, Defendants filed a Special Motion to Strike under California's Anti-SLAPP law, California Code of Civil Procedure § 425.16, automatically staying discovery. DN-9.

On April 19, 2010, this Court denied Defendants' Special Motion to Strike, set this matter for an August 3, 2010 trial, and ordered the parties to meet and confer under Rule 26 regarding discovery matters. DN-23, 24, DN-26. This Court bifurcated and advanced the trial to cover solely the civil RICO claim predicated on extortion, and excluding damages. Id.

Following this Court's grant of partial summary judgment for the Defendants, DN-92, DN-94, Plaintiffs on July 27, 2010 filed a First Amended Complaint ("FAC"), Request for Judicial Notice and Jury Trial Demand. DN-97, DN-98, DN-100. The First Amended Complaint contains detailed allegations of violations of the wire fraud statute, 18 U.S.C. § 1343, as predicate acts of RICO. The case remains bifurcated as to RICO claims only. DN-94 at 53.

The Court set a deadline of August 6, 2010 for any motion to dismiss the FAC. DN-94 at 53. The Court ordered that it would revisit the issue of further

[1] References to "DN-__" are to the civil docket in this action.

discovery after the resolution of a motion to dismiss or expiration of the deadline to file a motion to dismiss. Id.

B. Nature of the Case

This is a case about conduct on the Internet and in Internet search engines. The case primarily concerns Defendants' electronic communications through their website, ripoffreport.com (the "Website") and actions in optimizing certain web pages for Internet search engines.

The bifurcated cause of action is a claim for civil violations of RICO predicated on wire fraud. Briefly, the gravamen of Plaintiffs' civil RICO claims is primarily a pattern of racketeering by the "Ripoff Report enterprise." See FAC ¶¶9-15. The alleged enterprise uses the wires in interstate commerce in furtherance of a scheme to defraud (the "Content Trolling Scheme") consisting of soliciting rebuttals, inter alia, through false statements, as replies to negative "Rip-off Reports" and *ad hominem* complaints against businesses and individuals ("subjects" of the Reports). See FAC ¶¶16-21, 196-246 and *passim*.

Pursuant to the Content Trolling Scheme, the enterprise engages in various undisclosed search engine optimization ("SEO") practices that have the effect of presenting Google search results about the subjects (including Plaintiffs) in a certain negative manner, FAC ¶¶69-136, unless the enterprise is paid to "stuff" positive content into the HTML for the subjects' web pages. See FAC ¶¶138-169. The Ripoff Report Enterprise makes false statements that induce subjects to submit rebuttals (which acts to their detriment by refreshing the negative, more prominent, Reports for search engines) and also harms Plaintiffs and other subjects, inter alia, by reason of false statements to the consumer public and failure to disclose paid endorsements and verifications of certain companies on the Website, in violation of Section 5 of the FTC Act, 15 U.S.C § 45, and the Codes of Federal Regulations

promulgated thereunder, 16 C.F.R. Part 255.0 *et seq.*[2] See FAC ¶¶183-184 and *passim*. Plaintiffs allege that Defendants systematically changing the HTML for web pages and disclaim negative reports about Google to attract search engines and maintain high "authority" with Google. FAC ¶¶247-253 and Exs. 24, 25.

Plaintiffs allege that the enterprise does so to sell advertising, goods and services, including membership in a costly program (the "Corporate Advocacy Program" or "CAP") that promises to change negative Google search results into positive search results for paying members. FAC ¶¶138-169. Plaintiffs allege damages, in accordance with the standards of Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2008), by reason of the enterprise's acts of wire fraud in furtherance of the racketeering, including loss of property interests in Plaintiffs' formerly robust business in brokering real estate transactions, payments to reputation repair consultants, and otherwise. FAC ¶¶288 and at 82-84.

C. Relevance of Electronically Stored Information ("ESI")

The evidence in this action is almost exclusively electronic. Accordingly, the preservation of electronically stored information ("ESI") is of paramount importance to Plaintiffs.

The scope of ESI sought to be preserved is not burdensome. At a minimum, it would consist of the 58 web pages and associated HTML from the Website referenced in the pleadings, and evidence of the changes in Defendants' server directory structure. See Borodkin Dec. ¶¶10, Ex. 14. These 58 web pages represent less than a ***tenth of one percent*** of the over 627,870 web pages containing "Rip-

[2] The FTC issued new Guides effective December 1, 2009 expressly confirming that the disclosure requirements for sponsorships and testimonials apply to blogs, Internet message boards and other forms of new media. See http://www.ftc.gov/opa/2009/10/endortest.shtm.

off Reports" in Defendants' Website. Borodkin Dec. Ex. 14. Five of these web pages and HTML code concern Plaintiffs directly. See FAC ¶316, Ex. 22.

Plaintiffs understand that Defendants emphasize the preservation of the text of user submissions and IP addresses of contributors because the 35 federal actions in which Defendants have previously appeared generally include causes of action arising from the content on Defendants' website and the identities of contributors. This action is not like those cases. The gravamen of the claims alleged in this action requires preservation of ESI relevant to Defendants' HTML coding practices (see FAC ¶¶138-195, "Defendants Alter Google Search Results for CAP Members") and Defendants' changes in its directory structure (see FAC ¶¶106-120, "Defendants' use of Domain Names To Influence Google Page Ranking"), which are aimed at influencing Google search engine results under recognized principles published in an SEO handbook by Google itself. See FAC ¶74, Ex. 24 (Declaration of Anthony Howard), Ex. 25 (Declaration of Joe Reed).

The pleadings allege that Defendants purposefully change how they encode the HTML for the Website's web pages concerning Plaintiffs and others so as to cause "positive" or "negative" snippets of text to appear in search results yielded by search engine queries on Google and otherwise. See, e.g., Complaint ("Compl.") at ¶2, ¶3, ¶20, ¶22.D ("Defendants . . . Create 'META tags' for rip-off reports, which make the defamatory posts appear higher on the search engines"), ¶24, ¶32, ¶62, ¶96 ("one complainant claims that he 'came home and googled [Plaintiffs']s name, and found all these bad reports"). See also First Amended Complaint ("FAC") at ¶10 ("Xcentric . . . [is] distributing, displaying, publishing, continuously republishing, indexing, and optimizing for the Web such acquired and paid, self-produced content to make the content interactive and easily searchable by commercial Internet search engines"), ¶19 ("Unbeknownst to the

victims, . . . [a] rebuttal is likely to make the negative content in a [Rip-off] Report go up in page rank in search engine queries"); ¶21-¶22 ("for a price, [Defendants] will sell . . . the opportunity to change a negative Google search engine result into a positive"), ¶30, ¶33, ¶35, ¶38, ¶¶69-99, ¶¶106-120 ("Defendants' Use of Domain Names to Influence Google Page Rankings"), ¶¶138-179 ("Defendants Alter Google Search Results for CAP Members"), and ¶¶247-253 ("Defendants Falsely State that they have never done anything to cause Google to rank their website higher in the search results"). Preservation of ESI concerning server directory structures and HTML is thus critical to this action. See Declaration of Joe Reed ("Reed Dec") at ¶¶6-13, 18-20.

D. Plaintiffs' Efforts To Confirm Defendants' Preservation of ESI

Discovery was reopened in this case on April 19, 2010, following the end of the automatic discovery stay effected by Defendants' anti-SLAPP motion. DN-23, 24, DN-26, Declaration of Lisa J. Borodkin ("Borodkin Dec.") ¶3. Plaintiffs immediately took steps to gain Defendants' cooperation in preserving relevant ESI.

On April 22, 2010, Plaintiffs sent Defendants a written request to preserve ESI. Borodkin Dec. at ¶¶4-6, Ex. 1. Specifically, Plaintiffs' counsel put Defendants' counsel on notice that Plaintiffs would seek relevant ESI in the case and that Plaintiffs would seek assurances and certifications to the Court that Defendants' counsel would instruct Defendants to preserve all ESI "relevant to any allegation in the case":

> In particular, Plaintiffs request that Defense counsel immediately instruct Defendants to preserve all ESI (including metadata) relating, without limitation, to CAP, and any allegation in this case, and to be prepared to certify to the Court that such ESI has been preserved. Plaintiffs are not seeking all ESI at this time, simply assurances that no such evidence will be destroyed or spoiled.

Borodkin Dec. ¶¶4-6, Exhibit 1 at 2.

Plaintiffs specifically advised Defendants that the relevant ESI sought would include "HTML source and meta tags regarding title tags before and after CAP":

> Plaintiffs do request that Defendants take steps to provide, without awaiting a written request, . . . HTML source and meta tags regarding title tags before and after CAP, SEO policies, and other coding practices. . . .
>
> Plaintiffs request that Defendants produce all such ESI in electronic, searchable format, preferable in native format, and cooperate with Plaintiffs under the Sedona Conference Cooperation Proclamation."

Borodkin Dec. ¶6, Exhibit 1 at 2-3.

Plaintiffs followed up the request to preserve ESI and discussed preservation at the Rule 26(f) discovery conference in an email dated April 27, 2010. Borodkin Dec. ¶7, Exhibit 2. Defendants' response was vague, stating it was "not an issue." Borodkin Dec. ¶8, Exhibit 3.

On April 27, 2010, the parties conducted their discovery planning conference pursuant to Federal Rule 26(f)(3) and Local Civil Rule 26-1. Borodkin Dec. ¶¶9-10. Defendants' comments at the conference gave Plaintiffs cause for concern about the preservation of ESI. Plaintiffs informed Defendants of the need to preserve evidence of all versions of the specific web pages from the Website concerning Plaintiffs and since the litigation was commenced. Borodkin Dec. ¶10. In addition, Plaintiffs informed Defendants that the HTML source code for web pages from the Website, before and after the HTML is changed for CAP members would be relevant to the allegations in the Complaint. Id. Defendants' counsel, Ms. Speth insisted there was no way to preserve this type of information and maintained that the HTML for web pages is never changed. "Whatever comes in, it is." Id. Ms. Speth's comments indicated that Defendants' concept of "relevance" may be restricted to data contributed by users.

On May 10, 2010, the parties filed their Joint Rule 26(f) discovery plan. See DN-30, Borodkin Dec. ¶, Exhibit 11, Ex. 4. In the Joint Report, Plaintiffs articulated a narrow subset of relevant ESI. Borodkin Dec. ¶11, Exhibit 4 at 3-4. Defendants stated in their portion of the Joint Report that not all ESI is preserved:

> "Defendants have agreed to preserve any and all information in their possession which may be relevant to the claims in this case. However, because defendants operate a live/dynamic website which contains millions of unique postings that are constantly being updated, supplemented, and/or changed via the addition of new information, **it is not possible for defendants to preserve any snapshots of unknown information which plaintiffs have neither identified not requested**."

Borodkin Dec. ¶12, Exhibit 4 at 4. Defendants' statement in the Joint Report gave Plaintiffs additional cause for concern about the preservation of ESI.

In or around May 2010, Plaintiffs observed significant changes to the formatting of the HTML for Rip-off Reports about Plaintiffs. The user contributions had apparently not changed, but the HTML used by Defendants had. See Borodkin Dec. ¶14-16, Exhibits 5-6.

In addition, Plaintiffs noticed a change in the Website's server directory structure (the structure that determines the URL for a web page) since the time the Reports were first posted about Plaintiffs. Borodkin Dec. ¶¶13-17. On March 4, 2010, Defendants' server directory structure formatted a URL for Report 417493 concerning Plaintiffs of www.ripoffreport.com/reports/0/417/RipOff0417493.htm. Beginning at least in May 2010, Defendants had changed the user directory structure to generate a URL of http://www.ripoffreport.com/Employers/Asia-Economic-Instit/asia-economic-institute-aei-ef3f4.htm for the same Report. See Borodkin Dec. ¶¶13-17, Exs. 5-6; Reed Dec. at ¶20.

In addition, the titles displayed in the Google search results had also changed from "Rip-off Report: Asia Economic Institute, AEI, WorldEcon: Raymond. . ." in

March 2009 to "Asia Economic Institute, AEI, World Econ Review|Rip-off Report . . .," after May 2010, indicating a change in the HTML for the web page. See Borodkin Dec. ¶¶15-17; Reed Dec. ¶¶18-20.

On May 28 and 29, 2010, Plaintiffs sent emails to Defendants' counsel regarding the changes and requesting a statement regarding Defendants' preservation of ESI. Borodkin Dec. at ¶¶18-19, Exs. 6, 8. Defendants' counsel responded twice on May 30, 2010, again with vague responses, and also stating, "As is true of virtually any website, peripheral parts of the site are always being reviewed and upgraded, so perhaps you're confused by some cosmetic and other change." Borodkin Dec. ¶¶20-23, Exs. 7, 10.

On June 22, 2010, Plaintiffs served their First Set of Requests for Production of Documents ("RFPs"), specifically including ESI in the definition of "Documents" and identifying 11 discrete, narrowly tailored document requests that include ESI, namely Requests 16, 22, 27, 28, 29, 35, 36 and 37. See Borodkin Dec. ¶¶24-25, Ex. 11. Again, on June 24, 2010, Plaintiffs met and conferred with Defendants' counsel regarding preservation of ESI. Borodkin Dec. ¶26.

On July 14, 2010, Plaintiffs advised Defendants of their intention to seek a Temporary Restraining Order ("TRO") for preservation of ESI if Defendants' counsel would not provide a statement as to the steps taken to preserve ESI. Borodkin Dec. at ¶28, Ex. 12. Defendants did not respond. Borodkin Dec. at ¶28.

On July 22, 2010, Defendants served their Responses to Plaintiffs First Set of RFPs. Borodkin Dec. at ¶29 and Ex. 13. Defendants objected, inter alia, that none of the ESI sought in Requests 16, 27, 28, 29, 35, 36 and 37 was relevant or calculated to lead to discoverable evidence, notwithstanding that the Requests sought core documents such at HTML and meta tags in accordance with the allegations. Id. Because Defendants claim that such responsive ESI is not relevant, Plaintiffs anticipate that Defendants have no intention of preserving it.

Plaintiffs are aware that the Magistrate Judge in GW Equity v. Xcentric Ventures, LLS et al. (N.D. Tex. 3:07-cv-00976-O, DN-242, Oct. 8, 2008), made a finding that Defendants' SQL database automatically overwrites and saves over previous data when changes are made. See Order of October 8, 2008, attached to Reed Dec. at Ex. B at 4[3] ("Defendants do not dispute that . . . the SQL database saves [changes] directly into the submitted content . . the SQL database Defendants use is simply not designed to duplicate data before revising it.").

This case alleges changes to the HTML for Defendants' web pages. It is precisely because changes in the HTML may not be visible on the Website that ESI must be preserved. In this case, preservation and protection of data on an SQL database is necessary to evaluate if, when and how particular web pages and their HTML source code have been altered. See Reed Dec. ¶10. If data is overwritten on an SQL database without prior duplication, that data is lost. See Reed Dec. at ¶9. Appropriate preservation measures would be to backup and store source codes, take back end data snapshots, and change logs. See Reed Dec. ¶11. These are relatively low-cost solutions. See id.

Defendants frequently argue to Courts that they have handled many cases regarding the Website. Pacer indicates they have appeared in 35 federal actions. Defendants should be sophisticated in appropriate ESI preservation obligations.

On July 30, 2010, Plaintiffs requested that Defendants insert a "no index, no follow" meta tag into the HTML for the 5 web pages concerning Plaintiffs. The

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[3] The October 8, 2008 Order in GW Equity concerned Plaintiffs motion for sanctions and was denied in the context of defamation claims concerning the actions of the Defendants' content monitors. By contrast, here, Plaintiffs seek an order of preservation, and the claim is for Defendants' preservation of HTML and server directory structure as it relates to Defendants' deliberate conduct to influence Google search results.

purpose was to preserve the status quo and mitigate damage to Plaintiffs during the pendency of this action. See Borodkin Dec. ¶30, Ex. 14. Defendants refused.

E. Basis for Protective Order Re: Interference With Witnesses

Kent Hutcherson, an attorney in Texas, provided a declaration in support of Plaintiffs' First Amended Complaint, which was filed July 27, 2010. See Borodkin Dec. ¶32, Ex. 15. On July 28, 2010, Plaintiffs received a telephone call and email from Mr. Hutcherson. See Borodkin Dec. ¶¶32-35.

Mr. Hutcherson forwarded Plaintiffs' counsel a letter dated July 28, 2010 sent to him by Defendants' counsel, Ms. Speth. Borodkin Dec. ¶34, Ex. 16. The letter, inter alia, demanded that he, as a witness, "provide the *Asia Economic* court with a corrected declaration to include an explanation of the terms of the Settlement Agreement," and claimed that it was wrong of him to imply that the Communications Decency Act "can be challenged in the courts" because "[t]he CDA is a statute; therefore, any true challenge to its language and effect must be undertaken by Congress, and not by any court." See Borodkin Dec. ¶35, Ex. 16. Ms. Speth's July 28, 2010 letter also demanded that Mr. Hutcherson refrain from taking potential future employment adverse to her clients. Id.

Part of the very statute that Ms. Speth insists cannot "be challenged in the courts," the CDA (Communications Decency Act), was struck down as unconstitutional by the United States Supreme Court in Reno v. ACLU, 521 U.S. 844 (1997) (striking down 47 U.S.C. § 223, as overbroad and violative of the First Amendment). In addition to being manifestly incorrect on the doctrine of judicial review, see Marbury v. Madison, 5 U.S. 137, 180 (1803), the authoritative tone of Ms. Speth's letter and appearance of legal authorities would have a profound chilling effect on lay witnesses.

Together with Defendants' counsels' consistent threatening of Plaintiffs' counsel, see Borodkin Dec. ¶¶37-46, and pending motion for sanctions for discovery conduct, Plaintiffs are concerned about the chilling effect of any such

extrajudicial contact by Defendants' counsel on witnesses. Defendants demanded to know the names of witnesses Plaintiffs have been speaking to and described such information gathering as "herding cats." Borodkin Dec. ¶¶37-38. Certain potential expert witnesses have declined to speak with Plaintiffs' counsel and at least one stated a fear of being sued by Defendants. Borodkin Dec. ¶47.

II. THIS COURT HAS THE POWER TO ISSUE THE REQUESTED TRO REGARDING ESI

A. Defendants Have a Duty to Preserve ESI

Federal courts have liberally and broadly construed a party's right to discovery, so as to uphold the right to discovery wherever possible. See Fed. R. Civ. P. 26(b)(1)("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense."). Federal Rule of Civil Procedure 34(a) provides for the discovery of documents or electronically stored information. Fed. R. Civ. P. 34(a). See Columbia Pictures Indus. v. Fung, 2001 U.S. Dist. LEXIS 97576 at *16 (C.D. Cal. June 8, 2007). Rule 34(a)(1) "is expansive and includes any type of information that is stored electronically," and "is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and development." Id.

Even before discovery, Defendants have a duty to preserve relevant ESI. See United States v. Maxxam, Inc., 2009 U.S. Dist. LEXIS 30734 at *7 (N.D. Cal. Mar. 27, 2009)("The duty to preserve relevant evidence can arise even before the commencement of litigation and sanctions may be imposed if Defendants knew or should have known that the evidence destroyed was potentially relevant."). See also Lewis v. Ryan, 261 F.R.D. 513, 518 (S.D. Cal. 2009) ("Federal courts have recognized a party's duty to preserve evidence when it knows or reasonably should know the evidence is relevant and when prejudice to an opposing party is

foreseeable if the evidence is destroyed."); World Courier v. Barone, 2007 U.S. Dist. LEXIS 31714, 2007 WL 1119196 at * 2-*3 (N.D. Cal. Apr 16, 2007) ("courts have extended the affirmative duty to preserve evidence to instances when that evidence is not directly within the party's custody or control so long as the party has access to or indirect control over such evidence"); King v. Am. Power Conversion Corp., 181 Fed. Appx. 373, 378 (4th Cir. 2006) ("If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction"); Silvestri v. GMC, 271 F.3d 583, 591 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.").

"The preservation obligation runs first *to counsel*, who has 'a duty to advise his client of the type of information potentially relevant to the lawsuit and of the necessity of preventing its destruction.'" Gordon Partners, et. al. v. Blumenthal, 244 F.R.D. 179, 197-198 (S.D.N.Y. 2007) (emphasis added). Failure to instruct clients of a litigation hold supports a finding of gross negligence in failing to preserve evidence. See Hous. Rights Ctr. v. Sterling, 2005 U.S. Dist. LEXIS 44769 at *10 (C.D. Cal. Mar. 2, 2005) ("lack of a declaration from in-house counsel affirming that the necessity of preserving documents was communicated to employees" was "telling" proof that litigation hold not properly communicated).

Once the duty to preserve attaches, a party must "suspend any existing policies related to deleting or destroying files and preserve all relevant documents related to the litigation. This is especially true in cases involving ESI. See, e.g., In re Napster, Inc. Copyright Litigation, 462 F.Supp.2d 1060, 1070 (N.D. Cal. 2006), citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)

("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.").

B. The Facts Here Satisfy the 3-Part Test of *Capricorn Power Co.*

Courts have inherent judicial power to grant injunctive relief to further the purposes of discovery and preserve evidence. In appropriate cases, the Court may issue an order delineating the scope of evidence to be preserved. See 7-37A Moore's Federal Practice - Civil § 37A.10. "Such orders are increasingly routine in cases involving electronic evidence, such as e-mails and other forms of electronic communication." Treppel v. Biovail Corp., 233 F.R.D. 363, 370 (S.D.N.Y. 2006), citing Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 136 (2004) ("this court plainly has the authority to issue such orders").

Federal courts in California frequently apply the three-part test articulated in Capricorn Power Co. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 432-33 (W.D. Pa. 2004), to decide whether a preservation order is warranted:

> In determining whether to issue a preservation order, courts undertake to balance at least three factors: (1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in the absence of an order directing preservation; (2) any irreparable harm likely to result to the party seeking the preservation of the evidence absent an order directing preservation; and (3) the capability of the party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

Columbia Pictures Indus. v. Fung, 2007 U.S. Dist. LEXIS 97576 at *25-*26 (C.D. Cal. June 8, 2007) (granting order of preservation).

Plaintiffs have demonstrated circumstances that meet this test. Accordingly, this Court is empowered to grant Plaintiffs' application. Applying the Capricorn three-part test to the facts and history discussed, the Court should order the

requested TRO to ensure the preservation of ESI in this matter and prevent irreparable injury and prejudice to Plaintiffs in this case.

First, the Court's concern for the continuing existence and maintenance of the integrity of the ESI in this action should be paramount. In most cases involving Defendants that have come to bar, the defense is ordinarily that conduct is attributable to third-party contributors under the Communications Decency Act, or that changes are not made by content monitors. See, e.g., Reed Dec. ¶8, Ex. B. This case is different. This case concerns Defendants' HTML coding and SEO practices, and expressly alleges that Defendants make changes to the HTML that they claim does not "change" Reports, but in fact drastically changes the way search results for web pages containing the Reports appear on the Web.

Second, the harm to Plaintiffs from destruction of this ESI in the absence of a court order is irreparable. See Reed Dec. ¶¶9-11. Evidence of historical versions of HTML and the Website's server directory structure is in the sole possession of Defendants. Plaintiffs believe this is a case of first impression regarding the SEO practices alleged. Therefore, it is not likely that Defendants have taken snapshots of the server directories for the relevant time period based on any other litigation holds. In addition to the modifications made to the website content and HTML coding, Defendants it appears have deleted an entire category of Ripoff Reports, which also bears explaining. See Declaration of Jan Smith ¶18.

Defendants' counsel have stated to Plaintiffs that they will preserve what is "relevant," but Defendants do not display a reasonable grasp of "relevance." In their responses to Plaintiffs' RFPs, Defendants claimed that none of the 11 discrete requests seeking documents, such as metadata and HTML concerning Reports about Plaintiffs, were relevant. See Borodkin Dec. ¶¶25, 29, Exs. 11, 13. Defendants have also repeatedly refused to describe to Plaintiffs the steps they have taken to preserve data, notwithstanding that the Website has been changing,

and admitted in other cases that they overwrite their SQL database, which contains necessary ESI. See Reed Dec. ¶¶7-11. Were Defendants to destroy or permit destruction of such ESI, Plaintiffs' case would be irreparably damaged.

Third, the requested order is not burdensome. Such precautions as keeping disaster recover backups from being overwritten and maintaining change logs during litigation are relatively low-cost solutions that are provided with all server and database systems. See Reed Dec. ¶ 11. Plaintiffs estimate that the relevant web pages and HTML are only 58 out of the over 627,870 web pages on the Website. Borodkin Dec. ¶ 30. No significant harm will befall Defendants if they are ordered to preserve the requested ESI pending determination by the Court of the scope of document production. Accordingly, this motion should be granted.

Finally, Plaintiffs have requested a "no index, no follow" metatag to be inserted in to the HTML for the five web pages referencing Plaintiffs. The requested meta tag would preserve the status quo of the web pages as they appear on the Website. Reed Dec. ¶21. The meta tags would severely curtail the harm to Plaintiffs caused by future modifications by Defendants to SEO policies. Id. Defendants have not, and cannot, articulate any good reason for *not* including the meta tag in the HTML for web pages regarding Plaintiffs, as all their legal arguments have historically been confined to the four corners of the user-submitted contents of Reports. None of that would be affected by the requested meta tag.

III. "GOOD CAUSE" EXISTS FOR A PROTECTIVE ORDER FOR INTERFERENCE WITH WITNESSES

A. Applicable Standards under Federal Rule of Civil Procedure 26(c)

Federal Rule of Civil Procedure 26(c)[4] governs the granting of a protective order.

[4] Federal Rule of Civil Procedure 26(c)(1) provides in part:

> The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,

A protective order should be granted when the moving party establishes "good cause" for the order and "justice requires [a protective order] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Fed. R. Civ. P. 26(c). Subsection (c) [of Rule 26] underscores the extensive control that district courts have over the discovery process, authorizing courts to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" (emphasis added).

Thus, as Wright and Miller note, "a court may be as inventive as the necessities of a particular case require in order to achieve the benign purposes of the rule." Brulotte v. Regimbal, 368 F.2d 1003, 1004 (9th Cir. 1966). To conclude otherwise would contravene the policy that the Federal Rules should be construed "to secure the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1." See United States v. Columbia Broadcasting System, Inc., 666 F.2d 364, 369 (9th Cir. 1982) (citing 8 C. Wright and A. Miller, Federal Practice and Procedure: Civil § 2036, at 267). "Rule 26(c) . . . was enacted as a safeguard for the protection of parties and witnesses in view of the broad discovery rights authorized in Rule 26(b)") Id., 666 F.2d. at 368-369.

A district court must make a "good cause" analysis in determining whether a protective order is necessary. Phillips v. General Motors Corp., 307 F.3d 1206, 1212 (9th Cir. 2002). "For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order

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including one or more of the following:

> . . . (B) specifying terms, including time and place, for the disclosure or discovery

Fed R. Civ. Proc. 26(c)(1).

is granted." Id, 307 F.3d at 1210; see also Younger Mfg. Co. v. Kaenon, Inc., 247 F.R.D. 586, 588 (C.D. Cal. 2007).

In determining whether good cause exists for the protective order, the court must balance the interests in allowing discovery against the relative burdens to the parties and non parties. See In re Coordinated Pretrial Proceedings 669 F.2d 620, 623 (10th Cir. 1982); see also Wood v McEwen, 644 F.2d 797, 801-801 (9th Cir. 1981). Where a court believes that discovery is sought for an "improper and harassing purpose" and where such purpose "clearly outweighs" the minimal need for the very limited amount of information that could be discovered, the court should find "good cause" for the issuance of a protective order. See Lectrolarm Custom Sys v. Pelco Sales, Inc., 212 F.R.D. 567, 573 (E.D. Cal. 2002).

In Lectrolarm, the Court conducted a "good cause" analysis and found that the discovery requests propounded by the corporation were unreasonable, duplicative, overly broad and propounded for the improper purpose of harassment and obtaining information to which it clearly was not entitled. Therefore, the Court granted the protective order. Id. at 573.

In Columbia Broadcasting System, the Court of Appeals relied on the Catch-all of Rule 26(c) to order costs reimbursed to third-party witnesses that had incurred $2.3 million dollars in complying with subpoenas for massive amounts of information in an antitrust investigation of the networks CBS and ABC. The Court of Appeals held that the district court had not properly considered the studio's application for reimbursement of costs and remanded the summary denial. In making the order, the Court articulated the purpose of the rule as protection for third parties unfairly impacted by litigation. See id. at 372.

B. Plaintiffs Will Be Prejudiced Unless a Protective Order Issues

In this case, good cause exists to prevent Defendants' counsel from further attempting to procure evidence through extra-judicial means. First, Defendants' counsel have already contacted a witness and demanded he file a declaration with this Court, even though discovery is currently on hold and the witness is not admitted to file papers with the Court in this judicial District. Such a demand is procedurally incorrect and completely improper. The timing of the demand letter – one day after Plaintiffs filed their First Amended Complaint – gives rise to an inference of retaliation. See Borodkin Dec. ¶¶32-34.

Second, the tenor and tone of the letter to Plaintiffs' witness approaches intimidation, even by the definition of the federal witness tampering statute, 18 U.S.C. § 1512.[5] In United States v. Wilson, 795 F.2d 55, 59 (4th Cir. 1986), the court instructed the jury that "harass" is defined as "conduct that was designed and intended to badger, disturb or pester for the unlawful purpose or purposes as alleged in the indictment counts." 18 U.S.C. § 1512(d)(1) provides that "Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from . . attending or testifying in an official proceeding; or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both."

---

[5] (b) Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--

(1) influence, delay or prevent the testimony of any person in an official proceeding; . . . .

shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512.

Significant harm will be done to Plaintiffs' case if Defendants engage in further extra-judicial contact with witnesses, which can have an irreversible chilling effect. This is particularly true where the other witnesses are laypeople, who may not be sophisticated with legal contentions asserted by Defendants' counsel.

The danger that Defendants' counsel may attempt to coerce or influence certain testimony is imminent. The history of Defendants' counsel of attempting to influence Plaintiffs' counsel through threats and other improper means is well documented and continuing. See Borodkin Dec. ¶¶39-46; see also Plaintiffs' pending Motion for Sanctions [DN-87, DN-91] (unopposed with respect to sanctions for discovery conduct).

Defendant Magedson has also threatened Plaintiffs' counsel that she would be the subject of a Rip-off Report and "on the cover" of a book expressing his views of the legal profession. Borodkin Dec. ¶¶39-40. Defendants' counsel continue to threaten Plaintiffs' counsel with Rule 11 sanctions on unspecified grounds. Borodkin Dec. ¶¶43, 46.

Plaintiffs have already observed the chilling effects of Defendants' tactics as it has interfered with Plaintiffs' ability to locate potential expert witnesses willing to testify. See Borodkin Dec. ¶47. Ms. Speth's July 28, 2010 letter to Plaintiffs' witness, Kenton Hutcherson, contains gross misrepresentations of the law. Borodkin Dec. ¶¶35-36. Plaintiffs allege that Defendants make similar exaggerations of the law on Defendants' Website to intimidate susceptible and unsophisticated laypeople from exercising their rights. FAC ¶¶ 254-260. Accordingly, without a protective order for potential and current witnesses, there is a continuing and imminent danger that Plaintiffs' ability to prepare for trial will be further prejudiced.

By contrast, Defendants cannot articulate any prejudice they will suffer by being ordered to use conventional and recognized discovery techniques, and not to seek discovery for improper purposes such as harassment.

Accordingly, this Court should make a finding that "good cause" exists for issuing a protective order under Rule 26(c) and order that Defendants to refrain from demanding that third-party witnesses create evidence they are not obligated to provide and file such matter with the Court, particularly while discovery is on hold, and to refrain from making improper demands on witnesses to refrain from employment or otherwise attempt to procure, influence or compromise the testimony of witnesses by undue means.

IV. CONCLUSION

For the foregoing reasons, this application for a Temporary Restraining Order regarding preservation of Electronically Stored Information and for a Protective Order Regarding Interference with Witnesses should be granted in its entirety.

DATED: August 3, 2010

Respectfully submitted,

By: /s/ Lisa J. Borodkin
Daniel F. Blackert
Lisa J. Borodkin
Attorneys for Plaintiffs
Asia Economic Institute LLC, Raymond Mobrez, and Iliana Llaneras

DECLARATION OF LISA BORODKIN AND CERTIFICATION OF COMPLIANCE WITH LOCAL CIVIL RULES 7-3 AND 7-18

I, Lisa J. Borodkin, declare:

1. I am an attorney at law, duly admitted to practice before all the courts of the State of California and this Honorable Court. I am co-counsel of record for Plaintiffs Asia Economic Institute LLC, Raymond Mobrez and Iliana Llaneras ("Plaintiffs") in this action. 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.

2. This Declaration is made in support of Plaintiffs' Ex Parte Application for a Temporary Restraining Order ("TRO") requiring Defendants to preserve electronically stored data ("ESI") and for a protective order under Rule 26(c) to prevent Defendants and Defendants' counsel from interfering with witnesses.

A. Preservation Of Electronically Stored Information ("ESI")

3. I first appeared in this action on April 19, 2010 at the hearing on Defendants' Special Motion to Strike under the Anti-SLAPP law. This Court denied the Motion to Strike, set an August 3, 2010 trial date, bifurcated damages and all claims except for RICO predicated on extortion and ordered discovery to proceed.

4. On April 22, 2010 I sent Defendants' counsel the email attached hereto as **Exhibit "1"** concerning preparation for the Rule 26(f)(3) discovery plan conference that the parties had agreed to conduct on April 27, 2010. In the part of my April 22, 2010 email concerning "any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced," I stated that Electronically Stored Information ("ESI") was likely to yield critical evidence:

> "Much of this case takes place in cyberspace. Therefore, Plaintiffs believe that discovery of electronically stored information (ESI) may be critical and is likely to yield important evidence."

Exhibit 1 at 2.

5. In particular, I put Defendants' counsel on notice that Plaintiffs would seek ESI in the case and specifically that Plaintiffs would seek assurances and certifications to the Court that all ESI "relevant to any allegation in the case" would be preserved:

> In particular, Plaintiffs request that Defense counsel immediately instruct Defendants to preserve all ESI (including metadata) relating, without limitation, to CAP, and any allegation in this case, and to be prepared to certify to the Court that such ESI has been preserved. Plaintiffs are not seeking all ESI at this time, simply assurances that no such evidence will be destroyed or spoiled.

Exhibit 1 at 2.

6. Specifically, I advised Defendants that ESI relevant to allegations in the case would include "HTML source and meta tags regarding title tags" and "SEO policies and other coding practices":

> Plaintiffs do request that Defendants take steps to provide, without awaiting a written request, emails from and to Mr. Magedson and/or Xcentric and its agents regarding participation in CAP, offers made inviting businesses to join CAP, payments collected or made under CAP, reports generated under CAP, HTML source and meta tags regarding title tags before and after CAP, SEO policies, and other coding practices."

Exhibit 1 at 2-3.

7. Defendants' counsel did not respond in writing to my April 22, 2010 request for them to instruct Defendants to preserve ESI. On April 27, 2010, I sent Defendants' counsel another email asking them to be prepared to discuss Defendants' position of electronic discovery, preservation of evidence, the Sedona

Conference and other matters in my April 22, 2010 email. A true and correct copy of my April 27, 2010 email is attached hereto as **Exhibit "2."**

8. Attached hereto as **Exhibit "3"** is a true and correct copy of the email response Plaintiffs received from Defendants' counsel, David Gingras. Mr. Gingras' April 27, 2010 email states in part, with regard to ESI and the Sedona Conference:

> "Preservation of electronic evidence is not an issue. Xcentric keeps all of its records pretty much indefinitely, so there's no issue with respect to putting a hold on something specific because we always put a hold on everything."

Exhibit 3 (emphasis added).

9. On April 27, 2010, the parties, through counsel, conferred on a discovery plan under Federal Rule of Civil Procedure 26(f) and Local Civil Rule 26-1.

10. At the April 27, 2010 discovery plan conference, the parties discussed ESI and electronic evidence preservation. I stated that Plaintiffs want Defendants to preserve evidence of what happens to the HTML source code for web pages from Defendants' website, Ripoffreport.com (the "Website") before and after it is changed for members of the Corporate Advocacy Program ("CAP"), as alleged in the Complaint. In addition, I requested that Defendants preserve all versions of the specific web pages from the Website concerning Plaintiffs and discussing the CAP program to preserve a history of any changes made since the litigation was commenced. There are only 5 web pages on the Website discussing Plaintiffs, **less than one-hundredth of one percent**, of the over 500,000 web pages comprising the Website. Ms. Speth insisted there was no way to preserve this type of information and maintained that the HTML for web pages is never changed. "Whatever comes in, it is," Defendants' counsel stated, referring to the HTML for the web pages on the Website.

11. On May 1, 2010, I provided Defendants counsel with Plaintiffs' portions of the Joint Rule 26(f) discovery plan. On May 10, 2010, I received Defendants' portions of the Joint Rule 26(f) discovery plan. A true and correct copy of the Joint Rule 26(f) report as filed on May 10, 2010 is attached as **Exhibit "4."** On the subject of Electronically Stored Information, Plaintiffs' portion stated, in part, that Plaintiffs seek a narrow, specific, subset of ESI to be preserved regarding *Plaintiffs* and *CAP Members*, specifically referencing particular, relevant paragraphs in the Complaint:

> "Plaintiffs will seek discovery on the HTML source code and meta tags associated with the portions of the ripoffreport.com website relating to posting about Plaintiff and about CAP program participants before and after joining the CAP program, ***as alleged***, inter alia, at ***paragraph 25 of the Complaint***, and the relationship between such HTML source code and meta tags and Defendants' offer to 'change[] the negative listings on search engines into a positive along with all the Reports on Rip-off Report,' ***as alleged***, inter alia, in ***paragraphs 31, 32 and 62 of the Complaint***."

Exhibit 4 at 3-4 (emphasis added).

Regarding preservation of the **specific, relevant** ESI thus identified, Plaintiffs' portion of the Report stated:

> "Plaintiffs requested that Defendants' counsel instruct their clients to preserve all **such** ESI and associated metadata, particularly metadata history, and to instruct their clients to take steps to retain all backups and safeguards and prevent such ESI and metadata from being over-written, erased, lost or destroyed during the course of this action."

Exhibit 4 at p. 4.

12. Notwithstanding that Plaintiffs' counsel had given Defendants' counsel Plaintiffs' portions of the draft Rule 26(f) Report on May 1, 2010 -- including the ***specific, relevant*** ESI to be preserved -- nine days previously,

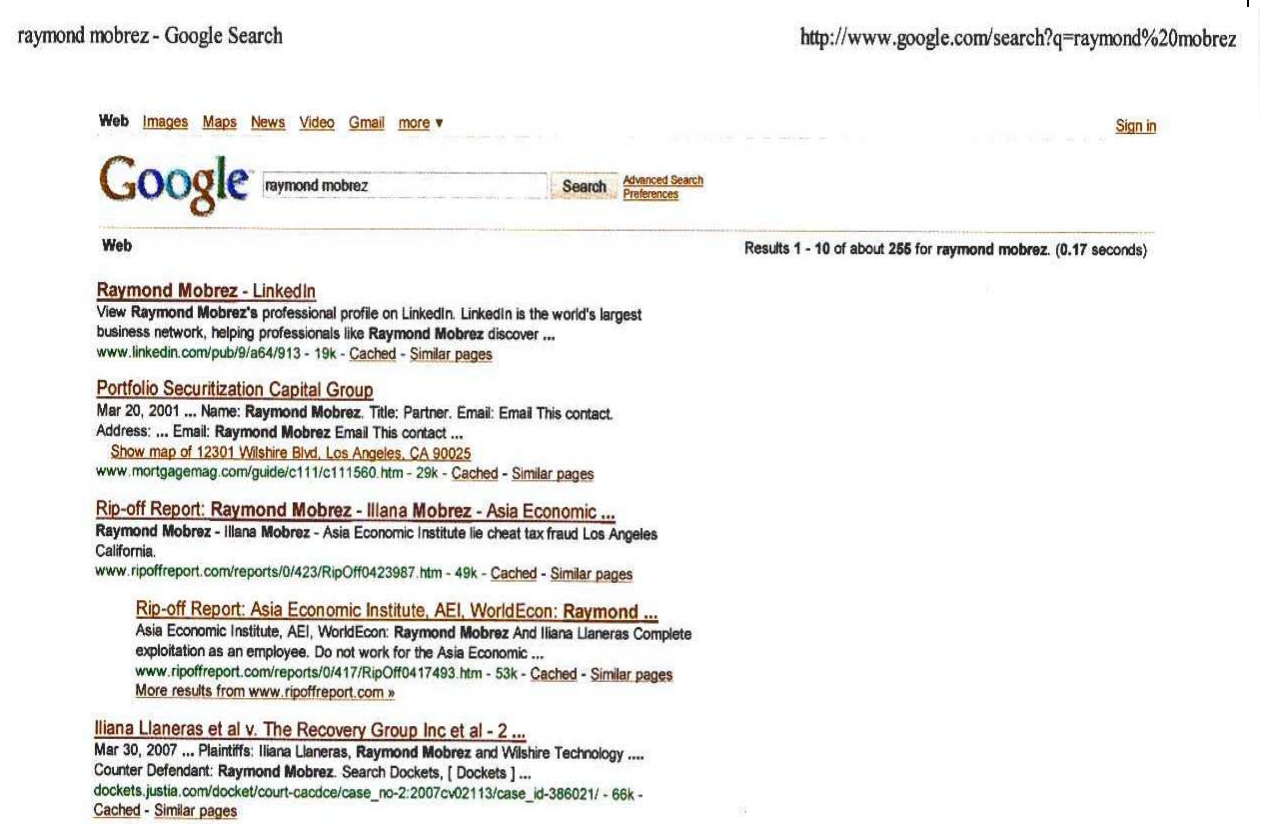
Defendants' counsel, on May 10, 2010, admitted that **Defendants do not preserve all ESI** and feigned ignorance as to what ESI needed to be preserved:

> "Defendants have agreed to preserve any and all information in their possession which may be relevant to the claims in this case. However, because defendants operate a live/dynamic website which contains millions of unique postings that are constantly being updated, supplemented, and/or changed via the addition of new information, **it is not possible for defendants to preserve any snapshots of unknown information which plaintiffs have neither identified not requested**."

Exhibit 4 at 4.

13. In or around May 2010, Plaintiffs observed a major change occur to the Google search results for reports from Defendants' Website ("Rip-off Reports" or "Reports").

14. A true and correct copy of the first page of Google search results for the query "Raymond Mobrez" retrieved on March 4, 2009 is attached hereto as **Exhibit "5."** A portion of the relevant page is reproduced below:


raymond mobrez - Google Search http://www.google.com/search?q=raymond%20mobrez

Web Images Maps News Video Gmail more ▾ Sign in

Google raymond mobrez Search Advanced Search Preferences

Web Results 1 - 10 of about 255 for raymond mobrez. (0.17 seconds)

Raymond Mobrez - LinkedIn
View Raymond Mobrez's professional profile on LinkedIn. LinkedIn is the world's largest business network, helping professionals like Raymond Mobrez discover ...
www.linkedin.com/pub/9/a64/913 - 19k - Cached - Similar pages

Portfolio Securitization Capital Group
Mar 20, 2001 ... Name: Raymond Mobrez. Title: Partner. Email: Email This contact. Address: ... Email: Raymond Mobrez Email This contact ...
Show map of 12301 Wilshire Blvd, Los Angeles, CA 90025
www.mortgagemag.com/guide/c111/c111560.htm - 29k - Cached - Similar pages

Rip-off Report: Raymond Mobrez - Iliana Mobrez - Asia Economic ...
Raymond Mobrez - Iliana Mobrez - Asia Economic Institute lie cheat tax fraud Los Angeles California.
www.ripoffreport.com/reports/0/423/RipOff0423987.htm - 49k - Cached - Similar pages

Rip-off Report: Asia Economic Institute, AEI, WorldEcon: Raymond ...
Asia Economic Institute, AEI, WorldEcon: Raymond Mobrez And Iliana Llaneras Complete exploitation as an employee. Do not work for the Asia Economic ...
www.ripoffreport.com/reports/0/417/RipOff0417493.htm - 53k - Cached - Similar pages
More results from www.ripoffreport.com »

Iliana Llaneras et al v. The Recovery Group Inc et al - 2 ...
Mar 30, 2007 ... Plaintiffs: Iliana Llaneras, Raymond Mobrez and Wilshire Technology .... Counter Defendant: Raymond Mobrez. Search Dockets, [Dockets] ...
dockets.justia.com/docket/court-cacdce/case_no-2:2007cv02113/case_id-386021/ - 66k - Cached - Similar pages

15. On March 4, 2009, the first page of the Google search results for the query "Raymond Mobrez" yielded a search result (consisting of a title, snippets of text and the URL www.ripoffreport.com/reports/0/417/RipOff0417493.htm) in the fourth page rank (position from the top) with the title "**Rip-off Report: Asia Economic Institute, AEI, WorldEcon: Raymond. . .**"

16. In or about May 2010, the Google search results changed. A true and correct copy of the first page of Google search results for the query "Raymond Mobrez" retrieved on August 3, 2010 is attached hereto as **Exhibit "6."** A portion of the relevant page is reproduced below.

17. Since in or about May 2010, the first page of the Google search results for the query "Raymond Mobrez" has yielded a **revised** search result with the **revised** URL www.ripoffreport.com/…/asia-economic-institute-aei-ef3f4.htm and pointing to the **revised** URL http://www.ripoffreport.com/Employers/Asia-Economic-Instit/asia-economic-institute-aei-ef3f4.htm, with the **revised** title "**Asia Economic Institute, AEI, World Econ Review|Rip-off Report . . .**"

18. On May 28, 2010, I sent Defendants' counsel, Mr. Gingras, an email, a true and correct copy which is attached as **Exhibit "7,"** stating in pertinent part that Plaintiffs had noticed changes in the Website and were getting concerned about the preservation of HTML and ESI:

> "We are also very concerned that the RipoffReport.com website seems to be changing. We are concerned electronic evidence may be destroyed. I would like a statement as to what you have done to preserve ESI in this case, and to confer on that."

Exhibit 7 (emphasis added).

19. On May 29, 2010, I again sent Defendants' counsel, an email, a true and correct copy which is attached as **Exhibit "8"** again stating concern about Defendants' reluctance to confirm that ESI was being preserved:

> "[P]lease give us your statement on ESI. The website is on and off. We need to know what backup tapes, disks, recovery, and otherwise overwriting precautions you are taking to preserve data.
>
> I'd prefer not to do this, but we may need to apply ex parte for a TRO if we cannot confirm a statement from you regarding preservation of ESI."

Exhibit 8 (emphasis added).

20. On May 30, 2010 at 7:02 p.m., Defendants' counsel sent me an email, a true and correct copy of which is attached as **Exhibit "9,"** stating falsely that I had told Defendants that Plaintiffs "don't intend to" request discovery "relating to ESI," that Plaintiffs had not identified ESI to be preserved and otherwise implied that Defendants were not preserving all types of relevant ESI:

> "You have requested no discovery from us relating to ESI or anything else, and you've indicated that you don't intend to so do. As such, I have no clue what ESI you want us to locate, preserve, or to provide you with a report about.
>
> As we have told you from the beginning of the case, original author submissions are always preserved and are never changed. This is true of the reports about AEI, so your perception of an emergency is mistaken. As is true of virtually any website, peripheral parts of the site are always being reviewed and upgraded, so perhaps you're confused by some cosmetic and other change. However, as I understand it, your case is not based on any of these aspects of the site so I don't think this is a real concern.

Exhibit 9 (emphasis added).

21. Reading between the proverbial lines, Defendants' counsel's May 30, 2010 7:02 p.m. email suggests (by negative implication) that parts of the Website that are not author submissions are being overwritten. Defendants -- as they do in

nearly all legal challenges to their conduct -- erroneously frames the ESI preservation dispute into one solely about user contributions. User contributions are not the only relevant evidence in this case. As Plaintiffs stated in the Complaint, in prior emails and conferences, and in the Rule 26(f) Report, the gravamen of the action is what Defendants put in, add to and subtract from the HTML code – and thus how Defendants determine whether Google search results are "positive" or "negative" for subjects of Rip-off Reports. At 7:25 p.m., I immediately responded by email, "Metatags and HTML source code for the reports at issue in the litigation." See Exhibit 9.

22. On May 30, 2010 at 10:15 pm. and 10:17 p.m., Defendants' counsel sent me a second and third email response concerning ESI, true and correct copies of which are attached hereto as **"Exhibit 10."** The 10:17 p.m. email stated in a conclusory fashion, "None of this is relevant to this case so we don't believe you're entitled to this, but as a matter of course we'll preserve this anyway."

23. Neither of Defendants' May 30, 2010 emails responded specifically to my request to describe what measures Defendants' attorneys had taken to instruct their clients to preserve ESI.

24. On June 22, 2010, Plaintiffs served their First Set of Requests for Production of Documents on Defendant Xcentric Ventures, LLC ("Xcentric"), a true and correct copy of which is attached as **"Exhibit 11."**

25. Plaintiff's Requests for Production defined "Documents" to include ESI and sought narrowly tailored, particularized categories of ESI, including HTML, meta tags, meta elements and related electronic evidence, as summarized in the table below:

Plaintiffs' First Set of Requests for Production of Documents dated June 22, 2010 Relevant to Preservation of ESI	
Definitions	"'DOCUMENT(S)' include but are not limited to: files, notes, memoranda, correspondence, or letters of any kind,

	hand-written notes, bills, ledgers, inter-departmental or office communications, written statements, moving or still photographs, moving or still pictures, diagrams, plans, drawings, specifications, measurements or other descriptions, agreements, contracts records, audio recordings, tapes, compact discs, and computer files in any format and printout thereof, digital media, digital files, backup tapes, discs, information stored on remote servers or drives or in the "cloud" (e.g., Google Docs, DropBox, or other cloud computing and storage services), and any and all forms of Electronically Stored Information ("ESI"). "Document" includes both originals and non-identical copies or copies that contain commentary or notation that does not appear in the original."
Request 16	"DOCUMENTS that refer or relate to YOUR use of META TAGS on ROR from 2005-present."
Request 22	"DOCUMENTS that IDENTIFY the HTML, META TAGS, META ELEMENTS, and source code for all web pages displaying reports about PLAINTIFFS at issue in this action."
Request 27	"DOCUMENTS that refer or relate to any instance of YOU deleting posts on ROR from 2005-present."
Request 28	"DOCUMENTS that IDENTIFY the HTML, META TAGS, META ELEMENTS, and source code for web pages displaying reports about a representative CAP member after joining CAP."
Request 29	"DOCUMENTS that IDENTIFY the HTML, META TAGS, META ELEMENTS, and source code for web pages displaying reports about a representative CAP member as they existed before the member joined CAP."
Request 35	"DOCUMENTS relating to, referring to, or evidencing any actions taken by DEFENDANTS to create, add, remove, edit or alter the TITLE META TAG of reports against members of the CAP, including but not limited to documents evidencing changes in the Web page's HTML source code."
Request 36	"DOCUMENTS relating to, referring to, or evidencing any actions taken by Defendants to create, add, remove, edit or alter the DESCRIPTION META TAG of the complaints against members of the CAP, including but not limited to documents evidencing changes

	in the Web page's HTML source code."
Request 37	"DOCUMENTS relating to, referring to, or evidencing any actions taken by Defendants to create, add, remove, edit or alter the KEYWORD META TAG of the complaints against members of the CAP, including but not limited to documents evidencing changes in the Web page's HTML source code."
Request 38	"DOCUMENTS relating to, referring to, or evidencing any actions taken by Defendants to create, add, remove, edit or alter the TITLE META TAG of the complaints against PLAINTIFF, including but not limited to documents evidencing changes in the Web page's HTML source code."
Request 39	"DOCUMENTS relating to, referring to, or evidencing any actions taken by Defendants to create, add, remove, edit or alter the DESCRIPTION META TAG of the complaints against PLAINTIFF, including but not limited to documents evidencing changes in the Web page's HTML source code."
Request 40	"DOCUMENTS relating to, referring to, or evidencing any actions taken by Defendants to create, add, remove, edit or alter the KEYWORD META TAG of the complaints against PLAINTIFF, including but not limited to documents evidencing changes in the Web page's HTML source code."

26. On June 24, 2010, I met and conferred with Defendants' counsel on a number of pretrial issues under Local Civil Rule 16, one of which was preservation of ESI.

27. On July 12, 2010, this Court granted Defendants' Motion for Summary Judgment in part with respect to Plaintiffs' civil RICO claim predicated on extortion and granted a Rule Motion to dismiss the civil RICO claim predicated on wire fraud with leave for Plaintiffs to replead wire fraud by July 27, 2010. DN-94.

28. On July 14, 2010, in an email attached hereto as **Exhibit "12,"** I again advised Defendants' counsel of Plaintiffs intention to seek a TRO for preservation of ESI if Defendants counsel would not provide a statement as to the steps taken to

preserve ESI and prevent the overwriting that Defendants indicated at the April 27, 2010 conference and in the May 10, 2010 Joint Rule 26(f) Report:

> "On a related note, I believe around the time of the discovery conference we requested a statement under oath regarding Defendants' preservation of electronic evidence. I believe we received the response "that's not an issue," which is not quite the same as a statement under oath committing to preserve evidence.
>
> Especially now that we are repleading as wire fraud, we would really appreciate a statement under oath as to your client's efforts to preserve and back up ESI. Perhaps it is not possible to get this without a TRO, but if it truly is not an issue, it may save time and money for all concerned later on.
>
> We've already met and conferred on a TRO for preservation of ESI, I believe. Please let me know if you disagree."

Exhibit 12. I received no response to my July 14, 2010 email.

29. On July 22, 2010, Defendants served responses to Plaintiffs' First Set of Requests for Production, a copy of which is attached as **Exhibit "13,"** that claimed that responsive ESI sought by Plaintiffs in Requests 16, 27, 28, 29, 35, 36 and 37 was not relevant.

30. On July 30, 2010, Plaintiffs gave notice to Defendants' counsel of this Application. A true and correct copy of my July 30, 2010 emails is attached as **Exhibit "14."** Plaintiffs also requested that Defendants voluntarily agree to insert a "no index, no follow" meta tag into the HTML for the web pages concerning Plaintiffs, both to preserve the status quo and to mitigate Plaintiffs' damages:

> "[W]e request that you immediately voluntarily insert a <meta name="ROBOTS" content="NOINDEX,NOFOLLOW"> meta tag on the HTML for the web pages containing reports 417493, 423987, 457433, 502429, 57123.
>
> That will preserve the status quo and protect our clients from harm from any future system-wide optimization you may undertake during this litigation.

> Since the meta tag I requested is exclusively in the HTML, that should not affect your ability to claim that reports are not removed or altered."

Exhibit 14. Defendants refused this request, although it would not affect the appearance of the web pages on the Website itself. Id.

31. Based on the history of Defendants' discovery conduct, Plaintiff anticipates that Defendants will claim that no ESI is "relevant" unless it meets Defendants' unreasonable, subjective standards, and will neither retain nor produce any ESI relevant to Plaintiffs' claims, and will again inappropriately move for Summary Judgment claiming, as before, that Plaintiffs have no evidence. See Motion for Sanctions for Discovery Conduct pending before this Court.

B. Facts Relevant to Request for a Protective Order for Witnesses

32. On July 28, 2010, I received a telephone call from Kent Hutcherson. Mr. Hutcherson had provided a Declaration in support of Plaintiffs' First Amended Complaint. A true and correct copy is attached hereto as **Exhibit "15."**

33. Mr. Hutcherson informed me that he had spoken with Defendants' counsel, Ms. Speth, and that she had accused him of being untruthful.

34. Thereafter, Mr. Hutcherson forwarded me a letter that Ms. Speth had sent him on July 28, 2010. A true and correct copy of the letter I was forwarded is attached as **"Exhibit 16."** Ms. Speth's July 28, 2010 letter, inter alia, demanded that Mr. Hutcherson file another declaration with this Court, and demanded that he refrain from taking certain potential future employment adverse to Ms. Speth's clients.

35. Among other things, Ms. Speth's July 28, 2010 letter vigorously castigates Mr. Hutcherson for suggesting that the Communications Decency Act can be challenged in the courts:

> "You further state that the CDA does not provide absolute justice and our legal system allows business owners to challenge it. . . . you imply that the

> CDA can be challenged in the courts. The CDA is a statute; therefore, any true challenge to its language and effect must be undertaken by Congress, and not by any court. *See Noah v. AOL Time Warner, Inc*., 261 F. Supp.2d 532, 539 (E.D. Va. 2003), aff'd sub nom. *Noah v. AOL-Time Warner, Inc*., 2004 WL 602711 (4th Cir. 2004) ("It is not the role of the federal courts to second-guess a clearly stated Congressional policy decision."). Your attempt to mislead the public into hiring you to file a frivolous lawsuit against Xcentric on the basis that Xcentric's immunity under the CDA can be "challenged" is based on a faulty legal presumption, which you know to be improper."

Exhibit 16.

36. These misrepresentations of law, and the role of the federal courts in interpreting statutory law, would have a profound chilling effect if made to laypeople. Part of the very statute that Ms. Speth insists cannot "be challenged in the courts," the CDA (Communications Decency Act), was struck down as unconstitutional by the United States Supreme Court in Reno v. ACLU, 521 U.S. 844 (1997) (striking down 47 U.S.C. § 223, as overbroad and violative of the First Amendment). Ms. Speth's assertions combine a demonstrated willingness to misrepresent the law – in this case, the doctrine of judicial review, established in Marbury v.Madison, 5 U.S. 137, 180 (1803) -- and an authoritative tone that could mislead laypeople. Plaintiffs are concerned about the chilling effect of any such extrajudicial contact by Defendants' counsel with witnesses.

37. At a July 20, 2010 conference between Plaintiffs' counsel and Defendants' counsel, Ms. Speth and another of Defendants' counsel, Adam Kunz of Jaburg & Wilk, demanded that I provide the names of all persons who had provided input into the First Amended Complaint or otherwise were interested in potentially asserting similar claims for relief against Defendants. I provided certain names to Defendants' counsel in the context of a potential motion to add parties.

38. On July 20, 2010, Mr. Kunz stated to me, “It’s like herding cats,” referring to Defendants’ desire to contain all information about potential claims against Defendants through contacting witnesses.

39. On July 20, 2010, Defendant Ed Magedson looked at me and told me that Ripoff Reports happen to everyone, and said “It will happen to you.”

40. On July 20, 2010, Defendant Ed Magedson also approached me physically and told me “You’re going to be on the cover of my book,” which I later came to understand is a book about his dissatisfaction with lawyers.

41. I do not bear any personal animosity towards Mr. Magedson, nor have I ever exhibited any. As my clients and co-counsel are aware, I have repeatedly expressed that I share and respect Mr. Magedson’s passion for First Amendment liberties, particularly on the Internet.

42. However, Plaintiffs have a valid concern regarding the chilling effect of Defendants’ counsel on witnesses.

43. Defendants’ counsel have a long history of making threats to Plaintiffs’ counsel. See, e.g., Plaintiffs’ pending Motion for Sanctions. Defendants counsel repeatedly threaten Plaintiffs’ counsel with a variety of retaliatory actions on unspecified grounds, ranging from a lawsuit in Arizona for abuse of process, a future lawsuit for malicious prosecution, and Rule 11 sanctions, most recently on July 30, 2010.

44. The threats of a lawsuit against Mr. Blackert and me personally were made most recently on July 20, 2010 at a conference between Ms. Speth, Mr. Gingras, Mr. Kunz, Mr. Blackert and myself.

45. On July 20, 2010, Defendants’ counsel offered a release of the future claims for malicious prosecution and abuse of process threatened against Mr. Blackert and me personally if we would effect an immediate settlement of the case between our clients and Defendants for a payment of either $35,000 or $50,000 from our clients to Defendants, which Defendants’ counsel referred to as attorneys’

fees. The numbers proposed seemed arbitrary and did not seem to reflect actual legal billings, since Ms. Speth proposed $35,000 and Mr. Kunz proposed $50,000. Similarly, the settlement amount proposed previously has been a round number of $25,000.

46. Prior to July 20, 2010, I previously requested Defendants' counsel, in writing, to provide the specific bases for their threatened Rule 11 sanction petition, and to refrain from threatening legal action for malicious prosecution, given that this action has not terminated in their favor and there is currently no good-faith basis for such a claim. Defendants' counsel have persisted in making threats of Rule 11 sanctions, without specifying the basis, most recently on July 30, 2010, when I called to confer on this application.

47. When I was seeking a witness qualified in search engine optimization ("SEO") to give testimony or speak with me about this action, I had great difficulty. One wanted to participate but his attorneys would not let him. Another would not speak with me, as I was informed by counsel. Another expressed being afraid of being sued by Defendants for being a neutral expert witness.

48. Given Ms. Speth's July 28, 2010 letter to Mr. Hutcherson, and Defendants' history of making veiled and explicit threats to Plaintiffs' counsel, Plaintiffs have a *bona fide* concern that contact by Defendants' counsel with other witnesses outside of formal discovery methods may be intimidating, and may have a chilling effect on potential participation in this action.

49. This Application is made following the conferences of counsel that occurred on April 27, 2010, June 24, 2010, and July 20, 2010, and other communications between counsel dated April 22, 2010, April 27, 2010, May 27, 2010, May 29, 2010, May 30, 2010, and July 14, 2010, and by contacting Defendants' counsel pursuant to L.R. 7-3 and notice of this *ex parte* application pursuant to L.R. 7-19 on July 30, 2010.

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

Executed this 3rd day of August, 2010, in Los Angeles, California.

/s/ Lisa J. Borodkin
Lisa J. Borodkin