

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

7 David S. Gingras, CSB #218793
 8 David.Gingras@webmail.azbar.org
 9 **Gingras Law Office, PLLC**
 10 4072 E Mountain Vista Dr.
 11 Phoenix, AZ 85048
 12 Tel.: (480) 668-3623
 13 Fax: (480) 248-3196
 14 David.Gingras@webmail.azbar.org

15 Attorneys for Defendants
 16 Xcentric Ventures, LLC and
 17 Edward Magedson

18 **UNITED STATES DISTRICT COURT**
 19 **CENTRAL DISTRICT OF CALIFORNIA**

20 **ASIA ECONOMIC INSTITUTE, LLC,**
 21 *et al.,*

22 **Plaintiffs,**

23 v.

24 **XCENTRIC VENTURES, LLC, et al.,**

25 **Defendants.**

Case No: 2:10-cv-01360-RSWL-PJW

[DISCOVERY MATTER]

**DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' EX PARTE TRO
 APPLICATION**

26 **I. INTRODUCTION**

27 Unfortunately, despite this court's admonitions, this case continues tumbling
 28 deeper and deeper down the proverbial rabbit hole. As explained briefly herein, the
 current matter before the court (Plaintiffs' *Ex Parte* TRO Application) is factually and
 legally groundless and it should be denied in its entirety.

**DEFENDANTS' OPPOSITION TO
 EX PARTE TRO APPLICATION**

2:10-cv-01360-SVW-PJW

JABURG & WILK, P.C.
 ATTORNEYS AT LAW
 3200 NORTH CENTRAL AVENUE
 SUITE 2000
 PHOENIX, ARIZONA 85012

1 Plaintiffs' *Ex Parte* Application violates the motion practice rules of this Court
2 because there is no urgency justifying proceeding *Ex Parte*. Indeed, Plaintiffs' pleading
3 reflects that the parties have been discussing the ESI issue for months.

4 Also, because there is no urgency whatsoever as to any matter raised in the
5 application, Defendants respectfully request that the court delay any consideration of
6 Plaintiffs' application for at least 21 days from today in order to permit Plaintiffs an
7 opportunity to withdraw the pleading following the Motion for Rule 11 Sanctions that was
8 served today but not filed.

9 II. ARGUMENT

10 Before discussing the specific points in Plaintiffs' application, Defendants note that
11 despite requesting a temporary restraining order, Plaintiffs have completely failed to
12 address or discuss the legal standards for such relief; "The traditional equitable criteria for
13 granting preliminary injunctive relief are (1) a strong likelihood of success on the merits,
14 (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted,
15 (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public
16 interest (in certain cases)." *Johnson v. California State Bd. Of Accountancy*, 72 F.3d
17 1427, 1430 (9th Cir 1995) (quoting *Dollar Rent A Car v. Travelers Indem. Co.*, 774 F.2d
18 1371, 1374 (9th Cir. 1985). "Alternatively, a court may issue a preliminary injunction if
19 the moving party demonstrates 'either a combination of probable success on the merits
20 and the possibility of irreparable injury or that serious questions are raised and the balance
21 of hardships tips sharply in his favor.' " *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675
22 (9th Cir. 1984) (quoting *William Inglis & Sons Baking Co. v. IIT Continental Baking Co.*,
23 526 F.2d 86, 88 (9th Cir. 1975)).

24 Here, Plaintiffs' application contains no discussion whatsoever of the crucial
25 question—whether their newly-repleaded wire fraud claim has a *strong likelihood of*
26 *success*. The omission of this analysis is hardly surprising given the breathtaking lack of
27 merit in this case. For instance, Plaintiffs' FAC accuses Defendants of engaging in wire
28

1 fraud by, *inter alia*, designing the Ripoff Report website in such a way that certain pages
2 are hard to print. See FAC (Doc. #96) ¶¶ 56–58. This is not a serious or valid claim.

3 Neither does the TRO application show that “serious questions are raised and the
4 balance of hardships tips sharply in [Plaintiffs’] favor.” This is so as to the three areas
5 covered by Plaintiffs’ application as explained herein.

6 **a. Plaintiffs Are Not Entitled To A TRO re: ESI**

7 At least four reasons exist for denying Plaintiffs’ TRO request as it related to
8 electronically stored information.

9 First, the law already imposes a duty on all parties to preserve relevant evidence,
10 including ESI. See generally *Keithley v. HomeStore.com, Inc.*, 2008 WL 3833384 , *2
11 (N.D.Cal. 2008) (awarding \$148,269.50 in fees and costs after litigant failed to effect
12 “litigation hold” on relevant information). The current TRO requested by Plaintiffs is
13 wholly duplicative of duties which *already* are imposed on both Plaintiffs and Defendants.
14 As such, the requested relief is completely unnecessary.

15 Second, Plaintiffs fail to recall that on June 24, 2010, they asked for and received
16 (over Defendants’ objection) an order from this court staying discovery in this matter as to
17 all issues except for their extortion claim which has, of course, been resolved in favor of
18 Defendants on summary judgment. The reason Plaintiffs requested this order was
19 obvious—they knew their allegations in this case were 100% factually frivolous, and they
20 knew that Defendants would promptly expose this fact if discovery was not stayed. For
21 that reason, Plaintiffs requested and obtained a discovery stay in order to prevent
22 Defendants from exonerating themselves. Because Plaintiffs have actively sought to
23 avoid discovery, there is no equitable basis to conclude they are now entitled to
24 *emergency* injunctive relief which has the effect of lifting the very stay which Plaintiffs
25 demanded.

26 Third, there is simply no need of any kind for a TRO or any other relief from this
27 court because all (or substantially all) of the “ESI” Plaintiffs are seeking is freely available
28

1 to them at any time by merely viewing the Ripoff Report website. Specifically, Plaintiffs
2 allege that their wire fraud claims are based on 58 web pages “referenced in the
3 pleadings” including certain unspecified HTML and “meta tags”. Given Plaintiffs’
4 whack-a-mole litigation strategy (wherein a legal or factual theory advanced by Plaintiffs
5 will be promptly defeated by Defendants and then replaced with a new but equally
6 groundless theory), Defendants are, for the most part, unaware of exactly what 58 specific
7 pages are involved. Nevertheless, the fact remains that Plaintiffs are free to view the
8 Ripoff Report website at any time, capture these 58 pages (including the HTML
9 associated with those pages), and in doing so, they will obviate any need for Defendants
10 to “preserve” these pages.

11 Fourth, Plaintiffs’ TRO request is unnecessary because as explained in the
12 Declaration of Justin Crossman submitted herewith, Defendants do keep and maintain all
13 data in the database, even when changes are made. As such, there is no imminent risk that
14 any information will be lost if immediate injunctive relief is denied.

15 **b. Plaintiffs Are Not Entitled To A TRO Requiring Defendants To**
16 **Insert A “NoFollow” Tag Into Reports About Plaintiffs**

17 In an effort to “slip one past” the court, Plaintiffs ask the court for an order
18 requiring Defendants to insert certain HTML code into the reports about Plaintiffs
19 including “ROBOTS.txt” and “NoFollow” tags. These tags have the effect of removing
20 the pages from search results. *See* Crossman Decl. ¶ 17.

21 Although Plaintiffs’ application briefly mentions this request, there is no
22 explanation of the legal or factual basis for the request. This is hardly surprising because
23 what Plaintiffs are seeking is nothing less than an unconstitutional prior restraint on
24 speech. As explained in the California Supreme Court’s seminal case of *Balboa Island*
25 *Village Inn, Inc. v. Lemen*, such prior restraints are presumptively unconstitutional and
26 may only be entered *after* a trial on the merits in which the speech at issue has been found
27 to be defamatory. *See Lemen*, 40 Cal.4th 1141, 1157–58 156 P.3d 339, 332–33 (Cal. 2007)
28

1 (recognizing “The traditional rule of Anglo-American law is that equity has no
2 jurisdiction to enjoin defamation[]” but concluding that a post-trial injunction against
3 defamation was permissible); *see also* 2 Smolla & Nimmer on Freedom of Speech § 15:57
4 (discussing *Lemen* and propriety of pre-trial injunctive relief).

5 **c. Plaintiffs Are Not Entitled To A TRO re: “Interference With**
6 **Witnesses”**

7 In keeping with their scheme of making groundless requests solely to increase the
8 costs of this meritless action, Plaintiffs falsely allege that Defendants have improperly
9 “interfered” with a witness named Kenton Hutcherson. The facts of this issue are
10 extremely simple.

11 Mr. Hutcherson is a Texas-based attorney who currently represents and has in the
12 past represented parties in litigation against Ripoff Report, including one case filed in the
13 U.S. District Court for the District of Arizona styled *Xcentric Ventures, LLC v. William*
14 *Stanley, et al.*, 2:07-cv-00954-GMS (the “Stanley litigation”). In short, the Stanley
15 litigation was a case in which Xcentric (as plaintiff) sued several defendants for engaging
16 in a series of illegal cyber-attacks against the Ripoff Report website. In addition to
17 injunctive relief, Xcentric eventually obtained a judgment awarding damages of
18 \$479,740.51 against one defendant who was not represented by Mr. Hutcherson.

19 Based on evidence that Mr. Hutcherson’s client was involved in these attacks,
20 Xcentric entered into a settlement agreement in which Mr. Hutcherson’s client agreed to
21 pay \$100,000 in damages to Xcentric. As part of this agreement, which is attached as
22 **Exhibit 8** to Plaintiffs’ FAC (Doc. #96-8) Xcentric also promised to monitor any new
23 reports about Mr. Hutcherson’s client in order to verify that the complaint was created by
24 an actual customer. After entering into this agreement, Xcentric inadvertently allowed
25 two new reports to be posted about Mr. Hutcherson’s client without the pre-publication
26 confirmation required by the settlement agreement.

1 In order to cure or avoid a default as a result of the inadvertent failure to verify the
2 author of the posting was a customer, Xcentric decided it would be appropriate to remove
3 the two reports about Mr. Hutcherson's client despite its general policy of never removing
4 reports.

5 Bizarrely, these events (which had no effect whatsoever on Plaintiffs) form a
6 substantial part of Plaintiffs' wire fraud allegations because Plaintiffs allege that
7 Defendants falsely represent that they "do not remove reports" from the Ripoff Report
8 website when, on one occasion, they did so for the reports about Mr. Hutcherson's client
9 based on the unusual circumstances of that mater.

10 On July 27, 2010, Mr. Hutcherson submitted a declaration (Doc. #96-12)
11 describing these issues in support of Plaintiffs' First Amended Complaint. His declaration
12 was misleading in that he did not explain the full circumstances of the matter. Defendants
13 subsequently learned that Mr. Hutcherson also issued a press release on July 28, 2010
14 (attached hereto as **Exhibit A** and also available here: [http://pdf.pr.com/press-release/pr-
15 252020.pdf](http://pdf.pr.com/press-release/pr-252020.pdf)) in which he boasted about his involvement in this matter and implied—
16 falsely—that he had successfully negotiated the removal of negative information from the
17 Ripoff Report site for his client as part of the client's settlement agreement with Xcentric.
18 Mr. Hutcherson also made specific false statements about the material elements of the
19 settlement agreement as follows:

20 On May 15, 2009, Kenton Hutcherson resolved a legal dispute between his
21 client and Xcentric Ventures, LLC. As a part of the terms of the settlement
22 agreement, Xcentric Ventures LLC agreed to prevent future submissions
23 related to Hutcherson's client from appearing on the Ripoff Report website.

24 **Exhibit A** (emphasis added). Based on Mr. Hutcherson's disappointing decision to make
25 false statements about the Stanley litigation settlement, Defendants immediately contacted
26 Mr. Hutcherson and demanded that he withdraw his press release and provide a new
27 declaration to this court which corrected the seriously misleading nature of his first
28

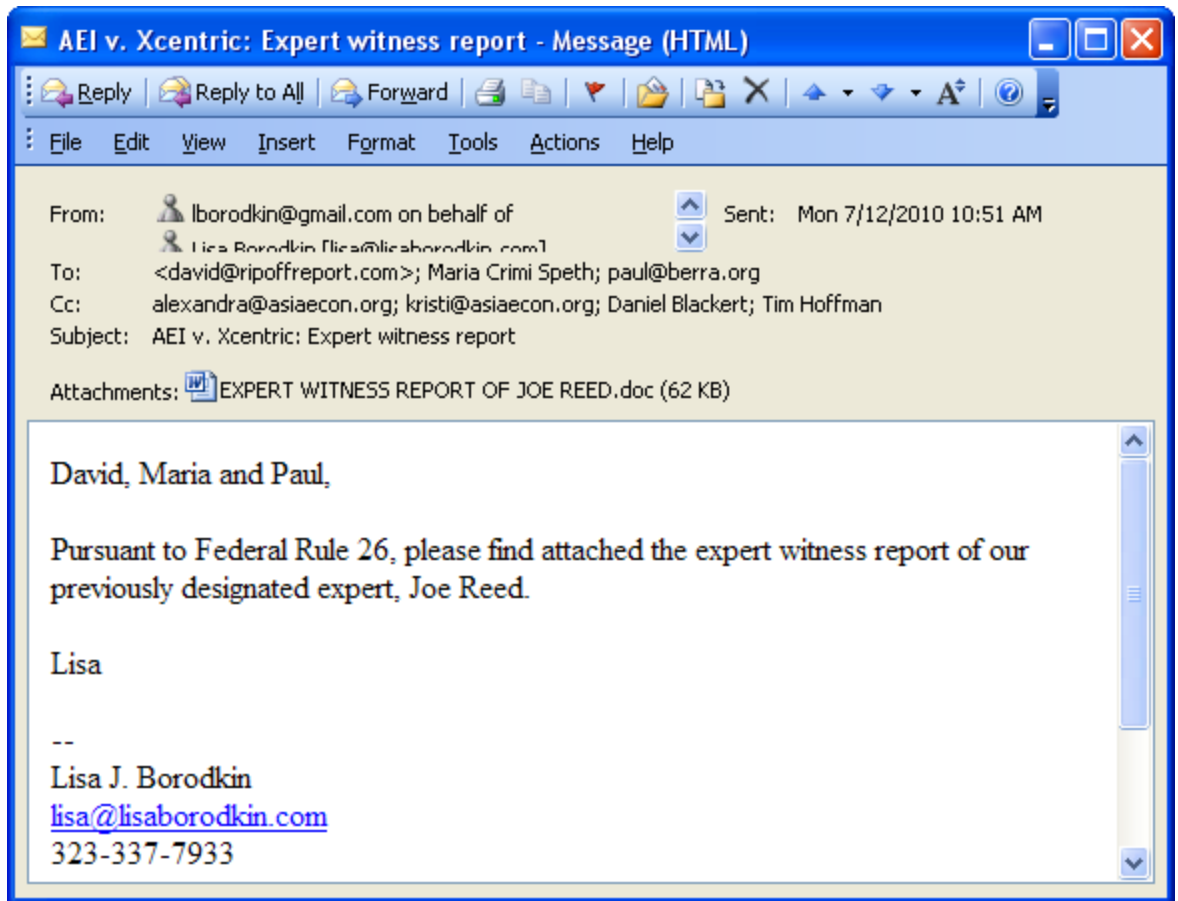
1 declaration. To date, other than promptly forwarding correspondence from Defendants to
2 Plaintiffs' counsel, Mr. Hutcherson has ignored all communication from Defendants on
3 this issue.

4 No part of Defendants actions vis-à-vis Mr. Hutcherson are improper. Again, it is
5 important to note that the primary basis for Defendants' demands to Mr. Hutcherson was
6 not the declaration submitted to this court, but rather those demands were focused on the
7 false statements contained in a press release created and distributed by Mr. Hutcherson.
8 To the extent any statements in the declaration submitted to this court by Mr. Hutcherson
9 may be protected by litigation privilege, that privilege does not give Mr. Hutcherson
10 license to issue press releases which contain false and misleading statements of fact for
11 the purpose of inducing new clients to hire him to commence new litigation against
12 Xcentric. Such conduct is a direct violation of Mr. Hutcherson's ethical duties as an
13 attorney and may result in Defendants taking legal action against Mr. Hutcherson in the
14 future if appropriate.

15 What is particularly ironic about Plaintiffs request is that they are urging this Court
16 to prevent Defendants from attempting to obtain truthful declarations from Mr.
17 Hutcherson while they are in constant communication from Mr. Hutcherson and are
18 obtaining and using misleading declarations from him. When Plaintiffs seek a declaration
19 from a witness, it is presumably acceptable, but when Defendants seek a declaration from
20 a witness, Plaintiffs argue it is witness tampering. In short, Plaintiffs are not entitled to
21 use this litigation as both a sword in which to solicit and distribute false statements and a
22 shield in which to prevent Defendants from responding to those statements in a lawful
23 manner.

24 In terms of Plaintiffs argument that "Defendants' tactics ... [have] interfered with
25 Plaintiffs' ability to locate potential expert witnesses willing to testify," Mot. At 19:17-
26 19, this assertion is unequivocally and demonstrably false. As reflected in **Exhibit B**

1 hereto, Plaintiffs have already retained and disclosed an expert witness named Joe Reed
2 who has prepared a “report” on various issues:



19 Mr. Reed also submitted a declaration in support of Plaintiffs’ TRO request. *See* Doc.
20 #102 (Declaration of Joe Reed). As such, it is manifestly false for Plaintiffs to argue, as
21 they expressly do, that Defendants’ actions have impaired Plaintiffs’ ability to locate a
22 suitable expert. It should cause serious concern to this court for Plaintiffs to *continue*
23 making such knowingly false representations to the court without any apparent regard for
24 their duty of honesty and candor. Defendants respectfully request that the court admonish
25 Plaintiffs that such practices are unacceptable and enter sanctions accordingly.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

III. CONCLUSION

For the reasons stated above, Plaintiffs' *Ex Parte* TRO Application is entirely without merit and it should be denied.

DATED this 4th day of August, 2010.

JABURG & WILK, P.C.

/s Maria Crimi Speth
Maria Crimi Speth
Attorneys for Defendants

JABURG & WILK, P.C.
ATTORNEYS AT LAW
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 4, 2010 I electronically transmitted the attached document
3 to the Clerk’s Office using the CM/ECF System for filing, and for transmittal of a Notice
4 of Electronic Filing to the following CM/ECF registrants:
5

6 Ms. Lisa Borodkin, Esq.
7 Mr. Daniel F. Blackert, Esq.
8 Asia Economic Institute
9 11766 Wilshire Blvd., Suite 260
10 Los Angeles, CA 90025
11 Attorneys for Plaintiffs

12 And a courtesy copy of the foregoing delivered to:

13 Honorable Patrick J. Walsh
14 U.S. Magistrate Judge

15 /s/Maria Crimi Speth
16
17
18
19
20
21
22
23
24
25
26
27
28

JABURG & WILK, P.C.
ATTORNEYS AT LAW
3200 NORTH CENTRAL AVENUE
SUITE 2000
PHOENIX, ARIZONA 85012