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 9 Xcentric Ventures, LLC and  
 Edward Magedson

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

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

18 Plaintiffs,

19 v.

20 XCENTRIC VENTURES, LLC., et. al.,

21 Defendants.

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

**OPPOSITION OF DEFENDANTS TO  
 REQUEST OF PLAINTIFFS TO TAKE  
 JUDICIAL NOTICE OF JURY  
 INSTRUCTIONS AND CONVICTION**

(Assigned to the Honorable Stephen V.  
 Wilson)

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

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 24 Defendants Xcentric Ventures, LLC and Ed Magedson oppose “Plaintiffs’  
 25 Request” (i.e. “Request of Plaintiffs to Take Judicial Notice of Jury Instructions and  
 26 Conviction in *United States v. Sypher*, 09-CR-85 (W.D. KY. Aug 4-6, 2010) In Support of  
 27 Plaintiffs’ Motion for Reconsideration”) on the grounds that the subject matter of the  
 28 request is not appropriate for judicial notice pursuant to Rule 201, Federal Rules of

**Opposition to Request of Plaintiffs  
 to Take Judicial Notice of Jury Instructions and Conviction**

**2:10-cv-01360-SVW-PJW**

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1 Evidence, because it is not “adjudicative fact” as required by Rule 201. Also, taking  
2 judicial notice of the documents from the unrelated case would be prejudicial to  
3 Defendants.

4  
5 **I. PLAINTIFFS’ REQUEST FOR JUDICIAL NOTICE IS NOT ABOUT**  
6 **ADJUDICATIVE FACTS PURSUANT TO RULE 201, AND IS**  
7 **PREJUDICIAL.**

8 Plaintiff requests this Court to take judicial notice “pursuant to Federal Rule of  
9 Evidence 201” of a conviction and jury instructions from a recent criminal case in  
10 Kentucky that has nothing to do with the parties involved in this case, and nothing to do  
11 with facts at issue in this case. (*See* Plaintiffs’ Request p.2 l. 1)

12 The requested material is completely unrelated to the facts of this case. Recently,  
13 in August of 2010, a U.S. District Court in the Western District of Kentucky convicted a  
14 woman named Karen Sypher for several specific misdeeds. The crimes included filing a  
15 false criminal complaint, lying to the FBI about an intimate personal relationship which  
16 she called “strictly business,” lying to the FBI about her knowledge of the person who  
17 made an extortionate telephone call, mailing a threat to accuse Richard Pitino of a crime  
18 and injure his reputation in order to extort money, and, presumably, helping someone  
19 make a phone call for the same purpose. Karen Sypher had nothing to do with the case in  
20 this Court, and none of the actions at issue in her criminal prosecution have any bearing  
21 on the issues before this Court in this civil case. The jury instructions and conviction  
22 record from that case are not proper subjects for judicial notice in this case.

23 Rule 201 of the Federal Rules of Evidence governs the taking of judicial notice of  
24 “adjudicative facts.” Adjudicative facts are facts about the case that go to the jury for  
25 decision.

26 When a court finds facts concerning the immediate parties, who did what,  
27 where, when, how and with what motive or intent the, court is performing  
28 an adjudicative function, and the facts are called adjudicative facts. . . . They  
are the facts that normally go to a jury in a jury case. They relate to the  
parties, their activities, their businesses.

1 *United States v. Gould*, 536 F.2d 216, 219-20 (8<sup>th</sup> Cir. 1976) (*quoting* Kenneth Davis,  
2 Administrative Law Treatise § 15.03 at 353 (1958)). The materials requested for judicial  
3 notice by the Plaintiffs are not adjudicative facts because they have nothing to do with the  
4 parties to this case, their activities, or their business.

5 As stated in Plaintiffs' Request, the case of *Allen v. City of Los Angeles* stands for  
6 the proposition that a Court of Appeals may take notice of proceedings in other courts, *if*  
7 *those proceedings have direct relation to the matters at issue*. *Allen v. City of Los*  
8 *Angeles*, 92 F.3d 842 (9<sup>th</sup> Cir. 1996). In that case, L.A. police officers Stacey Koon and  
9 Laurence Powell sued the City of Los Angeles to reimburse their legal fees from a civil  
10 lawsuit brought by beating victim Rodney King. Los Angeles was not liable to reimburse  
11 the officers because Koon and Powel beat King with deliberate wrongful intent. The 9<sup>th</sup>  
12 Circuit Court of Appeals affirmed the trial court in that respect, taking judicial notice of  
13 criminal court findings that Powell intended to inflict bodily harm, and that Koon intended  
14 to have Powell "gain pain compliance, and then to 'cripple' King and 'break [King's]  
15 bones." *Allen v. City of Los Angeles*, 92 F.3d 842, 850 – 51 (9<sup>th</sup> Cir. 1996). The criminal  
16 court records judicially noticed in the cited case had direct relation to the matters at issue  
17 in the cited case. The Sypher case criminal records from western Kentucky have no  
18 relation to the matters at issue in this Court. There is nothing in the jury instructions and  
19 conviction record proffered by Plaintiffs that is directly related to the matters in this  
20 Court. They do not indisputably apply to the parties, activities, and business at issue in  
21 this case. The *Allen v. City of Los Angeles* case would prevent judicial notice of the  
22 proffered proceedings from the Western District of Kentucky.

23 Rule 201 provides that "In a civil action or proceeding, the Court shall instruct the  
24 jury to accept as conclusive any fact judicially noticed." Fed.R.Evid. 201(g) (1975).  
25 Plaintiff apparently wants this Court to instruct a jury in this case to "accept as  
26 conclusive" a conviction, and some criminal jury instructions, from a western Kentucky  
27 criminal case with no relation whatsoever to the facts or people in this case. That would  
28 be confusing to the jury and prejudicial to the Defendants. It would NOT be appropriate

1 to take judicial notice pursuant to Rule 201. “It is clear that the reach of Rule 201 extends  
2 only to adjudicative, not legislative, facts.” *United States v. Gould*, 536 F.2d 216, 219 (8<sup>th</sup>  
3 Cir. 1976). Rule 201(g) is not applicable to subject matter that is not adjudicative fact. *Id.*,  
4 536 F.2d at 221 (stating that it would be “preposterous” to apply Rule 201(g)).

5 In fact, it has been held to be an abuse of discretion and reversible error to take  
6 judicial notice pursuant to Rule 201(g) of matters that do not indisputably apply to the  
7 case at hand, even factual findings from *related* prior litigation. For example, in the case  
8 *General Electric Capital Corp. v. Lease Resolution Corp.*, after a defendant settled a  
9 previous class action suit by transferring 95% of its assets to plaintiff class members, it  
10 was an abuse of discretion and reversible error for a federal trial court in a subsequent  
11 case to take judicial notice that the transfer was found to be fair, reasonable, and adequate.  
12 *Gen. Elect. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082-83 (7<sup>th</sup> Cir.  
13 1997) The issue in the subsequent case was not whether the settlement was fair to the  
14 class members, but whether it was fraudulent as to prior unsecured creditors such as G.E.  
15 Capital, because the assets may have been more valuable than the class member claims.  
16 *Id.* “Thus we believe the district court abused its discretion by taking judicial notice of this  
17 earlier finding without establishing that the fact may indisputably be applied in the later  
18 proceedings.” *Id.* The case in this Court obviously has even greater dispute about the  
19 applicability of the unrelated jury instructions and convictions records from the unrelated  
20 Kentucky criminal case.

21 Likewise, judicial notice of subject matter that is outside of adjudicative fact may  
22 prejudicially influence the outcome of a case. For example, in the case *Qualley v. Clo-Tex*  
23 *International, Inc.*, it was a reversible abuse of discretion for a federal trial court to take  
24 judicial notice that, generally speaking, there were well-known Nigerian fraud scams  
25 involving oil deals that never materialized, because those judicially noticed facts were  
26 outside the scope of Rule 201 and “did not specifically concern the parties before the  
27 court.” *Qualley v. Clo-Tex Int’l, Inc.* 212 F.3d 1123, 1128 (8<sup>th</sup> Cir. 2000). The general  
28 facts, though true, were prejudicial to defendants accused of participating in the fraudulent

1 behavior of others after the trial court “interjected” the facts into the jury’s deliberations  
2 through judicial notice pursuant to Rule 201. *Id.*, 212 F.3d at 1131-32. It would be  
3 prejudicial to interject the unrelated jury instructions and conviction records into the case  
4 through the process of judicial notice.

5  
6 **II. OTHER CASES CITED IN PLAINTIFFS REQUEST ARE  
DISTINGUISHABLE.**

7 Plaintiff cites case law to support the request for judicial notice, but the cases are  
8 factually different than the circumstances of the case before this Court. In *Reyn’s Pasta*  
9 *Bella, LLC v. Visa USA, Inc.*, plaintiffs attempted to collaterally attack a class action  
10 settlement. The court took judicial notice of documents in the underlying class action  
11 litigation that showed that the plaintiffs had been class members represented by counsel in  
12 the settlement, and had litigated all the relevant issues in a fairness hearing about the  
13 settlement, and thus were precluded from re-litigating the issues. *Reyn’s Pasta Bella, LLC*  
14 *v. Visa USA, Inc.*, 442 F.3d 741, 746 – 47 (9<sup>th</sup> Cir. 2006). The subject matter for judicial  
15 notice, consisting of court filings and the like, was irrefutably related to the subsequent  
16 litigation and involved the same parties and the same actions.

17 In *Bryant v. Clarleson*, 444 F.2d 353, (9<sup>th</sup> Cir. 1971), welfare recipients sued  
18 California’s Director of the Department of Social Welfare to force increases in welfare  
19 payments, in July 1969. In a hearing that took place after April of 1971, the 9<sup>th</sup> Circuit  
20 took judicial notice of “a number of developments since the taking of this appeal, called to  
21 our attention by the parties, since the circumstances may affect our consideration of the  
22 various issues presented.” *Id.*, 444 F.2d at 357. Those developments included presenting  
23 evidence to the district court about compliance with orders in the underlying case,  
24 amendments to the order in the underlying case, decisions of the California Supreme  
25 Court granting additional authority to the Director, the plaintiffs’ motion to dismiss their  
26 appeal, and other significant legal developments pertaining directly to the case. *Id.*, 444  
27 F.2d at 357 – 58. Also, there was no dispute that judicial notice of those developments  
28 was appropriate. The matter before this Court bears no significant resemblance to those

1 facts because the Plaintiff here seeks judicial notice for records from a completely  
2 unrelated case, over Defendants' objections.

3  
4 **III. CONCLUSION**

5 For the reasons stated, Defendants oppose the Request of Plaintiffs to Take Judicial  
6 Notice of Jury Instructions and Conviction in *United States v. Sypher*, 09-CR-85 (W.D.  
7 KY. Aug 4-6, 2010), and request the Court to deny the request.

8 DATED this 30<sup>th</sup> day of August, 2010.

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

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

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*Certificate of Service*

I hereby certify that on the 30<sup>th</sup> day of August, 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:

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And a courtesy copy of the foregoing delivered to:

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

/s/Debra Gower