

Maria Crimi Speth (Admitted *Pro Hac Vice*)
JABURG & WILK, P.C.
3200 North Central Avenue, Suite 2000
Phoenix, Arizona 85012
(602) 248-1000

David S. Gingras, CSB 218793
David.gingras@webmail.azbar.org
GINGRAS LAW OFFICES, PLC
4072 E. Mountain Vista Dr.
Phoenix, AZ 85048
(480) 668-3623

Attorneys for Defendants
Xcentric Ventures, LLC and
Edward Magedson

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

ASIA ECONOMIC INSTITUTE, a
California LLC; RAYMOND MOBREZ an
individual; and ILIANA LLANERAS, an
individual,

Plaintiffs,

v.

XCENTRIC VENTURES, LLC., et. al.,

Defendants.

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

**NOTICE OF MOTION TO STRIKE
MATERIAL FROM DOCUMENTS 118
AND 121 AND MOTION FOR
SANCTIONS AND MEMORANDUM
IN SUPPORT**

(Assigned to the Honorable Stephen V.
Wilson)

Date: September 20, 2010
Time: 1:30 p.m.
Courtroom: 6

TO ALL PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT ON September 20, 2010 at 1:30 p.m., in Courtroom 6 of the above-entitled court, located at 312 N. Spring Street in Los Angeles, California, Defendants Xcentric Ventures, LLC and Ed Magedson will and hereby do move this Court for an order striking Documents 118 and 121 as containing confidential settlement discussions.

This Motion is based upon this Notice, the attached Memorandum of Law, and the Court's file in this matter.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on August 18, 2010.

MEMORANDUM OF LAW

I. INTRODUCTION

Motions to strike pursuant to Rule 12(f) are disfavored and rarely granted. This is one of those rare instances that warrants the application of Rule 12(f). Similarly, it is rare for Courts to invoke their inherent power to sanction litigants, the Court should do so here, where the Plaintiffs have demonstrated bad faith.

Fed.R.Civ.P. 12(f) provides that a court may order stricken from any pleading any "insufficient defense or any redundant, impertinent, or scandalous matter." Courts often require a showing of prejudice by the moving party before granting the requested relief. Here, such prejudice exists because the offending pleadings publicize and misrepresent confidential settlement negotiations in violation of Rule 408.

II. THE PREJUDICE AND THE BAD FAITH

As the Court may recall, Defendants have been the subject of dozens of lawsuits by businesses with fraudulent and wrongful business practices, which were reported on Ripoff Report. None of these lawsuits has ever been successful. Like a martial arts movie, these businesses surround Xcentric and attack one or two at a time hoping to eventually wear it out. Perhaps the Court recalls that at the oral argument on the Motion for Summary Judgment, Plaintiffs almost filled their side of the courtroom with spectators. Those spectators were business owners who have been exposed on Ripoff Report.

As recognized by Judge Kozinski, websites must be protected not merely from ultimate liability, but from having to fight costly and protracted legal battles from clever lawyers who seek to circumvent the protections of the Communications Decency Act; “lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites...” *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174–75 (9th Cir. 2008).

Not only is this case itself one such “duck bite.” Many of the allegations in this case have been filed by Plaintiffs in bad faith and for the purpose of making a public record with the expectation of encouraging more duck bites. Plaintiffs know there are other potential litigants who carefully watch this case, Plaintiffs invite those potential litigants to court, and Plaintiffs send pleadings to them. Lisa Borodkin even sends Twitter messages announcing such things as “Filed federal civil RICO wire fraud complaint against owners of Rip0ffR3port.com.”

Plaintiffs hope to encourage further litigation by providing fodder to other potential litigants. One of the most egregious examples of this comes in the pleadings filed by Plaintiffs on August 16, 2010 and August 17, 2010. By breaching the confidentiality of a court-ordered settlement conference, and by compounding that unscrupulous behavior by misrepresenting the settlement proposal, Plaintiffs have sent a message to other potential litigants that if they sue Xcentric, Xcentric will make favorable settlement offers.

If the Court does not strike Plaintiffs’ detailed (and misrepresented) references to the settlement negotiations, Defendants will suffer substantial harm.

III. ALL REFERENCES TO THE SETTLEMENT DISCUSSIONS SHOULD BE STRICKEN PURSUANT TO RULE 12(F)

Federal Rule of Evidence 408 provides that “conduct or statements made in compromise negotiations regarding the claim” are not admissible when offered to prove liability for a claim that was disputed. One purpose of Rule 408 is the “promotion of the public policy favoring the compromise and settlement of disputes.” *United States v.*

Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982). By preventing settlement negotiations from being admitted as evidence, full and open disclosure is encouraged, thereby furthering the policy toward settlement. *Id.* The second principle underlying the rule is that the evidence is irrelevant as being motivated by a desire for peace rather than for a concession of the merits of the claim. *Id.*

Inadmissible settlement discussions that are included in pleadings and in declarations in support of pleadings should be stricken pursuant to Fed.R.Civ.P. 12(f). *See Sterling Savings Bank v. Citadel Development Company, Inc.*, 656 F.Supp.2d 1248 (D.Oregon 2009); *Cyr v. Reliance Standard Life Insurance Co.*, 525 F.Supp.2d 1165, 1171-72 (C.D. Cal. 2007)(striking exhibit 25 to motion for summary judgment pursuant to Rule 408); *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 40 (S.D.N.Y. 1992).

Moreover, by including these discussions in their pleadings, Plaintiffs have violated the verbal agreement made between the parties at the commencement of the settlement conference to keep the negotiations and discussions confidential. *See* Declaration of Maria Crimi Speth, Exhibit “A”; Declaration of Adam Kunz, Exhibit “B”; Declaration of David Gingras, Exhibit “C”; and Declaration of Edward Magedson, Exhibit “D.”

The following matter should be stricken pursuant to Rule 12(f) as redundant, impertinent, or scandalous matter and pursuant to Rule 408 as inadmissible statements made in compromise negotiations regarding the claim, which are offered by Plaintiffs to prove liability for a claim that is disputed:

Document 118, Motion for Reconsideration. Page 4, lines 1-3;

Document 120, Declaration of Raymond Mobrez, Paragraphs 8-12, 15-16.

IV. PLAINTIFFS SHOULD BE SANCTIONED

A court may assess attorney’s fees when a party has “acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Chambers v. Nasco, Inc.*, 501 U.S. 32,

45 (1991); quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). In this regard, if a court finds “that fraud has been practiced upon it, or that the very temple of justice has been defiled,” it may assess attorney’s fees against the responsible party, as it may when a party “shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order.” 501 U.S. at 46.

The imposition of sanctions in this instance transcends a court’s equitable power concerning relations between the parties and reaches a court’s inherent power to police itself, thus serving the dual purpose of “vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent’s obstinacy.” 501 U.S. at 46. Here sanctions are warranted because Plaintiffs’ bad faith in this instance is the latest in a pattern of behavior to exploit the judicial process to publicly harm Xcentric.

As the Court will recall, this case was commenced based upon the declarations of Plaintiffs that they were extorted in telephone calls. Faced with recorded proof that did not occur, Plaintiffs recanted.

Plaintiffs included wire fraud in the original complaint as a predicate act, and then were unable in court to identify any harm they suffered from the alleged wire fraud.

Plaintiffs then filed a First Amended Complaint (“FAC”) for RICO with wire fraud as a predicate act, but did not oppose a motion to dismiss that claim. (A Rule 11 motion that was served on Plaintiffs but not yet filed pursuant to the 21-day delay rule). The grounds for that Rule 11 motion were provided to Plaintiffs on July 20, 2010, before they filed the FAC. Instead of not filing a claim predicated on wire fraud, Plaintiffs filed it (placing it in the public record) and then withdrew it.

Now, with full knowledge of Rule 408 and of the agreed-upon confidentiality of the settlement discussions, Plaintiffs have publicly disclosed and misrepresented defendants’ settlement offer.

This “lie and withdraw” pattern is more than just a waste of Defendants resources and judicial resources, it is a manipulation of the judicial process to publicly defame defendants under a judicial privilege.

Absent sanction or reprimand from this Court, Plaintiffs will continue this pattern of abusive and bad faith litigation tactics.

V. CONCLUSION

For all of the foregoing reasons, Defendants request that the Court order the pleadings identified above stricken and sealed to remove them from the public record. If Plaintiffs choose to re-file the above listed pleadings, they must first remove the portions identified above.

DATED this 23rd day of August, 2010.

JABURG & WILK, P.C.

/s/ Maria Crimi Speth
Maria Crimi Speth
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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

And a courtesy copy of the foregoing delivered to:

Honorable Stephen V. Wilson
U.S. District Court Judge

/s/Maria Crimi Speth

Exhibit A

DECLARATION OF MARIA CRIMI SPETH

I, Maria Crimi Speth, declare as follows:

1. My name is Maria Crimi Speth. I am a resident of the State of Arizona, am over the age of 18 years, and if called to testify in court or other proceeding I could and would give the following testimony which is based upon my own personal knowledge.

2. I am counsel for Xcentric Ventures, LLC and Edward Magedson in Asia Economic Institute, et. al. v. Xcentric Ventures, et. al., 2:10-cv-01360-SVW-PJW.

3. On July 20, 2010, pursuant to the Order of Magistrate Walsh, I attended a settlement conference at my office. Present were myself, David Gingras, Adam Kunz and Edward Magedson for the Defendants and Lisa Borodkin, Daniel Blackert and Raymond Mobrez for the Plaintiffs.

4. During the settlement conference we expressly verbally agreed that the discussions in the mediation would be kept confidential.

5. I have read the declaration of Raymond Mobrez (Document 120) and the Motion for Reconsideration (Document 118).

6. The depictions in those documents (1) reveal confidential settlement discussions in violation of our agreement; (2) misrepresent some of the statements and proposals that were made; and (3) take statements out of context in a manner which makes them misleading.

7. Because the discussions were confidential, I have not included in this declaration a description of what occurred or otherwise corrected the inaccuracies. However, at the request of the Court, I would be willing to provide a statement for *in camera* review.

I declare the foregoing to be true under penalty of perjury.

DATED this 19th day of August, 2010.



Maria Crimi Speth

Exhibit B

DECLARATION OF ADAM S. KUNZ

I, Adam S. Kunz, declare as follows:

1. My name is Adam S. Kunz. I am a resident of the State of Arizona, am over the age of 18 years, and if called to testify in court or other proceeding I could and would give the following testimony which is based upon my own personal knowledge.

2. On July 20, 2010, I attended a settlement conference at my office related to the Asia Economics v. Xcentric matter. Present were myself, David Gingras, Maria Speth and Edward Magedson for the Defendants and Lisa Borodkin, Daniel Blackert and Raymond Mobrez for the Plaintiffs.

3. During the settlement conference we expressly verbally agreed that the discussions in the settlement conference would be kept confidential.

4. I have read the declaration of Lisa Borodkin (Document 121), the declaration of Raymond Mobrez (Document 120) and the Motion for Reconsideration (Document 118).

5. The depictions in those documents (1) reveal confidential settlement discussions in violation of our agreement; (2) misrepresent some of the statements and proposals that were made; and (3) take statements out of context in a manner which makes them misleading.

6. Because the discussions were confidential, I have not included in this declaration a description of what occurred or otherwise corrected the inaccuracies. However, at the request of the Court, I would be willing to provide a statement for *in camera* review.

I declare the foregoing to be true under penalty of perjury.

DATED this 18th day of August, 2010.


Adam S. Kunz

Exhibit C

DECLARATION OF DAVID S. GINGRAS

I, David S. Gingras, declare as follows:

1. My name is David S. Gingras. I am a resident of the State of Arizona, am over the age of 18 years, and if called to testify in court or other proceeding I could and would give the following testimony which is based upon my own personal knowledge.

2. I am counsel for Xcentric Ventures, LLC and Edward Magedson in Asia Economic Institute, et. al. v. Xcentric Ventures, et. al., 2:10-cv-01360-SVW-PJW.

3. On July 20, 2010, pursuant to the Order of Magistrate Walsh, I attended a settlement conference at my office. Present were myself, Maria Crimi Speth, Adam Kunz and Edward Magedson for the Defendants and Lisa Borodkin, Daniel Blackert and Raymond Mobrez for the Plaintiffs.

4. During the settlement conference we expressly verbally agreed that the discussions in the mediation would be kept confidential.

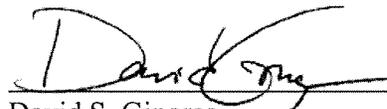
5. I have read the declaration of Lisa Borodkin (Document 121), the declaration of Raymond Mobrez (Document 120) and the Motion for Reconsideration (Document 118).

6. The depictions in those documents (1) reveal confidential settlement discussions in violation of our agreement; (2) misrepresent some of the statements and proposals that were made; and (3) take statements out of context in a manner which makes them misleading.

7. Because the discussions were confidential, I have not included in this declaration a description of what occurred or otherwise corrected the inaccuracies. However, at the request of the Court, I would be willing to provide a statement for *in camera* review.

I declare the foregoing to be true under penalty of perjury.

DATED this 18th day of August, 2010.



David S. Gingras

Exhibit D

DECLARATION OF ED MAGEDSON

I, Ed Magedson, declare as follows:

1. My name is Ed Magedson. I am a resident of the State of Arizona, am over the age of 18 years, and if called to testify in court or other proceeding I could and would give the following testimony which is based upon my own personal knowledge.

2. I am one of the defendants in Asia Economic Institute, et. al. v. Xcentric Ventures, et. al., 2:10-cv-01360-SVW-PJW.

3. On July 20, 2010, pursuant to the Order of Magistrate Walsh, I attended a settlement conference at the Jaburg & Wilk offices. I had with me my three attorneys, David Gingras, Adam Kunz and Maria Speth. Raymond Mobrez was there with his attorneys Lisa Borodkin and Daniel Blackert.

4. During the settlement conference my attorneys and the other side agreed that the discussions in the mediation would be kept confidential.

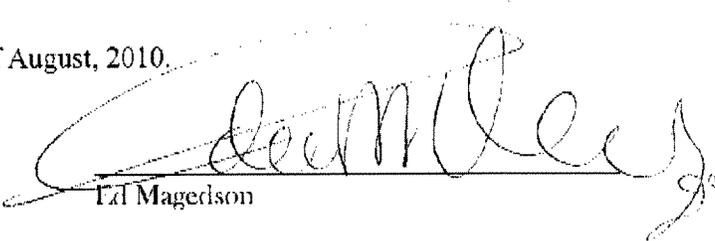
5. I have read the declaration of Lisa Borodkin (Document 121), the declaration of Raymond Mobrez (Document 120) and the Motion for Reconsideration (Document 118).

6. Those documents (1) reveal confidential settlement discussions in violation of our agreement; (2) misrepresent some of the statements and proposals that were made; and (3) take statements out of context in a manner which makes them misleading.

7. Because the discussions were confidential, I have not included in this declaration a description of what occurred or otherwise corrected the inaccuracies. However, at the request of the Court, I would be willing to provide a statement for *in camera* review.

I declare the foregoing to be true under penalty of perjury.

DATED this 18th day of August, 2010.


Ed Magedson