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 9 Edward Magedson

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

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

16 Plaintiffs,

17 v.

18 XCENTRIC VENTURES, LLC., et. al.,

19 Defendants.

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

**DEFENDANTS' RESPONSE TO
 MOTION FOR LEAVE TO AMEND
 PLAINTIFFS' FIRST AMENDED
 COMPLAINT**

(Assigned to the Honorable Stephen V.
 Wilson)

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

21 Defendants Xcentric Ventures, LLC and Ed Magedson oppose Plaintiffs Motion
 22 for Leave to Amend on the grounds that the Motion fails to comply with Local Rule 7-3,
 23 misrepresents to the Court the nature of the proposed amendment, and is futile.

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1 **I. PERTINENT BACKGROUND**

2 The original complaint in this matter was filed on January 27, 2010, was thirty-two
3 pages long and contained claims for common law defamation, unfair business practices,
4 RICO, RICO conspiracy, civil conspiracy, defamation per se, false light, intentional
5 interference with business relationships, negligent interference with business
6 relationships, breach of contract, preliminary injunction and permanent injunction.
7 (Document 1). As the Court will recall, this Complaint was predicated entirely upon the
8 allegedly false statements about Plaintiffs that Plaintiffs’ former employees posted on
9 Ripoff Report and upon the alleged extortion attempts that Raymond Mobrez and Iliana
10 Llaneras swore under oath occurred. Mr. Mobrez and Ms. Llaneras, when faced with
11 irrefutable audio recordings, then recanted.

12 On July 12, 2010, this Court granted Summary Judgment on the RICO claims
13 predicated on extortion, granted the Rule 9(b) Motion with respect to the RICO claims
14 predicated on wire fraud, and gave Plaintiffs until July 27, 2010 to file an Amended
15 Complaint to plead the wire fraud with particularity. The Order specifically stated, “If
16 Plaintiffs decide not to amend the Complaint as to the RICO claims, Plaintiffs should
17 notify the Court no later than July 27, 2010 and the Court will direct the parties as to how
18 to proceed regarding the remainder of the case.” (Document 92).

19 On July 27, 2010, Plaintiffs filed their First Amended Complaint which was 84
20 pages long and, in addition to making detailed factual allegations purportedly in support
21 of a wire fraud claim, added a deceit claim and a common law fraud claim. On August 3,
22 2010, Defendants served upon Plaintiffs (but did not file pursuant to the 21-day hold rule)
23 a Rule 11 motion on Plaintiffs identifying dozens of allegations in the First Amended
24 Complaint that Plaintiffs knew were false. On August 6, 2010, Defendants filed a Motion
25 to Dismiss the First Amended Complaint because (1) it failed to plead any facts from
26 which Plaintiffs could prove a causal relation between the alleged damages and the
27 conduct; (2) it failed to plead fraud as a matter of law; (3); it failed to plead fraud with
28 particularity.

1 On August 16, 2010, Plaintiffs filed its Notice of Non-Opposition to Defendants’
2 Motion to Dismiss the First and Second Causes of Action in Plaintiffs’ First Amended
3 Complaint. Plaintiffs explained that in light of the Rule 11 Motion and the Motion to
4 Dismiss, they had decided to abandon their RICO causes of action.

5 Also on August 16, 2010, Plaintiffs filed the motion at issue, a Motion for leave to
6 amend the First Amended Complaint.

7 **II. THE MOTION VIOLATES LOCAL RULE 7-3**

8 Local Rule 7-3 provides that “counsel contemplating the filing of any motion shall
9 first contact opposing counsel to discuss thoroughly, preferably in person, the substance of
10 the contemplated motion and any potential resolution.”

11 On August 14, 2010, which was a Saturday, Daniel Blackert sent an email to
12 undersigned counsel indicating that he planned to file several motions, including an
13 amended complaint. (Exhibit “A”.) The email proposed a telephonic conference the next
14 day (on Sunday) or on Monday. This was the only attempt at a meet and confer made by
15 Plaintiffs before filing a Declaration at 12:32 p.m. on Monday claiming that a meet and
16 confer occurred on August 14 (Document 114) and then the within motion at 5:20 p.m.
17 (Document 116). Plaintiffs did not make a single attempt to reach Defendants by
18 telephone. David Gingras was out of the country on August 14, 15 and 16 and
19 undersigned was in a meeting for four hours on Monday and did not check emails until 8
20 p.m. on August 16.

21 The Court has discretion to strike the Motion to Amend for failure to comply with
22 Local Rule 7-3. *See Elwood v. Drescher*, 456 F.3d 943 (9th Cir. 2006) and should do so
23 here, especially where counsel misrepresented to the Court that he did meet and confer
24 with Defendants.

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1 **III. THE MOTION MISREPRESENTS THE NATURE OF THE PROPOSED**
2 **AMENDMENT**

3 Plaintiffs misrepresent to this Court that the purpose of the amendment is only to
4 dismiss the RICO causes of action and strike or withdraw certain factual allegations
5 “without adding new allegations, thus streamlining and narrowing the issues for
6 litigation.” (Document 116, page 3, line 4-7). In reality, the proposed Second Amended
7 Complaint (“SAC”) is forty pages longer than the original complaint, adds a deceit claim
8 and a common law fraud claim that was not included in the original complaint, and makes
9 hundreds of allegations that were not in the original complaint.

10 Plaintiffs’ base their assertions that they are narrowing the claims by comparing the
11 SAC to the First Amended Complaint, and completely ignoring that the sole purpose of
12 leave granted by the Court to file the First Amended Complaint was to plead wire fraud
13 with particularity. Plaintiffs took advantage of the Court’s leave to amend the original
14 complaint by adding two new state law causes of action (fraud and deceit) and adding
15 hundreds of new allegations to support their fraud claims – far beyond the leave granted
16 by the Court. Then, in response to a Motion to Dismiss that amended complaint, Plaintiffs
17 are attempting to moot that motion and pretending to “narrow” the case by removing from
18 their complaint the only claims they were granted leave to amend but leaving in the new
19 fraud claim, the new deceit claim, and the hundreds of new factual allegations. This is by
20 no means a “streamlining and narrowing of the issues” as represented by Plaintiffs.

21 **IV. PLAINTIFFS’ PROPOSED AMENDMENT IS FUTILE**

22 Although amendments are freely granted, they should be denied when the proposed
23 amended complaint would be subject to dismissal. *Cleaver v. Hughes Aircraft Co.*, 172
24 F.3d 55 (9th Cir. 1999).

25 The proposed Second Amended Complaint suffers from the same fatal flaws as the
26 First Amended Complaint. Plaintiffs have not pled and cannot prove that any of their
27 purported “damages” are causally related to the purported fraud. In the interests of
28 economy, Defendants incorporate by reference the arguments addressed to the fraud

1 claims that are set forth in detail in the Motion to Dismiss First Amended Complaint
2 (Document 110). As is also set forth in Document 110, and incorporated herein by
3 reference, fraud cannot be based on statements about future events, on statements of
4 discretionary policy, on legal opinions, and on opinions.

5 The remaining state law claims are all barred by the Communications Decency Act
6 as Plaintiffs seek to treat Defendants as the publishers of postings about Plaintiffs even
7 though Plaintiffs admit that such postings were written by another information content
8 provider. As set forth in more detail on pages 12–16 of Document 9, and incorporated
9 herein by reference, numerous state and federal courts have held that Xcentric and Ed
10 Magedson are immune from liability pursuant to the Communications Decency Act, 47
11 U.S.C. § 230(c)(1). *See Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d
12 929, 932 (D.Ariz. 2008) (finding Xcentric and Magedson immune under the CDA); *see*
13 *also Whitney Information Network, Inc. v. Xcentric Ventures, LLC*, 2008 WL 450095
14 (M.D.Fla. 2008) (finding Xcentric and Magedson entitled to immunity under CDA); *GW*
15 *Equity, LLC v. Xcentric Ventures, LLC*, 2009 WL 62173 (N.D.Tex. 2009) (same);
16 *Intellectual Art Multimedia, Inc. v. Milewski*, 2009 WL 2915273 (N.Y.Sup. Sept. 11,
17 2009) (same). Because the material facts of this case are identical to the facts of each of
18 the above matters, this court should reach the same conclusion and hold that Defendants
19 are entitled to protection under the CDA.

20 Because the proposed Second Amended Complaint is futile, the Motion to Amend
21 should be denied.

22 **V. PLAINTIFFS' CONDUCT IS SANCTIONABLE AND PLAINTIFFS**
23 **SHOULD NOT BE PERMITTED TO CONTINUE THEIR ABUSE OF THIS**
24 **PROCESS**

25 Plaintiffs' abuse of this process has gone on for far too long and this Court should
26 not grant Plaintiffs leave to continue to assert baseless, frivolous claims designed to harass
27 Defendants and cost Defendants money.

1 With the dismissal of the RICO claims, Defendants urge this Court to decide the
2 remainder of Defendants' Motion for Summary Judgment and throw this case out in its
3 entirety. At a minimum, the Court should not endorse Plaintiffs behavior by permitting
4 them to Amend their Complaint to assert even more frivolous claims.

5 **VI. CONCLUSION**

6 For all of the foregoing reasons, Defendants request that the Court deny Plaintiffs'
7 Motion to Amend the Complaint.

8
9 DATED this 30th day of August, 2010.

10 **JABURG & WILK, P.C.**

11
12 /s/Maria Crimi Speth
13 Maria Crimi Speth
14 Attorneys for Defendants

15 *Certificate of Service*

16 I hereby certify that on the 30th day of August, 2010, I electronically transmitted the
17 attached document to the Clerk's Office using the CM/ECF System for filing, and for
18 transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

19 Ms. Lisa Borodkin, Esq.
20 Mr. Daniel F. Blackert, Esq.
21 Asia Economic Institute
22 11766 Wilshire Blvd., Suite 260
23 Los Angeles, CA 90025
24 Attorneys for Plaintiffs
25 lisa_borodkin@post.harvard.edu
26 daniel@asiaecon.org

27 And a courtesy copy of the foregoing delivered to:

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

/s/Debra Gower