



Lisa Borodkin &lt;lborodkin@gmail.com&gt;

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**Re: Meet and Confer - AEI v. Xcentric (C.D. Cal. 10-CV-1360)**

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Lisa Borodkin &lt;lisa\_borodkin@post.harvard.edu&gt;

Thu, Apr 22, 2010 at 10:23 PM

To: david@ripoffreport.com, mcs@jaburgwilk.com

Cc: Daniel Blackert &lt;blackertesq@yahoo.com&gt;, alexandra@asiaecon.org, kristi@asiaecon.org

Dear David:

We met after the last court hearing. Hope all is well. I am co-counsel with Daniel Blackert for the plaintiffs on this case and would appreciate being cc:ed on future communications.

Thank you for your Initial Disclosures and for tackling the first draft of a discovery plan. Our Initial Disclosures will follow shortly.

**1. Initial Disclosures under Rule 26(a)(1)**

Our understanding of the Court's Order is that we should meet and confer regarding Initial Disclosures. As a formal matter, we would like to abide by what the Court told us to do. Daniel and I are both available at your suggested time of 3 p.m. on Tuesday, April 27, 2010 and will call you at that time.

Keeping in mind that the Court has bifurcated to advance the trial of only the RICO and extortion claims, we would like to ask you to voluntarily supplement your Initial Disclosures to identify and describe, without awaiting a request, categories of documents relating to the Corporate Advocacy Program ("CAP").

We are certain that this will be a material issue -- if not the key issue -- in the bifurcated trial and any motion for summary judgment you may bring. In other words, please let us know what documents you have that you will use to show how the CAP program works, who has used it, the reports prepared under it, payments, collected, investigations conducted thereunder, etc. In particular, we expect that you have responsive, discoverable emails.

**2. Discovery Plan under Rule 26(f)(3)**

We would also be happy to use the teleconference at 3 p.m. on Tuesday, April 27, 2010, to work on a discovery plan with you. Our initial positions on your proposals below are as follows:

**3. Response time to discovery**

We can discuss the reasons for your request for shortened time periods.

Our initial position is that we should follow the Federal Rules on response times. Rather than shortening, and extending specific responses on an ad hoc basis, we believe the same efficiency can be accomplished by restricting discovery solely to topics relevant to the RICO and extortion claims in the bifurcated trial.

We agree that bifurcating discovery to match the bifurcated trial makes sense. It will cut out a lot of time and eliminate many potential discovery disputes.

**4. Depositions under Rule 30(a)(1)**

Our clients are available for deposition generally at any time.

What we propose in this regard is to make Iliana Llaneras available to you first, then to take the deposition of Ed Magedson in Los Angeles, then to make Raymond Mobrez available to you. Ideally, we would like to depose Mr. Magedson the week of May 10, 2010 and to have your CAP program documents in hand at least a week before his deposition. Please let us know if that works for you.

With regard to Mr. Magedson's personal deposition, we would appreciate it if you could be prepared to make him available for the full 7-hour deposition in a single day permitted by Rule 30(d)(1) if needed.

We are agreeable to your wanting to split the total 7-hour deposition times of Ms. Llaneras and Mr. Mobrez between dates if you choose, and will work with you on a stipulation to make them reasonably available on other issues later.

We plan to have a videographer at Mr. Magedson's deposition.

## 5. Discovery Plan

### **(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;**

Plaintiffs' Position:

Plaintiffs plan to serve Initial Disclosures by Friday, April 22, 2010. Plaintiffs will supplement as necessary.

Defendants' Position:

Defendants served their initial disclosures on April 21, 2010. Defendants will supplement as necessary.

### **(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;**

Plaintiffs' Position:

Plaintiffs would agree to stipulate to conduct discovery at this time only on issues relevant to the bifurcated trial on the RICO and extortion claims.

Defendants' Position:

Based on the court's order bifurcating this matter, Defendants believe that discovery should be initially focused on the matters set for trial in August. However, unless the court enters an order staying discovery as to any other matters or unless Plaintiffs agree to a stay, Defendants intend to pursue discovery as to each issue in the case.

Based on experience and assuming no stay, Defendants intend to pursue discovery as to each of the following areas:

- Any facts giving rise to Plaintiffs' claims;
- Any facts relating to Plaintiffs' damages;
- Evidence relating to the truth or substantial truth of the statements at issue;
- Evidence relating to Plaintiffs' credibility.

### **(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;**

Plaintiffs' Position:

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. Also, exchanging information in electronic or native format will save vast amounts of time and money.

Plaintiffs request that Defense counsel read and agree to follow the spirit of the Sedona Conference Cooperation Proclamation regarding ESI at [http://www.thesedonaconference.org/content/tsc\\_cooperation\\_proclamation](http://www.thesedonaconference.org/content/tsc_cooperation_proclamation)

The Sedona Conference Cooperation Proclamation has been endorsed by many federal courts and is intended to foster cooperation in discovery and keep costs down. We think these goals are consistent with the Court's Order of March 4, 2010 Re: Status Conference [DN-7].

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.

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. These are all directly relevant to the claim for extortion.

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.

Defendants' Position:

N/A

**(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;**

Plaintiffs' Position:

Plaintiffs believe it may not be necessary to identify the author(s) of the postings at issue in this case at this time due to the Court's bifurcation of issues. Plaintiffs reserve the right to seek such information later, and to challenge claims of privilege.

Defendants' Position:

In the event Plaintiffs wish to obtain discovery of information that may lead to the identity of the author(s) of the postings at issue in this case, Defendants note this information is subject to First Amendment privilege. See *Mobilisa v. Doe*, 217 Ariz. 103 (App. 2007); *UMG Recordings, Inc. v. Does 1–4*, 2006 WL 1343597, \*2 (N.D. Cal. 2006). As such, Defendants will not produce any such privileged information absent compliance with the standards set forth in *Mobilisa v. Doe* and related cases.

**(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and**

Plaintiffs' Position:

Plaintiffs prefer to follow the Federal Rules for discovery responses. Plaintiffs will reasonably consider exceptions on a case-by-case basis.

Plaintiffs believe that discovery shall be narrow, limited, and can be handled within the time frame set under the Federal Rules through reasonable cooperation and planning.

Defendants' Position:

Defendants request that the parties agree to expedited discovery responses (10 days from date of service with short reasonable extensions if necessary) for all requests under Rules 33, 34 and/or 36.

**(F) any other orders that the court should issue under Rule 26(c) or under [Rule 16\(b\)](#) and [\(c\)](#).**

Plaintiffs' Position:

Plaintiffs generally agree not to seek discovery regarding Defendants' overall financial condition (e.g. operations, salary, overhead) in this phase of the bifurcated action; however, Plaintiffs believe that information regarding specific payments under the CAP program are relevant and discoverable, and that certain operating costs relating to the CAP program in particular may be relevant to the issue of whether customers received value for their payments.

Plaintiffs expect that Defendants will not seek to discovery financial information from them in this phase of the case. Given that the Court excluded damages from the bifurcated trial, Plaintiffs request Defendants stipulate to the element of "injury to business" solely for purposes of the liability phase of the RICO claims at this time.

Defendants' Position:

To the extent Plaintiffs intend to seek discovery relating to Defendants' financial condition, such information is subject to the protections of Cal. Civ. Code § 3295(c); *see also Jabro v. Superior Court*, 95 Cal.App.4<sup>th</sup> 754, 115 Cal.Rptr.2d 843 (4<sup>th</sup> DCA 2002) (providing plaintiff who seeks punitive damages is prohibited from seeking discovery of defendant's financial condition absent showing of substantial probability that plaintiff will prevail on claim); *see also Larriva v. Montiel*, 143 Ariz. 23 (App. 1984) (setting even higher standard under Arizona law). As such, although a protective order is not strictly required under Rule 26(c) (because § 3295(c) expressly prohibits such discovery without an order granting leave), Defendants may nevertheless move for an order under Rule 26(c) in the event plaintiffs request discovery of financial evidence without leave of court.

We look forward to speaking with you at 3:00 p.m. Tuesday, April 27, 2010.

Regards,

Lisa

Lisa J. Borodkin

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**From:** "David Gingras" <[david@ripoffreport.com](mailto:david@ripoffreport.com)>

**Date:** Wed, 21 Apr 2010 14:43:38 -0700

**To:** 'Daniel Blackert' <[blackertesq@yahoo.com](mailto:blackertesq@yahoo.com)>

**Cc:** 'Maria Crimi Speth' <[mcs@jaburgwilk.com](mailto:mcs@jaburgwilk.com)>

**Subject:** RE: Meet and Confer - AEI v. Xcentric

Dan,

Thanks, but we don't need to meet and confer re: Rule 26(a) disclosures; these are simply done by both sides as a matter of course without any need to meet and confer. Our initial disclosures are attached and we will supplement them as time goes by.

We do, however, need to meet and confer re: a Rule 26(f)(3) discovery plan. Since you represent the plaintiff, it is customary for you to create the first draft of the plan, but since I already had some notes on this, I went ahead and added my comments. Below are the areas that need to be covered (this comes right out of Rule 26(f)(3)).

Why don't you review this stuff and add your clients' position where appropriate and then we can meet and confer on the phone to discuss anything that needs discussion. April 27<sup>th</sup> is actually no good for me unless you want to meet and confer before 11am or after 3pm. Also, my suggestion is that we meet and confer sooner – even later today, tomorrow, or Friday. This process shouldn't take very long, so there's no reason to put it off for a week or longer.

Also, FYI – as noted in my comments to the plan, I would like to propose that given the expedited schedule, we agree to answer discovery faster than the usual 30 days. For my part, I can probably turn around any number of

reasonable rogs or RFPs within about 5 business days or less, though I am okay with agreeing to use 10 calendar days for both sides. Of course, if any requests are particularly lengthy, we could agree to a reasonable extension of time (maybe 5 additional calendar days) when appropriate, but allowing 30 full days for responses to simple requests makes no sense given the short time available.

Finally, please let me know what dates your clients are available for deposition. In that regard, I think we need to discuss how much time will be needed for each depo and whether we should agree to bifurcate the depositions in the same manner as the trial. FYI – in Arizona, depositions are normally limited by rule to no more than 4 hours. Although we get 7 hours in federal cases, I normally like to go very, very quickly and complete my depositions in as little time as possible. In this case, however, I don't think it makes sense to require me to complete the depo of every possible issue since the trial won't cover a substantial number of issues. Thus, I suggest that we simply agree that both sides can divide the 7 hour time between two dates if they want to do so. This would help me to conduct a quick depo of your clients as needed for the issues to be tried in August, and then if the case continues beyond then, I would complete their depositions on other issues at a later time.

Anyway, talk to your clients about these points and let me know what you think.

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Plaintiffs' Position:

Defendants' Position:

Defendants served their initial disclosures on April 21, 2010. Defendants will supplement as necessary.

**(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;**

Plaintiffs' Position:

Defendants' Position:

Based on the court's order bifurcating this matter, Defendants believe that discovery should be initially focused on the matters set for trial in August. However, unless the court enters an order staying discovery as to any other matters or unless Plaintiffs agree to a stay, Defendants intend to pursue discovery as to each issue in the case.

Based on experience and assuming no stay, Defendants intend to pursue discovery as to each of the following areas:

- Any facts giving rise to Plaintiffs' claims;
- Any facts relating to Plaintiffs' damages;
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- Evidence relating to Plaintiffs' credibility.

**(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;**

Plaintiffs' Position:

Defendants' Position:

N/A

**(D) any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;**

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Defendants' Position:

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**(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and**

Plaintiffs' Position:

Defendants' Position:

Defendants request that the parties agree to expedited discovery responses (10 days from date of service with short reasonable extensions if necessary) for all requests under Rules 33, 34 and/or 36.

**(F) any other orders that the court should issue under Rule 26(c) or under [Rule 16\(b\)](#) and [\(c\)](#).**

Plaintiffs' Position:

Defendants' Position:

To the extent Plaintiffs intend to seek discovery relating to Defendants' financial condition, such information is subject to the protections of Cal. Civ. Code § 3295(c); see also *Jabro v. Superior Court*, 95 Cal.App.4<sup>th</sup> 754, 115

Cal.Rptr.2d 843 (4<sup>th</sup> DCA 2002) (providing plaintiff who seeks punitive damages is prohibited from seeking discovery of defendant's financial condition absent showing of substantial probability that plaintiff will prevail on claim); see also *Larriva v. Montiel*, 143 Ariz. 23 (App. 1984) (setting even higher standard under Arizona law). As such, although a protective order is not strictly required under Rule 26(c) (because § 3295(c) expressly prohibits such discovery without an order granting leave), Defendants may nevertheless move for an order under Rule 26(c) in the event plaintiffs request discovery of financial evidence without leave of court.

David Gingras, Esq.

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**From:** Daniel Blackert [<mailto:blackertesq@yahoo.com>]

**Sent:** Wednesday, April 21, 2010 11:07 AM

**To:** david gingras

**Cc:** [KRISTI.JAHNKE@GMAIL.COM](mailto:KRISTI.JAHNKE@GMAIL.COM); alex z

**Subject:** Meet and Confer

David,

Per the Court's ORDER on the record at the Hearing on April 19, 2010, are you available at 11:00 a.m. on Tuesday April 27, 2010, to meet and confer regarding initial disclosures on the topics covered in FRCP 26(a)(1)(a)? We can do this via telephone.

Here is a copy of the Rule:

**(a) Required Disclosures.**

(1) Initial Disclosures.

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy — or a description by category and location — of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under [Rule 34](#) the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under [Rule 34](#), any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

If this works for you, then please confirm it. If this does not work, then please propose an alternate time and date within the next 3 days.

Thank you.

DANIEL F. BLACKERT, ESQ.,

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