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AEI v. Xcentric -- Response to "Newly Discovered Evidence"

Lisa Borodkin <lborodkin@gmail.com> **Wed, Jul 14, 2010 at 11:40 PM**
To: "<david@ripoffreport.com>" <david@ripoffreport.com>
Cc: "<blackertesq@yahoo.com>" <blackertesq@yahoo.com>, Maria Crimi Speth <mcs@jaburgwilk.com>

Thanks David.

We appreciate your declaration.

Although as a formal matter we reserve the right to object to portions of your declaration as lacking in foundation, this is helpful.

I appreciate that your declaration was extremely helpful, appreciated and no doubt saved us all a great deal of time and trouble.

However, I don't think your declaration or the attachments conclusively support Maria's assertions.

To be clear, she said:

"You articulated in court that the wire fraud claim is based on the false representation that Rip-off Reports does not remove reports. In addition to lack of reliance and causation, the statement is true."

Here's where we'd have follow up questions. If you want to provide your position -- which is of course optional -- I think that might help further clarify our legal and factual analysis.

1. Your declaration does speak to specific incidents and that is very helpful. However, we do not see it as unequivocally and directly establishing the challenged assertion, that is, that "Rip-off Reports does not remove reports".

2. I read with great interest the attachments to your declaration (consisting of correspondence with the attorney for the 16-year old girl) and noticed quite conspicuously that you qualified your statements about removing Ripoff Reports with "general" or "generally." That is:

"First, as a general rule, Ripoff Report does not remove reports."

and

"Second, although we are generally unwilling to remove or redact reports, we always have the editorial discretion to do so."

Perhaps there is some reason for that qualifier "generally." We'd likely want a statement under oath from Defendants that does not include such an equivocation.

It may be that ultimately Xcentric will have to designate someone under Rule 30(b)(6) to answer that topic under oath to bind the entity to the statement. Under Rule 30(b)(6), that person does not have to have first-hand knowledge, only knowledge sufficient to bind the entity.

Also, I realize that is slightly different from what my email requested. If you have a way of handling that, we are open to it.

3. An ordinary person's reading of the email I referred to in Monday's oral argument would be that someone asked you to take down a report and Defendants said "YES."

I do appreciate the distinction you seem to be drawing between removal and redaction, but to be blunt, I don't think you are effectively communicating that distinction to people you are dealing with, such as Jan Smith, Tina Norris, and Sebastian Karnaby, whether in your emails or phone calls.

Therefore, Ms. Smith reasonably thought Defendants might take down reports, and you seem to be suggesting in your recent declaration without really stating that Defendants never take down reports.

Because we still don't have a statement under oath that Xcentric never takes down reports, we are still analyzing what to make of this apparent contradiction.

(As a formal matter, please note Mr. Karnaby was in our Rule 26 Further Supplemented Initial Disclosures [Set Six] but not actually on our draft witness list.)

4. We are investigating another factual issue regarding the claim that reports are never removed.

It seems that an entire category of Ripoff Reports that I understand were previously categorized under "Suspicious Activity" are no longer on the site.

These, we believe, formerly included reports about Jan Smith and Bob Holiday.

If you want to provide input on that, you can as well.

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.

5. I appreciate your citation to Sosa v. Direct TV, 437 F.3d 923, 941 (9th Cir. 2006) and your sending me the opinion earlier today in Hemi Group LLC v. City of New York, 130 S. Ct. 983, 986 (2010) on the issues of proximate causation. I agree that Hemi is the law on proximate cause under RICO, and also squares on the proximate cause issue with Holmes v. Securities Investor Protection Program, 503 U.S. 258, 268 (1992), and Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458-61 (2006).

However, I also note that you are very careful to frame Sosa in terms of the proximate cause standard under RICO, and not reliance, which was an element that Maria brought up.

Proximate cause, as you probably know, is different than first party reliance.

I would be sincerely interested in your thoughts on whether you plan to argue that first-party reliance is an element of wire fraud under 18 U.S.C. Section 1343 as a predicate act of RICO in light of the Supreme Court's 2008 decision in Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, __, 128 S. Ct. 2131, 2145 (2008). That decision made it very clear that the common-law fraud element of first-party reliance is not to be read into the wire fraud statute for purposes of RICO:

"We see no reason to change course here. RICO's text provides no basis for imposing a first-party reliance requirement. If the absence of such a requirement leads to the undue proliferation of RICO suits, the “correction must lie with Congress.” *Id.*, at 499, 105 S.Ct. 3275. “It is not for the judiciary to eliminate the private action in situations where Congress has provided it.” *Id.*, at 499-500, 105 S.Ct. 3275.

IV

For the foregoing reasons, we hold that a plaintiff asserting a RICO claim predicated on mail fraud need not

show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations. Accordingly, the judgment of the Court of Appeals is affirmed."

Bridge, 553 U.S. at __, 128 S.Ct. at 2145.

The Supreme Court in Bridge was quite clear that RICO cases predicated on acts of mail or wire fraud (and since you have cited Anza and Sosa, both of which are mail fraud RICO cases, I'll assume you agree with me that there is no reasoned basis to treat mail fraud RICO any differently from wire fraud with respect to causation) do not require first-party "reliance" on the false statements for the prima facie case, as opposed to claims of fraud under common law.

In short, first-party reliance is simply not an element of RICO wire fraud. I hope you and Maria take that into account in making any motion to dismiss or in any arguments to the Court. Of course if you know of binding authority that says differently, please let me know.

6. Maria asserted that because the Court "granted a rule 9(b) motion on wire fraud. That means that as of today the RICO claim is dismissed."

I am not sure what the import of that is in her mind, but as a technical matter, to the extent she is suggested we are to plead wire fraud but not to plead RICO we do not agree.

There is no stand-alone civil cause of action for wire fraud, 18 U.S.C. 1343, at least as far as I know. See, e.g., Wisdom v. First Midwest Bank of Poplar Creek, 167 F.3d 402, 408 (8th Cir. 1999). Therefore we are proceeding on the assumption that we are to replead as RICO wire fraud.

I assume this is not an issue, since you are still sending us RICO cases, but I thought it might be useful to resolve any doubts about Maria's comment.

To the extent that any of the above is helpful to you in understanding our RICO wire fraud theory in layman's terms, please consider this part of the email ordered by the Court that is due tomorrow.

Thanks very much again for your declaration.

Lisa

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